



California  
Bar  
Examination

Essay Questions  
And  
Selected Answers

July 2009



THE STATE BAR OF CALIFORNIA  
OFFICE OF ADMISSIONS

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**ESSAY QUESTIONS AND SELECTED ANSWERS  
JULY 2009  
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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JULY 2009  
ESSAY QUESTIONS 1-3

# 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

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the \$1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. "There isn't a lot of money involved," she said, "but I want to teach David a lesson. David can't possibly afford the legal fees to defend this case, so maybe we can put him out of business."

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the \$1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David's favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David's motion to dismiss on the grounds stated? Discuss.
2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? Discuss.

## **Answer A to Question 1**

Patty instituted a suit via her lawyer Art for losses incurred due to Patty's inability to deliver a kidney on time owing to a traffic jam. The traffic jam occurred when David's truck skidded on an oily patch and became wedged across the roadway. There are two issues that need to be determined. First, the validity of the court's decision to dismiss Patty's cause of action for damages based on strict liability owing to an ultrahazardous activity. Secondly, whether David will be successful in recovering against Patty and Art in a claim of malicious prosecution.

### 1. David's motion to Dismiss based on Failure to State a Cause of Action

David has instituted a motion to dismiss for failure to state a cause of action upon which relief can be granted. In the alternative, David argues that damages would not have been recoverable against David for strict liability from malicious prosecution. A motion to dismiss based on a failure to state a cause of action upon which relief can be granted is a 12(b)(6) motion in federal court. This motion can be filed as a preliminary motion to the filing of a complaint or contained within the answer. Along with failure to include an indispensable party it can be raised at any time prior to trial or at trial itself. The motion charges that the plaintiff has failed to adequately state a cause of action upon which relief can be granted. It requires the judge to accept that all the facts that are stated by the plaintiff are taken to be true and then requires a determination as to whether there exists an adequate basis for relief. In other words, even if everything that plaintiff asserted in the complaint is true, would that be sufficient to allege a cause of action against the defendant?

In the current case, in order to determine whether the motion to dismiss was appropriately granted in Art's favor, it is necessary to examine Patty's allegations against David. Patty's lawyer, Art, determined that a negligence claim would not be viable against David. Likely because there is nothing to indicate in the facts that David engaged in any activity whereby he breached the standard of care towards a

foreseeable plaintiff. There is nothing to indicate that he was negligent in driving his truck, but rather he skidded on an oily patch in the middle of the road and then his truck swerved to block all lanes of traffic. As a result, Art decided to pursue Patty's claim on a strict liability theory for transporting an ultrahazardous activity.

### Strict Liability for an Ultrahazardous Activity

Strict liability for transporting an ultrahazardous activity is an action whereby the defendant is engaged in an ultrahazardous activity. This is where the activity is so dangerous that the danger of its harm cannot be mitigated even with the exercise of reasonable care. Secondly, the activity has to be one that is not of common usage in the community. In a strict liability claim for ultrahazardous activity, in jurisdictions that still retain contributory negligence, this is not a valid defense to a strict liability claim.

In the current case, David transports gasoline over long distances in a tank truck. In the current case, he was transporting gasoline through the City. It is important to note that transporting gasoline through residential parts of a city is inherently an ultrahazardous activity because of the dangers that can occur if any gasoline spills, owing to the fact that gasoline is highly combustible and can cause serious injuries and damage to property in a matter of seconds. No amount of care can mitigate against these risks, and transporting gasoline through a residential community is not a matter of common usage in the community.

However, in the current case, when David was transporting the gasoline across the bridge, he skidded on an oily patch. There is no indication that he is responsible for the oily patch, rather, it was already spilled on the road when he arrived at the scene. As a result he skidded on the spill and his truck wedged across the roadway and blocked traffic in all directions. This blockage caused a traffic jam to develop in both directions and the delay of two hours caused Patty to be late in making her organ delivery. Yet the crucial distinction in this case is that the ultrahazardous nature of the gasoline was not the cause of Patty's damages. Even if David had been transporting a truck filled

with benign materials, such as flowers or children's toys, he still would have skidded on the oily patch and his truck would have wedged across the highway and caused the traffic jam. For strict liability to attach for transporting ultrahazardous activity, the nature of the harm or loss has to emanate from the ultrahazardous activity. This is not met in this case. There is nothing about the inherently dangerous nature of transporting gasoline that is the cause of Patty's harm.

As a result, even if the judge was to take all of the allegations that Patty made in her complaint to be true, she has failed to state sufficient facts necessary to constitute a cause of action for strict liability for transporting dangerous materials. Therefore, the judge was correct to grant David's motion to dismiss.

#### Patty's Damages are not recoverable

Moreover, David claimed that the damages that Patty claimed in her complaint were not recoverable. In this case, Patty sought to recover the \$1,000 fee she would have been paid had she been able to deliver the kidney while it was still viable.

As already noted, under strict liability the damages have to accrue from the inherent dangerousness of the activity - which in this case would have been transporting gasoline. However, in this case, the nature of Patty's damages resulted from the truck skidding on the oily patch, and as previously mentioned this could have occurred to any truck, even one transporting regular household goods. As a result, Patty is not entitled to recover for damages based on a theory of strict liability.

Her only viable claim would have been under a negligence theory which requires a duty under the applicable standard of care to all foreseeable plaintiffs (which under the majority Cardozo theory is to all plaintiffs in the zone of danger). There has to be a breach of the duty, causation (both factual and proximate), as well as damages. In this case, David would be held to the standard of care of a reasonable person driving a big truck along a bridge. The facts do not indicate that he was negligent in any manner,

such as driving too fast, or driving while distracted. As a result, Patty would be unable to establish a prima facie case for negligence and would be entitled to no damages. It is likely that Art realized that the negligence claim would be a non-starter and as a result he decided not to pursue the claim.

In conclusion, the court was correct to grant David's motion to dismiss for failure to state a cause of action and, in any event, the damages alleged were not recoverable because Patty failed to assert an appropriate and viable cause of action.

## 2. David's Suit for Malicious Prosecution against Patty and Art.

David decided to file suit for malicious prosecution against both Patty and Art. To establish a prima facie case for malicious prosecution, the plaintiff is required to show that there was an institution of civil proceedings against the plaintiff. Second, there was a termination of the proceedings in favor of the plaintiff. There also has to be a lack of probable cause. Moreover, the institution of the civil proceedings has to be for an improper purpose and the plaintiff has to show damages.

### David's suit for Malicious Prosecution against Patty

In David's suit against Patty, David can show that Patty instituted a claim against him for strict liability based on transporting an abnormally dangerous activity. Since the judge granted the motion to dismiss, there was a termination in his favor.

The third prong requires David to show that the proceedings were instituted for an improper purpose. In the current case, when Patty came to Art for advice she was clear that she wanted to sue David for the loss of her fee, i.e., the \$1,000 she would have received if she could have successfully delivered the kidney. In her mind, she believed that she had suffered damages and that David was to blame because he had caused the traffic jam on the bridge. As a result, it is unclear whether her motive to bring the suit was based on lack of probable cause. As a layperson, she likely did not have the legal knowledge to ascertain the proper basis for determining probable cause, and she



came to her lawyer for advice to determine the merits of her case. As a result, it is likely that the court will find that Patty's decision to bring suit against David was based on her relying on the legal expertise of Art and she might have honestly believed that there was sufficient probable cause to bring the action.

The fourth prong requires bringing the suit for an improper purpose. This requirement is likely met in this case, because Patty acknowledged that there was not a lot of money involved in the action; however, she wanted to teach David a lesson and try to run him out of business. As a result, the primary motivation behind the suit was not to recover damages, but rather to seek revenge and damage to David. This is an improper purpose because the legal system is not to be used in a civil proceeding in order to extract a revenge against a defendant or for an improper purpose.

Lastly, the plaintiff has to show sufficient damages. In the current case, David was forced to respond to an action for strict liability and although the matter was dismissed under a motion for failure to state a cause of action, this still might have resulted in David losing days at work because of the lawsuit. There is also the loss of professional and social reputation from being forced to defend against a lawsuit. However, David would have to present evidence of any such pecuniary loss in order to meet the damages prong.

In conclusion, David would likely not succeed in his suit for malicious prosecution against Patty because he cannot show that she instituted the proceedings without probable cause. Patty likely relied on Art's advice that there was a viable claim for strict liability and, as a result, she thought there was sufficient merit in the action to proceed to court.

### David's suit for Malicious Prosecution against Art

David also filed suit against Patty's lawyer Art for malicious prosecution.

Again, the first two prongs are easily met, because Art was the attorney that brought the strict liability action against Patty and there was a termination in Art's favor with the court's decision to grant the motion to dismiss based on failure to state a cause of action.

In the current case, the third prong, whereby the plaintiff has to show that the action was brought with a lack of probable cause, is likely to bring David more success against Art. An attorney is held to possess the required duty of competence, whereby he has to possess the legal skill, knowledge, preparedness and ability to pursue the case. In this case, Art realized that a negligence action would not be successful, but he still decided to pursue a claim for strict liability. This was the only plausible claim that he could bring against David and if he failed to adequately research the facts of the case based on the elements of strict liability, then he will be held liable for bringing a cause of action based on lack of probable cause. On the other hand, if Art honestly believed, with sufficient preparation and research in the case, that a strict liability cause of action might be viable in this case, then arguably there is sufficient probable cause. However, as previously noted under the first part, there was no connection between the ultrahazardous nature of transporting the gasoline and the accident that occurred in this case, and, as a result, Patty would be unable to recover damages based on a strict liability theory. As a result, Art should have realized this and counseled Patty against filing suit, and therefore, David will be able to successfully demonstrate the lack of probable cause in a suit for malicious prosecution against Art.

The fourth prong requires the plaintiff demonstrating that the suit was brought for an improper purpose. In the current case, Patty told Art that she knew that there was not a lot of money involved in the case, but that she simply wanted to teach David a lesson and run him out of business. A lawyer is held to a duty of candor and fairness to the court and an adversary. He is required to properly research the cause of action to

ensure that there is a viable cause of action. A lawyer signs Rule 11 motions asserting that there is a proper factual basis to the claim and legal contentions are accurate and that a claim is not being brought for an improper purpose. In the current case, Art should have counseled Patty against bringing a lawsuit for an improper purpose and made her aware of the legal basis of the claim and whether there were sufficient facts to bring a cause of action. Attorney representation can be expensive, and Art should not have taken a frivolous claim simply as a means of earning fees and wasting time. As a result, David will be able to show that the cause of action was brought for an improper purpose.

As previously noted, as long as David can show damages in the form of lost wages from days missed from work owing to the need to defend the lawsuit or other pecuniary losses, he will have sufficiently demonstrated the damages prong.

In conclusion, David will be successful in a claim for malicious prosecution against Art. Even though his case against Patty is not likely to be successful owing to the inability to demonstrate that Patty consciously knew that there was a lack of probable cause to the action. However, as an attorney, Art will be held to a higher professional standard, and he had an ethical duty to ensure that he only brings suit where there is a sufficient legal and factual basis and that the suit is not being brought for a frivolous purpose or to waste time or embarrass an opponent. As a result, he should be entitled to damages, based on the damages he incurred due to the inappropriate suit brought against him for strict liability.

## **Answer B to Question 1**

### **1. Patty (P) v. David (D) – Motion to Dismiss Suit for Strict Liability**

A motion to dismiss for failure to state a claim looks at the facts in a light most favorable to the party it is being asserted against. The court will then see if sufficient facts have been pled to sustain a prima facie case of the cause of action alleged. The court does not evaluate the merits nor go beyond the complaint.

In the present case, P filed a claim of strict liability for ultrahazardous activity against D. Therefore, the elements of the claim must be evaluated in light of the complaint to see if grant of the motion was proper. Additionally, the court noted the case would be dismissed because the damages alleged were not recoverable.

#### **Strict Liability – Ultrahazardous Activity**

Strict liability is tort liability without fault. It applies in cases of products liability, ultrahazardous activities, and wild animals. Here, the allegation is one of ultrahazardous activity. The elements of strict liability are 1) an absolute duty of care, 2) breach of that duty, 3) causation, and 4) damages.

#### **Absolute Duty of Care – Is the activity an ultrahazardous activity?**

For there to be an absolute duty of care (a duty that may not be met by reasonable protective measures), a court must decide if an activity is in fact ultrahazardous. An ultrahazardous activity is one where the activity is 1) highly dangerous even with remedial measures, and 2) not within common usage within the community. This is a question of law to be decided by the trial judge.

In the present case, D was driving a tanker truck filled with gasoline. P will argue that this is a dangerous activity, because no matter how safe D behaves the tanker is a giant gas bomb waiting to explode. D can argue that it is not that dangerous because, as the facts show, there was no explosion when the tanker crashed. However, because the

court will view the facts in a light favorable to P, the tanker is probably sufficiently dangerous.

However, the second element poses a problem for P. The activity must not be in common usage within the community. Here, D's tanker truck was transporting gas. This is an activity in common usage within all US communities, because gasoline is the primary fuel for automobiles, which is the most common method of transportation in the US. Additionally, gasoline must be transported by some means to service stations. Tanker trucks are the most common, if not [the] exclusive method of delivering gas to service stations in the US. Therefore, driving a tanker truck is an activity of common usage in City.

Therefore, the duty element has not been met, because driving a tanker truck is not an ultrahazardous activity.

Breach: if the duty element had been met, any damage caused by the ultrahazardous activity would be sufficient breach. Here, the truck crashed and blocked traffic for 2 hours.

### Causation

Causation has 2 parts: 1) actual (factual) cause and 2) legal (proximate) cause. Both must be met for the causation element to be sustained.

### Factual Cause

The test for factual cause is the "but for" test. This asked but for the defendant's conduct the injury would not have occurred. In the present case, but for D crashing the tanker on the bridge, P would not have been late for her delivery, the kidney would have been viable, and P would have been paid \$1,000. Viewing the facts in a light most favorable to P, factual cause is met.

### Proximate Cause

Proximate cause is a question of foreseeability. First, the court must ask what is dangerous about the activity. Here, a tanker truck filled with gas is dangerous because it could explode or cause a fire. Second, the court will isolate the breach. Here, the breach was a crash that resulted in blocked traffic on the bridge. Lastly, the court will match up the danger of the activity to the breach; if they do not match up, then the injury is not the type of harm that would result from the ultrahazardous activity. Therefore, it would not be foreseeable. In the present case, the danger of explosion or fire does not match the breach of mere traffic jam. Thus, P's injury was not foreseeable.

### Damages

Strict liability compensates damages from personal injury or property damages. In the present case, the type of harm is economic damages. Economic damages are those damages which result from the loss like lost wages or lost business opportunity. Therefore, there is not sufficient damage that P may be compensated for. While she may argue that the breach damaged the kidney. However, the kidney did not belong to her. At the very least it belonged to the kidney donor or the recipient. Additionally, one cannot have ownership interest in human tissue (see 13<sup>th</sup> Amendment). Thus, there is no personal injury or property damage that P has pled to sufficiently make a prima facie case.

### Conclusion

The motion to dismiss was proper, because P did not sufficiently plead facts to sustain a cause of action of strict liability for an ultrahazardous activity. Tanker driving is not an ultrahazardous activity. There is no proximate causation between the crash and the loss of \$1,000. Additionally, the damages requirement is not met because it is mere economic damages. Additionally, the trial judge was correct to assert that P's alleged damages are unrecoverable.

## **2. D v. P and Art (A) – Malicious Prosecution**

Malicious prosecution is a tort that protects the interest of only having process instituted against a party for proper purpose and only when there is a valid case. The elements are 1) institution of legal proceeding, 2) termination of case in plaintiff's favor, 3) absence of probable cause, 4) improper ulterior purpose for bringing legal process, and 5) damages.

Institution of proceedings: Typically, malicious prosecution involves the institution of criminal proceedings. However, institution of civil proceedings will sustain a cause of action as well. Here, P (under the advisement and representation of A) filed a civil claim for \$1,000 in lost damages in strict liability for an ultrahazardous activity (see above). A civil complaint was filed against D. This is sufficient to meet the first element/institution of legal proceeding.

Termination: The second element, termination of the case in plaintiff's favor, is met because the case was dismissed on failure to state a cause of action. This was a termination in D's favor, because he filed the motion to dismiss. The case was terminated on the granting of the motion.

### Absence of probable cause

Probable cause is the reasonable belief that there was a valid cause of action. In the present case, P relied on A's advice as her attorney to form her basis of probable cause. A told her that he believed there was a plausible claim for strict liability. Reliance on counsel will sustain a finding of probable cause. Therefore, this element is not met, as to P.

A, on the other hand, probably did not have probable cause. As discussed above, the claim of strict liability lacked sufficient facts to make a prima facie case. The complaint was just so bad that an attorney with minimal competence could not have a reasonable belief that there was a valid cause of action based on strict liability. Therefore, this element is met as to A.

Improper purpose is any purpose except that of justice. Here, the just purpose would be to make P whole again, after the loss of her \$1,000. This is the point of tort liability: to make the plaintiff whole. In the present case, she wanted to “teach D a lesson.” P and A will argue that this is not improper because D should be a safer driver. D may argue that strict liability has no punitive damages; therefore, strict liability is not to punish. Therefore, teaching a lesson is an improper purpose.

Additionally, and more flagrantly, P believed that D could not afford the legal fees, and bringing the strict liability case would cause him to go out of business. A acquiesced in assisting her in the case. This is an improper purpose because the \$1,000 was not a lot of money to her, but it would be a total loss of D’s livelihood. This is not a proper basis for suit because it is merely to harass and damage D.

Defenses: A may assert that he would qualify for immunity based on the prosecutor exemption. However, this will not happen because of the exception for state prosecutors filing criminal charges.

Conclusion: D will probably prevail against A. However, he will probably not prevail against P, because she had probable cause.



## Question 2

Alex, an attorney, represents Dusty, a well-known movie actor. Dusty had recently been arrested for battery after Vic reported that Dusty knocked him down when he went to Dusty's home trying to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Paul, the prosecutor, filed a criminal complaint against Dusty. Suspecting that Paul was anxious to publicize the arrest of a high-profile defendant as part of his election bid for District Attorney, Alex held a press conference on the steps of the courthouse. He told the press: "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney."

Meanwhile, Paul received a copy of the police report describing Dusty's alleged criminal behavior. Concerned that the description of Dusty's behavior sounded vague, Paul asked the reporting police officer to destroy the existing police report and to draft one that included more details of Dusty's alleged criminal behavior.

Paul interviewed Dusty's housekeeper, Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vic down. Paul told Henry to avoid contact with Alex.

Paul has not been able to obtain Vic's version of the events because Vic is on an extended trip abroad and will not be back in time for Dusty's preliminary hearing. Confident that Dusty is nevertheless guilty, Paul has decided to proceed with the preliminary hearing.

1. What ethical violation(s), if any, has Alex committed? Discuss.
2. What ethical violation(s), if any, has Paul committed? Discuss.

Answer according to both California and ABA authorities.

## **Answer A to Question 2**

### **1. A's Ethical Violations**

As an attorney, under both ABA and CA authorities, A has a blanket duty of fairness to the tribunal and opposing counsel and a duty to maintain the dignity of the profession.

#### Extrajudicial Statements

A lawyer has a duty to not make any extrajudicial statements which he knows or should know will be disseminated by means of public communication which have any likelihood of prejudicing the proceedings. The exceptions to this duty revolve around permitting extrajudicial statements that do not contain a substantial likelihood of prejudice. The exceptions include making statements regarding any information contained in public documents, the results of any hearing, routine booking information, scheduling of public hearings, or in the case of prosecutors, requesting the public to come forward with any information or evidence of the crime or to aid in apprehension, and to possibly warn the public of any reasonable danger presented by a criminal on the loose. Additionally, a lawyer may make an extrajudicial statement when it is reasonably necessary to rebut a violative statement made by opposing counsel.

#### Public Dissemination

Here, A held a press conference in which he stated that his client was unquestionably innocent and that P was only pursuing the case because he wanted to make a name for himself by prosecuting a well-known movie actor as part of his bid for District Attorney. First of all, A had to know that his statements would be disseminated by means [of] public communications. In fact, not only did he know his statements would be disseminated, he specifically intended that they be. That is why he called the press conference. He did so to get his message out to as many people as he could.

#### Likelihood of Prejudice

Moreover, these statements present a strong likelihood of prejudice to opposing counsel. By making such statements, it creates disdain in the public eye with regard to P's conduct. It makes the public believe that he is only acting for the personal gain of

becoming an elected official as opposed to acting in their best interest to get criminals off the streets. A jury is going to be more likely to side against P in any later trial because they believe he is only prosecuting D because of the personal motive. Moreover, by stating that “any intelligent jury” will find D innocent, A was representing to the public as fact something which may not be so. By using his position in society and the words “any intelligent jury,” it is likely that if a potential juror hears this statement he will be more likely to find in favor of D out of fear that he otherwise may be labeled as unintelligent.

### Conclusion

None of the normal exceptions apply here. Moreover, since A held this press conference preemptively instead of in response to other extrajudicial violations, A is most likely to be subject to discipline under both the ABA and CA rules of professional conduct.

### Dignity of Profession

A lawyer has a general duty to always uphold the dignity of the profession and to do nothing which would bring disdain to it in the public eye. Here, A has likely violated this duty by asserting that P is acting for an improper purpose without any actual knowledge of its truth. When a lawyer represents publicly, without justification, that another lawyer is dishonest or otherwise untrustworthy, it leads the public to believe that all lawyers are dishonest and untrustworthy. This detracts from the dignity of the profession and all lawyers must strive to avoid it wherever possible.

### Improper Influence of Jury

A lawyer has a duty to not seek any improper influence over any jurors. Here, as stated above, A’s statement basically amounted to a claim that only unintelligent people could convict his client. He thus is seeking to gain influence over potential jurors in any future hearings by these statements. However, he may not be subject to discipline on this basis alone because it is unclear whether a jury has been sworn or not. If a jury has not been sworn, then there are not really any jurors, in the literal sense, which could be improperly influenced. He would only be tainting the potential juror pool, but there is no

guarantee that a future juror would have heard this statement or, depending on how long before the trial, there's no guarantee that they will have remembered it. Moreover, there is likely to be actual cause to strike from the venire any person who has been influenced by the statement. Therefore, A is probably not subject to discipline merely because of this aspect of the statement unless a jury has already been sworn.

## **2. P's Ethical Violations**

### Fairness to Opposing Counsel

Though all lawyers must be zealous advocates of their positions, there remains a duty of fairness to opposing counsel which may trump zealousness in certain situations.

### Allow Access to Evidence

A lawyer has a duty to not alter, destroy, or obstruct access to evidence or to counsel, aid, or encourage any other person to do so. Here, upon receiving a copy of the police report describing D's conduct, P asked the police officer to destroy the record and replace it with one that included more details of D's alleged criminal behavior. Although it may have been proper for P to ask the officer to include more details in a supplemental report, by instructing him to destroy the original report, P has obstructed A's access to such evidence. It is highly unfair to opposing counsel to destroy a substantial piece of evidence just because it does not clearly favor your position. Here, A had a right to see that report in its unaltered state and then to point out any discrepancies contained therein at trial.

### Instructing Witnesses to Remain Silent

Related to the duty to allow access to evidence, a lawyer has a duty to not instruct or encourage a witness to remain silent about relevant knowledge unless that witness is the employee/agent of the lawyer's client and the lawyer reasonably believes that the witness' refusal to testify will not cause the witness any harm. Here, P interviewed D's housekeeper who witnessed the alleged criminal battery. The housekeeper, H, [said] D

did not knock down V as V had alleged. Thereafter, P told H to avoid contact with the opposing counsel, A. H clearly has relevant knowledge about the incident. He was a percipient witness of it and could accurately testify about what he saw. However, because H's perceptions were harmful to P's case, P instructed him to remain silent and not offer up his story to opposing counsel. This is most likely a violation of the rules of professional conduct because the exception does not apply. Though P may reasonably believe that H's interests will not be harmed by refusing to relate his story, P's client is the State and thus H is not an employee/agent thereof.

### No Falsification of Evidence

Along with the duty of access to evidence comes the duty to not falsify evidence or put on false testimony and not counsel, aid or encourage anybody to falsify evidence or testimony. It is unclear exactly what occurred when P instructed the officer to destroy the report and draft a new one with more details. P could have legitimately felt the original report was vague and wanted the officer to include additional accurate details to avoid the vagueness. However, there is a legitimate possibility that P was impliedly asking the officer to exaggerate the details to make P's case more compelling. If this is the case, P is certainly subject to discipline as it was a direct encouragement to falsify evidence.

### Special Duties of Prosecutors

Under both the ABA Model Rules and the CA Rules of Professional Conduct, because of the prosecutor's role as defender of the public, he is held to special heightened duties in a few areas. After all, his duty is to protect the public, but a criminal defendant is a member of the public as well and is owed at least some duty of fairness by the prosecutor.

### Exculpatory Evidence

A prosecutor has an absolute duty to divulge any and all possible exculpatory evidence to the defense in sufficient time to allow proper preparation for the trial. Here, P

instructed the officer to destroy the original report. Exculpatory evidence is any evidence which weighs in favor of acquitting a criminal defendant. The facts indicate that the report was vague as to the details surrounding the alleged battery. Thus, it is not certain that the report was exculpatory in the sense that it stated that D was not responsible for the crime. However, that is not the standard by which exculpation is judged. The evidence must only have a tendency of favoring the criminal defendant. And if this report was so vague that P felt it necessary to destroy it, surely there was substantial probative value for D's case. A could have used this report to, at the very least, point out an inadequate investigation and discredit the police officer who arrested D.

Moreover, P interviewed H, who basically said D is innocent. This is direct exculpatory evidence. And even though it is not in P's possession because H is a live witness, he has a duty to disclose its existence to A.

Thus, by failing to inform A of H's existence and by instructing the officer to destroy evidence, P is likely to have violated his special duty to inform opposing counsel of any exculpatory evidence.

#### Absence of Probable Cause

The other special duty of prosecutors is to not proceed with a case in the absence of probable cause. Probable cause is facts sufficient to lead a man of ordinary caution to believe that a crime was committed and the defendant was the one who committed it. Here, P has filed a criminal complaint alleging battery by D against V. However, P has been unable to obtain V's version of the events because he has been overseas and he will not be back by the preliminary hearing. Moreover, the only witness P has spoken to, H, said that D is innocent. Thus, it appears that the only evidence of criminal conduct that P had was the vague police report which he requested the officer to destroy and embellish. This seems to be an absence of probable cause. If the only incriminating facts regarding the incident were those contained in the vague police report, it would not lead a reasonable person to believe that an offense was committed

by the defendant. P should not have filed suit and proceeded to the preliminary hearing without at least hearing V's testimony regarding the matter. P should have waited until V returned before filing suit. By failing to wait, P has violated his duty to not proceed with criminal cases in the absence of probable cause.

## Answer B to Question 2

### 1. Alex's Ethical Violations

#### Duty of Fairness to Opposing Parties – Press Conference

A lawyer owes the opposing party a duty of fairness, which includes not making public, extrajudicial statements that have a substantial likelihood of materially prejudicing the case.

Alex held a press conference and told the press that “Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney.” Because Alex’s statement was made to the press at a press conference, he knew that this extrajudicial statement would be widely publicized. This statement also has a substantial likelihood of materially prejudicing the case because his statement was inflammatory and may influence potential jurors to cause them to make up their mind or at least to have some pre-existing beliefs or bias regarding the case.

The one exception to this rule against extrajudicial statements is that a lawyer may make a public extrajudicial statement if necessary to protect his client from the undue influence of recent adverse publicity that was not self-initiated.

Alex might argue that he only made this statement to the press because he was trying to defend his client from what he believed was Paul’s desire to publicize the arrest of a high-profile defendant as part of an election bid for District Attorney. However, Paul has not yet made any public statements regarding the case against Dusty, and, therefore, there is no recent publicity to defend Dusty against. Hence, this exception does not apply, and Alex has violated his duty of fairness to the opposing party.



## 2. Paul's Ethical Violations

As a prosecutor, Paul has many additional ethical duties that are particular to prosecutors, in addition to all of the professional responsibilities that all lawyers are subject to.

### Duty of Fairness to Opposing Parties – Destroying Original Police Report

A lawyer owes the opposing party a duty of fairness, which includes the duty not to tamper with, alter, or destroy evidence.

Paul asked a police officer to destroy the existing police report describing Dusty's alleged criminal behavior. The original police report was a piece of relevant, material evidence for the case against Dusty. By asking the police officer to destroy the original police report, Paul violated his duty of fairness to Dusty.

### Duty of Candor to the Court – Creating New Police Report

A lawyer also has a duty of candor to the court, which requires not making a false statement of material fact and not presenting false evidence.

Paul asked the police officer to draft a new report that included more details of Dusty's alleged criminal behavior. If Paul's request to include more details of Dusty's alleged criminal behavior required the police officer to make up details that he did not in fact remember, this would entail the creation of false evidence, in violation of Paul's ethical duties. Furthermore, even if the new police report only contained truthful information that the police officer remembered from the incident, if the police report is offered by Paul as the original, rather than disclosing that it was a second version created at his request, then Paul would be making a false statement of material fact and knowingly presenting false evidence, in violation of his duty of candor to the court and his duty of fairness to the opposing party.

### Exculpatory Evidence

A prosecutor has a duty to disclose exculpatory or mitigating evidence to the defendant.

Paul did not disclose the original police report to Alex and Dusty. The original police report described Dusty's behavior in a vague manner, such that Paul was concerned about the police report in making his case. Therefore, this police report could be viewed as potentially exculpatory or mitigating evidence, and Paul, as prosecutor, had a duty to disclose it to the defense. His failure to do so violated his ethical duties as prosecutor.

Paul also did not disclose his interview with Henry, Dusty's housekeeper. Henry had witnessed the incident, and he told Paul that Dusty did not knock Vic down. Because this is exculpatory evidence, Paul had a duty to disclose the interview to Alex and Dusty. Paul might argue that since Henry was Dusty's housekeeper, Dusty is probably already aware of his version of events. Nonetheless, Paul has the duty to disclose all exculpatory or mitigating evidence to the defense, even if he suspects that the defenses might be aware of it. His failure to do so violated his ethical duties as prosecutor.

### Duty of Fairness to Opposing Parties and Third Parties – Telling Henry to Avoid Alex

A lawyer has the duty not to tell a third party not to voluntarily speak with the opposing party, unless: (1) the third party is a relative/employee/agent of the lawyer's client, and (2) not voluntarily speaking will not be adverse to the third party's interests.

Paul told Henry to avoid contact with Alex, Dusty's lawyer. Because Henry is a third party, Paul may not ask him to refrain from voluntarily speaking to Alex. (The exceptions do not apply because Henry is not a relative/employee/agent of the state, whom Paul represents, and failing to speak to Alex may actually be adverse to Henry's interests because he is Dusty's housekeeper and may lose his job as a result.) Paul might argue that since Henry is Dusty's housekeeper, he probably has already spoken to Dusty himself. Nonetheless, Paul may not ask a third party to refrain from speaking with the opposing party's counsel, and by asking Henry to avoid Dusty's lawyer, Paul violated his duty of fairness, both to Dusty and to Henry.

### Probable Cause

A prosecutor has the duty to only prosecute when there is probable cause.

During Paul's investigation of the case against Dusty, he found a police report where Dusty's behavior was only vaguely described, and he spoke to Dusty's housekeeper, who witnessed the incident and said that Dusty did not knock Vic down. Dusty claims that Vic simply tripped, and Paul has not been able to obtain Vic's version of events because Vic has been on an extended trip abroad. Based on these facts, Paul does not have probable cause to prosecute the case against Dusty. Paul might argue that the police report does not entirely clear Dusty's name because it is only vague, not exculpatory, and that Dusty's housekeeper was likely an interested, biased party who had reason to lie. However, Paul does not have sufficient evidence affirmatively establishing probable cause for finding Dusty guilty. Even though Paul subjectively felt confident that Dusty was nevertheless guilty, probable cause is an objective standard, and this standard has not been met on the facts. Therefore, Paul's decision to proceed with the preliminary hearing anyway, without having spoken to Vic or obtained other evidence of Dusty's guilt, violated his ethical duty to prosecute only when there is probable cause.

### Question 3

While driving their cars, Paula and Dan collided and each suffered personal injuries and property damage. Paula sued Dan for negligence in a California state court and Dan filed a cross-complaint for negligence against Paula. At the ensuing jury trial, Paula testified that she was driving to meet her husband, Hank, and that Dan drove his car into hers. Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, Dan said, "I have plenty of insurance to cover your injuries." Paula further testified that, three hours after the accident, when a physician at the hospital to which she was taken asked her how she was feeling, she said, "My right leg hurts the most, all because that idiot Dan failed to yield the right-of-way."

Officer, who was the investigating police officer who responded to the accident, was unavailable at the trial. The court granted a motion by Paula to admit Officer's accident report into evidence. Officer's accident report states: "When I arrived at the scene three minutes after the accident occurred, an unnamed bystander immediately came up to me and stated that Dan pulled right out into the path of Paula's car. Based on this information, my interviews with Paula and Dan, and the skidmarks, I conclude that Dan caused the accident." Officer prepared his accident report shortly after the accident.

In his case-in-chief, Dan called a paramedic who had treated Paula at the scene of the accident. Dan showed the paramedic a greeting card, and the paramedic testified that he had found the card in Paula's pocket as he was treating her. The court granted a motion by Dan to admit the card into evidence. The card states: "Dearest Paula, Hurry home from work as fast as you can today. We need to get an early start on our weekend trip to the mountains! Love, Hank."

Dan testified that, as he and Paula were waiting for the ambulance immediately following the accident, Wilma handed him a note. Wilma had been identified as a witness during discovery, but had died before she could be deposed. The court granted a motion by Dan to admit the note into evidence. The note says: "I saw the whole thing. Paula was speeding. She was definitely negligent."

Assuming all appropriate objections were timely made, should the court have admitted:

1. Dan's statement to Paula about insurance? Discuss.
2. Paula's statement to the physician? Discuss.
3. Officer's accident report relating to:
  - a. The unnamed bystander's statement? Discuss.
  - b. Officer's conclusion and its basis? Discuss.
4. Hank's greeting card? Discuss.
5. Wilma's note? Discuss.

Answer according to California law.

## **Answer A to Question 3**

### Preliminary Matters

Proposition 8 not applicable

Proposition 8 is an amendment to the California Constitution that states, in part, that all relevant evidence is admissible in a criminal trial. However, the present action is a civil action for negligence and thus Proposition 8 does not apply.

Standard of Relevance

In CA, evidence is relevant if it has any tendency to make disputed fact of consequence to the determination of the action more or less probable.

Discretion to Exclude under CEC 352

Under CEC 352, a judge has discretion to exclude evidence where its probative value is substantially outweighed by risk of unfair prejudice, waste of time, or confusion of the issues.

### **1. Dan's statement to Paula about Insurance**

At the scene, Dan told Paula "I have plenty of insurance to cover your injuries."

Logical Relevance

Dan's statement is relevant in a couple of different ways. It might tend to show that D was driving negligently because he knew he was covered by insurance, and it may also show ability to pay a substantial judgment. Finally, it also indicates an admission of fault because D's insurance company would only pay for P's injuries if D was at fault. Thus, by admitting that his insurance would cover her, D implied he felt he was at fault. This is relevant because it tends to show that D was actually at fault and knew it immediately.

## Legal Relevance

### Insurance to Prove Negligence or Ability to Pay

Proof of D's insurance to show that D was engaged in negligent conduct or that D has ability to pay a substantial judgment is inadmissible for public policy reasons. We want to encourage people to have insurance and thus we do not allow it to be used against them in court. Thus, D's statement about his insurance should not be admitted to show that he was negligent or has the ability to pay a substantial judgment.

### Use as Acknowledgment of Fault

However, the statement is still relevant as an admission of fault. Thus, it should be admitted unless the court finds that the danger of undue prejudice to D substantially outweighs its probative value. The statement will be harmful to D's case for sure, but mere harm is not substantial unfair prejudice. If D made this statement at the scene, he should be required to explain it and he can attack the probative value. The statement should have been admitted to show D believed he was at fault but it should not be admitted for the above improper purposes. A limiting instruction should have been given upon D's request to ensure it was only used for the limited purposes of showing D believed he was at fault.

### Offer to Pay Medical Expenses

There is a public policy exclusionary rule for offers to pay medical expenses. Under the CEC admissions of fault made in conjunction with an offer to pay medical expenses are also inadmissible. Thus, D can argue his statement was an offer to pay P's medical expenses. However, P can argue that a statement that his insurance would cover her medical expenses is not really an offer to pay and thus his acknowledgement of fault should not be excluded. P seems to have the better argument on this point.

### Hearsay

An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is inadmissible unless it falls within an exception. Here, D's statement was made out of court at the scene of the accident. However, if used to show D believed he was

at fault, it is now being offered to prove the truth of the matter asserted - that D has insurance that will cover P's injuries. Thus, it is not hearsay if used for this limited purpose.

Even if offered for the truth of the matter asserted, under the CEC there is a hearsay exception for party admissions. Because D, the defendant here, made the statement, it would be admissible under the party admission hearsay exception.

Conclusion on Item #1: admission was proper for the purpose of showing that D believed he was at fault immediately after the accident but not to show that D was negligent or that D has the ability to pay a substantial judgment. The statement is non-hearsay or admissible as a party admission.

## **2. Paula's Statement to the Physician**

Logical Relevance

Paula's statement tends to show that her right leg was injured and also tends to show how D was negligent - that he failed to yield to her right of way.

Hearsay

See hearsay definition above. P's statement to the physician was made out of court while at the hospital getting treatment. P's statement is best divided up into two distinct portions: (1) that her right leg hurts, and 2) that Dan failed to yield to her right of way. Both portions of her statement are presumably being offered for their truth - that she suffered an injury to her right leg and that Dan didn't yield to her right of way. As such, P's statement is hearsay and is inadmissible unless it falls within a hearsay exception.

### **Portion 1 – Statement About Injury to P's Right Leg**

Present Physical Condition

A statement of present physical condition or of present state of mind is admissible as a hearsay exception. P's statement to the physician described her present physical condition. At the time she was seeing her doctor, her right leg was hurting her and her

statement described this present physical condition. Thus, the statement is admissible as a present physical condition.

#### Excited Utterance

An excited utterance is a statement relating to a startling condition made while the declarant is still under the stress caused by the condition. Here, P was injured in a car accident, which is a startling condition. However, the statement was made 3 hours after the car accident. Thus, P may not have still been under the stress caused by the accident at the time the statement was made. Perhaps if P's injuries were sufficiently severe, she could make a strong argument that she was still under the stress of the accident. It's a close call but P's statement is probably not admissible as an excited utterance.

#### Statement Pertaining to Medical Diagnosis or Treatment

Unlike the exception under the Federal Rules, California's exception for a statement made in connection with the receipt of medical treatment is very narrow and only applies to a child describing an incident of neglect or child abuse. Thus, P's statement is not admissible under California's narrow exception.

#### Portion 2 – Statement about D Failing to Yield

##### Present Physical Condition

Although made in connection with her description of her present physical condition, the second part of P's statement does not itself describe a present physical condition. Thus, it should not be admitted with the first portion under the present physical condition exception.

##### Excited Utterance

Following the same analysis above, the second part of P's statement may be admissible as an excited utterance. However, P would have to establish the preliminary fact that despite the passage of 3 hours she was still in a state of excitement as a result of the accident.



### Exclusion under CEC 352

However, even if the second portion of P's statement to the physician were admissible under a hearsay exception, it should probably be excluded under CEC 352. It's not clear what the statement was based on. If she observed D's failure to yield, she can testify to that directly rather than admitting it this way. Thus, the probative value is minimal since we don't know the basis for P's statement. And it will probably be duplicative of P's actual testimony at trial and it's somewhat prejudicial to D because it asserts that D breached a duty without giving him an opportunity to cross-examine P when she made the statement. Thus, the second portion of the statement should be excluded under CEC 352 even if it is found to fall within a hearsay exception.

### **3. Officer's Accident Report**

#### Logical Relevance:

The contents of the report tend to show that D drove out in front of P's car and was thus negligent and that D was responsible for the accident.

#### Report - Hearsay

The officer's report is hearsay because it is an out-of-court statement that was made by the officer prior after [sic] the accident and it is being offered to prove its contents - that a witness saw D pull out in front of [P] and that the officer concluded that Dan was at fault.

#### Public Records Exception

The CEC has a public records exception for records made by public employees in the course of their duties. However, the court may exclude the record if it does not appear trustworthy. Here, the police report is an ordinary record made in the course of a police officer's duties. Thus, it may be admitted under the public records exception. However, the police report contains a statement from a bystander which is hearsay and the public records exception does not permit that statement because the bystander had no duty to communicate the information to the police officer. The business records exception does not cover records including conclusions on complex issues. If the same requirement is

applied to the public records exception, Officer's conclusion that D was at fault may not be admitted under the exception.

#### Part A - Unnamed Bystander's Statement

##### Bystander's Statement - Hearsay

The bystander's statement is hearsay because it was made out of court at the scene of the accident and it is being offered to prove its content that D pulled in front of P's car. Thus, it is inadmissible unless it falls within a hearsay exception.

##### Excited Utterance

See definition above. The bystander witnessed a startling event: a car accident which he apparently saw at close proximity. The police report also indicates that the officer arrived only 3 minutes after the accident and the bystander made the remark to the police officer immediately upon his arrival. Thus, it is likely that the bystander would have still been under the stress of witnessing the accident when the statement was made. Thus, the bystander's statement falls within the excited utterance exception.

##### Present Sense Impression

The CEC's present sense impression exception is narrow in that it only applies to statements explaining the conduct of the declarant while engaged in that conduct. Here, the car accident wasn't the bystander's own conduct so the statement would not be admissible as a present sense impression.

#### Part B - Conclusion and Basis

##### Lay Opinion

The opinion of a lay witness is only admissible if it is a rational conclusion based on the witness's firsthand observations, is helpful to the jury, and does not require expertise or knowledge unknown to the general public. Here, the police report explains that the officer's conclusion as to fault is based on the bystander's statement, interviews with both parties, and the skidmarks. The officer's conclusion thus seems to be reasonably based on his own observations. The conclusion would also be helpful to the jury who

may not be able to understand the relevance of the skidmarks. However, it's not clear exactly how the officer formed his conclusion. If the skidmarks were an important factor, the analysis would seem to require some expertise not possessed by the general public. Thus, the opinion should not have been admitted as lay opinion because it relies on the officer's special expertise in accident reconstruction and analysis.

### Expert Opinion

Expert opinion is admissible if it is helpful to the jury, the witness is qualified as an expert, the expert witness is reasonably certain of his conclusion, the analysis is supported by a proper factual analysis and is the result of reliable principles reliably applied to the facts. Here, P cannot establish the admissibility of the officer's conclusions as an expert opinion. First, the officer was never qualified as an expert and thus it is not clear whether he knows anything about analyzing skidmarks. Second, it is not clear whether the officer was reasonably certain of his conclusion or was just making his best guess based on what he observed. Third, we don't know what method of analysis the officer used. California has retained the Kelley-Frye standard which requires that the expert's methods be generally accepted by experts in the field. It is unclear how the officer analyzed the skidmarks and, thus, it is not possible to know if the officer's methods were generally accepted. In conclusion, the officer's conclusions could not be admitted as expert opinion.

### Legal Relevance - CEC 352

Relevant evidence may [be] excluded where its probative value is substantially outweighed by risk of unfair prejudice. Even if the officer's conclusions were admissible as lay opinion or expert opinion, the conclusions in the police report should be excluded under CEC 352. The report is extremely vague in stating the basis for the officer's conclusions. For instance, it is not clear what the officer learned in his interviews of Dan and Paula that led him to the conclusion that Paula was at fault. And, as discussed above, the officer fails to describe how the skidmarks led him to conclude that D was at fault. For these reasons, the officer's conclusions have minimal probative value. On the other hand the conclusions in the report are very prejudicial to D because they state

that he is at fault and he is unable to cross-examine the officer who made them since he will not be testifying at trial. Thus, the risk of unfair prejudice substantially outweighs what little probative value the conclusions offer and the conclusions should have been excluded under CEC 352.

#### **4. Hank's Greeting Card**

##### Logical Relevance

The greeting card shows that P had a reason to rush home - to get an early start on their trip to the mountains and possibly that Hank would have been upset with P had she not hurried home. If P was rushing, it's more likely she may have been negligent, which is relevant to D's counterclaim and to D's defense that P was contributorily negligent.

##### Hearsay

See hearsay definition above. Henry's statements in the card are out-of-court statements because he wrote them up the morning of the accident. However, it does not appear that D is offering them for the truth of the matter.

##### Non-Hearsay - To Show Effect on Listener

Out-of-court statements are not barred by the hearsay rule if offered for some other purpose such as to prove the declarant's state of mind or to show the effect on the listener. Here, D is not offering the greeting card to prove that they were going to the mountains for the weekend. Rather, D is offering the card to show its likely effect on Paula - that it made her want to get home quickly and that she may not have been driving carefully as a result. Thus, the greeting card should be admitted as non-hearsay for this purpose.

##### Authentication

Physical evidence and writings must be authenticated before they may be admitted into evidence. Authentication requires such proof that is sufficient for a jury to find that the evidence is what the proponent claims it to be. Here, the greeting card was properly

authenticated by one of the paramedics who had seen the greeting card when treating Paula after the accident. Thus, it was properly admitted into evidence.

## **5. Wilma's Note**

### Hearsay

Wilma's note is an out-of-court statement because she wrote it down at the scene of the accident. Presumably it is being offered to prove the truth of the matter asserted, i.e., that P was speeding and that P was negligent. Because the note is hearsay, it is inadmissible unless it falls within an exception.

### Excited Utterance

An excited utterance is a statement relating to a startling condition made while the declarant is still under the stress caused by the startling condition. Wilma witnessed the accident, which was a startling event. According to Dan's testimony, Wilma handed him the note immediately after the accident. Thus, it seems that Wilma wrote the note immediately upon witnessing the accident when she was probably still under the stress caused by witnessing the accident at close proximity. As such, the statement may be admitted as an excited utterance.

### Lay Opinion re: Speeding

Lay opinions must be based on the witness's personal observations, helpful to the jury, and not based on special expertise. Wilma's note contains the assertion that Paula was speeding. This is a lay opinion because it is based on Wilma's observations (recall, Wilma states she "saw the whole thing") and does not communicate the facts directly to the jury. We don't know, for instance, whether Wilma was driving 80 miles per hour or 50 miles per hour. However, this type of lay opinion is usually permissible because it is helpful to the jury. The jury will understand that, under the circumstances, P appeared to be driving very fast. Thus, the opinion regarding P's speeding should be admitted.

### Lay Opinion re: Negligence

Wilma's opinion that P was negligent is probably not admissible. This opinion would not be helpful to the jury because it's not clear what Wilma based this opinion on. If it was based merely on the speeding, then there's no need to admit the conclusion regarding negligence because the opinion regarding speeding was already admitted. If it was based on other things, then it cannot be shown to be based on Wilma's firsthand observations. Thus, the opinion regarding P's negligence should not be admitted.

### Authentication

Dan, the recipient of the note, could properly authenticate it before it was admitted to evidence. Assuming that the foundation was established, the note would be admissible upon Dan's authentication.

### CEC 352

The circumstances surrounding the note are strange. Unless Wilma was mute, it is unclear why she would write out a note rather than just make a verbal statement to Dan. In addition, the note is rather conclusory and as such it does not assist the jury much in ascertaining whether or not P was driving negligently. On the other hand, there is some unfair prejudice because P has no opportunity to cross-examine Wilma or to even depose Wilma prior to trial. This is a close call, but the note should probably [be] excluded under CEC 352 because its probative value is substantially outweighed by its prejudice to Paula.

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

Because this case takes place in California state court, the court will use the California Evidence Code as the basis for the admissibility of evidence. Further, because this is a civil case, the rules regarding California's Proposition 8 will not be applied to the evidence.

#### 1. Dan's statement to Paula about the insurance

##### Relevance

For evidence to be admissible, it must be factually and legally relevant. In California, factual relevance is evidence that would tend to make a matter in dispute more or less probable. Here, it is in dispute whether Dan was liable. Therefore, Dan's statement that "he has plenty of insurance to cover the injuries" will be logically relevant to making the matter of Dan's negligence more probable.

Legal relevance means that the probative value of the evidence outweighs any prejudicial impact that the evidence may have. While Dan's comment may be slightly prejudicial in implicating him in the matter, it is highly probative because it establishes that he could have been liable. Therefore, the comment will be found to be legally relevant.

However, evidence can be excluded if a court finds that it has the tendency to confuse the issues and mislead the jury. The defendant's comment could only establish that he has the ability to pay, and not that he was negligent in the accident. However, such evidence is unlikely to be confusing, and would not be subject to exclusion on this basis alone.

### Reliability

Evidence must be reliable, and based on the witness' personal knowledge in order to be admissible. Here, Paula heard Dan make the comment that he has plenty of insurance. Therefore, the evidence is reliable.

### Evidence of Medical Insurance

According to the California Evidence Code, evidence of liability insurance is inadmissible in a civil trial to prove that the defendant was at fault or that the defendant has the ability to pay, because public policy concerns dictate that we should encourage persons to have insurance. Therefore, Paula's testimony that Dan said he had plenty of insurance to cover the injuries should not have been admitted.

### Offers to pay for injuries

In California, offers to pay another person's medical costs are inadmissible in court to show that the defendant was at fault, or that the defendant had the ability to pay. In addition, any statements made in connection with the offer to pay for medical expenses are similarly excluded. Paula is likely introducing the evidence to show that Dan was at fault, and this is why he offered to pay her costs. Therefore, Dan's statement that he can pay for Paula's injuries should not be admitted.

### Statements of sympathy

In a civil case, a defendant's statements of sympathy made at the scene of the accident are inadmissible to show fault; however, any accompanying statements can be admitted against the defendant. Here, however, Dan was not making a statement of sympathy, but only stating that he had liability insurance to cover the injuries. Therefore, this rule will not be applicable to the statement.



## Statements to settle

In California, any statements made with regards to a settlement offer are inadmissible to show guilt or liability. However, in order for this exception to apply, the plaintiff must have filed a lawsuit against the defendant. Because Dan's statements were made at the scene of the accident, this rule will also not apply.

## Hearsay

Hearsay is any out-of-court statement offered to prove the truth of the matter stated therein. Hearsay is generally inadmissible in court. In this case, Dan's statement was made out of court, and is being offered to show that Dan was liable; therefore, it will be inadmissible hearsay unless an exception applies.

In California, an admission by a party opponent is an exception to the hearsay rule. An admission includes any statement made by the opposing party that is a prior acknowledgement of any fact in the case. Here, Dan made a prior statement that he could pay for Paula's injuries. Therefore, the statement is an admission by a party opponent, and would fall under the hearsay exception.

However, as stated above, the evidence will be inadmissible, because of the public policy rule governing the exclusion of statements made in connection with proof of insurance and statements offering to pay for the plaintiff's injuries.

## 2. Paula's statement to the physician

### Relevance

Paula's statement to the physician is factually relevant because it shows that she suffered from physical harm, and because it establishes that Dan was negligent. Further, it is legally relevant, because while it is prejudicial to Dan in establishing that he

was negligent, it is highly probative because it shows that Paula suffered from physical injury, and it shows that Dan did not yield to the right-of-way, and thus was the party at fault in the accident.

### Reliability

Paula has personal knowledge of the statement to the physician, because she made the statement.

### Hearsay

Hearsay is any out-of-court statement offered to prove the matters stated therein. Here, Paula is introducing the evidence to show that she was injured and that she was negligent. Thus, it will be inadmissible hearsay unless one of the exceptions apply.

### Statements of a past physical condition made to a doctor in the course of treatment

California will admit statements made to a doctor and that were necessary to receiving treatment. However, this exception only applies to minors who make the statements in connection to a claim of child abuse or neglect. Therefore, this exception will not apply.

### Statement of a then-existing physical or mental condition

A statement made by the defendant of a then-existing physical condition is an exception to the hearsay rule. Paula can argue that her statement that her leg hurts the most was a statement of a then-existing physical condition, because her leg was hurting while she made the statement. However, the statement that Dan failed to yield to the right of way will not be admissible under this exception because it constitutes a past belief, and therefore, is not a then-existing state of mind.

### Statement of a past physical condition if the physical condition is at issue in the case

California also permits a statement of past physical condition if it is at issue in the case. However, in order for this exception to apply, the declarant must be unavailable, and here, Paula is in the court. Therefore, this exception will not apply.

### Excited utterance

The excited utterance exception permits the admission of a statement of a declarant who experienced an exciting or startling event and [is] still speaking under the stress of such excitement. In this case, Paula's comment was made 3 hours after the accident. This suggests that the statement was too remote for Paula to still be under the excitement. Further, no statements indicate that she was still under the stress of the accident. Therefore, her statements will not be admissible as an excited utterance.

### Present sense impression

A present sense impression is a statement made contemporaneously while witnessing the event. California only recognizes this exception to the extent that it applies to the conduct of the declarant, but not with regards to anyone else. Here, the statement was not made contemporaneously because it was made 3 hours after the accident. Further, it states the conduct of Dan and thus would not fall under the exception.

As a result, the court should have admitted her statement that her leg hurts the most because it was a statement of a then-existing physical condition. However, the further comment about Dan should be excluded because it is inadmissible hearsay.

### 3a. Officer's accident report relating to the unnamed bystander's statement

#### Relevance

The statement is logically relevant because the unnamed bystander's statement establishes that Dan caused the accident. Furthermore, it is legally relevant because it is highly probative in establishing who was at fault, and this probative value will outweigh any prejudicial impact of the testimony.

#### Reliability

The bystander personally witnessed the scene; therefore, he has personal knowledge with regards to his statement. Further, the police officer has personal knowledge as to the matters which he entered into the police report, because he wrote the police report.

#### Hearsay

The police report is an out-of-court statement being offered to prove the matters stated therein. Furthermore, the bystander's statement was an out-of-court statement that is being offered to prove the truth of the matters stated therein--that Dan was negligent. Thus, there are two levels of hearsay in the police report. Both levels of hearsay must fall within a hearsay exception in order to be admissible in court.

#### Excited utterance

The excited utterance exception permits the admission of a statement of a declarant who experienced an exciting event and is speaking under the stress of such excitement. The bystander made this statement three minutes after the accident occurred. It is likely that he was still under the stress of the excitement, because such a short time had elapsed, and he had run to the police officer in order to tell him the

statement. Therefore, the bystander's comment will be admissible under the excited utterance exception to the hearsay rule.

### Public records exception to the hearsay rule for the police reports

In California, the public records exception to the hearsay requires that the record be made by a public employee in accordance with his duties, that the matters were recorded at or near the scene of the accident, that the official had personal knowledge of the matters contained in the record, and that the record was made under circumstances indicating trustworthiness.

Here, the record was made by a public officer while he was carrying out his duties. Further, he made the report at the scene of the accident, and made the record according to his observations and interviews. Therefore, the factors indicating trustworthiness were present. As a result, the report is admissible under the public records exception.

### 3b. Officer's accident report relating to his conclusion and its basis

#### Relevance

The conclusion and its basis are relevant to establish that Dan was negligent. Further, it is highly probative in establishing who was at fault, and the probative value of this determination far outweighs any prejudicial impact that it may have. Therefore, the evidence is admissible.

#### Expert witness opinion

Expert opinion is admissible in court if 1) the testimony is helpful, 2) the witness is qualified, 3) the witness is relatively certain of his statements, 4) the witness' testimony has a sound factual basis, and 5) the opinion was reliably based on matters

that were reliably applied. Lay opinion is an opinion by a person that is rationally related to that person's perception of the incident. Lay opinion does not include legal opinions of negligence and causation.

In this case, Officer is making an expert opinion because he is testifying as to the legal conclusions of the case. This is not conclusion on which a layperson would be able to testify. Therefore, Officer must establish his credentials as an expert. His testimony is certainly helpful to the jury, because it allows the jury to ascertain who was negligent. However, it is not clear if Officer is qualified to make such a legal conclusion (that Dan caused the accident) or that officer is relatively certain of his statements. Further, Officer is not present in court to be cross-examined; therefore, a judge will not be able to make the determination that Officer is competent to testify as an expert witness. While the skidmarks and the interviews may provide a sound basis to establish that Dan caused the accident, Officer has not been qualified as an expert, therefore, the evidence is inadmissible.

As a result, the police report will only be admissible as to the contents of the bystander's comments, but not as to Officer's conclusion and its basis.

#### 4. Hank's greeting card

##### Relevance

The statement is relevant because it establishes that Paula was in a hurry on the way home, and as a result may have been driving too quickly. Further, the greeting card is probative in establishing that Paula was at fault in the accident.

##### Authentication

All physical evidence must be authenticated in order to be admissible. Here, the paramedic testified that she recognized the greeting card as the same greeting card that

she found in Paula's pocket. Therefore, the greeting card has been properly authenticated as belonging to Paula.

However, the note in the greeting card also must be authenticated to establish that it was indeed Hank who wrote the note. Circumstantial evidence can establish such authentication. The court may find that because it was found in Paula's pocket while she was being treated, and was signed by a man with the same name as her husband, Hank. Therefore, the note in the card has been properly authenticated.

### Hearsay

Paula could argue that the note should be excluded because it is inadmissible hearsay. However, Dan could argue that the statement in the note is not being offered for the truth of the matter. It is not being introduced to show that Paula was getting an early start on the weekend trip, but rather to show that Paula was on notice that she needed to hurry, and to show the effect on the hearer (Paula) upon hearing that she had to get an early start on her weekend. Therefore, the statement is non-hearsay because it is not being offered to prove the matters stated therein, but rather to show the effect of the card on Paula.

Dan could further argue that the statement is an admission by a party opponent. However, the statement was made by Hank, and not Paula, and, therefore, this exception will not apply.

### 5. Wilma's note

#### Relevance

The note is highly relevant because it establishes that Paula was speeding during the accident, and thus was negligent. Further, it is probative to the issue of

Paula's fault, and this probative value would outweigh any prejudicial impact that the note would have.

### Authentication

All real evidence must be authenticated in order to be presented in court. Here, Dan will likely authenticate the note as the same note that he received while he was waiting for the ambulance.

### Reliability

Even if a court believes that Wilma saw the whole thing, the statement in the note is inadmissible lay opinion. Lay opinion must be 1) helpful to the jury, 2) based on the person's perception, and 3) the opinion is rationally related to the perception.

Here, Wilma is making a legal conclusion as to Paula's negligence. A layperson cannot testify as [to] legal conclusions such as negligence. Therefore, Wilma's statement as to Paula's negligence will be inadmissible as inadmissible lay opinion.

### Hearsay

The note would also be inadmissible hearsay because it is an out-of-court statement that is being offered to prove the matters stated therein, that Paula was speeding and that Paula was negligent. The note may be admissible if it falls under any of the recognized exceptions to the hearsay rule.

### Excited utterance

There are no facts indicating that Wilma wrote this note when she was under the stress of having viewed the accident. Further, it is unclear how much time had passed since the accident had occurred and Wilma wrote the note. Therefore, the statement in the note would not qualify as an excited utterance.



### Present Sense Impression

As stated above, California only recognizes a present sense impression to the extent that it describes the declarant's conduct. Here, Wilma is describing Paula's conduct therefore, this exception will not apply.



JULY 2009

ESSAY QUESTIONS 4, 5, AND 6

# 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

In a recent statute, Congress authorized the United States Secretary of Transportation “to do everything necessary and appropriate to ensure safe streets and highways.” Subsequently, the Secretary issued the following regulations:

Regulation A, which requires all instructors of persons seeking commercial driving licenses to be certified by federal examiners. The regulation details the criteria for certification, which require a minimum number of years of experience as a commercial driver and a minimum score on a test of basic communication skills.

Regulation B, which requires that every bus in commercial service be equipped with seatbelts for every seat.

Regulation C, which provides that states failing to implement adequate measures to ensure that bus seatbelts are actually used will forfeit 10 percent of previously-appropriated federal funds that assist states with highway construction.

The State Driving Academy, which is a state agency that offers driving instruction to persons seeking commercial driving licenses, is considering challenging the validity of Regulation A under the United States Constitution. The Capitol City Transit Company, which is a private corporation that operates buses within the city limits of Capitol City, is considering challenging the validity of Regulation B under the United States Constitution. The State Highway Department, another state agency, is considering challenging the validity of Regulation C under the United States Constitution.

1. What constitutional challenge may the State Driving Academy bring against Regulation A, and is it likely to succeed? Discuss.
2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed? Discuss.
3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed? Discuss.

## **Answer A to Question 4**

### State Driving Academy Challenges

#### Standing

In order to bring a claim in federal court challenging this regulation each of the parties must have standing. In order to have standing the plaintiff must show (1) injury in fact, (2) that the defendant caused the harm, and (3) that a favorable opinion will remedy his harm. In this case, the state agency is likely to have standing because the regulation will require their instructors to obtain the federal certification and therefore they will incur greater expense because of the regulation. Moreover, a challenge brought against the US Secretary is proper because he is the one who issued the regulations. Finally, a favorable opinion invalidating the regulation would remedy the injury because they would no longer have to incur the expense to comply with the regulation.

#### Constitutional Challenges

##### State Action

In order for the constitution to apply there must be state action. State action exists whenever the government or a government official is acting or a private party with sufficient entanglement with the state is acting. In this case, the US Congress and the US Secretary of Transportation issued these regulations and therefore there is state action and the constitution will apply to such regulations.

##### Not Within Enumerated Powers

The State agency would argue that such regulation is not within Congress' enumerated powers and therefore would violate the constitution. Congress would argue that it has the power to regulate interstate commerce and therefore has the ability to regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce including those things within interstate commerce, (3) those activities that

have a substantial effect on interstate commerce. When Congress is using its commerce power to regulate an activity the activity must have a substantial effect on interstate commerce. If the activity is an economic activity then the court will uphold the regulation so long as in the aggregate all substantially similar activity is likely to have a substantial effect on interstate commerce.

In this case, the activity is commercial driving instruction. Congress is requiring that all instructors of persons seeking commercial driving licenses be certified by federal examiners. The regulation requires [a] certain minimum number of years of experience and a minimum score on a test of basic communication skills. In this case, Congress is not regulating an instrumentality of interstate commerce or a channel of interstate commerce but rather an activity. This activity is a commercial activity because it involves the provision of driving instruction for a fee. This commercial activity, although entirely intrastate, may be regulated by Congress so long as there is a reasonable belief that such economic activity would, in the aggregate, have a substantial effect on interstate commerce. In this case, since this [is] an economic activity, it is likely that such activity would have a substantial effect on interstate commerce because driving instruction provided to commercial truckers is likely to have an effect on the way that truck drivers drive on the road. If the truckers are taught more effectively then it is likely that they are going to [drive] safer when on the roads and therefore cause less accidents. Moreover, the safety of the highways has a substantial effect on interstate commerce. Moreover, in the aggregate if the instruction is not sufficient then our highways are likely to be unsafe and therefore will increase the cost of interstate commerce or reduce the amount of interstate commerce.

Since the activity is likely to have a substantial effect on interstate commerce the court will likely uphold regulation.

### Delegation of Legislative Powers

This State may also challenge the regulation as an invalid delegation of legislative power. As a general rule Congress may delegate its legislative authority so

long as it provides reasonably intelligible standards. In this case, Congress has delegated its authority to the US Secretary of Transportation. This delegation will be valid so long as Congress has provided reasonably intelligible standards. In this case, Congress has said that the Secretary should do everything “necessary and appropriate to ensure safe streets and highways.” While this guidance is broad the court is not likely to invalidate this as unintelligible because such broad delegations of authority have been upheld in the past. Therefore it is likely a valid delegation of legislative power.

### 10<sup>th</sup> Amendment: Commandeering

The State may challenge this regulation on the ground that it is commandeering state officials by forcing them to comply with a federal regulation. In this case, the State Driving Academy is a state agency; therefore their employees are state officials. The state would argue that by forcing them to comply with the regulation Congress is infringing on the state’s inherent powers protected by the 10<sup>th</sup> Amendment. In this case, while the regulation does require the state officials to comply with the regulation, the regulation is not likely to violate the 10<sup>th</sup> Amendment because it is regulating both private as well as state actors. In prior cases, the court has upheld generally applicable regulations that require state agencies to comply so long as they were applicable to both private and public actors. In this case, the regulation applies to all commercial driving instructors, public and private, and therefore will likely not violate the 10<sup>th</sup> Amendment.

### Capitol City Transport’s Challenges

#### State Action

As mentioned above, there is state action in this case, so the construction applies.

### Not Within Enumerated Powers

Transport would likely argue that this regulation is not within Congress' enumerated powers and therefore is unconstitutional. As mentioned above, under the Commerce Clause Congress has the power to regulate the instrumentalities of interstate commerce as well as those things within interstate commerce. Instrumentalities of interstate commerce include cars, planes, buses, etc. Moreover, Congress has the power to regulate an activity [that] has a substantial effect on interstate commerce.

In this case, the Regulation requires that every bus in commercial service be equipped with seatbelts for every seat. A bus is an instrumentality of interstate commerce because it is generally used to move people both within the state and between states. Even though Transport does not operate buses within interstate commerce (since it only operates within the City limits) the bus, itself, is an instrumentality of interstate commerce and therefore can be regulated by Congress under the Commerce Power. Moreover, commercial busing is an activity that has a substantial effect on interstate commerce because it is an economic activity that in the aggregate moves thousands of people and goods between states. So even though City itself does not move people in interstate commerce, the commercial activity of busing people within the city, in the aggregate, has a substantial effect on interstate commerce. If buses that operate in the country are safer than the roads and highways are likely safer and therefore there is going to be beneficial effect on interstate commerce.

Therefore the regulation is within Congress' enumerated powers.

### Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

### Equal Protection

Under the 5<sup>th</sup> Amendment Due Process Clause, the federal government is prohibited from making unjustifiable distinctions between its people. In this case, the plaintiff may challenge the regulation as a violation of equal protection because it distinguishes commercial buses from other buses. As a general rule, any classifications among economic actors is subject to minimum rationality review. In that case, the regulation is valid so long as it is rationally related to a legitimate government interest. In this case, the regulation is likely to be upheld because the regulation is rationally related to the legitimate interest of ensuring the safety of those instrumentalities of interstate commerce. Secretary may have concluded that commercial buses are more of [a] threat to safety and therefore needed to be regulated before other buses were regulated. Moreover, putting safety belts on buses makes them safer by ensuring less injuries when and if there is an accident. Therefore this challenge is likely to fail.

### State Highway Department's Challenges

#### State Action

As recommended above, there is state action in this case, so the construction applies.

#### Not Within Enumerated Powers

The State Highway Department may challenge this regulation by claiming that the regulation is not within Congress' enumerated powers. Congress has the power to tax and spend for the general welfare. In addition, Congress has the power to condition federal funds so long as the condition is related to the purpose for which the funds were granted.

In this case, the regulation requires states to implement adequate measures to ensure that bus seatbelts are actually used by conditioning 10% of the previously appropriated federal funds that assist states with highway construction on the implementation of such measures. Under Congress' conditional spending power this



condition placed on the funds is appropriate so long as the condition is related to the purpose for which the funds are used. The funds are being used to assist with highway construction. Such funds are likely to be used to build better, safer and more highways. The condition on the funds is that the states must implement measures ensuring that buses have seatbelts. The purpose of the condition is to improve the safety of an important instrumentality of interstate commerce. In this case, the condition is clearly related to at least one of the likely goals of the federal funds. Therefore the regulation is not outside of Congress' enumerated powers.

### Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

### 10<sup>th</sup> Amendment: Commandeering

The State Highway Department may challenge the regulation as invalid because it compels the state to legislate. As a general rule Congress cannot compel the state to implement legislation. Such regulations would be invalid and a violation of the 10<sup>th</sup> Amendment. However, Congress does have the power to condition its provision of federal funds on the states enacting certain regulation so long as the condition is not compelling the states to implement the regulation. In this case, Congress has conditioned only 10% of the federal highway funds on the implementation of such measures. 10% is only a slight percentage of the total and therefore it is unlikely that such an amount would constitute coercion of the states into implementing measures. If the state decides not to implement the measures it still will get 90% of the funds that were previously appropriated. Therefore the court is likely to find that such regulation is only inducing the states to act, not compelling them to act.

Therefore the regulation is not likely a violation of the 10<sup>th</sup> Amendment.

## **Answer B to Question 4**

### **1. What constitutional challenges may the State Driving Academy bring against Regulation A, and is it likely to succeed?**

#### Standing

It first must be determined whether the State Driving Academy (SDA) has standing to challenge Regulation A. Because of the requirement in Article III that federal courts only hear actual cases and controversies, the United States Supreme Court has imposed various requirements to determine whether a case is justiciable. Importantly, a litigant must have standing to bring a claim in federal court. This requires the litigant demonstrate injury in fact, causation, and redressability.

The SDA can demonstrate injury in fact based on Regulation A. The SDA offers its own driving instructions for persons seeking commercial driving licenses. However, the current federal regulation requires that the instructors at the SDA be certified by federal examiners, and meet specific criteria for eligibility. Thus, the SDA is injured because it cannot continue to offer driving instruction until it has complied with the federal regulations. Causation is also met, since the fact that the SDA cannot continue to offer instruction was caused by Regulation A. Finally, the SDA can also demonstrate redressability. If it succeeds in challenging Regulation A under the U.S. Constitution, it will be overturned, and the SDA will no longer have to comply.

As such, the SDA has standing to challenge Regulation A.

#### Improper delegation of legislative power

The SDA will first argue that the entire regulatory scheme is an improper delegation of legislative power. Congress may delegate its power to other branches, so long as intelligible standards are given and the power assigned is not uniquely confined to Congress (e.g., the power to declare war). It should be noted that although some

intelligible standard is required, the United States Supreme Court has not struck down a delegation of legislative power in nearly 30 years.

In this case, Congress authorized the United States Secretary of Transportation, an executive officer, to “do everything necessary and appropriate to ensure safe streets and highways.” This does seem possibly overbroad. However, the facts indicate that, as regards Regulation A, specific details were given for the licensing scheme. The facts say that the criteria for certification were detailed, and lists the types of things required for certification. Based on the fact that the United States Supreme Court is hesitant to overturn delegations of legislative power, these criteria are likely sufficient.

As such, a challenge based on improper delegation of legislative power will likely fail.

### Interstate Commerce Clause

In order for Congress to take action, it must exercise an express power granted to it in the Constitution or it must exercise an implied power, typically those necessary and proper to achieve those powers expressly granted. Article I of the Constitution grants Congress the power to regulate interstate commerce. The United States Supreme Court has interpreted this power broadly, and Congress may regulate interstate commerce in three different areas: (1) it may regulate the channels of interstate commerce, such as highways and rivers; (2) it may regulate the instrumentalities used in interstate commerce, as well as regulate to protect the persons and things engaged in interstate commerce; and (3) it may regulate activities which have a substantial effect on interstate commerce.

In this case, Regulation A requires that all instructors of persons for commercial driving licenses be certified by federal examiners. Regulation A is part of the overall scheme “to ensure safe streets and highways.” The SDA will argue that this regulation is too broad, because it is not limited to those engaged in interstate commercial driving. Specifically, they will argue that the regulation also requires instructors to be certified

even when they're only instructing commercial drivers engaged in wholly intrastate commerce, and thus, the Interstate Commerce Clause cannot justify Congress' action here.

First, Congress will argue that Regulation A is a method of regulating the instrumentalities used in interstate commerce. Specifically, Congress will point out that those engaged in commercial driving are instrumentalities of interstate commerce, and thus regulating those who grant licenses to these drivers is entirely proper under the second prong mentioned above. However, Congress will also argue that the activity regulated has a substantial effect on interstate commerce.

Importantly, when Congress regulates an activity which may be entirely intrastate, it has to demonstrate that the activity has a substantial effect on interstate commerce. However, where the activity regulated is commercial or economic in nature, the regulation will be upheld if there is a rational basis to conclude that the activity regulated, in the aggregate, does have a substantial effect on interstate commerce. That test would easily be met in this case. It can rationally be assumed that commercial drivers within a state would impact commercial activities in interstate commerce – intrastate drivers could convey goods to interstate drivers, goods in interstate commerce could be moved by commercial drivers through the state, etc.

As such, Regulation A is constitutional under the Interstate Commerce Clause.

#### Intergovernmental immunity/principles of federalism

The SDA will next argue that Regulation A violates principles of intergovernmental immunity. Specifically, it will state that the federal government is targeting the states and forcing them to comply with federal regulations. The SDA will argue that Regulation A commandeers state officials to enforce the regulatory scheme, since all state driving instructors must now comply with federal certification rules. However, state governments are not immune to federal regulation, and it should be noted that principles

of federalism are not violated where a federal law regulates both states and private individuals equally, without directly targeting states.

This argument will likely fail. First, Regulation A is not targeted only to states. The facts indicate that Regulation A is applicable to all instructors of persons seeking commercial driving licenses. Thus, Congress is not requiring states to regulate in a certain way, but merely requiring those engaged in a specific activity [to] meet certain requirements.

Next, Regulation A does not commandeer state officials. Although state officials must meet certain requirements before being permitted to instruct, the Regulation does not mandate that state executive officials enforce a federal law. It merely requires all persons engaged in commercial driving instruction, both private and governmental, follow the federal rules.

As such, Regulation A does not violate principles of intergovernmental immunity.

### Preemption

Because of the Supremacy Clause of Article IV, a lawfully passed act of Congress may preempt or supersede state laws. Congress may expressly preempt state law, or impliedly do so. It does so impliedly where the state law prohibits obtaining a federal objective or interferes with a federal scheme.

In this case, the SDA will argue that Congress is intruding on areas left to the States under the 10<sup>th</sup> Amendment. However, this argument will fail. As demonstrated above, Regulation A is lawful under the Interstate Commerce Clause. If the SDA has conflicting licensing requirements for commercial driving instructors, its scheme will be struck down and Regulation A upheld under the Supremacy Clause.

## Conclusion

As such, the SDA's challenge to Regulation A will fail.

## **2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed?**

### Standing

As indicated above, a litigant must have standing to bring suit in federal court, meaning it must demonstrate injury in fact, causation, and redressability. The Capitol City Transport Company (CCTC) can demonstrate injury from Regulation B because it requires CCTC to put seat belts in all of its buses. This is an economic detriment that CCTC will have to incur. Because this economic detriment is due entirely to Regulation B, causation is met. Additionally, redressability is also met, because if the regulation is declared unconstitutional CCTC will no longer have to comply.

As such, CCTC has standing to litigate the constitutionality of Regulation B.

### Interstate Commerce Clause

CCTC will also likely argue that Regulation B exceeds Congress' power under the commerce clause. However, this argument will likely fail. Again, as indicated above, Congress may regulate interstate commerce in three different ways (see above).

Regulation B requires that every bus in commercial service be equipped with seat belts. This indicates that Congress is regulating instrumentalities of interstate commerce, since buses engaged in commercial service are being regulated and are an instrumentality. Additionally, Congress is protecting persons involved in interstate commerce, since the regulation require seat belts. However, CCTC will argue that the regulation is again overbroad, because it does not regulate only buses engaged in

interstate commercial activity. Once again, as indicated above, since this activity is economic, Regulation B will be upheld if there is a rational basis to conclude the activity, in the aggregate, has a substantial effect on interstate commerce. Such a rational basis is easy to see here. Buses engaged in commercial service, even if only within the state, will likely impact commercial activity coming into the state and leaving it.

As such, a challenge under the interstate commerce clause will fail.

### Government action

The CCTC may also argue that the law infringes its substantive due process rights under the 5<sup>th</sup> Amendment, as well as its rights to equal protection (which is implied in the 5<sup>th</sup> Amendment). However, to properly allege a violation of due process or equal protection, some government action must be shown. This is easy here, since the act complained of is a federal regulation, which would count as government action.

### Equal protection

Again, implied into the 5<sup>th</sup> Amendment is a clause providing that no one be deprived of equal protection of the laws. Where a law regulates on a suspect or quasi suspect class, or infringes a fundamental right, strict scrutiny or intermediate scrutiny may be used. However, for all other activities or classes, only a rational basis test is used. Specifically, the claimant must demonstrate that the law is not rationally related to a legitimate government purpose. This test is very deferential to the government.

In this case, CCTC will argue that its equal protection rights are violated. Particularly, it will argue that the regulation targets only commercial buses, and not other buses. However, commercial buses are not a suspect or quasi suspect class. Additionally, no fundamental rights are infringed by Regulation B. Thus, only a rational basis review will be used to determine the validity of the law. The state purpose of these regulations is to ensure safe streets and highways. This is clearly a legitimate government purpose.

Additionally, the law is rationally related to this purpose because regulating commercial drivers, who would frequently be on streets and highways, is a manner of ensuring that the roads are safe for other drivers.

As such, an equal protection challenge to this regulation will fail.

### Substantive due process

The due process clause analysis is similar to the equal protection analysis. However, we are not concerned with discrimination based on a group or class, but a law which equally deprives people of constitutionally protected rights. Where a law infringes upon fundamental rights, strict scrutiny must be used. However, for all other rights only a rational basis test is used.

The analysis is the same as the equal protection analysis above, and the law will be upheld.

### Taking

CCTC may also argue that the regulation affects a taking of private property. The 5<sup>th</sup> Amendment provides that the federal government shall not take private property for public use without paying just compensation. The takings clause can apply both to physical takings as well as regulatory takings which deny owners the economic use of their property.

CCTC will argue that the law affects a taking, because it requires them to put in seat belts. Specifically, it will argue that Regulation B is [a] governmental act which requires them to pay money to install seat belts, thus decreasing the value of their overall business enterprise.

However, Congress will argue that in no way does the regulation deprive CCTC of all economically viable uses of its buses. To the contrary, it is simply making the buses



safer for their continued commercial use in which CCTC was making profits. And although the takings clause does apply to regulations, it typically applies to those regulations which limit the use of the land. In this case, the regulation only requires that CCTC install seat belts in its buses, which would in no way limit the use of the buses.

### Conclusion

As such, Regulation B will be upheld under the US Constitution.

### **3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed?**

#### Standing

Again, the 3 standing requirements must be met. The State Highway Department (SHD) can show that Regulation C injures it because the state will lose federal funding if it does not implement adequate measures for providing seat belts. Causation is met, since the funding will be cut due to the requirements of Regulation C. And finally, redressability is met, because a successful constitutional challenge will overturn the law, meaning SHD no longer has to comply.

#### Intergovernmental immunity

Here, a challenge based on violations of intergovernmental immunity might succeed. As stated above, the federal government cannot commandeer state executive officers or state legislatures to ensure enforcement of federal laws. Specifically, the federal government cannot force the states to enact laws or regulations.

In this case, Regulation C punishes states which fail to enact adequate measures under the federal scheme. The SHD will argue that this violates intergovernmental immunity,

since the federal government is requiring states to regulate and punishing them if they don't.

In response, Congress will argue that this is perfectly acceptable under its taxing and spending power. As indicated above, this is a successful argument, and a challenge based on intergovernmental immunity will fail.

### The power to tax and spend

Article I of the Constitution grants Congress the power to tax and spend to ensure a common defense and provide for the general welfare. This essentially allows Congress to spend money for any purpose which is related to the general welfare of the United States. Of particular importance, under the Spending Clause, Congress may “attach strings” to congressional grants of money to require [that] States act in a certain way. Thus, although Congress may have no power to regulate a certain area, it can require states to regulate as a condition of receipt of federal funds.

In this case, Congress cannot constitutionally require states to legislate on the subject of commercial drivers' licenses. However, under the spending clause, it can incentivize [sic] states to so regulate by conditioning the receipt of federal funds on enacting proper measures under the federal scheme. Here, the facts indicate that Congress has indicated that states will forfeit 10% of federal funds for highway conditions if they fail to enact measures to ensure compliance with Congress' regulation of seat belts on buses. The SHD will argue that Congress has no power to require states to regulate, and thus this scheme is unconstitutional. However, as discussed above, Congress can properly condition receipt of federal funds on state compliance with federal regulations, and thus Regulation C is constitutional.

### Conclusion

As such, Regulation C is constitutional.

## Question 5

Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops and to fill their wells, immediately demanded that Diane stop construction. Diane refused. Six months into the construction, when the dam was almost complete, the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance and for a taking under the United States Constitution. After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, separately retained Lawyer and filed an application for a permanent injunction against Diane in federal court asserting the same causes of action and requesting the same relief as in the state court case. Personal jurisdiction, subject matter jurisdiction, and venue were proper. The federal court granted Diane's motion to dismiss Paul's federal court application on the basis of preclusion.

Infuriated with the ruling, Paul told Lawyer, "If the court can't give me the relief I am looking for, I will take care of Diane in my own way and that dam, too." Unable to dissuade Paul and after telling him she would report his threatening comments to criminal authorities, Lawyer called 911 and, without identifying herself, told a dispatcher that "someone is on his way to hurt Diane."

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
2. Was the federal court's denial of Paul's application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
3. Did Lawyer commit any ethical violation when she called 911? Discuss. Answer according to both California and ABA authorities.

## Answer A to Question 5

### I. Was the State court's denial of Diane's neighbors' application for a permanent injunction correct?

A permanent injunction is an equitable remedy which is appropriate where there is an inadequate remedy at law, the plaintiff has a protectable property interest, enforcement of the injunction is feasible, balancing of the hardships, and there are no applicable equitable defenses to enforcement of the injunction.

**Inadequate remedy at law** – A remedy at law is inadequate where monetary damages are insufficient to compensate the plaintiff, or where they are unlikely to be recovered because the plaintiff is insolvent. Furthermore, a legal remedy may be inadequate. In this case, the neighbors are going to argue that an award of monetary damages will be inadequate because they rely on the stream that Diane is diverting to irrigate their crops and fill their wells. While an award of damages would give them money, it would in no way help them in dealing with this problem. Furthermore, they will also argue that because the use and enjoyment of their real property is involved, this is a situation where their land is unique and legal damages will be inadequate because of the irreparable harm that will occur to the neighbors if they lose access to the water.

**Protectable Property interest** – A plaintiff may only seek a permanent injunction where they have a property interest that a court in equity will protect. While the traditional rule was very strict, the modern rule provides that an interest in property will suffice. The plaintiffs will argue that as landowners living downstream, they have a protectable property interest in the water. The court is likely going to accept this argument because they had been using the water before Diane came into the area and likely have at least some rights to continue using some of the water.

**Feasibility of enforcement** – Enforcement problems arise in the context of mandatory injunctions which requires the defendant to do something. Negative injunctions which

prohibit the defendant from performing certain actions create no enforcement problems. In the enforcement area, courts are concerned about the feasibility of ensuring compliance with a mandatory injunction and also with the problem of continuing supervision.

Under these facts, Diane's neighbors initially asked for a partial mandatory injunction and partial negative injunction, ordering Diane to stop construction and remove the dam. With regard to the mandatory part (removing the dam), Diane has to affirmatively take this action, rather than being required simply to stop building the dam. Because this is a mandatory injunction, this creates an enforcement problem for the court. It will have the problem of continually supervising Diane to make sure that she in fact takes the dam down. The part of the injunction regarding stopping construction is a negative injunction because all that is required is that Diane stop construction. As such it creates no enforcement problems. While the part of the injunction that requires Diane to take down the dam creates some enforcement problems, the court could solve this problem by couching it as a negative injunction.

**Balancing of the hardships** – In balancing the hardships, the courts will always balance the hardships if the permanent injunction is granted on the defendant with the hardship to the plaintiff if the injunction does not issue. The only time that courts will not balance the hardships is where the defendant's conduct is willful. Finally, in balancing the hardships, the court can take the public interest into account.

Was the plaintiff's conduct willful so as to prohibit balancing of the hardships – In this case, while Diane willfully continued the construction and used the dam to divert the water, there is no indication that when she was doing this that she knew that her conduct was wrong or was intentionally violating the rights of the plaintiffs. While the neighbors demanded that she stop, there is no indication that she believed that she was not entitled to continue. Consequently, the hardships should be balanced because the defendant's conduct was not willfully in violation of the plaintiffs' rights.

Balancing the hardships – The plaintiffs are going to argue that they will suffer great harm if an injunction does not issue. Under these facts, the plaintiffs need the water from the stream for their crops' irrigation and to fill their wells. Thus if a permanent injunction does not issue their crops are likely to die and they will not have a water supply in their wells. This is a great showing of hardship. The defendant is going to counter that she is trying to construct a free summer day camp for poor kids and that she cannot do so if she is forced to halt construction and if she cannot use the water diverted by the dam for her pond. However, in this case, these hardships do not seem so great compared to the hardships faced by the plaintiffs. There is no indication that she cannot get the water from her pond from somewhere else; furthermore, it seems likely that she could continue constructing her property in a way that does not interfere with the rights of the plaintiffs. The direct balancing of the hardships thus favors the plaintiffs.

Consideration of the public interest in balancing the hardships – Courts may also consider the public interest in balancing the hardships. Diane is going to argue that the public interest favors her because she is doing this project to create a free summer day camp for children who do not have a lot of money. This certainly indicates that her action is in the public interest. However, the neighbors can also make a public interest argument. Assuming that they sell their crops for consumption by the general public, they also have public interest factors on their side. Thus this factor does not seem to favor either side very strongly.

On balance, thus, it seems that the balancing of the hardships favors the plaintiffs when taking the direct hardships and the public interest into account.

**Equitable Defenses** – Courts in equity will not issue an injunction in favor of plaintiffs where they have unclean hands, where laches applies, or where the claim is barred by estoppel.

Unclean hands – is a defense in equity where the plaintiffs have committed acts of bad faith with regard to the subject matter before the court. In this case, there is no indication that the plaintiffs have unclean hands, so this argument by Diane will be unsuccessful as a defense.

Laches – Laches applies where a plaintiff or group of plaintiffs unreasonably delay in instituting a cause of action or claim against a defendant and this delay prejudices the defendant. In this case, Diane is going to argue that the plaintiffs' delay in this case was unreasonable. When Diane refused the neighbors' initial request to stop construction, they waited six months before filing an application with the state court for an injunction. Furthermore, she is going to argue that she was harmed by this delay because she continued construction and expended substantial funds during this delay. While Diane can make a pretty compelling argument, it does not seem that a delay of six months is enough time that the plaintiffs' claim should be barred by laches.

Estoppel – applies as a defense in equity where plaintiffs take a course of action that is communicated to the defendant and inconsistent with a claim later asserted, and the defendant relies on this to their detriment. In this case, estoppel will not bar the claim by the plaintiffs because once they became aware of the construction, they immediately indicated that they did not approve. They commanded Diane to stop so the plaintiffs' claim is not barred by estoppel.

**Conclusion** – The state court was incorrect in denying the permanent injunction because it appears that the permanent injunction should have issued because of the factors discussed above.

## **II. Was the federal court's denial of the permanent injunction correct?**

**Claim Preclusion (Res Judicata)** – The equitable doctrine of res judicata stands for the proposition that a plaintiff should only have one chance to pursue a claim against the same defendant. This doctrine applies and bars relitigating of a claim where (1) the

claim is asserted by the same claimant against the same defendant in case #2 as in case #1, (2) where the first case ended in a valid final judgment on the merits, and (3) where the same claims are being asserted in case #2 as in case #1. In federal court these claims arise from the same conduct, transaction or occurrence.

Same Claimant Against Same Defendant in Case #2 as in Case #1 – In this case, second case, Paul is suing Diane in federal court. The facts indicate that he was one of the neighbors and a plaintiff in the first case in state court. Consequently this element is met, because Paul was also a claimant against Diane in the first case.

Case #1 ended in a valid final judgment on the merits – The facts indicate that in the first case, the court denied the application for a permanent injunction on the merits. The facts also indicate that the neighbors did not appeal. A judgment on the merits is clearly a valid judgment and because no appeal was made, this judgment is also final. Consequently, this element of res judicata is also met. The one issue that Paul may raise on this point is that if the time for appeal has not run in state court, he may argue that he could file a notice of appeal in state court. However, taking up this suit in federal court is improper because absent an appeal in state court, there has been a valid final judgment on the merits that the federal court should adhere to.

Are the same claims asserted in case #2 as were asserted in case #1? Under federal law there is a theory of merger whereby a plaintiff is deemed to have asserted all claims pertaining to a prior claim that arise from the same conduct, transaction, or occurrence. In this case, the facts indicate that Paul asserted the same causes of action and requested the same relief in the second case as in the first case. Consequently, this element is met. California follows the primary rights theory which gives the plaintiff a cause of action for each right that this invaded. However, in this case, because there is no indication that any of the causes of action are different than the ones in the first case, the result in California would not be different.

Conclusion – The court was correct to dismiss Paul's application for permanent injunction because the doctrine of claim preclusion (res judicata) precluded relitigating claims that had already been asserted in a prior case.



### **III. Ethical Violations of Lawyer in reporting Paul's communications to the 911 Dispatcher**

**Duty of Confidentiality** – Under the ABA Model Rules, a lawyer has a duty of confidentiality to a client which precludes disclosing any information obtained during the representation. Under the California rules, while there is no express duty of confidentiality, a lawyer is required to keep his client's confidences and this is a strict duty.

In this case, Paul is going to argue that lawyer violated this duty when he revealed the information that he was told after the ruling to the 911 dispatcher. While he is correct that this raises an issue with regard to the duty of confidentiality, he may be incorrect that Paul has violated this duty because both the ABA Rules and the CA Code recognize that there are certain situations whereby the duty of confidentiality is overridden by other concerns.

**Exceptions to the Duty of Confidentiality** – Under the ABA Model Rules, a lawyer may reveal client confidences where he believes necessary to prevent reasonably certain death or serious bodily injury. The California Code has the same requirements but also requires that where reasonable a lawyer should first try to talk the client out of committing the act and then tell them that they will reveal confidences if they are not assured that the client will not commit the act. Under both the ABA and California rules, this type of disclosure of client confidences is permissive; it is not mandatory. Under the federal rules, there is also an exception to the duty of confidentiality where the client has used or is using the client's services to commit a crime or fraud which will result in substantial financial loss. California has no such exception, but this exception will not be applicable anyway because there is no indication that Paul will be using Lawyer's services if he acts against Diane or the dam.

**Federal Rules** – Under the federal rules, the main issue is whether Lawyer reasonably believed that his disclosure was necessary to prevent reasonably certain death or substantial bodily injury to Diane. If this is the case then he was entitled to reveal client confidences and will not have breached his duty of loyalty. The facts indicate that Paul

was infuriated with the ruling that the federal court had made in dismissing his claim and that he said “If the court can’t give me the relief I am looking for, I will take care of Diane in my own way and that dam too.” The question is whether the belief that he was going to get Diane made it reasonable to believe that she was threatened with death or serious bodily injury. Based on the facts of this case, this may not be met here because Paul had just lost his case and was upset. People often say things when they are upset, but don’t necessarily act on them. Lawyer will argue that he tried to talk Paul out of hurting Diane and that he only reported the comments then. However, under these circumstances, it seems like this disclosure may have been unreasonable and violated Lawyer’s duty of confidentiality, particularly because such a disclosure is permissive.

California Code – In addition to the federal requirements discussed above, before revealing any client confidences based on a reasonable belief of a reasonable threat of death or substantial bodily injury, Lawyer was required to first try to talk Paul out of committing the violent act against Diane and inform client of his intention to reveal the confidential communications. In this case, the facts indicate that Lawyer did this by trying to dissuade Paul and telling him that she would report his threatening comments to criminal authorities. However, as discussed above, given all of the circumstances this disclosure may not have been reasonable.

**Attorney/Client Privilege** – Under the attorney-client privilege, a lawyer may not reveal information intended by the client to be confidential which is given in order to get legal advice. However, in both California and under the ABA Model Rules, there is an exception where disclosure of confidential information obtained during the course of the attorney-client privilege is permitted to prevent death or serious bodily injury. This analysis while similar to the analysis above and the question is whether the statements made by Paul were for the purpose of legal advice; it seems like he was just telling Lawyer what he was planning to do so. The statements may not even be covered by the Attorney/Client privilege. Furthermore, these statements may fall within the exception for threats of death or serious bodily injury if the threat that Paul made against Diane was credible.

**Duty to uphold justice** – Under their duty to uphold justice under both the ABA Model Rules and the California Code, a lawyer is permitted to disclose client confidences where necessary to prevent reasonably certain death or substantial bodily harm. Lawyer will argue that this is why the disclosure was made. However, if this disclosure was unreasonable, this duty will not protect Lawyer from breaching her duty of confidentiality and potentially the Attorney-Client privilege.

Conclusion – Lawyer may have violated her duty of confidentiality and the attorney-client privilege under both ABA Model Rules and the CA Code if it is found that the threat made by Paul against Diane was not a credible one and just made in the heat of the moment without any reasonable chance of actually carrying it through. However, in her defense, Lawyer may argue that she did not disclose the identity of who was on their way to hurt Diane because she just told the dispatcher that “someone was on the way.” However, this will not be dispositive on this issue of whether she breached ethical duties.

## **Answer B to Question 5**

### **1. Denial of Diane's neighbors' application for permanent injunction**

#### Permanent injunction

A permanent injunction is a court order mandating a person to either perform or refrain from performing a specific act. A permanent injunction is granted after a full trial on the merits. In order to obtain a permanent injunction, a claimant must establish the following elements.

#### a. Inadequate legal remedy alternative

A claimant must first establish that any legal remedy alternative is inadequate. In this case, the neighbors will argue that a money damages remedy would be inadequate because it would necessitate the filing of multiple suits. The harm that Diane is inflicting by constructing the dam -- i.e., stopping the flow of the water to neighbors downstream who rely on the stream to irrigate their crops and fill their wells -- affects multiple parties and is ongoing, therefore giving rise to multiple suits. Moreover, the neighbors will argue that a money damages remedy would be inadequate because it would be difficult to assess damages. It may be difficult, for instance, to establish how much damages they will sustain as a result of not being able to irrigate their crops. It may also be difficult to determine how much it would cost to obtain such water from other sources. Finally, the dam may be the neighbors' only source of water, and, therefore, the award of any amount of money damages may be inadequate (i.e., the stream is unique). Therefore, the neighbors will likely satisfy this element.

#### b. Property right/protectable interest

Traditionally, permanent injunctions only protected property rights. However, the modern view holds that any protectable interest is sufficient. In this case, the neighbors likely have a property right in the stream to the extent that the stream flows through their respective properties. Even if they do not have a property right, however, they still have

a protectable interest stemming from their right to use water from a stream that runs through their property. Thus, this element is likely satisfied.

c. Feasibility of enforcement

There is usually no enforcement problem in the case of negative injunctions (i.e., court orders mandating that a person refrain from performing a specific act). Mandatory injunctions (i.e., court orders mandating that a person perform a specific act) present greater enforcement problems. For instance, a court may be unwilling to grant a mandatory injunction if: (a) the mandated act requires the application of taste, skill or judgment; (b) the injunction requires the defendant to perform a series of acts over a period of time; or (c) the injunction requires the performance of an out-of-state act.

In this case, the neighbors seek both a negative injunction (i.e., order requiring Diane to immediately stop construction of the dam) and mandatory injunction (i.e., order requiring Diane to remove the dam). There will be little enforcement problem in ordering Diane to immediately stop construction of the dam. There will likewise be little enforcement problem in ordering Diane to remove the dam since both Diane and the dam are within the court's territorial jurisdiction, and the injunction does not require Diane to perform an out-of-state act. Therefore, the neighbors will satisfy this element.

d. Balancing of hardships

The court will balance the hardship to the neighbors if a permanent injunction is not granted against the hardship to Diane if a permanent injunction is granted. Unless the hardship to Diane greatly outweighs the hardship to the neighbors, a court will likely not grant a permanent injunction. In this case, Diane will suffer little hardship if the permanent injunction is granted because the pond was intended to be used for a free summer day camp. Therefore, the only economic harm she will suffer as a result of this injunction is the money she has already expended in constructing the dam and any additional amount she will incur in removing the dam if the injunction is granted.

However, the neighbors will suffer substantial harm if the injunction is not granted and the dam is completed. They rely on the stream to irrigate their crops and to fill their wells and will likely suffer substantial damage if they either cannot obtain substitute water from another source or must pay significant amounts to obtain any substitute. Thus, the hardship to the neighbors if a permanent injunction is not granted greatly outweighs the hardship to Diane if a permanent injunction is granted, and a court is more likely to grant the injunction.

e. Defenses

Diane may raise the defense of laches and argue that the neighbors delayed in bringing the permanent injunction action, thereby prejudicing her. The laches period begins the moment the neighbors know that one of their rights is being infringed upon. In this case, the neighbors knew six months before they filed an application in state court for a permanent injunction that Diane was constructing a dam and that such construction infringed on their right to obtain water from the stream. By waiting these six months to bring suit, Diane incurred substantial construction expenses in building the dam that could have been avoided if the neighbors had brought the suit sooner.

Thus, Diane will likely be able to successfully assert this laches defense.

In the end, a court may still grant the neighbors the injunction and order Diane to remove the dam. However, the court may require the neighbors to compensate Diane for any construction expenses that could have been averted if the neighbors brought the suit sooner.

## **2. Denial of Paul's application for permanent injunction**

### Claim preclusion

Once a court renders a final judgment on the merits with respect to a particular cause of action, the plaintiff is barred by res judicata (i.e., claim preclusion) from trying that same cause of action in a later suit. I will examine each element of claim preclusion, in turn, below:

#### a. Final judgment on the merits

The court must have rendered a final judgment on the merits in the prior action. For federal court purposes, a judgment is final when rendered. For CA state court purposes, a judgment is not final until the conclusion of all possible appeals. In this case, Paul is filing his case in federal court. Since judgment was rendered by the state court in the prior action, the judgment is considered final.

A judgment is "on the merits" unless the basis for the decision rested on: (a) jurisdiction; (b) venue; or (c) indispensable parties. In this case, the state court's decision did not rest on any of these grounds. Therefore, the judgment was on the merits.

#### b. Same parties

The cause of action in the later suit must be brought by the same plaintiff against the same defendant. In this case, Paul was one of the plaintiffs in the prior state court case, and the suit is brought against Diane, who was the same defendant in that prior case. Therefore, this requirement is also met.

c. Same cause of action

The cause of action in the later suit must be the same cause of action asserted in the prior suit. In general, if causes of action arise from the same transaction or occurrence, a claimant must assert all such causes of action in the same suit. However, under CA's "primary rights doctrine," a claimant may separate the causes of action into separate suits so long as each suit involves a different primary right (e.g., personal injury vs. property damage).

In this case, Paul is asserting the same permanent injunction claim based on nuisance and taking grounds that he asserted in the prior state court action. He is also requesting the same relief as in the state court case. He is not asserting a different primary right, and, thus, the "primary rights doctrine" is inapplicable. Therefore, this requirement is likewise met.

d. Actually litigated or could have been litigated

The same cause of action must have either actually been litigated or could have been litigated in the prior action. This requirement is met because the permanent injunction cause of action based on nuisance and taking grounds was actually litigated in the prior action.

In the end, Paul will [be] barred by res judicata (i.e., claim preclusion) from trying the permanent injunction cause of action against Diane in federal court, and the court was correct in granting Diane's motion to dismiss.



### 3. Lawyer's ethical violations

#### Confidentiality

Under both ABA and California rules, a lawyer has a duty not to reveal any information related to the representation of a client. However, several exceptions may nonetheless permit a lawyer to reveal such confidential information. First, a lawyer can reveal confidential client communications if the client gives the lawyer informed consent to do so. In this case, Paul has not given Lawyer such informed consent, and, therefore, this exception does not apply. Second, a lawyer can reveal confidential client communications if he is impliedly authorized to do so in order to carry out the representation. Again, this exception does not apply here.

Third, under the ABA rules, a lawyer can disclose confidential client communications if he reasonably believes it is necessary to prevent a person's reasonably certain death or serious bodily injury. Under the CA rules, however, a lawyer can disclose such information only to prevent a criminal act that is likely to lead to death or serious bodily injury. The lawyer must first make a good faith effort to convince the client not to commit the criminal act and, if the client refuses, then the lawyer must inform the client of his intention to reveal the client's confidences.

In this case, Paul told Lawyer that he "will take care of Diane in my own way" after becoming infuriated with the court's ruling on his permanent injunction application. On the one hand, Paul's statement is too unclear and ambiguous to provide any indication of what specific harm he intended to inflict on Diane. On the other hand, Lawyer will argue that he reasonably believed that Paul intended to inflict serious bodily harm on Diane, as evidenced by his infuriation after the ruling. Lawyer was so convinced that Paul intended serious harm to Diane that he told the 911 dispatcher that Paul was "on his way to hurt Diane." In the end, a disciplining body would likely hold that Lawyer was reasonable in his belief that Paul intended to cause death or serious bodily injury to Diane and, therefore, his disclosure of Paul's confidential communications was permissible. The killing or injuring of a person also constitutes a criminal act, and since

Lawyer first made a good faith effort to dissuade Paul from committing any harm against Diane, Lawyer's revelation of this confidential information would also not subject Lawyer to discipline in CA.

Fourth, under the ABA rules only (i.e., CA has no equivalent rule), a lawyer may disclose confidential client communications to prevent a crime of fraud that is likely to produce substantial financial loss to a person, so long as the client was using the lawyer's services to perpetrate the crime or fraud. In this case, Paul threatened to "take care... of that dam." While this threat may result in substantial financial loss to Diane, the threatened act did not involve the use of Lawyer's services. Therefore, this exception does not apply. Nonetheless, as discussed above, Lawyer should escape discipline for his revelation of client's confidential communications under the "death or serious bodily injury" exception.

## Question 6

Polly, a uniformed police officer, observed a speeding car weaving in and out of traffic in violation of the Vehicle Code. Polly pursued the car in her marked patrol vehicle and activated its flashing lights. The car pulled over. Polly asked Dave, the driver, for his driver's license and the car's registration certificate, both of which he handed to her. Although the documents appeared to be in order, Polly instructed Dave and his passenger, Ted: "Stay here. I'll be back in a second." Polly then walked to her patrol vehicle to check for any outstanding arrest warrants against Dave.

As she was walking, Polly looked back and saw that Ted appeared to be slipping something under his seat. Polly returned to Dave's car, opened the passenger side door, looked under the seat, and saw a paper lunch bag. Polly pulled the bag out, opened it, and found five small bindles of what she recognized as cocaine.

Polly arrested Dave and Ted, took them to the police station, and gave them *Miranda* warnings. Dave refused to answer any questions. Ted, however, waived his *Miranda* rights, and stated: "I did not know what was inside the bag or how the bag got into the car. I did not see the bag before Dave and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet."

Dave and Ted have been charged jointly with possession of cocaine. Dave and Ted have each retained an attorney. A week before trial, Dave has become dissatisfied with his attorney and wants to discharge him in favor of a new attorney he hopes to select soon.

What arguments might Dave raise under the United States Constitution in support of each of the following motions, and how are they likely to fare:

1. A motion to suppress the cocaine? Discuss.
2. A motion to suppress Ted's statement or, in the alternative, for a separate trial? Discuss.
3. A motion to discharge his present attorney and to substitute a new attorney in his place? Discuss.

## Answer A to Question 6

### 1. Motion to suppress the cocaine

#### Standing:

Dave has standing to bring this motion because he is being charged with possession of cocaine that was found in his car. He, unlike Ted, has a reasonable expectation of privacy in compartments within his car that are not visible in plain view, and can therefore assert a violation of the 4<sup>th</sup> Amendment if they are unlawfully searched, and assert the exclusionary rule to suppress evidence found that way.

#### Traffic stop

A police officer has the right to stop and detain a car that is violating any provision of the vehicle code. Here, the car was speeding and weaving in violation of the code, so Polly had the right to cause the car to pull over. Upon such a stop, both the driver and passenger are considered detained according to the Terry v Ohio doctrine. The request for Dave's driver's license and registration were lawful, as was her intended search for arrest warrants.

#### Search

However, instead of going to her patrol car, Polly saw Ted "slip something under the seat." This must have been a very minimal viewing, and somewhat lacks credibility, because Ted was in the passenger seat, and Polly was walking away from the driver's side back to her own vehicle. Anyway, assuming that she actually did [see] what she says she saw, her actions were still unlawful. Polly opened Ted's car door, looked under his seat, and opened a bag found there. This action qualifies as a search, because a person has a reasonable expectation of privacy in the compartments of his car which are not visible in plain view. The contents of a paper bag under a car seat are certainly not in plain view. Therefore, to search it, Polly needed a warrant, or a warrant exception.

### Auto Exception:

The auto exception the warrant requirement allows an officer to search any compartment within a car in which the officer has probable cause to believe that she will find evidence of a crime. Here, Polly saw Ted “slip something under his seat.” Under these circumstances, that sight is not enough to generate probable cause. If asked, she could not articulate with particularity what it is she suspected she saw. There were no other facts to cause Polly to suspect that something under Ted’s seat would contain evidence of a crime. The mere fact that Ted appeared to be concealing whatever-it-was is not enough. A Supreme Court case involving a student on school grounds, who held a black pouch behind his back when approached by the principal, provides precedent that the mere inarticulate hunch or suspicion created when a suspect appears to be hiding something is not enough to create reasonable suspicion, much less the higher standard of probable cause.

### Search incident to arrest:

Before a Supreme Court decision [in] March of 2009, an officer would be allowed to search the passenger compartment of a car during or after the arrest of a car’s occupant, based on a search incident to arrest. However, this rule has been changed, and does not allow a search if the passenger has been removed and is no longer in arm’s reach of the contents of the car. Additionally, Polly had not chosen to arrest Ted and Dave at the time she made the search. Although she had the right to arrest Dave for a vehicle code infraction, she had not made the decision to do so, and therefore, even under the old rule, she would not have been able to use this exception to search under Ted’s seat.

### Terry frisk

As stated earlier, the traffic stop was a detention. When an officer detains a suspect because of a reasonable suspicion that a crime has occurred (here, the vehicle code infractions), she has the right to frisk the suspect for weapons to protect herself. This allows a visual scan, as well as a brief physical inspection of the outer garments by running her hands along them. To do this, the officer must have at least a reasonable

suspicion that the person might be carrying a weapon. Here, Polly went far beyond what was allowed. She wasn't looking for weapons; she was simply indulging her suspicious curiosity when she checked to see what Ted put under the seat. As mentioned above, she had no reason to believe Ted would be concealing a weapon. Now, if perhaps she had run her check for warrants, and found a warrant out for Ted or Dave for a violent offense, that might have generated the necessary suspicion for some kind of frisk. But even then, the frisk would have required her to command Dave and Ted out of the car and she could frisk their clothing - not permitted her to look under their seats and inside bags.

#### Conclusion:

Since no warrant exception permitted Polly to make the search, and she did so in violation of Dave's reasonable expectation of privacy without a warrant, the search was unlawful, the cocaine that was found is "Fruit of the poisonous tree" and should be excluded.

#### 2. Motion to suppress Ted's statement or for a separate trial

##### Confrontation Clause

A statement by a coconspirator is not admissible against a defendant as an admission of a party opponent. Therefore it must be admissible under some other hearsay exception if it is hearsay. Even if it is admissible under evidence law, the constitution sometimes allows for suppression.

The confrontation clause of the constitution requires that for any testimonial evidence offered against a defendant, the defendant must have the opportunity to confront and cross-examine the declarant. Here, Dave and Ted are being tried jointly, and Ted's statement is offered substantially against both of them. Ted's statement is not admissible against Dave unless Ted can be cross-examined. And because it is Ted's trial too, Ted has the right not to take the stand because of his Fifth Amendment right against self-incrimination. If Ted exercises this right, then Ted cannot be cross-examined, and Dave's right of confrontation is violated. The remedy is, as Dave requested, to either exclude the statement, or try Ted and Dave separately.

The prosecution, if it wishes to avoid both these remedies, can argue that the statement is not offered “against” Dave. The statement really doesn’t incriminate Dave in any way; in fact, it is more exculpatory than anything for both defendants. More facts would be needed to be sure of this, because if Dave’s defense is that Ted owned the cocaine, then the statement, while good for Ted, weakens Dave’s defense. Or if Ted has changed his story, this prior inconsistent statement may hurt Ted’s credibility, which may hurt Dave’s defense by association with Ted. So the prosecution’s attempt to include the statement and maintain a joint trial will probably fail, but will succeed if Ted’s statement is not harmful to Dave’s defense.

If the statement is helpful to [the] prosecution of Ted, the prosecution will not wish it to be excluded. Rather than exclude it, the prosecution will prefer to try Dave separately, and this remedy will be granted upon the prosecution’s agreement.

### Miranda

Even if Ted’s statement was obtained in violation of Miranda rights or 14<sup>th</sup> Amendment voluntariness rights, Dave cannot assert those rights as a reason to exclude the statement from use against him. A defendant can only assert his own constitutional rights in seeking to exclude evidence, not those of another person.

### **3 . Motion to discharge Dave’s attorney and substitute a new attorney in his place**

A criminal defendant has an absolute right to counsel at trial, as long as incarceration is a possible punishment. The issue is whether Dave has a right to discharge and replace his attorney a week before trial. Dave has retained an attorney, not used a publicly provided one, and this is helpful to his case, because no public financial hardship is involved. However, because [the] trial is so soon, the court has discretion to grant Dave’s motion only if it finds that the case will not be unduly delayed. The court will not permit Dave to delay the case so much that he will have a defense of a speedy trial violation; however, it may allow Dave the delay if he waives that defense. And, if the substitution will cause delay that will make a necessary witness unavailable, the court will be disinclined to grant it.

The court will balance Dave's interests as well. If he has differences with his attorney that make it impossible for his attorney to provide him with competent representation, then the court will be strongly inclined to grant the substitution, because otherwise Dave may have a case for Ineffective Assistance of Counsel that could undo the court's and prosecution's time and efforts. If the only consequence of the substitution will be delay, the court will consider its calendar, and it will also consider the right to a speedy trial. But weighing all these considerations, the court will likely permit the substitution because no facts show that any undue burden on the court will occur.



## Answer B to Question 6

### Question 1: The Motion to Suppress the Cocaine

Fourth Amendment / Fourteenth Amendment Applicability: Any action by the state (a government official) that invades a person's reasonable expectation of privacy (REOP) will trigger the applicability of the Fourth Amendment protections against unreasonable searches and seizures.

Here, assuming that Polly was a state police officer, the Fourth Amendment will apply to her actions through selective incorporation via the Fourteenth Amendment.

Fourth Amendment -- State Action: Private actors are not bound to constitutional norms. As mentioned above, any Fourth Amendment challenge to a search or seizure must involve "state action" in the searching and seizing. Here, there is no question that Polly, a police officer, is an agent of whatever state or local government she works for. Since her actions revealed the cocaine, the state action requirement is satisfied.

Fourth Amendment -- Reasonable Expectation of Privacy: To have standing to bring a Fourth Amendment claim to suppress seized evidence, the person asserting the claim must have standing.

To have standing under the Fourth Amendment, Dave must prove that he had a reasonable expectation of privacy in the contents of his passenger compartment. Under existing case law, because Dave is the owner of the vehicle that was stopped by Polly, Dave has a reasonable expectation of privacy in the contents of the passenger compartment of the vehicle, as well as the trunk and any other places that items could be stored.

Note also that the state cannot argue that Dave lacked a REOP due to the item being in plain view from the exterior of the car (placing an item in plain view in the passenger

compartment may indicate that the owner had no reasonable expectation of privacy), the item in question--the bag--was under a passenger seat, and not visible from the exterior of the car.

Therefore, Dave has standing (a REOP in the item seized) to move for its suppression.

The Traffic Stop -- Lawful Stop: A police officer may conduct a routine traffic stop if the police officer has reasonable suspicion that a law has, is, or will be violated by the occupants of the car, or if the police officer has probable cause that the car contains contraband, or the driver has violated the law.

Here, Polly personally observed Dave's car "speeding" and "weaving in and out of traffic" in violation of the Vehicle Code. Therefore, Polly was justified under the Fourth Amendment in stopping the car, because she had at least reasonable suspicion, if not probable cause, that a law had been violated.

The Traffic Stop -- Lawful Seizure: The Supreme Court has made clear that a traffic stop seizes not only the driver, but any passengers, under the Fourth Amendment. However, because the stop was justified (as discussed above), this seizure is lawful under the Fourth Amendment.

### The Search of the Passenger Compartment -- Improper Search

#### *Warrant Requirement*

The general rule, subject to a number of exceptions, is that any search by a state actor of any area that a person has a REOP in cannot be conducted without (1) probable cause, (2) supported by a validly executed warrant.

Here, it is clear that Polly did not have a validly executed warrant to search Dave's car. Therefore, we must look to see whether any exceptions will apply to this general rule.

### Automobile Exception Does Not Apply Because NO PROBABLE CAUSE

The automobile exception, which exists because items in an automobile may be quickly transported and disappear before a warrant can be applied for and issued, is only a replacement for the general warrant requirement. However, it does not absolve the state actor from having probable cause to search.

Probable cause to search means that the person has probable cause to believe that the place to be searched will contain specific items of contraband. It is determined based upon a totality of the circumstances, and must be based upon more than just mere suspicion, but reliable sources and articulate observations.

Here, Polly merely saw Ted slipping “something” under his seat as she was walking away. Polly had no other facts to support a belief that the item was contraband or a weapon, nor could she be sure that Ted was actually performing that act (she was walking when she observed it). Therefore, Polly did not have probable cause to perform the search of Dave’s car. Moreover, the basis for the stop itself was a routine traffic violation, and not something (perhaps intoxicated driving) that would provide probable cause to search the automobile compartment (perhaps for open liquor bottles).

Because Polly did not have probable cause to search Ted’s car, the automobile exception cannot apply.

*An Exception to Probable Cause -- A Terry Search of the Car:* An officer may conduct a “Terry Frisk” of a person if the officer has reasonable and articulable suspicions that the person may be armed. This is to ensure that officers are safe while conducting their duties.

Here, the state may argue that Polly’s observation created an articulable and reasonable suspicion that the occupants of the car were stowing weapons or other materials that might put her in danger. Therefore, pursuant to her lawful seizure of Ted

and Dave, she was within her rights to conduct a “Terry Search” of the automobile (only for weapons) to ensure her safety.

However, a Terry search is limited solely to a search of weaponry, and the paper lunch bag was likely clearly not a weapon (even if Polly conducted a plain feel of it, which she didn't). Polly was not authorized to open the bag under a Terry search theory, because she did not first ascertain that it was contraband based upon a “plain feel.”

Therefore, this exception will also not apply.

*Plain View Does Not Apply.* As mentioned earlier, because the paper bag was beneath the passenger seat, the item was not in plain view of the officer from a lawful vantage point (outside the car), nor was the paper bag immediately incriminating on its face. Therefore, the discovery of the paper lunch bag does not meet either of the requirements for this exception.

*Evanescent Exception Does Not Apply.* The evanescent exception often applies to contraband that can be easily disposed of, or will easily disappear, thereby excepting officers from obtaining a valid warrant. However, it requires that the officer have probable cause to search the area in which the contraband is discovered. Because no probable cause existed, this exception does not apply.

*No Consent.* The seizure of a passenger vehicle in a routine traffic stop does not provide consent to the officer to search the passenger compartment, nor did Dave or Ted give such consent to Polly. Therefore, this exception will also not apply.

*No Exception to the Warrant Requirement or Probable Cause Applies [To] The Cocaine:* Because no exception to the warrant requirement or probable cause applies to the circumstances here, the search of the car and the discovery of the cocaine must be suppressed. Thus, Dave will likely succeed on this motion.

## **Question 2: Motion to Suppress Ted's Statement or for a Separate Trial**

State Action: Again, private actors are not bound to constitutional norms. Thus, the statement must have been obtained by a "state actor" for the suppression motion to be valid. Here, the statements by Ted were obtained by questioning by Polly, who as discussed above is a state actor. Therefore, this requirement is met.

Suppression of Statement After Unlawful Arrest -- No Standing to Bring: As discussed in Question 1, the arrest of Ted and Dave was the result of an improper search of Dave's vehicle, because the probable cause to arrest Ted and Dave was based entirely upon the improperly seized cocaine. If probable cause to arrest is based solely on unconstitutionally obtained evidence, then the subsequent arrest is invalid and unlawful.

Any statements made by a suspect in custody following an unlawful arrest must be suppressed unless the state can show that the "taint" of the unlawful arrest has been purged. Case law is unclear whether Mirandizing a suspect unlawfully arrested is sufficient to "purge the taint" of the prior arrest, even if the suspect waives his Miranda rights following a properly administered warning. What is clear is that releasing the suspect would purge the taint (but that didn't happen here).

However, regardless of the merits of this valid issue, Dave has no standing to bring a claim that Ted's statement was improperly obtained as evidence of an unlawful arrest. This is because only the person who made such a statement can bring such a challenge. Thus, Dave would be wise to encourage Ted to bring this argument forward.

Co-Defendant Confession, Confrontation, and Self-Incrimination Rights -- Redact or Suppress: Because this is a criminal trial with co-defendants, special constitutional concerns arise when one defendant's confession is being admitted against the other defendant. This is because of the intersection between the right of a defendant against self-incrimination (and the right to not take the stand) and the right of an accused to

“confront” the witnesses against him, meaning being able to put the witness under oath, cross-examine him, assess his demeanor, and physically be present for the process.

The Confrontation Clause only applies to “testimonial statements,” which case law clearly includes confessions to police officers within the definition. Here, Ted’s statement falls within this category, because his statement was made to Polly after waiving his Miranda rights. Therefore, the admission of the statement falls within the “testimonial” category of testimony.

Moreover, the testimony clearly implies that Dave is responsible for the contents of the bag, as Ted makes it clear that he--the only other passenger in the car--had nothing to do with the paper bag. This testimony will likely be used against Dave to show that he had true possession of the bag.

Under these facts, because Ted cannot be forced to take the stand and be confronted (because he can assert his Fifth Amendment right to not take the stand), the confession must be redacted as to not cast any negative light onto Dave, or be suppressed.

Conclusion on Suppression: Because it is unlikely that the statement can be redacted to not cast an accusatory light upon Dave, the court will likely grant its suppression.

Conclusion on Alternative -- Separate Trials: The Court may alternatively grant separate trials for Dave and Ted, and should do so in the interests of justice, since it appears under the facts that Dave and Ted will be asserting inconsistent defenses, and will likely attempt to implicate each other in the process.

This has the potential of prejudicing each defendant’s right to a fair trial, and confuse the issues to the jury, because the jury may be tempted to conclude that one defendant is “correct” and the other defendant is “wrong” in accusing the other of fault. This may violate the Fourteenth Amendment requirement that the state bear the burden of

proving the element of every crime charged, and, therefore, separate trials may be the only way to ensure that the state still bears this burden.

Under these circumstances, the court, in the interests of justice should grant the request for separate trial.

### **Question 3: Motion to Discharge Attorney**

The Sixth Amendment Right to Counsel of Choice: The “root meaning” of the Sixth Amendment, per Supreme Court case law, is that the Sixth Amendment right to counsel also includes a Constitutional right to the counsel of one’s choice. This right, of course, does not apply to appointed counsel (which the Supreme Court has clarified), but only to retained counsel. Moreover, this right is not absolute. A criminal defendant cannot improperly delay criminal proceedings by abusing this right, constantly requesting permission to substitute counsel for no good reason.

Here, it is clear from the facts that Dave has retained counsel, and was not appointed counsel by the court. Therefore, Dave does have a Constitutional right to the counsel of his choice. However, it is also clear that the time frame in which Dave has requested a new lawyer is one week before trial.

Under these facts, the court must consider whether granting the request for substitution of counsel would be unfairly prejudicial to the other parties (both the co-defendant and the state), because it would likely have to grant time for the new counsel to become familiar with the details of the case.

Thus, under these facts, it is unlikely that the court would agree--at the eve of trial--to allow the defendant to exercise his Constitutional right to the counsel of his choice.

The Sixth Amendment Right to Go Pro Se: Note that the Sixth Amendment also guarantees the right of a defendant to represent himself (subject to competency

requirements and a knowing and intelligent waiver of the right to an attorney). Here, the Court could grant the discharge of the present attorney (but deny the substitution of a new attorney) if Dave would rather represent himself. However, the facts do not show such a desire, and therefore, the Court will likely not propose such an alternative.

The Sixth Amendment Right to Effective Counsel: The Sixth Amendment guarantees a defendant the right to effective assistance of counsel. The deficiency of counsel in representation, if it causes actual prejudice (a reasonable probability of a different outcome due to the deficiency), is a structural Constitutional error that is grounds for reversal of a conviction and retrial.

Here, the facts show that Dave was merely dissatisfied with his attorney's performance. If Dave had alleged an actual conflict of interest (which would exist if the same attorney represented both Dave and Ted), and the court agreed with this claim of actual conflict, the court should allow Dave to discharge his present attorney and substitute a new attorney, or risk any conviction being reversed under the Sixth Amendment.