

California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

February 2008

**ESSAY QUESTIONS AND SELECTED ANSWERS  
FEBRUARY 2008  
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2008 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.

<u>Question Number</u>	<u>Contents</u>	<u>Page</u>
1	Torts	4
2	Professional Responsibility	16
3	Criminal Law and Procedure/Constitutional Law	25
4	Trusts/Wills and Succession	39
5	Community Property	51
6	Corporations/Professional Responsibility	60

**TUESDAY MORNING  
FEBRUARY 26, 2008**



# 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

Peter, a twelve-year old, was playing with his pet pigeon in a field near his home, which is adjacent to a high voltage electricity power substation. The substation is surrounded by a six-foot tall chain link fence topped with barbed wire. Attached to the fence are twelve 10 inch by 14 inch warning signs, which read "Danger High Voltage."

Peter's pigeon flew into the substation and landed on a piece of equipment. In an attempt to retrieve his pet, Peter climbed the surrounding fence, then scaled a steel support to a height of approximately ten feet from where the bird was stranded. When Peter grasped the bird, it fluttered from his hand, struck Peter in the face, causing Peter to come into contact with a high voltage wire, which caused him severe burns.

Peter's father is contemplating filing a lawsuit on Peter's behalf against the owner and operator of the substation, Power and Light Company (PLC), to recover damages arising from the accident.

What causes of action might Peter's father reasonably assert against PLC, what defenses can PLC reasonably raise, and what is the likely outcome on each? Discuss.

## Answer A to Question 1

The following courses of action might reasonably be asserted against PLC by Peter's father on behalf of his son:

### I. Strict Liability for Ultrahazardous Activity

A defendant ( $\Delta$ ) can be held strictly liable for damages caused to a plaintiff ( $\pi$ ) where the  $\Delta$  is engaged in an ultrahazardous activity. An ultrahazardous activity is one that is 1) inherently dangerous, 2) uncommon to the geographic area, 3) cannot be made safe and 4) whose risk outweighs its social utility.

- A. Inherently dangerous. Electricity is inherently dangerous. In this case, the substation was a high voltage station. This element is met.
- B. Uncommon to the geographic area. Substations are often located in neighborhoods or near them. In this case, the station was located in a field near  $\pi$ 's house, not close where it might be uncommon, for example, next to his house. Arguably, a substation in a field near a residential community is not uncommon. This element weighs against finding an ultrahazardous activity. This element [sic.]
- C. Cannot be made safe. Arguably, high voltage electricity cannot be made safe.
- D. Social utility vs. risk. The social utility of providing electricity to homes is clear. People need electricity for everyday purposes. Moreover while the activity cannot be made safe, the related risks can be lessened. In this case, fences, razor wire and signs were posted and used to prevent people from coming into contact. Therefore the social utility outweighs the risks.

On whole, the factors weigh against finding an ultrahazardous activity and holding  $\Delta$  strictly liable.

### II. Negligence

In order to find  $\Delta$  liable for negligence,  $\pi$  must prove duty, breach, causation, and damages.

A. Duty

1. Foreseeable  $\pi$ ? Here, a child from the houses near the station is certainly within the zone of danger presented by a high voltage station.
2. Standard of Care. Absent a special relationship, the  $\Delta$  must use reasonable care. Here, there may be a special relationship with the  $\pi$ .
  - a) Anticipated Trespasser. Where a landowner foresees trespassers, the landowner has a duty to warn of known artificial conditions that present serious risks of bodily harm. In this case, the high voltage electricity is an artificial condition that presents a risk of serious harm. Therefore,  $\Delta$  had the duty to warn.  $\Delta$  met this duty by posting 12 signs to the fence warning of danger.
  - b) Attractive Nuisance. Where a landowner has an attractive nuisance on his land, the landowner may have the duty to make the artificial condition safe or have a greater duty than to just warn the trespasser.
    1. Foreseeable to have children trespassers. Since the station is near his home it is foreseeable that children might trespass.
    2. Unlikely to appreciate the danger. It is arguable that a 12 year-old boy is unlikely to appreciate the danger that high voltage electricity presents; however, younger children might not.
    3. The cost to make safe outweighs the risk of harm. The risk of harm in this case is death from electrocution. However, given the social utility of the activity and the steps taken by  $\Delta$  (fence, warnings, razor wire) one could argue that the appropriate actions were taken to satisfy the landowner's duty.

Taller Fence?  $\pi$  might argue that a taller fence was not that costly in

comparison to the risk. Here the fence was only 6 ft. Arguably a taller fence may have prevented  $\pi$  from entering the station.

Assuming the special duties of a landowner were satisfied,  $\Delta$  only owed a duty of reasonable care to  $\pi$ .

#### B. Breach of Duty of Reasonable Care in Operating Substation

Here,  $\Delta$  posted danger signs, enclosed the station in a fence; however, it only used a 6 ft. chain link fence. Kids climb fences often; therefore, reasonable care would dictate that a higher fence made of something less “climbable” was necessary to prevent entry to the substation. Arguably, therefore,  $\Delta$  breached its duty to  $\pi$ .

#### C. Causation

1. Actual Cause. But for  $\Delta$ 's failure to erect a more formidable barrier,  $\pi$  would not have been able to come into contact with the electricity.
2. Proximate Cause. Where another force intervenes,  $\Delta$  is only liable if the force is merely intervening and not superseding.
  - a) Intervening. Here, the pigeon struck Peter in the face and caused him to make contact with the wire. This is intervening.
  - b) Superseding. Acts of God, intentional torts, and crimes are intervening acts. Here, the flight of a pigeon could arguably be superseding, however, where  $\Delta$ 's negligence creates the situation which gives rise to the act,  $\Delta$  can still be liable if it was foreseeable. Once a child is inside a substation, many acts could cause the child to become electrocuted. Therefore, perhaps this will be held to constitute proximate cause.

#### D. Damages

$\pi$  sustained burns and undoubtedly related expenses. These damages were foreseeable, unavoidable, certain and [sic.]

## E. Defenses

1. Assumption of the Risk. Here  $\pi$  scaled a fence posted with 12 warning signs and scaled a steel support. Arguably, a 12 year-old comprehended the risk of high voltage electricity and assumed that risk when entering the station. This would, if successful, preclude  $\pi$ 's recovery.
2. Comparative/Contributory N.  $\pi$  could be held N. for failing to heed the warnings posted. This would preclude (contrib. N.) or reduce (comparative N.) his recovery.



## **Answer B to Question 1**

### **Strict Liability**

Peter's father (Father) can assert a claim of strict liability against Power and Light Company (PLC) to recover damages arising from Peter's accident. To establish strict liability, (i) the defendant is engaged in abnormally dangerous activity, (ii) no amount of due care can eliminate the dangerous conditions, and (iii) the activity or conditions are not common in the community.

### **Abnormally Dangerous Activity**

Father can argue that PLC is engaged in abnormally dangerous activity on its property. In this case, PLC operated a high voltage electricity power substation. Father can argue that the substation is a participial condition created by PLC that is inherently dangerous. The high voltage substation is continuously conducting high amounts of electricity. Upon contact with the electric substation, a person can be shocked with a deadly amount of voltage. Furthermore, the operation of a high voltage power substation is not a low risk activity. The possibility and likelihood of injury due to electric shock is extremely high. Therefore, regardless of the utility of the substation, the operation of the substation is an abnormally dangerous activity.

On the other hand, PLC can argue that the operation of the electric substation is not an abnormally dangerous activity. The substation, while producing high voltages of electricity, is in a controlled, secure environment. The electricity is used to power the community, and it is not being used for any type of dangerous purpose other than to provide electricity. PLC can argue that providing electricity to a community is not an abnormally dangerous activity. Furthermore, while the high voltage substation is inherently dangerous, it is not abnormally dangerous. The substation is operated safely by PLC, and the risk of harm or danger only arises when a third party fails to observe the danger warnings and acts without regard to their safety when near the substation.

The court will likely agree with Father and find that the operation of the high voltage electric substation is an abnormally dangerous activity. Simply operating such a substation carries with it the high risk of danger. PLC's argument that the power is being used to benefit the community will not outweigh the risk that the substation poses to the general public.

## Due Care Will Not Eliminate Danger

Father can argue that regardless of the due care the PLC may have used in securing the high voltage electric substation, the danger of electric shock was not eliminated. Although there was a fence around the substation, and warning signs posted on the property, the substation was still producing high voltages of electricity. The dangerous conditions were still present even though there were warnings. Father can argue that the only way that the risk of electrocution could be eliminated was to shut down the substation so that it would no longer produce high voltages of electricity. Therefore, regardless of any amount of due care by PLC, the substation was still extremely dangerous and capable of electrocuting people who came in contact with the substation.

On the other hand, PLC can argue that the danger in operating the substation arose from third parties who ventured onto the property and came into contact with the substation. The substation was inside a fenced area. The fence was six feet tall with barbed wire on top. PLC can argue that it completely restricted access to the substation to third parties. Therefore, since the substation was in a secure area, the risk of harm to those outside of the secured area was eliminated. By eliminating free access and contact with the substation, the substation posed no harm to the third parties not authorized or legitimately inside the secured fenced-in area near the substation.

The court will likely agree with Father and find that regardless of the erection of the fence and warning signs on the property, PLC still could not eliminate the danger of electrocution to persons coming into contact with the substation. Therefore, no amount of PLC's due care could eliminate the danger posed by the high voltage electric substation.

## Not a Common Activity

Father can argue that operating a high voltage electric substation is not a common activity that occurs in the community so close to a residential area. Father can argue that while electric substations are common, they are not erected and operating near residential areas. In this case, PLC operated the high voltage electric substation adjacent to Father and Peter's home. The substation should have been operated in a remote part of the community where it would not pose a danger to the public. Furthermore, if PLC was to operate a substation near a residential area, it should only operate low voltage substations that do not have deadly amounts of electricity being produced from them. Therefore, PLC's operation of the substation next to Father's home was not a common activity.

PLC can argue that it had numerous substations situated throughout the community. The only way PLC can deliver power consistently and reliably to the whole community is to have high voltage substations near residential areas, where power consumption is high. Furthermore, PLC can argue that power companies throughout the area commonly place high voltage substations near densely populated areas. PLC can argue that by placing the substation in a

remote area, it would defeat the purpose of providing electricity directly to the areas that have high power consumption and electricity needs. PLC may even argue that the residential area was constructed after PLC built and began operating its substation. Therefore, operating the substation next to Father's home is common practice in the power generation industry and PLC commonly practices placing such substations near residential areas.

The court will likely agree with Father that PLC's operation of the high voltage substation near a residential [community] was not a common activity. Furthermore, even if Father's home was built after PLC began operation of the substation, PLC's operation of the substation was still not a common activity, and the operation should have ceased.

### Assumption of the Risk

PLC can argue that Peter assumed the risk of electrocution. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence and attempted to climb a fence topped with barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

### Contributory Negligence

Contributory negligence is not a valid defense in strict liability cases.

### Conclusion

Father will not prevail against PLC for strict liability since Peter assumed the risk of electrocution by climbing onto the substation. However, if the court finds that Peter did not assume the risk of electrocution, then Father may recover on Peter's behalf since PLC was engaged in abnormally dangerous activity by operating the high voltage substation, no amount of care by PLC could eliminate the harm of electrocution to third parties, and the operation of the substation was not a common activity. Father can recover compensatory damages from the injuries sustained by Peter as a result of being electrocuted by PLC's substation.

### Negligence

Father can assert a claim of negligence against PLC for negligently operating the substation. A claim of negligence requires that (i) the defendant owed a duty to the plaintiff, (ii) defendant breached this duty, (iii) the breach was a cause-in-fact of plaintiff's injury, (iv) the breach was a proximate cause of plaintiff's injuries, and (v) plaintiff suffered damages. In this case, Father is bringing a claim of negligence against his son and injured party, Peter.

## Duty

A defendant is liable for negligence only to those plaintiffs to whom they owe a duty. Under the Cardozo test (majority view), a plaintiff has a duty to all foreseeable plaintiffs who may be injured as a result of defendant's negligence. Under the Andrews test (minority view), a plaintiff has a duty to all plaintiffs who are injured as a result of defendant's negligence. In this case, Peter was injured as a result of being electrocuted by PLC's high voltage substation. Under the Cardozo test, Father can argue that Peter is a foreseeable plaintiff because it is foreseeable that children living near the substation would climb on the substation or otherwise come into contact with the substation, and be electrocuted. PLC can argue that it is not foreseeable that someone would climb over the six foot high fence with barbed wire, and ignore all warning signs posted by PLC. The court is likely to find that Peter was a foreseeable plaintiff, since PLC was aware of the danger posed by the substation, and it is foreseeable that children in the residential area near the substation would sneak into the secured area and be harmed. Therefore, under the Cardozo and Andrews tests, Peter is a foreseeable plaintiff, and PLC owed a duty of reasonable care to Peter.

## Attractive Nuisance

Father can argue that PLC's substation was an attractive nuisance, and PLC breached its duty of care to Peter by failing to eliminate the harm posed by the substation. For a defendant's activities to be an attractive nuisance, (i) defendant must know that children frequent defendant's property, (ii) defendant is aware of dangerous conditions existing on the property, (iii) defendant failed to eliminate the dangerous conditions, and (iv) the cost of eliminating the dangerous conditions is outweighed by harm.

### PLC Must Know that Children Frequent the Property

Father can argue that PLC knew, or should have known, that children play on the substation. Father can argue that the substation is in a field adjacent to the residential area. Therefore, children from the area could easily play near the substation, or inside the fence by sneaking into the property. On the other hand, PLC argues that it was not aware that children have entered the fenced-in area of the substation. PLC has not received any warnings of children sneaking into the secured area, nor had there been any past incidents of children being harmed by sneaking into the fenced-in area. Furthermore, PLC can argue that it was not aware that children lived in the residential area. The court will likely find that absent any evidence that PLC knew children had been sneaking into the fenced-in area, or that PLC should have known that children live in the neighborhood and play near the substation, PLC did not know that children frequented the property and played near the substation. However, in the event that Father prevails in showing that PLC was aware that children snuck into the

fenced-in area of the substation, we can continue the analysis for attractive nuisance below.

#### PLC is Aware of the Dangerous Conditions

Father can argue that PLC was aware of the danger posed by the high voltage substation. PLC was aware of the danger since it had posted signs stating "Danger High Voltage." PLC can argue that while it was aware that its substation posed the danger of electrocution to third parties, it was not aware of the danger being posed to any children in the area. However, Father will easily prevail since PLC did know that the substation was capable of electrocuting persons who came into contact with the substation.

#### PLC Failed to Eliminate the Dangerous Condition

Father can argue, as above with strict liability, that PLC failed to discontinue operating the substation. Thus, the risk of electrocution remained, despite the erection of a fence and posting of warning signs by PLC. The court will likely find that PLC did not eliminate the dangerous conditions since the harm of electrocution remained.

#### Cost Outweighed by Benefit

Father can argue that the benefit of eliminating the risk of death to children in nearby residential areas greatly outweighs any costs associated with discontinuing operation of the substation. Father can argue that PLC can simply move the substation operation to another less densely populated part of the community. On the other hand, PLC argues that the substation is strategically placed to provide reliable power to the community and its residents and businesses. The cost of discontinuing the substation would be great, and the adverse effects of unreliable power would be felt throughout the community by everyone. Furthermore, PLC would suffer a great financial hardship by having to shut down one of its high voltage substations.

#### Conclusion

The court will likely find that PLC was not aware that children frequented the property; thus, PLC did not breach any duties owed to Peter under the attractive nuisance doctrine. Even if Father proves that PLC was aware or should have known that children frequented the property, PLC may have a strong argument in showing that the cost of shutting down the substation is outweighed by the financial hardship it will face, as well as the hardship to the community for the loss of reliable power.

### Breach – Reasonable Care

Father can argue that PLC breached a duty of reasonable care in failing to erect a more protective fence around the substation. In this case, the fence was six feet tall and had barbed wire around the top portion. Father can argue that since the substation was extremely dangerous since it produced high voltage power, a higher fence should have been erected. However, PLC can argue that it acted as a reasonable substation operator would have acted. It erected a high fence, with barbed wire at the top; thus, reducing the chance that even if someone climbed the fence, they would not be able to scale the top of the fence. Furthermore, the PLC posted conspicuous 10 inch by 14 inch warning signs which clearly stated “Danger High Voltage.” The court will likely find that PLC acted reasonably, since it did construct a reasonable protective fence and posted warning signs advising of the danger posed by the substation.

### Cause-in-Fact

Father can argue that but-for PLC’s operation of the high voltage substation, Peter would not have been harmed. PLC can argue that but-for Peter chasing his bird into the substation area, Peter would not have been electrocuted. The court will likely find that PLC’s operation of the substation was a cause-in-fact of Peter’s injuries, since a defendant’s conduct need only be one cause of the plaintiff’s injuries.

### Proximate Cause

Proximate is legal cause, and the plaintiff’s injuries must have been a foreseeable result of the defendant’s conduct. In this case, Father can argue that it was foreseeable that a child could sneak into the substation area, and be electrocuted while climbing the substation. On the other hand, PLC can argue that it is not foreseeable that a child would scale the six foot high wall, climb over the barbed wire at the top of the fence, then scale a ten foot high steel support in order to catch a bird, and in the process of doing so, be electrocuted by falling onto the substation. Father can argue that all that is necessary is that it was foreseeable to PLC that if someone was to enter the fenced-in area, they could be harmed by electrocution, regardless of how that electrocution came about. The court will likely find that Peter’s electrocution by the substation was a foreseeable injury. Therefore, PLC’s operation of the substation was the proximate cause of Peter’s injury.

### Intervening Cause

PLC may argue that Peter’s chasing the bird was an intervening cause which cuts off PLC’s liability. However, an intervening act must be unforeseeable

to cut off liability. In this case, Father can argue that it was foreseeable for a child to chase a pet into the fenced-in area. Thus, Peter's chasing his pet bird was not an intervening cause of Peter's injuries which cuts off PLC's liability.

### Contributory Negligence

PLC can argue that Peter was contributorily negligent for chasing his bird into the fenced-in area, and that his injuries were due in part to his own negligence. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence, and attempted to climb a fence topped with a barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

The court is likely to find that Peter was contributorily negligent since he failed to heed the warning signs posted by PLC. In a contributory negligence jurisdiction, Father will not recover at all since Peter's negligence cuts off recovery. In a pure comparative negligence jurisdiction, Father's recovery on behalf of Peter will be reduced by Peter's percentage of his own negligence. Finally, in a modified comparative negligence jurisdiction, Father will only recover on Peter's behalf if Peter's negligence is not more than 50%.

### Assumption of the Risk

Similarly as above, PLC can argue that Peter assumed the risk by ignoring the warning signs and scaling the fence. Unless Peter could not read or was otherwise not mentally competent to appreciate the risk, Father will not be able to recover on Peter's behalf since Peter assumed the risk of electrocution.

### Conclusion

The court is likely to find that PLC was not negligent in operating the substation. Furthermore, Peter most likely contributed to his own negligence, and he assumed the risk of electrocution. However, if they are found to be negligent, Father may recover damages for injuries sustained by Peter, including medical bills and pain and suffering.

## Question 2

Acme Paint Company (Acme) was sued when one of Acme's trucks was involved in an accident with a car. June, an attorney, was retained to represent Acme. She has done substantial work on the case, which is about to go to trial.

Recently, June's three-year-old niece suffered lead poisoning after being in contact with lead-based paint. June became so upset that she joined a local consumer advocacy group, No Lead, which lobbies government agencies to adopt strict regulations restricting the use of lead-based paint. June also undertook to perform legal research and advise No Lead concerning its tax-exempt status.

In the course of reviewing Acme's records in preparation for trial, June found a memorandum from Acme's President to the company's drivers. The memorandum states:

We know our paint contains lead and that it is a misdemeanor to transport it over roads abutting public reservoirs. The road our trucks have been using for many years runs alongside the City water reservoir, but it's the shortest route to the interstate, so you should, for the time being, continue to use that road.

June became outraged by the content of the memorandum. She believed that if an Acme truck were to have a mishap and paint spilled into the reservoir, lead could enter the public drinking water and injure the local population.

Because of her strong feelings, June anonymously disclosed the memorandum to No Lead and to the media. She also sent Acme a letter stating that she wished to withdraw from the representation of Acme. Acme objected to June's withdrawal. June filed with the court a petition for withdrawal.

1. What ethical violations, if any, did June commit by disclosing Acme's memorandum? Discuss.
2. What arguments for withdrawal from representation could June assert in support of her petition to the court, and how would the court be likely to rule? Discuss.

Answer according to California and ABA authorities.



## Answer A to Question 2

### 1. Ethical Violations Committed by June in Disclosing Acme's Memorandum.

#### Duty of Confidentiality

A lawyer owes their client a duty of confidentiality. This requires the lawyer not to disclose any of the client's information learned or discovered during their representation of the client. The confidentiality also extends to information gathered about the client in preparation of trial.

June, in violation of her duty of confidentiality, anonymously disclosed the Acme memorandum (from Acme president to company drivers) to No Lead and the media. She will be subject to discipline due to her disclosure because the material in the memorandum was confidential, meant for Acme employees only, and was only to be used by June in her preparation for trial.

#### **Consent**

A lawyer may disclose confidential materials if the client consents (in California ["CA"] the consent must be in writing). Here, there was no consent given by Acme because they didn't know of June's intention to disclose the memo and probably would not have consented anyway.

#### **Prevention of a Crime/Fraud**

A lawyer may sometimes disclose confidential information if it is to prevent a crime or fraud. Under the federal rules, a financial crime as well as a crime of bodily injury may be disclosed to prevent it from being committed. In CA, however, only a crime that would result in serious bodily injury may be disclosed, after the lawyer makes a good faith effort to try and prevent the harm from occurring.

Here, the crime that was committed was transporting paint containing lead over a road abutting a public reservoir, a misdemeanor. This would not invoke the status of a financial or injury crime so as to warrant disclosure to a court or public agency.

Therefore, June breached her duty of confidentiality to Acme by disclosing the memorandum.

### **Duty of Loyalty**

A lawyer owes their client a duty of loyalty. She must act in the client's best interests and put the client before herself in making decisions that would affect the client.

When an event occurs that would make it difficult for a lawyer to represent the client, putting aside their feelings or position, this is called a conflict of interest. If the conflict is occurring then it is an actual conflict of interest. However, if there is a possibility of a conflict, then it is a potential conflict of interest. If an actual conflict of interest occurs, a lawyer may be forced to withdraw unless the conflict can be resolved effectively, the client is informed of all the potential negative effects of the conflict, and the client consents to the conflict. In the case of a potential conflict, the lawyer may continue if they feel they can effectively represent the client despite the conflict and the client consents after being informed of the potential conflict. In CA, [regarding] the consent for representation to continue after all conflicts, the consent must be in writing.

### **Actual Conflict of Interest**

There is an actual conflict of interest due to the fact that June disclosed the memorandum intended for Acme company drivers. This is a breach of duty of loyalty because June has put her interest ahead of Acme's and has taken a position adverse to their interests by giving up confidential information of the company. In order for her to continue her representation, June must disclose that she was the one who put forth the letter to the media, explain all the negative repercussions of her continued representation (her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint), and obtain the consent of Acme officials. Although it is stated that Acme objected to June's withdrawal, the facts do not show that they were informed of the actual conflict, and, therefore, their objection to her representation may change after being informed of her breach of the duty of loyalty.

June is likely subject to discipline for her breach of the duty of loyalty.

### **Potential Conflicts of Interest**

Intertwined in the actual conflict of interest with Acme are several potential conflicts of interest that will hinder June's future representation of Acme: her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. These will be disclosed in trying to obtain Acme's consent to continue her representation. But, it should be noted that these may very easily result in actual conflicts, and possibly may already be actual conflicts that breach her duty of loyalty, without Acme's consent.

## **Participation in a Consumer Advocacy Group**

A lawyer is permitted to affiliate with a local consumer advocacy group to express their views and be an active member of society. However, if their involvement is adverse to the interests of their client, then potential or actual conflicts may result, which they should be aware of.

## **2. Arguments for Withdrawal by June.**

### **Mandatory Withdrawal – Crimes**

A lawyer must withdraw if their continued representation of the client will facilitate a continued crime committed by the company. Here, June is not participating in the crime, misdemeanor for transporting lead-based paint, despite the fact that she knows about it. Therefore, this would not be enough for her withdrawal from her representation.

She may, however, be required to notify the court of the crime if it pertains to a lawsuit in existence and her participation would lead to suborn perjury or false statements to the court. Here, however, the lawsuit is about an accident, not the transportation of lead-based paint, so June would not be able to disclose the misdemeanor to the court.

### **Mandatory Withdrawal – Conflict of Interest**

As stated above, Acme and June have a conflict of interest. If she could not effectively represent Acme and if Acme will not consent to her continued representation in spite of the conflict, then June must withdraw from representation of Acme. Here, Acme objected to June's withdrawal even after the media and No Lead knew about the memorandum. This may hint that Acme may not consent to the withdrawal due to the fact that June has done substantial work on the case, which is about to go to trial.

### **Permissive Withdrawal**

#### **June's Interests**

The court will permit an attorney withdrawal if their representation of their client is repugnant/disgusting to the lawyer. However, in assessing permissive withdrawal the court will weigh such factors as the interests of the court and the client before deciding.

On these facts, June is outraged by the practices and is clearly disgusted by Acme's transportation of lead paint. She feels so strongly because of her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. The court will take these into account in balancing them with the interests of Acme and the Court.

**Acme's Interests**

Acme's interests stem from the fact that June has done substantial work on the case, which is about to go to trial. This is a huge factor because Acme would be severely disadvantaged if they had to get new counsel to replace June at such a late stage in the trial process.

**Court's Interests**

The Court's interests are those of efficiency of the trial process, undue delay and fairness. Permitting June to withdraw would add more time to the trial process, which was about to happen. Also, the court might have to delay the case in order for new counsel to prepare adequately. And, if the trial commenced as scheduled with Acme obtaining new counsel, there is very little likelihood that they would adequately be able to represent their interests.

Therefore, unless Acme consents to the withdrawal by June, it is unlikely that she will be able to withdraw from her representation.

## **Answer B to Question 2**

- 1. An attorney owes duties of Confidentiality, Competence, Loyalty and Fiduciary duties to her clients.**

### Duty of Confidentiality

Under the ABA Model Rules and the California Rules of Professional Conduct, the duty of confidentiality requires that an attorney preserve her client's confidences and not reveal any information regarding the client, regardless of its source. The duty of confidentiality attaches at the moment that an attorney-client relationship is formed; however, an attorney may also be prevented from revealing any confidences gained in consultation even if an attorney-client relationship does not result. Further, the duty of confidentiality endures after the attorney-client relationship ends. Finally, the client is the holder of the privilege.

In this case, June has breached her duty of confidentiality to Acme. June was reviewing Acme's records in preparation for trial and June found a memo that she subsequently and anonymously disclosed to a third party, No Lead. An attorney may reveal a client's confidential information where the client consents; however, there are no facts to suggest that Acme was aware of, or consented to, June revealing Acme's memo to No Lead. Under the ABA Model Rules, an attorney may reveal a client's confidential information if the revelation is necessary to prevent death or bodily injury. The California Rules permit disclosure only if the disclosure is necessary to prevent an imminent risk of death or serious bodily injury. Under both rules, the attorney must take steps before the disclosure is made. First, the attorney must notify her client that the behavior is illegal and/or dangerous. Here, Acme's letter, by its own terms, indicates that Acme was aware that the [behavior was] illegal. Second, the attorney must try to persuade the client from continuing to engage in or threaten the behavior. Here, June did not attempt to discuss Acme's policy with Acme before the disclosure. Finally, the attorney must tell the client that she intends to make the disclosure. Here, not only did June not tell Acme that she intended to make the disclosure, June made the disclosure anonymously in an attempt to hide the fact that she made the disclosure. Finally, California Rules permit disclosure only where there is an imminent risk of seriously bodily harm or death. In this case, the risk was not imminent because there was no increased likelihood that Acme's truck drivers would have the kind of accident feared in the next day, week, or month or even that the accident would ever happen. Because June disclosed a client's

information to a third party without the client's consent or a privilege to do so, June has violated her duty of confidentiality to Acme.

### Duty of Loyalty

The duty of loyalty requires that an attorney be vigilant to potential and actual conflicts that will prevent or impede an attorney from fully representing her client's interests. An attorney may not represent clients with actual adverse interests because of the danger that the attorney will purposefully or inadvertently reveal or use confidential information gained from one client against the other client. Under California Rules, an attorney may represent clients with potential conflicts so long as the attorney believes that she can adequately and fairly represent the interests of both parties and both clients agree to the continued representation in writing.

Here, June represented Acme Paint Company stemming from an Acme truck accident with another car. The original cause of action was likely to be negligent driving and respondeat superior liability and June's representation was not likely to be very involved in investigating the dangers of lead paint. However, June was aware of Acme's business when she decided to get involved with No Lead. No Lead is a group which lobbies government agencies to adopt strict guidelines restricting the use of lead-based paint. June formed an attorney-client relationship with No Lead, undertaking legal research duties and advising No Lead on its tax status. While legal research and tax advice do not pose actual conflicts with June's representation of Acme at the outset of June's relationship with No Lead, nonetheless, there are potential conflicts because Acme makes paint that contains lead and No Lead is an activist group that targets the kind of business that Acme runs.

Because the interests of Acme were potentially adverse with the interests of No Lead, June was obligated to disclose the potential conflicts to both parties and obtain their written and informed consent to continue with the representation. In this case, June did not inform Acme of her affiliation with No Lead and she did not seek Acme's consent to continue the representation. The facts also do not state that June disclosed her relationship with Acme to No Lead. Because June continued to represent Acme and No Lead, whose interests were potentially adverse, without disclosure or seeking consent to the continued representation, June breached her duty of loyalty to Acme and No Lead.

### Duty of Competence

An attorney owes a duty of competence to a client. A duty of competence means that the attorney will use her legal knowledge, training, and skill to diligently represent the client's interests. In this case, June was diligently preparing for trial when she discovered Acme's memo. Up to that point, June had not breached any duty of competence owed to Acme. However, once June discovered the memo, it is probable that June will no longer act in a diligent manner to pursue Acme's goals. Here, June was outraged by the content of the memorandum and

she subsequently breached her duty of confidentiality to Acme, acting on her outrage that was likely fueled by the injuries suffered by her niece. Since June was willing to engage in a breach of one of the most important duties that an attorney owes a client, confidentiality, as a result of the memo, it is doubtful that June will be able to set aside her feelings in any way that is sufficient to allow her to adequately and competently continue to represent Acme.

## **2. June's Argument for Withdrawal**

An attorney may withdraw from representation where the withdrawal will not unfairly prejudice the client. An attorney must withdraw from representation where the attorney becomes aware of actual conflicts of interest or where the continued representation would foster the commission of a crime.

In this case, June will make several arguments for her permissive withdrawal. First, June will argue that the withdrawal is proper and should be granted because the goals of the client have become repugnant to her. June will argue that Acme paint contains lead and that Acme engages in transportation policies that are unsafe and present a risk of injury to the community. Further, June will disclose to the court that June has been personally touched by this issue where her three-year old niece suffered lead poisoning after coming into contact with lead paint. Because of the emotional reaction to her niece's injuries that stirred June to act by joining and providing legal services to a lead paint activist group, June can no longer separate herself from the issue in a way that would allow June to adequately represent Acme. The court will likely point out to June that Acme has asked her to represent them in an action that has nothing to do with lead paint content or safety issues where children are concerned. The court will also note to June that Acme is likely to be very prejudiced by her withdrawal from the case because the case is already at the stage of trial preparation. If Acme is forced to retain new counsel at this stage of litigation, Acme will be exposed to enormous costs relating to getting a new attorney familiar with the case sufficient to go into trial. Consequently, with only the argument that June now finds Acme to be engaged in activities that she finds repugnant, the court is not likely to allow her withdrawal and expose Acme to the costs of hiring a new attorney.

June may argue that she should be allowed to withdraw because Acme is engaged in an illegal activity. Here, Acme's memo states that Acme paints contain lead and that it is a misdemeanor to transport lead paint over roads abutting public reservoirs. The court is not likely to accept June's reason because, in this case, June's services are not being used to further a crime. The case that June is involved in may or may not involve an Acme truck on a road near a reservoir, but that fact would not change the underlying cause of action in the case from the most likely negligence claim. Thus, the court is likely to reject June's argument.

June will continue to argue that her withdrawal is now mandatory because she now represents two clients with adverse interests. Acme manufactures and delivers lead paint and No Lead is an activist group trying to influence legislation of Acme's activities. The court will point out that June is representing Acme in what is most likely a tort case where the elements of the cause of action that June is currently working with will likely have no reasonable relationship to the kind of paint that Acme makes or to the amount of lead contained in the paint. Further, June's activities for No Lead have consisted only of legal research and tax advice. It is unclear whether the legal research relates solely to the tax advice or covers questions relating to the amount of lead in paint; however, her research is most likely directed at influencing policies rather than researching tort claims relating to transportation of paint. As a result, the court is not likely to view the representation of Acme and No Lead as sufficiently adverse to allow June to withdraw at such a crucial time in the proceeding.

However, if June discloses to the court that June has become so emotionally involved in the issue that she can no longer adequately represent Acme as a company regardless of the cause of action, then the court will likely allow June to withdraw. The court will certainly allow June to withdraw if June discloses that she provided the confidential Acme memo to No Lead. However, if June discloses this information, Acme would also likely drop their objection to June's withdrawal. Even where the court allows June's withdrawal, June will be subject to ethical sanctions and she may even face malpractice liability for her work on Acme's case.



### Question 3

Dan's neighborhood was overrun by two gangs: the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

After threatening Dan for several weeks, Vic backed Dan into an alley, showed him a knife, and said: "Think carefully about your decision. Your deadline is coming fast." Dan was terrified. He began carrying a gun for protection. A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic.

Dan was arrested and put in jail. After his arraignment on a charge of murder, an attorney was appointed for him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant, who had been instructed beforehand by the police to try to get information from Dan.

1. May Dan successfully move to exclude his statement to Sid under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss.
2. Can Dan be convicted of murder or of any lesser-included offense? Discuss.

## Answer A to Question 3

### 1. Dan's Motion to Exclude his Statement to Sid

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

The 5<sup>th</sup> Amendment protection demands that Miranda warnings be provided to persons that are in the custody of government officials prior to any interrogation. The Miranda rights to remain silent and to counsel must be waived before any statement used against the person in court is obtained. Miranda is not offense-specific.

A person is in custody if they reasonably believe they are not free to leave. Interrogation is defined as conduct or statements likely to elicit an incriminating response.

In this case, Dan was in jail. He had been arraigned for murder and was being held, so he was clearly not free to leave. Thus, custody is satisfied.

As to interrogation, Dan was approached by Sid, and Sid informed Dan that he was a member of the Blues, a rival gang to the gang of Vic, and that the Blues had hired an attorney to assist Dan. He said that the lawyer needed Dan to inform Sid of what happened so that he could represent him. In fact, Sid was a police informant, who had been instructed by the police to try to get information from Dan.

Clearly, Sid was talking to Dan in such a way that was likely to elicit an incriminating response; he was asking him to give the details so that Dan would have better representation. He had lied to Dan and was tricking him into confessing.

However, the problem here is that Dan did not know that Sid was a police informant who was seeking a confession. The court has upheld the admissibility of statements obtained by police informants when the suspect did not know that the informant was working for the government. The rationale is that the coercion

factor is not so high, because the suspect does not know the police are involved. In other words, the suspect is free to not speak to the informant.

In this case, the court will have to weigh the fact that Dan did not know that Sid was a police informant against the devious nature of Sid's behavior in lying to Dan in determining whether the interrogation factor is met. Based on the prior cases admitting police informant confessions, interrogation is probably not satisfied and the confession will probably not be barred by the 5<sup>th</sup> Amendment.

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

The 6<sup>th</sup> Amendment guarantees every person the right to counsel at all critical post-charge proceedings and events, including questioning. This right is offense-specific and must be waived prior to questioning.

In this case, the time frame for the 6<sup>th</sup> Amendment protection had been triggered, because Dan had been arrested, put in jail, and arraigned for murder, all before Sid approached Dan. In fact, Dan had been appointed an attorney by the court.

When Sid, a government informant posing to be a member of a rival gang interested in helping Dan, approached Dan and elicited the incriminating response, he violated Dan's 6<sup>th</sup> Amendment Right to Counsel. Sid initiated the conversation, and lied to Dan, tricking him into giving up the information. All the time, Sid was working as an informant. This equates to questioning by the government.

Because it was post-arraignment and the government sought to initiate questioning of Dan, Dan would have to first waive his right to have counsel present, or have his attorney present. Dan did not waive this right, because he did not even know Sid was a government informant, and his attorney was not present.

Because Dan's 6<sup>th</sup> Amendment right to counsel was violated, he can successfully move to exclude his statement to Sid from trial.

When he makes this motion, the government will have to prove by a preponderance of the evidence that the statement is admissible, a burden they will not be able to meet on the existing facts. Thus, the statement will be excluded.

## 2. Can Dan be Convicted of Murder or any Lesser-Included Offense

Murder is the unlawful killing of another human being with malice aforethought.

It requires actus reus, which in this case was Dan's act of shooting Vic.

It also requires causation, both actual and proximate. Actual cause is easily satisfied because "but for" Dan's act of shooting Vic, Vic would not have died. Proximate cause is the philosophical connection which limits liability to persons and consequences who [sic] bear some reasonable relationship to the actor's conduct, so as to not offend notions of common sense, justice, and logic. Proximate cause is also easily satisfied, because Dan shot and killed Vic without any intervening cause or unforeseeable event. If one shoots a human being, death is a logical and foreseeable result.

Malice is satisfied under one of four theories:

1. Intent to kill;
2. Intent to commit great bodily injury;
3. Wanton and Willful disregard of human life ("Depraved Heart Killing"); or
4. Felony Murder Rule.

#### Intent to Kill

Intent to kill can be satisfied by the deadly weapon doctrine: where the death is caused by the purposeful use of a deadly weapon, intent to kill is implied.

In this case, Dan used a gun, pointed it at Vic, shot Vic, and killed Vic. A gun is a deadly weapon, so intent to kill is satisfied.

#### Intent to Commit Great Bodily Injury

Even if intent to kill were not satisfied, intent to commit great bodily injury would be apparent because the least that can be expected to occur when one points a gun at a human being and pulls the trigger is great bodily injury.

#### Wanton and Willful Disregard

In addition, wanton and willful disregard for human life is satisfied because the use of a gun against another human being shows a conscious disregard for human life. Guns can, and frequently do, kill people. In fact, killing things is one of their main purposes. The use of a gun against another human being shows disregard for the human being's life.

#### Felony Murder Rule

The felony murder rule requires an underlying felony, that is not "bootstrapped" to the murder. In this case, Dan does not appear to have

committed any crime except for killing Vic, so the malice could not be implied under the felony murder rule.

### Murder in the First Degree

Murder in the first degree at common law was the intentional and deliberate killing of another human being. It required deliberation, but deliberation can happen in a very short period of time.

In this case, Vic had “terrified” Dan, and Dan began carrying a gun for protection. Dan carried this gun for an entire week before he saw Vic. In obtaining the gun, or taking it from its storage place, putting it on his person, and carrying it around for an entire week, Dan acted intentionally and deliberately. When he saw Vic, he then pulled out the gun and shot and killed Vic.

These facts, especially the elapse of an entire week, are probably sufficient to show that Dan was intentional and deliberate in his use of the gun. It did not arrive there by chance, and once Dan saw Vic, he acted without pause.

### Murder in the Second Degree

All murder that is not murder in the first degree is murder in the second degree.

If the prosecution was not able to establish Dan intentionally and deliberately shot Vic, because perhaps the jury believed that Dan did not deliberate before he shot Vic, then he could be convicted of second-degree murder.

### Self-Defense

Self-defense is the use of reasonable force to protect oneself at a reasonable time. Deadly force may only be used to protect against the use of deadly force.

Dan will argue that he was engaged in self-defense when he shot Vic. Dan will point out that his neighborhood was run by two gangs, and as such it was very dangerous. He will testify that Vic was a Red, one of the gangs, and that he had tried to recruit Dan to the gang. When Dan refused, Vic said he “couldn’t be responsible for Dan’s safety,” implying that Dan might be injured.

Vic then threatened Dan for several weeks, and finally backed him into an alley, showed him a knife, and told him that “Your deadline is coming fast.” Dan will argue that the statement regarding Dan’s safety, the threats, the knife and the deadline statement cumulate to show that Vic intended to kill Dan if he wouldn’t join the gang, or at least that Dan reasonably believed Vic would do it.

Dan will argue that when he then saw Vic on the street, with his hand under his jacket, he was terrified and afraid that Vic might stab him with the knife he had threatened him with, and therefore he defended himself by shooting Vic.

The primary problem with Dan's defense is that he carried around a gun for a week before seeing Vic, and then when he saw Vic with his hand under his jacket he pulled out the gun and shot Vic, without Vic producing any weapon or making any threat at that time. The state will argue that Dan is not entitled to a self-defense defense because he was under no threat when he shot Vic.

### Unreasonable Self-Defense

Unreasonable self-defense is a defense available to one who engages in good faith but unreasonable self-defense. It is a mitigating defense which takes a murder charge down to voluntary manslaughter.

Dan will argue that if self-defense was not appropriate because of the timing of the threats and the shooting, then he is at least entitled to an unreasonable self-defense defense. Dan will argue that he acted in good faith and really believed Vic would stab him.

This is a very colorable defense for Dan, because although the timing of self-defense was inappropriate, Vic had been threatening Dan for several weeks, and had recently shown him a knife and said "Your deadline is coming fast," so Dan's fear was likely reasonable.

### Heat of Passion

Heat of passion is a defense when circumstances evoke a sudden and intense heat of passion in a person, as they would affect a reasonable person, without a cooling off period, and the person does not cool off. Heat of passion is a possible defense during a fight.

In this case, however, it is likely not viable because Dan had not seen Vic for an entire week before the shooting, which is sufficient time for a reasonable person to cool off from the last incident with the knife in the alley. For that entire week, Dan carried around a gun, and then when he saw Vic he shot and killed him, without any prior interaction on that occasion. It appears unlikely that Dan's response was "sudden" or "intense".

### Involuntary Manslaughter

Involuntary manslaughter is established by a killing with recklessness not so egregious as to satisfy wanton and reckless disregard for human life, but more serious than common negligence.

Involuntary manslaughter could be established by the reckless use of a gun, but because Dan intended to kill Vic, Dan will be convicted of a greater crime, or, if his self-defense defense is effective, of no crime at all.

### Conclusion

Dan will likely be tried for first-degree murder under the intent to kill theory, and will allege the defenses of self-defense and imperfect self-defense. Dan is likely to be found guilty of voluntary manslaughter, by use of an imperfect self-defense defense.

## **Answer B to Question 3**

### **Dan's Motion to Exclude**

#### Exclusionary Rule

The exclusionary rule prohibits the introduction of evidence obtained in violation of defendant's 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Amendment rights, and under the "fruits of the poisonous tree" doctrine, also prohibits any evidence found as a result of violating defendant's 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Amendment rights, with limited exceptions. Thus, if Dan's confession violated his 5<sup>th</sup> or 6<sup>th</sup> Amendment rights, the statement cannot be admitted.

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

The 5<sup>th</sup> Amendment provides that a defendant should be free from self-incrimination. The right applies to testimonial evidence coercively obtained by the police. Under the 5<sup>th</sup> Amendment, before the police conduct custodial interrogation, the police must give the defendant his Miranda warnings. Miranda warnings inform the defendant of his right to remain silent and the right to an attorney. The 5<sup>th</sup> Amendment right is non-offense specific, meaning that even if the defendant exercises his rights, the police can question him about an unrelated offense. If the defendant asserts his right to remain silent, the police must abide by defendant's right, although they can later question him after a reasonable amount of time has passed. If the defendant unambiguously asserts his right to an attorney, the police cannot question him without either providing an attorney or obtaining a waiver of the right to counsel.

The 5<sup>th</sup> Amendment right to remain silent and to counsel only applies in custodial interrogation. A person is in custody if he or she is not objectively free to terminate an encounter with the government. A person is subject to interrogation if the police engage in any conduct that is likely to elicit a response, whether incriminating or exculpatory.

Dan will argue that he was subject to custodial interrogation because (1) he was in prison and not free to leave, and (2) the informant was planted in order to elicit statements from Dan. Clearly, Dan was in custody, as he was in jail. Dan may have a harder time proving he was subject to interrogation. Typically,



interrogation only occurs when the person is aware that he is in contact with a government informant. The prosecution will argue that Dan was not aware that Sid was a government informant, and believed that Sid was a gang member who was trying to help him. Thus, the prosecution will argue, the police were not required to give Dan his Miranda rights before commencing the questioning. The prosecution will argue that if Dan trusted Sid and willingly spoke to him, he cannot now claim that the statement constituted interrogation or was coercively obtained.

As Dan did not know that Sid was a government informant, he will likely fail in arguing that he should have received his Miranda rights before Sid questioned him. Thus, he will not be able to exclude his statement on 5<sup>th</sup> Amendment rounds.

### Impeachment Purposes

Even if Dan's statement violated his 5<sup>th</sup> Amendment right, the statement may still be used to impeach Dan's testimony if he testifies at trial.

### Fruits of Miranda

If the police obtained any evidence as a result of Dan's statement to the informant, these "fruits of Miranda" may be admissible. The Supreme Court has not conclusively determined whether such fruits are admissible, but they likely are.

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

The 6<sup>th</sup> Amendment provides the right to counsel at all criminal proceedings. It applies once the defendant has been formally charged with a crime, and prevents the police from obtaining an incriminating statement after formal charges have been filed without first obtaining the defendant's waiver of counsel. The right is offense-specific, meaning it only attaches for the crime(s) for which the defendant has been formally charged. It does not prevent the police from questioning the defendant about unrelated offenses.

Here, Dan had been [under] arraignment on a charge for murder, so formal charges had been filed by the government. Thus, Dan was entitled to counsel at any post-charge police interrogation. Dan will argue that by subjecting him to interrogation by a police informant after formal charges had been filed without obtaining a waiver of his right to counsel, the police violated his 6<sup>th</sup> Amendment right.

The police will argue that Dan was not aware that Sid was a government informant, but this awareness is not necessary for a 6<sup>th</sup> Amendment violation. Once Dan's rights to counsel attached at his arraignment, Dan had a right to counsel during police interrogation to prevent the police from deliberately eliciting

an incriminating statement. The police used a government informant who lied to Dan about his identity, made a promise of a better attorney, and asked him about his involvement with the crime, in order to obtain a confession from Dan. The police did all of this without waiving Dan's right to have his attorney present during the interrogation. Dan's right to counsel under the 6<sup>th</sup> Amendment has been violated, and Dan is entitled to exclusion of the statement at his trial.

Like a violation of Dan's 5<sup>th</sup> Amendment right, the prosecution may use a coercively obtained confession to impeach Dan's testimony at trial.

### Conclusion

Dan's statement to Sid likely violated his 6<sup>th</sup> Amendment right to counsel at any post-charge interrogation, because he had already been arraigned. The police should have obtained a waiver of Dan's right to counsel before sending Sid in, and it should not matter that Dan did not know that Sid was a police informant. However, because Dan did not know that Sid was working for the government, the questioning and subsequent statement did not likely violate Dan's 5<sup>th</sup> Amendment rights to Miranda warnings.

Thus, Dan will likely be successful in his motion to exclude his statement under the exclusionary rule as a violation of his 6<sup>th</sup> Amendment right.

### **Dan's Conviction for Murder or any Lesser-Included Offense**

#### Murder

Murder is the unlawful killing of another human being with malice aforethought. Malice aforethought exists if there is no excuse justifying the killing and no adequate provocation can be found, and if the killing is committed with one of the following states of mind: intent to kill, intent to inflict great bodily injury, reckless indifference to an unjustifiably high risk to human life, or intent to commit a felony.

The prosecution will argue that Dan is guilty of murder because no excuse existed (duress is not an excuse to homicide), no adequate provocation exists, and he had any one of the three following states of mind: intent to kill, intent to inflict great bodily injury, or a reckless indifference to an unjustifiably high risk to human life.

The prosecution will argue that no excuse existed for Dan to kill Vic. The prosecution will argue that even though Dan may have felt he was under duress imposed by Vic, this does not justify the killing of Vic, for two reasons: (1) the duress was to join the Reds, not to kill Vic, and (2) duress cannot be used as an excuse for homicide. The prosecution will also argue that no excuse existed from Vic's actions toward Dan during the incident where he was killed that would

give Dan the reasonable belief that he was about to be killed or seriously injured. The prosecution will note that there is no evidence that Vic was even aware of Dan's presence, that Vic did not confront Dan with unlawful force, and that it was unreasonable that Dan thought he was about to be stabbed.

The prosecution will be required to show that adequate provocation did not exist for Dan's killing of Vic, and that Dan had one of the required states of mind here. Adequate provocation is discussed in detail below, but the prosecution will argue that even if Dan was subjected to a serious battery, he had a week to cool off from the provocation of that battery, and thus was not still under the direct stress imposed by that battery when he killed Vic.

The prosecution will also argue that Dan had any of the states of mind listed above. By pulling out his gun and pulling the trigger, Dan intended to kill Vic. This intent was evidenced by an awareness that the killing would occur if he pulled the trigger, and a conscious desire for that result to occur. The prosecution can also argue that if he did not intend to kill Vic, he knew or acted recklessly as to whether Vic would suffer great bodily injury as a result of the shooting. Finally, the prosecution can argue that by pulling the trigger, Dan was acting with a reckless disregard to the unjustifiably high risk to Vic's life that would occur from his actions. Dan, the prosecution will argue, clearly did not care whether Vic lived or died as a result of the shooting, and thus Dan had the requisite intent to be convicted of murder.

Because the prosecution can show that no excuse or adequate provocation existed, and that Dan acted with one of the states of mind required for murder, Dan can likely be convicted of murder unless he has a valid defense. In addition, if the prosecution can show that the killing was deliberate and premeditated, Dan may be guilty of first-degree murder. The prosecution will show that the killing was deliberate and premeditated because Dan was carrying a gun and shot Vic almost immediately after seeing him in the street.

### Self-Defense

Self-defense is a complete defense to murder. Self-defense is justified when the defendant reasonably believes that the victim is about to kill him or inflict great bodily injury upon him. Deadly force may be used in self-defense if the defendant is not at fault, is confronted with unlawful force, and is subject to the imminent threat of death or great bodily harm.

Dan will argue that the defense of self-defense should completely bar his conviction for murder. Dan will point to the history between the parties as well as Vic's actions at the scene of the crime to establish that he was justified in using deadly force against Vic. Dan will argue that Vic had subjected him to a serious battery when he pushed him into the alley, showed him a knife, and threatened him. Dan will argue that this battery made Dan aware that Vic was a serious

criminal (and that Dan already had knowledge of Vic's criminality because he was involved in a gang), and that Vic would stop at nothing to injure Dan if Dan refused to join his gang.

With this history, Dan will argue that it was reasonable for him to believe that Vic was about to shoot him, because Vic was walking with his hand under his jacket, Dan will argue that the history between the parties and Vic's suspicious behavior made it reasonably likely that he was about to be stabbed, and thus he was justified in using deadly force in self-defense.

The prosecution will argue that even if the history between the parties made Dan afraid of Vic, that Vic had not confronted Dan with any unlawful force before Dan shot him. There is no evidence that Vic even saw Dan walking down the street. In addition, the prosecution will argue that even if Vic had plans to harm Dan, he wanted Dan to join his gang and would have only injured him if Dan refused to join the gang once again. While Dan was obviously not required to join the gang, this evidence will support the prosecution's defense that Dan's belief that he was about to be subject to immediate harm was unreasonable. At the very least, Vic probably wanted to talk to Dan one more time before inflicting harm upon him, so Dan was not subject to an immediate threat of death or bodily harm. The prosecution will argue that Dan should have waited until Vic produced the knife before shooting, or, at the very least, approached Dan in a threatening manner. Because Vic did not do these things, Dan cannot use the defense of self-defense.

### Duress

Dan may argue that he was under duress, and this resulted in his killing of Vic. Duress is a good defense when the defendant is coercively forced under threats from another to commit a criminal act. Duress may have been a good defense if Dan was forced to join the gang and commit criminal acts. However, duress cannot be used to defend against homicide. Thus, this defense will fail.

### Voluntary Manslaughter

Dan may try to get his charge lessened to voluntary manslaughter. Voluntary manslaughter is a killing that would be murder but for the existence of adequate provocation. Adequate provocation will be found where: the provocation is such that it would provoke a reasonable person, the defendant was in fact provoked, the facts suggest that the defendant did not have adequate time to cool off, and the defendant did not in fact cool off.

Dan will argue that Vic's repeated threats to him constituted adequate provocation. He will argue that being shoved into an alley, being shown a knife, and given basically a death threat is enough to provoke anger in the mind of a reasonable, ordinary person. Courts typically use an aggravated battery, as Vic

has committed here, as existence of adequate provocation. Dan will also argue that he was provoked, evidenced by carrying a gun for protection and living in fear of Vic.

However, Dan will have a harder time showing that a reasonable time to cool off could not be found, and that he did not in fact cool off. A week existed between Vic's aggravated battery of Dan and Dan's killing of Vic. While Dan may have still been frightened of Vic, a week is likely too long to find that Dan was still acting under the provocation supplied by Vic during the aggravated battery. Rather, Dan likely had cooled off, but was still upset by the incident and repeated threats.

It is likely that the prosecution can successfully argue that adequate provocation did not exist here because Dan was not acting under the direct stress imposed by the serious battery committed by Vic when he shot and killed Vic. However, if Dan can show such adequate provocation, his charge should be reduced to voluntary manslaughter.

### Manslaughter

Dan may try to get his charge lessened to a manslaughter charge under the "imperfect self-defense" doctrine. Dan will argue that even though he may be ineligible to use the self-defense as a valid defense because Vic had not confronted him with unlawful force, he reasonably believed that it was necessary to shoot Vic to avoid being killed or subject to serious bodily harm. It is more likely that a court will accept Dan's argument for a lesser charge of manslaughter under the imperfect self-defense doctrine, rather than accepting Dan's total defense of self-defense, because Vic did not do anything during the incident where he was shot to suggest that he was about to kill Dan or subject Dan to great bodily harm.

Thus, Dan may likely be convicted of murder, voluntary manslaughter, or manslaughter.

THURSDAY MORNING  
FEBRUARY 28, 2008



# 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 2001, Wilma, an elderly widow with full mental capacity, put \$1,000,000 into a trust (Trust). The Trust instrument named Wilma's church (Church) as the beneficiary. Although the Trust instrument did not name a trustee, its terms recited that the trustee has broad powers of administration for the benefit of the beneficiary.

In 2002, Wilma's sister, Sis, began paying a great deal of attention to Wilma, preventing any other friends or relatives from visiting Wilma. In 2003, Wilma reluctantly executed a properly witnessed will leaving her entire estate to Sis. Following the execution of the will, Wilma and Sis began to develop a genuine fondness for each other, engaging in social events frequently and becoming close friends. In 2005 Wilma wrote a note to herself: "Am glad Sis will benefit from my estate."

In 2007, Wilma named Sis as trustee of the Trust, which was when Sis found out for the first time about the \$1,000,000 in the Trust. Without telling Wilma, Sis wrote across the Trust instrument, "This Trust is revoked," signing her name as trustee.

Shortly thereafter, Wilma died, survived by her daughter, Dora, who had not spoken to Wilma for twenty years, and by Sis.

Church claims that the Trust is valid and remains in effect. Sis and Dora each claim that each is entitled to Wilma's entire estate.

1. What arguments should Church make in support of its claim, and what is the likely result? Discuss.
2. What arguments should Sis and Dora make in support of their respective claims, and what is the likely result? Discuss.

Answer question number 2 according to California law.

## Answer A to Question 4

### 1. What arguments should Church make in support of its claim?

#### A. Attempted creation of the trust

A private express trust is created when the following elements are met: (1) a settlor with capacity, (2) intent on the part of the settlor to create a trust, (3) a trust res, (4) delivery of the trust res into the trust, (5) a trustee, (6) an ascertainable beneficiary, and (7) a legal trust purpose. In this case, each of these elements have been met, and Wilma successfully created a valid inter vivos express trust.

(1) The facts state that Wilma had full mental capacity.

(2) The facts indicate that a trust instrument was created, which is evidence that Wilma intended to create a trust, and not some other type of instrument or conveyance.

(3) The res here is the \$1m that Wilma put in the trust.

(4) According to the facts, Wilma put the \$1m into the trust, so the delivery element is satisfied.

(5) The trust instrument here did not name a trustee. However, courts will not allow an otherwise valid trust to fail for want of a trustee. Rather, courts will appoint a trustee. So, notwithstanding the lack of a trustee, the trust was validly created. In this case, the lack of a trustee was cured later by Wilma, when she named Sis as the trustee in 2007. So, at the time of Church's assertion that the trust is valid and in effect, there is a trustee and the court need not appoint one. (However, given Sis's conduct in attempting to revoke the trust, which is likely a violation of her fiduciary duty as trustee, the Church should consider moving the court to dismiss Sis as trustee and appoint a new trustee.)

(6) The beneficiary in this case is Church. Beneficiaries can be natural persons, corporations, or other organizations. So, Church is a valid beneficiary. Because the beneficiary is Church, it can argue that the trust set up by Wilma is a charitable trust. Charitable trusts have as their purpose the specific or general charitable intent to benefit some social cause. Religion is considered a legitimate purpose of a charitable trust. Thus, this trust can be considered a valid trust.

(7) There is no illegal or otherwise improper purpose for Wilma's trust, so this element is satisfied.



B. Attempted revocation of the trust

Inter vivos trusts are revocable unless otherwise provided. The facts do not state whether the trust instrument had a provision making it irrevocable, so it is assumed that the trust is revocable.

A trust cannot unilaterally be revoked by the trustee. Typically, only the settlor (if she is alive and has mental capacity) can revoke an inter vivos trust. In some circumstances, a trustee and the beneficiaries may petition the court to terminate (or modify) a trust, but no such circumstances exist here. Thus, Sis's attempt to revoke the trust unilaterally, without telling Wilma and without involving the court, by writing across the instrument "This Trust is revoked," was ineffective. The trust therefore remains in effect.

Had Wilma written across the Trust instrument "This Trust is revoked," it might have operated as a valid revocation by physical act. However, such a revocation must be done by the settlor or by someone at the direction of the settlor and in her presence, which is not what happened here.

C. Survival of the trust after Wilma's death

Sis might argue that the trust should pass to her under Wilma's will, which left her the entire estate. However, there are no facts to suggest that Wilma only intended the trust to continue for her lifetime. Rather, the creation of the charitable trust by Wilma is assumed to be a valid will substitute, which disposes of the settlor's property outside of probate.

**2. What arguments should Sis and Dora make in support of their respective claims?**

A. Sis's Arguments

For Sis to succeed in arguing that she is entitled to Wilma's estate under the terms of her will, she must establish that the will is valid. A valid will requires (1) a testator with capacity, (2) testamentary intent, and (3) valid compliance with the applicable formalities.

(1) Capacity: To have sufficient capacity to execute a will, a testator must (1) know the nature and extent of her property, (2) understand the natural objects of her bounty (i.e., her relatives and friends), and (3) understand that she is making a will. The facts here state that in 2001 Wilma had full mental capacity. In 2003, when Wilma executed the will, it is presumed that she still had such capacity.

(2) Testamentary intent: Here, the facts state that Wilma executed a will, although she did so "reluctantly." Mere reluctance on the part of a testator is insufficient to defeat the existence of testamentary intent. However, if the

testator's intent was the product of undue influence, then true testamentary intent will not be found, and the will will be set aside to the extent of the undue influence. In this case, Dora will argue that Sis cannot take Wilma's estate under the will because she exerted undue influence on Wilma.

#### Undue Influence:

Undue influence exists when the testator was influenced to such a degree that her free will was subjugated. A prima facie case of undue influence is established by showing the following: (1) the testator had some sort of weakness (e.g., physical, mental, or financial) that made her susceptible to influence, (2) the person alleged to have exerted the influence had access to the testator and an opportunity to exert the influence, (3) there was active participation by the influencing person in the devise (the act by the person that gets them the gift), and (4) an unnatural result (i.e., a gift in the will that is not expected).

(1) In this case, there is no evidence that Wilma suffered from any particular weakness that made her susceptible to Sis's influence. She had capacity. She presumably was in good physical health, as she attended social events frequently. And she presumably was of comfortable means, as she was able to give away \$1m to a charitable trust.

(2) Here, Sis did have access and opportunity to influence Wilma. She began "paying a great deal of attention" to her, and she prevented any other friends or relatives from visiting her. This element of the prima facie case is therefore established.

(3) It is unclear from the facts whether Sis actively participated in Wilma's drafting of her will, or somehow suggested in some other way that Wilma leave her estate to her. Dora would need to present evidence on this point to succeed in challenging the will on the basis of undue influence.

(4) The result here is not unnatural. Wilma is survived only by Sis and her daughter Dora. However, Wilma had not spoken to Dora for twenty years. Wilma is a widow, and leaves no surviving spouse or domestic partner. The facts do not suggest that Wilma had any close non-relative friends to whom she might naturally leave part of her estate. Wilma had already provided generously for Church in the trust. Therefore, it is natural that she would leave her estate to her sister. Moreover, Sis can argue that the "naturalness" of the result is further proven by the fact that she and Wilma genuinely became close friends in the years following the execution of the will. This friendship is evidenced by the note that Wilma wrote in 2005, which stated that she was "glad Sis will benefit from my estate."

(3) Formalities: In this case, the facts state that Wilma "executed a properly witnessed will," so the last element is satisfied.

Because all of the elements of a valid will are present, and because it is not likely that Dora can prove that the gift to Sis of Wilma's entire estate was the product of undue influence, Sis will take Wilma's entire estate under the will.

B. Dora's arguments

1. Dora's rights if undue influence is found

If Dora can prove that the gift to Sis is the product of undue influence, the will will be set aside to the extent of that undue influence. If there is a residuary clause in the will, the gift to Sis will pass into it. If there is no residuary clause, then the gift to Sis – which in this case is the entire estate – will pass as if Wilma died intestate. Because Dora is Wilma's only other surviving relative, the estate would pass to her.

2. Dora's rights as an omitted child

In California, if a child is pretermitted, she has certain rights to take from her parent's estate. A pretermitted child is one who is born after a will and all other testamentary instruments have been executed, and who is not provided for in the instruments. In this case, however, Dora was already born when Wilma executed her will in 2003 and the Trust in 2001. So, Dora is not pretermitted. (Had she been pretermitted, Dora would have been entitled to claim her statutory share of the estate passing through the will, plus a statutory share of any revocable inter vivos trusts.)

California does not provide protection for omitted children. An omitted child is one who was born at the time a testamentary instrument is drafted, but not provided for in the instrument. Therefore, Dora does not have any rights to Wilma's estate by mere virtue of being omitted from Wilma's will.

## **Answer B to Question 4**

### **1. Arguments Church should make in support of its claim**

#### Whether a valid trust was formed

A trust is a fiduciary relationship relative to property, where a trustee holds legal title to such property (corpus) for the benefit of a beneficiary, and which arises from the settlor's manifested present intention to create such a trust for a valid legal purpose. In the case of a private express trust, the beneficiary must be an ascertainable person or group, while for a charitable trust the beneficiary must be society at large.

#### Corpus

The corpus of a trust must be a valid currently existing type of property, and may not be a mere expectancy [of] future profits or any other illusory property. In the case of a trust set up during the settlor's lifetime (inter vivos), a trust with a third person as a trustee will be under transfer in trust, with delivery of the property being actual, symbolic (some item representing ownership) or constructive (presenting the means to access the property, or, modernly, doing everything reasonably possible to put the trustee in possession, without raising suspicion of fraud or mistake).

In this case, the corpus existed and was validly delivered, because it was \$1 million in money, which Wilma actually put into the trust.

#### Beneficiary

If the beneficiary is an ascertainable group or person, a private express trust may form. If an unascertainable group that is for the benefit of society in general, even if some individuals incidentally benefit, that is a charitable trust. For a charitable trust, the rule against perpetuities does not apply to invalidate the trust.

In this case, it could be argued that the church is an ascertainable, definite legal person, in which case Wilma may have formed a private express trust. It could alternatively be said that the real benefit is in the present and future members of the church, which advances a social interest in having religious institutions. In that case, it could be a charitable trust, and even though under the trust some people might take a benefit more than 21 years after a present life [is] in being, there is no rule against [a] perpetuities problem and the trust is valid. Therefore, there was a valid beneficiary.

#### Trustee

A trustee, who is appointed to administer the trust, is necessary for a trust; however, a trust instrument will not fail because a trustee is not named. In this case, even though Wilma never named a trustee, a court can appoint a trustee to fulfill the duties of a trustee, and the trust is not invalidated.

### Resulting trust

A resulting trust is an implied in fact trust that occurs when a private express trust or charitable [trust] fails by means other than wrongdoing by the settlor. Under a resulting trust, the court-appointed resulting trustee's sole duty would be to convey the corpus back to the settlor or, if dead, her estate.

It might be argued against the church that Wilma created the trust in 2001, and did not appoint a trustee until 2007, that presumably the trust had no trustee for a full six years, during which there was no trustee. Therefore, it may be argued that during that time, the trust should have turned into a resulting trust. It might also be argued that in certain states, there is a statute of uses that creates a resulting trust when there is a passive trust of real estate property where the trustee has no active duties. It might [be] argued that, equitably, this principle should also apply to where the corpus is money, and that having no trustee for six years is equivalent to having a passive trustee, and that the money should have gone into a resulting trust.

However, because courts have explicitly stated that trusts do not fail for want of a trustee, the trust by Wilma will likely not fail.

### Manifestation of intent

For there to be a valid trust, the settlor must have made a clear manifestation that she was delivering the property with the present intention of creating a trust. In this case, Wilma clearly showed her intent to do so. While she failed to name a trustee, she provided for there to be a trustee by naming his broad powers, and actually delivered the money into the trust. Finally, because Wilma, although elderly, had full mental capacity, there is no questioning that her ability to intend to create a trust was compromised. Therefore, Wilma clearly showed a showing of intent to create the trust, and it will be valid.

### Legal purpose

Any purpose that is not illegal is allowed. In this case, Wilma clearly intended that the church and/or its members benefit in carrying out its activities on an ongoing basis, and there was nothing illegal about that. Therefore, she had a valid legal purpose.

Therefore, a valid trust was formed in 2001.

### Termination of the trust

A trust may terminate by its own express terms. It may also terminate by the settlor's express revocation, where she has reserved the right to do so (in a majority of states). Finally, a trust may terminate by initiation of the beneficiaries, if all of them join and consent (any unborn remaindermen must be represented by an appointed guardian ad litem). If the settlor also joins in, the termination may proceed. If the settlor does not or has died, then the beneficiaries may only terminate if all material purposes of the trust have been fulfilled.

#### Revocation by express terms

Here, there is no indication that Wilma provided for the trust to have ended at any point. Therefore, it was not revoked.

#### Revocation by settlor

Here, Wilma did not expressly reserve her right to revoke. Even in the minority of states where the right is implied, she never exercised such right. Sis may argue that Wilma's later making a note that she was glad that Sis would benefit worked to impliedly revoke the trust, since it showed an intent that Sis benefit from her estate, this will likely not be able to show Wilma's intent to revoke. Therefore, she did not revoke the trust.

#### Revocation by beneficiaries

As shown above, Wilma did not consent or join in any acts to terminate the trust. Furthermore, under the facts neither the church nor its members did anything to suggest that it wanted to revoke the trust; to the contrary, the church is suing to show the validity of the trust. Therefore, the beneficiaries did not revoke.

Therefore, no revocation occurred.

#### Powers of the trustee

A trustee has the powers expressly granted her in the trust instrument, plus any implied powers necessary to carry out her duties, such as the powers to sell, lease, incur debts on property, and modernly, to borrow.

Here, as of 2007 Sis was named trustee of the trust. The trust instrument provided that the trustee had "broad powers" to administer the trust for the benefit of the beneficiary. It spoke nothing of trustee's power or authorization to revoke, which is not traditionally a power implied to the trustee. Therefore, Sis had no power to revoke the trust by canceling it. Therefore, it was not revoked by her acts.

#### Duties of trustee

Furthermore, a trustee has duties of care and loyalty to the beneficiary. Under the respective duties, she must act as a reasonably prudent person handling her own affairs, and in the best interests of the beneficiaries at all times.

When Sis attempted to revoke the trust, intending to cut out the beneficiaries, this was expressly against the trust, and breached her duty of care. Also, because she was the taker under Wilma's will, she also breached her duty of loyalty because her act would have benefited her.

Therefore, Sis acted improperly, and her act of revocation was not valid.

### Conclusion

Therefore, the trust was valid and was not revoked, and the church has a claim to it.

## **2. Arguments Sis and Dora should make in support of their claims**

### Dora's arguments

I: capacity

II: insane delusion

III: undue influence

IV: pretermitted

### Capacity

A testator has capacity to make a will if she is over 18, can understand extent of her property, knows the natural objects of her bounty (family members, etc.) and knows that she is executing a will. If a testator lacks capacity, the entire will will not be probated and the property passes through intestacy unless there is a former valid will.

Dora may argue that because Wilma was elderly and a lonely widow, she lacked the true capacity to make a will, and that as Wilma's sole issue, she should take the whole estate under intestacy. However, Wilma was over 18. She was of full mental capacity, and knew what her property consisted of. She knew who the natural objects of her bounty were, because presumably she knew of Sis and Wilma. And finally, she executed a properly witnessed will with no signs that she did not know what she was doing. Therefore, Dora's argument will fail.

### Insane delusion

A provision in a will [can] be denied probate if 1) it was based in a false belief, 2) which was the product of a sick mind, 3) there was not even a scintilla of evidence to support the belief, and 4) the belief actually affects the will (shown by the provision in question).

Here, Dora may argue that Wilma may have had some sort of sick mind causing her to believe that she would devise all her estate to Sis and leave Dora out. However, there is no evidence to support that view. Wilma's will was based in a genuine belief in and factual close relationship with Sis that had developed. There is no indication of Wilma's sick mind. Finally, no false belief affected the will. Wilma and Sis got along well, engaged in social events together, and were close friends. Therefore, Dora's argument will fail.

### Undue influence

There are three bases for undue influence: prima facie case, presumption, and CA statute.

### Prima facie UI

If a person has access to a testator, the testator was of a susceptible trait, the person had a disposition to induce the testator and there was an unnatural result, there will be a prima facie case of undue influence, and the relevant affected provision will not be probated.

Here, Dora can show that Sis had access (indeed, sole access to Wilma, through her own prevention of others). Dora will emphasize that Sis acted wrongfully in paying an unnatural amount of attention to Wilma suddenly, and preventing others from accessing her. However, Sis will show that her interest in Wilma was legitimate, as shown by their growing fondness for each other. However, she cannot show that Wilma was particularly susceptible in any way. She was likely lonely, but she did not have outward signs of feebleness to subjugate her testamentary intent.

Sis may have had the disposition to induce Wilma to make a will in her favor, because she was with her all the time, but it will also be hard to show that she did anything to manipulate her into making the will. Additionally, she made the will soon after Sis began paying attention to her, and it happened to leave everything to her. Dora will argue these points; however, she cannot show that Sis actually did anything to induce the will, and the two became genuine friends. Furthermore, the note from 2005 shows that Wilma was genuinely pleased to have provided for Sis. Even if Sis had exercised a disposition to coerce a will, it would be difficult to imply that she did so with an extrinsic note showing testator's intent. Therefore, Dora will have a tough time proving this element. Her best case is likely to argue that the note was not written until 2005, and in 2003, at the time of the will's execution, a disposition was exercised, which would be enough to satisfy.

Finally, giving all of her property to Sis was not an unnatural result, though Dora will claim that cutting out a child is unnatural. Wilma had not spoken to Dora in twenty years, long before Sis's interference. Therefore, it was not unnatural to cut Dora out.

Therefore, the prima facie case fails.

### Presumption UI

If a person is in a certain type of close relationship with the testator (in CA, any position where the testator reposes trust in the person), and there is a disposition to cause the devise and there is an unnatural result, there will be a presumption of undue influence, and the will will not be probated.

Here, Dora can clearly show that Wilma reposed her trust in Sis, since they were close friends and Wilma even appointed her trustee over the trust to the church. However, as discussed above it will be difficult to show disposition, and more so to show an unnatural result.



Therefore, this branch of undue influence fails.

#### CA statutory UI

In CA, any donative transfer will be deemed invalid if made to a drafter of a testamentary instrument, of someone related to or in business with such drafter, a fiduciary of the testator who transcribed the instrument, or a care custodian. If found, the portion will not be probated, to the extent that it is above what the person would have received in intestacy.

In this case, there are no signs that Sis had a hand in drafting or transcribing a will. Dora may argue that Sis was Wilma's care custodian, since she was elderly and alone. However, no signs indicate that she was in need of care. In fact, they attended social events together in public, implying that Wilma was quite capable of taking care of herself. Therefore, there is no statutory basis for undue influence.

#### Fraud in the inducement

A portion of a will affected by a person's affirmative misrepresentations to the testator, the falsity of which the person knew about, and intended to induce reliance upon, will be denied probate if it was justifiably and actually relied upon by a testator in making such portion of the will. It will rather pass to the residuary of the will, if there is one, or to a co-residuary, if already in the residuary, or to intestacy. Alternately, the court may impose a constructive trust to deliver the property to the intended beneficiary of the testator, had it not been for the fraud.

In this case, there are not enough facts to determine whether Dora or any other person misrepresented any facts to Wilma, such that she would have been induced to make a will entirely leaving her property to Sis. Dora will argue that the court should imply it, since Sis was the only person with access to Wilma and there would be no way to know whether there were such misrepresentations. If there has been, the will may be refused probate, but Dora likely cannot show this.

#### Pretermitted child

A child born or adopted after all testamentary instruments (wills, inter vivos, revocable trusts), and not provided for in them, will be deemed to have [been] inadvertently left out, and can take a statutory share in intestacy as if the testator had no such instruments. Here, both the trust and the will were made after Dora was born. Therefore, she cannot argue this.

#### Conclusion

Dora does not have very solid bases to argue that she should take Wilma's estate. If she can show that Sis exercised a disposition to coerce Wilma's will, her "ratification" in 2005 with the note would not save the will, and it would be denied probate, such that Dora could take. However, because it is difficult to

time when the relationship between Wilma and Sis blossomed, Dora's arguments are likely no good.

### Sis's arguments

#### Validly executed will

A will is valid if witnessed by two witnesses and signed in their simultaneous presence by the testator. An interested witness who would take under the will would be presumed to have exercised wrongful influence. In this case, however, we are told that the will was validly executed, and there is no indication that Sis was a witness.

Therefore, because the will was validly executed, Sis should be able to argue that she can take the entire estate. She can raise defenses to each of Dora's claims, as explained above, and should succeed on all of them.

## Question 5

Harvey and Fiona, both residents of State X, married in 1995. Harvey abandoned Fiona after two months. Harvey then met Wendy, who was also a State X resident. He told her that he was single, and they married in State X in 1997. They orally agreed that they would live on Harvey's salary and that Wendy's salary would be saved for emergencies. They opened a checking account in both their names, into which Harvey's salary checks were deposited. Wendy opened a savings account in her name alone, into which she deposited her salary.

Harvey and Wendy moved to California in 1998. Other than closing out their State X checking account and opening a new checking account in both their names in a California bank, they maintained their original financial arrangement. In February 1999, Harvey inherited \$25,000 and deposited the money into a California savings account in his name alone.

In 2004, Wendy was struck and injured by an automobile driven by Dan. Harvey and Wendy had no medical insurance. Wendy's medical bills totaled \$15,000, which Harvey paid from the savings account containing his inheritance. In 2005, Wendy settled with Dan's insurance carrier for \$50,000, which she deposited into the savings account that she still maintained in State X.

Very recently, Harvey learned that Fiona had died in 2006. He then told Wendy that he and Fiona had never been divorced. Wendy immediately left Harvey and moved back to State X. The savings account in State X currently contains \$100,000. Under the laws of both State X and California, the marriage of Harvey and Wendy was and remained void.

1. What are Harvey's and Wendy's respective rights in:
  - a) The State X savings account? Discuss.
  - b) The California checking account? Discuss.
  - c) The California savings account? Discuss.
2. Is Harvey entitled to reimbursement for the \$15,000 that he paid for Wendy's medical expenses? Discuss.

Answer according to California law.

## Answer A to Question 5

California is a community property state. Property acquired during the marriage is community property (CP), while property acquired before marriage, after the end of the marital economic community or by gift or inheritance is separate property (SP). When couples who are not domiciled in California acquire property in a non-community property state and then later relocate to California, such property is treated as quasi-community property (QCP) if it would have been CP had the couple been domiciled in California at the time of acquisition.

In order to determine the character of any asset, the court will look at (i) the source of the asset, (ii) any actions of the parties that may have changed the nature of the asset, and (iii) any presumptions affecting the asset.

With these general principles in mind, I now turn to the specific items of property.

### 1. Harvey's and Wendy's Respective Rights

Prior to determining Harvey's (H) and Wendy's (W) respective rights in the various items, it is important to determine the nature of their marital relationship, as well as the effect of their oral premarital agreement. Putative spouses are entitled to "quasi-marital" property (QMP) rights, while unmarried cohabitants' property rights are governed by contract. QMP rights are treated the same as CP.

#### Putative Spouse

In order to be considered a putative spouse, the spouse must have a good faith reasonable belief that he or she is lawfully married. While H knew that he had never divorced Fiona prior to marrying W, W had a good faith reasonable belief that she was lawfully married to H because H told her that he was single, and it appears that they married in 1997. Thus, W qualifies as a putative spouse. The putative marriage, and QMP rights accrue, until such time as the putative spouse learns that he or she is not lawfully married. Here, the facts indicate that H only told W in 2006 that he and Fiona had never divorced, at which time she learned that she was not lawfully married. Thus, the putative marriage existed from 1997 until 2006, at which point it ended when W learned that she was not lawfully married, and QMP rights ceased to accrue.

#### Oral Arrangement between H and W

While generally parties may orally agree how to handle their affairs, premarital or marital agreements and agreements changing the character of marital property rights must be in writing. Thus, although H and W orally agreed that they would live on H's salary and save W's for emergencies, this "oral transmutation" of their QMP rights is invalid. Further, if their oral agreement was akin to a prenuptial

arrangement, it would only be valid if (i) it was in writing, (ii) each had disclosed to the other the full nature of his or her property, and (iii) [each] was represented by independent counsel. None of these elements appear to be present. W may try to argue that she should still get the benefit of the oral arrangement, however, because her savings account has \$100,000, and she was the putative spouse and that H will benefit under QMP rights; however, the court can find that even if W's State X savings account was to be "saved for emergencies", this still indicates an intent to use it for the benefit of the putative marital economic community (and not keep it as W's SP). Thus, the court should not give effect to the oral agreement between H and W regarding the treatment of their QMP. All of the QMP should be treated as CP (for property acquired while domiciled in California) and QCP for property acquired while domiciled in State X.

**a. The State X Savings Account**

The source of the \$100,000 State X savings account is W's earnings and [a] \$50,000 settlement with Dan's insurance carrier (resulting from a 2004 injury W suffered when she was struck and injured by an automobile driven by Dan). Earnings during marriage are CP, which would be considered QMP in the present case. Further, the \$50,000 settlement would also be considered CP, or QMP in the present case, because the cause of action arose during the putative marriage and H was not the tortfeasor. Thus, the entire State X savings account is QMP.

The court will then look to the actions of the parties to determine if they have changed the character of the asset. W may then try to argue that because the bank account is in her name alone that it is her SP. However, taking title in one spouse's name alone does not defeat the QMP interest. Nothing indicates that H intended the savings account to be W's SP, only that they intended it to be available for "emergencies." Plus, as discussed above, the court will not enforce the oral agreement regarding the treatment of the QMP. Thus, the State X savings account is QMP, and should be treated as QCP (for earnings deposited while not domiciled in California) and CP (for earnings and tort settlement deposited while domiciled in California).

Upon the end of the putative marriage (similar to divorce), QCP and CP are treated the same and each spouse generally has an equal undivided ½ interest in the QCP/CP. However, an exception to this general rule exists for tort settlements and judgments, which the court will award solely to the injured spouse unless the interests of justice require otherwise. Here, nothing indicates that it would be unfair to let W keep the \$50,000 tort settlement, subject to reimbursing H for the \$15,000 expended (see below). Thus, of the \$100,000 in the State X savings account, W will take \$50,000 (as the injured spouse taking the tort settlement), subject to reimbursement of \$15,000 to H, and will take \$25,000 as her QCP/CP interest and H will take the \$25,000 as his QCP/CP interest.

### **b. The California Checking Account**

The source of the California checking account is H's salary checks (and presumably the funds from their State X checking account, which were also H's salary checks). As noted above, earnings are CP and thus the source of the California checking account is CP/QCP and would qualify as QMP.

The court will then look to see if the parties have taken any actions to change the character of the assets. Here, H and W have done nothing to defeat the putative marital economic community interest in the property. As discussed above, the oral agreement will be given no effect. Moreover, even though the oral agreement of the parties won't be given effect, the oral agreement is evidence of an intent that H and W intended H's earnings to be used to benefit the putative marital economic community. Further, H and W took title to the checking account in both their names. Thus, the California checking account is QMP.

As noted above, as QMP will be treated like CP upon end of the putative marriage. Thus, each of H and W has an undivided  $\frac{1}{2}$  interest in the California checking account.

### **c. The California Savings Account**

The source of the California savings account is H's \$25,000 inheritance. Inheritance is SP. Thus, the California savings account is H's SP. Because the parties have taken no actions that would change the nature of H's SP to CP (or QMP in this case), the California savings account remains his SP. This is further evidenced by the fact that H took title to the account in his name alone. Upon the end of H's and W's putative marriage, H takes the remaining funds in the California savings account as his SP and W has no rights in the California savings account.

## **2. Reimbursement to Harvey of \$15,000 for Wendy's Medical Expenses**

When a spouse (or putative spouse) expends SP on the medical expenses of the other spouse, he or she is entitled to reimbursement to the extent that the community had sufficient funds available or that the debtor spouse had sufficient SP available at such time. Here, it appears that H expended \$15,000 of his SP, while the putative marriage may have had sufficient QMP funds to handle the "emergency" medical expenses in the State X savings account (which now has \$100,000 [only \$50,000 of which is the insurance settlement]), or even in the California checking account (QMP), for which we have no information. To the extent that there was sufficient QMP available or that W had sufficient SP available at the time H paid the \$15,000 of medical expenses out of his SP, H is entitled to reimbursement.

## **Answer B to Question 5**

### General community property rules

California is a community property state. Under California law, all property acquired during marriage is presumed to be community property (CP). All property acquired before marriage, after marriage, or during marriage through inheritance, bequest, or devise is presumed separate property (SP). Three factors determine the characterization of property as CP or SP: the source of the asset; what actions the parties took that may have changed the asset's character; and what special presumptions apply, if any, that might change the asset's character.

### Quasi-community property

Under California law, quasi-community property (QCP) is any property acquired during marriage that would have been CP had the acquiring spouse lived in California at the time of acquisition. The QCP designation generally only becomes relevant at divorce or death. At divorce, QCP is treated like CP; at death, the surviving spouse has a ½ interest in the deceased acquiring spouse's QCP, but a nonacquiring spouse who predeceases an acquiring spouse has no rights to QCP.

Here, because H and W acquired property while married but living outside California, any such property that would otherwise be designated as CP will be designated as QCP.

### W's status as putative spouse

California does not recognize common-law marriage, but recognizes putative spouses. For a party to claim putative spouse status, the aggrieved party must have been acting under the good faith belief that she was married during the period claimed. As soon as the party becomes aware that the marriage is invalid, or upon dissolution of the relationship, her rights as a putative spouse terminate. California treats all property acquired during putative marriage as quasi-marital property (QMP), which is treated the same as CP for purposes of disposition at death or divorce.

Here, W was under the mistaken good-faith belief that she and H were validly married. H told her he was single, and they had some kind of marriage that led W to believe they were married. Thus, between 1997 and "very recently," W will have putative spouse rights from their putative marriage through the time she found out that H and Fiona had never been divorced. Thus, all property acquired by W and H during this period that would otherwise be QCP or CP under California law will be designated as QMP.

It should be noted that while some states bar a non-innocent putative spouse from any recovery of QMP, California law permits both spouses to recover their respective shares of QMP notwithstanding fraud or bad faith of one of the parties. Thus, if QMP should be treated as CP, H will recover his share accordingly.

## **1. Harvey and Wendy's rights**

### **a. State X savings account**

#### Source: W's QMP earnings

W opened a savings account in State X during her putative marriage to H. She deposited her salary earned during her putative marriage into this account. Because all earnings acquired during marriage are presumptively community property if the couple lives in California, this property would be QCP/QMP and treated as CP for purposes of divorce.

#### Form of title

W would argue that because she opened the savings account in her name alone, the form of title should make the deposits her SP, rather than community earnings. If W could prove that H knew that she took title in her name alone and consented to it, such a showing could strengthen a presumption that H intended to make a gift to W of community earnings. However, H would successfully rebut any potential gift presumption through evidence of their oral agreement that the earnings were to be used "for emergencies"; i.e., this was intended to be a community nest egg in the event of an emergency.

#### Oral transmutation

A transmutation is an agreement by a married couple to change the form of property from SP to CP or vice versa. Any oral agreements by a married couple before 1985 are admissible to prove transmutation; however, after 1985 a writing is required. Here, because the oral agreement is one that supports an argument for CP, W would not be able to use this evidence to strengthen her SP assertion. Additionally, because the property is presumptively CP under California law, H would not need to introduce this oral agreement as evidence of transmutation.

#### Married woman's special presumption

The married woman's special presumption states that any property taken in a married woman's name alone before 1975 is presumed to be her SP. However, here, no married woman's special presumption applies, because the property was taken in W's name after 1975. Additionally, the presumption does not apply to bank accounts.

#### Personal injury award

As a general rule a personal injury settlement for a cause of action that arose during the marriage is considered CP unless the other spouse was the tortfeasor.



However, upon divorce, the proceeds are awarded to the injured spouse unless the interests of justice require otherwise.

Here, W was injured by Dan, a non-spouse, and ultimately received a \$50,000 settlement, which she deposited into the State X savings account in 2005. H would argue that the settlement was QMP, and thus should be split equally between H and W. However, as noted, at divorce, the \$50,000 will be awarded to W unless the interests of justice require otherwise. Here, no facts indicate that the interests of justice require otherwise, so W should be entitled to the \$50,000.

#### Disposition

Thus, W should be entitled to \$50,000 of the State X savings account unless the interests of justice require otherwise. W and H each have a ½ QMP/CP interest in the remaining \$50,000, so they should get an additional \$25,000 each.

### **b. The California checking account**

#### State X earnings

H's earnings in State X occurred during his putative marriage to W; thus, these earnings would be considered QCP under California law, characterized as QMP, and treated as CP upon dissolution of his relationship with W.

#### California earnings

H's California earnings also occurred during his putative marriage to W; thus, these earnings would be considered CP under California law, characterized as QMP, and treated as CP upon dissolution.

#### Form of title

Here, there is no form of title to rebut the presumption that all marital earnings are CP. The bank account was in joint and equal form, and as such, strengthens the presumption that his was a community asset.

#### Presumptions

No special presumptions apply.

#### Disposition

Because all of the contents of the California checking account were either QCP or QMP under California law, they will be treated as CP upon dissolution to the extent the money was earned during H and W's putative marriage. Thus, H and W are entitled to a ½ share each of the balance of the account as of the date of W's departure/the dissolution of the putative marriage.

### **c. The California savings account**

#### **H's inheritance**

H inherited \$25,000, which he deposited in the California savings account. Property acquired during marriage through inheritance is considered the inheriting spouse's SP; thus, the \$25,000 is considered H's SP.

#### **Form of title: In H's name alone**

H kept his inheritance separate in an account in his name only and did not commingle any QMP earnings during the putative marriage. Thus, the form of title combined with the source of the account funds will be sufficient to sustain a finding that the property remained H's SP at all times.

#### **H's expenditures for W's medical bills**

H expended \$15,000 of his SP for W's benefit during their putative marriage. The effect of this expenditure on H's potential rights to reimbursement is discussed below. For purposes of the remainder of H's California savings account, this expenditure will have no effect on the characterization of the asset.

#### **Presumptions**

No special presumptions apply.

Thus, H retained an SP interest in the California savings account and is entitled to the entire contents. Because H expended some of his SP for community benefit, he may be entitled to reimbursement from the community. Regardless, H takes the remaining \$10,000 as his SP.

### **2. H's potential right to reimbursement for W's medical expenses**

As a general rule, all debts incurred during marriage are community obligations. Where one spouse expends SP to pay a community obligation, he may be entitled to reimbursement from the community if he did not intend a gift and there were sufficient CP funds available at the time, and no other special presumptions apply.

Here, H expended \$15,000 of his SP to pay W's medical expenses. H will argue that he is entitled to reimbursement from the community because W's expenses were a community obligation.

To the extent CP funds were available at the time to pay W's medical expenses, H will be entitled to reimbursement from the community.

However, a spouse's SP may be reached to the extent the other spouse incurs expenses for "necessaries" during marriage. The contributing spouse remains liable for expenses for "necessaries" until the dissolution of the marriage.

Here, H would argue that because W's savings account was expressly created as a community asset "for emergencies," and because the balance after receiving W's settlement deposit was \$100,000, sufficient CP funds existed at the time W incurred her medical expenses and he should be reimbursed for his SP expenditures.

In the alternative, H would argue that because W subsequently received a \$50,000 settlement, which was considered QMP during marriage and which would more than cover her direct medical expenses, the interests of justice should require that \$15,000 of that \$50,000 should be treated as the community's property to pay her medical expenses and he should be reimbursed.

Thus, under either argument, because sufficient QMP funds existed at or near the time of W's medical expenses, H should be entitled to reimbursement for his \$15,000 payment of W's medical expenses.

## Question 6

Albert, an attorney, and Barry, a librarian, decided to incorporate a business to provide legal services for lawyers. Barry planned to perform legal research and draft legal memoranda. Albert intended to utilize Barry's work after reviewing it to make court appearances and argue motions on behalf of other attorneys. Albert and Barry employed Carla, an attorney, to prepare and file all of the documentation necessary to incorporate the business, Lawco, Inc. ("Lawco").

Carla properly drafted all required documentation to incorporate Lawco under the state's general corporation law. The documentation provided that: Lawco shares are divided equally between Albert and Barry; Lawco profits will be distributed equally to Albert and Barry as annual corporate dividends; Barry is president and Albert is secretary.

Albert and Barry opened their business in January, believing that Lawco was properly incorporated. In February, they purchased computer equipment in Lawco's name from ComputerWorks. The computer equipment was delivered to Lawco's office and used by Barry.

Carla, however, neglected to file the articles of incorporation until late April.

In May, Albert, without consulting anyone, contracted in Lawco's name to purchase office furniture for Lawco from Furniture Mart. On the same day, also without consulting anyone, Barry contracted in Lawco's name to purchase telephones for Lawco from Telco.

1. Is Lawco bound by the contracts with:
  - a. ComputerWorks? Discuss.
  - b. Furniture Mart? Discuss.
  - c. Telco? Discuss.
  
2. Has Albert committed any ethical violation? Discuss.

Answer question number 2 according to California and ABA authorities.

## **Answer A to Question 6**

### 1A) Lawco's Contract with Computer Works

#### Status of the Corporation

The first defense Lawco might raise against enforcement of this contract is that while it was entered into by Lawco, Inc., no such entity existed at the time the contract was formed. They might argue that because no corporation existed, the corporation is not liable on the contract. There are three scenarios under which a corporation might be bound.

If the corporation is a de jure corporation, it has been validly created by observing the formalities of incorporation and receiving its articles of incorporation from the state. While the second and third contracts discussed below were entered into by a de jure corporation, this first one was not, as attorney Carla had neglected to file the articles of incorporation with the state until April, two months later.

A corporation is a de facto corporation where the formalities have been entered into, and the corporation had a good faith belief that it is a corporation, but the paperwork has not been processed and the state has not actually issued corporate status. A corporation can rely on its de facto status in such a situation to enforce a contract that it might not otherwise be able to enforce. Here, A and B both believed that Lawco had been properly formed, though it had not yet been so. If they wanted to enforce the contract, they would depend on their de facto status. If they are trying to avoid being bound by it the de facto characterization might be considered, but the doctrine of corporation by estoppel is probably more appropriate.

Corporation by estoppel results when a corporation holds itself out to the public as a corporation, acts as such, and enters into contracts under that banner, but is not actually a corporation at the time. Such an entity is estopped from claiming that it was not in fact a corporation when it entered into those contracts, as it benefited from claiming that it was.

#### Adoption of Pre-Incorp Contract

Even if none of the doctrines above are successful, ComputerWorks (CW) will argue that the contract was a pre-incorporation contract and that Lawco adopted it by accepting and using the computers that it delivered. It will argue that such actions demonstrate its intent to profit from the contract.

#### Quasi-Contract

If no contract is found, CW will argue that Lawco benefited from the use of its computers after holding itself out as ready to contract and that under the doctrine of quasi-contract, should not be unjustly enriched. Under such a theory, CW will receive the value conferred upon Lawco.

### Sue A and B personally

If none of the above work, CW can sue whomever signed the contract (A, B, or both) and claim that it was a pre-incorporation contract which was not adopted by the corporation and hold them personally liable.

### 1B) Lawco's contract with Furniture Mart (FM)

As described above, Lawco was a validly formed corporation when it entered into a contract with FM for furniture. The issue is whether or not Albert, by himself, had authority to enter into such a contract, or whether B's consent was required. This issue is best analyzed under the law of agency.

### Agency

If FM can establish that A was acting as an agent of Lawco when he entered into the contract, then Lawco will be bound. An agent can have actual or apparent authority.

### Actual Authority

Actual authority can be either express or implied. Actual authority is express when the agent and principal have agreed that the agent will act on behalf of the principal in a certain capacity. Authority can be implied to the extent that an agent's express authority requires it to do certain other acts as a matter of course in order to perform its functions as an agent.

In this case, A entered into the contract with FM. Under the articles of incorporation, A is the secretary of Lawco. While there is no evidence of express authority for A to purchase for Lawco, a corporation is not an individual and so must act through agents by necessity. Lawco will argue that as a 50% shareholder, A needed to have approval of B in order to enter into a contract to purchase assets for the corporation and that he was not an agent. It is much more likely that B will possess actual authority than A will, and this argument will probably fail.

### Apparent Authority

If the argument for actual authority fails, FM will argue that, instead, A had apparent authority to act for Lawco. Apparent authority is authority that results from 1) an agent's position or title with respect to the principal, 2) where the principal has held the agent out in the past as its agent and has not published the revocation of authority, or 3) the principal ratifies the agent's actions after the fact.

In this case, FM will argue that because of his position as secretary of the corporation, even if A did not have actual authority to contract, they relied on his apparent authority to do so as the secretary of the corporation. This will be a weak argument, as the secretary is not usually expected to enter into contracts for a corporation. Although the facts are silent as to what happened after the contracts were entered into, if Lawco accepted the benefits of the contract with

FM, they will also argue that Lawco ratified the contract entered into by A when they accepted the furniture and used it.

Lawco will argue that A's role in the corporation was a 50% shareholder and secretary. It will argue that there was no express agency agreement, nor did it ever act in a manner that might hold A out as its agent. Furthermore, A's shareholder status grants him no right to enter into contracts on behalf of the corporation as that is a job for the officers and directors. Finally, A's role as a secretary is to take notes at meetings, and perhaps oversee documents. It is not to make unilateral decisions for the corporation or spend money.

Unlike the situation of B below, FM will not have access to some of the more persuasive arguments of apparent authority. Unless there is some manifestation of express authority in the corporate records, absent a decision by the officers or vote of all shareholders, they will probably not be able to bind Lawco under A's contract, unless Lawco takes some action after the fact to ratify A's actions. They may, however, be able to go after A personally for any damages due to breach on a contract he signed as a purported agent.

#### 1C) Lawco's Contract with Telco (TC)

As described above, Lawco was a de jure corporation when B entered into the contract with TC on its behalf. As above with A, the issue will be whether B qualifies as an agent who might bind Lawco as the principal. Unlike A, however, who was the secretary of Lawco, B was the president. The president arguably has actual or apparent authority to enter into contracts for the corporation where the secretary is less likely to have such.

The same principles will be applied as above, but in this case, the facts probably dictate a different outcome. The president of a corporation is arguably an agent thereof by [the] very nature of his position. FM will argue that for a necessary business expense of the corporation, like securing furniture, the president had actual or at least implied authority to secure them. They will argue that the corporation cannot act on its own and that its president is the obvious choice to enter into contracts on behalf of it. They will also argue that Lawco accepted the benefit of B's actions and that in doing so it ratified B's actions.

TC will have access to more persuasive arguments than FM had above due to B's apparent authority as president, and will have a much stronger case to enforce its contract against Lawco than FM did.

#### 2) Albert's Ethical Violations

##### Albert's Duty Not to Aid in the Unauthorized Practice of Law

A has a duty not to help a nonlawyer practice law. The practice of law includes advising or counseling clients, as well as arguing before the court. In this case, the facts state that B's duties are to perform legal research and to draft legal memoranda. A intends to review this work and use it to make court appearances

and argue motions. While B's legal research is probably not prohibited, his drafting of legal memoranda may be. The fact that A intends to review this work and basically attach his name to it after verifying its contents makes it a close call. Law clerks are able to engage in such activity before graduating from law school and passing the bar as long as they are appropriately supervised. A will argue that B's work is almost identical to that of a law clerk and that with proper supervision there is no breach of his duty.

#### Albert's Duty Not to Go Into Business With a Nonlawyer

A has a duty not to incorporate with a nonlawyer when he plans to practice law. Lawyers are allowed to form partnerships with each other, but they cannot form partnerships or corporations with another type of professional or nonlawyer such as a CPA. Here, A will argue that the actuality of the relationship is exactly like a lawyer – experienced paralegal. He is mistaken, however, in that the liability of Lawco, the ownership interests, and the division of power between A and B are almost exactly equal. A should not allow himself to enter into a business transaction with a nonlawyer like B who may try to exert influence on his decisions in legal matters as a result of his partial ownership in the venture. The fact that B is the president and A is the secretary makes this arrangement particularly suspect. B arguably has a persuasive role in determining the direction of the venture due to his office. Furthermore, he is the face of the venture that is in its very name offering legal services, yet he is not himself a lawyer. A has violated this duty.

#### A's Duty Not to Share Profits with A Nonlawyer

A has a duty not to share profits with a nonlawyer in his practice of law. Lawyers may hire paralegals or research assistants for salary, but arrangements under which a nonlawyer is entitled to a preset ratio of the profits is forbidden. In this case, Lawco's articles provide that Lawco's profits are to be distributed equally to Albert and Barry as annual corporate dividends. The form the profit sharing takes is not nearly as important as the fact that it exists. A will not be able to hide behind the fact that the distribution scheme is couched in dividends rather than an outright sharing. A has violated this duty.



## Answer B to Question 6

### 1A) Contract with ComputerWorks

In [order] for Lawco to be bound, (i) the corporation must be validly incorporated, (ii) the doctrines of de facto corporations or corporations by estoppel must apply or (iii) the contract must have been adopted by the corporation after incorporation.

#### Valid Incorporation

A corporation is formed when the incorporator validly complied with the requirements of the state's general incorporation law. This typically requires the filing of the articles of incorporation. Since the articles were not filed until April and the contract was entered into in February, Lawco was not validly incorporated at the time of the contract.

Generally, a corporation is not liable for contracts entered into before it was incorporated until it adopts the contract. It can adopt the contract through (i) express adoption, such as a writing, or (ii) implied adoption, which may be accomplished by accepting the benefits of the contract without protest.

#### De facto Corporation

ComputerWorks could argue that Lawco is still liable on the contract since it was a de facto corporation. A de facto corporation may be found where (i) there is a valid general corporation law, (ii) the incorporation made a colorable good faith attempt to comply with the statute, (iii) the incorporator was not aware that the attempt to comply with the statute was invalid and (iv) the corporation took some action indicating that it considered itself a corporation.

In this situation, Carla properly drafted all the required documentation to incorporate Lawco. The state does have a general corporation law. Albert and Barry entered into the contract with ComputerWorks believing that the corporation was valid. The corporation took an action typical of a corporation by purchasing computer equipment in the corporation's name and having the equipment delivered to the corporation's office and used by a corporate employee.

This question of de facto corporation will revolve around whether Carla's neglect in delaying the filing of the articles negates her "good faith, colorable" attempt to comply with the corporation statute. Since Carla is a lawyer and knew her job was to prepare and file all the documentation necessary to incorporate Lawco, it is likely that this is not a good faith, colorable attempt to comply with the statute, and there is no de facto corporation.

### Corporation by Estoppel

ComputerWorks can argue that Lawco should be estopped from denying the corporation existed since it received a benefit under the contract and would be unjustly enriched if the contract were not enforced. ComputerWorks can argue that there was (presumably) a promise to pay. ComputerWorks can argue that Lawco received a benefit by accepting and using the computers. It would be unjustly enriched by retaining the computers without paying for them. ComputerWorks can argue that it was foreseeable that it would expect to be paid for the computers and it was reasonable that it should be paid for the computers.

### Adoption of the Contract

Finally, ComputerWorks could argue that Lawco should be bound on the contract since it adopted the contract after formation. A corporation adopts a contract after formation when it impliedly accepts the benefits of the pre-incorporation contract after incorporation. Here, Lawco retained the computers and probably continued to use them after formation in April.

The result is that the court would likely find that Lawco adopted the contract, or if not, that it should be estopped from denying the contract.

### 1B) Contract with Furniture Mart

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Furniture Mart in May.

### Express Authorization by Articles

Second, there is the issue whether Albert validly bound Lawco when he contracted in Lawco's name with Furniture Mart. Albert is the secretary of the corporation and is thus a senior officer. The articles of the corporation would likely delineate the powers of the officer, and so Albert may be authorized under the articles.

### Implied Authorization under Agency Law

If not, Albert may also be authorized under general principles of agency law to bind the corporation. Generally, an agent may bind a principal if he has express authorization, implied authorization or apparent authorization to do so. There is no evidence that Albert received express authorization to enter into the contract.

Albert would have implied authorization if (i) it was customary for someone in his position to bind the corporation, (ii) he reasonably believed, based on past behavior and actions, that he had the power to do so, or (iii) it was necessary for the performance of his duties that he be able to bind the corporation. It is also necessary that Albert acted within the scope of the authorization.

Since it is probably necessary for Albert's position as secretary that he be able to bind the corporation on such routine contracts as buying office furniture, he probably had implied authority.

He may also have had apparent authority if (i) the corporation "cloaked" him with the apparent position of being able to enter into the contract and (ii) Furniture Mart relied on this position.

In conclusion, even though he did not consult anyone, it is likely that the contract is valid since Albert had implied and apparent authority to enter into the contract. Since the contract is valid, Lawco is bound on the contract.

#### 1C) Contract with Telco

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Telco in May.

Please see part (1)(B) for detailed discussion of agency law. Below is the application of the discussed legal principles to this situation:

#### Express Authorization by Articles

As President, it is likely that Barry was expressly authorized by the articles to enter into routine contracts, such as the purchase of telephones, for the corporation.

#### Implied Authorization under Agency Law

If not, Albert may have validly entered into the contract by express, implied or apparent authority. The facts give no indication of express authority. However, it is probably necessary for the president of a corporation to enter into contracts for routine items, so he probably had implied authority. It is also perfectly reasonable for another corporation to believe that the president has the power to bind the company, so Barry definitely had apparent authority.

In conclusion, even though he did not consult anyone, Barry had apparent and implied authority to enter into the contract, and Lawco is thus bound by the contract.

## 2. Possible Ethical Violations by Albert

### Unauthorized Practice of Law

An attorney may be disciplined for aiding a nonlawyer to practice law. The practice of law consists of making decisions which require the exercise of legal judgment by the lawyer. However, activities related to law, which do not involve the “practice of law,” may be performed by any nonlawyer. Also, under the ABA Rules and California law, a nonlawyer may practice law under certain very specific circumstances. For example, under ABA Rule, a nonlawyer may practice law under the direct supervision of a practicing lawyer who is licensed in that jurisdiction.

Albert is an attorney, and he knowingly decided to incorporate a business in which Barry, who is not an attorney, would perform legal research and draft legal memoranda. Not only did Albert know that Barry would be doing these things, he intended to use Barry’s work to make court appearances and argue motions. There is no mention of Albert supervising Barry or reviewing his work before using it. Therefore, Albert can be disciplined for assisting Barry in the unauthorized practice of law.

### Partnering with Nonlawyers

A lawyer is permitted to partner with a nonlawyer in a business providing legal services. A lawyer may hire a nonlawyer to work in such a business as long as they are not practicing law in an unsupervised way.

Here, Albert, a lawyer, and Barry, a nonlawyer, incorporated to form a business together. The business was specifically to provide legal services. The shares of business would be divided equally between Albert and Barry. Therefore, Albert may be disciplined for partnering with Barry to perform legal services, in a corporation in which they have equal shares.

### Splitting Fees with Nonlawyers

A lawyer is not permitted to split fees with nonlawyers, except in certain very specific circumstances, such as employee benefit plans. Albert could argue that he was not splitting fees with Barry, and that fees for his services would be paid to the corporation. However, profits are distributed equally to Albert and Barry as corporate dividends. Therefore, Albert would be disciplined for splitting fees with Barry since his argument that fees are not split is illusory.