



California
Bar
Examination

Essay Questions
and
Selected Answers

February 2009



THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

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

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

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

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FEBRUARY 2009 ESSAY QUESTIONS 1, 2, AND 3



California Bar Examination

Answer all three questions.
Time allotted: three hours

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

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

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

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

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

Question 1

Betty formed and became president and sole shareholder of a startup company, ABC, Inc. ("ABC"), which sells a daily on-line calendaring service. ABC retained Lucy, a lawyer, to advise it about a new trademark.

As ABC was very short on cash, Lucy orally proposed that, in lieu of receiving her usual \$200 per hour fee, she could become a 1% owner of ABC. On behalf of ABC Betty orally agreed. Lucy performed 20 hours of legal work and received her ABC stock shares. Years later, Lucy would sell her shares back to Betty for \$40,000.

While Lucy was performing legal services for ABC, she discovered certain representations by ABC that were false and misleading and caused customers to pay for services they would never receive. She reported her discovery to Betty, who told her to ignore what she had found. After Lucy finished her legal work for ABC, she reported the false and misleading representations to a state consumer protection agency.

Betty sold all of her interest in ABC, including the shares previously held by Lucy, and formed and became president and sole shareholder of another startup company, XYZ, Inc. ("XYZ").

After Lucy had finished her work for ABC and closed that file, she was retained by a new client, Donna, in a trademark dispute with XYZ.

What ethical violations, if any, has Lucy committed? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 1

Attorneys owe their clients the duties of confidentiality, loyalty, fiduciary responsibility, and competence. They owe the public and the courts the duties of candor and truthfulness, fairness, and the obligation to uphold the dignity and decorum of the legal profession. Here, Lucy's conduct implicates the duties of confidentiality, loyalty, and fiduciary responsibility.

1. Lucy & ABC's Fee Agreement

Lucy and ABC have entered into a fee agreement whereby Lucy will receive a 1% ownership interest in ABC as the fee for her legal services, rather than her usual \$200 per hour fee.

A. Requirement of Written Fee Agreements

Fee agreements between lawyers and clients must generally be in writing unless the fee to be charged will be less than \$1,000, the work is routine work for a regular client, the client is a corporation or business organization, or the circumstances of the engagement make a written agreement impractical or impossible. Here, the agreement between Lucy and ABC does not appear to have been reduced to writing. The facts indicate that Lucy orally proposed the terms and that Betty orally agreed to them. However, ABC is a corporation. Therefore, it falls within the exception requiring the fee agreement to be in writing. Accordingly, Lucy has not breached any ethical duty by entering into what appears to be an oral fee agreement.

B. Accepting Ownership Interest in Client's Business As Fee For Legal Services

When a lawyer holds an ownership interest in a client's business, the duty of loyalty is implicated. The duty of loyalty requires an attorney to put his or her client's interest ahead of his own. When a lawyer holds an interest in a business that is also a client, the lawyer must be able to separate his or her own interest from that [of] the business, and must be able to put the business' interest ahead of his or her own interest. Generally, a lawyer is permitted to accept an interest in a client's business as part or all of the fee for legal services. However, consent must [be] in writing and [must] obtain independent legal counsel before entering into the transaction.

In this case, it is not clear that there was any consent by ABC in writing. Moreover, it does not appear that Lucy advised Betty or ABC to obtain independent legal counsel with regard to the transaction, nor does it appear that Betty or ABC obtained such advice. Accordingly, Lucy has violated the rules of professional conduct.

C. Reasonableness of Fee

Under the ABA Model Rules, a lawyer's fee must be reasonable, taking into account a number of factors, including the amount of work required, the complexity of the matter, the lawyer's skill and experience and other factors. Under the California rules, a fee must not be "unconscionable" (that is, it must not "shock the conscience"). Here, Lucy's "normal" fee was \$200 per hour. The facts do not indicate Lucy's experience or skill level or what type of matters she normally handled, but a \$200 per hour fee would likely be considered to be reasonable. The facts do not indicate any value of ABC at the time of the fee agreement or at the time Lucy performed the services for ABC. However, Lucy sold her shares in ABC back to Betty for \$40,000 "years later." Had the shares

been worth \$40,000 or anywhere in the ballpark of \$40,000 at the time of the agreement and the time Lucy provided her services, they would likely be considered both “unreasonable” and “unconscionable” under the circumstances. Lucy performed only 20 hours of work to obtain certain trademark advice. Although trademark advice may be a specialized field that might justify a “premium” fee, if Lucy were given stock worth \$40,000 to perform 20 hours of work, she would be receiving the equivalent of \$2,000 per hour for her work, a fee that would most likely be considered both “unreasonable” and “unconscionable.” Accordingly, unless the value of the shares grew significantly, the amount of the fee would be a violation of the rules of professional conduct.

However, it is not clear what the value was at the time the agreement was entered into or when the services were provided. The facts suggest that all 20 hours of service were provided before Lucy received the stock. If that is the case, and if the stock only had a value of roughly \$4,000 at that time, then the fee was not unreasonable or unconscionable, and the amount of the fee would not be a violation of the rules.

2. Lucy’s Report of ABC to the State Consumer Protection Agency

Attorneys owe their clients a duty of confidentiality. The duty of confidentiality requires a lawyer to keep confidential all information provided to the lawyer for the purpose of rendering legal services. The duty of confidentiality is necessary to ensure complete candor between clients and their attorneys, so as to facilitate effective legal advice. There are certain exceptions to the duty of confidentiality, such as when a lawyer is accused of malpractice, or is required to sue to collect a fee. Moreover, a lawyer who becomes aware that his or her client intends to commit an act that will cause great bodily injury or death may under certain circumstances disclose confidential information. Under the ABA Model Rules, a lawyer who is aware that a client intends to commit fraud that will cause significant financial injury can disclose confidential information to the extent

reasonably necessary to avoid the fraud if the lawyers' services were used in connection with the fraud. Under the California rules, there is no similar exception for information related to fraud.

Here, Lucy became aware that ABC had made certain representations that were false and misleading that caused customers to pay for services they would never receive. Although Lucy learned of these false and misleading representations during the course of her work for ABC, there is no indication that Lucy's services were used as part of any effort to mislead consumers.

A. Lucy's Report to Betty

Lucy properly reported her discovery to Betty. Under the ABA Model Rules, when a lawyer working for a business organization discovers misconduct that might damage the organization, he or she has an obligation to report that misconduct up the chain of authority within the organization. Under certain circumstances the lawyer may also be able to report that misconduct to the SEC if the organization is a reporting company and the CEO/CFO/CLO fail to act upon receiving the information. California permits but does not require a lawyer to report such misconduct "up the chain" and prohibits reporting it outside of the company, although with regard to securities law violations, federal law may preempt California law.

B. Lucy's Report to the State Consumer Protection Agency

However, it was a breach of Lucy's duty of confidentiality to ABC to report the misconduct to the State Consumer Protection Agency. Under the California rules, there is no exception to the duty of confidentiality to report fraud. Even under the ABA Model Rules, the exception would not apply here. As indicated above, Lucy's services were apparently not used to make the misrepresentations. Moreover, Lucy discovered evidence of past

misrepresentations in which consumers had already paid for services they would not receive. Therefore, it does not appear that disclosure of those past instances of misrepresentation were necessary to prevent or mitigate any further fraud.

3. Lucy's Representation of XYZ

A lawyer's duty of loyalty prohibits the lawyer from undertaking matters in which he or she has a conflict of interest except under certain circumstances. When a new client seeks to engage a lawyer in a matter involving a former client, the duties of loyalty and confidentiality are involved. A lawyer must not use confidential information obtained in a prior engagement in the new engagement. Generally, a lawyer may not undertake to represent a new client if there is a significant risk that representation of another client might have a material impact on the lawyer's ability to diligently and competently represent the new client. If a reasonable lawyer could conclude that he or she could undertake the subsequent representation without impact on the lawyer's ability to diligently represent the new client, and that the representation of the former client will not result in the use of any confidential information obtained in the prior engagement, the lawyer may undertake the new engagement so long as both clients are informed and [provide] consent in writing. The California rule is similar, but does not have a "reasonable lawyer" standard and requires only disclosures, not a signed consent.

Here, after completing her work for ABC and closing her file on that matter, Lucy is asked to represent Donna, in a trademark dispute with XYZ. Lucy has not previously had any attorney-client relationship with XYZ. It is true that XYZ is solely owned by Betty, the former president and shareholder of ABC, Lucy's former client, but corporations are separate legal persons. It is clear that Lucy's prior client was ABC, not Betty. The facts indicate that Betty engaged Lucy "on behalf of ABC." Moreover, Donna's dispute is with XYZ, not with Betty (or ABC). If ABC had merged or consolidated with XYZ, or if ABC had sold assets

(particularly its intellectual property, including any trademarks that Lucy was involved with) then it might be possible that Lucy would be in possession of confidential information belonging to ABC/XYZ that might be pertinent to her representation of Donna in her dispute with XYZ. However, the facts do not indicate this is the case, and assuming that XYZ is a separate company from ABC, there is no conflict of interest that would result in any ethical violation if Lucy undertakes the representation of Donna.

Answer B to Question 1

Financial Duties

Lawyers are governed by professional ethics in their practice of law. Lawyers have several duties to their clients, the court, the public, and the profession. One duty lawyers have to their clients is in the realm of finances. Such duties include the amount of fees and how fees may be charged to clients.

Fees

The ABA requires that fees must be reasonable, taking into account the lawyer's skill level, the amount of work involved in a case or matter, and the novelty of the service being provided.

In California, fees must not be unconscionable. Also, fee agreements must be in writing, unless the services are for a routine matter dealing with a business client or the matter is handled in an emergency situation.

It is permissible for lawyers to accept stock shares from clients in lieu of money payment, but the deal must be objectively reasonable to the lawyer and fair to the client at the time that it is made. However, in business dealings with clients, lawyers must only engage in a transaction so long as it is fair to the client and the client is advised to seek separate counsel before proceeding.

Fee Amount

In this case, Betty, as sole shareholder and owner of ABC, needed legal counsel in starting her business. Since she was short on cash, she offered to pay Lucy with stock shares, which would make Lucy a 1% shareholder in ABC. Lucy's regular fee is \$200 per hour and she ended up doing just 20 hours of work for

ABC. When Lucy eventually cashed in her shares, she earned \$40,000. The issue is whether this would be reasonable at the time the company was started and the deal between Lucy and Betty was formed.

The amount that Lucy eventually recovered was 10 times greater than the fees she would have collected in her work for ABC. Since Lucy probably had some idea of what the stocks were worth at the time she made this fee arrangement with ABC, it turns on whether the stock returns would have been unreasonable had Lucy sold the stocks around the time she made this arrangement. It is likely that the ABA rules may determine that a lawyer receiving a \$40,000 payment for \$4,000 of work is simply unreasonable. However, since the standard is whether it was reasonable and fair at the time of the contract or arrangement, Lucy may be able to show the stock prices spiked unexpectedly and that she did not act unfairly or unreasonably here.

In CA, however, the standard is unconscionability. Since ABC was a startup company and offered an online calendaring service, there are no facts to suggest that Lucy's receiving 1% of the stock would amount to a windfall, or even an unreasonable fee amount. In the case the company failed, Lucy would have received very little or nothing for her services. Since Lucy didn't know that the fees would be so out of proportion to her normal fees, the fee arrangement probably would not be deemed unconscionable in California and therefore would be upheld.

Fee Agreement

The other issue is that the fee arrangement was oral. In CA, all fee arrangements must be in writing, unless there is an emergent or routine matter being handled by the attorney. Since ABC is a new client, we have no reason to believe this work was routine. Also, it was not an emergency since Lucy merely

was handling some trademark work for ABC. Lucy should have reduced this fee agreement in writing.

Lucy also should have advised Betty to obtain separate counsel since the fee arrangement is tantamount to a business engagement between Lucy and Betty. That way, Lucy would protect herself and follow ethical rules by ensuring that Betty knew her rights and was prepared to continue with the fee arrangement, having received independent advice on the matter.

Duty of Confidentiality

Lawyers have an ethical duty to maintain confidential all communications related to the representation of their client. The source of the information is irrelevant to this duty, and the duty extends to clients even after representation has ended.

Should a lawyer receive information from or about a client that the client will be engaging in activity that poses serious risk of death or bodily harm to another, the ABA allows the lawyer to report this to authorities, notwithstanding the duty of confidence. In CA, the act must amount to a crime. In the case of financial crimes or fraud, CA does not permit reporting to authorities. In the ABA, reporting is allowed only if (a) the lawyer's services are being used to perpetrate the crime or fraud, and (b) reporting would prevent the financial crime from occurring.

Here, Lucy obtained confidences in her representation of ABC that were related to the representation; therefore she has a duty to maintain those confidences unless she is excused from that duty.

False Representations to Customers

In this case, Lucy learns that ABC is making certain false and misleading representations that caused customers to pay for services they would never receive. Here, this would amount to a financial fraud or crime since customers will be wrongfully led to believe they are receiving something they are not, after they turn over their money. In CA, Lucy may not report this to authorities such as the police or the District Attorney. In the ABA, Lucy may only report this to authorities if her services are used to commit the wrong, and she believes reporting will stop it.

Lucy only performed trademark work, so the likelihood that she was assisting in this fraudulent activity is slight. However, Lucy may argue that, without the trademark, the company couldn't have started [the] business, so she is responsible for assisting. Lucy could prevent the crime if she told authorities and ABC was required to stop operations or refund customer funds.

Reporting Up and Reporting Out

The ABA authorities permit attorneys to report within the corporation to higher authorities if they suspect wrongdoing or fraud. The ABA also allows attorneys to report to outside authorities, such as the SEC, for securities violations or fraud within a corporation. In CA, again, only reporting within is allowed. Reporting out is not allowed in any case; however, if the federal law requires or allows an attorney to report, federal preemption means she cannot be held liable for that.

Here, Lucy reported up when she told Betty of her concerns. However, this was probably futile since Betty is the sole shareholder and president of the company, and told Lucy to ignore what she had discovered. Lucy then went to the State Consumer Protection Agency. In the ABA, this would be permitted. And, if it were a federal agency, Lucy would be permitted to report out if the agency so

required. However, in CA, Lucy is not permitted to report out to prevent financial crime. The ethical rules in CA prohibit Lucy from doing anything but discussing her concerns with Betty. Since the agency she reported to was state-governed, and not federal, Lucy will be subject to discipline for violating her duty of confidentiality to ABC and to Betty.

Withdrawal

If an attorney's services are used to perpetrate a crime or a fraud, they must make [an] attempt to withdraw from the representation; this is mandatory withdrawal. Permissive withdrawal means that Lucy could attempt to withdraw from the representation if she finds the client's wishes or activities to be morally repugnant. If Lucy withdraws, she must provide timely notice to Betty and must return all materials obtained during the representation. She also must not divulge any confidences since the duty of confidentiality persists indefinitely.

Duty of Loyalty

Lawyers owe their clients a duty of loyalty. This means that if there is a conflict with the lawyer and the client, a past client, or any third party that materially limits the lawyer's ability to effectively represent the client, she must not take the representation or withdraw from it. Some conflicts can be waived upon informed consent from the client. In CA, this consent must be in writing.

In CA, the lawyer must be able to effectively represent their client. The ABA requires that the lawyer "reasonably believe" she can effectively represent the client, notwithstanding conflicts. This is an objective test and the lawyer's actions will be judged objectively. Therefore, representation of one client that compromises the confidences of another may make consent impossible, and would make representing both parties unreasonable.

Past Client Conflicting with Present Client

If a lawyer has represented a client in the past who is now on the opposing side in litigation, representation of the new client may still be permitted if written consent is obtained from the former client, and the lawyer may represent each client effectively without compromising her duties of confidence and loyalty to both. However, if the subject matter of the litigation is similar to the past representation of the former client, this will be deemed unreasonable and therefore a non-consentable conflict.

Lucy's Representation of Donna

Lucy represented ABC on trademark work. ABC has been sold, but Betty, the essential founder and controller of ABC, has now started a new company, XYZ. The work Lucy performed for Betty is regarding the same matter currently at issue in her representation of Donna—trademarks. However, it may not be related to anything that Lucy handled for ABC in the past, and, so, even though it is the same nature of work, it may not directly relate to her work with ABC.

Now, Lucy seeks to represent Donna, her new client, in an action against XYZ. Since XYZ is essentially run by Betty, Lucy must get consent by Betty to represent Donna. However, Donna must also be informed about the conflict. Lucy knows confidential information regarding misrepresentations [of] ABC, and, therefore, Betty, has made in the past. Since she may not reveal this information to Donna, Donna cannot be informed fully about how Lucy's representation may harm her. She may not understand fully the reasons behind the conflict, and therefore, consent is not possible.

Since Lucy cannot obtain fully informed consent from Donna, she must not take Donna's case and should withdraw.

Question 2

Copyco, Inc. ("Copyco"), a maker of copy machines, was incorporated in State A. Most of Copyco's employees work in State B at its sole manufacturing plant, which is located in the southern federal judicial district of State B. Copyco also has a distribution center in the northern federal judicial district of State B.

Sally is a citizen of State B. Sally was using a Copyco copy machine at Blinko, a copy center within the northern federal judicial district of State B, when the machine started to jam. When Sally tried to clear the jam, she severely injured her hand. She underwent several surgeries at a nearby hospital. Her physician believes she may never recover the full use of her hand.

Sally filed a lawsuit against Copyco as the sole defendant in the State B northern district federal court. Her complaint alleges that Copyco was negligent and that she has suffered physical injury, and also seeks damages of \$100,000, exclusive of costs and interest.

The federal court has subject matter jurisdiction to hear Sally's lawsuit on the basis of diversity of citizenship. Copyco, however, moved for a change of venue to the southern federal judicial district of State B. The court denied Copyco's motion.

Sally wishes to obtain from Blinko a copy of the maintenance records for the copy machine that caused her injuries.

Questioning the extent of the injuries Sally alleged, Copyco wishes the court to compel Sally to appear for an examination by both a physician and a psychologist of Copyco's own choosing.

1. Was the federal court correct to deny Copyco's motion for change of venue? Discuss.
2. (a) Is Sally entitled to a copy of the maintenance records? Discuss.
(b) If so, how must she proceed to obtain them? Discuss.
3. (a) Is Copyco entitled to an order to compel Sally to appear for an examination by a physician and an examination by a psychologist chosen by Copyco? Discuss.
(b) If so, how must it proceed to obtain such an order? Discuss.

Answer A to Question 2

1. Change of Venue

Proper Venue

Under the federal rules of civil procedure, venue is proper in any district where (1) all defendants reside or where a substantial portion of the claim arose, (2) there is subject matter jurisdiction over the claim, and (3) there is personal jurisdiction over the parties. If there are multiple defendants and they reside in different districts, the venue may be satisfied in any district where one of the defendants resides.

Residence of Corporations

A corporation is subject to special rules with regard to its residence for venue purposes. Unlike a person, who is a resident of whichever district that he/she is domiciled in, a corporation is considered a resident of any district where there is a personal jurisdiction over the corporation. Personal jurisdiction may be specific or general. General jurisdiction requires substantial, continuous and systematic contacts with the forum. Specific jurisdiction requires that the defendant have sufficient minimum contacts with the forum so as not to offend traditional notions of fair play and substantial justice.

Copyco (C) will argue that venue is not proper in the northern district (ND) of State B because it lacks personal jurisdiction over C. This argument will likely fail, however, because C arguably has substantial, continuous and systematic contacts with ND by the fact of its distribution center. C's contacts are clearly continuous and systematic because C maintains a permanent presence in the district and presumably the distribution is an integral part of C's overall business operation. Thus, the only real question is whether C's presence in ND is substantial. The better argument is that C's permanent physical presence in ND,

which presumably requires it to transport materials in and out of the district on a daily basis, is substantial.

Moreover, even if ND does not have general jurisdiction over C, the court will in all likelihood conclude that it has specific jurisdiction. Specific jurisdiction requires minimum contacts, which consist of purposeful availment and foreseeability, and basic fairness, which requires relatedness. Here, C purposefully availed itself of the ND by establishing a distribution center there. That C could be sued in ND is clearly foreseeable because it regularly transacts shipping/distribution operations there. Thus, the minimum contacts prong is satisfied. On these facts, the relatedness prong of the test may be debatable as it is difficult to determine if C actually sells any of its copy machines to businesses or consumers in the ND. Blinko may have obtained the copy machine outside C's normal chain of retail/distribution, in which case the relatedness inquiry may cut in C's favor. However, even where this [is] the case, if C took any action in ND to advertise its copy machines or otherwise availed itself of customers in ND, then relatedness is satisfied.

Where Injury Arose

Of course, venue is also proper because the Northern District is where S was injured in the district while using a C copy machine; thus, a substantial portion of S's personal injury claim arose in the Northern District.

Personal Jurisdiction

The Northern District has personal jurisdiction over C – see discussion above re residence of corporations.

Conclusions – Northern District is Proper Venue

Because (1) a substantial portion of the claim arose in the Northern District (and also because C is a resident of the Northern District), (2) the Northern District has specific jurisdiction and probably general jurisdiction over C, and (3) the facts

state the diversity subject matter jurisdiction is present, then venue in the Northern District is proper.

Change of Venue

Where venue is improper, the defendant may move for dismissal of the plaintiff's claim. The court may grant the dismissal or order that venue be transferred (assuming there is a federal district court with proper venue) if the transfer is in the interests of justice. Here, C did not seek dismissal. Moreover, venue in ND is proper (see discussion above). When a defendant seeks to transfer venue from a proper forum, a three part test is applied: (1) the transferee court must have subject matter and personal jurisdiction; (2) the transfer must be convenient; and (3) the transfer must be in the interests of justice. District courts are afforded great discretion when deciding permissive venue transfer requests.

Jurisdiction

The Southern District, where C seeks to have the case transferred, may assert both personal jurisdiction and subject matter jurisdiction. Subject matter jurisdiction is present because the district is the same state as where the plaintiff filed her lawsuit, and therefore there is no disruption of the requirement of complete diversity. Personal jurisdiction is also present because C has its principal place of business in the Southern District and therefore C satisfies the general personal jurisdiction requirement of substantial, continuous, and systematic contacts.

Note: On the facts present, it is unclear how the federal court may assert the presence of subject matter jurisdiction based on diversity of citizenship. Diversity required complete diversity – no plaintiff may be a resident of the same state as any defendant. S is a citizen of B. As a corporation, C is a resident of (1) the state of its incorporation, and (2) the state where it maintains its principal place of business (PPB). The PPB is determined using either the muscle center test (where most of the corporation's operations are located) or the nerve center test

(where most of the corporation decision making occurs). It would appear on these facts that C's PPB is in State B because that is where most of its employees work and where it maintains its sole manufacturing plant. Yet the facts state the federal court has subject matter jurisdiction based on diversity, so perhaps the court applied the nerve center test (assuming C's decision making occurs in A).

Convenience

A court may transfer venue if it promotes convenience, and courts frequently focus the convenience issue on questions of witness availability. S will oppose the transfer and argue that convenience favors keeping the case in ND. That is the site of C's injury and is also where she received medical treatment. Thus, virtually all of the key witnesses, and presumably the plaintiff, are located. On the other hand, C will argue that [the] machine in question was manufactured in SD, and thus, there [are] a number of witnesses present in that district (presumably, witnesses who will testify regarding any design or manufacturing defect).

Interest of Justice

Normally, a plaintiff's choice of forum is entitled to deference and should not be disturbed absent compelling reasons of fairness. At most, C has demonstrated that the convenience issue is a close call. Generally, a marginal difference in convenience will not be sufficient to overcome the deference afforded to the plaintiff's forum choice.

Conclusion

Because C will be unable to demonstrate that [it] is significantly more convenient to try the case in SD or that fairness issues dictate transferring the case to SD, the court acted appropriately in denying the motion to transfer venue.

2. Maintenance Records

(a) Relevant/Discoverable

Unlike the admission of evidence at trial, the test for what information is discoverable is extremely broad and is not limited to simply that information which is deemed relevant (defined as having any tendency to make a fact of consequence more or less likely than in the absence of the evidence). Information is discoverable if it is relevant or if it is reasonably calculated to lead to the discovery of relevant information.

S will argue that the maintenance records are directly relevant to whether the copy machine was maintained in a manner and on the schedule established by C, the manufacturer. She is likely [to] attempt to preempt any possibly defense by C of an intervening supervening cause for her injury – namely, the lack of maintenance by Blinko or negligent maintenance by Blinko or a third party service contractor. Thus, the information sought by S is discoverable and, indeed, C would likely not oppose the discovery. S is therefore entitled to the discovery subject to the discussion below re third parties.

(b) Third Party Discovery

Here, S seeks to obtain the records not from C, a party to the litigation, but rather from Blinko, who is a third party. As such, S is not entitled to many of the discovery devices set out in the FRCP, such as interrogatories or requests for production. Yet the rules do provide for limited discovery of third parties through use of a subpoena. Thus, a third party [may] be subpoenaed to appear for deposition. In this case, S seeks discovery of documents as opposed to live testimony. She must therefore serve a subpoena duces tecum to obtain the documents. Note that she does not have to seek court approval to serve the subpoena on Blinko, although she must include in the subpoena a list of Blinko's third party rights under the FRCP, including the right to file a motion to quash the

subpoena. The subpoena must specify a time and location when Blinko will make the requested records available for inspection and copying by S.

Ideally, S will serve a subpoena duces tecum on Blinko in which she requests that Blinko produce its records custodian at deposition along with the actual records. This way, S can examine Blinko under oath to establish both the authenticity of the documents and attempt to establish any exceptions under the hearsay rules (such as business records). Note that if S simply wishes to secure the authenticity of the documents, she can simply negotiate with Blinko to have the records custodian provide an affidavit certifying the authenticity in lieu of a deposition.

If Blinko objects to the subpoena, Blinko may file a motion to quash or may simply respond to the subpoena duces tecum with written objections along with a refusal to produce the records. In this case, the burden shifts to the moving party (S) to establish the need for the discovery. Although courts generally try to protect the interests of third parties to be free from discovery, the maintenance records are highly relevant to S's claims, and therefore, the court will in all likelihood overrule any objections to the discovery by Blinko.

Of course, S is always free to simply negotiate the production of the discovery with Blinko with the need to use any formal discovery devices.

Conclusion

The maintenance sought by S is discoverable and she is entitled to use third party discovery devices, including subpoena duces tecum, to obtain the records.

3. Medical/Psychological Examination

(a)

C will be entitled to an order compelling S to a medical examination by a physician chosen by C because S, by the filing of her claim for personal injuries,

placed her physical condition at issue in her case. In personal injury cases, defendants have a right to examine the injured plaintiff upon a showing of good cause. In this case, C challenges the extent of S's injuries and therefore the good cause condition is likely met. However, S will probably not be able to establish good cause with respect to the need for S to submit to a mental examination. The issue depends on the extent to which S is alleging any special emotional/mental damages. Generally, courts will permit a party to recover for emotional distress as a result of physical injuries and will not require any special expert testimony on this issue, largely because a jury is competent to understand this issue. However, if S intends to offer any expert testimony regarding her mental/emotional distress, then C will be able to show good cause as to why it should be entitled to have its own expert examine S.

(b)

There is a specific rule under the FRCP which addresses requests by one party to conduct a physical/mental examination of the other party. Under this rule, the party seeking the examination [must] first serve a written discovery request on the party to be examined. The written request must identify the time and place for the examination as well, the amount of time the examination is expected to take, and the person who will be conducting the examination. The request must set forth good cause as to why the examination should be permitted to proceed. Preapproval of the court is not required. However, a party may object to the discovery request, in which case court involvement is necessary.

Answer B to Question 2

1. Denying Copyco's motion for change of venue

The first question to determine is whether the original venue was proper, because in federal court this determines which law the court should apply if a transfer is granted.

Original Venue in Northern District Federal Court

Venue in federal court is proper (1) in any district where any defendant resides if all reside in the same state, or (2) where a substantial amount of the action or the property involved in the lawsuit is located. If neither applies, then in a diversity case, venue is proper where any defendant is subject to personal jurisdiction, and, in all other cases, where any defendant can be found. In local actions venue is proper where the land is located.

Here, since the property involved in this location is located in the Northern Federal District, venue was originally proper.

However, if this wasn't the case, then we must look at the residence of C.

Residence of Copyco

A corporation is a resident of any place where it is subject to personal jurisdiction. It is not like citizenship for the purposes of diversity, which is its principal place of business and its state of incorporation.

Thus, we must do a personal jurisdiction analysis.

Personal Jurisdiction Over Copyco

Personal jurisdiction requires both that the state statute must allow jurisdiction and that it meet the constitutional requirements.

Statutory Requirements

In general, states allow jurisdiction when (1) the defendant is domiciled in the state, (2) the defendant is personally served in the state, (3) the defendant consents, or (4) if the long-arm statute applies.

Here, Copyco is domiciled in State B because it has its sole manufacturing plant in State B, and this would be considered its principal place of business. It is unclear where C was served. It appears that C has consented to venue in State B since it is simply asking for a transfer to any other district in the state. The long-arm statute probably allows this as well.

However, the real question is whether it is domiciled in the Southern or Northern District. Although it has a distribution center in the Northern District, this might be a very small operation. The facts are not clear on this. But assuming that the state statute allows this, which it might, the next question is whether this is appropriate for the Constitution.

Constitutional Limitations

This requires that the defendant have minimum contacts such that jurisdiction does not offend traditional notions of fair play and substantial justice. This requires (1) minimum contacts, which in turn requires (a) purposeful availment, and (b) foreseeability, and (2) fairness, which requires (a) relatedness of claim to contact, which can either be general or specific, (b) no severe inconvenience to defendant, and (c) weighing the interests of the forum.

However, the traditional bases have been found by the Supreme Court to satisfy this standard, and these are (1) domicile, (2) service in state, (3) consent.

As explained above, it is unclear if C is domiciled in the Northern District; thus we must do a minimum contacts analysis.

1. Minimum Contacts

(a) purposeful availment

C has a distribution center in the Northern District; thus, it is making use of the privileges and protections of the law of the Northern District. And it likely had knowledge +, as explained immediately below, that its machines would end up in a place like Blinko or actually in Blinko, since it might have personally done the distribution to the shop, and the Supreme Court is unanimous that knowledge plus is enough for purposeful availment.

(b) foreseeability

It was foreseeable that C might be haled into court in the Northern District since it sold machines to Blinko, which is in the Northern District, and thus they would probably sue there. The Supreme Court is split between knowledge and knowledge + requirement for PJ. It can be shown that C knew that B had some machines most likely, and C most likely purposefully sent them to Blinko or caused them to be distributed there; thus this was foreseeable.

2. Fairness

(a) relatedness

This suit is directly related to the contact between C and the Northern District since this was the machine that was sold in the Northern District and Sally was injured there.

(b) inconvenience

It must be severely inconvenient for C to defend there; this seems unlikely unless State B is incredibly large.

(c) state's interest

The Northern District has an interest in protecting its citizens from defective products and the injuries they cause.

Conclusion

Original venue was proper in the Northern District.

Transfer of Venue

The court will transfer to another district in the federal court if (1) it could have originally been bought there, (2) the interests of justice and the convenience of the parties require it. The court has discretion to grant or deny the motion.

Could Have Been Brought

This requires (1) subject matter jurisdiction, (2) personal jurisdiction, and (3) venue.

Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. They can only hear diversity of citizenship jurisdiction cases and federal question cases. Diversity requires complete diversity of citizenship between defendant and plaintiffs, and that the claim exceed \$75,000, exclusive of interest and costs.

Here, the claim that Sally is asserting is negligence. This is a state law claim; thus, there is no federal question jurisdiction.

However, the facts stipulate that there is diversity of citizenship jurisdiction (although this seems questionable since C is incorporated in State A and seems to have its principal place of business in State B, and the facts state that Sally is a citizen of State B; thus, it would seem that there is not complete diversity between plaintiff and defendant; however, since the facts stipulate it, that is settled.) The amount in controversy is \$100,000, which exceeds \$75,000.

Thus there is a subject matter jurisdiction.

Personal Jurisdiction

There is this over C; see above.

Venue

See rule above.

As analyzed above, because C had its sole manufacturing plant in the Southern Federal Judicial District, there is personal jurisdiction over it in this district, and thus venue is proper.

Interest of Justice and Convenience of the Parties

Here, the claim is for negligence. In order to prove the negligence there must be (1) duty, (2) breach, (3) actual cause, and (4) proximate cause. The defenses are (1) contributory negligence, (2) comparative negligence, and (3) assumption of the risk.

Here, the claim arose from a machine that is located in Blinko, a copy center in the Northern Federal District of State B. The property is thus located in the Northern District. All maintenance records and employees and witnesses to the use of the machine will likely be at or near the Northern District, since other customers might be called to testify as to whether they noticed anything or how Blinko maintained the machine. This is important because C will not be found liable if the defect was not present when the machine left its control; thus many Blinko employees might have to testify. Furthermore, S had her surgeries in a nearby hospital, and its staff and doctors might have to testify, and they likely live in the Northern District. It wasn't just one surgery, it was several; thus many doctors could be involved, and staff and they might all have to appear as witnesses.

On the other hand, C could argue that its sole manufacturing plant is located in the Southern District, and it will have to call its employees to testify as to their manufacturing procedures and how they check their products for defects. However, on balance, it seems likely most of the witnesses and the records will come from the Northern District; thus, it seems like the most appropriate place.

Moreover, the Northern District has a big interest here because this was a severe injury, and it does not want this to happen to others.

Conclusion

Thus, the court did not err in denying the motion.

Original Venue Law

Note that because the original venue was proper, the original venue law would apply if the court had granted the motion, i.e., the law of the Northern District of State B.

Note

This is not a motion for forum non conveniens since the federal court can transfer to another federal court.

2. (a) copy of maintenance records

Discovery in federal court is allowed as to anything that is nonprivileged and relevant to a claim of defense. It does not have to be admissible in court; it just had to be reasonably calculated to lead to the discovery of admissible evidence.

Here, the maintenance records will be necessary for Sally to prove her negligence claim against C. If B has an excellent record for maintaining its machines, then this circumstantial evidence that her negligence claim is viable because the defect in the machine must have been there when it left C's control. On the other hand, the records could also show that the machine always had problems, which would also indicate that there was a defect from the start. However, if the machine had been tampered with by a customer, this would hurt her case. Thus, the records would likely lead to discovery of admissible evidence (customer names, maintenance company name). Note the records themselves are probably admissible as a business record.

(b) how can she obtain them

Since B is not a defendant, Sally will have to send a request to produce along with a subpoena duces tecum. This requires a non-party to produce documents in its possession.

It is not possible for this to be obtained by deposition or interrogatory since these are simply questions that are asked and interrogatories are just for [a] party.

3. (a) (i) physician

As above, discovery is allowed as to anything relevant to a claim of defense.

A physical examination will be relevant for C to disprove the amount of damages that S is claiming or to prove that she did not mitigate, or was perhaps herself negligent in seeking help for her injuries in a strange manner. Thus, an examination by a physician should be allowed by the court. While C can request that the court allow it to use a physician of its choosing, the court is not required to do this. The court is free to choose a neutral physician or to order the parties to decide together.

(ii) psychologist

A psychologist examination does not appear reasonably calculated to lead to the discovery of admissible evidence, and it does not appear relevant to any claim or defense by C. Here, Sally is not suing for emotional trauma; she appears to only be suing for her physical injuries. Thus, an examination by a psychologist will not determine the extent of her physical injuries. However, if Sally is claiming some pain and suffering or emotional scarring from the fact that she may never recover the full use of her hand, then a psychological examination would be appropriate.

(b) how does it proceed

Unlike in state court in California, where one physical examination is granted as a matter of right, if the physical condition of the party is in issue, in federal court, the requesting part must take a motion to the court to compel a physical examination and issue an order. The court then allows a hearing where both sides present their case, and decides whether it should issue an order. This is a form of discovery called a request for physical or mental examination. It must occur during the discovery period in accordance with the discovery schedule that the court has determined, although the court has discretion to allow it past the date if it would not prejudice the parties and the interests of justice don't require otherwise.

Question 3

Dustin has been charged with participating in a robbery in California on the morning of March 1.

(1) At Dustin's trial in a California state court, the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify.

During the direct examination of Wendy, the following questions were asked and answers given:

(2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct?

Wendy: That is correct.

(3) Prosecutor: Did you speak with Dustin on that day?

Wendy: Yes, I spoke to him in the afternoon, by phone.

(4) Prosecutor: What did you discuss?

Wendy: He said he'd be late coming home that night because he had to meet

some people to divide up some money.

(5) Prosecutor: Later that evening, did you speak with anyone else on the phone?

Wendy: Yes. I spoke with my friend Nancy just before she died.

(6) Prosecutor: What did Nancy say to you?

Wendy: Nancy said that she and Dustin had "pulled off a big job" that afternoon.

(7) Prosecutor: Did Nancy explain what she meant by "pulled off a big job"?

Wendy: No, but I assume that she meant that she and Dustin committed some sort of crime.

Assuming all proper objections, claims of privilege, and motions to strike were timely made, did the court properly allow the prosecution to call the witness in item **(1)** and properly admit the evidence in items **(2) - (7)**? Discuss.

Answer according to California law.

Answer A to Question 3

1. In the prosecution of D for a robbery, the prosecution called W, who was D's wife at the time of the robbery as a witness.

Spousal Testimonial Privilege

California recognizes a spousal testimonial privilege in both civil and criminal cases. Under that privilege, a person is permitted to refuse to testify against his or her spouse. However, this privilege does not bar W's testimony for two reasons.

First, because W and D are no longer married, the privilege does not apply; the spouses have to be married at the time of the trial for the privilege to apply.

Second, the testifying spouse holds the privilege, so that if W decided to testify because she wanted to, D could not assert the privilege to prevent her from testifying. Here, W is eager to testify, and D cannot prevent her from doing so.

Thus, W was properly called as [a] witness, even though she was D's spouse at the time of the robbery and even over D's objection.

Confidential Marital Communications Privilege

California also recognizes a confidential marital communications privilege. That privilege protects communications that were made during marriage if those communications were made in confidence. Even though W and D are no longer married, the privilege would still apply to statements made during the marriage. Additionally, D and W jointly hold the privilege, and D can prevent W from testifying as to confidential communications. However, the privilege would not preclude W from testifying in general, so W was properly called as a witness.

2. Question about seeing D on the day of the robbery

Presentation

D should object that to the form of this question because it is leading. A leading question is one that suggests the answer to the witness. Leading questions are only proper on cross-examination, or on direct examination if a witness is hostile or has trouble remembering. Here, the prosecutor's use of a leading question on direct examination is improper, and an objection to the form of the question should be sustained.

Relevance

The question, though leading, is nevertheless relevant. Relevant evidence is evidence that tends to establish the existence of a material, disputed fact. Here, it is likely material whether W saw D on the day of the robbery, depending on D's defenses and alibis about that day.

Relevant evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion. Nothing in W's answer suggests these factors, and it is therefore admissible.

3. W's answer to the question about speaking with D

Presentation

D should move to strike W's answer because it answers questions not asked. The prosecutor's question was simply if W spoke with Dustin on that Day. W should simply have answered yes, but instead offered "in the afternoon" and "by phone." That additional material was not in response to the question and could

be stricken by the court. In California, both the party conducting the examination and the opposing party can move to strike a witness's answer.

Relevance

The answer is, however, likely relevant to the existence of a material, disputed fact because it relates to where D was and what he was doing on the day of the robbery.

4. W's testimony of D's statement

Relevance

W's testimony is relevant because it is offered to prove the existence of a disputed, material fact: namely, that D was going to divide up money with his friends, which suggests that he participated in the robbery.

The testimony can nevertheless be excluded if its prejudicial value substantially outweighs its probative value. Although, it's prejudicial to D because it establishes guilt, it is not unfairly prejudicial because it does not improperly appeal to the jury's sensitivities. Thus, the information is relevant.

Competence

Furthermore, W is competent to testify about D's statement because she has personal knowledge of it, as she heard it.

Hearsay

D should object to this testimony on the basis that it is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the

D's out-of-court statement is being offered to prove that he was meeting up with friends to divide money, as evidence that D participated in the robbery.

Hearsay Exceptions

The prosecution should argue that a number of exceptions apply to this statement.

Admissions by Party Opponent

First, the prosecution should argue that D's statement is admissible hearsay under California law because it is an admission by a party opponent. D, the defendant, is the prosecution's party opponent. His statement that he was going to divide up money with friends is an acknowledgement of fact, and is, therefore, admissible hearsay as an admission from a party opponent.

Present State of Mind

Additionally, the prosecution could argue that the statement is admissible hearsay because it is not being offered to prove the truth of the matter asserted, but rather is being offered as circumstantial evidence of D's state of mind and his intent to go see his friends to divide up money and as circumstantial evidence that he carried out that intent. A limiting instruction could be given to limit the use of the evidence for that purpose.

Present Sense Impression

California also recognizes a hearsay exception where the declarant is describing his conduct at the time he is acting. However, because this statement is one of future action, this exception would not apply.

Confidential Marital Communication Privilege

D should also object on the basis that this statement is privileged through the confidential marital communications privilege. As described above, this privilege applies even where the marriage has ended at trial, if at the time the statement is made the parties are married and the statement was made in reliance of the confidential nature of the marital relationship. D will argue that his statement that he was going to divide up money with his friends was intended to be confidential. Given its incriminating nature, it is likely he will win that argument. Unless W can show that there was no confidentiality because others were present when the statement was made, the court should probably grant D's motion to exclude W's testimony about his statement on the basis of privilege.

5. Question about conversation with Nancy

Form of Question

D could object to this question as another leading question, because it suggests the correct answer, and is improper on direct examination.

Form of Answer

D could also object to the answer and move to strike, since it offers information ("just before she died") that was not asked for in the question. In California, both the person conducting the examination and the other party can move to strike an answer that is nonresponsive to the question asked.

Relevance

D could argue that this evidence is not relevant to a material fact in dispute. On the face of the question, it does seem irrelevant that W's friend Nancy died

shortly after they spoke. However, as explained below, at this information is probably relevant to lay the foundation to establish whether any hearsay exception (dying declaration) applied to Nancy's statement, and so is likely admissible for that reason.

6. Testimony of Nancy's statement

Competence

W is competent to offer this testimony because she has personal knowledge of the statement, that is, Nancy said it to her. However, she may not be competent to testify as to its meaning, as will be discussed below.

Relevance

The testimony of Nancy's statement is relevant to a disputed material fact because it tends to establish D's participation in the robbery and his guilt.

Hearsay

D should object to the admission of this statement on the basis that it is hearsay, that is, Nancy's out-of-court declaration is being offered to prove the truth of the matter asserted (that she and D committed a robbery).

Dying Declaration Exception

California's dying declaration hearsay exception applies to both criminal and civil cases and permits the admission of statements that were made while the declarant was dying, about the circumstances leading to her death. California requires that the declarant actually have died.

Here, Nancy actually died, and her statement was made shortly before her death. However, nothing indicates that the statement was related to the circumstances of her death. Perhaps if Nancy was injured during the robbery, the statement would be admissible, but on the facts presented currently, nothing suggests the statement was made about the circumstances of her death, and it is therefore not admissible under this exception.

Statement Against Interest

California also recognizes a hearsay exception where the declarant's statement is against his or her financial, social, or penal interest at the time it was made. The declarant must be unavailable.

Here, Nancy is unavailable because she is dead. Additionally, the statement that she and D "pulled off a job" suggests criminality on her part and is therefore, against her penal interest, and was so at the time that it was made. The statement should be admitted under this exception.

7. W's interpretation of Nancy's statement

Relevance

W's comment about Nancy's statement is relevant because it goes to prove a disputed material fact, that is, whether D committed a crime on March 1.

Form of answer

D should move to strike W's answer because the prosecutor did not ask W what she thought Nancy meant by the statement; the prosecutor only asked whether Nancy explained what she meant, and W's answer was therefore nonresponsive and possibly in narrative form.

Competence

However, D should object to W's statement on the basis that W is not competent to interpret Nancy's statement. W has no personal knowledge of what Nancy meant by "pulled off a big job" because, as W testifies, Nancy never explained what that meant.

Lay Opinion

D could also object to W's statement on the basis that it offers a lay opinion evidence, since W has no personal knowledge of what the statement meant when Nancy made it. Lay opinion is admissible where it is rationally based on a witness's perception and is helpful to the jury. Here, it is unlikely that W's statement is helpful to the jury because members of the jury are just as able to offer an interpretation of Nancy's statement as W is. Unless W has some other basis for her opinion (i.e., Nancy and D had used those terms in the past, or that it was customary where she lived), W should not be allowed to offer her interpretation of Nancy's statement.

Proposition 8

In a California criminal case, all relevant evidence is admissible, subject to certain exceptions (such as hearsay rules and privilege). Here, the court could determine that the evidence is admissible notwithstanding that it is an otherwise inadmissible lay opinion, if the evidence's probative value was not substantially outweighed by its prejudicial value.

Answer B to Question 3

Because this is a criminal prosecution in California, Prop 8 applies. Prop 8 makes any relevant information admissible subject to unfair prejudice balancing. However, Prop 8 doesn't apply to hearsay, rape shield, the exclusionary rule, privilege, evidence of D's character first presented by the prosecution, and secondary evidence.

1. Spousal Privilege

Testimonial Privilege

In California, a witness may refuse to testify against their spouse in both civil and criminal proceedings. This privilege exists only during a valid marriage. Further, it is the [witness] spouse that holds the privilege.

Because D and W are divorced and W wants to testify, she may.

Confidential Communication Privilege

All communications made during the course of a valid marriage and intended to be confidential between the husband and wife are privileged. The party spouse holds the privilege, and thus may prevent the witness spouse from testifying to these communications. The communications made during marriage remain privileged even after divorce.

Therefore, Wendy may testify to information other than confidential communications made between her and D during the marriage. The defense may not prevent her from taking the stand. The court allowed the prosecution to call the witness.

2. You did not see Dustin on

Relevance

Logical

In order to be admissible, evidence must be relevant. It is relevant if it tends to make any disputed material fact of consequence more or less probable.

Here, the fact that D wasn't in S's presence on the afternoon in question makes it more probable that he could have been participating in a robbery. Thus, it is relevant.

Legal

Although logically relevant, evidence may be excluded for public policy reasons or because the risk of unfair prejudice substantially outweighs the probative value. Neither of these apply here.

Form

The prosecution should object to this question as leading. Leading questions are questions that suggest the desired answer. They are inadmissible on direct except where the witness is hostile, adverse, or needs help remembering. It doesn't appear that any of these exceptions apply; thus, the form of the question was improper.

Competence of Witness

A witness may testify only based on personal knowledge and present recollection. Here, W is testifying based on what she observed that day from present recollection. Thus, it is proper.

Therefore, the question was asked in an improper form, and any objection to form would have been granted. However, the answer would be admissible.

3. Did you speak with D on that day?

Relevance

This information is relevant to lay a foundation for the next question. The fact that W spoke with D makes it more probable that he told her something in the phone conversation.

Further, it is neither unfairly prejudicial nor excluded for public policy reasons.

Competence

Evidence is based on present recollection and personal knowledge.

4. What did you discuss?

Relevance

Evidence is relevant in that it makes more probable that D committed the robbery if he had money to divide up.

Hearsay

Hearsay is an out-of-court statement used to prove the truth of the matter asserted. It is inadmissible unless it fits under one of California's hearsay exceptions.

W's response of what D said is hearsay because it is used to prove the truth of the matter asserted, i.e., that he would be home late because he had to divide some money. The prosecution is using it to show he did have some money from the robbery.

Exceptions

Party Admission

The statement, although hearsay, would be admissible under the party admission hearsay exception. A statement by any party is admissible hearsay regardless of whether the statement was against their interest when made.

Here, D's statement that he had money to count up is an admission by a party, D, that he had some money to divide up.

Statement Against Interest

Further, the statement may be admissible under the statement against interest hearsay exception. For this exception to apply, the statement must be against the declarant's interest and the declarant must be unavailable. It is unclear if D is testifying, but if he doesn't he is unavailable. Further, the statement could be argued to be against his interest because he is admitting he has a sum of money to divide.

Present State of Mind

This exception includes statement of intent as circumstantial evidence that the intent was carried through. D's statement of intent to meet people and divide some money may be admissible as circumstantial evidence that he did in fact do that.

Confrontational Clause

Under the 6th Amendment, criminal defendants have the right to cross-examine the witnesses against them. If a statement of a hearsay declarant is admitted, the confrontation clause is violated if the declarant is not available, doesn't testify, wasn't subject to cross, and the statement is testimonial.

The confrontation clause doesn't apply here because the declarant is the defendant himself and he wasn't giving testimonial evidence.

Privilege

As discussed above, the confidential communication privilege may bar this testimony. It was made during a valid marriage and intended to be confidential.

Therefore, the defense may properly object to this testimony, and it should be excluded.

Therefore, the evidence would be admissible hearsay as a party admission. However, the confidential communication spousal privilege likely would apply to exclude the evidence.

5. Later that evening did you speak with anyone else....

Relevance

Relevant to lay the foundation for the following question. If W spoke to Nancy, it is more likely she obtained the information she is about to testify to.

Form

This answer may be non-responsive in that it goes beyond the question asked of the witness. Further, it may assume facts not in evidence as there is no indication that Nancy had died. As such, an objection to form should have been granted.

6. What did Nancy say to you?

Relevance

It is relevant because it tends to make it more likely that D was in fact involved in a robbery.

Hearsay

W's testimony is an out-of-court statement by Nancy used for the truth of the matter asserted. Thus, it is inadmissible unless an exception applies.

Exceptions

Dying Declaration

The dying declaration hearsay exception applies to statements made with belief that death is imminent and that concern the cause of circumstances of death and, under California law, the declarant must actually die. In CA, it applies in both civil and criminal cases.

The declarant actually died, but the statement didn't involve the cause or circumstances of death. Thus, it is not applicable.

Party Admission

An admission by a coconspirator may be admissible against a fellow conspirator as an exception to hearsay. The statement must be made concerning the conspiracy and during the existence of the conspiracy.

It appears that N and D were coconspirators (an agreement between two or more persons w/the intent to agree and intent to complete the target offense). However, a conspiracy ends when the target offense is completed, and thus, when the bank robbery was completed, it is unlikely N and D were coconspirators any longer. Therefore, it is not an admissible party admission.

Statement Against Interest

A statement that, when made, was against the declarant's interest may be admissible under this exception. The declarant must be unavailable for this exception to apply.

Here, the statement that N and D had pulled off a big job, depending on how interpreted, was against N's interest when made. At the time made, it subjected her to criminal punishment because most people would interpret that as having committed a big robbery. Therefore, this exception likely applies.

Therefore, the statement is admissible hearsay under the statement against interest exception.

7. Did Nancy explain what she meant by “pull off a big job”?

Form

The defense could move to strike the witness’ answers as non-responsive (except the “No”). The prosecution asked [for] a “yes” or “no” answer, and the witness responded with something in addition to “yes” or “no” that did not respond to the question. The prosecution didn’t ask her what she thought of what it meant. This would be granted by the court.

Competence/Opinion Testimony

A witness must testify as to present recollection and personal knowledge. Here, W is testifying based on speculation and this is improper.

Further, a lay witness may give opinion testimony only if it is based on personal knowledge and helpful to the jury. Again, there is no personal knowledge and the speculation is not helpful to the jury. Thus, W’s last statement should be stricken.

FEBRUARY 2009 ESSAY QUESTIONS 4, 5, AND 6



California Bar Examination

Answer all three questions.
Time allotted: three hours

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

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

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

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

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

Question 4

ConsumerPro, a consumer protection group, published a manual listing the names, addresses, telephone numbers, and specialties of attorneys who represent plaintiffs in tort cases. The manual also included comments rating the attorneys. The manual was distributed by ConsumerPro to its members to aid them in the selection of an attorney should they need one.

Paul was listed in the manual as an attorney who litigates automobile accident cases. In the related comments, the manual stated that “Paul is reputed to be an ambulance chaser and appears to handle only easy cases.”

Paul sued ConsumerPro for defamation, alleging injury to reputation and requesting general damages. ConsumerPro moved to dismiss for failure to state a claim on which relief could be granted, on the grounds that (1) the statement was non-actionable opinion, (2) Paul failed to allege malice or negligence under the United States Constitution, (3) Paul failed to allege special damages, and (4) in any event, the statement was privileged under the common law.

How should the court rule on each ground of the motion to dismiss? Discuss.

Answer A to Question 4

1. Statements of Opinion May Be Actionable in a Defamation Action

To state a claim for defamation, the plaintiff must allege (1) a defamatory statement (2) that is published to another. ConsumerPro alleges that the statements about Paul in its manual are not actionable defamatory statements because they are opinions. This is incorrect. Statements of opinion are considered defamatory (and actionable) if a reasonable reader or listener would have reason to believe that the declarant has a factual basis for his or her opinion. Here, a reasonable person reading the manual would have reason to believe that ConsumerPro has a factual basis for its statements concerning Paul. A reader would reasonably assume that ConsumerPro – a consumer protection group – researched the various attorneys before writing and publishing its manual, that it investigated their reputations and their prior experience, and that it based its assertions on facts it had discovered through this investigatory process. In such circumstances, statements of opinion are actionable. Accordingly, the court should not grant ConsumerPro’s motion to dismiss on this ground.

2. Failure to Allege Malice or Negligence Does Not Defeat Liability Here

If the subject of a statement is a matter of public concern, the First Amendment requires a plaintiff in a defamation action to allege falsity and fault in addition to the elements listed above. If the plaintiff is a public official, public figure or limited public figure, the level of “fault” the plaintiff must prove is that the defendant acted with malice or recklessness. If the plaintiff is a private figure, he need only show that the defendant acted negligently. If, however, the subject matter of the statement is not a matter of public concern, the plaintiff need not prove malice, recklessness, or negligence. Even a non-negligent good faith publication of a defamatory statement on matters that are not of public concern will support liability for defamation.

Here, ConsumerPro may argue that the subject matter is a public concern because lawyers offer a service to the public, making their abilities and expertise relevant and important information for the public to know. This argument should fail. While an individual's qualifications to do a job may be relevant to specific people (or a specific group of people), it does not qualify as a matter of public concern that it [is] important information for the community at large. Accordingly, Paul did not have to allege fault (malice, recklessness, or negligence) here and ConsumerPro's motion to dismiss on this ground should also be denied.

3. Failure to Allege Special Damages Does Not Defeat Liability Here

In some defamation cases, the plaintiff is also required to allege special (i.e., actual economic) damages in addition to the elements discussed above. A plaintiff need not allege or prove special damages; however, in cases involving libel (written defamation) or slander per se (spoken statements concerning a person's ability to do his or her job, imputing unchastity to a woman, accusing someone of a crime of moral turpitude or stating that a person has venereal disease). Special damages are only a necessary element in complaints alleging regular slander. Here, the statements were made in writing and are therefore properly characterized as libel. Accordingly, Paul need not allege special damages, and ConsumerPro's motion to dismiss on this ground should be denied.

Notably, Paul may not be able to recover a substantial amount of money if he is unable to prove any special damages at trial, but failure to allege special damages is not a ground on which to dismiss a defamation action based on libel.

4. The Statements Are Subject to a Qualified Privilege

There are two types of privilege that may be asserted as a defense to a defamation action: Absolute privilege and qualified privilege.

Absolute privilege is available as a defense with respect to statements made by one spouse to another, and with respect to statements made by government officials (including lawyers) in the course of their duties. This privilege is not applicable here.

Qualified privilege is available when there is a socially useful context for the speech at issue. In such cases, statements will be privileged if (1) the speaker has a good faith belief in the truth of the statements and (2) the statements are relevant to and within the scope of the useful purpose for the speech. For example, a former employee providing a reference will have a qualified privilege defense to a defamation action if he believed the statements he made and refrained from injecting extraneous and irrelevant information into the communication. Here, ConsumerPro is providing a service to the public by providing information about lawyers to individuals who may require a lawyer's services. This is a socially useful context. The statements about Paul being an "ambulance chaser" and taking "only easy cases" are relevant to the purpose of the manual in that they provide information that a person looking to hire an attorney would be interested to know to inform his or her selection. Accordingly, the latter element of the qualified privilege defense is likely satisfied here.

Nevertheless, ConsumerPro's motion to dismiss on the ground of qualified immunity should be denied. A factfinder could find based on evidence presented at trial that ConsumerPro did not have a good faith belief in the truth of the statements. If so, the privilege would not be applicable and Paul could prevail at trial.

Conclusion

In sum, ConsumerPro's motion to dismiss should be denied in its entirety because none of the arguments asserted by ConsumerPro are meritorious.

Answer B to Question 4

Paul's motion to dismiss will be evaluated on the basis of the facts alleged in his complaint. The court will assume that the facts alleged by Paul are true and will determine whether Paul is entitled to relief on the basis of the facts as he alleges them.

Part One: Non-Actionable Opinion & Application of the Basic Definition of Defamation to Paul

Definition of Defamation

Paul sued ConsumerPro for defamation. Defamation requires a defamatory statement about the plaintiff that is published to a third person. A defamatory statement is one that tends to negatively affect the plaintiff's reputation. However, statements of opinion are usually excluded from the definition of defamatory statement. You may not hold someone liable for offering their opinion, unless the defendant gives the impression that the statement is based on verifiable facts known to the defendant.

Publication to a third person may be oral or written; the defamatory statement must be conveyed in some manner to someone other than the plaintiff. Truth is always a defense to defamation but, depending on the type of defamation alleged, the plaintiff may bear the burden of proving the untruth of the statement or the defendant may bear the burden of raising truth as an affirmative defense. Whether and what kind of damages plaintiff must prove depends upon the type of defamation alleged.

Here, Paul alleges that ConsumerPro's statement was defamatory and that it was published to the group of persons who read the ConsumerPro manual.

Defamatory Statement or Non-Actionable Opinion

To succeed in his claim, Paul must show a defamatory statement about him made by ConsumerPro. ConsumerPro stated in its manual that Paul “is reputed to be an ambulance chaser and appears to handle only easy cases.” Since Paul is a lawyer, the allegation that he is an “ambulance chaser” reflects poorly on Paul’s integrity and draws on stereotypes of lawyers propagated in the media. The statement suggests that Paul takes advantage of people by finding them at their weakest—immediately after an accident or illness—and trying to convince them to hire him. Moreover, stating that he only handles easy cases suggests that Paul is not a very good lawyer or that he is lazy and refuses to take challenges. Since the statement will negatively affect Paul’s reputation, it could be considered a defamatory statement.

As to the first part of the statement, ConsumerPro will argue that its statement is merely a non-actionable opinion. It will point out that the statement does not address a particular incident. For example, if ConsumerPro alleged that Paul was seen at the hospital yesterday talking to an accident victim, that would be a statement of fact that is either true or untrue. Here, the statement is more general and just says Paul is reputed to be an accident chaser.

Paul will argue that the claim that he is “reputed to be an ambulance chaser” gives the impression that ConsumerPro’s statement is based on fact. The opinion of ConsumerPro alone does not make a reputation. Rather, ConsumerPro gives the impression that it has talked to a group of people who all hold opinions about Paul and that the majority of the group believes Paul to be an ambulance chaser.

As to the second part of the statement, ConsumerPro will again argue that the statement that Paul “appears to handle only easy cases” is non-actionable opinion. ConsumerPro will point out that the statement cannot be proven true or

untrue because different people hold different views of which cases are easy and hard. Moreover, ConsumerPro will argue that the statement does not give the impression that it is based on any facts. Unlike the first statement, the second part of the statement does not imply that ConsumerPro's statement is based on the opinion of more than one person. Instead of referring to Paul's reputation (which implies many people's opinions), ConsumerPro directly asserts its own opinion by stating that Paul "appears" to only handle easy cases.

The court should conclude that the first part of ConsumerPro's statement is actionable because it gives the impression that it is based on facts. The statement could be verified by polling the relevant community and determining whether Paul indeed has a reputation for being an ambulance chaser.

The court should, however, conclude that the second part of ConsumerPro's statement is non-actionable because it is purely ConsumerPro's opinion. As explained above, it does not imply that it is based on any facts and it cannot be proven either true or false.

Conclusion: The court should deny ConsumerPro's motion to dismiss as to the first part of the statement (reputation as ambulance chaser) because it gives the impression that it is based on facts. It should grant the motion to dismiss as to the second part of the statement (only takes easy cases) because it is non-actionable opinion.

Part Two: Allegation of Malice

Whether or not a plaintiff must allege malice depends on whether the defamatory statement deals with public persons and public matters or not. When a defamatory statement involves a private person and a private matter, plaintiff need not allege any fault on the part of the defendant. However, if the statement involves a matter of public interest and a private person, the plaintiff must allege

and prove at least negligence on the part of the defendant. Finally, if the statement involves a matter of public interest and a public figure, the plaintiff must allege and prove malice. Malice requires a showing that the defendant made the statement either knowing that it was false or with recklessness to the truth or falsity of the statement.

Conclusion: As explained below, a court will conclude that the statement concerns a matter of public interest, but that Paul is a private figure. Therefore, Paul will be required to allege negligence or more on the part of the ConsumerPro. Because he did not do so, the motion to dismiss should be granted on this ground.

Matter of Public Interest

A matter of public interest is a topic that would be of general concern or interest to the community. ConsumerPro will argue that the statement is a matter of public interest because many people eventually need to hire attorneys. Consumers have a strong interest in knowing which attorneys will responsibly handle their cases and which will not. ConsumerPro will support its argument by pointing to the fact that members of the community join ConsumerPro, a consumer protection group, to learn more about the issues that ConsumerPro discusses in its manual. People go out of their way to access the information offered by ConsumerPro, suggesting that the information is of general concern to the community.

Paul, on the other hand, will argue that the matter is not of public interest. He might point out that ConsumerPro is only one group amidst the entire community, which shows that consumer protection issues are really of limited concern and interest only a small number of people. Paul will argue that, if consumer issues were really of public concern, they would be covered in the newspaper and ConsumerPro would not need to publish its manual.

Since the topic of ConsumerPro's statement is of interest to a number of people (ConsumerPro's members) and since the entire public has an interest in making an informed decision when it hires lawyers, the court will probably decide that the statement by ConsumerPro concerns a matter of public interest.

Public Figure

A public figure is one who lives their life in the public eye, for example, a politician or movie star. The person may have sought out fame or may have become notorious, for example, as a well-known criminal.

Paul will argue that he is not a public figure because he does not live his life in the public eye. Since the facts do not indicate that he is a famous lawyer or that he has had any particularly notorious cases, he probably does not give press conferences or appear on television. There is nothing to indicate that he even engages in public speaking, for example, at lawyer's conventions or continuing education events.

ConsumerPro will argue that Paul became a public figure by making himself available as an attorney. However, there are no facts to support this argument. Nothing suggests that Paul has sought out public attention or has unwillingly received it. Therefore, he is neither famous nor notorious. A court will conclude that Paul is not a public figure.

Since Paul is not a public figure but the statement does involve a matter of interest to the general public, Paul will be required to plead negligence on the part of ConsumerPro.

Did Paul Plead Negligence?

In order to plead negligence, Paul needs to allege that ConsumerPro did not act with reasonable care in making its statement about Paul. Paul has not alleged any particular actions by ConsumerPro in relation to the making of the statement. He alleges only that the statement was made. Negligence, on the other hand, requires more. For example, Paul could have pled negligence by alleging that ConsumerPro made the statement without engaging in a fact-checking process, even though it is standard for consumer protection organizations to do three hours of research before publishing a review of an attorney. If Paul had alleged that ConsumerPro fell below the normal standard of care, he would have alleged negligence. However, he failed to do so. Therefore, the motion to dismiss should be granted on this ground.

Part Three: Special Damages

Defamation carries a variety of damages requirements, depending on the type of defamation alleged. Plaintiffs injured by slander, which is oral defamation, but [sic] allege and prove special damages unless the statement falls into one of the four slander per se categories. However, plaintiffs injured by libel, which is written defamation, generally need not allege special damages. However, when the defamatory statement involves a public figure, the plaintiff must allege special damages even for libel.

As explained in Part Two, the court will conclude that ConsumerPro's statement concerns a matter of public interest but that Paul is not a public figure. Because Paul is not a public figure, he will not be required to allege special damages.

Conclusion: Because Paul is not a public figure and is not required to allege special damages, the motion to dismiss on this ground should be denied.

Part Four: Privilege?

At common law, to protect the free flow of information, certain types of statements received a qualified privilege. If a statement falls within the privilege, a defamation plaintiff must show that the speaker knew the statement was false when it was made.

Statements made for the benefit of either the speaker or the audience fall within this qualified privilege. For example, a statement in a credit report would fall within the qualified privilege because it is made for the benefit of the audience of the credit report. Because the public has an interest in ensuring the accuracy and reliability of credit reports, the publishers of such reports receive a qualified privilege. The privilege encourages them to openly and honestly report blemishes on someone's credit because they will be protected from suit unless the publisher knows the statement is false when it is made.

Does the Statement Fall within the Privilege?

Paul will argue that ConsumerPro's statement does not fall within the privilege because a manual reviewing attorneys is not as important as something like a credit report. He will argue that the public has a weaker interest in the accuracy of consumer information manuals than they do in other sorts of documents and that the privilege should not be applied to ConsumerPro's statement.

However, ConsumerPro will prevail in its argument for privilege. ConsumerPro's statement was made for the benefit of its members: to help them make informed decisions about hiring attorneys. Moreover, the public has a strong interest in being able to access accurate consumer information when it hires attorneys or buys products. Because the accuracy of ConsumerPro's statement is important to the audience and the statement was made for the benefit of the audience, the

court will conclude that ConsumerPro's statement falls within the qualified privilege.

Did Paul Allege Knowledge of Falsity?

Paul will argue that it is clear that ConsumerPro must have known that the first part of its statement was false when it was made. The statement gives the impression that ConsumerPro polled the community to determine Paul's reputation. Paul will argue that since he does not have a reputation as an ambulance chaser, ConsumerPro could not possibly have based the statement on a poll. If ConsumerPro did not make a poll, it must have known that the statement was false.

ConsumerPro will prevail, however, because Paul did not allege that ConsumerPro knew that the statement was false when it was made. Assuming for the moment that the statement implies that it was based on a number of opinions, ConsumerPro could only have known its statement was false if it had conducted a poll and determined that Paul has a reputation as a wonderful diligent lawyer. Paul has not alleged that ConsumerPro had any knowledge, good or bad, about Paul's reputation at the time it made its statement.

Conclusion: ConsumerPro's motion to dismiss should be granted because ConsumerPro's statement falls within the qualified privilege and Paul has not alleged that ConsumerPro knew that the statement was false when it was made.

Question 5

Developer had an option to purchase a five-acre parcel named The Highlands in City from Owner, and was planning to build a residential development there. Developer could not proceed with the project until City approved the extension of utilities to The Highlands parcel. In order to encourage development, City had a well-known and long-standing policy of reimbursing developers for the cost of installing utilities in new areas.

Developer signed a contract with Builder for the construction of ten single-family homes on The Highlands parcel. The contract provided in section 14(d), "All obligations under this agreement are conditioned on approval by City of all necessary utility extensions." During precontract negotiations, Developer specifically informed Builder that he could not proceed with the project unless City followed its usual policy of reimbursing the developer for the installation of utilities, and Builder acknowledged that he understood such a condition to be implicit in section 14(d). The contract also provided, "This written contract is a complete and final statement of the agreement between the parties hereto."

In a change of policy, City approved "necessary utility extensions to The Highlands parcel," but only on the condition that Developer bear the entire cost, which was substantial, without reimbursement by City. Because this additional cost made the project unprofitable, Developer abandoned plans for the development and did not exercise his option to purchase The Highlands parcel from Owner.

Builder, claiming breach of contract, sued Developer for the \$700,000 profit he would have made on the project. In the meantime, Architect purchased The Highlands parcel from Owner and contracted with Builder to construct a business park there. Builder's expected profit under this new contract with Architect is \$500,000.

What arguments can Developer make, and what is the likely outcome, on each of the following points?

1. Developer did not breach the contract with Builder.
2. Developer's performance was excused.
3. In any event, Builder did not suffer \$700,000 in damages.

Discuss.

Answer A to Question 5

This contract is for construction services. As a result, it will be governed by the common law.

Valid Contract

In order to proceed, Builder must establish a valid contract, which requires (1) offer, (2) acceptance, and (3) consideration. The facts state that Builder and Developer reached an agreement and signed a contract. Therefore, there is likely the required offer, acceptance and consideration. The contract does not fall under the Statute of Frauds because it is not: in consideration of marriage, suretyship, contract for real property, sale of goods \$500 or more, or unable to be performed within one year. In any event, the contract was signed, which indicates that it would satisfy the Statute of Frauds anyway. There is a valid enforceable contract.

1. Developer did not breach

A breach of contract occurs when a party to the contract does not perform after performance comes due. Therefore, if performance has not come due, there can not be a breach. Likewise, if the party substantially performs his obligations under the contract, there is no breach. Performance only comes due after the occurrence of all conditions precedent to performance. This contract contained such a condition. The contract contained the condition that obligations were only due once the City approved “necessary utility extensions.” Therefore, unless the City approved these extensions, performance is not due.

Builder will argue that the City did approve the extensions, and that performance is due. The fact that the City approved the extensions is true; however, it still may not give rise to performance. Developer will rebut this argument with a claim that Developer and Builder agreed that this condition impliedly included the condition that City reimburse Developer for the cost of the extensions.

Merger and Parol Evidence: A merger clause in a contract indicates that the contract is a final integration of the agreement between the parties. This clause causes the Parol Evidence rule to apply. This rule states that no prior or contemporaneous oral statements are admissible that contradict the final integration between the parties. Builder will argue that the statements by Developer that the condition means that the City must approve and reimburse for the extensions is barred as parol evidence. However, the parol evidence rule does not outlaw all statements. Developer can still admit statements that prove the existence of a condition precedent to the formation of the contract or statements that explain the meaning of a clause in the contract. Both of these rules apply here.

The statements in question represent the agreement by Developer and Builder that the condition in 14(d) means that the agreement is conditioned on reimbursement by the City for the cost of the extensions. This means that there was an additional condition precedent: the contract is conditioned upon reimbursement by the City. This also means that statements that Developer seeks to admit will explain the language of 14(d). Therefore, the statements Developer seeks to admit will [be] admissible by the Parol Evidence Rule.

Because Developer can admit the statement pertaining to reimbursement, he will be able to establish that performance is not due. As a result, his failure to perform is not a breach.

2. Performance was excused

Performance can be excused by the occurrence of a number of events. These include frustration of purpose, impracticability, impossibility, and failure of a condition precedent. Failure of a condition precedent is discussed above.

Frustration of Purpose

Frustration of purpose excuses performance under a contract when performance is still technically possible, but the purpose of the contract no longer exists. In order to prevail, the defendant must show (1) the purpose of the contract was known by the plaintiff at the time of contracting, (2) circumstances that are out of the defendant's control changed, and (3) the change of circumstances caused the original purpose to be unavailable.

Here, the purpose of the contract was to make money on the development of a residential community. Builder, who knew that he was expected to build single family homes, was aware of the purpose of the contract. Circumstances did change pertaining to the development. The City had a long-standing policy of reimbursing the cost of extensions to new areas. After this contract was entered into, the City changed this policy. Therefore, the second element is met. Lastly, Developer must show that the change in circumstances made the purpose of the contract unavailable. City's change in policy made Developer bear the cost of the extensions. However, Developer could still build the extensions, and therefore, build the residential development. It would cost Developer more money; however, the purpose of the contract was still available. Therefore, the purpose of the contract was not frustrated. It may have been less appealing to Developer, but it was not frustrated.

Impracticability

Performance of a contractual obligation is impracticable when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes undue hardship on the defendant. Here, as discussed above, circumstances did change: City changed a long-standing policy. This was out of Developer's control. Therefore, Developer need only demonstrate undue hardship to prevail with this claim. The change of the policy meant that Developer would bear the burden of financing the extensions required to build the community. This cost was "substantial," and

made the project unprofitable for Developer. Making a project unprofitable is probably inadequate for a court to find impracticability. Developer would have to establish more than simple unprofitability. If Developer could show that the cost is so burdensome that he would be forced out of business, that would establish impracticability. However, simply unprofitability is probably inadequate. Therefore, this element is not met. The court will probably not find that performance was excused by impracticability.

Impossibility

Impossibility occurs when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes performance to be impossible for the defendant. As discussed above, the change in circumstances makes performance unappealing, but not impossible. Impossibility will not excuse performance.

Developer should be able to successfully argue that performance should be excused by failure of a condition precedent.

3. Builder did not suffer \$700,000 in damages

A plaintiff in breach of contract claim can pursue damages that put the plaintiff in the position he would have been in had the defendant fully performed. This is generally established by expectation damages, incidental damages, and consequential damages, minus any mitigation available to the plaintiff. These damages are not available to the plaintiff if there is a valid liquidated damages clause. This contract did not have a liquidated damages clause, so that will not apply. Punitive damages are not available in a contract cause of action.

Expectation Damages

For a seller or provider of services, these damages typically equal the amount of profit the plaintiff expected to make. Here, that is clearly established as \$700,000.

Incidental Damages

These damages are the damages that the plaintiff incurred as incidental to the defendant's breach. They typically include the cost of finding a replacement buyer and administrative costs incurred because of the breach. Here, the facts do not indicate any incidental damages. However, if Builder incurred any costs in contracting with Architect to construct a business park, such as lawyer's fees, etc., these would be covered as incidental damages.

Consequential damages

These are the damages that occurred as a foreseeable result of the breach. In order to recover these damages, the plaintiff must establish that the parties contemplated these damages at the time the contract was formed. Builder does not appear to have incurred any consequential damages.

Mitigation

Generally, a plaintiff is required to mitigate damages. He is not allowed to sit by after a breach and allow himself to incur more damage than is necessary. Here, the original contract required Builder to build residences for Developer on The Highlands. After the alleged breach by Developer, Architect hired Builder to build a business park on the Highlands. This contract would not be available to Builder had he performed for Developer. If it would have been possible for Builder to perform both contracts, then this would not be mitigation. However, that would be impossible. Therefore, this is proper mitigation of damages. The other issue involved with mitigation is time. If the work for Developer would have taken 9 months, and the work for Architect takes 12 months, Builder could argue that the entire \$500,000 profit should not be considered for mitigation. However, no facts indicate the time required for either job, so the court will assume equal performance for both contracts.

Builder's damages for the alleged breach are \$700,000. However, because Builder is required to mitigate his damages, the \$500,000 from the contract with

Architect will be applied to the damages. Therefore, Builder's total damages due to the alleged breach are \$200,000.

Answer B to Question 5

1. Developer did not breach the contract with Builder.

Parol Evidence Rule

Although Developer will assert that he was not obligated to perform under the contract with Builder unless the City followed its usual policy of reimbursing for installation costs, Builder will argue that this condition precedent is not part of the agreement between the parties and therefore Developer has breached the contract by failing to perform. Builder's argument will rest on the parol evidence rule.

The parol evidence rule provides that the terms of a written agreement cannot be varied by prior or contemporaneous oral terms where the writing represents the party's final agreement. Consistent additional terms may supplement the writing if the contract is not complete, and extrinsic evidence may also be introduced to interpret ambiguous terms as long as the terms are reasonably susceptible to the proffered meaning.

Here, the agreement between Developer and Builder has been reduced to writing. Under the Williston rule, a court will look at the contract and determine whether the parties likely intended it to be the final and/or complete expression of the agreement given the detailed or specific nature of the terms. In this case, the contract provides for the construction of 10 single family homes and has several sections (including section 14(d)) describing aspects of the venture. Importantly, the writing contains a merger clause which states that "This written contract is a complete and final agreement between the parties hereto." Courts typically find that the parol evidence bar to extrinsic evidence presumptively applies where the writing contains a merger clause.

Accordingly, a court will likely find that the parol evidence rule applies. Developer's best arguments, therefore, are exceptions to the parol evidence rule. These exceptions include where extrinsic evidence show (1) fraud, (2) subsequent modification of the contract, (3) absence of consideration and other formation defects, (4) to interpret ambiguities, (5) to show a collateral agreement, (6) to show the existence of a condition precedent.

Exception to Parol Evidence Rule – Conditions Precedent

One exception to the parol evidence rule's bar on extrinsic evidence that may be helpful to Developer is the exception permitting a showing of conditions precedent. A condition precedent modifies a promise to perform; the promise to perform will not mature until the condition is satisfied, and accordingly a party cannot be in breach of said promise unless the condition precedent occurs.

Developer can argue that the City's following of its ordinary policy of reimbursing utility installation was a condition precedent to the obligations under the contract, and therefore the parol evidence rule does not bar him from presenting evidence on the existence of this condition.

However, Builder will have a good argument in response; specifically, Builder will point to section 14(d), which provides "All obligations under this agreement are conditioned on approval by City of all necessary extensions." Section 14(d) clearly is a condition precedent to Developer's performance, but it is expressly provided for in the written contract. Under the Williston Rule of contract interpretation, Builder will argue that since the contract included written terms covering conditions precedent, it is reasonable to presume that the parties would include all such agreed upon conditions precedent in the writing.

Accordingly, in light of these arguments, the "condition precedent" exception to the parol evidence rule is probably not Developer's best argument, although a

court that mechanically applies the exceptions to the parol evidence rule could be sympathetic. Developer should raise it and hope for the best.

Exception to Parol Evidence Rule – Explaining Ambiguity

Another exception to the parol evidence rule is extrinsic evidence admitted to explain an ambiguity in the written contract. Some jurisdictions, such as California, permit a party to also introduce extrinsic evidence to first demonstrate the existence of the ambiguity. This exception will be helpful to Developer in light of the difficulties presented by section 14(d) above.

Under this exception, Developer will argue that the term “conditioned on approval by City of all necessary utility extensions” implicitly included the City’s willingness to pay for utility installation. To support his argument, Developer will utilize the general commercial construction customs and understandings in the community, which may likely include the fact that any reasonable builder or developer operating in City would interpret “approval by the city of necessary utility extensions” to include, as a matter of course, funding to install the utility extensions. Developer will particularly be likely to avail this exception to the parol evidence rule in jurisdictions like California, since this ambiguity is not clear from the face of the contract.

Builder, however, will argue that section 14(d) is not reasonably susceptible to the meaning proffered by Developer. Availing the Williston Rule, Builder will likely harp on the fact that the sophisticated, commercial parties would insert such a material condition if it was in fact part of the agreement, especially where the writing contains a merger clause.

Ultimately, Developer’s arguments supporting the introduction of the prior negotiations will likely be successful; courts are loath to ignore clear, understood commercial patterns in an industry in contracts between sophisticated parties. Merger clauses are typically inadequate in such circumstances unless they

explicitly except course of dealing, course of performance, usage of trade from being permissible interpretive tools for the contract.

Exception to Parol Evidence Rule – Collateral Agreement

Developer may also argue that he did not breach the contract because it was controlled by a separate, collateral agreement. However, this argument will likely fail. Although collateral agreements are exceptions to the parol evidence rule, a court must conclude that the parties would reasonably have made the proffered collateral agreement separate from the primary contract.

Here, interpreting the condition of receiving installation funding from the City as a collateral agreement would be unreasonable. First, it is intimately related with the primary contract, and it is unlikely that Builder and Developer would fashion it separately from the main agreement. Second, it is unclear whether the proffered “collateral agreement” could even be an enforceable contract, as there would not be any consideration—i.e., bargained-for-legal detriment—flowing to support the agreement.

Accordingly, although the “collateral agreement” arguments is available to Developer to argue that the failure of a condition precedent did not mature his obligation to perform, it is one of his weakest arguments.

Mistake Due to Ambiguity

Mistake due to ambiguity is a contract formation defect. Developer could foreseeably argue that no contract was formed because of his mistake as to the meaning of a material term in the contract. Mistake due to ambiguity usually does not obtain relief for a party (typically the form of rescission or reformation) unless the other party was aware of the ambiguity.

Here, under these facts, Developer might argue that Builder was aware that section 14(d) was ambiguous and would not necessarily be interpreted to have

the meaning that Developer intended. Further, Developer would argue that the term was material to the contract, as the failure of the city to pay for the utility installation would drastically alter the expected benefits he would receive. If Developer can demonstrate these facts persuasively, he may be able to argue that there was either no “meeting of the minds” or that the contract should be reformed to match the “innocent party’s” interpretation of the contract. Under either scenario, Developer would not be in breach.

Unconscionability

Unconscionability is another contract formation defect, which is determined at the time of formation. There are two types, procedural and substantive. No facts suggest that the terms of the contract were so prolix as to amount to procedural unconscionability, but Developer may argue that the absence of a condition requiring reimbursement from the City makes the bargain so one-sided as to “shock the conscience” of the court.

Such an argument will likely not succeed in this case; the parties are sophisticated, commercial parties who are able to fend for themselves. Developer’s unfortunate circumstances are not of the type that would raise to unconscionability.

2. Developer’s performance was excused.

Impossibility

Developer may try to argue that his performance under the contract, even if matured because the court does not recognize his proffered condition precedent, was excused under the doctrine of impossibility.

Impossibility excuses performance of the contract where performance would be objectively impossible, i.e., not only can the party asserting the defense not perform, but no one could perform the contract under the unforeseeable circumstances that have arisen.

Here, impossibility will not be a helpful argument because not only could other developers potentially execute the agreement Developer has with Builder, Developer himself could do so, but simply at a large loss because he would have to pay for the utility installations.

According, the Developer's performance is unlikely to be excused by impossibility.

Nonetheless, Developer could successfully argue impossibility in that the subject matter of the contract can no longer be obtained by him because it was sold by Owner to Architect.

Impracticability

Developer may be better suited to prevail under the argument that performance was excused under the doctrine of impracticability. Impracticability is a subjective test that examines whether performance would be commercially unreasonable due to subsequent circumstances unforeseeable at the time of contract formation.

Here, Developer will argue that City's long-standing policy of paying for utility installation was a reasonable assumption by both parties. Further, the policy had been so ingrained in the community and understood by commercial developers and builders that a change in the policy was practically beyond the realm of possibility. Builder will respond that Developer's reliance on the permanence of the policy was misplaced, and he assumed the risk that the City could easily change its discretionary policy if economic requirements warranted. Ultimately, if Developer is able to persuasively argue his position, he may ultimately prevail on his argument of impracticability.

Frustration of Purpose

Developer may try to argue that the failure of the City to reimburse for construction costs constituted frustration of purpose. Frustration of purpose arises where circumstances unforeseeable at the time of contract formation arise that destroy the purpose of the contract, and that this purpose was known by both parties involved.

Here, Developer is unlikely to prevail on his frustration of purpose argument. Although, both Developer and Builder were aware of the purpose of the contract, the purpose of the contract—namely to construct ten single-family homes on the Highlands—was not “destroyed” by the City’s decision not to reimburse for utility installation. Accordingly, whether or not the City’s decision was foreseeable, it would not constitute frustration of purpose. Accordingly, this argument by Developer would fail.

3. Builder did not suffer \$700,000 in damages.

The purpose of compensatory damages is to place a non-breaching party in as good a condition as he would have been had the breach not occurred. The requisite showing in order to obtain compensatory damages is (1) breach, (2) causation, (3) foreseeability, (4) certainty, and (5) unavailability.

Applicability of “Lost Volume Seller” Rule

Builder may try to argue that he is a “lost volume seller,” and accordingly the fact that he was hired by Architect should not reduce his damages in the slightest because, had the contract with Developer been performed, he would have made both \$700,000 and \$500,000 in profits.

Builder’s argument is unlikely to succeed. Lost volume sellers must, in effect, have “unlimited supply” of whatever good or service they provide. Builder is not properly viewed as a car or TV salesman; he builds structures, and therefore his

services are in limited supply. Accordingly, a lost-volume seller type argument by Builder will be unavailing.

Certainty Requirement

In order to recover compensatory damages, such damages must be relatively certain. If the contract provided that Builder's payment was in any way contingent on the ultimate sale of the homes, his damage may well be too uncertain to permit recovery.

Unavoidability / Mitigation Requirement

A non-breaching party is required to mitigate his damages. Although failure to mitigate will not eliminate one's damages, it can reduce them to the amount that would have been incurred had proper mitigation been pursued.

Here, Builder did not fail to mitigate his damages; rather, he sought employment by Architect to construct a business park for \$500, 000. By mitigating, Builder was only damaged by the alleged breach to the extent of \$200,000, because only \$200,000 is needed for Builder to obtain the "benefit of his bargain" with Developer.

Question 6

Stage, Inc. ("SI") is a properly formed close corporation. SI's Articles of Incorporation include the following provision: "SI is formed for the sole purpose of operating comedy clubs." SI has a three-member Board of Directors, consisting of Al, Betty, and Charlie, none of whom is a shareholder.

Some time ago, Charlie persuaded Al and Betty that SI should expand into a new business direction, real estate development. After heated discussions, the board approved and entered into a contract with Great Properties ("GP"), a construction company, committing substantial SI capital to the construction of a new shopping mall, which was set to break ground shortly.

Although Charlie remained enthusiastic, Al and Betty changed their minds about the decision to expand beyond SI's usual business. SI was struggling financially to keep its comedy clubs open. Al and Betty decided to avoid SI's contract with GP in order to devote all of SI's capital to its comedy clubs.

Last month, GP approached Charlie about another real estate project under development. GP was building a smaller mall on the other side of town and was seeking investors. Aware that Al and Betty were unhappy about the earlier contract with GP, Charlie believed that SI's board would not approve any further investments in real estate. As a result, Charlie decided to invest his own money in the endeavor without mentioning the project to anyone at SI.

Meanwhile, Al and Betty have come to suspect that Charlie has been skimming corporate funds for his personal activities, and, although they have little proof, they want to oust Charlie as a director.

1. Under what theory or theories might SI attempt to avoid its contractual obligation to GP and what is the likelihood of success? Discuss.
2. Has Charlie violated any duties owed to SI as to the smaller mall? Discuss.
3. Under what theory or theories might Al and Betty attempt to oust Charlie from the Board of Directors and what is the likelihood of success? Discuss.

Answer A to Question 6

Stage, Inc. (S) vs. Charlie

1. The issue is whether Al and Betty can avoid its contractual obligations to GP under the theory that the contract is ultra vires (outside scope of corporations purpose). Ultra vires statement is the corporation's statement of purpose and can either be broad and indicate that the corporation is incorporated for the purpose of "conducting lawful business" or can be as specific as Stage, Inc.'s and indicate that "SI is formed for the sole purpose of operating comedy clubs." At common law, if a corporation acts outside the scope of its statement of purpose, the contract is voided. At modern law, when a corporation conducts ultra vires activities, the transaction is valid; however, individual directors and officers who enter into the transaction can be held personally liable. Here, SI's Articles of Incorporation include the provision that SI is formed for the sole purpose of operating comedy clubs and decided at a later point to expand into the real estate development area.

In entering into the contract with Great Properties (GP), a construction company, and committing substantial SI capital to the construction of a new shopping mall, SI has acted outside its statement of purpose because the business of real estate is wholly different and apart from the business of running comedy clubs. Thus, SI has committed an ultra vires act and, modernly, it cannot avoid its contractual obligations with SI. The corporation's assets, however, will not be liable for the act of its Board of Directors, but the directors can be held personally liable for entering into an ultra vires act. Thus, although SI may not be able to void the contract, its assets are protected and Al, Betty, and Charlie will be held personally and be responsible for damages to GP.

2. The issue is whether Charlie has violated his duty of loyalty to SI by investing money into GP's project of building a smaller mall. A director owes the

corporation a duty of loyalty to act in good faith and in the best interest of the corporation. One of the several ways a director can violate his duty of loyalty to the corporation is by usurping a corporate opportunity. Before taking a business opportunity upon himself that he reasonably believes the corporation would be interested in, the director must inform the corporation of such opportunity and wait for the corporation to reject it. It is important to note that it is not a valid defense to state that at the point the corporation was not adequately financed to take on the opportunity.

The courts use the interest/expectancy test in order to determine whether an opportunity is one that the director should believe the corporation is interested in. Here, the corporation's statement of purpose is to operate comedy clubs and not deal in real estate; thus, the business opportunity is not within the corporation's line of business. Further, given that Charlie, Betty, and Al engaged in heated discussions before approving and entering into the contract with GP and given that Al and Betty later changed their minds about the decision and sought to void its contractual obligation to GP, it was reasonable for Charlie to believe that the opportunity was one that SI was not interested in. Also, the facts also state that Al and Betty decided to devote all of SI's capital to its comedy clubs since it was short on capital and struggling financially to keep its comedy clubs open. Finally, the facts state that Charlie was aware that Al and Betty were unhappy about the earlier contract with GP and believed that SI's board (which consisted of Al, Charlie, and Betty) would not approve any further investments in real estate. Thus, given the fact that the business of real estate development was out of SI's line of business and one that they would not likely be interested in taking advantage of, Charlie did not usurp a corporate opportunity and did not violate his duty of loyalty to the corporation in investing in the smaller mall with GP.

3. The issue is whether Al and Betty could oust Charlie from the Board of Directors for fraud and gross abuse of authority and for violating his duty of due care to the corporation.

Duty of Due Care

A director owes the corporation a duty of due care and must act as a reasonable prudent person and run the business as if it were his own. A director who takes action that harms the corporation (misfeasance) will be liable to the corporation unless he can defend himself under the business judgment rule. Here, if Charlie did in fact skim corporate funds for his personal activities as Al and Betty suspected, and if they could prove such activities, Charlie has violated his duty of due care to the corporation because a reasonably prudent person would not embezzle funds from a corporation. Under these facts, he will not be able to defend under the business judgment rule because that requires a showing that he acted in good faith and made a reasonably and well informed decision. It would be difficult and near impossible to show he was acting in good faith for the corporation's interest in embezzling money for personal use. Thus, he has violated his duty of due care to SI.

Removal of a board member for fraud and gross abuse of authority

The issue is whether Al and Betty would be able to remove Charlie from the Board of Directors for his acts of skimming corporate funds for his personal activities. A Director may be removed from the board by court order for fraud or gross abuse of authority or by a vote of the majority of shares of the corporation for any reason. Here, given that the corporation is a closed corporation with no shareholders, Al and Betty can petition the court to remove Charlie if they can show that he engaged in fraud or gross abuse of authority as a director of SI.

Here, the facts state that Al and Betty only suspected Charlie of skimming corporate funds for his personal use and had little proof of his unlawful activities. Further, Charlie would likely argue that SI has been struggling financially and thus it is unlikely that he was able to skim funds from SI. Additionally, the fact that Charlie was able to invest his own funds into the mall project with GP may

show that he is financially stable enough to not have to skim funds from a struggling corporation. Finally, Charlie could also defend himself on the grounds that perhaps Al and Betty are acting in retaliation because they resent him for convincing them to enter into the contract with GP which they wish to rescind at this point.

Unless Al and Betty can show clear proof that Charlie has engaged in such fraud, it is unlikely that the court will oust Charlie from his position as Board Member of SI.

Answer B to Question 6

I. SI's Ability to Avoid the Contract with GP

SI may attempt to avoid its contractual obligations on the basis that it was an ultra vires act. A corporation may only engage in activities which fall within the stated business purpose in its Articles of Incorporation. SI's Articles explicitly stated that it was formed for the sole purpose of operating comedy clubs. The contract with GP had nothing to do with comedy clubs, but rather was for an investment of capital into construction of a new shopping mall. Traditionally, corporations could always void contracts that were ultra vires and, in a jurisdiction that retains that approach, SI would prevail on this theory. SI could make a strong argument that the use of the term sole purpose left no ambiguity as to whether SI was able to take action in the form of real estate development. Modernly, however, most corporations are allowed to engage in any legitimate business purpose and are not able to void contracts on the mere claim that they were ultra vires. This protects the other contracting party from being abandoned if the corporation determines that the contract would not be profitable and then cites their Articles of Incorporation, which the other contracting party probably had no notice of, as a reason to evade contractual obligations. Insofar as that is exactly what is happening here (Al and Betty knew what the stated purpose of their corporation was and discussed and approved entering into the area of real estate development, then had second thoughts because of SI's struggling financial position), this theory may not work. Furthermore, the shareholders would have to bring the suit and SI is a close corporation, so it may be unlikely that a court would believe that the directors acted in complete defiance of the shareholder's wishes. Finally, it could be argued that investing in real estate is a way to earn capital that would ultimately be used to operate their comedy clubs, and thus the contract was actually within the corporate purpose.

The shareholders of SI may argue that the directors had no authority to enter into the contract and that the corporation should not be bound by the unauthorized acts of its agents. This would require showing that the directors had no actual, implied, or apparent authority to contract with GP and would likely fail. The entire Board of Directors approved the decision to expand in the direction of real estate development after heated discussion and subsequently entered the contract with GP. The directors of a close corporation most likely have implied, if not actual, authority to conduct the business of the corporation by approving and entering contracts. The role of the Board is to manage the corporation's affairs and make decisions about actions to be taken by the corporation. Often the actual authority to pursue those approved actions would be vested in a corporate officer like a president, but the small size and nature of a closely-held corporation typically implies a more fluid power structure. If there are, in fact, officers who are expressly vested with exclusive authority to enter [into] contracts on behalf of SI and none of the directors hold those officer positions, then SI may be able to avoid the contract on the basis that it was an unauthorized act. However, at the very least, it is likely that the directors held themselves out to GP as having authority to bind the corporation such that GP could argue they had apparent authority and prevail in enforcing the contract. Finally, the Directors did approve the decision, so it is likely that they ratified the contract in some way even if it was entered into by someone without authority.

The easiest way for a corporation to avoid a contract is not present here. If SI had not yet been formed and someone like Charlie had entered into the contract as a pre-incorporation contract, SI could claim they were not bound if the corporation never ratified the contract or received the benefit of it. SI has been properly formed and the directors approved the contract so this defense is not available.

II. Charlie's Potential Breach of Duties to SI

As a director of SI, Charlie owes the corporation the fiduciary duty of loyalty which involves a duty to avoid usurping corporate opportunities. When a director learns of an opportunity based on his position as director (Charlie was approached by GP about "another" real estate project of theirs), he may not personally benefit from the knowledge by acting on the opportunity until he presents it to the corporation and allows the corporation to reject it. Here, Charlie will claim that he knew Al and Betty were unhappy with the earlier contract and that they wouldn't approve any further contracts with GP. However, Charlie's mere "belief" that the board would not approve further contracts does not absolve him of the duty to report the opportunity to them and wait for them to reject it. Considering the circumstances of SI's financial difficulties, they probably would have rejected it immediately and Charlie could proceed on the investment with his own money after fully and properly disclosing it to SI. Instead, Charlie never mentioned the project to anyone at SI, but went forward with investing his own money into the opportunity. Traditionally, the financial inability of the corporation to take advantage of the opportunity may have been an adequate defense to a director accused of usurping a corporate opportunity, but even if that was the case here, this defense is no longer a good one. Charlie breached his duty of loyalty.

The other fiduciary duty which Charlie owes SI, the duty of care, could also be potentially implicated in this situation if Charlie denied the GP smaller mall contract on behalf of SI and it would have been a good investment. The duty of care requires a director to act as a reasonably prudent person would in similar circumstances. As discussed above, Charlie should have presented the opportunity to SI's board and let them vote to refuse it. Given SI's financial struggles, it would have been a proper exercise of business judgment to decline the opportunity and a court would not question Al, Betty, or Charlie's decision to not enter the contract under the business judgment rule.

III. Removing Charlie from the Board of Directors

Betty and Al will attempt to oust Charlie from the Board of Directors on the theories that he breached his fiduciary duties. If they know about his usurpation of the opportunity to enter a contract with GP related to the smaller mall, they would be able to show that he breached his duty of loyalty. If he is, in fact, skimming corporate funds, then he is self-dealing, another violation of the duty of loyalty which exists when a director reaps personal advantage at the expense of the corporation. They would also argue that he breached his duty of care by acting unreasonably in his pursuit and advocacy of the new business direction of real estate development. A director has the responsibility of acting in the corporation's best interests as a reasonably prudent person would in the investments they make. Betty and Al would argue that the investment of a "substantial" amount of SI's capital into real estate development (especially given that their sole purpose is operating comedy clubs) would not escape scrutiny and condemnation, even under the business judgment rule. However, Al and Betty agreed to taking SI in that new direction and no matter how "heated" the discussions were, they eventually approved the decision.

Importantly, Betty and Al cannot oust Charlie from the Board of Directors by their own act because only shareholders can remove a director. Thus, Al and Betty would need to bring all of the information they have about Charlie's breaches of fiduciary duties and any other reasons they have to desire his removal to the shareholders and let the shareholders address the question. A majority vote of all shareholders would be required for Charlie's removal. Considering what appears to be bad financial judgment on Charlie's part, the obvious breaches of the duty of loyalty, and the fact that shareholders can remove a director with or without cause, the shareholders would probably vote to remove him and Al and Betty would succeed in their ousting, although indirectly.