



# **California Bar Examination**

**Essay Questions  
and  
Selected Answers**

**July 2018**



The State Bar Of California  
Committee of Bar Examiners/Office of Admissions

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## **ESSAY QUESTIONS AND SELECTED ANSWERS**

**JULY 2018**

### **CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the July 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Evidence
3.	Professional Responsibility
4.	Community Property
5.	Constitutional Law

## **ESSAY EXAMINATION INSTRUCTIONS**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts 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 the 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 or no 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 that 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

In January, Stan, a farmer, agreed in a valid written contract to sell to Best Sauce-Maker Company (Best), 5,000 bushels of tomatoes on July 1, at \$100 per bushel, payable upon delivery. On May 15, Stan sent Best the following e-mail:

“Heavy rains in March-May slowed tomato ripening. Delivery will be two weeks late.”

Best replied:

“Okay.”

On May 22, an employee of Delta Bank (Delta), where Best and Stan banked, told Best that rains had damaged Stan’s tomato crops and that Stan would be unable to fulfill all his contracts. Best called Stan and asked about the banker’s comment. Stan said:

“Won’t know until June 10 whether I’ll have enough tomatoes for all my contracts.”

Best replied:

“We need a firm commitment by May 27, or we’ll buy the tomatoes elsewhere.”

Stan did not contact Best by May 27. On June 3, Best contracted to buy the 5,000 bushels it needed from Agro-Farm for \$110 per bushel.

On June 6, Stan told Best:

“Worry was for nothing. I’ll be able to deliver all 5,000 bushels.”

Best replied:

“Too late. We made other arrangements. You owe us \$50,000.”

Concerned about quickly finding another buyer, Stan sold the 5,000 bushels to a vegetable wholesaler for \$95 per bushel.

Stan sued Best for breach of contract. Best countersued Stan for breach of contract.

Has Stan and/or Best breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

## QUESTION 1: SELECTED ANSWER A

### Applicable Law

Contracts for goods are governed by Title 2 of the Uniform Commercial Code. All other contracts are governed by common law.

### **Goods**

Goods are qualified as movable, tangible objects. As this contract is for bushels of tomatoes, which are movable, tangible objects, this contract will **be governed by the UCC.**

### **Merchants**

The UCC additionally has special rules for merchants. A merchant is someone who regularly deals with the types of goods that are the subject matter of the contract, someone who has special knowledge of such subject matter, or a business person involved in the transaction.

This contract is a contract between Best, a sauce making corporation, and Stan, a farmer, who appears to be a commercial farmer, but even if he is not, he would have special knowledge of the goods involved, and therefore both parties **qualify as merchants**, and the UCC rules for Merchants will apply.

## Possible Breaches of Contract

### **Valid Contract**

In order to have a valid contract there must be an offer with clear and definite terms, acceptance, consideration, and no defenses to contract. Here, the facts indicate, that Stan and Best have entered into a valid contract. There appears to have clearly been an offer and acceptance. The only essential terms under the UCC are *parties, subject matter, and quantity*, but this contract also included price and timing. Both have exchanged valuable consideration, tomatoes for money, and as it's a valid contract, there should be no defenses to formation.

### **Anticipatory Repudiation**

Anticipatory Repudiation is when one party to a contract clearly and unambiguously informs the other that they will not or cannot perform the performance required by the contract. Upon an anticipatory repudiation, the non-repudiating party may either (i) treat the repudiation as a breach and sue immediately, (ii) treat the contract as rescinded, (iii) suspend performance until the repudiating party indeed performs, (iii) or wait and sue when a breach occurs.

Best will argue that Stan repudiated his contract when he sent Best the May 15th email saying Delivery will be two weeks late. While under the common law, a **time is of the essence** clause is not typically enforced as a material breach of contract unless this has been specified when the contract was formed, the UCC requires **Perfect Tender**, which applies to goods, quantity *and time of delivery*. The UCC does not allow for substantial performance unless under an installment contract, which this is not. Therefore, Best will argue, by saying that there was going to be a 2-week delay in the delivery of Stan's tomatoes, Stan had anticipatorily repudiated the contract, and Best was allowed to treat such anticipatory repudiation as a breach.

## **Contract Modifications**

While under the Common Law, a modification to a contract must be supported by consideration, the UCC only requires good faith to modify the contract.

Stan will argue, therefore, that the initial May 15th communications between Best and Stan were not a repudiation of the contract, but instead a good faith modification. Stan will argue that the only reason he was delayed in delivering the tomatoes was due to the heavy rains, a condition completely out of his control, and that therefore his attempt to change the delivery date will be a good faith effort to modify the contract. He will point to Best's response, an "Okay", as further proof that Best also viewed this communication as a modification of contract.

Because Best did not treat Stan's informing them of the delay as a breach of contract, or as a rescission, but instead answered in the affirmative, "Okay", a court will most likely treat this as a modification rather than a repudiation as of May 15.

## **Request for Assurances**

Under the UCC, when a party has a reasonable suspicion that the other party may not perform, they may make a request for assurances *in writing* from the other party that they will indeed be able to perform as promised under the contract. Upon receiving a request for assurances, the other party must respond within a reasonable period of time (typically not to exceed 30 days), also in writing, with assurances that they will be able to complete their portion of the agreement. If a party fails to respond to a request for assurances, the requesting party may treat this failure as an anticipatory repudiation and take any of the options discussed above.

Best will argue that the phone call on May 22nd was a request for assurances. Best will argue that due to the information shared with them by their and Stan's bank, they had a reasonable suspicion that Stan may be unable to perform and were therefore within their right under the contract and the UCC to make such a request. Best will argue that Stan's

further uncertainty, about not knowing until June 10, would be even more support for their request for assurances. Best will argue that because Stan failed to respond to their request, he breached the contract by implicitly repudiating the contract, and Best was therefore within their rights to search elsewhere for their tomatoes to cover any losses. Stan will argue that he did not breach the contract through the May 22nd conversation. First, Stan will argue that because the request for a "firm commitment" was in a phone call rather than in writing, that this was not an enforceable request for assurances. Stan will also argue that as Best only gave him 5 days, from May 22nd to May 27th, to respond to such assurances, with the date of performance still a month away, that this was not a reasonable time for him to respond in. Stan will further point out that even if this was a viable request for assurances, Stan gave the assurances on June 6th. Stan will argue that despite the fact that Best had demanded assurances be given by May 27th, as mentioned above, this was an unreasonable amount of time, and Stan did give them assurances within a reasonable amount of time. June 6, 2 weeks later, is well within 30 days, and still well before the date of performance. Stan will further argue that the fact that he had told Best that he wouldn't know until June 10th is even more evidence that the required date of May 27th was unreasonable.

Because Best's request was not in writing, and because they gave Stan less than a week to respond, most likely a court will not find that Sam breached his contract by failing to respond by May 27th.

### **Revocation of Repudiation**

In the event of an anticipatory repudiation, the breaching party may revoke their repudiation any time before the date of performance agreed upon on the contract provided (i) the other party has not rescinded the contract already, (ii) the other party has not materially changed their position in reliance of this repudiation, or (iii) the other party has not already filed suit for breach of contract.

Stan will argue that even if it were found that he repudiated the contract either on May



15th, or the May 22nd through May 27th communications, that he revoked that repudiation on June 6th when he said there was nothing to worry about, and he would deliver as promised.

Best will argue that by that point in time, they had already materially changed their position and contracted with Agro-Farm in order to ensure they were able to obtain the necessary tomatoes, and that therefore Sam's revocation came too late. Stan will argue that as there was not a proper request for assurances, and that despite this, Stan was still able to give assurances well before the July 1st date, that Best itself was breaching the contract by entering into the agreement with Agro-Farm and refusing to honor the contract.

### **Impracticability**

A contract becomes unenforceable if the subject matter of the contract is destroyed, the performing party dies, or the performance becomes illegal; also if performance becomes impracticable due to an **unforeseen occurrence**, (i) the nonoccurrence of which was an essential assumption of the contract, (ii) that makes performance impracticable, and (iii) the other party was not at fault.

Finally Stan might argue that he was not repudiating the contract, that the rain made his performance impracticable. However, this would have been a foreseeable occurrence, the risk of which Stan would have assumed.

### **Possible Damages**

#### **Best's Damages Compensatory Damages**

Compensatory Damages are damages meant to put the non-breaching party into the position they would have been in had the contract been fully performed. Typically these

are determined by the difference of the market price and that of the contract, or the difference between price of goods purchased in the non-breaching party's attempt to cover and the contract price. A party only needs to put in an objectively reasonable effort in finding a reasonably priced product to cover.

Should it be found that Stan did indeed breach the contract, Best will be able to claim compensatory damages. These would be the difference between the price they paid to Agro-Farm, \$110 per bushel for 5,000 equaling \$550,000 minus the agreed upon price with Stan of \$500,000, or \$50,000.

### **Consequential Damages**

Consequential Damages are any damages that rise naturally out of the breach of contract that are not compensatory damages. These damages must be (i) actually **caused** by the breach, but for the breach, these damages would not have been suffered, (ii) **foreseeable**, and (iii) relatively **certain** as to the amount.

As Best only requested \$50,000 dollars from Stan, it does not seem that they suffered any consequential damages, but if for some reason production were stopped as a result of having to go through Agro-Farm or something of this nature, they would be able to recover such consequential damages.

### **Incidental Damages**

Incidental Damages are damages suffered by the non-breaching party in trying to remedy the breach.

Again, it is unclear whether Best suffered any such damages, but if they did in their attempts to locate and contract with Agro-Farm, these damages too could be recovered from Stan.

## **Stan's Damages**

### **Compensatory Damages**

See Rule Above.

If Best is found to be in breach of contract, Stan also could recover compensatory damages. These would be the difference in the agreed upon price with Best with what he was able to sell them for to the vegetable wholesaler. As such, Stan's compensatory damages would be the \$500,000 agreed upon price, minus the \$475,000 he received from the wholesaler or \$25,000.

### **Consequential Damages**

See Rule Above.

If Stan suffered any consequential damages, such as costs in having to transport the vegetables further, or storage fees, lost profits if he couldn't replant soon enough, etc, so long as these were caused by the breach, foreseeable, and a relatively certain dollar amount, these damages too could be recovered.

### **Incidental Damages**

See Rule Above.

If Stan suffered any incidental damages, like Best, he too could recover these.

### **Reliance Damages**

Reliance damages are recoverable as the costs suffered by the party upon reliance of the contract and reliance that the other party would perform. Reliance damages and

compensatory damages cannot both be obtained and as such a party must choose between reliance and compensatory damages.

Stan, therefore, could choose to take reliance damages that he suffered instead of compensatory damages

### **Duty to Mitigate**

A non-breaching party must do all that is reasonably possible to mitigate damages and eliminate costs. The damages recoverable will be reduced by what has actually been mitigated, or what could have, should the non-breaching party fail to take steps.

Therefore, if Stan were to take reliance damages, they would be mitigated by his sale to the vegetable wholesaler and the costs such a sale would normally cost Stan.

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## QUESTION 1: SELECTED ANSWER B

The main issue in this case is whether there was a breach of the contract when Stan did not reply to a request for assurance of performance. This is a case governed by the UCC since it deals with delivery between merchants.

### Waiver of Delivery Date

It is likely a court will find that the May 15 email from Stan to Best is a proposed modification of the contract.

At common law, a modification requires consideration. However, as this concerns movable goods (i.e. tomatoes), the UCC allows for modification as long as it was in good faith. Here, the modification of the delivery was due to the heavy rains, which was not, arguably, the fault of Stan. As such, the assent of Best, although without consideration, was binding.

Moreover, considering that the contract dealt in goods with a value in excess of \$500, the modification had to be in writing. Here, the modification was by email and constitutes a writing in accordance with the Statute of Frauds. As such, the proposed modification is binding.

Alternatively, this is construed as an express waiver of the delivery date. A waiver need not be supported by consideration, and the mere fact Best replied "okay" is sufficient for the waiver to be provided. As such, the delay in delivery is valid.

### Anticipatory Repudiation on May 22

According to the facts, Best was informed by a bank employee (Delta) that rains had

damaged Stan's crops, and that Stan would be unable to fulfill all of his contracts. Best in turn called Stan, who commented that he will not know until June 10 whether there will be enough tomatoes.

An anticipatory repudiation allows the other contracting party to treat the contract as breached when the other party unequivocally states he will not perform. It is likely that a court will find that the admission by Stan that he would not know until June 10 whether there will be enough tomatoes is not, by itself, a breach of contract as there is no such unequivocal assurance by Seller that he will be unable to perform. All he said is he will not know by June 10 whether there will be enough tomatoes for all of his contracts. There is a probability he will breach the contract, but it is not unequivocal amounting to a refusal to perform under the contract. As such, this statement alone is not sufficient to constitute anticipatory repudiation and therefore, at this point, there has been no breach by Best.

#### Assurance of Performance on May 22

As per the same facts, while it did not constitute an anticipatory repudiation, which would have allowed Stan to treat the contract as breached, Stan had reasonable grounds to require assurance of performance. If there are reasonable grounds for a party to doubt performance of the contract by the other party, a party may require the other party to provide reasonable assurance of performance. Until receipt of the reasonable assurance, the party is allowed to suspend performance.

Here, it was a Delta employee who told Best about the crops. There is no indication here of its reliability, although it may be reasonable for Best to rely on it since it came from a bank, and presumably came from a reasonable source. However, even if this fact alone was not sufficient, Stan himself admitted to Best that he will not know until June 10 whether there will be enough tomatoes. The information, coupled with the admission, allows Best to require the assurance of performance from Stan.

The main issue here is whether there was a reasonable request for assurance of performance.

It is arguable whether the telephone call by Best demanding a firm commitment by May 27 would be considered by the court as reasonable since it was not in writing. Moreover, as Best is aware, Stan would not know until June 10 whether there were enough tomatoes to comply with the contract. A court may find that it was unreasonable to make Best wait. However, Stan did secure, as discussed earlier, a valid waiver, of two weeks, which would move the delivery date from July 1 to say July 14. As such, demanding an earlier time for Stan to commit may be held as unreasonable since the delivery date has been delayed for two weeks anyway and therefore, waiting from May 22 to June 10 would not be unreasonable.

On the other hand, it may be argued that by Best that all Best wanted was for Stan to assure him by May 27 that he will deliver the tomatoes, failing which, he will buy tomatoes elsewhere. Best will also argue that he was not asking for anything else, other than an assurance that Stan will comply. It is likely that a court will agree that a firm commitment in this case is reasonable since all that Best is asking is that he will receive assurances that Stan will perform the contract. Considering that Stan did not reply, Best was entitled to treat the contract as breached.

The attempt on June 6 by Best to provide assurance may be treated by the court as being too late. In this case, Stan was aware on May 22 that Best intended to buy tomatoes from another supplier without adequate assurance of performance. As such, the failure by Stan to reply by May 27 would allow Best to contract for the tomatoes from Agro- Farm. At best, Best may argue that Stan's failure to commit led Best to reply on the assumption that performance is not forthcoming and therefore, Best may treat the contract as breached.

Moreover, even if the court found earlier that Stan anticipatory repudiated the contract, Stan is not permitted to retract his repudiation if Best has already detrimentally relied on

the reputation. This is the likely result here since Stan is aware that Best will make other arrangements if Stan did not contact Best by May 27. As such, Stan took the risk that Best actually went through, as is here, with securing an alternative supply of tomatoes.

As such, it is likely that a court will find that this was reasonable and as such, the failure by the Stan to reply would be considered a breach. If a court finds that this was a breach, then Best was permitted to buy the other tomatoes from Agro-Farm. On the other hand, if the court finds that this was not a reasonable request, then Best is liable for the breach of contract.

### Impossibility

It is possible that Stan will argue impossibility. Impossibility of performance will only be excused if it is not objectively possible for Stan to perform. However, it is likely this argument will fail because even if Stan's farm could not have produced the tomatoes, Stan could have easily performed by buying tomatoes from a different supplier, of equal quality. There is no indication here that Best only wanted Stan's tomatoes, or that Stan's tomatoes were of a unique quality that only Stan could provide. In fact, Best simply went to Agro-Farm for the other tomatoes, indicating that this was a generic purchase.

### Impracticability

It is possible that Best will argue impracticability. Impracticability of performance will only be excused if its performance will be highly impractical. The mere fact it has become more expensive does not by itself make performance impractical. As stated earlier, even if Stan's farm could not have produced the tomatoes, Stan could have easily performed by buying tomatoes from a different supplier, of equal quality. As such, if he was not sure if he could deliver, Stan should have committed to delivering the tomatoes anyhow.



## Damages

Applying the aforementioned, it is likely that a court will find that Stan had breached the contract, and as such, Best is entitled to damages.

As a preliminary matter, both parties had a duty to mitigate damages. Regardless of which party was at fault, both Stan and Best fulfilled their duty to mitigate damages by finding another customer, and supplier, respectively.

## Best Damages

The general rule for damages here are expectation damages, which would put the non-breaching party at the same place as though the breach did not occur. Here, the contract price was 5,000 bushels at \$100 per bushel (or total of \$500,000). On the other hand, Best contracted to buy additional tomatoes at \$110 a bushel. As such, the expectation damages here would be the difference between the original contract price and the new contract price, or  $5,000 \times (\$110 - \$100) = \$50,000$ .

Moreover, the non-breaching party is allowed to recover incidental expenses incurred by the breach. Here, there is no showing of incidental expenses.

Best is also entitled to recover special damages in the form of lost-profits if this was specifically pleaded and was a foreseeable loss due to the breach of the contract. Here however Best did not suffer any such damages.

As such, Best would only be entitled to recover the \$50,000 from Stan, since Best did not make any down payment. Stan would not be entitled to recover any damages.

### Stan Damages

On the other hand, if the court finds that Best breached the contract, then it will be liable to Stan for expectation damages and incidental damages as well. The same formula would be applied to compute the expectation damages, which would be the difference between the original contract price and the new contract price, or  $5,000 \times (\$100 - \$95) = \$25,000$ . As said earlier, the non-breaching party is allowed to recover incidental expenses incurred by the breach. Here, there is no showing of incidental expenses by Stan.

As such Stan would only be entitled to recover \$25,000, as Best did not make any down payment.

## QUESTION 2

Deb was charged in a California state court with battery of a spouse or live-in companion. Vic, Deb's live-in boyfriend, was beaten when he stepped out of his car in their driveway. Vic called 911 about two minutes after the beating and reported that Deb, his girlfriend, had beaten him.

At trial, the prosecution called Vic as a witness. He reluctantly took the stand. He refused to identify Deb in open court as the perpetrator. He admitted making the 911 call in which he reported that Deb had beaten him. The parties stipulated that the 911 recording was a business record of the police department, but that Vic's statements on it were specifically not covered by the stipulation. The prosecution properly authenticated the 911 tape, moved the tape into evidence, and played it for the jury.

The prosecution also called Sam, a man who had been Deb's live-in boyfriend eight years earlier. All evidence pertaining to Sam's testimony had been properly disclosed to the defense before trial. Sam testified that Deb had threatened to choke him to death if he left her, and that she had beaten him several times during the time they lived together.

Deb took the stand in her own defense. She testified that she was working at her desktop computer in her office at the time of the assault, 20 miles away. She offered a print-out of a list of file names, which contained the dates and times they were created, indicating they were created on her computer at the time of the beating. She testified that her computer clock was set to the correct time and keeping time accurately on the day of the beating.

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

1. The 911 tape? Discuss.
2. Sam's testimony? Discuss.
3. The computer print-out? Discuss.

Answer according to California law.

## QUESTION 2: SELECTED ANSWER A

### **Battery**

Battery is unlawful touching of the victim's person which results in harm or offense.

### **Proposition 8**

As a preliminary matter, in California, Proposition 8 permits the admission of all relevant evidence in criminal cases, subject to certain exceptions. Hearsay rules and exceptions still apply, as do Constitutional requirements. To be relevant, evidence must be: 1) factually relevant, or make a material element of the case more or less likely, and 2) legally relevant, in that the probative value of a piece of evidence outweighs its prejudicial effect.

### **911 Call**

The first issue is whether the 911 tape recording of Vic's statement is admissible.

#### *Relevance & Authentication*

The 911 call is likely relevant because Vic's statement on the 911 call claiming that Deb battered him, if true, makes it more likely that Deb is actually guilty of battery. The probative effect of such evidence would far outweigh its prejudicial value. Additionally, the facts state the recording has been properly authenticated.

#### *Confrontation Clause*

We must next determine whether admission of the 911 tape violates Deb's rights under

the Confrontation Clause. The Confrontation Clause is a federal Constitutional requirement which requires all criminal defendants the opportunity to confront witnesses against them. It applies only to the admission of testimonial evidence. Testimonial evidence is generally determined under the "primary purpose" test, in which a statement is adjudged testimonial if the primary purpose of the statement is to assist law enforcement or give testimony. 911 recordings are generally not considered testimonial.

Here, Vic's primary purpose in calling 911 was to seek help, rather than to aid law enforcement. He did not intend to give testimony in his communications to the dispatcher. Thus, the call was likely not testimonial. Further, Vic has taken the stand as a witness, giving Deb the opportunity to cross-examine him as to the contents of the recording. Thus, regardless of whether the tape was testimonial, its admission does not violate Deb's Confrontation Clause rights.

### *Hearsay within Hearsay*

The next issue is whether the tape presents a double hearsay problem. Hearsay is an out-of-court statement offered for its truth. It is generally inadmissible, subject to certain exceptions. When an item of evidence presents two levels of hearsay (as is the case with a recording), both levels must be subject to an exception to be admissible.

Here, the prosecution is trying to admit an out-of-court statement by Vic. The tape is a recording of his voice, which is itself another level of hearsay (Vic's statement is level 1, and the recording of his statement is level 2). Thus, the recording presents a hearsay within hearsay problem.

### *Level 1: Vic's Statement*

Now we must determine whether Vic's statement falls under a hearsay exception.

i. Spontaneous Statement

In California, a spontaneous statement (under the FRE, an excited utterance) occurs when a speaker becomes frightened or excited by a startling event, and speaks during or shortly after that event while still experiencing the excitement. This type of statement is admissible as an exception to the hearsay bar, regardless of whether or not a declarant is available.

Here, Vic called the police two minutes after he was allegedly beaten by Deb. Though there are no facts which indicate Vic's mental state at the time of the call, being beaten is likely considered a startling event. The prosecution will likely successfully argue that two minutes is not enough time to recover from the stress or shock of such an experience, considering the physical and emotional ramifications. Thus, the first level of hearsay is likely admissible under the spontaneous statement rule.

ii. Contemporaneous Statement

A contemporaneous statement (under the FRE, a present sense impression) occurs when a speaker is describing events he is witnessing after they occur. This is broader than the federal rule, which permits a description shortly after the events occur. Such a statement is an exception to the hearsay bar, regardless of whether or not a declarant is available.

Given the narrowness of the rule, it is likely not satisfied by Vic's statement. He called the police two minutes after the alleged beating, and was thus not describing events as they occurred. Therefore, his statement is likely inadmissible as a contemporaneous statement.

## Description of Past Physical Harm or Threat of Harm

California provides a hearsay exception which permits the admission of a statement describing past physical harm or threat of physical harm by a declarant who is unavailable. The statement must be made: 1) at or near the time the harm/threat occurred; 2) with circumstances suggesting reliability; and 3) be made to a police or medical professional, written, or recorded. In California, unlike under the FRE, a declarant is not "unavailable" merely because he refuses to testify.

Here, Vic is available because he has taken the stand. His refusal to identify Deb in open court is not sufficient to make him "unavailable" for purposes of the above hearsay exception. Thus, the exception likely does not apply

### iii. Statement of Past Physical Condition

California also permits a hearsay exception when a declarant is making a statement describing a past physical condition, if it is at issue in the case. The statement need not be made for medical assistance; however, the declarant must be unavailable.

Because Vic is available, as discussed, his statement will not be admissible under this exception. Furthermore, Deb would likely argue that, even though the case concerns domestic violence, Vic's physical condition is not "at issue" in the case. Instead, she would likely be successful in arguing that her actions towards Vic are what is at issue.

In sum, the first level of hearsay - Vic's statement on the 911 call - is likely admissible as a spontaneous statement.

### *Level 2: 911 Recording*

The next issue is whether the second level of hearsay is admissible under any exception.

## i. Business Records Exception

A business record is admissible if: 1) it is not made in preparation for litigation; 2) it is made in the normal course of business; 3) it is made by someone with a duty to records; and 4) the recording party has personal knowledge or is transcribing on behalf of someone with personal knowledge.

Here, the recording 1) was not made in preparation for litigation; 2) was made in the normal course of police business; 3) recorded by one with a duty to record (here, the dispatcher); and 4) recorded on behalf of one with personal knowledge (here, Vic). The parties have furthermore stipulated that the 911 recording itself is admissible as a business record. Thus, the recording is likely acceptable under the business records exception to the hearsay rule.

The 911 call will likely be admitted if Vic's statement is considered a spontaneous statement, since the second level (the recording itself) has been stipulated admissible by the parties.

## **Sam's Testimony**

The next issue is whether Sam's testimony is admissible.

### *Relevance*

Sam's testimony is relevant because the fact that Deb has battered a partner in the past makes it more likely she would continue that pattern of behavior in the future. This is true even though the alleged battery occurred eight years prior. Domestic violence is a special exception to the presumption that past bad acts do not predict future behavior, likely due to the habitual behavior of domestic abusers. Though such testimony is also prejudicial, a court would likely find that its probative value outweighs its prejudicial effect, notwithstanding the time that has passed.



### *Character Evidence*

Character evidence can take three forms: opinion testimony, reputation testimony, and prior bad acts. In a criminal case, character evidence of the defendant is typically not admissible unless the defendant first "opens the door" to such evidence by presenting testimony of her good character. However, California provides a special exception for character evidence in domestic violence cases: the prosecution may present evidence of opinion, reputation, and specific bad acts testimony to show a defendant's character for domestic violence.

Here, Sam lived with Deb as her boyfriend eight years prior. He testified that Deb had threatened to choke him to death if he left her, and that she had beaten him several times during the time they lived together. This is adequate "bad acts" testimony which is admissible as character evidence under California's rule pertaining to domestic violence. From Sam's testimony, a factfinder may infer that Deb is more likely to batter Vic, if they accept Sam's testimony as credible.

### *Deb's Statement*

Statements of a criminal defendant, or a party admission, is admissible as a hearsay exception.

Here, part of Sam's testimony covers what Sam said in the past (that she would choke him to death). Since it is an out of court statement, it is hearsay. However, it is admissible, notwithstanding the above character evidence rule, as a party admission.

### **Computer Print-Out**

The final issue is whether Deb's computer printout should be admissible. The computer print-out is not hearsay because it is generated by a machine (here, a computer).

Hearsay only occurs if made by a person.

### *Relevance*

Whether the computer printout is relevant is a close call. Evidence is likely inadmissible if it is likely to cause delay or confuse the issues of the case.

Here, a print-out would show that *someone* used Deb's computer at the time stated.

There are no assurances that the person was Deb. However, such a fact likely goes to the weight of the evidence and not admissibility. Furthermore, the evidence is unlikely to be particularly prejudicial; thus, it is likely relevant to show that Deb might not have been near Vic at the time of the alleged battery.

### *Authentication*

An item may only be admitted to evidence if the moving party presents enough circumstantial evidence to allow a jury to find that the evidence is what it purports to be. Here, Sam is testifying that a print-out list of file names, containing the dates and times they were created, is evidence of the state of her office computer on the day of the battery. Some documents are "self-authenticating."

Here, Deb has testified to the nature of the list, where she obtained it, and that her computer clock was accurate. Whether Deb's testimony is sufficient to authenticate will likely depend on the level of expertise required to create and identify such a list. If any person could create a printout of file dates/times, then it is likely common knowledge and able to be authenticated by a layperson. However, if obtaining such a list is complicated, authentication may require a computer expert to testify that the list is what it purports to be. Thus, the document's admissibility will depend on proper authentication.

Furthermore, the document is likely not considered "self-authenticating."

### *Secondary Evidence Rule*

California's secondary evidence rule (the FRE "best evidence" rule) requires that when a

document is admitted to prove its contents, an original must be provided. This includes duplicates or written copies.

Here, Deb is attempting to admit a file list from her computer at the time in question. A print-out of the list is likely adequate to be considered a "copy" that will satisfy the secondary evidence rule.

Given that the printout is not hearsay and will likely satisfy the secondary evidence rule, it will be admissible to the extent it can be properly authenticated.

In sum, the 911 tape and Sam's testimony are likely admissible against Deb. Her computer print-out is likely inadmissible.

## **QUESTION 2: SELECTED ANSWER B**

### **RELEVANCE**

#### **Logical Relevance**

Evidence must be logically and legally relevant. Under the California Evidence Code (CEC), logical relevance means that the evidence has any tendency to make a disputed fact of consequence to the determination of the action more or less probable.

#### **Legal Relevance**

Evidence must be legally relevant. Under CEC section 352, evidence is legally relevant when its probative value is not substantially outweighed by the danger of unfair prejudice, waste of time, misleading the jury, or needless presentation of cumulative evidence.

### **PROPOSITION 8**

Under California's Proposition 8, in a criminal case, all relevant evidence must be admitted, subject to the court's balancing power under section 352, and subject to additional exceptions noted in my answer below. Because Deb (D) is charged with the crime of battery in California state court, Proposition 8 applies.

#### **I. THE 911 TAPE**

##### **Relevance**

The 911 tape is both logically and legally relevant. The tape has logical relevance because it is highly probative of whether D committed the battery. The tape has legal relevance because it has high probative value that is not substantially outweighed by the

risk of any unfair prejudice or misleading the jury. Although any evidence tends to prejudice the D when it demonstrates guilt, that does not make the prejudice unfair. The 911 tape is also logically relevant to impeach V by a prior inconsistent statement (discussed below).

## **Authentication**

All evidence must be properly authenticated, meaning that there must be enough evidence to support a jury finding that the evidence is what the proponent says it is. Here, the tape was properly authenticated.

## **Personal Knowledge**

Testifying witnesses must have personal knowledge of what they are testifying about. Here, Vic (V) had personal knowledge of what D did to him and what he conveyed on the 911 call.

## **Secondary Evidence Rule**

Any writing, tangible collection of data, or recording must satisfy the Secondary Evidence Rule when offered to prove its contents. In California, the original or a duplicate (including carbon copies, photocopies, and handwritten notes) must be admitted into evidence, unless it is reasonably unavailable (then testimony is allowed). Here, the actual tape of the 911 call was admitted into evidence, and it appears to be an original (or at least, an exact duplicate).

## **Hearsay**

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally excluded unless an exception warrants admissibility. Proposition 8 does not apply to or alter the hearsay rules.

## ***Multiple Hearsay***

The tape presents the problem of multiple hearsay. The recording itself is hearsay (the outer layer), and the statements contained within it, including V's statements, are also hearsay (the inner layer of hearsay). Both layers must fall within an exception to be admissible.

### **Outer Layer of Hearsay**

The parties have stipulated that the 911 tape is a business record of the police department. The CEC recognizes an exception for business records. Thus, the outer layer of hearsay (the tape itself) is admissible under this exception.

### **Inner Layer of Hearsay**

V's statements are hearsay because they are being offered to prove the truth of the matter asserted, i.e. that D battered V. To be admissible, V's statements must be admissible under a hearsay exception. (They may also be admissible nonsubstantively as impeachment of V's credibility, as noted below).

## **Hearsay Exceptions**

### ***Prior Inconsistent Statement***

The prosecution's best argument is that V's statement was a prior inconsistent statement of a testifying witness. Under the CEC, a prior inconsistent statement is admissible as a hearsay exception even when it was not made under oath at a prior proceeding. Here, V is the prosecution's testifying witness, and he refuses to identify D on the stand. Thus, the statements are admissible as a prior inconsistent statement. Moreover, these statements are admissible both substantively and as impeachment evidence.

### ***Spontaneous Statement (Excited Utterance)***

The prosecution will also succeed in showing that V's statement was a spontaneous statement. A spontaneous statement is one that describes a startling or exciting event and that is made when the declarant is still under the stress of that exciting event. Here, V was allegedly beaten by D as he stepped out of his car. He called 911 "about two minutes after the beating." Unexpected physical violence would constitute a startling or exciting event, and it is very likely that V was still under the stress of excitement of that event when he called 911 a mere two minutes later to report D as the perpetrator. Thus, V's statements are likely admissible as a spontaneous statement.

### ***Contemporaneous Statement (Present Sense Impression)***

The prosecution will argue that V's statements are admissible as a contemporaneous statement, but this argument will fail. Under the CEC, this exception only applies when the declarant is describing or making understandable his own conduct while engaged in that conduct. V's statements identified D's conduct. Thus, this exception does not apply.

### ***Statement of Infliction of Violence***

The CEC recognizes an exception for a statement made by a declarant that describes, narrates, or makes understandable an infliction of physical violence or a threat of physical violence. The statement must have been made at or near the time of the event; must be made under circumstances indicating trustworthiness; and must be in writing, recorded, or given to emergency personnel. The declarant, however, must also be unavailable at trial. Here, V's statement would likely meet all of the requirements for this exception (his statements were made 2 minutes after the beating, were recorded, and were communicated to 911), but V is a testifying witness at trial. Thus, because V is not unavailable at trial to testify, this exception does not apply.

### ***Dying Declaration***

The CEC recognizes an exception for a dying declaration. This exception applies in all cases (not just homicide cases or civil trials, as the Federal Rules require) when the declarant is dead and when the statement concerns the cause of death. Here, V is alive and testifying at trial. Thus, this exception does not apply.

### ***Business Record***

V's statements are not admissible under the business records exception. For the exception to apply, the statement must relate to an event or condition (not opinions or diagnoses under the CEC, but courts allow simple ones); must be made in the regular course of business; must be made at or near the time of the matter described; must be made by a person with personal knowledge or transmitted by a person with a duty to transmit the information; and must be authenticated by a custodian or record. It must also be a regular practice of the business to make such records. Here, V was not under any duty to transmit the information to 911. Thus, this exception does not apply to V's statements, the inner layer of hearsay.

### **No Marital Privileges**

V is a live-in boyfriend of D. Thus, V could not invoke any spousal immunity, which is a privilege held by a non-defendant spouse in which that spouse can refuse to testify in any civil or criminal proceeding against the defendant spouse.

### **No Confrontation Clause Problem**

The Confrontation Clause in the Sixth Amendment bars testimonial out-of-court statements by an unavailable witness when the criminal defendant had no opportunity to cross-examine the statement when made. Here, V testified at trial, and his statements



were arguably in response to an emergency. So, they were likely not testimonial.

## **Conclusion**

The 911 tape of V's statements are admissible.

## **II. SAM'S TESTIMONY**

### **Relevance**

Sam's testimony is legally relevant because it makes it more probable that D committed the battery. By showing that D committed a similar battery against a former live-in boyfriend 8 years before V's battery *and* that she committed several batteries during the time Sam and D lived together, this evidence would make it more probable that D has a violent nature and propensity to commit batteries against boyfriends, which in turn, would make it more probable that she battered V. The testimony, however, likely poses a risk of unfair prejudice because it is improper character evidence, as discussed below.

### **Character Evidence**

Evidence of a person's character trait to prove that the defendant acted in conformity with that character on a given occasion, or that the person has a propensity to act in conformity, is referred to as character evidence. Proposition 8 does not apply to character evidence rules. Here, Sam's testimony is likely being offered by the prosecution to show that D has a character for violence and propensity to commit battery against boyfriends. Thus, this evidence is character evidence.

### **Defense Must Open the Door**

In a criminal case, evidence of a defendant's character is not admissible in a prosecution's case in chief. The defendant, however, may present evidence of the defendant's pertinent good character, which the prosecution may rebut. Here, there is

no indication that D had offered any evidence as to her peaceful nature or as to any other good character trait. Thus, Sam's testimony was inadmissible to prove D's character based on that justification.

However, the CEC recognizes an exception for character evidence in cases of sexual assault, child molestation, elder abuse, and domestic violence. Here, D is charged with battering her live-in boyfriend, which likely qualifies as domestic violence. Thus, under this exception, Sam's testimony should have been admitted.

### **Not Independently Admissible**

At issue is whether Sam's testimony is offered for a non-character purpose. Evidence of a defendant's past acts may also be independently admissible if not offered to prove character or propensity. Evidence of past acts, for example, are admissible to prove motive, identity, absence of mistake, and a common plan or scheme. Here, the prosecution could argue that Sam's testimony is being offered to prove the identity of the assailant (Deb) or to prove that D has a common plan or scheme of using battery to prevent boyfriends from leaving her. Sam testified that D threatened to choke him to death "if he left her." As the prosecution would argue, this shows a common plan of D to coerce boyfriends into staying. Neither of these arguments are persuasive. First, evidence is usually allowed to prove identity when there is a unique modus operandi of the defendant. Here, the fact that someone committed battery in the past is indistinguishable from character evidence. Second, it is unlikely that a court, based only on D's threat to S, would find that D had a "common plan or scheme" to entrap boyfriends unless there is other evidence that could prove such a plan. Unfortunately, many people threaten significant others if they attempt to leave, and this by itself is not sufficient to show a scheme.

### **Impeachment of Deb**

The prosecution may also argue that Sam's testimony is offered to impeach Deb's

credibility, given that Deb has testified in the case. Under Proposition 8, prior acts of moral turpitude are admissible, subject to 352 balancing, as impeachment. Moral turpitude includes violence and would likely include these batteries against Sam. However, the court would likely exclude the evidence under its section 352 balancing power because of the high risk of unfair prejudice. Even with a limiting instruction, a jury would be hard-pressed not to view these past batteries as a form of character evidence.

## **Conclusion**

Sam's testimony is likely admissible given that it is character evidence in a case involving domestic violence. However, if this exception did not apply it would otherwise be inadmissible for character purposes and would likely be inadmissible as impeachment evidence because of the high risk of unfair prejudice.

## **III. COMPUTER PRINT-OUT**

### **Relevance**

The computer print-out is legally relevant because it supports D's alibi, i.e. that she could not have committed the assault because she was working at her office 20 miles away. The evidence is legally relevant because of its high probative value and because it does not present a risk of unfair prejudice, waste of time, or misleading the jury.

### **Authentication**

As noted above, evidence must be authenticated. In other words, there must be enough evidence to support a jury finding that the evidence is what the proponent says it is. Here, D testified that her computer clock was set to the correct time and that it was keeping time accurately on the day of the beating. This may be at least sufficient to show that a bona fide print-out of the activity from D's computer for that day would be accurate in terms of its time entries. But D's testimony does not actually provide any other

evidence that the print-out came from D's computer (after all, many computers have accurate time-keeping) or that it was unaltered or unmodified. To reach a definitive conclusion, the court would need more evidence on what the print-out specifically entails (e.g. if it indicates D's user ID) and what other testimony is offered.

### **Secondary Evidence Rule**

As noted above, the Secondary Evidence Rule would apply to such writings and tangible collections of data. A computer print-out of an original would suffice.

### **Not Hearsay**

The computer print-out is not hearsay. Hearsay does not include print-outs of machine-created data that was not a result of human assertions. But hearsay would include a declarant's out-of-court statements even if recorded or transcribed on a computer. Here, D's computer likely automatically generated these time stamps and records of the activity and file names. Thus, these were not assertions by a human declarant, so the hearsay exclusion rules would not apply.

### **Conclusion**

Assuming that authenticity objections can be overcome, the computer print-out should be admitted.

### QUESTION 3

Betty and Sheila, who have been friends for a long time, were charged with armed robbery, allegedly committed in a convenience store. They decided to hire Betty's uncle, Lou, as their lawyer. Lou is an estate planning attorney and has never represented defendants in criminal cases before.

Both Betty and Sheila met with Lou together. In that meeting, both of them emphatically denied that they robbed anyone. Lou agreed to represent them in their criminal cases and gave them a retainer agreement, which states:

**Scope of representation.** Lawyer agrees to represent Clients through any settlement or trial.

**No conflicts of interest.** From time to time, Lawyer may represent someone whose interests may not align with that of Clients. Lawyer will make every effort to inform Clients of any potentially conflicting representations.

**Fees and expenses.** Lawyer will advance the costs of prosecuting or defending a claim or action or otherwise protecting or promoting Clients' interests, but Clients are ultimately responsible for repaying Lawyer for all costs that Lawyer advances. If Clients are unsuccessful at trial, Clients will owe only costs advanced by Lawyer and zero fees. If Clients are successful either before or at trial, Lawyer will be paid \$10,000 plus any costs incurred.

Betty and Sheila each signed the retainer agreement.

Two days later, Lou represented both defendants at the joint arraignment. He angered the court during the arraignment because of his unfamiliarity with criminal procedure, and the court relieved Lou and appointed new counsel for Betty and Sheila. Betty and Sheila agreed to new counsel.

Although Lou had not incurred any costs by that point, Lou asked Betty and Sheila to pay him a total of \$2,000, divided up however they wanted, to reimburse him for his time spent on the case.

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

Answer according to California and ABA authorities.

## QUESTION 3: SELECTED ANSWER A

Lou (L) has committed a number of ethical violations that would subject him to discipline under both the CA and the ABA rules.

### **Duty of Loyalty**

The first issue is L's breaches of the duty of loyalty. A lawyer has a duty to act in the best interests of their client, which means avoiding potential and actual conflicts of interest.

### **Potential Conflicts of Interest**

L's representation raises a potential conflict of interest by representing two criminal co-defendants.

Representing two co-defendants raises the significant possibility that their interests will become adverse to each other in the future.

Under the ABA and CA rules, an attorney may represent two clients with a potential conflict of interest if he (1) reasonably believes that the representation of either client, the lawyer's own personal interests, or the interests of his family will not materially limit his duties to the other; (2) informs the client in understandable language of the conflict; and (3) obtains written consent. Under the CA rules, the belief that representation won't be materially limited doesn't have to be objectively reasonable (it can be subjectively reasonable based on what the attorney knew).

So under the ABA rules, an attorney must advise a client of any conflict of interest, and obtain consent, memorialized in writing (if the client consent was initially oral). CA requires written consent to all conflicts of interest. Additionally, CA requires the lawyer to

advise on all potential and actual conflicts, and obtain additional consent if a conflict actualizes.

Here, L was representing two co-defendants in a criminal case. Even if both maintain innocence now, there's a strong possibility that one might want to testify against the other in exchange for favorable sentencing, or to mitigate their own culpability as compared to the co-defendant. A disciplinary board might view that as making representation unreasonable. L might point to the fact that Betty (B) and Sheila (S) have been friends for a long time, and both emphatically deny guilt, so they are less likely to become adverse. But that argument is weak, since L has a duty to convey to each client the best possible legal course of action, and it's very likely that B and S will have conflicting interests. Under the CA rule, L probably has a stronger argument that he subjectively believed it was possible, given his knowledge of B and S, and the defenses they were making.

More information about the strength of their relative cases might be useful here. But on the whole, under the ABA standard, it's probably a close call but representation is likely unreasonable, and under the CA rule, L can probably prevail under the subjective test.

But, L likely failed to adequately warn of conflicts. L's retainer contains general language about conflicts of interest. But he doesn't specifically warn B and S about the risk that his representation would be limited. Nor does he inform them that information between them won't be protected by attorney-client privilege if he represents both, so there's a real risk their statements to him would be used against them.

Because his retainer is wholly inadequate at advising B and S about the risk, the fact that they signed the retainer likely doesn't constitute consent. Therefore, L would likely be subject to discipline under both the ABA and CA rules for failing to get adequate consent to a potential conflict of interest.

## **Actual Conflicts of Interest**

The next issue is that L failed to reveal an actual conflict of interest, because he has a personal conflict.

An actual conflict of interest is treated under the same standard as above. But under the CA rules an attorney just needs to advise a client of a personal conflict in writing. They don't need written consent.

Here, L is Betty's uncle, so they are close family. That raises an actual personal conflict of interest. L is much more likely to favor B's representation; he is likely to be uncomfortable with taking action that will harm B's position, and he likely faces family pressure to ensure that B gets the best possible outcome. He doesn't face similar pressure with S.

So that's an actual personal conflict of interest.

L failed to advise either client of that risk, let alone in writing, because the retainer is completely silent on that issue.

Therefore, L would also be subject to discipline under both ABA and CA authorities for failing to adequately disclose an actual, personal conflict of interest.

## **Duty of Confidentiality**

L's representation also raises an issue with the duty of confidentiality.

A lawyer has an obligation to keep all of a client's non-public information private, and not to use that information against them. There are limited exceptions for: (1) when legally



required to do so by a statute, ethical rule, or court order, when the client consents, when the representation is at issue (i.e. in a fee or malpractice dispute); when necessary to prevent death or serious bodily injury; or under the ABA to prevent your services from being used to commit a financial crime or fraud.

When an attorney represents co-clients, attorney client privilege and confidentiality is waived as between them. So B and S would be able to use the confidential information of the other against each other. An attorney may represent co-defendants, but must advise them of the risk from losing confidentiality, and obtain written consent.

Here, L made no mention of confidentiality. There's no indication, though, that L has yet disclosed any information, so this is probably more a violation of the duty of loyalty, than a direct violation of the duty of confidentiality: L failed to warn his clients about the risk, and adequately protect their confidentiality, and act in their best interests.

Therefore, L would likely be subject to discipline under the ABA and CA rules for failing to receive informed consent for this part of the arrangement as well.

## **Financial Duties**

A lawyer also owes a client a number of financial duties. Here L would likely be subject to discipline for violations of these as well.

## **Improper Fee Agreement**

The issue here is whether L entered into an improper fee arrangement, and made the appropriate disclosures, under the ABA and CA rules.

The ABA prohibits contingent fees in criminal and domestic cases. CA prohibits contingent fees in criminal cases, or in a domestic case where the contingent fee "promotes the dissolution of a savable marriage."

A contingent fee is a fee where payment depends on the outcome. Usually the lawyer is only paid upon the resolution of a favorable result.

Here, L entered into a fee agreement where he was only paid if they were successful at trial. L might argue that he wasn't recovering a percentage, just a flat fee for certain results. But since this is a criminal case, making the fee contingent on the outcome of the case seems like the only way to enter into such an arrangement. So the ABA and CA disciplinary boards would probably find this was a contingent fee.

Therefore, L entered into an impermissible contingent fee arrangement in a criminal case.

The next issue is whether L complied with the formal requirements for a fee arrangement. CA requires all fee agreements to be in writing, unless the client is a corporation, the fee is less than \$1000, or the fee is for routine work for a regular client.

None of these exceptions apply, so the fee would have to be in writing signed by the client, with informed consent. Here, that information is contained in the retainer, and it was signed by B and S. But there is still a potential issue with the informed consent. It's unclear whether L went over the fee arrangement, and it's not clear the retainer is in sufficiently plain language.

So in all, the retainer could satisfy the writing requirement, but more information about the nature of the fee meeting would probably be necessary.

Next, both the ABA and CA require certain information in a contingent fee arrangement. The ABA requires the attorney's percentage of recovery; whether it's taken out before or after expenses; and who pays for which expenses. CA also requires the lawyer to advise the client how work not paid for under the contingency will be compensated.

Here, L arguably meets neither requirement. Specifically, he does not explain how work outside the contingency will be paid for. For example, the agreement is completely silent about how L will be compensated in the event that one of the clients pleads guilty. It's unclear whether that would be counted as success at trial, or whether L would recover nothing. That information would be highly relevant to the clients in determining the veracity of L's advice. Under the ABA, by analogy to a civil case, it's like L is only explaining what his percentage would be with the best and worst possible outcomes. Under the CA rules, he's failing to explain how work outside the contingency will be compensated.

Therefore, L is likely subject to discipline under both these rules as well.

### **Excessive Fee**

The size of L's fee also raises an issue. Under the ABA rules a lawyer's fee must be reasonable in light of the experience of the lawyer, time and preparation required, nature of the case, and the result achieved. Under the CA rules the fee must not be unconscionable.

Here, a board might argue that L was unqualified for the case, and didn't plan on doing much work, \$10000 is unreasonable. On the other hand L might argue that this is a complex robbery case, where he represents 2 defendants, and he is charging a flat fee, so \$10,000 makes sense through trial. The outcome likely depends on more facts. Under the higher CA standard that's obviously a harder argument. But the board would likely look to the fees for similar work to see if this is unreasonable/unconscionable.

So this might be grounds for discipline depending on additional facts.

### **Request for Payment After Discharge**

L also requested payment for \$2000 for the work already performed. Generally, when a

lawyer is discharged by a client they represent on contingency, they may recover through quantum meruit for the work already done. Here though, L appears to have added almost no value to B and S's case. Additionally, if a lawyer is discharged by the court they may not be able to recover. Finally, this was an unethical fee arrangement, so it's unlikely the court would enforce a portion of it to compensate L.

Therefore, although a lawyer might ordinarily be entitled to quantum meruit, L probably isn't entitled to the \$2000, and demanding that payment is unreasonable.

### **Duty of Competence**

Finally, L has violated his duty of competence. A lawyer has an obligation to competently represent his clients.

Under the ABA rules, a client must employ the time, preparation, skill, expertise, knowledge, and experience necessary to reasonably represent the client. If a client does not have those factors, he must learn the relevant material if possible without undue delay or associate with a competent attorney.

CA looks to a similar standard, but will only discipline a lawyer for repeated or reckless violations of the duty of competence.

Here, L was an estate lawyer, with no criminal experience. There's no indication he associated with a competent attorney. And it seems unlikely that he took time to prepare since the court was so frustrated with him they dismissed him as counsel. Under the ABA standard then, it's very likely that L failed to employ the requisite experience, skill, knowledge, time, and preparation in the case.

Therefore under the ABA rules, it's highly likely that L would be subject to discipline. Under the CA rules it's unclear whether this is L's first violation, so he might argue that his conduct is not repeated. But there's a strong argument he acted recklessly. An

armed robbery prosecution has a potential to seriously and permanently harm the interests of the lawyer's client(s). Failing to act competently at any stage could waive issues on appeal, or cause a host of problems that lead to long-term incarceration, and a felony conviction. That risk would be apparent to any attorney undertaking a serious criminal case. Taking on such a case without apparently any preparation, or association when you have no prior background in that area is arguably disregarding a substantial and known risk.

Therefore, even under CA's standard, L probably not only violated the duty of competence, but would be subject to discipline for reckless conduct.

### **Duty of Decorum in the Court**

A lawyer also owes duties to the court.

Among others, a lawyer has a duty to uphold decorum in the court, and behave professionally and appropriately at all times. They should act in a way that builds the confidence in the legal profession. Arriving at an arraignment with such serious lack of preparation that the court was forced to appoint alternative counsel, and discharge the lawyer arguably violates those duties.

The lack of preparation is clearly disruptive to the court proceedings, and inconveniences the court and the parties, so it violates the duty to uphold decorum in the court. Such flagrant lack of preparation also undermines public confidence in the judicial system, by appearing to undermine the integrity of counsel. That's particularly important in a criminal prosecution, where there's a strong interest in ensuring adequate representation on both sides.

Therefore, L may be subject to discipline for violating (some of) his duties to the court as well.

In all, under both the ABA and CA rules, L is likely subject to discipline for violations of the duty of loyalty, the duty of confidentiality, financial duties, duty of competence, and duty of decorum in the court.

## QUESTION 3: SELECTED ANSWER B

### Duty of loyalty

A lawyer has a duty of loyalty to his clients. The duty of loyalty prohibits a lawyer from representing an individual with interests that are adverse to that of a current or former client. A lawyer may nevertheless represent parties with conflicting interests if he reasonably believes that he can provide adequate representation despite the conflict, if he can inform both clients of the conflict without breaching his duty of confidentiality, and if he obtains the consent of both clients to proceed. In California, the lawyer needs only a subjective belief that he can provide adequate representation. Additionally, California requires that the lawyer obtain written consent from the clients. Moreover, the California rules require a lawyer to get the consent of the clients when the potential is merely a potential conflict and again when the conflict ripens into an existing conflict.

Here, a potential conflict exists between the clients because they are co-defendants. During the course of the criminal trial, it is possible for the interests of Betty and Sheila to become adverse to each other. For example, Betty and Sheila might not agree on a defense to assert or they might not agree on plea deal. Because there is a potential conflict of interest, Lou is required to inform the clients of the conflict of interest and to get their written consent before proceeding. There is nothing in the facts to indicate that the clients consented to the potential conflict of interest. However, under the ABA rules, Lou has not breached his ethical duties because the conflict is merely a potential and not an existing conflict.

Therefore, it is likely that Lou breached his ethical duty in CA by not obtaining written consent from the clients. However, it does not appear that he has breached his duties under the ABA rules.

### Personal conflicts of interest.

The duty of loyalty also requires that the lawyer disclose his clients of personal conflicts that he has. In California, personal conflicts simply require disclosure and not consent and personal conflicts are not imputed to other lawyers at the attorney's firm.

Here, Lou likely has a personal conflict of interest because Lou is Betty's uncle. The fact that Lou is Betty's uncle indicates that he might tend to act more in Betty's best interest rather than acting in the best interest of Sheila. This is purely a personal conflict of interest. In California, Lou is simply required to disclose the conflict to Sheila. Under the ABA rules, however, Sheila is required to consent to the conflict and the consent must be memorialized in writing. The facts here do not indicate that there has been disclosure and do not indicate that Sheila has consented to the conflict.

Therefore, Lou has breached his ethical duty by not disclosing her personal relationship to Betty to Sheila.

### Lou's retainer agreement

The facts here indicate that L will make every effort to inform clients of potentially conflicting representations. This disclaimer is not enough to satisfy the consent requirement for a conflict of interest and does not relieve Lou of any liability for not receiving consent for conflicts of interest. This disclaimer has no effect on Lou's duty of loyalty to Betty and Sheila.

Moreover, the agreement states that the lawyer will make every effort to inform clients of any potentially conflicting representations. According to the CA rules, this is not sufficient and Lou must obtain written consent from the clients for any potential conflicts of interest.



## **Duty of competence**

A lawyer has a duty of competence which requires him to provide competent representation to his clients by using the appropriate skills, knowledge, and thoroughness. A lawyer who is not competent in a particular area may nevertheless take a case in that area if he can either 1) become competent before trial through research and familiarizing himself with the area of law or 2) associating with a lawyer who is competent in the area. Additionally, in an emergency, a lawyer may act in an area in which he is not competent, as long as he stops the representation when the emergency is over. In California, a lawyer breaches his duty of competence only if he intentionally, recklessly, or repeatedly acts without competence.

Here, Lou is an estate planning attorney who has never represented defendants in a criminal case before. Lou has not breached his duty of competence merely by taking the case because he can potentially become competent in the area or he can associate with an attorney who is competent in the area. The facts, however, do not indicate the Lou has done either of these things. Lou clearly has not familiarized himself with the area of law because the court was angered during the arraignment with Lou's unfamiliarity with criminal procedure. Additionally, there is nothing in the facts that indicates that Lou has associated with a competent attorney. Therefore, under the ABA rules, it is likely that Lou has breached his duty of competence.

Under the CA rules, a lawyer breaches his duty of competence only if he acts incompetently intentionally, recklessly, or repeatedly. In this instance, Lou has not repeatedly acted without competence because there is no indication that it was Lou's normal practice to accept representation for clients in areas in which he is not competent. There is a strong argument that Lou has intentionally or recklessly acted without competence. If Lou has not made any effort to familiarize himself with the area of law, then he has intentionally acted incompetently. However, if Lou truly made an effort to become competent but nevertheless was unable to become competent, it is unlikely that he acted intentionally or recklessly.

Therefore, Lou has clearly breached the ABA rules by acting incompetently. His actions preceding the arraignment would indicate whether or not he has breached his duty under the CA rules by intentionally or recklessly acting incompetently.

## **Fee agreement**

### Contingent fees

In a contingent case, the lawyer must give the client a written fee agreement that states 1) the lawyers % of the recovery, 2) expenses to be paid out of the recovery, 3) whether the lawyer's fee will be taken before or after expenses are taken out, 4) other expenses that the client will be required to pay. Additionally, under both the ABA and CA rules, contingent fee agreements are not permitted in criminal cases.

Here, Lou clearly has a contingent fee agreement because his payment is contingent on whether or not the clients are successful either before or after trial. Additionally, this is a criminal case because Betty and Sheila were charged with armed robbery. Therefore, it was not proper under either the ABA or the CA rules for Lou to enter into a contingency agreement with Betty and Sheila because of the criminal nature of their case. Moreover, even if it were proper for Lou to enter into a contingency agreement with his clients in this instance, the contingency agreement would not meet the requirements under the ABA and CA rules because the agreement states that Lou will be paid \$10,000, which is not a percentage of the recovery.

### Non-contingent fees

If this is not a contingent agreement but rather is a fee agreement, certain requirements must be met. The agreement must state how the lawyer's fee is calculated, what the duties of the clients and the lawyer are, and what expenses will be paid out of the fee. In

California, the agreement is required to be in writing unless it is for 1) less than \$1000, 2) a corporation, 3) regularly performed services for a regular client, 4) it is impracticable, or 5) there is an emergency.

Here, the fee agreement does not indicate how L's fee is calculated: it merely states what the fee is, \$10,000, and when the fee is incurred: if the client is successful in their case. Although the fee agreement is in writing in this instance as it was contained in the retainer agreement, it does not meet all the requirements for a fee agreement because it does not provide enough details about how the fee is calculated and it does not provide information about the lawyer's and client's duties.

Therefore, Lou has breached his ethical duties because he has used a contingent agreement in a criminal case. Even if the agreement were not contingent, he has breached his ethical duties because he did not include enough information about how the fee is calculated to satisfy the CA and ABA rules.

### **Fee amount**

#### The \$10,000 flat fee

Under the ABA, the fees that a lawyer charges must be reasonable. Under the ABA, a lawyer's fees cannot be unconscionably high. Some factors used to determine whether a lawyer's fees are reasonable are the time he spends on the case, his expertise and experience, the difficulty and novelty of the matter, and the result obtained.

Here, it is difficult to determine whether Lou's fee of \$10,000 is unconscionable or unreasonable. Given that the fee is obtained only if the client is successful at trial, it could be considered reasonable. However given that it is a flat fee instead of a percentage of the client's recovery indicates that it might not be reasonable or conscionable, depending

on what the client actually recovers at trial. Additionally, the fee does not take into account how much work that Lou puts in the case. Under the agreement, it is possible for Lou to get the \$10,000 fee if the case is dismissed early on in the proceeding before Lou has performed any work.

Given all these facts, it is likely that the \$10,000 flat fee is not reasonable or conscionable under the CA and ABA rules.

### The \$2,000 charge

The \$2,000 charge that Lou eventually charged to Betty and Sheila likely is not reasonable or conscionable since he had not yet incurred any costs. Additionally, the arraignment was only 2 days after Betty and Sheila came to Lou for help. This means that Lou is seeking to be paid \$1,000 per day. This fee is definitely unreasonable and unconscionable, especially given that Lou apparently made no effort to learn criminal procedure or criminal law since the judge was angered during the arraignment due to Lou's unfamiliarity with criminal procedure.

Therefore, Lou violated his ethical duty by asking Betty and Sheila to pay him \$2,000 for a mere 2 days of incompetent work.

### **Loans to clients**

Under the ABA rules, a lawyer is prohibited from making loans to his client unless 1) the loan is an advance of litigation costs to an indigent client or 2) the loan is an advance of litigation fees in a contingent case. Under the CA rules, a lawyer is allowed to make a loan to his client for any reason so long as the client and the lawyer enter into a written loan agreement. Additionally, in CA, a lawyer is prohibited from promising to pay a client's debts in order to persuade the client to agree to have the lawyer represent them.

Here, Lou has promised to advance the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interest. The facts here do not indicate that either Betty or Sheila are indigent, so this agreement would not be permitted on this grounds. However, the fee arrangement here appears to be a contingent fee basis since Lou will recover only if the clients are successful at trial. Therefore, the lawyer could appropriately advance the litigation costs in this instance under the ABA rules.

This agreement is likely valid under the CA rules because the clients have entered into a written loan agreement with Lou. The agreement is written because it is contained in the retained agreement, which was signed by both Betty and Sheila.

Therefore, Lou has not breached his ethical duties under the CA rules because he has entered into a written loan agreement with the clients. Additionally, he has not breached his duties under the ABA rules if this agreement can validly be classified as a contingent fee agreement.

## **Withdrawal**

A lawyer is required to withdraw from a case when he is fired or when continuing representation would violate a law or ethical duty. Upon withdrawal, the lawyer must return all materials related to the representation to the clients. In CA, the lawyer is prohibited from keeping the materials in order to persuade the client to pay the lawyer any fees owed.

In this instance, Lou has been removed from the case by the judge. This is likely akin to being fired. If this act is not alone enough to constitute Lou being fired, it is likely that the clients agreeing to representation by new counsel is enough for Lou to be considered fired, thus requiring that he withdraw from the case. The fact that Lou's retainer agreement states that the Lawyer agrees to represent Clients through any settlement or

trial does not affect his ability to withdraw from or to be fired in the case. Here, Lou contends that Betty and Sheila owe him \$2000 to reimburse Lou for the time that he spent on the case. Under the CA rules, Lou would not be permitted to hold the materials of the clients hostage while he waits for them to pay this amount. Under both the ABA and CA rules, Lou is required to give the materials related to the representation back to the clients.

Therefore, it is not clear that Lou has breached an ethical duty yet. But it is possible for him to breach an ethical duty by not withdrawing or by not promptly returning the clients' materials.

## QUESTION 4

Wilma, a California resident, was employed as an accountant for many years. She retired in 2010 and received a pension. Wilma received part of the pension as a lump sum and the rest in monthly installments deposited into an account in her name at Main Street Bank. She used the lump sum as a down payment on a townhouse. The title to the townhouse and the mortgage are in Wilma's name.

In 2011, Wilma met Harry, also a California resident, who worked in a local store. Wilma and Harry married in 2012. Harry opened an account at Valley Bank in his name and deposited his salary from the store into the account. Wilma did freelance accounting work and deposited the pay from that work into her Main Street Bank account.

During their marriage, Wilma and Harry used funds from Harry's account to pay the mortgage on the townhouse in which they both lived. They paid all their household expenses from Wilma's account. Wilma's pay from her accounting work did not cover all their expenses and her monthly pension installments paid the rest of their expenses.

In 2013, Wilma and Harry bought a motorboat using funds from Wilma's account. Although they would both use the boat, title was taken in Wilma's name.

In 2014, Harry was injured when a driver, Dana, negligently struck him with her car.

In 2016, Wilma and Harry permanently separated, and Harry moved out of the townhouse and stopped making mortgage payments.

In 2017, Harry settled his claim against Dana for \$30,000.

In 2018, Harry instituted dissolution proceedings.

What are Wilma's and Harry's rights and liabilities, if any, with regard to:

1. The townhouse? Discuss.
2. The motorboat? Discuss.
3. The personal injury settlement funds? Discuss.

Answer according to California law.

## QUESTION 4: SELECTED ANSWER A

California (CA) is a community property (CP) state. There is a community presumption, meaning that all property acquired during marriage is CP. This includes wages of either spouse and labor of either spouse during marriage. There are areas of separate property (SP): (1) property acquired before or after marriage, (2) property acquired during marriage by either spouse through gift, will, or inheritance, (3) Property acquired from SP funds, and (4) profits, rents, and issue of SP. The burden is on the spouse opposing SP to defeat the CP presumption. Courts use the source rule to determine the character of property by tracing the source of funds used to acquire the property.

The marital economic community (MEC) begins at marriage and ends at death of either spouse, divorce, or with the intent of either spouse to not resume the marital relationship coupled with conduct indicating that intent. If spouses maintain the facade of marriage the MEC has not ended.

Here, Wilma (W) and Harry (H) married in 2012. This is when the MEC began. The MEC likely ended in 2016 when W and H permanently separated. Although separation in and of itself is not sufficient to end MEC, it shows the intent of both spouses not to resume the MEC. The fact that Henry moved out is conduct that supports that intent. However, if Henry moved out for the intention of improving and coming back together, the MEC would officially end when H instituted divorce proceedings in 2018.

Generally, on divorce, CP is divided equally in kind, meaning on a per-item basis (not in the aggregate), unless a special rule requires deviation from the equal distribution requirement. Earning power is not generally not considered, other than considering spousal support or debt. Upon divorce, each spouse is entitled to their own SP. Upon death, one spouse's CP inures to the other spouse, such that the surviving spouse ends up with 100% of CP. The



surviving spouse is entitled to at least 1/3 of decedent- spouse's SP, depending on how many, if any, heirs or issue the decedent left behind.

Note, that all CP is divided equally between the spouses. Thus, even if property below is awarded CP, it is still split between the two spouses upon marriage, with the exception of personal injury funds.

## **TOWNHOUSE**

The issue is whether the townhouse is CP or SP. As stated above, property acquired before marriage is presumptively SP. Here, the townhouse was purchased by W prior to 2012 when H and W married. Additionally, wages of either spouse earned prior to marriage is SP. The court will trace the source of the funds used to acquire the townhouse to determine its character. Here, the source of funds is W's pension before she was married. To determine the character of pension, courts use the time rule. Courts consider the amount of time the spouse worked during marriage to get the pension divided by the amount of time total the spouse worked to get the pension. The rationale for the formula is that spouse's labor during marriage is CP and any funding earned from spouse's labor is CP. However, W received the pension before she met or married H. As such, the entire pension is her SP. As such, the townhouse was initially SP.

Spouses may alter the character of assets during marriage with an agreement known as a transmutation agreement. A transmutation agreement may alter the character of CP to SP, SP to CP, or one spouse's SP to another spouse's SP. A valid transmutation agreement must be in writing, accepted by the adversely affected party (signed), and expressly state that ownership of the property is being transferred. One exception to the writing requirement is gifts of personal property given by one spouse to another spouse that are not substantial in value and used in the home. Here, there were no transmutation agreements because there was no writing. Rather, after the MEC, the spouses began paying off the mortgage on the townhouse with funds from Harry's account, which is CP (as discussed below). Harry might argue that the fact that both spouses lived in the townhouse changed

the character of the townhouse. However, that is insufficient. There was not a valid transmutation agreement. As such, using CP to pay the mortgage on SP did not alter the character of the townhouse from SP to CP.

When property is acquired in joint and equal form, there is a presumption that the property is CP and if any SP was used to purchase the property is subject to the Lucas and anti-Lucas statute. Here, the townhouse was solely in W's name alone. Therefore, the presumption that arises from joint and equal form and the anti-Lucas (which applies on divorce) and the Lucas (which applies on death) need not be considered.

Harry may argue that the fact that CP funds are used during marriage to pay off the mortgage on the townhouse makes the property CP. The funds used to pay down the debt constituted deposits of H's salary at the Main Street Bank. As stated above, wages earned during marriage by either spouse are CP. The fact that such wages are deposited into an account in the sole name of just one spouse does not alter the character of the funds. Therefore, the funds in Harry's account deposited after 2012 are CP. The funds beforehand are SP.

Here, the Court will trace back the funding used for the house. As stated above, the downpayment was W's SP, but for the reasons stated in the previous paragraph, the mortgage was paid with CP.

When CP funds are used towards SP property, the character of the property does not change. Rather, the community gets a pro rata ownership share in the property. Courts use the principal debt reduction method to discern the community's ownership share in the property. The community is entitled to the amount it expended to "feather the nest" of CP. Additionally, the community is entitled to the pro-rata increase in value of the property as to its pro-rata ownership share. As such, the townhouse is SP, and under the principal debt reduction method, the CP will receive a pro rata share as follows: amount of CP funds expended on paying down the debt divided by the total amount of SP and CP money used to

pay off the debt X the increase in value. Furthermore, the CP is entitled to the funds expended on paying down the debt from H's account.

If the court finds that the property was somehow held in joint and equal form, upon divorce, under the anti-Lucas statute, the SP spouse is entitled to a refund for downpayment, and any improvements and principal payments. Under this unlikely theory, W will receive a refund for the downpayment.

With regards to the mortgage, the lender's primary intent when giving the loan determines the character of the loan. If the lender looks to SP as security, the mortgage is likely SP. However, if the lender looks to the spouse's standing in the community or CP property as security, the loan is likely CP. Here, the loan was given before marriage. Therefore, the mortgage is entirely SP. Upon divorce, W will be responsible for the mortgage unless justice requires otherwise.

## **MOTORBOAT**

The issue is whether the motorboat is SP or CP considering that it was purchased during the marriage, but from funding from Wilma's account. As stated above, property purchased during marriage is presumptively CP. Here, the motorboat was purchased during the marriage and therefore is presumptively CP. W will urge the court to use the source rule to trace back the funds used to purchase the motorboat. Here, the funds used to purchase the motorboat were funds from Wilma's bank account. Funds from Wilma's bank account include the pension plan monthly installments as well as her pay from freelance accounting.

W may argue that the motorboat is SP because it was purchased in her name alone and with funds from a bank account held in her name alone. W will not prevail on this argument because depositing wages earned during MEC into an account held in the name of only one spouse does not alter the character of the asset. Additionally, holding property in the name of one spouse does not defeat the community presumption that arises when property is

acquired during marriage. As such, W will not prevail on these arguments. For the reasons stated above, neither action is a valid transmutation agreement (no writing).

As stated above, the pension plan monthly installments are W's SP because she worked as an accountant for many years prior to the marriage and thus, under the time rule, none of her labor during the marriage (CP labor) was used to earn the pension. However, W also deposited her pay from the freelance accounting jobs into her Main Street account as well. After MEC, W did freelance accounting. Since these wages were earned during the marriage, W's bank account in Main Street is commingled with both CP and SP.

## **COMMINGLED FUNDS**

H might argue that W's pension plan benefits are CP because they were commingled with CP. However, commingling SP and CP funds does not alter the character of either spouse. When CP and SP funds are commingled, the burden is on the spouse claiming that property acquired with funds from that account is SP to show that SP funds were used to acquire the property. Here, W may claim that her pension benefit funds only were used to purchase the motorboat and thus, under the source rule, the motorboat is SP.

W can satisfy the burden using two methods of accounting: (1) direct in-direct-out method and (2) the exhaustion rule. Under the direct-in-direct-out rule the spouse claiming SP must show that there were sufficient SP funds in the account and that the spouse had the intent to purchase the asset with SP funds. Alternatively, under the exhaustion rule, the spouse claiming SP must show that all the CP funds were used in the account and all that was left in the account was SP. Under the family expense presumption, expenditures for community items, such as living, rent, food, etc. are presumptively made from CP. However, inevitably due to commingling and inadequate records, SP funds may be used for family expenses. If there are not adequate records and commingling occurs, it is presumed the SP funds used for family expenses are a gift to the community.

Here, H and W paid all of their household expenses from Wilma's account - the account that has both SP and CP. Wilma's pay from her accounting work, which is CP, was not enough to cover all of their expenses and the monthly pension installments (SP) were used to pay the rest of the expenses. Under the exhaustion rule, W has a strong argument that only SP funds were used to purchase the motorboat because the CP funds were "exhausted," shown by the fact that Wilma's accounting work was not enough to pay for their expenses. This means that inevitably Wilma's separate property was used to pay for the living expenses. Under the family expense presumption, it is presumed that CP was used first to pay for the family expenses and that all the funds left to purchase the boat were Wilma's SP. H can argue some of W's SP was used for the family expenses and some of Wilma's accounting work (CP) was used for the motorboat. However, due to the family expense presumption, H is unlikely to prevail in this argument given the exhaustion method.

Under the direct-in-direct-out method, Wilma must argue that not only were SP funds available but also it was her intent that the motorboat remain SP. It is unclear from the facts when the motorboat was purchased - whether it was at a time when the Wilma's wages from accounting were exhausted and thus only SP funds were available for the rest of the expenses, or was it during the beginning of the month when both SP and CP funds were available. H may argue that Wilma's pension funds used for expenses is presumably CP because the funds were commingled. A court may have to seek more documents to see the status of the funds during the time the motorboat was purchased. However, it is likely that SP pension funds were available when the boat was purchased because SP funds were used by the "finish out the month" after the CP funds were exhausted. This means that generally SP funds were always available.

If court finds that SP funds were available, then with regards to the intent, W will argue that the spouses intended the motorboat to be SP because it was held in her name alone. H will argue that the intent was for the property to be shared because they both used the motorboat.

H may also argue that W violated her fiduciary duty to him as a spouse. Due to the close and honest relationship between spouses, courts find a fiduciary duty relationship. Where one spouse gains a better position in a transaction as compared to the other spouse, there is a presumption that the spouse in the better position breached that duty. Here, H may argue that W breached her duty using SP funds to purchase the motorboat and thus, the community does not have a stake in the property. H can argue that W was more sophisticated financially than H because she was employed as an accountant for many years and was working as a freelance accountant during the marriage. H can point out that he merely worked at a local store and did not have the financial knowledge held by W. H can argue that CP funds were available from his work at the store, as well. This is a strong argument for H and a court will strongly consider this fact when deciding whether W satisfied her burden from the commingled funds.

Accordingly, unlike PI and townhouse, it is unclear who has rights to the motorboat.

## **PERSONAL INJURY SETTLEMENT FUNDS**

The issue is whether the personal injury (PI) funds are CP and SP considering the cause of action arose during the MEC, but the case settled after the MEC. Generally, all funds acquired during marriage are presumptively CP. With regards to PI settlement awards, if the cause of action arose during the MEC, the settlement award is CP, UNLESS the settlement award is from the other spouse when the other spouse is the tortfeasor. The rationale behind this is if the funds were CP, the tortfeasor spouse would be able to benefit from his own wrongdoing. Although PI funds awarded from a cause of action that arose during marriage are CP, upon the divorce the court usually awards the funds exclusively to the injured spouse as SP. However, this exception is limited and applies only if those funds are not spent. The court will attempt to trace back the funds to determine that.

Here, H was injured by driver (D) when she negligently struck him in 2014. H and W permanently separated in 2016 and divorced in 2018. As such, even if the MEC did not end

at separation (as discussed above), the cause of action still arose during MEC. Although the funds were paid out afterwards, the funds were initially CP.

H will ask the court to provide the award solely to him because he was the victim of the accident. Here, the funds were paid out after the MEC and there is no evidence that supports an assertion that it would be difficult to trace the funds, given that they were awarded after MEC has ended. As such, H is likely to receive rights to the entire award at divorce because he was the victim and tracing is not an issue. While courts may split PI awards evenly if justice so requires, there are no facts here that suggest it is equitable to split the PI funds. Accordingly, H will receive the PI settlement award.

## **QUESTION 4: SELECTED ANSWER B**

California is a community property state. There is a presumption that all assets acquired during marriage are community property. California also recognizes the following forms of separate property: (1) property acquired before marriage, (2) property acquired through gift or inheritance, (3) expenditure of separate property, and (4) rents and profits of separate property.

Upon divorce, all community property assets are separated equally in kind, unless otherwise provided by a special rule of community property. Separate property remains separate property upon divorce.

### **THE TOWNHOUSE**

There is an issue as to how the townhouse should be distributed upon divorce. Here, Wilma purchased the townhouse in 2010, prior to Wilma and Harry's marriage in 2012. Both title to the townhouse and the mortgage are in Wilma's name. The townhouse is presumptively Wilma's separate property since it was acquired before marriage.

### **Characterization of Funds From Harry's Account**

There is an issue as to whether the funds used to make the payments on the townhouse mortgage were separate property or community property. Generally, all assets acquired during marriage, including any income earned, is presumptively community property. The fact that the funds are placed in a separate account, not a joint account, does not change the characterization of the property.

Here, the funds to pay the mortgage on the townhouse came from Harry's account. Harry opened the account only in his name and deposited his salary from his job into the



account. The fact that the funds were put into an account in Harry's name does not change the fact that the funds were community property. Since the funds were acquired from a job during marriage, they were community property. The community therefore was responsible for paying down the mortgage on the townhome.

### **Proration Rule**

Under the proration rule, when community property is used to pay an installment payment on separate property, the community gains an interest in the property. The community has a prorated interest in the property, calculated by the expenditure of community property towards the installment payment over the total purchase price.

Here, Wilma and Harry used funds from Harry's account to pay the mortgage on the townhouse. As discussed above, the funds from Harry's job are community property. Since community property was used to pay down the balance of the mortgage, the community has a pro rata interest in the townhouse. The community's interest in the townhouse is the ratio between the amount of community funds used to pay the mortgage, over the total purchase price.

### **Conclusion**

The community has an interest in the townhouse, calculated by the ratio between the amount of community funds used to pay the mortgage over the total purchase price. Wilma and Harry will split the proceeds from the community's interest in the townhouse.

### **THE MOTORBOAT**

There is an issue as to Wilma's and Harry's rights and liabilities in the motorboat. Since the motorboat was acquired during marriage, there is a presumption that the boat is community property, despite the fact that title was taken only in Wilma's name.

## **Characterization of Wilma's Pension**

There is an issue as to whether the monthly payments from Wilma's pension are community property or are separate property. Generally, property acquired before marriage is separate property. However, property acquired during marriage, such as income, is considered community property.

Here, Wilma retired in 2010 and received a pension. Wilma received part of the pension as a lump sum and received the rest in monthly installments. She then deposited these funds into an account in her name at the Main Street Bank. Harry may try to argue that these funds are community property since Wilma gets funds each month, characterizing them as income. Wilma, however, will argue that the pension funds were earned and acquired before marriage. Wilma worked as an accountant for many years. Wilma had to work for many years prior to 2010 before receiving a pension. The work was already done, and Wilma earned her pension when she retired in 2010, despite the fact that it was paid over many months. Wilma will argue that unlike income, she did not perform any work during marriage to receive the funds. Wilma had a property interest in the pension prior to her marriage with Harry.

Wilma's pension will likely be considered her separate property, since it was earned prior to marriage. Wilma's pension was a result of her work as an accountant, from which she retired prior to the marriage.

## **Characterization of Wilma's Salary**

Generally, all assets acquired during marriage—including income—are community property. Here, Wilma took a salary from freelance accounting work which she deposited into her Main Street Bank account. Wilma's salary was earned during marriage and is therefore community property.

## **Commingling of Funds**

There is an issue as to whether Wilma's separate property or community property was used to purchase the boat. The commingling of separate property and community property does not transform the nature of the property. Wilma has deposited both her pension--separate property, and her salary--community property, into her account. The assets have been commingled and it must be determined whether separate property or community property was used to purchase the boat.

## Family Expenses Presumption

There is a presumption that all family expenses are paid with community property. Any funds spent on household expenses exceeding the amount of community property is deemed to be a gift to the community.

Here, Wilma and Harry paid all household expenses from Wilma's account. Wilma's pay from the accounting work was not enough to cover their expenses, and her monthly pension paid the remaining expenses. There is a presumption that all these household expenses were paid using the community property assets.

## Exhaustion

A spouse can show that a purchase was made with separate property from a commingled account if they show that the community funds were exhausted, and the only remaining funds were separate property.

Here, Wilma paid all household expenses with the commingled funds from Wilma's account. Based on the family expenses presumption, discussed above, the payment of these expenses is presumed to be from community property. Wilma can show that the

community property funds in the account were exhausted, since Wilma's pay from her accounting work did not cover all their expenses. Wilma was required to use her monthly pension installments to pay the remaining expenses. Since the community property funds were depleted each month to pay for the household expenses, the only funds remaining in her account were her separate property funds from her pension. Wilma can therefore show that the separate property funds were used to purchase the motorboat. Since the motorboat was purchased with Wilma's separate property, the motorboat is Wilma's property, not subject to equal division upon divorce.

### Tracing

Tracing is available when you can directly trace a deposit of separate property into a commingled account to a subsequent purchase. For example, if Wilma deposited \$12,000 into her account, and then purchased the boat for \$12,000, the court can trace the purchase to the deposit of separate property. Here, however, Wilma only deposited her salary and monthly pension installments into the account, and tracing is not available.

### **Joint Use/Transmutation**

Harry may try to argue that the boat is community property since they agreed that they would both use the boat. Joint use does not change the character of the property. Here, the property was acquired through the expenditure of Wilma's separate property, making the boat her separate property.

A valid transmutation requires a writing signed by the spouse whose interest is affected, and must explicitly state that a transmutation in the form of property is being made. Here, there is no writing signed by Wilma. The fact that both parties agreed to use the boat does not transform the separate property into community property.

## **Conclusion**

There is a presumption that the boat is community property since it was acquired during marriage. Wilma, however, can show that the motorboat was purchased with her separate property. Wilma purchased the boat from a commingled account containing community and separate property. The community property was exhausted each month to pay the family expenses, and the only remaining money was Wilma's separate property. This separate property was used to purchase the boat, making it an expenditure of separate property. The boat is separate property and not subject to equal division upon divorce--Wilma has a 100% interest.

## **PERSONAL INJURY SETTLEMENT FUNDS**

There is an issue as to how Harry's settlement for his personal injury claim should be distributed upon divorce. Funds received from a personal injury settlement are community property if the cause of action arose during the economic community.

## **End of Economic Community**

The economic community ends when the parties intend not to continue marital relations, and take action consistent with that intent.

Here, Wilma and Harry permanently separated in 2016, but did not file for dissolution proceedings in 2018. It is unclear whether the parties intended to divorce when they separated in 2016. If the parties intended to end marital relations in 2016, it does not matter that dissolution was not filed until 2018. The fact that Wilma and Harry permanently separated is sufficient conduct for the economic community to have ended in 2016 if they intended to permanently end marital relations at the time of separation.

Harry was injured in 2014, while the parties were still married. Harry, however, did not settle his claim against Dana until 2017--arguably after the end of the economic community. Harry may try to argue that the personal injury award should be his separate property since it was obtained after the economic community. His argument will fail, however, because his cause of action arose in 2014 when the parties were still married. The parties were married at the time the cause of action arose, and Harry's settlement funds are therefore community property.

### **Personal Injury Funds Upon Divorce**

Generally, personal injury settlement funds are community property. The court will, however, award the entire recovery to the injured spouse upon divorce, unless the money has been spent or the interests of justice require otherwise. Here, although the funds are community property, the money does not appear to be spent, and it does not seem unfair to award Harry the entire settlement. Harry should therefore be awarded the entire \$30,000 settlement upon divorce.

### **Conclusion**

Although Harry settled the claim after the end of the economic community, the cause of action arose while the parties were married making the settlement community property. The court should, however, award the entire \$30,000 settlement to Harry, the injured spouse.

## QUESTION 5

Five years ago, State X bought Railroad (RR), which was in bankruptcy and about to be liquidated. RR has always been the largest rail carrier in State X, presently carrying 70% of its rail freight. RR's transport rates are generally lower than other rail carriers. In signing the Act authorizing the purchase of RR, the governor stated that it would ensure continued freight rail service for State X industry.

The Act authorizing the purchase of RR provides that manufacturers with factories in State X shall have first choice of space on RR.

Peter, a citizen of State Y, which borders State X, grows melons in State Y for sale to grocers there and in State X. Before its purchase by State X, Peter exclusively used RR for shipping melons to his many State X customers. Peter has lost nearly all of his State X customers over the last 5 years because he cannot guarantee timely delivery of ripe melons because shipping space on RR is so uncertain.

Corporation manufactures refrigerators in State Y and sells them there and in other states, including State X. Corporation has lost retail customers in State X because it can no longer guarantee dates of delivery when using RR.

Peter and Corporation have repeatedly been forced to give up reserved space on RR because it is being used by State X manufacturers. They have now filed suit in Federal Court in State X.

1. What claims can Peter make under the United States Constitution and how should the court rule? Discuss.
2. What claims can Corporation make under the United States Constitution and how should the court rule? Discuss.

## QUESTION 5: SELECTED ANSWER A

### 1. PETER'S POTENTIAL CLAIMS

The issues are the claims Peter can make under the United States Constitution against State X.

#### **Dormant Commerce Clause (Negative Implications of the Commerce Clause)**

Whether State X's Act providing State X manufacturers priority choice of space on RR is a violation of the Dormant Commerce Clause (DCC).

Under the Commerce Clause in the US Constitution, Congress has the authority to regulate interstate commerce. This includes (i) the channels of interstate commerce (roads, railways, waterways), (ii) the instrumentalities of interstate commerce (trucks, boats, airplanes, the internet), and (iii) economic activities that, when aggregated, have a substantial effect on interstate commerce. However, this authority is not absolute. States are allowed to regulate commerce if such regulation is not preempted by federal law, and so long as the State regulation does not discriminate against out of staters. If the state regulation discriminates on its face against out of staters, it violates the DCC unless the regulation is necessary for a compelling state interest (strict scrutiny). If the regulation does not discriminate against out of staters, it usually will be upheld so long as it does not unduly burden interstate commerce. Citizens, including individuals and corporations, as well as aliens can sue on a cause of action arising under the DCC.

Here, State X purchased RR, which is the largest rail carrier in State X. The Act authorizing the purchase of RR, provides that manufacturers with factories in State X get first choice of space on RR. Peter grows melons in State Y for sale in both State Y and State X. Peter exclusively uses RR for shipping his melons to his many State X



customers. Since State X purchased RR, Peter has nearly all of his State X customers because he cannot guarantee delivery due to uncertain availability of space on RR. State X manufacturers are given priority all the time so if they fill up all freight space, there is none left for out of state users. Peter will argue the State X Act discriminates against out of states because it gives priority to manufacturers in State X to the disadvantage of out of state business. In contrast, State X will argue that even if the Act prioritizes State X manufacturers it has a compelling interest in doing so. Prior to State X's purchase of RR, the railroad was in bankruptcy. The State X Act allowed the State to purchase RR to ensure its continued service as State X's largest rail carrier. Peter, on the other hand, can argue that although State X has a interest in continuing rail service, the provision in the Act giving priority to in-state business is not necessary to achieve this interest. Continued rail service is not dependent on giving priority space to in-state users and could be accomplished just the same if all shippers received the same access regardless of whether they were in state or out of state. Thus, although State X's interest is compelling, the methods used are not necessary and thus violate the DCC.

Therefore, because the State X Act discriminates against out of staters and the method used is not necessary to achieve the Act's purpose, State X has violated the DCC.

### Market Participant Exception to DCC

Whether State X is a market participant.

Congress has provided two exceptions to the DCC: (i) consent by Congress, and (ii) when the state acts as a market participant.

Here, State X owns RR and RR presently carries 70% of State X's rail freight. Because State X owns the railroad, it is acting as a market participant and would fall under the exception to the DCC so long as there is not an undue burden on interstate commerce. Presently, 70% of RR's freight comes from State X. Further, the Act does not prohibit out of state users. It simply gives priority to its existing State X users which comprise the

majority of its rail freight. Therefore, it is likely that the court would find that State X qualifies as a market participant.

Therefore, although State X's Act discriminates against out of staters in violation of the DCC, State X is a market participant and as such would be exempted. Peter would fail in a claim under the DCC and the court would rule in favor of State X.

### **Privileges and Immunities Clause of Article IV**

Whether State X's Act violates the Privileges and Immunities Clause of Article IV (P&I Clause).

The P&I Clause guarantees that citizens of each state shall be given the privileges and immunities of citizens of all states. A state law which discriminates against out of staters as to a fundamental right or civil liberties, including the ability to earn a livelihood, violates P&I Clause unless a substantial justification exists.

Here, Peter will argue that the State X Act violates the P&I Clause because it discriminates against out of staters. Peter will specifically argue that the Act has impeded his ability to earn a livelihood as evidenced by five years of lost customers for lack of access to shipping on RR. Although Peter is able to earn his livelihood in State Y and sell his melons in State Y, the State X Act substantially interferes with his preexisting customer relationships in State X, hindering his ability to earn a living. Such discrimination will violate the P&I Clause unless a substantial justification exists. Here, State X will make the same arguments regarding RR as to its market participation and its need to continue the rail service in State X. Peter will again argue other means would be available to meet the state's purpose. Unlike under the DCC claim, Peter will likely succeed in his P&I claim. Although the need to save the bankrupt RR is a substantial justification for the Act, it is not a justification for discriminating against out of staters. Therefore, Peter will likely prevail in his P&I claim.

## **Equal Protection**

Whether Peter has an equal protection claim.

The equal protection clause under the 14th Amendment to the US Constitution applies when the government is making a distinction between similarly situated people. If the classification is based on race or national origin, then the state must meet strict scrutiny. If the classification is based on gender, then intermediate scrutiny will be used. Any other classification will only need to meet a rational basis test.

Here, Peter will be unable to argue a fundamental right has been violated. The right to use a railroad for shipping is an economic right and Peter will need to prove State X has no rational basis for the Act. Because the Act rationally relates to the legitimate interest of preserving the State X railroad, State X will likely prevail, and the court will rule against Peter.

Therefore, Peter will not prevail in an EP claim and the court will rule for State X.

## **Due Process**

Whether Peter has a due process claim.

The Due Process clause under the 14th Amendment prohibits the government from acting arbitrarily and unreasonably.

Here, Peter will argue his due process rights were violated when State X arbitrarily and unreasonably gave priority to State X manufacturers over out of state users of RR. Because Peter used RR exclusively, he will argue he was deprived of right without due process of law. However, Peter's right to use RR relates to an economic liberty and not a fundamental right. Thus, State X's Act must only meet a rational basis test. The Act must be rationally related to the achievement of a legitimate government interest. As the

challenger, Peter will have the burden to prove the Act does not meet the rational basis test. Because State X can argue that preservation of the 70% of in-state users is a legitimate interest and the Act's provisions rationally relate to this, Peter will likely lose this challenge.

Therefore, Peter will likely not prevail and the court will rule for State X on this claim.

## 2. **CORPORATION'S CLAIMS**

The issues are the claims Corporation can make under the United States Constitution against State X.

### **Dormant Commerce Clause (Negative Implications of the Commerce Clause)**

Whether Corporation has a DCC claim against State X.

See rule above.

Here, Corporation will make very similar arguments as those by Peter above. However, Corporation will further argue that because he is an out-of-state manufacturer he is more directly impacted by the State X Act. The State X Act specifically discriminates against out-of-state manufacturers by giving priority to in-state manufacturers. Additionally, because Corporation does not have any factories in State X, he is further impacted because he needs RR in order to get his refrigerators into State X to sell. Nonetheless, State X will again argue for a market participant exception and will likely prevail.

Thus, Corporation will lose on a DCC claim and the court will rule in favor of State X.

## **P&I Clause of Article IV**

Whether Corporation has a claim under the P&I clause of Article IV.

See above. The P&I clause does not apply to corporations and aliens. Therefore, they cannot sue under it.

Here, Corporation is a state Y corporation. Thus it cannot sue under the P&I clause and would not prevail in such a claim.

## **Due Process (DP)**

Whether Corporation has a claim under the DP clause of the 14th Amendment.

The due process clause provides that states may not act unreasonably or arbitrarily. Here, Corporation will argue that State X's Act unreasonably denies him due process because it deprives him of existing rights. Further, Corporation will argue that repeatedly being forced to give up on RR just because it is an out of state manufacturer is an arbitrary and unreasonable denial of his rights. However, Corporation's right to use RR relates to an economic liberty and not a fundamental right. Thus, State X's Act must only meet a rational basis test. The Act must be rationally related to the achievement of a legitimate government interest. As the challenger, Corporation will have the burden to prove the Act does not meet the rational basis test. Because State X can argue that preservation of the 70% of instate users is a legitimate interest and the Act's provisions rationally relate to this, Corporation will likely lose this challenge.

Therefore, Corporation will likely not prevail and the court will rule for State X on this claim.

## **Contracts Clause**

Whether Corporation has a claim under the Contracts Clause of the US Constitution.

Under the Contracts Clause of the US Constitution, a state may not impair rights under pre-existing contracts. If the interference is with a private contract, intermediate scrutiny applies. If the interference is with a government contract, strict scrutiny applies.

Here, Corporation may argue that he has lost all retail customers in State X due to the fact that it can no longer guarantee delivery dates. If Corporation is engaged in existing contracts with these customers, then the State X Act giving priority to in-staters over out-of-staters would cause an impairment to Corporations' existing contracts. Corporation has shown that it has repeatedly had to give up space on RR for in state manufacturers. However, the facts do not indicate that Corporation has existing contracts in place. The facts only state Corporation has lost retail customers; there is no indication whether they are new or existing. Thus, if Corporation can prove the State X Act has impaired his rights under existing contracts, State X will have to prove its Act meets intermediate scrutiny--the provision in the Act is substantially related to an important government interest. If State X cannot do so, then Corporation may prevail on a contracts clause claim. Therefore, if Corporation can prove impairment of existing contracts under the contracts clause, it may prevail in this claim over State X.

## QUESTION 5: SELECTED ANSWER B

### 1. Peter's Claims

#### Standing

Injury in fact; causation/redressability; ripe; not moot

A plaintiff in federal court must have standing in order for the court to hear the case. In order to have standing the plaintiff must show (1) injury-in-fact; (2) causation: the P's harms were caused by the defendant's conduct; (3) redressability: a decision in the P's favor will redress the injury caused by D (e.g. a favorable decision will remedy the harm); (4) ripeness: the case must be ripe for judgment (e.g. a case is not ripe if the law has yet to be enacted and there is insufficient details in the legislative discussion on its enforcement or the law is unlikely to be enforced); and (5) not moot: a case is moot if the harm has already occurred and is not capable of repetition, but evading review (e.g. it is not a live case and controversy).

**Injury:** P's injury is the loss of nearly all of his State X customers over the last 5 years. Economic damages need not be proven to show an injury in fact, but economic harms are sufficient if a P can prove them. P could easily demonstrate that the loss of this many customers led to a downfall in profits for his melon business.

**Causation:** P's injury was caused by the state law at issue (the Act that authorizes State X to purchase RR and giving manufacturers with State X factories first choice of space on the RR). P has been forced on many occasions to give up his space on the RR for his melons because a State X manufacturer needed the space. This priority given to State X manufacturer has caused P much uncertainty regarding whether or not he can ship his melons to customers in State X. Additionally, P exclusively used the RR for shipping melons to his many State X customers. Because of the uncertainty of

shipping space on the RR, P cannot guarantee his customers timely delivery of ripe melons, which has caused him to lose nearly all of his State X customers. Thus, there is but-for cause (but for the Act, P would not have lost its customers) and proximate causation (foreseeability and fairness). Thus, causation is satisfied.

**Redressability:** Because the state X Act caused the P's injuries, a decision by the court in favor of P will redress P's injuries. By striking down the Act, a court would allow P to get space on the RR without being kicked out unexpectedly by an in-state manufacturer and, thus, he would be able to deliver melons to his customers in a timely manner while the melons are still ripe.

**Ripeness:** Here, the Act has been enacted. It was enacted 5 years ago. It has clearly been enforced by the State because it purchased the RR and it repeatedly kicked out P and Corporation (out-of-staters) to make room for in-state manufacturers. Since it is an enacted law that is fully enforced, the case is ripe for adjudication.

**Not Moot:** The state may argue that this case is moot because the harm has already been done to P, he has lost nearly all his customers. Thus, a favorable decision will not be able to get those customers back. There is no live case or controversy since the law has caused all the harm it can to P. However, P will rebut that he has not lost all of his State X customers. Thus, the court striking down the law would help him to not be further harmed by losing the rest of his State X customers. Also, this is a harm (like *Roe v. Wade*) that is capable of repetition but evading review. Although the harm has already been caused by D's acts, it is possible that P could get more state X customers and then lose them again because of the impact of the Act on P's timely delivery of melons.

Thus, the court will likely find that P has standing to challenge State X's Act.

### **Dormant Commerce Clause**

The Commerce Clause grants Congress the power to make laws regarding interstate



commerce (between states). This power includes the right to regulate (1) instrumentalities of interstate commerce (cars, trains, planes, buses); (2) channels of interstate commerce (roads, highways, etc.); and (3) intrastate (solely in one state) economic activity that has a substantial effect (in the aggregate) on interstate commerce. Where an intrastate non-economic activity is involved, the activity's effect on interstate commerce cannot be aggregated and courts generally require that Congress submit a finding that the activity has a substantial effect on interstate commerce.

The Commerce Clause also grants certain powers to the state. As part of the negative implications of the Commerce Clause (e.g. the dormant commerce clause), states are prohibited from unduly burdening interstate commerce and particular states may not discriminate between in-staters and out-of-staters without satisfying a level of scrutiny (discussed below). If a state's actions (law, regulation, act, etc.) violate the Dormant Commerce Clause (DCC), that state's actions will be deemed unconstitutional and the relevant law/regulation will be struck down. Both corporations and aliens can sue under the DCC.

Where a state both discriminates against in-staters and out-of-staters (treats in state citizens or corporations differently from those out of state) and burdens interstate commerce, the law will be deemed unconstitutional unless the state can demonstrate that the regulation is necessary to achieve an important government interest. Necessary means that there must be no less restrictive (e.g. no less burdensome or less discriminatory) means to achieve the stated ends. It is the state's burden to satisfy this level of scrutiny.

Where a state is not discriminating between in-staters and out-of-staters, but its regulation/law burdens interstate commerce, courts perform a balancing test to determine if the state's law unduly burdens interstate commerce. The court weighs the benefits to the state and the burdens placed on interstate commerce. If the benefits outweigh the burdens, then the state law does not unduly burden interstate commerce and is constitutional (e.g. does not violate the DCC). If the burdens outweigh the

benefits, then the law does unduly burden interstate commerce and it is unconstitutional (e.g. violates the DCC) and will be struck down.

### **Burdens and Discriminates**

Here, P will argue that the Act both unduly burdens interstate commerce and discriminates between in-staters and out-of-staters. The Act unduly burdens interstate commerce because it prevents companies and businesses from being able to have reserved space on railroad transportation. Businesses require shipment of their goods between states in a timely manner. If goods are kicked off a train because of a need for priority space for in-state manufacturers, it will lead to the goods to spoil (as in the case of melons) or it will cause the business to pay extra money to secure some emergency shipment of the goods. It also causes the loss of customers for the businesses and slows down and frustrates transportation of goods between states. All of this was shown with P's situation because the priority space has led P's melons to be taken off the train and he lost customers since he failed to timely deliver these perishable goods to the customer when he contracted/promised to do so. P will also argue that it discriminates between in-staters and out-of-staters because it gives in-state manufacturers priority space on the train and does not give priority space to out-of-state companies or citizens. The law treats similarly situated companies and people differently based on their state of citizenship.

State X may rebut that it is not discriminating against out-of-staters, as the manufacturers it is favoring are not necessarily solely State X corporation, rather it is favoring those manufacturers that have factories in State X. This argument will likely be unsuccessful, as they are still favoring entities that operate within the state and disfavoring entities that operate out of state.

P's argument will likely be successful. State X will have the burden of providing that the Act is necessary to achieve an important government interest. X will argue that the important government interest is ensuring that State X industries are guaranteed freight

rail service. However, courts have found it to be not an important government interest to protect in-state companies and businesses at the expense of out-of-state ones. X will next argue that providing in-state manufacturers with first choice of space on the RR is necessary to ensure that these manufacturers with in-state factories are ensured and guaranteed railroad transportation for their goods. If RR had gone bankrupt and was not bought by State X, the in state manufacturers would have lost 70% of their source of freight services, which would have been disastrous for State X's economy and its in-state corporation. Also, this RR was less expensive than other rail carriers, so its bankruptcy would have led to less profits and revenues for in-state manufacturers since they would have to pay more for shipment costs and that would harm the job market and economy of State X. X would reason that stabilizing and ensuring the continuing profits of in-state manufacturers was an important interest.

P will rebut that necessary means least restrictive means and this law could be much more narrowly tailored. For example, the law could merely guarantee that a small percentage of all rail cars on a given RR train would be kept open only for State X manufacturers and if they are not filled, those spots can be used for out of state entities as well. This would be less discriminatory and less burdensome on interstate commerce because it would never kick out an out of state company's goods that had originally planned on being shipped to customers on that particular train. Thus, the Act is not necessary because there are feasible alternatives that cause less burden and are less discriminatory.

Thus, a court will likely find that the Act both discriminates and burdens and that the state will not be able to satisfy their burden of showing the Act is necessary to serve an important government interest. Thus, the law will be found to violate the DCC unless an exception applies.

### **DCC Exceptions**

There are a few exceptions to the dormant Commerce Clause. Where there is

Congressional approval for the law/regulation/act in question, the DCC does not apply. Where a state is acting as a market participant, the state's regulation/law is allowed under the DCC. A state acts as a market participant when it assumes the role of an entity in the market place, such as a corporation, and participates in the market itself.

This would include a state-owned company. Another exception to the DCC is the traditional public function exception. This is where a state is performing a function traditionally given to the states under their powers. Examples of this include public universities that charge lower tuition to in-state citizens as opposed to out-of-state citizens.

Here, there is no Congressional approval and the state isn't performing a traditional public function. However, State X is acting as a market participant. X bought a public company (RR) after it went bankrupt and was about to be liquidated. X bought it so that the State's manufacturers did not lose 70% of their freight services. The Act authorized the State to buy the RR and take its place as a market participant. Since X was performing the services of a private company in the marketplace of freight shipping, a court will likely find that an exception to the DCC applies.

Thus, a court will likely dismiss P's DCC claim against State X because the market participant exception applies.

### **Privileges and Immunities Clause under Article IV**

Under the Privileges and Immunities Clause under Article IV, states are prohibited from discriminating between in-state citizens and out-of-state citizens as to fundamental rights (important rights) or important commercial activities. This clause prevents states from denying out of state citizens the privileges and immunities it provides to its own state citizens. If a state law both discriminates and burdens interstate commerce, the level of scrutiny discussed above under the DCC applies.

If the state law discriminates but does not burden interstate commerce, then the court will first ask whether a fundamental right or important commercial interest/activity is involved. Courts have found the right to earn a living to be an important commercial interest. Laws have been struck down under the privileges and immunities clause (PIC) where they only allow in-state citizens to get licenses to practice law. Laws have been struck down for charging in-state shrimp fishermen a small fee for a shrimping license (like \$100), but then charged out of state fishermen an extremely large fee (\$20,000-30,000). However, courts have found no important commercial interest where mere hobbies are involved. Thus, state laws charging in-state golfers lower greens fees on golf courses than out-of-state golfers were deemed constitutional and did not violate the PIC. Also, a law making hunting licenses relatively cheap for in-staters, but very expensive for out-of-staters was also found constitutional.

If a court finds a fundamental right or important commercial interest is involved, then the burden is on the state to show that the law is necessary to achieve an important government interest.

If the state law does not discriminate between in-staters and out-of-staters (and does not unduly burden interstate commerce (DCC)), the law is presumptively valid.

Unlike the DCC, corporations and aliens cannot sue under the PIC.

Here, State X is discriminating between in-state manufacturers/entities and out-of-state ones. P is an out of state citizen from State Y. State X provides first choice of freight space benefits to manufacturers with State X factories, but not those, such as P, who are out of state. The same scrutiny analysis will apply (state's burden to show Act is necessary to achieve an important government interest). P has standing to file this suit because he is an individual and a US citizen presumably, not an alien or a corporation. See DCC analysis from above. Because PIC does not have any exceptions, a court will likely find that the state cannot show the law is necessary to achieve an important government interest since less restrictive means are available. Thus, the court will find

the law invalid under the PIC under Article IV and strike the law down as unconstitutional.

### **Equal Protection Clause**

Under the EPC, applied to the states through the 14 Amendment, states may not treat similarly situated persons differently. The level of scrutiny that applies depends on what classifications is used by the government to differentiate persons/entities. Corporations and individuals can sue under the EPC.

If the state is using a suspect classification, then strict scrutiny will be used to determine the constitutionality of the law. Thus, the state has the burden to show the law is necessary to achieving a compelling government interest (it must be the least restrictive means available). Suspect classifications include race, national origin, and alienage (for the states where it does not involve a job dealing with the democratic process, such as an elementary school teacher, police officer, etc.; this does not apply to the federal government, which has plenary power over immigration).

If the state uses a quasi-suspect classification, intermediate scrutiny applies. The state has the burden to show that the law is substantially related to an important government interest. This requires narrow tailoring, which does not require the least restrictive means, but requires there is a substantial relationship between the means and the ends). Quasi-suspect classifications include gender (where the state must show an exceeding persuasive justification) or illegitimacy.

If the state uses a non-suspect classification, rational basis review applies. The plaintiff (challenger of the law) has the burden to show that the law is arbitrary, e.g. that it is not rationally related to a legitimate purpose. The purpose need not be the actual one used, but rather need only be a hypothetical one that the court could come up with. Laws generally pass RBR. RBR applies to all classifications that are not those stated for SS and IS, which includes age, mental disability, wealth, education level, etc.

Here, the classification at issue under this law is whether the entity has an in-state factory or not. This is not a suspect or quasi-suspect classification. Thus, RBR would apply. P would not be able to show that this law is arbitrary and that it is not rationally related to a legitimate purpose. The legitimate purpose could be to protect the economy of State X and X's in-state factories and stabilize employment levels. The law achieves these ends by providing access to freight shipping to these in-state entities, so it is rationally related to those ends.

Thus, under the EPC the court would likely find the law is valid and constitutional.

### **Due Process**

The Due Process clause of the 5th amendment applies to the federal government and applies to the states through the 14th amendment. Under the DP clause, states must not act unreasonably or arbitrarily. The government cannot deprive individuals of certain rights without a counter-balancing justification for doing so. Individuals and corporations can sue under the DP clause.

If the government is depriving individuals of a fundamental right, then SS applies (stated above). Fundamental rights include the right to contraception, marriage, guiding the upbringing of one's family, sex, privacy, right to vote, right to travel.

If the government is depriving other rights, such as the right to abortion (undue burden test for pre-viability), something below SS applies. For sex between members of the same gender, it is unclear what level of scrutiny applies.

IS applies when the government is depriving a member of the public's right to commercial speech.

Law depriving individuals of other rights need only satisfy RBR.

Here, the right to have goods shipped on a freight train is not a fundamental right. Thus, P has the burden to show the Act does not satisfy RBR. Since the law does satisfy RBR, the court will likely find the law is valid under the DP clause.

**Conclusion:** Thus, P's DCC claim will likely be successful and a court would likely strike down the State X act as unconstitutional on DCC grounds. However, none of P's other claims would likely be successful.

## **2. Corporation's Claims**

### **Standing**

Similar analysis as P. C manufactures refrigerators outside of State X (in State Y). C sells those fridges to customers in State X. C has injury because it lost retail customers in State X because it could not guarantee dates of delivery. This was caused by the Act since C was repeatedly forced to give up reserved space on RR to an in-state manufacturer. Redressability is also satisfied. The claim is ripe and not moot.

### **Privileges and Immunities**

Because corporations and aliens cannot sue under the PIC, C will not be able to bring this claim because C is a corporation.

### **Dormant Commerce Clause**

Same analysis as above. DCC can be used by corporations and aliens, so this would be available to C. C is an out-of-state manufacturer and the Act is discriminating between out-of-state and in-state manufacturers in providing the reserved freight space.

As above, the market participant exception likely applies and thus a DCC claim would be



unsuccessful.

### **Equal Protection**

This claim can be used by individuals and corporations, so would be available to C. Same analysis as above. Same conclusion as above (the analysis for P).

### **Due Process**

Can be used by individuals and corporations. Same analysis as above. Same conclusion as above.

**Conclusion:** Thus, C will likely not have any successful claims against State X's Act and, thus, a suit by C would not lead a court to strike down the State X act as unconstitutional under any grounds (unlike P's DCC claim which would be successful).