



The State Bar *of California*

OPEN SESSION

AGENDA ITEM O-200

JUNE 2021

COMMITTEE OF BAR EXAMINERS

DATE: June 18, 2021

TO: Members, Committee of Bar Examiners

FROM: Lisa J. Cummins, Program Manager, Examinations

SUBJECT: Approval of Draft Report to the Supreme Court on the February 2021 California Bar Examination

EXECUTIVE SUMMARY

As soon as practical after each California Bar Examination, the State Bar is to provide the California Supreme Court with a report on the administration of the examination. The Committee of Bar Examiners approves the draft of each such report before it is delivered to the Court.

BACKGROUND

Rule 4.60(B) of the Rules of the State Bar of California (Title 4. Admissions and Educational Standards) requires the State Bar to provide “. . . the California Supreme Court a report on each administration of the examination as soon as practical.”

DISCUSSION

Attached please find the draft Report to the Supreme Court on the February 2021 California Bar Examination for the Committee’s approval, along with the following:

1. February 2021 California Bar Examination Statistics Report
2. “Analysis of the February 2021 General Bar Examination” prepared by Roger Bolus, Ph.D., Research Solutions Group

3. February 2021 Essay Questions and Selected Answers
4. February 2021 Performance Test and Selected Answers

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

None

RECOMMENDATIONS

It is recommended that the Committee of Bar Examiners approve the draft Report to the Supreme Court on the February 2021 California Bar Examination to be submitted to the California Supreme Court.

PROPOSED MOTION

Should the Committee of Bar Examiners agree with the staff recommendation, the following motion should be made:

MOVE, that the draft Report to the Supreme Court Report on the February 2021 California Bar Examination be approved and submitted to the California Supreme Court.

ATTACHMENTS LIST

- A. Report to the Supreme Court on the February 2021 California Bar Examination
- B. February 2021 California Bar Examination Statistics Report
- C. "Analysis of the February 2021 General Bar Examination" prepared by Roger Bolus, Ph.D., Research Solutions Group

- D. February 2021 Essay Questions and Selected Answers
- E. February 2021 Performance Test and Selected Answers



The State Bar *of California*

Report to the Supreme Court on the February 2021 California Bar Examination

Committee of Bar Examiners

June 18-19, 2021

FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

Report Pursuant to Title 4. Admissions and Educational Standards, Division 1. Admission to Practice Law in California, Chapter 5. Examinations, Rule 4.60 (B) of the *Rules of the State Bar of California*

2020–2021 Committee of Bar Examiners

Esther P. Lin, Chair, *Irvine*
Alexander C. Lawrence, Jr., Vice-Chair, *Los Angeles*
James A. Bolton, Ph.D., *Altadena*
Robert S. Brody, *Pasadena*
Michael Cao, M.D., *Arcadia*
Alex H. Chan, *Pearland*
James H. Efting, *Sunnyvale*
Kareem Gongora, *Fontana*
Dolores Heisinger, *Belmont*
Hon. James E. Herman, *Santa Barbara*
Michael A. Iseri, *Tustin*
Larry Kaplan, *Los Angeles*
Paul A. Kramer, Jr., *Woodland*
Bethany J. Peak, *Los Angeles*
Vincent Reyes, *San Ramon*
Hon. Shelly B. Torrealba, *Los Angeles*
David A. Torres, *Bakersfield*
Don Ajené Wilcoxson, *Riverside*

Office of Admissions The State Bar of California

Amy Nuñez, Director
Audrey Ching, Assistant Director
Lisa Jeong Cummins, Program Manager, Examinations
Christina Doell, Program Manager, Examination Grading
Tara Clark, Program Manager, Moral Character Determinations
Natalie Leonard, Principal Program Analyst, Educational Standards
180 Howard Street
San Francisco, CA 94105-1639

Tammy Campbell, Program Manager, Operations and Management
845 South Figueroa Street
Los Angeles, CA 90017-2515

TABLE OF CONTENTS

A. Report on the February 2021 California Bar Examination

B. Attachments

1. February 2021 California Bar Examination Statistics Report
2. “Analysis of the February 2021 General Bar Examination” prepared by Roger Bolus, Ph.D., Research Solutions Group
3. February 2021 Essay Questions and Selected Answers
4. February 2021 Performance Test and Selected Answers

REPORT ON THE FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

The State Bar of California received applications from 5,040 applicants to take the February 2021 California Bar Examination, which was administered on February 23 and 24, 2021. Of those, 3,530 applicants completed the exam and received results. Of those, 3,098 applicants completed the General Bar Examination and 1,151 passed (37.2 percent); 432 attorney applicants completed the Attorneys' Examination and 247 passed (57.2 percent). A number of applicants begin the exam, but do not complete all portions. To be considered as having completed an exam, an applicant must have been in attendance for its entirety and have a complete set of scores for the six written questions, which may include zeros. In addition, for the California General Bar Exam, the applicant must have submitted answers to the Multistate Bar Examination (MBE) portion. Applicants taking the Attorneys' Exam included attorneys in good standing admitted to practice law in other jurisdictions for four or more years prior to the date of testing. Two of the 16 disciplined attorneys who took the exam as a condition of reinstatement passed the exam.

The February 2021 California Bar Exam was administered online and remotely proctored using ExamID and ExamMonitor software from ExamSoft, which had been approved by the Supreme Court. The General Bar Exam consisted of two days containing the following: Day 1: three (3) one-hour essay questions administered separately in the morning, with scheduled breaks in between each question, and two (2) one-hour essay questions plus one (1) 90-minute Performance Test (PT) administered separately in the afternoon, with scheduled breaks in between each question; and Day 2: two (2) 90-minute sessions with 50 multiple-choice questions each administered in the morning, with scheduled breaks in between each session, and two (2) 90-minute sessions with 50 multiple-choice questions each administered in the afternoon, with scheduled breaks in between each session. The 200 item multiple-choice MBE was provided by the National Conference of Bar Examiners (NCBE). The one-day Attorneys' Exam consisted of the same six (6) written questions as administered for the General Bar Exam – five (5) essay questions (three in the morning and two in the afternoon) together with one (1) 90-minute PT in the afternoon. Differing from the traditional exam format with multiple questions being administered in a single exam session, the online remote exam required each question to be administered separately with scheduled 30 minutes between each question session for breaks, password delivery, facial recognition security protocols, and login.

While the exam was administered online and remotely proctored to the majority of applicants, the exam was administered in person at 6 test centers throughout the state to applicants granted testing accommodations that were not compatible with the testing conditions required to test remotely and/or could not be effectively provided and securely administered in a remote environment, to handwriters, and to applicants with extenuating circumstances. In order to participate in the Laptop Computer Program, applicants were required to pay an additional fee and download special security software in advance. Following conclusion of the exam, applicants who completed their answers using their laptops under standard time constraints were required to upload ten (10) separate files containing their answers, i.e., 6 for the written exam sessions plus 4 for the MBE sessions, along with ten (10) separate corresponding video monitoring files, to a secure server no later than noon on Thursday, February 25th, the day following the last day of the exam. The electronic answer files were downloaded from the ExamSoft secure server into the State Bar's Admissions Information

Management System (AIMS) for electronic grading. A total of 3,455 applicants (97.9 percent) took the exam by laptop.

A total of 288 applicants with disabilities were granted accommodations. Of those, 62 applicants were assigned to take the exam at testing accommodations test centers, while 226 applicants were granted accommodations for the online remote examination (e.g., extra time to test, permission to bring food/water into the exam room, etc.). Forty-four (44) applicants who were granted accommodations either withdrew their applications, had their applications abandoned, or were not eligible to take the exam. Of the 288 applicants who were granted accommodations, 15 did not show up.

Six grading groups, each consisting up to 14 experienced graders and three backup/apprentice graders, were selected to grade the essay and PT answers. The groups convened virtually via Zoom for the purpose of calibration on two Saturdays in March and one Saturday in April. Members of the Committee of Bar Examiners (CBE) were invited to attend the second calibration session in March. A member of the Exam Development and Grading Team (EDG Team) supervised each group of graders. At the first calibration session, the graders discussed discrepancies in the prepared analyses of their assigned question and any patterns or problems they found in the sample answer books they had been sent the previous week. They then determined which weights to assign to the issues raised by the question.

After this discussion, the graders assigned grades to 15 answer books. These books were copies of actual answers written by a sample of the applicant group; the sample was stratified by law school, repeater status, etc., so that graders saw a cross section of the applicant population who took the exam. They read the sample books, assigned a grade to each book, and then discussed and debated the grades assigned. The graders arrived at a consensus grade for each book. After reading and reaching consensus on 15 books, without further group discussion, the graders independently read a new set of 25 answer books and submitted grades for review at the second calibration session.

At the second calibration session, which was held one week after the first calibration session, the supervising member of the EDG Team distributed and discussed the grading guidelines they drafted based upon the discussion at the first meeting. Graders received statistical information concerning their independent grading of the 25 books distributed at the first meeting and reread and discussed any of the answers where they were in significant disagreement. An additional 10 answer books were read, graded, and discussed before a consensus grade was assigned to each answer. The groups were then given their first grading assignments.

During the third calibration session, which was held in April, graders discussed any problems they had been experiencing with their assigned books, and then calibrated grades on an additional 15 answer books to ensure that they were still grading to the same standards.

The February 2021 California Bar Exam was graded under the 1390 (reduced from 1440) minimum passing score directed by the Supreme Court in July 2020 and subjected to the 2-phase (rather than 3-phase) grading system adopted by the Committee of Bar Examiners in April 2020. The February

2021 California Bar Exam was graded using California's phased grading system, the goal of which is to focus resources on those answers written by applicants with scores right around the pass line. Applicants who clearly pass and fail are eliminated from the grading process as early as possible.

After all written answers for each applicant were read by separate graders, applicants with total scaled scores after the first read of 1390 or higher were considered as having passed the exam, and applicants with total scaled scores of 1349.9999 or lower failed the exam (first read or Phase I). Applicants with total scaled scores of 1350–1389.9999 had all of their written answers read a second time by a different set of graders (second read or Phase II), and then the averages of the first and second read grades were used in the calculation of the total scaled scores.

The scores on the written portion of the February 2021 exam were scaled to the MBE, i.e., the written scores were converted to a score distribution that has the same mean and standard deviation as the MBE score distribution. This procedure ensures that the difficulty of the exam remains consistent from one exam administration to the next. For the February 2021 California Bar Exam, the mean scaled MBE score in California was 1345, compared with the national average of 1340. Beginning with the first administration of the modified bar exam (3-day to 2-day General Bar Exam and 2-day to 1-day Attorneys' Exam) in July 2017, the scaled written score accounts for 50 percent of the total score, and the scaled MBE score accounts for the other 50 percent.

Admission oath packets were mailed timely on May 7, 2021, to the successful applicants who have completed all the requirements for admission to practice law in California. Results were made available to them via the State Bar's website on May 7, 2021, and then were made available to the public at 6:00 a.m. on Sunday, May 9, 2021.



General Statistics Report
February 2021 California Bar Examination¹
Overall Statistics for Categories with More Than 11 Applicants Who Completed the Examination

	First-Timers			Repeaters			All Takers		
Applicant Group	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
General Bar Examination	1,225	650	53.1	1,873	501	26.7	3,098	1,151	37.2
Attorneys' Examination	287	188	65.5	145	59	40.7	432	247	57.2
Total	1,512	838	55.4	2,018	560	27.8	3,530	1,398	39.6

Disciplined Attorneys Examination Statistics

	Took	Pass	%Pass
CA Disciplined Attorneys	16	2	12.5

General Bar Examination Statistics⁵

	First-Timers			Repeaters			All Takers		
Law School Type	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
CA ABA Approved	340	222	65.3	579	225	38.9	919	447	48.6
Out-of-State ABA	165	95	57.6	203	53	26.1	368	148	40.2
CA Accredited	84	37	44.0	329	56	17.0	413	93	22.5
CA Unaccredited	42	17	40.5	124	19	15.3	166	36	21.7
Law Office/Judges' Chambers	*			*			*		
Foreign Educated/JD Equivalent + One Year US Education	58	10	17.2	151	23	15.2	209	33	15.8
US Attorneys Taking the General Bar Exam ²	222	182	82.0	58	33	56.9	280	215	76.8
Foreign Attorneys Taking the General Bar Exam ³	282	66	23.4	301	66	21.9	583	132	22.6
4-Year Qualification ⁴	*			21	1	4.8	24	1	4.2
Schools No Longer in Operation	25	18	72.0	103	23	22.3	128	41	32.0
Total	1,225	650	53.1	1,873	501	26.7	3,098	1,151	37.2

¹ These statistics were compiled using data available as of May 21, 2021.

² Attorneys admitted in other jurisdictions less than four years must take and those admitted four or more years may elect to take the General Bar Examination.

³ Attorneys admitted in foreign jurisdictions must take the General Bar Examination.

⁴ Applicants may qualify to take the General Bar Examination through a combination of four years of law study without graduating from a law school.

⁵ Transitioning law schools: Applicants from Thomas Jefferson School of Law and University of La Verne College of Law are included in the ABA approved program. Applicants from Concord Law School, St. Francis School of Law, and Northwestern California University School of Law are included in the unaccredited law school program. Applicants from Pacific Coast University School of Law and Southern California Institute are included in the accredited law school program.

February 2021 California Bar Examination

Number of Applicants Completing the Examination & Percent Passing by Racial/Ethnic Group General Bar Examination First-Time Takers Only ⁵

School Type	Asian		Black		Hispanic		White		Other **		Decline to Answer	
	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass
CA ABA Approved	53	66.0	13	30.8	46	60.9	127	72.4	60	65.0	41	58.5
Out-of-State ABA	29	55.2	12	50	17	29.4	67	65.7	29	55.2	11	72.7
CA Accredited	*		*		21	28.6	28	50.0	13	38.5	13	61.5
CA Unaccredited	*		*		*		22	59.1	*		*	
Other	260	28.5	27	37.0	43	41.9	190	71.6	55	49.1	19	73.7
Total	356	36.5	60	35.0	130	45.4	434	68.9	158	55.1	87	62.1

Number of Takers and Percent Passing by Racial/Ethnic Group: Repeaters ⁵

School Type	Asian		Black		Hispanic		White		Other **		Decline to Answer	
	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass
CA ABA Approved	111	38.7	48	25.0	98	35.7	178	37.6	114	50.0	31	35.5
Out-of-State ABA	53	26.4	44	34.1	23	17.4	51	23.5	25	28.0	8	12.5
CA Accredited	53	13.2	33	9.1	81	21.0	106	18.9	45	15.6	11	18.2
CA Unaccredited	20	15.0	15	13.3	25	8.0	56	19.6	*		*	
Other	286	22.7	47	14.9	80	23.8	159	27.0	48	22.9	15	20.0
Total	523	25.2	187	20.9	307	25.1	550	27.8	239	34.7	67	25.4

*Fewer than 11 applicants

**Includes racial/ethnic groups American Indian, Native Hawaiian, other and more than one racial/ethnic group.

Number of First-Time Takers and Repeaters by Gender*** ⁵

School Type	First-Timers						Repeaters					
	Males		Females		Other		Males		Females		Other	
	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass
CA ABA Approved	143	66.4	188	64.4	*		246	34.6	326	41.4	*	
Out-of-State ABA	74	58.1	86	57.0	*		94	22.3	107	29.9	*	
CA Accredited	33	33.3	50	50.0	*		141	13.5	184	19.6	*	
CA Unaccredited	22	36.4	19	47.4	*		66	13.6	58	17.2	*	
Other	242	47.9	342	46.5	*		271	22.1	359	24.0	*	
Total	514	53.1	685	53.0	4	25.0	818	23.7	1,034	28.9	4	50.0

***Number are for those reporting gender

February 2021 California Bar Examination

Number of First-Timers and Repeaters Taking and Passing and the Percent Passing: California ABA Approved Law Schools

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
CALIFORNIA WESTERN SCHOOL OF LAW	51	33	65	54	15	28
CHAPMAN UNIVERSITY SCHOOL OF LAW	19	14	74	26	8	31
GOLDEN GATE UNIVERSITY SCHOOL OF LAW	19	8	42	59	15	25
LOYOLA LAW SCHOOL – LOS ANGELES	16	15	94	31	15	48
PEPPERDINE UNIVERSITY	*			20	9	45
SANTA CLARA UNIVERSITY SCHOOL OF LAW	24	17	71	38	23	61
SOUTHWESTERN LAW SCHOOL	21	12	57	48	26	54
STANFORD LAW SCHOOL	*			*		
THOMAS JEFFERSON SCHOOL OF LAW	27	9	33	58	9	16
UNIVERSITY OF CALIFORNIA – BERKELEY	11	8	73	*		
UNIVERSITY OF CALIFORNIA – DAVIS	*			13	9	69
UNIVERSITY OF CALIFORNIA - HASTINGS	16	10	63	33	9	27
UNIVERSITY OF CALIFORNIA – IRVINE	*			12	6	50
UNIVERSITY OF CALIFORNIA – LOS ANGELES	*			14	6	43
UNIVERSITY OF LA VERNE COLLEGE OF LAW	11	6	55	28	10	36
UNIVERSITY OF PACIFIC MCGEORGE SCHOOL OF LAW	20	16	80	25	13	52
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW	17	13	76	15	5	33
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW	15	9	60	46	16	35
UNIVERSITY OF SOUTHERN CALIFORNIA	*			15	11	73
WESTERN STATE COLLEGE OF LAW	28	19	68	36	14	39
TOTAL	340	222	65	580	225	39

February 2021 California Bar Examination

Number of First-Timers and Repeaters Taking and Passing and the Percent Passing: Out-of-State ABA Law Schools with 10 or More Takers

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
AMERICAN UNIVERSITY	*			*		
COLUMBIA UNIVERSITY SCHOOL OF LAW	*			*		
GEORGETOWN UNIVERSITY	14	7	50.0	*		
WESTERN MICHIGAN UNIVERSITY	*			*		
ALL OTHER OUT-OF-STATE SCHOOLS	136	81	60	181	47	26
TOTAL	165	95	58	204	53	26

February 2021 California Bar Examination

Number of First-Timers and Repeaters Taking and Passing and the Percent Passing: California Accredited Law Schools ⁵

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
CALIFORNIA NORTHERN SCHOOL OF LAW	*			*		
EMPIRE COLLEGE SCHOOL OF LAW	*			*		
GLENDALE UNIVERSITY COLLEGE OF LAW	*			*		
HUMPHREYS UNIVERSITY DRIVON SCHOOL OF LAW	*			13	2	15
JOHN F. KENNEDY SCHOOL OF LAW	*			28	4	14
KERN COUNTY COLLEGE OF LAW	*			*		
LINCOLN LAW SCHOOL OF SACRAMENTO	*			26	7	27
LINCOLN LAW SCHOOL OF SAN JOSE	*			21	4	19
MONTEREY COLLEGE OF LAW	*			16	3	19
PACIFIC COAST UNIVERSITY SCHOOL OF LAW	*			27	4	15
SAN DIEGO LAW SCHOOL, ALLIANT INTERNATIONAL UNIV	*			*		
SAN FRANCISCO LAW SCHOOL	*			*		
SAN JOAQUIN COLLEGE OF LAW	*			22	7	32
SAN LUIS OBISPO COLLEGE OF LAW	*			*		
SANTA BARBARA COLLEGE OF LAW	*			*		
SOUTHERN CALIF. INST. – SANTA BARBARA	*			*		
SOUTHERN CALIF. INST. – VENTURA	*			*		
TRINITY LAW SCHOOL	*			40	6	15
UNIVERSITY OF WEST LOS ANGELES	15	6	40	64	11	17
VENTURA COLLEGE OF LAW	12	3	25	12	2	17
TOTAL	84	37	44	329	56	17

February 2021 California Bar Examination

Number of First-Timers and Repeaters Taking and Passing and the Percent Passing: California Unaccredited Law Schools, Fixed Facility ⁵

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
CALIFORNIA DESERT TRIAL ACADEMY COLLEGE	*			*		
CALIFORNIA SOUTHERN LAW SCHOOL	*			*		
IRVINE UNIVERSITY COLLEGE OF LAW	*			*		
PACIFIC WEST COLLEGE OF LAW	*			*		
PEOPLE'S COLLEGE OF LAW	*			*		
WESTERN SIERRA LAW SCHOOL	*			*		
TOTAL	4	0	0	21	0	0

California Unaccredited Law Schools, Distance Learning ⁵

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
ABRAHAM LINCOLN UNIVERSITY	*			25	5	20
AMERICAN HERITAGE UNIVERSITY SOL	*			*		
CALIFORNIA SCHOOL OF LAW	*			*		
CONCORD LAW SCHOOL, PURDUE UNIVERSITY	12	5	42	24	4	17
ST. FRANCIS SCHOOL OF LAW	*			*		
TOTAL	15	7	47	58	10	17

California Unaccredited Law Schools, Correspondence ⁵

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
AMERICAN INSTITUTE OF LAW	*			*		
CALIFORNIA SOUTHERN UNIVERSITY	*			*		
NORTHWESTERN CALIFORNIA UNIVERSITY	13	6	46	31	7	23
OAK BROOK COLL OF LAW	*			*		
TAFT LAW SCHOOL	*			*		
TOTAL	23	10	43	46	9	20

ATTACHMENT C

PR-21-01

**ANALYSIS OF THE FEBRUARY 2021
CALIFORNIA GENERAL BAR EXAMINATION**

Roger Bolus, Ph.D.

RESEARCH SOLUTIONS GROUP

May 27, 2021

SUMMARY

The February 2021 General Bar Examination (GBX) had the following three sections: (a) a standard 200-item multiple choice test (“MBE”), (b) five essay questions, and (c) one Performance Test (PT) problem. For the second time, the exam was administered remotely, via computer. The combination of the essay and PT sections constituted the “Written” portion of the exam. There were 3,019 applicants who completed all three sections, 60.7% of whom had taken the GBX at least once before.

“MBE” raw scores are the number of MBE questions answered correctly. These scores were converted to “scale” scores to control for possible differences in average item difficulty across administrations of the examination. Essay and Performance Test (PT) answers were graded on a 40 to 100-point scale. Scores on this scale were assigned in 5-point intervals. PT score was multiplied by two (2) so that the maximum possible Written raw score was 700 points.

Written raw scores were converted to the same scale of measurement as was used on the MBE. This was done to adjust for possible differences over time in the difficulty of the questions asked and the leniency with which the answers to them are graded. An applicant's Total Scale Score was computed using the formula below:

$$\text{Total Scale Score} = (.50 \times \text{MBE Scale}) + (.50 \times \text{Written Scale})$$

The major findings for the 3,019 applicants¹ who had all of their answers read at least once and the subgroup of 348 applicants who had them read at least twice were as follows:

- After the first reading of all answers 51.8% of the applicants failed and 36.6% passed. An additional 1.5% passed after the second reading. Overall, 38.8% of the applicants passed the examination².
- The reliability of the Written and Total scores were .82 and .93 respectively, slightly higher than past February administrations.

¹ Applicants who had completed all sections of the examination, including the MBE. Note that the manner in which the scaling formulas, data analytics, and technical reports are done for each examination uses only complete sets of applicant scores. By definition, a “complete set of scores” for these purposes would not include any applicants who have a grade of less than 40 on any of the 6 written questions on the examination or a missing MBE score. In contrast, the manner in which numbers are reported for purposes of “Allocation of Applicants, Production of Examination Statistics and Law School Lists” and the Report to the Supreme Court on the California Bar Examination uses a definition of applicants who “completed” the exam that also includes applicants who have a grade of less than 40 (i.e., zeros) on any of the 6 written questions, so long as they are in attendance for the entirety of the exam. Thus, that latter number will be larger in comparison to the former number, as it is more inclusive. For the February 2021 GBX, there were 79 applicants who had one or more zeros in their set of 6 written questions. Accordingly, there were 3,098 applicants who completed the GBX for purposes of the exam statistics (3,019 + 79).

² The bar passage rate for all 3,019 applicants taking the GBX, including those without complete scores was 37.2%. The passage rate for the 432 applicants taking the Attorney’s exam was 57.2%.

- The correlation between MBE and Written scores was .67, higher than all previous February examinations.
- Fully, 44 (12.6%) of the 348 applicants who went into regrade passed the examination. Only 2 applicants in the lower portion (i.e., < 1360) of the regrade range passed.
- The historic tendencies for males to score higher on the MBE than females (1360 vs. 1332) and vice-versa for the Written section (1326 vs. 1356) continued for this examination. During the current administration, the average total score for Whites (1381) was 78 points higher than Black (1303), 72 points higher than Asians (1309), and 49 points higher than Hispanics (1332). These differences were similar for both sections of the examination. We did notice that Hispanics scored higher on the Written section than the MBE.
- 54.7% of the 1,185 first-time takers passed the exam, while 27.3% of the 1,834 repeaters passed. The chances of passing for those taking the exam for the 4th and 5th time were significantly smaller (19.3% and 20.5%) than those taking the exam for a 2nd time (34.5%), while only 16.3% taking the exam for more than a 5th time passed. (see chart below).
- The Appendices at the end of the report continue key statistics for each of the two annual administrations of the bar examination going back to the early 1990's.

PASS vs. FAIL STATISTICS BY NUMBER OF PREVIOUS EXAMS TAKEN

Decision	0	1	2	3	4	5	>5	Total
Fail	536	461	200	169	130	105	268	1,869
Pass	649	243	84	64	31	27	52	1,150
Total Takers	1,185	704	284	233	161	132	320	3,019
% Passing	54.8%	34.5%	30.0%	27.5%	19.3%	20.5%	16.3%	38.1%

ANALYSIS OF THE FEBRUARY 2021 GENERAL BAR EXAMINATION

TEST SECTIONS, TIME LIMITS, AND SCHEDULE

The examination had three parts: A 200-Item Multiple-Choice section (MBE), the California essay section, and the California Performance Test (PT). The combination of the Essay and PT sections constitute the “Written” section. The current examination was administered over a two-day period.

The written portion (Essays and PT) of the GBX was administered on Day 1. It consisted of five one-hour essay questions and one 90-minute PT, with a 30-minute interval between each question. On Day 2, the Multiple-Choice test was administered in four 90-minute sessions, each containing 50 items, with a 30-minute interval between each session. Because of the COVID pandemic, all questions were given and answers recorded on special software designed for remote administration (i.e., each examinee took the exam in their own location, rather than in a group setting).

SCORING RULES, FORMULAS, AND PHASED GRADING

MBE raw scores (the number of multiple-choice questions answered correctly) were converted by the National Conference of Bar Examiners (NCBE) to equated ("scaled") scores using Item Response Theory (IRT) methodology. This procedure adjusted the raw scores for possible variation in average question difficulty from one administration of the MBE to another. California multiplies the MBE scale scores by 10.

Each essay answer was graded in 5-point intervals on a scale ranging from 40 to 100-points. The same procedure is used to grade each PT answer. The PT score was then multiplied by 2 so that the maximum possible Written Raw Score is 700 points (5 essays at 100 points each plus 1 PT item at 200 points).

Written Raw Scores were converted to a score distribution that had the same mean and standard deviation as the applicants' MBE scores. This scaling used the MBE and Written scores of 8,640 applicants who had their written answers graded first. The formula used to convert February 2021 Written Raw Scores to scale scores:

$$\text{Written Scale} = (4.1641 \times \text{Written Raw}) - 386.5342$$

An applicant's Total Scale Score was a weighted combination of that applicant's MBE and Written Scale Scores. The formula for computing Total scale scores is:

$$\text{Total Scale Score} = (.50 \times \text{MBE Scale}) + (.50 \times \text{Written Scale})$$

A two-phased grading process was used to determine an applicant's pass/fail status. In Phase 1, applicants passed if their Total scale score was 1390 or higher and failed if it was

less than 1350³. The remaining applicants, i.e., those with total scale scores of 1350 to 1389.99, then have their essay and PT answers read again. The second Grader was a different Grader than the first one and did not know the score assigned by the first Grader. The final score for these applicants was the average of the two graders.

ANALYSIS

Analyses were conducted with the 3,019 applicants who had both an MBE score and a complete set of Written scores. This is the smallest population of February test-takers on record. This sample contained 1,185 applicants who were taking the examination for the first time (39% of all takers) and 1,834 repeaters (61% of all takers). The General Statistics Report, available online on the State Bar's website, contains data on the number of first timers and repeaters by school type.

SUMMARY STATISTICS

Table 1 provides summary statistical data on each section after all readings. There was a .67 correlation between MBE and Written scores which was the highest value since correlation statistics were calculated. Fully 38.1 % of the applicants passed the exam, the highest rate since 2015. The increase can be attributed primarily to the lowering of the pass score from 1440 to 1390.

Table 1 - SUMMARY TEST STATISTICS AFTER ALL READINGS

Test Statistic	MBE Scale	Written Raw	Total Scale
Mean Score	1345	415	1344
Standard Deviation	164	39	150
Reliability	.93	.82	.93

SUBGROUP ANALYSES

On the average, women scored about 24 scale score points higher on the Written section than on the MBE while there was a 34 scale-point average differential in the opposite direction for male applicants (Table 2), continuing the historic trend observed on previous examinations. With respect to racial/ethnic groups, Blacks, on average, continued to score lower than all other racial/ethnic groups, while Asians and Hispanics scored 72 and 49 scale score points lower than Anglos. These differences are similar to previous February examinations. During the current administration, the average score on each of

³ The decision rules were modified by the CA Supreme Court and first applied during the previous administration. The passing score was lowered to 1390, the regrade range was changed to 1350 to 1389.99, and the resolution grading phase was eliminated.

the sections differed by no more than 9 scale points in each racial/ethnic group, except for Blacks where the difference was 29 points.

Table 2 - MEAN SCALE SCORES WITHIN RACIAL/ETHNIC AND GENDER GROUPS AND THE NUMBER OF APPLICANTS AND PERCENTAGE OF MALES WITHIN EACH GROUP

Test	Racial/Ethnic Group					Gender	
	Asian	Black	Hispanic	White	Other	Female	Male
Written	1304	1288	1336	1381	1366	1356	1326
MBE	1315	1317	1328	1380	1344	1332	1360
Total	1309	1303	1332	1381	1355	1344	1343
N	846	241	425	963	392	1,681	1,292
% Male	40%	45%	43%	46%	42%	0%	100%

PHASED GRADING

A two-phased grading process was used to focus additional grader time on the applicants who were just below passing. There were 348 applicants who had their answers read at least twice. On the average, their mean Written scale score on the first reading (420.9) was 6.6 points higher than their mean on the second reading (414.3). The difference is larger than that observed on the last administration. The impact of the change in the regrade range (from 1390-1439 to 1350-1389) on phase grading differences should be closely monitored.

Table 3 presents the number and percentage of applicants in each pass/fail category at each phase. The number and percentage of applicants that passed were 1,128 and 31.9%, respectively. Of these, only 62 examinees (about 2%) passed after Phase 1.

Table 3 - NUMBER AND PERCENTAGE OF APPLICANTS WHO PASSED AND FAILED IN EACH PHASE OF THE MULTIPHASED GRADING PROCESS

Phase	Fail		Pass		Total	
	Number	Percent	Number	Percent	Number	Percent
1	1,565	51.8%	1,106	36.6%	2,671	88.4%
2	304	10.1%	44	1.5%	348	11.6%
Total	1,869	61.9%	1,150	38.1%	3,019	100.0%

Table 4 shows the continuing strong relationship between Phase 1 scores and final pass/fail status. Beginning with the previous examination, along with the reduction in the passing standard, the regrade band was tightened by 10 points; moving from 50 points (1390 - 1439) to 40 points (1350-1389). However, the pattern of having relatively few examinees in the lower portion of the range pass upon regrade continues. Only 2 examinees out of 90 (2%) with an initial total scale score in the 1350 to 1359 range passed. Compare these to those examinees in the top of the regrade range (1380-1389) where 23% passed. As we mentioned in the report on the last examination, the passing rates within the regrade ranges should continue to be monitored over future exams to determine the appropriateness of the revised regrade range.

Table 4 - NUMBER OF REREAD APPLICANTS WHO PASSED AND FAILED RELATIVE TO THEIR TOTAL SCORES AFTER THE FIRST READING

Score after the first reading	Number of Applicants			Percent passing
	Fail	Pass	Total	
1380 – 1389	68	20	88	23%
1370 – 1379	78	13	91	14%
1360 – 1369	70	9	79	11%
1350– 1359	88	2	90	2%
Total	304	44	348	13%

APPENDIX A: SUMMARY TEST STATISTICS ON FEBRUARY EXAMINATIONS*

Exam	N	Percent Passing	Mean MBE Scale Score	Written Raw Score		
				Mean	Reliability	Correlation with MBE
1991	3,685	51	1430	667	.68	.58
1992	3,907	51	1432	663	.69	.60
1993	3,682	45	1418	666	.73	.59
1994	3,638	44	1421	657	.68	.59
1995	3,488	42	1412	653	.74	.60
1996	3,834	44	1417	646	.67	.58
1997	4,103	49	1434	651	.66	.59
1998	3,871	40	1412	650	.70	.60
1999	4,309	41	1416	642	.65	.55
2000	4,447	40	1415	638	.66	.57
2001	4,461	38	1405	640	.72	.58
2002	4,030	34	1396	633	.71	.53
2003	4,162	38	1398	611	.68	.58
2004	4,363	36	1392	625	.72	.50
2005	4,458	41	1407	607	.72	.62
2006	4,758	39	1402	621	.77	.58
2007	5,109	37	1398	611	.75	.59
2008	4,497	40	1405	614	.78	.55
2009	4,051	34	1383	608	.79	.58
2010	4,193	37	1392	612	.74	.57
2011	4,309	43	1414	606	.72	.56
2012	4,334	43	1407	614	.77	.57
2013	4,362	42	1413	604	.75	.58
2014	4,529	46	1423	596	.77	.61
2015	4,709	40	1400	605	.78	.65
2016	4,678	36	1386	601	.77	.61
2017	4,439	34	1379	607	.78	.61
2018	4,654	28	1357	417*	.74	.64
2019	4,574	31	1373	418	.75	.61
2020	4,139	27	1361	416	.71	.60
2021	3,019	38	1344	415	.82	.67

* Beginning in July 2017, the raw score was based on 5 essays and 1 PT. 2021 was the first February administration to have 1390 as the passing score. Previous to this administration, the passing score was 1440.

APPENDIX B: SUMMARY TEST STATISTICS ON JULY EXAMINATIONS*

Exam	N	Percent Passing	Mean MBE Scale Score	Written Raw Score		
				Mean	Reliability	Correlation with MBE
1990	6,963	58	1451	684	.76	.67
1991	7,219	55	1454	674	.75	.67
1992	7,108	60	1464	674	.71	.64
1993	7,018	59	1465	671	.77	.68
1994	7,027	64	1482	672	.76	.70
1995	7,109	60	1471	660	.75	.68
1996	7,445	56	1458	667	.76	.70
1997	7,678	62	1478	655	.75	.68
1998	7,548	53	1446	656	.74	.65
1999	7,684	51	1449	644	.75	.66
2000	7,603	56	1460	645	.74	.62
2001	7,585	57	1468	637	.77	.64
2002	7,477	51	1445	632	.72	.64
2003	7,732	50	1443	634	.73	.67
2004	8,020	49	1434	621	.75	.67
2005	8,310	49	1437	630	.79	.68
2006	8,858	52	1452	630	.80	.65
2007	8,115	56	1459	630	.79	.67
2008	8,590	62	1476	623	.80	.68
2009	8,607	59	1463	616	.78	.69
2010	8,521	55	1454	622	.80	.66
2011	8,412	55	1458	618	.78	.71
2012	8,664	56	1460	613	.82	.66
2013	8,822	56	1461	593	.80	.66
2014	8,428	49	1436	610	.83	.67
2015	8,236	47	1426	612	.83	.70
2016	7,648	44	1423	596	.82	.73
2017	8,546	50	1432	429*	.79	.72
2018	7,943	41	1408	419	.80	.71
2019	7,678	51	1431	426	.78	.71
2020	8,640	61	1431	424	.85	.71

* Beginning in July 2017, the raw score was based on 5 essays and 1 PT. The 2020 examination was administered in October rather than July. Beginning with that administration, the passing score was dropped from 1440 to 1390 and the third phase of grading was eliminated.



California Bar Examination

Essay Questions and Selected Answers

February 2021



The State Bar
of California

Committee of Bar Examiners
Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2021 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.	Evidence
2.	Contracts / Remedies
3.	Community Property
4.	Professional Responsibility
5.	Real Property

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

On January 15, Paul fell down the stairwell of Dell's Department Store ("Dell"). Paul sued Dell for personal injuries, alleging he fell because one of the steps was broken. The following occurred at a jury trial in the California Superior Court while Dell's manager, Mark, was being examined by Dell's attorney:

QUESTION: Where were you when Paul fell down the stairs?

ANSWER: I was standing nearby with my back to the stairs talking to Carol, a store customer, when I heard the noise of the fall.

(1) QUESTION: Has Paul sued Dell before?

ANSWER: Yes, five times that I personally know about.

(2) QUESTION: No one saw the accident. Right?

ANSWER: That's right. A thorough investigation was unable to find anyone who saw Paul fall on the stairs.

Mark was then cross-examined by Paul's attorney as follows:

(3) QUESTION: Isn't it true that you used to be employed by Paul as a cashier in his grocery store and that he fired you for stealing money from the cash register?

ANSWER: That is what he claimed.

(4) QUESTION: The stairs were repaired the day after Paul fell. Weren't they?

ANSWER: Yes.

(5) QUESTION: Didn't Carol, the store customer, exclaim at the time of the accident: "Oh no! A man just fell on that broken step"?

ANSWER: So, what?

QUESTION: Is this the report that Dell's insurance company prepared following an investigation of the accident?

ANSWER: Yes. That is the report the insurance company gave me. They always prepare a report in case we get sued.

Paul's attorney then moved to enter into evidence the insurance company's report. The report states: "Steps on the stairs at the store are in very poor condition."

- A. What objections could Paul's attorney and Dell's attorney reasonably make to the questions or answers to Mark's testimony numbered **(1)** to **(5)** above, and how should the court rule on each objection? Discuss.
- B. What objections could Dell's attorney reasonably make to the motion to enter the insurance company's report into evidence and how should the court rule? Discuss.

Answer according to California law.

QUESTION 1: SELECTED ANSWER A

Relevance

Under California law, evidence is admissible if it is relevant and competent. Evidence is relevant if it pertains to an element of a claim or defense and is probative of that element. Probative means that the evidence has some tendency to prove or disprove a particular element of a claim or defense. Evidence is competent if it is not otherwise barred by some exclusionary rule. A court may nonetheless exclude otherwise relevant and competent evidence if there is a risk of prejudice to the party against which the evidence is being offered and the prejudice substantially outweighs the evidence's probative value.

Question 1

The question is relevant in that it tends to prove that Paul has a prior motive for suing Dell other than the cause of his personal injury. Moreover, Mark is asserting that he has personal knowledge of the prior suits, which means that this testimony is competent, because a witness must generally have personal knowledge of the matters to which they are testifying.

Character Evidence

Paul's attorney should object to this question on the grounds that it is inadmissible character evidence. Character evidence is evidence that tends to establish a particular trait of one party. Character evidence may take the form of reputation testimony about the party's reputation in the community, the testifying witness's opinion of the party's

character, or prior acts of the party. Generally, character evidence is inadmissible unless character is directly in issue. Here, the question appears to be establishing that Paul's prior suits against Dell were frivolous or lacked some sort of sound basis. Moreover, because this is a personal injury tort claim, Paul's character is not directly in evidence. Therefore, under the general rule, the question should be objected to on the basis that it is improper character evidence.

There are several exceptions to the general rule against the introduction of character evidence. These exceptions include (1) establishing motive; (2) establishing the identity of a party; (3) establishing lack of mistake; (4) establishing intent; or (5) demonstrating a common plan or scheme. Here, Dell's attorney should argue against the objection that the question establishes Paul's motive for suing Dell; that it also establishes Paul's intent to sue Dell, thereby undercutting the argument that Dell was negligent in maintaining its stairs; and that Paul's previous suits establish a common plan or scheme against Dell through the use of multiple, potentially frivolous suits. It appears that potentially multiple exceptions to the general rule against character evidence apply to this question, and the court should therefore overrule the objection that this is impermissible character evidence.

The court should also weigh in favor of admitting the evidence because its probative value tends to outweigh its prejudicial conduct. The evidence is clearly prejudicial to Paul, but the fact that Paul has sued this particular store five times in the past is highly probative of Paul's intent to sue the store and perhaps contributory negligence or recklessness. Therefore, the court should overrule this particular objection.

Question 2

Paul's attorney should object to this question on the grounds that it is irrelevant and leading. Paul's attorney should also object to the part of the answer that affirms that "no one" saw the fall actually happen.

Relevance

As noted above, evidence must be relevant to be admissible. Here, while Paul's attorney could argue that the question is not relevant, he likely will fail on this point. The fact that no one else saw the fall happen is not relevant to the issues in a personal tort claim. Dell's attorney, however, should argue that this testimony is relevant because it tends to undercut the validity of Paul's claim, i.e. that there are no corroborating witnesses to the fall.

Leading Questions

An attorney directly examining a witness may not ask leading questions unless the witness is hostile. A leading question tends to assume its answer in the form of the question. Here, the question assumes that no one saw the fall happen and then asks the witness to confirm this. Moreover, Mark is being directly examined by Dell's attorney and is clearly not hostile to Dell's attorney. Therefore, the form of the question was improper. The proper remedy here would be to strike the leading question for Dell's attorney to rephrase the question in a way that is not leading.

Lack of Personal Knowledge

Paul's attorney should object to the portion of the answer that asserts that "no one" saw the fall actually happen. In order for a witness's testimony to be admissible, he must

have personal knowledge of the matter being testified to. Here, it is likely impossible that Mark could identify all possible bystanders in a department store. Therefore, this portion of the answer is outside the scope of Mark's knowledge and therefore should be inadmissible. The proper remedy here would be to strike the offending portion of the statement.

The remaining portion of the statement is admissible, because Mark has personal knowledge of the investigation and can attest that the persons interviewed in the investigation.

Question 3

Dell's attorney should object to this question because it improperly references the consequences of a prior bad act by Mark.

The question is relevant because it tends to undermine Mark's credibility for truthfulness and a possible motive against Paul. The court should not exclude the testimony under the normal balancing test because Mark is a key witness and his truthfulness is probative of the validity of the rest of his testimony.

As noted above, character evidence in the form of prior bad acts is generally inadmissible. A witness's credibility may be impeached, however, by an attorney asking a good-faith question about a prior bad act if the act is probative of the witness's truthfulness. Extrinsic evidence of the prior bad act is not admissible, and the attorney may not reference any consequences of the prior bad act. The act in question here is theft, which is probative of truthfulness. Paul's attorney likely has sufficient grounds to ask the question in good faith, because Paul is his client and likely mentioned Mark's

firing to the attorney. The form of the question, however, is improper, because the attorney references the fact that Mark was fired for stealing from Paul. Dell's attorney should object, and the question should be stricken. Paul's attorney may, however, rephrase the question to remove the reference to the consequence.

As noted above, the form of the question here is not objectionable because Paul's attorney is cross-examining a witness for the opposing party. Therefore, a leading question is permissible.

Answer to Question 3

At issue in Mark's answer is whether his statement constitutes hearsay. Hearsay is an out of court statement that is offered as proof of the matter asserted. Here, Mark is repeating a statement made by Paul ("That's what he says."). The statement is being offered as proof of the matter asserted because the question is whether Mark stole money from the cash register. Therefore, the statement is hearsay under the general rule.

A hearsay statement may be nonetheless admitted under one of the exceptions to the hearsay rule. An admission by a party-opponent is admissible as an exception to the hearsay rule in California. Here, Paul is an opposing party and therefore his statement may be admitted under this exception to the hearsay rule.

Question 4

Dell's attorney should object that this question is impermissible because it includes subsequent remedial measures.

The evidence here is relevant because it tends to show that the stairs were, in fact,

broken, thereby establishing a breach of duty by Dell.

While nonetheless relevant, public policy excludes evidence of subsequent remedial measures, except in cases of products liability. Here, there is no products liability question involved, and the question falls squarely within the subsequent remedial measures rule. Therefore, the question should be objected to and stricken from the record.

Question 5

Hearsay Objection

Dell's attorney should object to this question because it is clearly hearsay. The statement by Carol is an out of court statement and it is being offered as proof that Paul fell and that the stairs were broken. Therefore, under the general hearsay rule, the testimony is not admissible. Note that the statement is relevant because it is probative of both breach (the stairs are broken) and causation (Paul fell down the stairs).

Paul's attorney could potentially argue that the statement constitutes an excited utterance and is therefore admissible as a hearsay exception. An excited utterance is one that is made by a person who is still under the stress of an exciting event and for which there is no time to reflect on the statement. Here, seeing a person fall down broken stairs likely qualifies as a startling event and the statement was made contemporaneously with the event in question. Therefore, the question and its answer are likely proper under this exception to the general rule against hearsay.

Note that Paul's attorney cannot successfully argue that the statement is a present sense impression. In California, a present sense impression is only admissible when

the hearsay declarant makes a statement about her actions while she is performing the act. Here, there is no action by the hearsay declarant and therefore this exception does not apply.

Lay Opinion Objection

Paul's attorney could object to the answer in the question because it constitutes a lay opinion that goes to one of the ultimate issues in the case (whether there was a breach of duty because of the broken stairs). In California, a lay witness may testify to her opinion as to sensory matters, speed of an automobile, whether a person is drunk or insane, or other matters within her personal knowledge. Note that California also allows a lay witness to testify as to scientific or technical knowledge that the lay witness has. Here, it is likely within the lay witness's knowledge that the stairs are broken because Carol can observe that the stairs were broken. Therefore, this objection should likely be overruled.

Insurance Report

Dell's attorney should object that the insurance report is (1) privileged work product; (2) that it is hearsay; (3) that it is improper evidence of liability insurance; and *[sic]*

The first issue is whether the work product privilege would attach. The work product privilege is a qualified privilege that allow documents made in anticipation of litigation to be excluded from discovery and evidence. Here, the work product doctrine likely applies because an insurance company making a report likely anticipates that its insured will be sued because of an accident that happened on the store's premises. Moreover, Mark indicated that the report was prepared "in case we get sued." Paul's attorney could

argue here that the work product doctrine should not apply because there is substantial need for the document. This argument may succeed because the stairs were repaired shortly after the fall, and therefore Paul's attorney could not inspect them or have an expert inspect them.

The second objection would be that the document constitutes hearsay because it is an out of court statement being offered to prove that the stairs were in fact broken. This argument will fail because the report likely constitutes an exception to the hearsay rule known as the business records rule. Where a business normally keeps a particular type of record within the ordinary course of business and the record is made by a person with knowledge of the event and a business duty to record the event, the business record may be admitted under an exception to the hearsay rule. Here, the insurance company always prepares a report when there is an accident and the insurance company likely has a duty to keep such records for when it is required to issue liability payments. Therefore, the business records exception to this evidence applies and the report will not be excluded on the grounds that it is inadmissible hearsay.

Finally, Dell's attorney may attempt to argue that the report is inadmissible evidence of liability insurance. Generally, evidence of liability insurance is not admissible to prove guilt or ability to pay. Here, however, the report is not being offered to prove guilt. Instead, it is likely being offered to show the condition of the stairs at the time of the accident. Therefore, the liability insurance exclusionary rule likely does not apply.

The court should also balance the introduction of the report against unfair prejudice to Dell. While the report is prejudicial to Dell, it does not appear to be unfair to Dell.

Moreover, the insurance company likely has an interest in accurately representing the material in its reports. Therefore, the balancing test weighs admission.

The court may consider excluding the evidence on the grounds that it is protected work product, but should likely rule for its admission on the ground that there is substantial need for the report.

QUESTION 1: SELECTED ANSWER B

Under Proposition 8 of the California Constitution (Prop 8), all relevant evidence is admissible in a criminal trial. Prop 8 makes an exception for California Rules of Evidence Code Section 352, which prohibits the introduction of evidence whose relevance is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury. As this is a civil case, Prop 8 will not apply.

A.1. Prior suits

Logical relevance

To be admissible in CA, evidence must be relevant to an issue in dispute. Here, Paul's previous lawsuits against Dell are relevant because they show potential bad faith by Paul (P) in constantly bringing lawsuits against Dell (D). This fact makes it more likely that the lawsuit is without merit, and may have been brought for the purpose of harassing D.

Legal Relevance

In CA, evidence should be excluded if its relevance is substantially outweighed by the risk of undue prejudice. Here, the evidence is prejudicial in that it does not address the issue here - D's negligence for P's injuries, but instead seeks to introduce extraneous evidence about P's previous actions against D. This must be weighed against the relevant bias that this evidence introduces. In balance, it is likely that the court would find that the relevance would not be substantially outweighed by the prejudice of this statement.

Form of the question

Assumes facts not in evidence

The question states that Paul fell down the stairs. This has not been established in the fact pattern. If there is no basis for the statement, it is improper to include this fact in the question. However, if it has previously been established that P fell down the stairs, then the question is proper.

Personal knowledge

To testify, a witness must have personal knowledge about the facts being described.

Here, although Mark (M) may not have been involved in the previous lawsuits, he has testified that he is personally aware of five previous lawsuits. Therefore, this testimony is based on personal knowledge.

Character evidence

Character evidence is evidence about a party's previous actions or dispositions that are introduced to establish that the party acted in conformity with their purported character.

Character evidence is generally inadmissible. Character evidence is inadmissible in civil cases unless a party's character is part of the cause of action.

This case, a negligence suit does not have a party's character at issue. The question and answer introduce evidence about P's previous actions in suing D. This does not relate to the suit, but instead relates to P's previous actions with respect to D.

Therefore, it will be inadmissible character evidence, and should be excluded for substantive purposes.

Habit

Although character evidence is inadmissible, habit evidence is admissible. Habit evidence are a party's actions that always occur with respect to certain stimulus. Habit evidence may be introduced to show that a party acted in conformity with the habit.

Here, P's prior suits do not rise to the level of a habit. They are isolated instances of actions that P has taken, but they are not a reaction to a stimulus. Therefore, this evidence is not admissible as habit evidence.

Impeachment

Although character evidence may be inadmissible for substantive purposes, it may be used to impeach a party or witness. Bias may always be raised to impeach a party to a suit.

Here, P's previous suits show a pattern that may indicate bias against D. Therefore, this evidence is admissible to impeach P, but may not be used for substantive purposes.

A.2. No witnesses

Logical relevance

See rule above. This evidence is admissible because it shows that there were no witnesses to the accident. This makes it less likely that the accident occurred since no other person can corroborate P's version of events. Therefore, it is logically relevant.

Legal relevance

See rule above. As stated above, the statement is relevant. It is not unfairly prejudicial to P. P can contradict this testimony by producing a witness.

Form of the question - leading question

Leading questions are questions that contains the answer. It is improper to ask a leading question in direct examination.

Here, this question is a leading question. D's attorney states that no one saw the accident, and merely asks for concurrence. M is an employee of D and is being called as D's witness. Because this is D's witness, and this is direct examination, this question is an improper leading question. P's attorney should have objected to this question as leading, and the court should sustain that objection.

Personal knowledge

See rule above. M's answer talks about a thorough investigation but does not state who engaged in the investigation. It is unclear whether M has any personal knowledge about this testimony. Therefore, P's attorney should object to the response, and the court should either (1) sustain the response, or (2) order some clarification to identify M's basis for the statement.

A.3. Mark's firing

Logical relevance

See rule above. The question is relevant because it tends to show a potential basis for M's bias. This evidence throws into question M's previous testimony. Therefore, it is logically relevant.

Legal relevance

See rule above. The question is relevant as described above. It is prejudicial in that it

does not precisely go to a disputed fact, but merely throws into question M's truthfulness. Still, the court will likely find it more relevant than prejudicial.

Form of the question - leading question

See rule above. While leading questions are not allowed in direct examination, they are allowed in cross examination. Here, P's attorney is cross examining M. Therefore, this question form is appropriate.

Form of the question - compound

When questioning a witness, a lawyer may only ask one question at a time. Compound questions are disallowed.

Here, this question is composed of two questions: (1) did P fire M, and (2) was the firing for stealing money. Because it is a compound question, D's lawyer should object, and the court should sustain the objection.

Form of the response - nonresponsive

A witness must respond to the question asked. A response that does not answer the question can be stricken, and the witness will be instructed to answer the question.

Here, M's response does not respond to the question. P's attorney asked M if P fired M for stealing money. M does not answer the question, but instead states that M claimed these things. Therefore, P should object to the answer, and the court should sustain the objection and order M to answer the question.

Character evidence

See rule above. This evidence is a past act being introduced to show that M's testimony

is false because he was previously fired by P, and therefore has an axe to grind. As this is character evidence it is inadmissible as substantive evidence.

Impeachment

See rule above. This evidence is proper impeachment evidence because it shows M's bias. Therefore, it will be admitted for impeachment purposes.

A.4. Repair of the stairs

Logical relevance

See rule above. The fact that the stairs were repaired after the accident tends to show that there was something wrong with the stairs previously - during the time of the accident. Therefore, it tends to show that the stairs were negligently maintained by D, and that P's claim has merit. Therefore, this evidence is logically relevant.

Legal relevance.

See rule above. As stated above, this evidence is relevant. However, it is prejudicial because it uses a subsequent repair against D. The prejudice of this use is the reason for the rule against its use, as described below. Therefore, it is prejudicial. The court may exclude it on these grounds, but there is a specific rule on point.

Subsequent remedial measure

Where a defendant makes a subsequent repair, such repair may not be used to show the fault of the defendant. This is because it would make it less likely that defendants would make subsequent needed repairs. Subsequent repairs may be used to show ownership or control over the property.

Here, the ownership or control of the stairs does not appear to be at issue. Instead, this is being introduced to show that the stairs were in bad repair at the time of the accident. Therefore, it is inadmissible because it is a subsequent remedial measure. D's attorney should object to this line of questioning, and the court should sustain it.

A.5. Store customer's statement

Logical relevance

See rule above. Here, this statement tends to show (1) that P in fact fell on the stairs and (2) that the step was broken. Therefore, it shows both that P fell, and that D was potentially at fault. As such it is logically relevant.

Legal relevance

See rule above. Here, the evidence is relevant as described above. There is little risk of prejudice because M can say whether this did or did not occur.

Form of the answer - nonresponsive

See rule above. M does not respond to the question either affirmatively or negatively, and instead questions the relevance of the question. As M did not respond to the question, P's attorney should object to the response. The court should sustain the objection and order M to respond.

Hearsay

Hearsay is an out of court statement being introduced for the truth of the matter asserted. Hearsay is generally inadmissible.

Here, Carol's statement, made out of court, is being introduced for the truth of the

matter asserted. It is being introduced to show that P fell on D's broken step. Therefore, it is hearsay, and D's attorney can object to it on those grounds. It will be inadmissible unless an exception applies.

Contemporaneous statement

A contemporaneous statement is a statement that a witness makes while an event is occurring. A contemporaneous statement is admissible as an exception to hearsay.

Here, Carol's statement was made immediately after the event. It was not made while the event was occurring, but a contemporaneous statement may be admissible if the statement was made immediately after the event. Here, it is likely that the court would find that this is admissible as a contemporaneous statement.

Excited utterance

An excited utterance is a statement made while a person is under the stress of an exciting event. Such a statement is admissible as an exception to hearsay.

Here, Carol's statement was made while witnessing a person fall down the stairs. This is an exciting event and would startle a reasonable person. Therefore, this statement was made due to a startling event. In addition, it was made immediately after the event, and likely while Carol was still under the stress of the event. Therefore, it will be admissible as an excited utterance.

B. Insurance company's report

Logical relevance

See rule above. The insurance report describes an investigation of the accident. It likely

provides background and a determination of fault. Therefore, it will be logically relevant.

Legal relevance

See rule above. The insurance report is relevant as described above. It will likely not be deemed to be prejudicial. There are no facts that indicate that the report is prejudicial to D.

Authenticity

To be admissible, the proponent of tangible evidence must establish that the thing is what it purports it to be. This may be done through the testimony of an individual with knowledge of the evidence.

Here, M was able to identify that the report that P proffered was what it purports to be - an insurance report that D's insurance company prepared. Therefore, it has been properly identified.

Hearsay

See rule above. The insurance report, a report that was prepared and contains statements made out of court, is being introduced for the facts set forth in the report.

Therefore, it is hearsay, and will be admissible unless it is non-hearsay or an exception applies.

Vicarious statement

A statement that a party's agent makes out of court may be imputed to the party. A party's out of court statement is always admissible as non-hearsay. Similarly, a

vicarious statement made by a party's agent may similarly be admissible. Admissibility will depend on whether the agent is an employee or an independent contractor, and whether the statement is made in the course of employment.

Here, the insurance company is not an employee of D, but is instead an independent contractor. The insurance company provides insurance to D, and D does not control the insurance company's actions. Therefore, statements that the insurance company makes cannot be imputed to D. Therefore, the insurance report will not qualify as a vicarious statement.

Business record

A record made in a business's regular course of business is admissible as an exception to hearsay. The record must be part of a regularly conducted activity, must be regularly recorded, and must be made at or near the time by a person with knowledge of the items being recorded.

Here, the insurance company's report may be a business record. However, P's attorney has failed to establish a foundation for its status as a business record. P's attorney has failed to show that it was the insurance company's regular practice to prepare these reports, and that it was made at or near the time of the events by a person with knowledge of the items being recorded. Instead, P's attorney is seeking to introduce the record through M, who did not prepare the report. While M stated that the insurance company always prepares the report, he does not know how or by whom it was prepared.

In addition, if a record is created in anticipation of litigation alone, it is not a business

record. Here, the record is only created when the insurance company believes that D will be sued. Therefore, it does not constitute a business record.

QUESTION 2

Bright Earth Solutions ("Bright"), an agricultural services business that employed 10 people and had over 100 clients, purchased a new commercial tractor mower (not suitable for personal, family or household purposes) from Stercutus Mowers ("SM") for \$15,000. In concluding the sale, SM presented a one-page contract that contained the following language:

SM undertakes, affirms and agrees that this mower is free of defects in material and workmanship at the time of its delivery to the buyer. If the mower or one of its component parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, SM shall repair or replace at its sole option any such mower or component part at its own cost or expense. Other remedies are excluded.

The contract also stated in bold, 12-point font:

THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED AND PARTICULARLY, THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY SM IN CONNECTION WITH THE SALE OF THIS MOWER.

Authorized representatives of Bright and SM signed the contract and Bright took delivery of the mower.

Over the next six months, Bright experienced numerous problems with the mower. The bolt holding the mower blade in place broke five times under normal usage. The steering system was faulty, causing unsightly and uneven lines in mowing jobs. The gas tank installation was defective, causing intermittent gas leaks. Several times the mower would not start due to various electrical faults and Bright had to cancel planned jobs. As a result, Bright lost clients and \$5,000 in profits.

Bright took the mower to SM each time it malfunctioned. SM effected repairs and the mower would work for a while and then malfunction again. Sometimes the replacement part would fail, other times a different part would fail. The mower was returned to SM for repairs 12 times in the first six months after purchase.

At the beginning of the seventh month after purchase, the mower's steering wheel came off during a job. At that point, Bright communicated to SM that it wished to return the mower and be refunded the purchase price. SM refused, pointing to the clauses above in the original contract. Bright then sued SM for breach of contract and warranty.

1. Is Bright likely to prevail in its suit against SM? Discuss.
2. If Bright prevails, what remedies, if any, would likely be available? Discuss.

QUESTION 2: SELECTED ANSWER A

1. Success of Bright in its suit against SM

Governing Law

Contracts for the sale of goods are governed by Article 2 of the UCC. All other contracts are governed by the common law. Goods are things moveable when identified in the contract. Here, we have a contract for the sale of a commercial tractor mower, which is moveable. Because the tractor is a good, the contract is governed by Article 2.

Statute of Frauds

While contracts generally need not be evidenced by a writing, some contracts require a writing if they fall within the Statute of Frauds. A contract for the sale of a good over \$500 falls within the Statute of Frauds and requires a writing signed by the party against whom enforcement is sought, and expressing the quantity involved.

Here, the contract is for the sale of one \$15,000 commercial tractor mower. The contract is in writing and signed by both parties, so it complies with the formalities of the Statute of Frauds.

Breach of Contract

A contract for the sale of goods (governed by Article 2) requires that the seller of goods tender perfect goods. This means that goods have to be exactly what the buyer contracted to purchase under the terms of the contract. If the seller fails to tender perfect goods, the buyer is entitled to not accept delivery of the defective goods. However, once acceptance is made, a buyer cannot revoke the acceptance unless

there is a latent defect later arising (whereby the defect was not easily identified, but with subsequent use becomes clear).

Here, the contract is for a commercial mower, and the mower has to run perfectly and like an ordinary good of that type operates. After the contract was signed, Bright took delivery of the mower. The assumption would be that the mower, at first glance, seemed to conform to the good that was purchased and as such it was accepted.

However, over the next six months, Bright experienced numerous problems with it. The bolt holding the mower blade broke five times under normal usage, the steering system was faulty, the gas tank installation was defective, and on several occasions the mower failed to start due to electrical faults.

Because these defects were latent and could not have easily been discovered the buyer, Bright, is entitled to revoke its acceptance of this nonconforming good by stating that the defect was a breach of the contract.

With this type of defect and breach, Bright would be entitled to a refund of the full contract price of the mower - \$15,000.

Express Warranty and its Disclaimer

Moreover, Bright will be able to argue that the contract included an express warranty which stated, "this mower is free of defects in material and workmanship at the time of its delivery to the buyer." An express warranty is one which sits on the face of the contract and entitles the buyer to rely on such warranty. Express warranties cannot be disclaimed by a subsequent statement in the contract saying that there "are no warranties expressed or implied."

Here, SM made an express warranty in promising that it would be free of defects at the time of delivery and failure to abide by such warranty will subject SM to damages.

There is no direct evidence that mower was defective at its delivery but it is unlikely that all the problems that arose were a result of negligence on the part of Bright (especially given that it malfunctioned under "normal usage"). Rather the logical inference is that the mower was defective at delivery and SM will be liable for violating the express warranty - the disclaimer will be irrelevant.

SM might argue that the express warranty was specific to defects in material and workmanship and not related to defects in the component parts or in installation.

However, where there are vague terms in express warranties, they will be read in favor of the non-breaching party and as such, Bright will win in arguing that the types of defects that occurred were a result of defects in material and workmanship - in breach of the express warranty.

**** Note:** SM's disclaimer of an implied warranty of merchantability or fitness for a particular purpose was likely proper. It was in bold and on the same page as other contractual terms.

Limits to Relief

While disclaiming express warranties is improper, SM was able to limit the relief that could be sought if the mower was not defective upon delivery. Here, a term of the contract stated that in bold 12 point font that "If the mower or one of its parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, **SM shall repair or replace at its sole option any such**

mower or component at its own cost or expense. Other remedies excluded."

Accordingly, SM properly limited Bright's relief to repairs or replacement at its sole discretion.

The facts state that Bright took the mower to SM each time it malfunctioned and SM effected repairs. Thus, SM would argue that it was abiding by its contractual duty to repair the mower and was under no obligation to replace the mower or offer a refund. Further, SM would argue that the fact that the mower would work for a while and then malfunction again is of no relevance, because SM was willing to repair each time as evidenced by the fact that the mower was returned to SM for repairs 12 times in the first six months after purchase and repairs were made each time.

Note: If the suit was for personal injuries sustained by the defective condition, then the limit to relief would not be abided by and the plaintiff would be entitled to damages for his/her injuries. Here, the suit is not for personal injuries so the limit to relief would have been proper but for the express warranty saying the mower would be free from defects.

Conclusion

Bright will be successful in its suit against SM both on a contractual and express warranty suit. Contractually, SM breached by failing to tender perfect goods, and under the express warranty by failing to deliver a mower free of defects in material and workmanship.

2. Remedies available for Bright

Damages

Compensatory Damages

Bright is entitled to recover the purchase price of the defective mower. The mower was purchased for \$15,000 and based on the breach of contract, Bright will argue that he is entitled to a full refund of the purchase price. Assuming the court finds that SM did in fact breach by providing a defective product, then the breach will entitle Bright to a refund of the purchase price plus any other damages sustained as a result of the breach.

Incidental Damages

Bright will also be able to recover any incidental damages that resulted from SM's breach. Incidental damages are those that arise in dealing with the breach. Here, Bright took the mower to get repaired a total of 12 times. He will be able to recover any costs associated with taking the mower to get repaired such as the cost of the salary for the employee who had to go take it in or the gas money spent, etc.

Consequential

Bright will also argue he is entitled to consequential damages for the lost profits he sustained as a result of the breach. Consequential damages will be awarded if both parties (especially the breaching party) was aware of the lost profits that would be incurred as a result of a breach and that those losses were foreseeable.

Here, as a result of the mower being so defective (that sometimes it wouldn't even start), Bright had to cancel planned jobs and lost both clients and \$5,000 in profits.

Bright has a good claim here because SM knew that Bright was an agricultural services provider and that if the mower failed consistently it would cause Bright to lose both

clients and profits. As such, the court should award the consequential damages. SM will argue that it was not foreseeable that the losses would be incurred as a result of the breach because it was not foreseeable that Bright would not have other mowers it could use while the mower they purchased was being repaired. Assuming it was clear that this is the only mower Bright owned, the consequential damages will be awarded at least in the amount of \$5,000.

Conclusion

Bright will likely be able to recover the initial purchase price, anything expended as incidental damages, and at least the \$5,000 in consequential damages.

Defenses

SM might argue that Bright is not entitled to the tender of perfect good because it was a contract for goods not suitable for personal, family or household purposes. However, this argument will fail because nothing indicates that the goods were made specifically for Bright.

Additionally, SM might say that Bright consented to the repairs or took too long to demand refund. Also fails.

QUESTION 2: SELECTED ANSWER B

Governing law is UCC Art. 2

Where a contract is for a sale of goods, Article 2 of the UCC applies. For all other types of contracts, the common law applies. Here, the contract was for Bright Earth Solutions (B) to purchase a commercial tractor mower from SM. This is a contract for a sale of goods, therefore Art. 2 of the UCC applies to the contractual analysis set out below.

1. Is B likely to prevail in its suit against SM?

The issue here is whether B has a claim against SM for breach of contract and breach of warranty.

Valid contract

The Statute of Frauds requires that any contract for the sale of goods worth more than \$500 be in writing and signed by the party against whom it is sought to be enforced, and UCC Article 2 requires that the essential term of quantity be included. This is not an issue here as a contract was entered into in writing and signed by both representatives of B and SM and it referenced "this mower", being the particular mower that B purchased from SM. There is, thus, a valid written contract for SOF and UCC purposes.

Breach of contract

Article 2 of the UCC requires a perfect tender where sale of goods is concerned; this means that the seller must tender the right number of conforming goods as required

under the contract. The standard for determining "conforming goods" is that they are fit for their ordinary purposes. Failure to deliver conforming goods entitles the buyer to reject all the goods, accept some and reject the rest, or accept all and sue for damages. However, Article 2 also permits a buyer to reject a good *after acceptance*, where there are defects that are subsequently discovered. Acceptance of defective goods does not preclude a buyer from subsequent rejection where (i) the defect could not have been discovered at the time of delivery and the buyer relied on the seller's assurance that there were no defects; or (ii) the defect was apparent but the buyer accepted in reliance on seller's assurance that the defect would be cured.

Here, B took delivery of the mower upon signing the contract and there is nothing on the facts to suggest that the mower was not conforming at the time of delivery.

However, B can argue that it was not possible to detect any defects at the time of delivery because of the nature of the good (i.e. that any defects could be discovered only after operating the mower for some time) and additionally that B relied on SM's undertaking that the mower was "free of defects in material and workmanship at the time of its delivery". In addition, B could argue that SM's undertaking to repair or replace any mower or component part that failed within 1 year of delivery constituted an assurance to cure a defect discovered after delivery. As such, B will be able to argue that the subsequent defect constituted a breach of the perfect tender rule thereby allowing it to remedies (discussed in part 2 below).

Breach of warranties

B may also argue that SM breached the express warranty set out in the contract.

Express warranty

An express warranty is a statement of fact, description of a good, or a sample or model relating to the quality of the product, where such statement, description, sample or model formed as part of the bargain into and made at such time that the buyer could have relied on the same when entering into the bargain. Here, B will argue that the statement in the contract where SM affirmed that the mower was "free of defects in material and workmanship at the time of its delivery" constituted an express warranty, that was breached when the mower subsequently broke down multiple times over the next 6 months. It is clear that this statement constituted an express warranty. On the other hand, SM will argue that the contract also contained a disclaimer that "there are no warranties express or implied...in connection with the sale of this mower", which precluded B from being able to sue on the express warranty. However, SM's argument is likely to fail. The general rule is that it is very difficult to disclaim express warranties because of the nature of the inconsistency between the disclaimer clause and the express warranty, and the court is likely to construe the interpretation of both in favor of B, the consumer who acted in reliance on the express warranty by entering into the agreement.

As such, B will be able to sue for breach of the warranty if it can be shown that the numerous problems experienced were a result of a defect in material and workmanship at the time of delivery. On the facts, it is stated that the bolt holding the blade in place broke 5 times under normal usage, the steering system was faulty, and that the gas tank installation was defective. It will be for a trier of fact to determine if this evidence shows that the defects existed at delivery, but on balance it seems like this is the case

here such.

Implied warranties

B may also sue for breach of implied warranties of merchantability and fitness for particular purpose. A warranty of merchantability is provided by a commercial seller of the goods in question and warrants that the goods are fit for their ordinary purpose. A warranty of fitness for particular purpose can be provided by any seller and provides that the goods are fit for the particular purpose of the buyer, where the seller knew of the buyer's purpose and that buyer was relying on the seller to help select a suitable good. Here, SM is a commercial seller of mowers and thus can provide both types of implied warranties. B will argue that on the facts, the mower was not fit for ordinary purpose (given that the blade broke down 5 times on normal use, as well as the gas leaks and steering issues). B will also argue that it was not fit for the particular purpose which was for B to use on customers' lawns which required that the mowing lines be satisfactory, since the steering system was faulty and caused unsightly and uneven lines in mowing jobs) and that SM knew of B's particular purpose as B was an agricultural services business.

However, SM will likely be able to succeed that the implied warranties were validly disclaimed by the language. The rule is that a disclaimer must be fair and in conspicuous font and writing so that it is clear to the buyer. Here, the disclaimer clause was stated in bold and 12- point font and will likely meet this requirement. As such, B is unlikely to succeed in arguing breach of implied warranty.

2. B's remedies

If B prevails, it might be entitled to damages or rescission, provided it can argue against the validity of the disclaimer clause.

Validity of limitation of remedies clause:

A commercial contract may include a clause limiting the remedies available, provided that such clause is not unconscionable. A limitation clause may not purport to limit remedies for personal injury or operate in such a way where it limits the remedy to a one that is essentially unworkable under the circumstances. Here, the contract seeks to limit B's remedies to repair or replacement by SM, at its sole option, any mower or component part. However, B can show that the mower simply could not be repaired; on the facts, the mower was returned to SM for repairs 12 times in the first 6 months after purchase and finally that at the beginning of the 7th month, the steering wheel came off during a job, As such, B can argue that the limitation of remedies clause was unfair and should not be enforceable to limit the types of remedies available to B.

Damages

As B can demonstrate breach of contract and express warranty (discussed above), B can sue for damages, namely expectation damages, consequential damages, and any incidental damages. The expectation damages are to place B in a place it would be in had the contract been properly performed (i.e. receiving a mower that functions for ordinary purposes) and would be the cost of cover or market cost of a functioning mower. In addition, B can sue for any consequential damages (the lost \$5000 in profits) as it was reasonably foreseeable to SM that any defect in its mower would cause a loss

in business to B (being an agricultural services company) and lost profits. Finally, B can sue for any incidental damages such as the cost of sending the mower back and forth to SM for repair.

Rescission

B may also look to sue for rescission and obtain its money back. To succeed, B will need to show grounds for rescission such as mistake, misrepresentation, undue influence, duress and further that SM has no valid defenses such as laches, unclean hands etc. Here, B may argue that there was a misrepresentation of statement by SM as to the mower being free of defects. Misrepresentation is an untrue statement of fact regarding the product, that the buyer was objectively justified in relying on and actually relied on. If the statement was made intentionally to induce the buyer's reliance, then it is intentional misrepresentation. Here, B can show that it was justified in relying on SM's statement regarding the defect free nature of the mower and did actually do so. This serves as grounds for rescission. In addition, SM has no valid defenses in equity such as laches (e.g. that B did not sue within a reasonable time thereby causing prejudice to SM) or that B had unclean hands (i.e. acted wrongfully in relation to the matter at hand). As such, B can sue for rescission of the contract, which would entitle it to unwind the contract as if it had not been entered into, and to obtain a refund of the purchase price paid.

QUESTION 3

Prior to her 1990 marriage to Hal in California, Wendy helped operate an antiques and rare book business owned by her father.

During the marriage, Wendy continued to work with her father in operating the business. Over the years, Wendy and her father jointly operated the business and in 1995, they signed an agreement whereby Wendy became the owner of a $\frac{1}{2}$ interest in the business. Wendy had developed an exceptional talent for buying antiques and took over that part of the business in 1995. The business doubled in value from 1995 to 2000. In late 1999, Wendy's father died and by his will left his interest in the business to Wendy, including all of the business's real property and inventory.

Wendy and Hal separated early in 2014. They have lived separate and apart since then and are now involved in divorce proceedings.

How should the court allocate the value of the business between Hal and Wendy? Discuss.

Answer according to California law.

QUESTION 3: SELECTED ANSWER A

California is a community property state (CP). In a CP state, the marital economic community begins at the time of marriage and ends with (a) separation, (b) divorce or (c) the death of a spouse. Income, property and debts acquired during the marriage are presumed to be CP. Income, property and debts acquired (a) prior to marriage, (b) during marriage but pursuant to a gift or inheritance and (c) after separation or divorce are presumed to be separate property (SP). Property acquired while the couple are living in another state that would be CP if the couple had been living in a CP state is called quasi-CP and is distributed according to CP principles upon divorce or the death of a spouse.

Marriage: In California, marriage requires the consent of two individuals with the capacity to enter into the contract of marriage, along with adherence to certain formalities. Here, the facts indicate that H and W married in California in 1990. We presume that they met all of the above requirements. As the marriage took place in California and it appears that H and W still live in California, the entirety of their marital economic community is subject to CP principles.

Separation: In California, separation requires (1) an expression of intent by one or both spouses to end the marital relationship and (2) action in conformity with that intent. Prior to 2017, a valid separation ending the marital community also required that the spouses live separate and apart. That requirement no longer holds, and this applies retroactively. Here, the facts indicate that W and H separated early in 2014 and that they have been living separate and apart since. Though the separate and apart element

is no longer necessary, it certainly evinces an intent to end the marital relationship. There has therefore been a valid separation since 2014 and that is when their marital economic community ended.

1990-1995: Prior to marriage W helped operate an antiques and rare book business owned by her father. During the marriage, W continued to work with her father in operating the business.

Presumptions: As noted above, income acquired during marriage is presumed to be CP. During this period, though the business was owned by W's family, W did not own it. Therefore, it was not W's SP business. Rather, she worked for her father and probably derived an income from her work. W's income during this period would be CP but would not be incorporated into the calculations further discussed below.

Distribution: As with any other income accrued during the marriage, W's income from this period would be CP and, as such, would be split 50/50 with H upon divorce.

1995-1999: In 1995, W and her father signed an agreement whereby W became the owner of a 1/2 interest in the business.

Presumption: Property acquired during marriage is presumed to be CP. As the 1/2 interest in the business was acquired during marriage, it is presumed to be CP. However, it is not clear that W paid any consideration for her 1/2 interest. If she did not, then the 1/2 interest would be considered a gift and therefore W's SP. Though the business was SP, W's efforts invested in the business would be considered CP and therefore the community would have an interest in the business and be allotted a portion at divorce using either the Pereira or Van Camp formula. The following

discussion assumes that the business was SP.

Pereira Formula: The Pereira formula applies to the allotment to CP when the increase in the value of the SP business comes from the efforts of the spouse. Here, the Pereira formula fits because the facts indicate that W had developed an exceptional talent for buying antiques and took over that part of the business in 1995, so her efforts probably contributed to the subsequent increase in the value of the business.

Under the Pereira formula, the SP is calculated as (fair market value (FMV) of the business at marriage) + [(FMV of business at marriage) * (fair rate of return) * (years of marriage)]. Here, we do not have the numbers to do the calculation. While we know that the value of the business doubled from 1995 to 2000, that is not necessarily reflective of the actual fair rate of return. Note also that the years of marriage would be 1990 to 2014, at time of separation, rather than 1990 to now.

The CP is then calculated by subtracting the SP calculated above from the FMV at time of separation.

Van Camp: The Van Camp formula applies to the allotment of CP when the increase in the value of the business is due to reasons other than the spouse's efforts, such as market forces or characteristics inherent in the business, rather than the efforts of the spouse. Here, the Van Camp formula may fit because (1) the facts indicate that the entire value of the business doubled, but we know W was only involved in 1/2, so her father's efforts probably also contributed and (2) antiques and rare books naturally go up in value over time.

Under the Van Camp formula, the CP is first calculated as [(FMV of spouse's efforts in

business) minus (family expenses paid from business)] multiplied by years of marriage.

Again, we do not have the numbers to do the calculation but note that the years of marriage are 1990 to 2014.

SP is then calculated as the FMV of the business at separation minus the CP calculated above.

If the spouse was under-compensated - that is, the salary she drew was lower than the actual value of her work - then the court may choose to calculate CP by removing family expenses from actual salary paid on the theory that the community has already been compensated for the spouse's efforts.

Disposition: Assuming the 1/2 interest in the business was a gift, then the formulas above would apply. If W paid consideration for her 1/2 interest, however, then she would have likely used CP and therefore the 1/2 interest would be CP. This is because the concept of tracing dictates that property takes on the character of the property used to acquire it.

1999-2014: In late 1999, W's father died and by his will left his interest in the business to W. Presumably this would be the book end of the business.

Presumptions: Property acquired during marriage is generally considered CP. However, property acquired during marriage by gift or inheritance is presumed to be SP. Here, H and W had not separated at the time W's father died. However, as W's father left W his 1/2 interest in the business by will, the interest would be S's SP.

Disposition: As this 1/2 interest in the business was definitely SP, the formulas outlined above would apply again to the CP allotment.

2014-2021: During this period H and W were separate, which ended the marital economic community.

Presumptions: Property acquired after separation is presumed to be SP. Any earnings W had from the book side of the business would then be entirely SP. If the antiques side of the business is SP, then any earnings from that side of the business would also be SP. If, however, W paid for that interest and used CP, then that interest would be CP. This is because the property acquires the character of the property used to buy it; so property acquired using CP would continue to be CP. If the antique side of the business is CP, then the community would be entitled to allotment even after separation. The following calculations presume that the antiques side of the business was CP.

Reverse Pereira: As with the regular Pereira formula, the reverse Pereira formula applies to the allotment of CP when the increase in the value of the business comes from the efforts of the spouse. Again, the reverse Pereira formula would apply because the facts indicate that W's knack for the antiques business contributed to the business's earlier success.

Under the reverse Pereira formula, the CP is calculated as (FMV of the business at separation) + [(FMV of business at separation) * (fair rate of return) * years of separation)]. Here, we do not have the numbers to do the calculation. Note also that the years of separation would be 2014 to 2021, or 2020 since it is so early in 2021.

The SP is then calculated by subtracting the CP calculated above from the FMV at time of divorce.

Reverse Van Camp: As with the regular Van Camp formula, the reverse Van Camp formula applies to the allotment of CP when the increase in the value of the business is due to reasons other than the spouse's efforts, such as market forces or characteristics inherent in the business, rather than the efforts of one spouse. Here, this may fit because antiques and rare books naturally go up in value over time.

Under the Van Camp formula, the SP is first calculated as [(FMV from spouse's efforts from business) minus (family expenses paid from business)] multiplied by years of separation. Again, we do not have the numbers to do the calculation but note that the years of separation are 2014 to 2021, or 2020 since it is so early in 2021.

CP is then calculated as the FMV of the business at divorce minus the SP calculated above.

Disposition: The book side of the business, which W inherited from her father at death is definitely SP and W will be able to keep it. It is not clear whether the antique side is SP or CP, and the court will allocate the value of the business as discussed above. If it is CP, there may be a question as to whether H will be able to maintain a 1/2 interest in it (i.e., a 1/4 interest in the whole business). It is possible that he will and that W will have to buy him out. She will be able to keep the business for herself, however, despite the usual rule of equitable division at divorce. The court will consider that the business is identified more with her than with H and that her means of income would be severely affected if she lost it.

QUESTION 3: SELECTED ANSWER B

General Community Property Principles

California is a community property (CP) state. All property and earnings that are acquired during marriage that do not come from inheritance, gift, or devise, is considered CP. Property that a spouse acquires before marriage, after divorce or permanent separation, or during marriage via gift, inheritance, or devise is considered separate property (SP). Property acquired in a non-CP state that would be CP if the spouses were living in California is considered quasi-community property (QCP) and treated like CP upon divorce or death.

Here, Hal (H) and Wendy (W) were residents of California and married in California, so the general CP principles of California would apply to this case.

Marital Economic Community

The marital economic community is defined as the time between the formation of a valid marriage and ending with death, divorce or permanent separation. Property acquired during the marital economic community is CP, as discussed above.

Here, H and W were married in 1990 and separated in early 2014. They have lived separate in the interim and now have initiated divorce proceedings. The community begins in 1990 when the marriage was entered into, and potentially ended in 2014 if there is the requisite intent attached to their separation to not re-instate the marital economic community. Seemingly their separation in 2014 was permanent because the facts mention they lived separate and have been apart since, which has led to their

divorce proceedings. There's no other mention of them rekindling any romance in between or making any other remedial measures to re-instate the marital economic community, so likely the community ended in 2014 upon their permanent separation.

Thus, the community lasted between 1990 when they got married and 2014 when they permanently separated.

VALUE OF THE BUSINESS

Character / Source of the Business

As discussed above, property acquired before marriage or during marriage through a gift, inheritance or bequest is considered SP. Property acquired during marriage or acquired from CP assets, is considered CP.

Here, W helped operate the antique business owned by her father before she and H got married. However, she did not acquire the property until after they got married and she took jointly with the operations in 1995. W would argue that the business is her SP because the business was owned by her father and her father granted her 1/2 of the business in 1995. There's no mention of her father granting H any stake in the business and no mention of H even working there. Further, W would argue that the business is hers because in 1999 when her father died, she inherited the entire business through his will. So while she and H were married in 1999 at the time she inherited the business, because the business was hers through inheritance and not through purchase or any other acquisition, means that would result in it being CP, that the business is her SP and her SP alone.

H would likely counter this and say that even though W acquired her father's interest in

the business through his will in 1999, that her becoming owner of 1/2 of the business in 1995 means that the business is a CP asset. The 1/2 interest was not a result of any inheritance or gift, and seemingly the inheritance in the will only was to give her the other half she didn't own already. While the 1/2 she inherited in 1999 would be her SP because it came from an inheritance, the fact that he obtained a 1/2 ownership to the business during marriage would result in 1/2 of the business being a CP asset.

However, the court would have to determine the exact circumstances surrounding the 1995 acquisition and whether it was a purchase with CP funds, SP funds or a gift.

There's no mention of whether W paid for this 1/2 interest or whether the business was a gift from her father, but all the facts mention is that they "signed an agreement" where W became 1/2 owner of the business and took a 1/2 stake. Depending on whether W paid for this 1/2 stake and where the money came, potentially this could result in 1/2 of the business being a CP asset. If she paid for the 1/2 interest with her earnings during marriage, then that 1/2 stake would be a CP asset because funds earned during marriage are a CP asset and anything bought with them would also be considered a CP asset. If the court finds that this was a gift from her father to W, then potentially this is an SP asset because it could be a gift in lieu of money or some other repayment that was specifically directed at W and not at H and gifts acquired during marriage are the SP of that spouse. While the facts are ambiguous as to what the 1/2 ownership stake came from, W clearly owns 1/2 of the business as her own SP from the inheritance from her father because inheritance during marriage is an SP asset.

Thus, depending on whether the court finds the 1/2 ownership interest W took in 1995 via the agreement with her father was purchased or a gift, potentially that 1/2 interest

could be a CP asset, or an SP asset. The other 1/2 interest W took in 1999 under her father's will would be considered an SP asset because property acquired via inheritance during marriage is an SP asset.

CP Contributions to SP Business

When one spouse owns an SP business and there are CP contributions to the business, the CP acquires an interest in the SP business. The court has discretion to apply one of two formulas when determining how to apportion the CP share of the business: the Pereira formula, and the Van Camp formula.

Here, W would likely argue that the court should apply the Van Camp formula to apportion the CP share because the increase in the business was not due to her own work, but rather the work of her father and the inherent value of the business itself. The business was an antique shop that also sold old rare books. Her father owned the business and started it and even though she continued to work there, her father was really what got the business off the ground. There's no mention of how long W's father owned it, but potentially he was a mainstay in the community and someone that was very valued in the community. He could have had the business for a very long time before W began helping him out in 1990 and potentially the business was already on an upwards trajectory before she joined the team and started helping him out. Further, depending on where they live in California, W could also argue that the business was successful because of the local area. Potentially people in that area were attracted to the store because of its items and because the local population valued such a store in their community and not because of W's own contributions to the store. Even though W

worked there, she would argue that the value of the business and the increase was due to her father and the business that he created and not any of her own doing.

H would certainly counter this and say that the increase in the business between 1995 and 2000 was due to W's contributions. She developed "an exceptional talent for buying antiques" and took over that part of the business in 1995. Even if the local community valued the store, it was because of W's own contributions. She had worked at the store for over 5 years and had been helping her father out with running the business. He would argue that potentially she did not have this skill before they were married because she hadn't been working there for that long, but rather developed the skill after they were married through her continued work, and the fact that she developed it after they got married would result in it being a CP asset. She did not come into the marriage with this, but because of her constant work and time spent with her father she learned these skills and trained her eye for antiquing which increased the value of the business based on her work alone and her own time spent developing her craft. That much experience and that much exposure contributed to her having an eye for antiquing and for collecting valuable items and it was this eye and expertise that increased the value of the business. Even if the 1/2 stake W acquired in 1995 was a SP interest, her own contributions through her labor and time and expertise increased the business, so much so that she solely took over the antiquing part of the business from her father because she was so good in that area and had such a skill set that H would argue she developed during the marriage meaning it is a CP asset. She was married during that time so her labor would be a CP asset and the exceptional and business savvy labor was the reason that the business doubled in value from 1995 to 2000 and no market

forces could have pushed that drastic increase in value.

Likely the court would apply the Pereira formula to determine the CP share of the increase in value. While there's no mention of any outside market or economic factors that drove the increase in the business from 1995 to 2000, seemingly W's own acquired skill and expertise in this area had a huge impact on the business. While it is in the court's discretion to apply either formula, likely they would apply the Pereira formula to determine the CP share of the business.

Pereira Formula

The Pereira formula attributes the increase in value of the SP business to the labor, skill, and work of the spouse, which is considered a CP asset. The Pereira formula is more favorable to the CP because it views the labor and skill and work of the spouse as the factor behind the increase and the reason the business is doing so well.

Here, as discussed above, if the court applies the Pereira formula to determine the CP share in the SP business, it would determine that the increase in the value of the business was due to W's own experience, skill, and mastery in the area of antiques. The SP would still have its ownership interest, but the CP share would likely be greater because the Pereira formula is more favorable to the CP interests. Thus, the court would determine the CP and SP share of the business as shown by the formula below.

Formula

Under the Pereira formula, the court determines the two shares as follows: $SP = \text{value of business at marriage} + (\text{value of business at marriage} \times \text{fair rate of return [10\% in California]} \times \text{years of marriage})$. $CP = \text{fair market value of the business at divorce} - \text{the}$

SP share.

Here, there are no specific numbers to determine the value of the business when W started working there or acquired her interest. The two were married for 24 years so that would be applied at the end of the formula, and presumably the fair market value at marriage versus at divorce would be different because of the increase in the business during marriage, but without the specific monetary figures it is all speculative.

Dependent on the discussion above and whether the interest she acquired in 1995 was an SP or a CP interest, potentially the value at marriage would be different because those were four years apart. Without the numbers and actual concrete monetary figures of the increase it is impossible to know the actual numerical figures associated with the business value, but likely the CP would have a sizable stake based off of W's contributions because her contributions seem to have drastically increased the value of the business.

Thus, if the court applies the Pereira formula, likely the CP interest would be greater because of Pereira's favoring of the CP interest.

Van Camp Formula

The Van Camp formula attributes the increase in the value of the business to market forces, the economy, the inherent business value, and all other factors not related to the hard work of the spouse. Because this formula does not consider the work of the spouse to be the reason for the increase, this formula and approach tends to favor the SP of the business owner spouse.

Here, if the court determines the Van Camp formula applies, it will be because the

increase in the value of the business was due to the market forces and inherent business qualities of the business and not of W's hard work or expertise. Thus, the court would determine the CP and SP share based on the formula as described below.

Formula

Under the Van Camp formula, the court determines the shares as follows: CP = (reasonable rate of services - annual family expenses) X years of marriage. SP = fair market value of the business at divorce - CP share.

Here, as discussed above, there are no corresponding monetary values to show the actual expenditures. Likely W's reasonable rate of services was substantial because she seemingly was the sole operator of the business outside of her father and was the only person running it as there is no mention of any other employees or any other helpers, especially after her father died. There's also no mention of the family expenses or no other mention of them having any children, but depending on how much they spent annually on the family expenses, this would be factored in. Further, they were together for 24 years, so the interest would be determined by multiplying that figure at the end. Presumably the fair market value at divorce would be substantial because the business doubled in value from 1995 and 2000 and there's no mention of any other decrease in value. Without any other facts to support the numbers it is pure speculation, but likely the SP would have a more favorable interest here because the Van Camp formula more heavily favors the SP interest.

Conclusion

Likely the court would find the Pereira formula to be more appropriate for determining

the SP and CP interest of the business, but without any concrete monetary values it is impossible to determine the actual percentage of both interests.

Goodwill of CP Business

Goodwill of a CP business refers to its community reputation and future business prospects and earning potential. If the goodwill of the business is earned during marriage, then it will be a CP asset.

Here, potentially the goodwill of the business could be a CP asset. If the court finds that W's acquisition of the business in 1995 was a CP acquisition and that 1/2 was a CP asset, then any other increase in goodwill from the business from there on out could be a CP asset as well. The business seemed to be doing well, saying it increased in value substantially from 1995 to 2000 and W had seemed to develop quite a specialty in that area. W's own expertise and the business's success would likely result in high projected future earnings and a good reputation throughout the community. If this comes from W's own hard work and labor, which is a CP asset, then the resulting growth of the goodwill of the business would also be a CP asset. There's no mention of any future contracts or earnings or deals that the business has lined up, but if the business is successful in the community which it seemingly is, then the goodwill and local good reputation of the business would be a CP asset and the court would have to attribute a value to this in order to distribute it evenly at divorce.

Thus, the goodwill of the business could also be factored into its value and be distributed at divorce between H and W if the court finds that the goodwill comes from CP contributions.

Distribution

W owns at least 1/2 of the business as her own SP from when her father devised it to her in his will. An increase in the business and its value would at least be half of her own SP as attributed to that 1/2 of the business. Depending on whether the court determines the 1995 acquisition of the other 1/2 was a purchase with CP funds or an SP acquisition through a gift or other SP funds purchased, then potentially 1/2 of the business is CP or SP. Further, the CP will have an interest in the SP business and its increase because of W's work there while they were married. The court will likely apply the Pereira formula to determine this interest because of the mention of W's expertise and growing skill in antiquing. However, the court has the discretion to apply either the Van Camp or Pereira formulas and the resulting CP or SP share will be different depending on which formula is applied. Further any earnings W had from her time at the business while married would be CP assets.

QUESTION 4

Linda Lawyer is just starting out in practice. She arranges with Chiro, a chiropractor, to give Linda's name to his patients who have been in car accidents or falls. When Linda recovers money in contingent-fee lawsuits for Chiro's patients, she gives Chiro a gift, which they have agreed will be 5% of Linda's fee. If Linda recovers nothing, Chiro receives no gift. They also form a partnership, in which Chiro's services are described as "marketing."

Pete is one of Chiro's chiropractic partners. Chiro sends Pete to Linda because Pete is seeking a divorce from his wife Alice.

Pete tells Linda he can never forgive Alice because she was unfaithful. Pete tells Linda that he's having money problems and asks that she take the case on a contingency basis. Linda tells him she'll consider it if he'll have drinks with her. Pete feels he has little choice, and goes out with her. Linda initiates a sexual relationship with Pete, and agrees to take the case. Linda is increasingly distracted from Pete's case by her desire to spend time with him, sometimes filing papers hurriedly and narrowly avoiding deadlines.

Tom, Alice's divorce lawyer, calls Linda one day and says, "I know you're having sex with Pete. Either you settle this case cheaply, or I'll report you to the Bar." Linda decides to beat Tom at his own game and, without telling him, calls the Bar herself and reports his threat.

1. What ethical violations, if any, has Linda committed with respect to her:
 - a. Financial arrangement with Chiro? Discuss.
 - b. Partnership with Chiro? Discuss.
 - c. Relationship with Pete? Discuss.
 - d. Accepting Pete's case on a contingency basis? Discuss.
2. What ethical violations, if any, has Tom committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

Q1. What ethical violations, if any, has Linda committed with respect to her:

a. Financial arrangement with Chiro?

Fee for referral

Under ABA and California rules, a lawyer may not arrange referral agreements with non-lawyers for a fee unless it is a qualified reciprocal referral service.

Here, Linda made an arrangement with Chiro, a chiropractor who gives Linda names of his patients who have been in car accidents. This is not a qualified referral service and it involves procuring clients from a chiropractor who would see patients who come following car accidents. Their names would then be given to Linda who would then presumably contact the clients.

Thus, Linda violated the rules by engaging a non-qualified referral arrangement.

Gifts

Under ABA rules, lawyers are not permitted to solicit substantial gifts. Under California rules, gifts for past referrals are permitted as long as there is an understanding that the gift is **not a consideration** for future referrals and the gift is "fair".

Here, Linda gives the gift of 5% for the names. They do have an understanding that Chiro will continue to receive "gifts" if he keeps giving her name and she recovers fees from those representations. Thus, the arrangement with "gift" is prohibited under California rules.

Solicitation

Under ABA rules, solicitation, whether personally or through an agent, is prohibited.

Solicitation is direct communication with a person in order to gain representation for a **financial gain**. Under California rules, direct solicitations in hospitals and medical facilities are **presumed** unethical.

Here, Chiro is referring the clients to Linda. In effect, Linda is soliciting injured clients directly after she gets their names from Chiro, knowing that they might need a lawyer following an accident for a financial gain of representing them in a case for a fee. This is especially egregious as recognized by California rules because the clients are vulnerable in these situations when they were involved in a car accident and are easily manipulated, especially when the clients are not aware of the arrangements.

Thus, Linda violates both ABA and California rules by soliciting these patients.

b. Partnership with Chiro?

Partnership with a non-lawyer

Under both ABA and California rules, a partnership with a non-lawyer is strictly prohibited to **avoid** any improper influence on a lawyer.

Here, Linda has formed some sort of partnership with Chiro, who is a non-lawyer that they call "marketing" whereby Chiro would provide Linda with the names of the patients that Linda would then contact in order to win representing them. Because partnership would involve both partners having a say in a strategy of the law firm, influencing strategic and legal decisions and otherwise influencing legal services, such arrangements are violative of ethical rules.

Thus, Linda violated both ABA and California rules by engaging in such partnership.

Sharing fees with non-lawyers

Under both ABA and California rules, sharing fees with non-lawyers is **prohibited**, unless it is for employees within a firm as part of a compensation plan.

Here, as Linda is sharing a fee with Chiro, a non-lawyer, whereby he acquires 5% of the fee for giving her names of the clients. Because Chiro is not an employee of Linda and it's not part of a compensation plan and is otherwise for an improper purpose, such fee sharing is prohibited under both ABA and California rules.

Thus, Linda violated both ABA and California rules by sharing fees in this "partnership".

c. Relationship with Pete?

Sexual relations with a client

Under ABA rules, sexual relations with a client are prohibited, unless they **pre-date** the lawyer-client relationship. Under California rules, lawyer is prohibited from coercing or otherwise **unduly influencing** a client into sexual relations.

Here, Linda started dating Pete after she took him on as a client. Their relationship started at the same time and did not pre-date the lawyer-client relationship. Additionally, Pete felt like he "had no choice" indicating that there was a coercion and the relationship was not entirely voluntary. This is especially egregious because she knew that Pete and Alice were divorcing, and he would be in a vulnerable situation from his wife being unfaithful. These circumstances in total show that sexual relations resulted from an improper influence and coercion.

Thus, under both ABA and California rules, sexual relations with Pete was a violation of ethical duties by Linda.

Competence

Under both ABA and California rules, a lawyer must represent a client and act with a **skill, effort, preparation** and diligence of a **reasonable attorney** in the like circumstances. If the lawyer cannot competently represent a client, s/he must 1) withdraw from representation, 2) acquire knowledge and skill before performance arrives, or 3) associate him/herself with a competent lawyer or seek advice from an experienced lawyer.

Here, Linda let her relations with Pete affect her performance as an attorney. She was distracted by Pete and because she wanted to spend more time with him, she frequently underperformed, filing papers in a hurry and only narrowly avoiding deadlines. That would be below what a reasonable attorney would do under the circumstances. Thus, Linda violated her duty of competently representing a client. Additionally, she likely should not have taken the case in the first place. She is a new attorney, she is taking accident cases and Pete's case was a divorce case. Ordinarily, it would not be a violation if she acquired the knowledge and expertise. However, she is frequently missing deadlines and otherwise not engaging in an exemplary competence. Thus, Linda violated her duty of competent representation under both California and ABA rules.

Current conflict

Under ABA rules, a current conflict exists if 1) representation is adverse to one of the clients, or 2) representation is **materially limited** by responsibilities to other clients, third parties, or **lawyer's own interests**. Lawyer may still continue to represent despite a conflict, if 1) the lawyer reasonably believes that s/he may still competently represent a client, 2) obtains written consent from a client. California rules are similar but do not have a "reasonableness" requirement.

Here, Linda's own interest in sexual relations with Pete are likely in conflict with Pete's divorce case. Her own interest in him is likely to be in conflict with a representation in a divorce case where she would have to be impartial. She has a personal interest in the case, creating a conflict.

Thus, Linda likely violated her duty to Pete under both California and ABA rules.

d. Accepting Pete's case on a contingency basis?

Contingency fee agreements

Contingency fee agreements are agreements whereby a lawyer recovers a percentage fee of the recovered amount. Generally, contingency fee agreements are permitted. They must be in writing and clearly indicating how the fee is calculated. However, contingency fees are **prohibited in domestic relations** cases for policy reasons because there is a danger that such agreements would promote divorces. There are certain exceptions such as recovering alimony judgment due.

Here, Linda said that he would take a case on a contingency basis because Pete is having money problems. Because the case involves divorce, such arrangement is

prohibited.

Thus, Linda violated ethical rules under both ABA and California rules.

Q2. What ethical violations, if any, has Tom committed?

Threatening with administrative action to gain advantage in a current litigation

Under California rules, threatening with administrative action or any other civil action or prosecution to **gain advantage** in a current litigation is prohibited. Under ABA there are no such rules.

Here, Tom threatened that he would report Linda to the Bar about her relations with Pete in order to gain advantage in the current divorce proceedings where Linda is an adversary attorney. Such threat is strictly prohibited under California rules.

Thus, Tom violated California rules by making such threats.

Reporting violations of the rules to the authorities

Under ABA, a lawyer must report violations of the ethical rules. Under California, there is no such reporting requirement. However, under California rules, the lawyer him/herself must report to the bar of any own professional misconduct.

Here, it would be a violation for Tom not to report Linda's misconduct to the bar under the ABA rules but not under California rules.

Thus, Tom violated ABA rules by not reporting the misconduct.

QUESTION 4: SELECTED ANSWER B

1. Ethical Violations of Linda

In California, lawyers are obligated to comply with the ethical rules promulgated by the Rules of Professional Conduct (RPC) and the State Bar Act (SBA). The ABA also promulgates the Model Rules (MR) which CA will take under advisement in conjunction with the CA rules.

a. Financial arrangement with Chiro

Referral fees

Under the MR, lawyers are prohibited from engaging in exclusive referral arrangements that result in a pecuniary gain for the lawyer, absent participation in an approved attorney referral program. Here, L has made an agreement with C to give L's name to his patients when they suffer personal injuries and when L recovers for these patients, she will pay him a gift of 5% of Linda's fees. Under the MR, referral fees are strictly prohibited and as such, L is in violation of the rules regarding referral fees as they are prohibited under the MR.

Under the CA rules, lawyers may not engage in straight referral fee arrangements; however, they may provide a gift as a gesture of thanks when a referral is provided. The gift must be given as purely a gesture of thanks and not for the purpose of a quid pro quo or for securing future referrals. Here, L has arranged with C to give him a gift that amounts to 5% of L's fee in contingent fee lawsuits. Even though they

call this a gift, it is clearly not a gift. There is a clear quid pro quo arrangement whereby L is paying C for referring business. L is likely to argue this as well. She will argue that it is a gift pure and simple and she has called it as such, but this argument will not succeed. A referral fee disguised as a gift is not permitted under the CA rules. As such, L has violated the CA ethical rules by agreeing to pay a referral fee to C in exchange for his referral of clients.

Additionally, any referrals cannot be exclusive. It is not clear that the arrangement is exclusive, but to the extent that it is, it is not permitted. L may also attempt to argue that there is no quid pro quo because she is not offering to send patients to C, but this will fail because the exchange of money for the referral of patients is the quid pro quo and thus, is a violation of the rules.

Fee Splitting

Under the MR and the CA rules, lawyers are strictly prohibited from splitting fees with non- lawyers. The exception to this rule is where fees are paid to non- lawyers for compensation, as retirement benefits, and the like. Here, L is purporting to split the fees she earns as a lawyer with a non- lawyer, the chiropractor, C. This is strictly prohibited under the MR and the CA rules. L will likely attempt to argue that she is permitted to compensate staff for wages and earnings resulting from the work they perform on behalf of her and in assisting her in her cases, but this argument will fail. C is a chiropractor and even though it seems that L and P have agreed to form a partnership, it does not change the fact that lawyers are not permitted to split fees with non- lawyers.

Solicitation

Under the MR and CA rules, solicitation is prohibited when it is in person or live direct telephone or internet chat in nature. Here, the facts indicate that C's services are described as marketing services, meaning that C is likely conducting in person solicitation of L's services as a result of the in person patients C meets as part of his job as a chiropractor. While L might argue that C is merely a conduit and there is no guarantee that C's clients will turn to L for legal services, C will be deemed to be engaging in solicitations on L's behalf. As such, this marketing/solicitation agreement will be another of L's violations of ethical rules.

b. Partnership with Chiro

Formation of Law Partnership

Under the MR and CA rules, lawyers are not permitted to form law partnerships with non-lawyers. Here, the facts indicate that L and C formed a partnership and C's services are described as marketing. While law firms do typically have marketing departments whereby they market themselves outside of the firm, a law partnership between a lawyer and a non-lawyer is strictly prohibited.

Here, the facts indicate that C is a chiropractor, not a lawyer. There is no information to suggest that C is a lawyer and as such, the joining of L and C as partners as a lawyer and marketer is a violation of the ethical rules under both MR and CA analyses.

Splitting Fees

As discussed above, L and P's partnership, which by implication means they are sharing in the profits and losses of their respective businesses, is a violation of the fee

splitting rules promulgated by the CA rules and the MR. C and L's partnership is improper between a lawyer, and also due to the fact that C is sharing in the profits of L's cases potentially, L's partnership arrangement is a violation of the ethical rules under both CA and MR.

c. Relationship with Pete

Duty of Loyalty

A lawyer has a duty of loyalty to act in the best interests of their clients and exercise independent professional judgment. When a personal conflict of a lawyer may materially limit their ability to represent a client to the best of their ability, they may be in violation of their duty of loyalty. A lawyer may represent a client when there is a personal conflict if he or she believes objectively and subjectively that he can provide representation that is not limited, it is not prohibited by law, it is not in violation of the ethical rules, and the client gives informed written consent (CA) or informed consent, confirmed in writing (MR). Here, while it is highly unlikely that a lawyer engaged in sexual relationship with a client can give objectively solid representation, this representation is likely in violation of the ethical rules that prohibit sexual relationships with clients.

Sexual Relationships with Clients

Under both the MR and CA rules, lawyers are prohibited in engaging in sexual relationships with their clients, unless the sexual relationship existed prior to the attorney client relationship. California also has a specific exclusion that applies to lawyers who are married. The conflict of interest that arises due to a sexual relationship

with a client is not waivable.

Here, the facts indicate that L met P through a referral from C. As such, P and L did not have a relationship prior to commencing their relationship as attorney and client. They clearly were not married; in fact, L was hired by P to help him secure a divorce and as such, the married couple exception is not applicable. Additionally, L may argue that P will agree to sign a waiver and indicate that he is fine with the concurrent sexual relationship and representation, but this prohibition cannot be waived by client consent. As such, L will be in violation of the ethical rules by engaging in a sexual relationship with her client that began after the representation had started.

Start of Attorney Client Relationship

The attorney client relationship begins when the client reasonably believes that the attorney client relationship begins. Attorneys and clients may meet prior to deciding to formally engage as attorney and client, but to the extent that the relationship is confirmed, the conversations that took place prior to a formal engagement will likely be deemed to comprise the start of the attorney client relationship.

Here, the facts indicate that P confided in her regarding his relationship with his former spouse, A. This initial meeting whereby P clearly gave L confidential information and conducted himself such that the relationship was likely to have started, would probably be deemed to have begun the attorney client relationship between L and P. Although L states that she'll consider the case if he has drinks with her, P's actions indicate that he believed the attorney client relationship had already begun. After the drinks outing, L initiated a sexual relationship with P, who at that point, after drinks and an initial

consultation, likely believed he was her client, even though those acts occurred before she agreed to take the case.

L will attempt to argue that she began her relationship with P prior to the attorney client relationship, but this argument will likely fail. The facts seem to indicate that P likely believed the relationship had already begun and, thus, the exception for preexisting sexual relationships is likely not applicable. As such, L likely abused her position of power and is in violation of the ethical rules to not engage in a sexual relationship with a client.

Even if L was successful in arguing that the attorney client relationship began after the sexual relationship, there are no facts indicating that P, as the client, disclosed in writing that he was comfortable to continue with the representation in light of their sexual relationship. As such, L is likely in violation of the ethical rules.

Duty to Decline Representation

A lawyer is under a duty to decline representation if the representation would lead to a violation of the ethical rules of conduct. Here, by representing P, a client L is in a sexual relationship with, L is violating the rules of professional conduct under MR and CA principles as discussed above. As such, L is under an obligation to decline representation in accordance with the expected violation of ethical rules. L is in violation of her duty to decline representation when she is in a sexual relationship with P before, in her mind, she formally undertakes the representation. She should not have undertaken the representation of P and has violated her ethical duty by doing so.

d. Accepting Pete's case on contingency basis

Interest in Cases

Under the MR and CA rules, an attorney may only obtain a financial interest in a case to the extent that it doesn't involve criminal or divorce matters. Here, the case is a divorce matter and this i *[sic]*

Contingency Fee Arrangements

Under the MR and CA rules, contingency fee arrangements are permissible so long as they are not unreasonable or unconscionable and they are not for compensation related to criminal cases or conditioned upon fees that would be awarded in securing a divorce. To be valid in CA, a contingency fee arrangement must be in writing, must include the duties and responsibilities of the lawyer and the client, must set forth the details regarding the calculation of the fee, and the fee must be reasonable. Here, L has agreed to take P's divorce case on a contingency fee basis and as such, this is a violation of the MR and CA rules. P's case is a divorce case and L is clearly working to secure a favorable divorce settlement.

L might argue that P having money problems and as such, she agreed to take on his case on a contingency fee basis to help him, but under CA rules, this is not permissible. Under CA rules, lawyers may not advance costs or fees. As L has engaged in a contingency fee agreement for P's divorce, this is a violation of both CA and MR.

Duty of Competence

Under the MR, a lawyer is under a duty to represent a client with the appropriate

knowledge, skill, and experience such that they can provide the client with competent representation. A lawyer may become competent by putting in the time necessary to gain competence or by associating with a competent lawyer. In CA, a lawyer must not knowingly, recklessly, or intentionally fail to represent their client with competence. Here, all of the other relationship issues aside, it is necessary that a lawyer be competent in the representation of the client. Here, the facts indicate that L is just starting out in practice and she seems to have perhaps some experience in the field of personal injury. She agreed to take on P's case for a divorce and it is not clear that she has any experience in this field. The facts are silent as to whether she had undertaken any steps to gain competence in the field of divorce law and whether she has associated with an experienced lawyer. Unless L becomes competent in this field or associates herself with a competent lawyer in this field, she will be in violation of her duty of competence to P under both MR and CA rules. Additionally, L is being distracted by her relationship with P, which means she is not providing the most competent representation possible. She clearly is not undertaking time and efforts necessary to competently represent P.

L might argue that P doesn't mind and will waive her incompetence, but unfortunately, waiver of competence is not permitted under either CA rules or MR. L has clearly violated the duty of competence to her client, P.

Duty of Diligence

Under the MR, a lawyer is obligated to perform their duties in a diligent and timely manner such that the lawyer is a zealous advocate for the client. Under CA rules, a

lawyer is obligated to not knowingly, recklessly, or intentionally fail to act with diligence. Here, the facts indicate that L is increasingly distracted by her desire to spend time with P and files papers hurriedly and narrowly avoiding deadlines. Due to her inability to act as a zealous advocate for P, filing his papers in a concerted manner and giving his case the appropriate time needed to ensure he is adequately represented, L is breaching her duty of diligence under both the MR and CA rules.

2. Ethical violations of Tom

Duty Not to Threaten

In CA, lawyers are not permitted to threaten opposing parties or other clients with a claim that lacks merit to gain some kind of strategic advantage. Here, T, who is A's divorce lawyer, has called L and threatened to report her for having sex with her client, P. This is forbidden under the ethical rules as it is clearly based on T's statements that he is intending to use this information to induce L to convince her client that he should settle the case. As such, T is in violation of his ethical duty not to threaten with the prospect of influencing the result of a case.

T will likely argue that he is threatening L with a meritorious breach of duty, L's personal relationship with P that she has engaged in with her client. And while this may be true, it is an inappropriate use of the information as it is clearly being used to threaten L and P regarding the outcome of the case. As such, T has violated his ethical duties by threatening L.

Duty to Report

Under the MR, lawyers are under a duty to report misconduct of other lawyers when it pertains to matters of clear and weighty importance, like truthfulness or honesty, that would impact a lawyer's ability to practice law. Under the CA rules, there is no such duty to report misconduct of others. Rather, there is a duty to self-report conduct. Here, under a MR analysis, it must be determined whether L's relationship with T is a matter of clear and weighty importance that weighs on L's ability to practice law. While it is certainly a violation of ethical duties for L to engage in a sexual relationship with her client, as discussed above, she will likely argue that it does not in any way relate to her ability to practice law or her truthfulness or honesty. T will likely argue that any violation of the ethical rules is of clear and weighty importance and L's behaviors are report worthy. It is possible that under the MR, T violated his duty to report by not reporting L's misconduct to the state bar.

In CA, as discussed above, only lawyers have a duty to self-report their ethical misgivings. As such, under CA law, T is not under a duty to report L's relationship with P.

QUESTION 5

Ed owned a parcel of land on the north side of a rural highway. A lane connected the highway to the small country inn Ed operated on the land. Ten years ago, Ed entered into a signed written agreement conveying a right-of-way easement over the lane to Fran, his neighbor north of his parcel. Fran operated a commercial farm with a small bunkhouse for farm workers on her land. She often used Ed's lane to access the farm and bunkhouse from the highway.

Recently, Fran announced that she was converting her farm into a 50-lot residential subdivision and the bunkhouse to a computer server center. She informed Ed that she wanted to run new electric lines and a fiber optic cable along the lane.

Fifteen years ago, Ed and Gloria, his then-neighbor on the south side of the highway, had entered into a signed written agreement in which Gloria covenanted that she and her successors in interest would use her property only as a commercial organic garden and, in exchange, Ed would purchase produce from Gloria for use in his country inn. Soon thereafter, Gloria sold her land to Henry. Ed continued to buy produce from Henry.

Recently, Henry informed Ed that the more intense development Fran had planned for her parcel and the increased traffic along the highway justified the conversion of Henry's garden into a combination truck stop and diner.

Ed objected to Fran's and Henry's intended changes and decided to sue both of them to enforce his rights.

1. What rights and interests do Ed and Fran each have in the lane, and may Fran, over Ed's objection, carry out her plans for the lane? Discuss.
2. What rights and interests do Ed and Henry each have in the garden property, and may Henry, over Ed's objection, carry out his plans for that property? Discuss.

QUESTION 5: SELECTED ANSWER A

Easements

An easement is a property right that grants the use of land to someone who does not otherwise own the property. It can either be tied to another parcel of land (appurtenant) or be tied to the person who has the easement (in gross). Typically, easements are appurtenant, but it does not appear to matter for the controversy here.

Ten years ago, Ed and Fran entered into an agreement for an express easement. Fran's property benefited from the easement, so it is the dominant estate, while Ed's was burdened, so he has the servient estate. This was a signed document, so it appears that it has satisfied the requirement that it comply with the Statute of Frauds. There is a valid express easement.

With that easement, Fran has the right to use the lane as she has been doing for the past ten years (as they agreed). She also has the right to make minor changes to her use so long as it is reasonable under the circumstances. Her right to use the lane is not exclusive (Ed can use it too). And Fran has the obligation to pay or make repairs necessary to the easement.

Change in use

When easements are established, they are typically limited to the use that was agreed upon. Establishing the use of the lane does not give Fran the absolute right to use it however she sees fit. A court will judge whether a change in use of an easement is allowable based on a test of reasonableness.

Fran says that she needs to run new electric lines and a fiber optic cable along the lane because she is converting her farm into a 50-lot residential subdivision. While needing the additions to the lane, given the changes to the property she is making, is reasonable for Fran, the court will question whether it is a reasonable accommodation based upon the agreement that was made between the parties.

Given these circumstances, it does not appear to be reasonable. This is transforming the use of the easement into something it never was before. Before it was used to access the small farm and bunkhouse from the highway. Now Fran wants to install significant electrical infrastructure. Importantly, this is inconsistent with how Ed, one of the signatories to the easement, uses his land. He runs a small country inn. While Fran's old farm and bunkhouse, along with a path used to reach it, did not affect Ed's enjoyment of his land, his inn will be materially hurt if he is forced to place cables and electric lines along the path. Ed does not have a right to tell Fran what she does with her property (changing the farm and bunkhouse into large residential lots), but he will convince the court that her attempt to add the lines (and potentially the cable, although it may be allowed if the court believes it can be underground and not an eyesore, resulting in minimal harm to Ed) is not reasonable under the circumstances.

Ed will be able to enforce his rights to maintain the easement as to its current use with Fran.

Real Covenants

Real covenants occur when owners of property covenant to engage or refrain from certain behaviors with their property regarding one another. That is what appeared to

happen between Ed and Gloria 15 years ago. Here, Ed now seeks to enforce the rights under the covenant to prevent Henry, a successor in interest from Gloria, from changing his land into a truck stop and diner, in violation of the agreement Ed had struck with Gloria.

While Ed could have simply enforced his contractual rights with Gloria, since Henry is not a party to that contract, Ed will try to enforce his rights under a real covenant. In order to enforce the burden of a covenant you must show that there is privity, intent for the covenant to run with the land to successors in interest, notice, the covenant touches and concerns the land, and that it complies with the Statute of Frauds. I will address each below.

Privity

While for the benefit to run with the land in a real covenant, it only requires minimal vertical privity, for the burden to run with the land, there must be horizontal and complete horizontal privity. Here, the burden is running because it is Ed who is trying to enforce the rights, or burden, under the real covenant on Henry, who was not a party to the original contract (and therefore is only subject to the covenant if it runs with the land).

Horizontal privity occurs when the covenant was involved in the actual establishment of the horizontal transaction of the real property between the landowners. A common way to see if this is the case is to see if the covenant is in the deed. Here, Ed and Gloria simply entered into an agreement to use their property in specific ways, without the required transaction relating to the land. Therefore, the requirement for horizontal

privity is not met.

Complete vertical privity is also required to enforce the burden of a real covenant. Complete vertical privity means that the entire property interest, nothing short of that, must be passed along to the successor in interest against whom the burden is sought to be enforced. Here, it appears that Gloria sold her entire interest, so vertical privity is met.

While complete vertical privity exists, horizontal privity does not. Therefore, the requirement of privity has not been met.

Intent

It must be the intent of the parties to the contract that the covenant run with the land. Here, the facts state that the agreement stated the covenant applied to Gloria and her successors in interest. This is sufficient evidence to show that the requirement of intent is met.

Notice

A purchaser of land, such as Henry, must be on notice that the covenant exists as well, or else it will not be enforceable. Here, the facts are unclear. On one hand, they state that Ed did continue to buy fruit from Henry and Henry informed Ed, giving him a chance to evaluate his legal obligations, before going ahead with the change. On the other, Henry may have simply been giving a kind of heads up to Ed, and Ed's actions do not serve as evidence to what Henry knew. These facts do not cut one way or the other definitively, but it seems likely that Henry was indeed aware of the agreement between Gloria and Ed.

The requirement of notice is met.

Touch and Concern

Real covenants must also touch and concern the land. That means that each party enters into the agreement to benefit their land, rather than entering into unrelated contractual relations regarding personal conduct that have nothing to do with the property. Here, Ed benefits from having a consistent supplier of produce to serve his country in, while Gloria benefits by having a consistent buyer of goods for her business. These are both tied to the pieces of property.

The touch and concern requirement is met.

Statute of Frauds

As will all contracts regarding real property, the contract must comply with the Statute of Frauds. Here, the facts state that they entered into a signed written agreement, demonstrating compliance with the Statute of Frauds.

Conclusion re Real Covenant

As the above demonstrates, Ed has satisfied the requirements of intent, notice, touch and concern, and Statute of Frauds that are necessary to enforce his rights against Henry. However, he has fallen short of establishing the final prong of privity necessary, meaning he will not be able to enforce his rights as a real covenant. However, the remedy available when enforcing a real covenant is damages. Ed appears to want to maintain the status quo, meaning he may have another option.

Equitable Servitude

An equitable servitude is similar to a real covenant but has two important differences. First, while it requires a showing of intent, notice, touch and concern, and compliance with the Statute of Frauds (things Ed has shown), it does not require privity. Privity is the one issue Ed was missing, meaning that he will be able to enforce his rights under an equitable servitude.

Second, while damages are not the available remedy under an equitable servitude, an injunction is. Here, Ed objects to Henry's change, and an injunction preventing Henry from changing the land from its use as an organic garden is exactly what he wants. Therefore, Ed will be able to prevent Henry from carrying out his plans for the property.

Changed Circumstances Doctrine

Henry may counter that he should not have to abide by the contract because of the changed circumstances doctrine. This applies in situations where there have been drastic changes to the land and the surroundings such that it makes it unreasonable to comply with the former restrictions placed by covenants/equitable servitudes/implied reciprocal servitudes. However, this is a very high bar to establish. The facts do not suggest that it is infeasible, or even close to it, for him to continue operating as a commercial organic garden. Rather, it appears that due to external factors, he may have a better commercial option if he switches to being a truck stop and diner. The existence of a better commercial opportunity on its own is not sufficient to release Henry from his legal obligation.

Ed will still be able to enforce his rights via injunction under the equitable servitude.

QUESTION 5: SELECTED ANSWER B

Easements

Express Easement

An easement is the right to enter the property for a particular purpose, but it does not grant any right of possession or enjoyment in the land.

An express easement is an easement given in writing signed by the party to be charged in order to satisfy the Statute of Frauds.

Here, Ed gave signed written agreement to Fran over the lane going to the highway.

Therefore, this was a valid express easement.

Termination of An Easement

Easements are presumed to last forever. However, they can be terminated by a writing, oral statement, and act of abandonment, selling of the servient estate to a bona fide purchaser without notice, or merging of the dominant and servient estate (the benefited and burdened estate, respectively).

Here, there is no indication that there has been any attempt to terminate this express easement. Fran did not say or write that she was abandoning the easement and Ed (the servient owner) has not sold his land.

Therefore, Fran will successfully argue that the easement is still valid.

Use of an Easement -- Surcharging the Easement

An easement can be used in a reasonable way for the purpose that it has been given. If the dominant estate owner exceeds the reasonable use of the easement and thus surcharges the easement, the servient estate holder can sue to enforce an injunction and prevent the use beyond what is reasonable.

Additionally, the user of the easement can do what is reasonably necessary for the maintenance of the easement even if it burdens the servient estate owner.

Here, Ed will argue that he gave Fran this right of way easement so she could access her farm and bunkhouse from the highway, not to run electrical lines and cables across it. Therefore, she is surcharging the easement by going beyond the scope of its use. Additionally, these additions of cables are not maintenance of the easement, that would be adding something to the easement.

Here, Fran will argue that the right of way easement was not conditioned on the fact that she continue to use the property as a farm and bunkhouse. Therefore, running the cables along the lane is now reasonable for the use of her property and thus the easement should still apply to it.

Here, the court will likely find that the right of way express easement was intended for the use of Fran having access to her property, not to run lines and cables across it or along it. Therefore, by wanting to install cables along the lane, Fran is exceeding the reasonable use of the easement. Therefore, Ed can likely get an injunction to prevent Fran from carrying out her plans with the lane.

Covenants and Servitudes

A covenant or servitude is a condition on the use of land. A covenant is when the person seeking to enforce the covenant is seeking damages. An equitable servitude is when they are seeking an injunction.

Here, Ed and Gloria entered into an agreement when Gloria covenanted that she and her successors would use the property as a garden and Ed would purchase produce from her in exchange. However, Gloria sold the land to Henry, but Ed continued to be able to buy produce from Henry.

Now, Henry wants to get out of this covenant.

Covenants

Burden to Run

For there to be a valid covenant to enforce for damages the subsequent owner of the burdened estate must have 1) notice 2) in writing 3) horizontal privity 4) vertical privity 5) intent 6) and the covenant must touch and concern the land.

Notice

The owner must have notice (actual, constructive, or inquiry).

--Actual

Actual means that the new owner has actual knowledge of the covenant at the time of conveyance.

Here, it appears that Henry has actual knowledge of the covenant because he continued to sell Ed produce after he bought the land and there are no facts suggesting

that he learned this later. It is likely that Gloria informed Henry of this in the sale of the land considering her contract with Ed that her successors in interest would also be bound.

--Constructive

Constructive notice means that the covenant is recorded in the chain of title.

There is no indication here that anything is in the title to the property because this covenant was just in a signed written agreement, not the deed itself.

--Inquiry

Inquiry notice is when there are facts or circumstances that would lead a reasonable person to further inquire about the property.

Here, Henry is selling product to Ed, so he seems to be aware of the covenant and thus inquiry notices doesn't apply.

Thus, Henry had actual notice of the covenant.

Writing

Here, the covenant was set out in a signed writing.

Horizontal Privity

Horizontal privity means that the covenant was set out in the conveyance of the land between the original grantor and grantee.

Here, there is no indication of that.

Facts indicate that Ed and Gloria were merely neighbors who signed a written agreement. Thus, this was not a covenant set out between a grantor and grantee, but

just a contract between to neighbors, so there is no horizontal privity.

Vertical Privity

Vertical privity means that the new owner owns the same interest as the original owner.

Here, it appears that Gloria sold all of her land to Henry and there are no facts to the contrary.

Thus, Henry likely has the same interest in the property that Gloria did and therefore there is vertical privity.

Intent

Intent means that there is an intent that the subject matter of the covenant be affected.

Here, there was clearly an intent for Gloria/Henry's land to be subject to this produce covenant that limited her use to a garden in exchange for Ed buying her produce because they explicitly put that in the written agreement.

Touch and Concern

Touch and concern means the covenant is valuable to the benefitted party.

Here, the covenant is valuable to Ed, who is the benefitted party because, he gets to buy organic produce for his country inn which he runs on his property. Additionally, it also benefits Ed's "country inn" by being right next to a garden which is likely more appealing to guests out in the country than a truck stop/diner combination would be.

Thus, this covenant touches and concerns the land.

However, since there is no horizontal privity, Ed does not have a right to seek damages for breaching this covenant.

Benefit to Run

To determine if the benefit to run for a subsequent owner of the benefitted parcel requires 1) notice 2) intent 3) vertical privity 4) and for it to touch and concern the land.

Here, Ed was the original party to the covenant, and he is the one trying to enforce it; therefore, there is no need to analyze whether the benefit runs. That only applies to subsequent owners of the benefitted estate.

Here, Ed can seek to enforce the covenant without showing this.

Equitable Servitude

Burden to Run

Ed may also seek an injunction for this equitable servitude and prevent Henry from changing the land from a commercial organic garden into a truck stop and diner.

For the burden to run for an equitable servitude there must be 1) notice 2) a writing 3) intent 4) and it must touch and concern the land. There is no requirement for privity.

Notice

See above for rule statement.

See above for discussion as to why Henry likely had actual notice of the covenant.

Writing

See above for discussion how this equitable servitude is in writing because it was set forth in the written agreement between Gloria and Ed.

Intent

See above for rule statement.

See above for discussion on why there was intent.

Touch and Concern

See above for rule statement.

See above for discussion for why this equitable servitude likely touches and concerns the land.

Therefore, since all four of these elements are likely met, Ed is able to enforce this equitable servitude and get an injunction that prevents Henry from operating the land as anything other than the commercial garden.

Benefit to Run

For the benefit to run for an equitable servitude it requires 1) notice 2) intent 3) and that it touch and concern the land.

Here, see above for discussion as to why Ed does not need to show the benefit to run because he is the original party to the servitude.

Termination of a Covenant/Servitude

A covenant or equitable servitude can be terminated based on abandonment, change in circumstances, estoppel, written release, and merger of the dominant and servient estates.

Change of Circumstances

Here, Henry is asserting that this covenant/servitude is terminated and thus cannot be

enforced because of change of circumstances. Henry will argue that Fran's change to her parcel and increased traffic change the circumstances of the area such that this covenant no longer should apply.

Fran used to use the land as a farm and bunk house, but now, Henry will argue, she is changing that to 50 residential homes and a computer server center, thus changing the nature of the area from agricultural and farmland. Thus, since there will be more people and less farms, a truck stop and diner now fit within these new circumstances.

Additionally, many more people will be in the area because instead of one farm with some workers on Fran's land, it will be 50 residences with people living in them.

Ed will argue back that she is changing her land into majority residential housing which is different in nature to a truck stop or diner which are entirely different types of establishments for commercial uses. Ed will argue that keeping the garden is still applicable and should be enforced because this is an agricultural area and thus a truck stop and diner do not fit in the area. This is a "rural" area, even with additional residential homes.

Here, because of the likely massive construction changes that will take place on Fran land, the increase in traffic due to 50 residential houses being used, and the change from using the land for agriculture/farming to a different use, the court could likely find that the circumstances have changed enough that the covenant/servitude should no longer apply to Henry's land even it was previously enforceable.

Therefore, Henry can likely carry out his plans over Ed's objections.



ATTACHMENT E

California Bar Examination

**Performance Test
and
Selected Answers**

February 2021



**The State Bar
*of California***

**Committee of Bar Examiners
Office of Admissions**

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TEST AND SELECTED ANSWERS

FEBRUARY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2021 California Bar Examination and two selected answers.

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.

CONTENTS

- I. Performance Test: Matter of I.B.I.
- II. Selected Answers for Performance Test



February 2021

**California
Bar
Examination**

**Performance Test
INSTRUCTIONS AND FILE**

MATTER OF I.B.I.

Instructions.....

FILE

Memorandum from Sarah Hodgeson to Applicant

Memorandum from Sarah Hodgeson to File:
Notes of Interview with Frank Duquesne.....

Article from Columbia Business Incubator Newsletter.....

Draft I.B.I. Contract Between Incubator and Mentor.....

MATTER OF I.B.I.

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Hodgeson and Hawkins, LLC

53 Severance Ridge Road
Columbia City, Columbia

MEMORANDUM

To: Applicant
From: Sarah Hodgeson
Date: February 23, 2021
Re: Matter of I.B.I.

Our firm represents Innovative Business Incubators (I.B.I.), a non-profit business that provides advice and support to new entrepreneurs in Columbia City. I.B.I. offers a range of services to new startups, including advice, expert consulting, networking, and referrals to other professional services. I recently met with Frank Duquesne, the Executive Director of I.B.I.

One of I.B.I.'s main services is the arranging of mentoring relationship between new entrepreneurs and experienced mentors. As the attached interview notes and article explain, these mentors can provide value that I.B.I. cannot, including expertise tailored to the needs of particular kinds of business.

Recently, after a complaint about a mentor, Duquesne has decided that he needs to formalize the relationship between I.B.I. and its mentors. He provided me with an article that highlights the benefits and the risks of the mentoring relationship in an incubator context. He has also provided me with a draft contract that he has revised to include the basic parameters that he wants to set on the relationship.

I want you to write a memo assessing several legal issues arising out of the relationship between mentor and mentee. For each of the following questions, I want you

to assess the impact of the law on the draft contract and, without drafting new language, describe any changes you might recommend to address our client's concerns:

1. Whether the relationship between an I.B.I. mentor and mentee gives rise to fiduciary obligations owed by the mentor to the mentee;
2. Whether the draft contract between I.B.I. and a mentor creates contractual rights that an I.B.I. mentee can assert against the mentor.

Hodgeson and Hawkins, LLC

53 Severance Ridge Road
Columbia City, Columbia

MEMORANDUM

To: File
From: Sarah Hodgeson
Date: February 21, 2021
Re: Matter of I.B.I.: Initial Interview with Frank Duquesne

I met with Frank Duquesne today. He's the Executive Director of Innovative Business Incubators (I.B.I.), a private non-profit that helps startup businesses with services and advice. Frank is an old acquaintance who, after several years working in business, started I.B.I. as a way of providing help to new entrepreneurs.

Frank told me that, for several years after starting I.B.I., he and his paid staff provided almost all of the support services to mentees: help with business basics; networking activities; internet access; advice on finding loans, managing accounts, and developing businesses.

Eventually, Frank told me, he realized that his mentees would benefit from working directly with established business people in areas where I.B.I. lacked expertise. He created several informal mentoring relationships between these "mentors" and his mentees. These relationships worked well, so he decided to make mentoring a regular and important part of I.B.I.'s service.

He recruited a team of over 30 mentors, all located in the capital city, representing a diversity of business structures and business types. I.B.I. now routinely offers to connect its mentees with mentors and Frank is aggressively seeking out new mentors for business models and services with which he is not familiar.

Recently, however, Frank received a complaint from one of his startup mentees. The mentee reported that one of I.B.I.'s mentors had pressured the mentee to use the mentor's business as a principal supplier, on terms less favorable than the mentee could obtain elsewhere. Moreover, this same mentor had also pressured the mentee to allow him to invest in the business, in exchange for a significant ownership share. The mentee resisted both advances and ended the relationship.

Frank stressed that this kind of problem had only occurred once. He believes that, in most circumstances, both mentor and mentee will act in good faith, that the mentees will seek independent advice before transacting with a mentor, and that strong reasons can exist for such transactions, involving benefits for both parties.

However, Frank wants to clarify the relationships between I.B.I., its mentors, and its mentees. He did some research and found some model mentoring agreements that he revised and proposes to ask his mentors to sign. He proposes to use such an agreement with all of his mentors. Before he does so, he wants us to review the agreements and advise him about the legal consequences for I.B.I.'s mentors.

Before our meeting ended, I spent time exploring what goals he wanted these agreements to serve. As I expected, Frank identified several conflicting concerns:

- Protecting I.B.I.'s Startup Mentees: Given the feedback from this one mentee, Frank wants to make sure that both he and his mentees have a way to protect the mentee legally if a mentor does succeed in taking advantage of the mentee.
- Avoiding the Discouragement of Mentors: At the same time, Frank does not want to expose his mentors to unnecessary liability. In most cases, mentors volunteer their time. He doesn't want the threat of lawsuits to chill that willingness to help.
- Informality: Frank is more than willing to ask mentors to contract with I.B.I., but he wants to preserve the informality and open-endedness of the relationships between mentors and mentee/mentees. He strongly

believes that these relationships work best if mentors and mentees work in good faith, without asking them to sign binding contracts defining the relationship.

I told Frank that we would research his questions and get back to him soon.

Business Incubators and Business Mentors: Helpful or Harmful?

Columbia Business Incubator Newsletter

A business incubator helps startup companies to grow by providing services such as management training or office space. Business incubators differ from industrial parks in their dedication to startup and early-stage companies. Incubators also differ from the Small Business Development Centers (and similar government sponsored business support programs) in that they serve only selected clients.

The formal concept of business incubation began in the USA in 1959 when Joseph Mancuso opened the Batavia Industrial Center in a Batavia, New York, warehouse. Since then, incubators have spread across the globe; by some estimates, as many as 7,000 business incubators exist world-wide.

Technology has increased this growth. New experiments like Virtual Business Incubators bring the resources of entrepreneurship hubs like Silicon Valley to remote locations all over the world. Virtual incubators allow startups to get the benefit of an incubator without actually being located at the incubator site.

Many incubators rely on business mentors to help as advisors and consultants for startup businesses. These mentors typically come from the same industry as the startup and include established individuals with substantial business experience.

A good mentor can be a huge plus. Mentors bring knowledge and perspective that allow startups to avoid hidden risks and to seize unseen opportunities. A mentor can provide entry into specialized business networks and can help new business people form relationships with suppliers, customers, and regulators.

At the same time, the mentoring relationship can have its downsides. Mentors sometimes take too little time to learn the new business. Mentors may fail to understand new or disruptive business models. Finally, some mentors have used their position of

influence to take an ownership position in the startup or to sign contracts that benefit the mentor's own business.

Before using the services of an incubator or a business mentor, take time to understand how the incubator and the mentor work. Ask for copies of the mentoring agreement. If you do work with a mentor, make sure to seek a second opinion before entering into an investment or contractual relationship with your mentor.

AGREEMENT WITH BUSINESS MENTORS

This Agreement is between Innovative Business Incubator (I.B.I.), a non-profit in the State of Columbia, and _____, an individual (Mentor), desiring to provide business and professional guidance to individuals and businesses using the services of I.B.I. (Mentee(s)).

With this Agreement, I.B.I. and the Mentor seek to accomplish the following goals:

- to protect the respective interests of I.B.I., the Mentor, and the Mentees;
- to clarify the relationships between I.B.I., the Mentor, and the Mentees; and
- to ensure the confidentiality of information disclosed in the context of counseling or technical assistance.

Accordingly, I.B.I. and the Mentor agree as follows:

1. The Mentor agrees:

- a) Not to charge a fee or accept a gift (or secure same or another) for counseling or other services provided to the Mentee;
- b) Not to service competing Mentees at the same time prior to notifying all competing Mentees that the Mentor is providing services to competing Mentees;
- c) Not to discuss Mentee information or the counseling relationship with anyone other than I.B.I. personnel; and
- d) Not to withdraw from a counseling assignment without first notifying I.B.I.

2. Duration: The Mentor agrees that this Agreement shall remain in force and in effect, from the date hereof, during the term of its relationship with any Mentee.

3. Remedies: In the event of any breach of this Agreement, I.B.I. is entitled to enforce the terms of this Agreement through actions that may include actions for damages or injunctive relief or other remedies.

IN WITNESS WHEREOF, the undersigned parties have duly executed this Agreement.

I.B.I.

MENTOR:

(name) (title)

Date:

(name) (title)

Date:



February 2021

**California
Bar
Examination**

**Performance Test
LIBRARY**

MATTER OF I.B.I.

LIBRARY

Togs for Tots, Inc. v. CCM
Columbia Supreme Court (2011)

Norton v. Kramer
Columbia Supreme Court (2007)

Togs for Tots, Inc. v. CCM

Columbia Supreme Court (2011)

Jeremy Painter owns Togs for Tots, Inc., a Columbia corporation that markets children's clothing to retailers. Children's Clothing Manufacturer, or "CCM," manufactures children's clothing in Columbia.

In 2001, Painter approached Ronald Denito, owner of CCM, with a business proposition: Denito should create a company to manufacture children's clothing that Painter would then sell. As a result, Denito started up CCM. Painter and Denito agreed that CCM would manufacture products, that Painter would market those products to the retail trade, and that Painter would act as CCM's sole marketer.

Through his company, Togs for Tots, Painter then began to create a market for the products CCM manufactured and sold under its name. Togs for Tots paid all costs of the sales effort, including travel expenses and the maintenance of a showroom office in Columbia. Painter held himself out to the retail trade as a partner in CCM and carried a business card designating him as Vice President of CCM. From 2002 to 2008, Togs for Tots solely engaged in marketing products for CCM.

During this time, Painter and Denito made all business decisions together. CCM handled the manufacturing aspect, while Togs for Tots handled the marketing. At trial, Painter alleges that he and Denito shared "a confidential relationship." Painter and Denito shared the profits of CCM, with Painter receiving marketing profits in the form of commissions and Denito receiving manufacturing profit.

As a result of Painter's marketing efforts, by 2009, CCM grossed \$15 million in annual sales. This included \$12 million from Walmart, CCM's biggest customer. To obtain Walmart as a client, Painter helped design a unique line of clothes that CCM manufactured exclusively for sale under Walmart's private label.

In October 2009, CCM terminated their relationship with Togs for Tots. At that time, Denito informed Painter that defendants could no longer afford to share their revenues with plaintiffs.

Painter and Togs for Tots then filed suit, claiming that both Denito and CCM had breached a contract and, separately, that Denito and CCM had breached a duty arising out of a confidential relationship. Defendants moved to dismiss all claims. The trial court dismissed the claim as to breach of contract but did not dismiss the confidential relationship claim. The defendants appealed this decision; the Columbia Court of Appeals affirmed.

In this appeal, CCM contends that Painter and Togs for Tots have failed to establish the existence of a confidential relationship between them, and that this cause of action must also be dismissed.

To succeed on a claim for breach of fiduciary duty in Columbia, a plaintiff must prove three elements: (1) a fiduciary duty between the parties; (2) defendant's breach of that duty; and (3) damages that were proximately caused by the breach. If proven, such a claim can result in liability independent of any contract between the parties.

The first element requires proof of the existence of a fiduciary duty. In some cases, such a duty arises out of a relationship well recognized as such: agent and principal; trustee and beneficiary; or guardian and ward. In other cases, the duties may arise out of relationships outside the standard fiduciary models. In such cases, the plaintiff must prove the existence of a "confidential relationship" as a matter of fact.

The existence of a confidential relationship cannot be determined by recourse to rigid formulas. A confidential relationship may exist where one person relies on another because of a history of trust, older age, family connection, and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship. Reliance and dominance are the key

factors in such a relationship. In the relationship between a business advisor and client, the advisor may bring more knowledge, expertise, or financial resources than the advisee. The resulting inequality could impose duties on the advisor to refrain from self-dealing or from exacting inequitable terms.

For example, in *Shaw v. Benedetti Enterprises* (2007), defendant Benedetti hired Shaw as an advisor to help Benedetti create a business that would manufacture and market durable medical equipment. Shaw sued for unpaid commissions, and Benedetti counterclaimed for breach of a confidential relationship. On the facts of that case, we found no such relationship. The parties had entered into a bargained-for exchange, pursuant to which each party received some benefit. We refused to extend duties of a confidential relationship to everyday commercial activity. To do so would expose participants to unexpected liability and could erode the exacting standards applied to those in a true fiduciary relationship with each other.

In this case, the pleadings do not indicate that either Painter or Denito had substantially greater knowledge, expertise, or financial resources than the other. In fact, Painter initiated the relationship and provided his share of the capital required to start up the marketing relationship. Moreover, the pleadings indicate a history of bargained-for collaboration resulting in substantial profits for both parties.

The trial court erred in failing to dismiss the plaintiffs' claim based on an alleged confidential relationship.

Accordingly, we reverse.

Norton v. Kramer

Columbia Supreme Court (2007)

This case arises from a lawsuit filed by Josephine Norton and several others against Samuel Kramer. Norton and her co-plaintiffs claim to be third-party beneficiaries of a contract between Kramer, acting under the name of Joseph Morgan, and the Columbia Basin Retreat (Retreat). The plaintiffs alleged that Kramer breached this contract by concealing his identity and by fraudulently inducing the plaintiffs to reside at the Retreat for over ten years.

Samuel Kramer formed the Retreat in 1992 as a non-profit corporation. He appointed himself as the spiritual leader of the Retreat, using the name of Joseph Morgan. In so doing, Kramer concealed his background as a former art student at the Columbia College of Art and as a failed retail merchant.

The Retreat included approximately twenty resident members (Residents) and operated a small public center for teaching yoga. In 1995, the Retreat moved to a 150-acre site in Lenox County, Columbia, which contained several large facilities. Between 1995 and 2006, over 8,000 paying guests per year visited the Retreat “to relax, take yoga classes, meditate, have massages, and otherwise take a break from the routine of their daily lives.” The Residents operated the facility, working for room and board and a small monthly stipend in exchange for the opportunity to live at the Retreat as Morgan’s “disciples.”

The Residents allege that they, the paying guests, and donors were attracted to the facility precisely because of Morgan's presence. Morgan's picture hung throughout the facilities, his videos ran continuously in the public areas, and his books, tapes, and other items were offered for sale by the Retreat. Publicly, Morgan claimed to be an authentic teacher and object of veneration, one who attained his status through several forms of abstinence. Morgan outwardly professed “honesty, selfless devotion to the well-being of his followers,” and

“absolute personal trust” between teacher and disciples, as well as celibacy and a physically and financially simple lifestyle.

The Residents characterize Morgan as cultivating an intense emotional dependence on him. They were told to identify themselves and their well-being with Morgan and to regard him as the most important person in their lives. He frequently offered guidance on the most intimate aspects of the Residents’ personal lives. They state that, over many years, each of them developed a “close and deeply personal relationship” with Morgan. They state that they endeavored to be chaste, honest, selfless, and devoted to the well-being of others. At Morgan’s urging, many donated all of their possessions to the Retreat, in some cases as much as \$100,000.

The Residents claim that, in fact, Morgan/Kramer was a fraud. Their complaint alleges that, from 1992 through 2005, the Retreat entered into a series of lucrative contractual relationships with Kramer, to induce him to remain physically present at the Retreat. Kramer received an annual fee, free housing, free transportation (both domestic and international), a percentage of the proceeds from literature, video, and audiotape sales, and free sponsorship of seminars throughout the world. He retained the revenue from these operations in an amount of many hundreds of thousands of dollars.

Kramer left the Retreat after the discovery of his background by an author hired to write his authorized biography. The Residents brought this lawsuit, claiming intentional infliction of emotional distress; breach of fiduciary duty; breach of contract on a third party beneficiary theory of recovery; fraud and misrepresentation; and unfair and deceptive trade practices.

Kramer moved to dismiss all claims. The trial court dismissed all but the fiduciary duty, fraud, and trade practices complaints. The Residents appealed the dismissal of their breach of contract claims to the Court of Appeals, which affirmed the dismissal. We also affirm.

The Residents' complaint alleges that the Retreat contracted with Kramer for his services and that they, as resident members of the Retreat, were the intended beneficiaries of such contracts. According to them, Kramer breached these contracts when he misrepresented his status as a "true and authentic teacher" for the purpose of amassing significant personal wealth.

To recover as third-party beneficiaries, the Residents must show that they were intended beneficiaries of a contract between the defendant and the Retreat. Only intended beneficiaries, not incidental beneficiaries, can enforce a contract. A party is an intended beneficiary if performance under the contract effectuates the intention of the parties, and if circumstances indicate that the beneficiary would receive the benefit of the promised performance. See Restatement (Second) of Contracts § 302(1)(b).

The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. For example, if A and B enter into a contract whereby A agrees to pay B to construct a house for C, it is clear that C is an intended beneficiary. Similarly, if X and Y enter into a contract whereby Y will provide a service to C, C has the right to enforce the terms of that contract against Y.

The Residents allege that Kramer, for valuable consideration, contracted with the Retreat to provide services to the customers and Residents of the Retreat. Construed in a light favorable to the Residents, the terms of those contracts required Kramer to remain physically present at the Retreat, teach yoga courses, meet with guests and visitors, and serve as advisor, mentor and exemplar to the Residents, in addition to providing counseling services to his followers.

These allegations, if proven, would be sufficient to conclude that the Residents were intended beneficiaries of his agreement with the Retreat. They may maintain an action for breach of contract as third-party beneficiaries. However, this conclusion does not end the discussion; the facts as alleged by the

plaintiffs simply fail to state a claim for breach of the contract between Kramer and the Retreat.

The gist of the Residents' complaint is that, by secretly reaping substantial monetary compensation, Kramer was not providing the services of an "authentic" teacher. The required services included the development of a close mentoring relationship with the plaintiffs, as an exemplar of a particular lifestyle. But plaintiffs' own complaint indicates that Kramer satisfied those requirements: "Over many years, each of the plaintiffs developed a close and deeply personal relationship with Kramer."

To achieve the result sought by the Residents, the contract would have had to limit the financial benefits to Kramer or to require him either to act or refrain from acting in ways that complied with particular standards of behavior. But nothing in the complaint indicates that the contract specifically required Kramer to adhere to a particular code of conduct or abjure any specific behavior to maintain his status. Considering the liberal financial benefits obtained by Kramer, it is difficult to conclude that the contract intended such terms. Even taking all the Residents' allegations as true, Kramer's conduct does not constitute a breach of any specific terms of the contract between him and the Retreat.

In sum, although the Residents are third-party beneficiaries of the contract between the Retreat and Kramer, nothing in their complaint states a claim for breach of contract. Accordingly, we affirm the dismissal of this count of their complaint. We note that their claims for breach of fiduciary duty, for fraud, and for unfair and deceptive trade practices were not dismissed and are not affected by our decision. Plaintiffs may pursue those claims at trial.

Affirmed.

PT: SELECTED ANSWER 1

Hodgeson and Hawkins, LLC

53 Severance Road

Columbia City, Columbia

MEMORANDUM

To: Sarah Hodgeson

From: Applicant

Date: February 23, 2021

Re: Matter of I.B.I.

1. INTRODUCTION

Our client is Innovative Business Incubators (I.B.I.), a non-profit business that provides advice and support to new entrepreneurs in Columbia City. I.B.I. is arranging mentoring relationships between new entrepreneurs and experienced mentors, and I.B.I. would like to formalize the relationship between I.B.I. and its mentors through a contract.

You have asked me to assess the following two legal issues:

1. Whether the relationship between an I.B.I. mentor and mentee gives rise to fiduciary obligations owed by the mentor to the mentee; and
2. Whether the draft contract between I.B.I. and a mentor creates contractual rights that

an I.B.I. mentee can assert against the mentor.

Please find below my legal analysis of these two issues, their impact on I.B.I.'s draft contract, and changes that should be made to the draft contract to address our client's concerns.

2. LEGAL ANALYSIS

a) Does the relationship between an I.B.I. mentor and mentee give rise to fiduciary obligations owed by the mentor to the mentee?

To succeed on a claim for breach of fiduciary duty in Columbia, a plaintiff must prove (i) a fiduciary duty between the parties; (ii) defendant's breach of that duty; and (iii) damages that were proximately caused by the breach. If proven, such a claim can result in liability independent of any contract between parties. Togs for Tots.

Existence of a Fiduciary Duty

The existence of a fiduciary duty may arise out of well-recognized relationships such as agent and principal, trustee and beneficiary, or guardian and ward. Outside of these established categories, a fiduciary can be found where a "confidential relationship" exists as a matter of fact. Togs for Tots. In looking into whether a confidential relationship exists, the Columbia Supreme Court in Togs for Tots has held that this cannot be determined by rigid formulas, but rather it depends on the facts and circumstances surrounding the relationship. For example, a confidential relationship may exist where one person relies on another because of a history of trust, older age, family connection, and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship.

The key factors in determining the existence of a confidential relationship are reliance and dominance. In the relationship between a business advisor and a client, the advisor may bring more knowledge, expertise, or financial resources than the advisee. This resulting inequality could impose duties on the advisor to refrain from self-dealing or from exacting inequitable terms. Togs for Tots.

In Togs for Tots, the plaintiff had initiated a business relationship with the defendant, whereby the plaintiff marketed and sold products manufactured by the defendant. In this case, they made all business decisions together and shared the profits. The court in this case found that there was no confidential relationship due to the fact that neither party had substantially greater knowledge, expertise or financial resources than the other, and that there was a history of bargained-for collaboration resulting in substantial profits for both parties. Similarly, in Shaw v Benedetti (as cited in Togs for Tots), the court found that there was a bargained-for exchange and therefore no confidential relationship between the defendant who had hired the advisor plaintiff to create a business. In coming to this decision, the court used public policy reasons, holding that fiduciary duties should not be extended to everyday commercial activity, as unexpected liability could erode the standards applied to a true fiduciary relationship.

Impact of the Law on the Contract

In our client's case, the mentors being recruited are more experienced than the mentees and are providing expertise tailored to the needs of the mentee's business. As stated in the Columbia Business Incubator Newsletter, mentors bring knowledge and perspectives to allow startups to avoid hidden risks and seize unseen opportunities, and

provide specialized business networks and help new business-people form relationships with suppliers, customers, and regulators. This relationship is very different from the case in Togs for Tots, where both parties were of relatively equal bargaining power and skill, and they shared profits. In the mentor-mentee relationship, the mentee is relying on the mentor, who is in a position of dominance in the relationship due to their super expertise, training, and knowledge.

Therefore, it is likely that the relationship between an I.B.I. mentor and mentee would give rise to fiduciary obligations owed by the mentor to the mentee. This is desirable given that I.B.I. has an interest in providing legal protection for a mentee in the case that a mentor does succeed in taking advantage of a mentee. As noted by Frank Duquesne, there has already been a worrisome case where a mentor took advantage of a mentee by pressuring the mentee to use the mentor's business as a principal supplier on less favorable terms than the mentee could obtain elsewhere. The mentor also pressured the mentee to allow him to invest in the business, resulting in the mentee resisting both advances and ending the relationship. While this kind of incident has only occurred once, such situations are likely to occur again as the mentorship program grows and continues. In addition, the Columbia Business Incubator Newsletter has flagged issues where mentors have used their position of influence to take an ownership position in the startup or to sign contracts that benefit the mentor's own business.

Recommended Changes to the Contract

It is important that the contract stipulate the role of the mentor and the mentee, so that if

a breach of fiduciary duty arises, a court is able to look at the contract and determine that there was a confidential relationship. For example, the contract could mention that the mentee is relying on the mentor's expertise and guidance. The draft contract already stipulates that the mentor agrees not to charge a fee or accept a gift for its services provided to the mentee, so the court will likely not find that there is a bargained for exchange, which would make it less likely that there is a fiduciary relationship.

I.B.I. is also concerned about preserving the open-endedness and informality of the relationship between mentors and mentees and wants them to work in good faith. I.B.I. also does not want to open mentors up to unnecessary liability and chill their willingness to help. Therefore, the contract could also add a covenant that the mentor will act in good faith. It should also spell out the kinds of activities that a mentor may not do, that may be an example of a breach of fiduciary duty, so that this relationship is defined, and the mentors know exactly what to expect. A mentor does not need to worry about opening themselves up to liability if they know exactly what they can and cannot do, and if they know how they can protect themselves legally. For example, in the case where a mentor took advantage of one of I.B.I.'s mentees, that may not have occurred had the mentor signed a contract explicitly prohibiting these activities. This would also have the benefit of providing I.B.I. mentees with legal protection should any mentor take advantage of them and breach their fiduciary duty.

b) Does the draft contract between I.B.I. and a mentor create contractual rights that an I.B.I mentee can assert against the mentor?

i) Third-Party Beneficiaries

Only intended beneficiaries, rather than incidental beneficiaries, can enforce a contract.

A party is an intended beneficiary if performance under the contract effectuates the intention of the parties, and if circumstances indicate that the beneficiary would receive the benefit of the promised performance. Restatement (Second) of Contracts, s.

302(1)(b). The key question is the intent of the parties to the actual contract to confer a benefit on a third party. The intent must appear from the contract itself or be shown by necessary implication. For example, if X and Y enter into a contract whereby Y will provide a service to C, C has the right to enforce the terms of that contract against Y. Norton v Kramer.

In Norton v Kramer, the plaintiffs were resident members at the Retreat, where the defendant Kramer was their spiritual leader. The residents operated the facility in exchange for the opportunity to live as Kramer's "disciples". Kramer's contract with the Retreat provided that Kramer remain physically present at the Retreat, teach yoga classes, and provide counseling services to the residents. In this case, the court found that the residents were intended beneficiaries of Kramer's contract with the Retreat.

Impact of the Law on the Contract

In our client's case, I.B.I. mentees are clearly an intended beneficiary of the contract between I.B.I. and the mentor, as the contract stipulates that the mentor desires to provide business and professional guidance to mentees of I.B.I. As a result, the contract would create standing for an I.B.I. mentee to bring a breach of contract claim against a mentor. However, currently only I.B.I. may claim any remedies under the contract.

Recommended Changes to the Contract

While a mentee is likely to be able to claim that he or she is an intended beneficiary under the contract, it would be desirable to specifically specify the name of the mentee, so that the contract is explicit in naming such mentee as the intended beneficiary, as I.B.I. has many different mentees. In addition, Section 3 of the contract should be revised so that the mentee who is the intended beneficiary may also enforce the terms of the agreement and obtain remedies.

As one of I.B.I.'s concerns is to maintain informality and not ask mentors and mentees to sign binding contracts defining the relationship, having a contract between I.B.I. and the mentor would be sufficient, and no contract would be required between the mentor and mentee as the contract between I.B.I. and the mentor would provide a sufficient basis for the mentee to have standing should a mentee require any legal protections.

ii) Breach of Contract

Even if a plaintiff is able to ascertain that he or she is an intended beneficiary, there must be basis for a breach of contract. In Norton v Kramer, the court found that the residents had not proven a breach of contract, as Kramer had satisfied the requirements in the contract between himself and the Retreat. Had the contract limited the financial benefits to Kramer or required him to either act or refrain from acting in ways that complied with particular standards of behavior, the residents may have had a viable breach of contract claim.

Impact of the Law on the Contract

In addressing I.B.I.'s concern to provide legal protections to its mentees should a

mentor take advantage of a mentee, it is important that the contract limit the financial benefits available to the mentor, and require the mentor to act or refrain from acting in ways that comply with particular standards of behavior. Meeting these elements would make more likely that a mentee is able to ascertain a basis for breach of contract as an intended beneficiary, as outlined in Norton v Kramer.

Recommended Changes to the Contract

The draft contract currently says that the mentor agrees not to charge a fee or accept a gift. This is desirable as it limits the financial benefits available to the mentor. The contract could also explicitly stipulate that the mentor is not accepting any financial consideration from I.B.I.

The draft contract also stipulates several standards of behavior. For example, the mentor cannot service competing mentees at the same time without notifying the competing mentees, they cannot discuss mentee information or the counselling relationship with anyone outside of I.B.I., and they cannot withdraw from the counselling assignment without first notifying I.B.I.

Therefore, the contract likely already creates contractual rights that an I.B.I. mentee can assert against the mentor. However, the contract could be strengthened by adding additional standards of behavior so that the mentee has additional bases for claiming a breach of contract should the mentor take advantage of the mentee. For example, it could stipulate that a mentor may not ask a mentee to use the mentor's business (or a mentor's close contact) as a principal supplier or distributor, and that a mentor may not ask a mentee to allow the mentor to invest in the business. As already stated above, by

adding these clear stipulations, this also provides certainty to the mentor in defining the mentor-mentee relationship, so that they know their exact liabilities. Having this certainty would lessen any chilling effect that may reduce a mentor's willingness to help. By having these stipulations, it also allows enough flexibility and open-endedness for an informal relationship between the mentor and mentee.

3. CONCLUSION

As currently drafted, the contract likely gives rise to fiduciary obligations owed by the mentor to the mentee, and the draft contract likely creates contractual rights that an I.B.I. mentee can assert against the mentor. The contract could be strengthened by adding the additional language as outlined in my legal analysis.

Thank you for the opportunity to write this memorandum. Please let me know if I can provide any further research or assistance.

PT: SELECTED ANSWER 2

To: Sarah Hodgeson

From: Applicant

Date: February 23, 2021

Re: Matter of I.B.I. and the Draft Mentor Agreement

I. Introduction and Scope of Research

You asked me to review several questions regarding a draft mentorship agreement that Frank Duquesne, Executive Director of IBI, provided you. In particular, you asked me to evaluate whether the current mentor-mentee relationships that IBI facilitates give rise to fiduciary obligations on the part of the mentors, and whether the draft agreement between IBI and potential mentors would grant mentees contractual rights that an IBI mentee could assert. You further asked me to evaluate these questions and the draft contract in light of Mr. Duquesne's concerns of balancing protections for mentees against a desire to (a) avoid potentially large *[sic]* and deterring liability against mentors, and (b) avoid overly-formalizing the relationship between mentors and mentees.

I have reviewed the draft agreement and accompanying File and Library and have set out my assessment of the legal questions below.

II. Fiduciary Obligations

A. The mentor-mentee relationships at IBI will frequently give rise to fiduciary obligations owed by the mentor to the mentee

(1) Relevant Caselaw (Togs for Tots)

In Togs for Tots, the Columbia Supreme Court explained the basic test for whether a fiduciary duty exists. The Court explained that fiduciary duties often arise out of long-standing and "well recognized" relationships such as "agent and principal; trustee and beneficiary; or guardian and ward" (Togs for Tots at 3). In addition, the Court explained that fiduciary duties can exist when two parties have a "confidential relationship," a legal status that the Court explained is dependent on the facts of each case and "cannot be determined by recourse to rigid formulas" (*id.*).

The Columbia Supreme Court listed several factors for when a confidential relationship exists that are relevant to the context of IBI-facilitated mentor-mentee relationships. The Court explained that a "confidential relationship may exist where one person relies on another because of a history of trust, older age . . . and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship." The Court noted that "[r]eliance and dominance are the key factors in such a relationship" (Togs for Tots at 4).

(2) Application to the IBI Context

A number of aspects of the mentor-mentee relationships involved in IBI's business will likely satisfy the factors for creating a confidential relationship, and thereby give rise to fiduciary duties. For example, IBI mentors are frequently older in age than their mentees and were chosen for their "superior training and knowledge" (see Columbia Business Incubator Network, Business Incubators and Business Mentors: Helpful or Harmful? at 8 (noting that mentors "bring knowledge and perspective")). In similar

fashion, mentees will likely frequently rely upon the knowledge and experience of mentors, who possess superior knowledge of the relevant industry and business practices. Finally, the fact that these mentors are vetted in part by IBI may lead to greater trust on the part of mentees, who believe that IBI has helped locate skilled and trustworthy mentors.

Furthermore, the Columbia Supreme Court in *Togs for Tots* noted that one of the factors that counsels against finding a fiduciary duty is whether the parties engaged in a typical, commercial, bargained-for transaction. That factor will frequently be absent in the context of IBI mentor-mentee relationships, as mentors are often expected to give advice without a commercial contract or explicit bargained-for consideration (as is Mr. Duquesne's wish).

While the existence of a fiduciary duty will be a fact-specific inquiry involving the unique circumstances of each relationship, it is likely that many of the mentor-mentee relationships that IBI facilitates will give rise to fiduciary obligations on the part of the mentor.

B. Mr. Duquesne's Concerns

(1) Protection of Mentees

The existence of a fiduciary duty will generally provide protections for mentees. For example, a fiduciary relationship could oblige the mentor to avoid utilizing confidential information learned from the mentee for the mentor's exclusive benefit, if such a business opportunity could have fallen to the mentee instead.

Unlike the plaintiffs in *Togs for Tots*, the mentees will have a much stronger ability to

enforce violations of a fiduciary's obligations, irrespective of the draft contract, because the mentees will frequently be able to demonstrate that they have been in a position of reliance -- due to a trust in their mentor -- and that the mentor has abused her position of dominance (assuming a violation occurs).

However, even though mentees may be able to seek remedies for breaches of fiduciary duties, there is some possibility that the draft agreement that IBI has proposed will be counterproductive from the perspective of protecting mentees. The draft agreement currently lists a small set of duties that a mentor owes, and not every mentor may necessarily realize the scope of the fiduciary duties that they are taking on, which extend far beyond the few that are currently mentioned in the draft agreement (see *Togs for Tots* at 4 (noting the "exacting standards applied . . . in a true fiduciary relationship)).

It may be worth either expanding the list of duties mentioned, or including more general statements about the Mentor's duties -- beyond the important, but small number currently mentioned -- to avoid creating the misimpression that the mentor has only limited responsibilities with respect to a mentee.

(2) Avoiding Discouragement of Mentors

There is a risk that a fiduciary duty will expose mentors to significant liability, a fact the Columbia Supreme Court has recognized in cases like *Togs for Tots* where the Court has declined to extend fiduciary duties in part based on the significant liabilities that flow therefrom. However, the fiduciary obligations that arise are the flip side of the beneficial aspects of the mentor-mentee relationship -- trust and reliance upon the mentor's

advice are arguably essential to the mentor-mentee relationship.

Rather than limit fiduciary liability, IBI may wish -- perhaps through the draft agreement or through a handbook or associated policy -- to further disseminate best practices. For example, the Columbia Incubator Newsletter notes that mentees should be encouraged to seek out advice and counsel before engaging in transactions with mentors (which will often ultimately be in the mentee's best interest). IBI may wish to include a provision in the agreement that encourages or requires mentors to go over such best practices with their mentees on how to secure independent advice on transactions, a habit that may be dividends for mentees in subsequent relationships for years to come.

(3) Avoiding Formality

The case law indicates that the existence of a fiduciary duty between a mentee and mentor will not depend upon the two parties signing a contract. Indeed, signing a contract with bargained-for consideration may make the relationship seem more like a simple commercial contractual relationship, and not a full fiduciary relationship. Consequently, it does not appear that any revisions need to be made to the agreement in order to ensure, via greater formalization of the mentor-mentee relationship, that the mentor will owe a duty to the mentee.

III. Mentee's Enforcement of Rights Under the IBI-Mentor Contract

A. Mentees are Likely Intended Third-Party Beneficiaries

(1) Relevant Case Law

In *Norton v Kramer* (2007), the Columbia Supreme Court held that the plaintiffs -- a class of residents residing at a Retreat -- had alleged facts sufficient to show that the

residents were the intended third-party beneficiaries of a contract between the Retreat and Kramer, a self-described spiritual leader who provided services and counseling to the residents. The Court explained that even though the residents were not parties to the contract, they could enforce contractual obligations that Kramer owed to the Retreat because the residents were "intended beneficiaries of [the] contract between the defendant and the Retreat" (Norton at 7).

Among the elements the Court identified as significant for determining whether the residents were intended beneficiaries was the fact that Kramer's contract with the Retreat required Kramer to "serve as advisor, mentor, and exemplar to the Residents, in addition to providing counseling services to his followers" (*id.*).

(2) Application to the IBI Mentor-Mentee Relationship

The same factors cited in Norton indicate that mentees are likely intended third party beneficiaries of the contract between IBI and mentors. IBI is contracting with mentors to provide advice and counseling to the mentees, just as Kramer did.

(3) The Contractual Language Provides Further Support for the Proposition that Mentees Are Intended Third-Party Beneficiaries

Moreover, the language of the draft agreement includes several provisions that strongly indicate that mentees are intended third-party beneficiaries. For example, the draft agreement states that one of the purposes of the agreement is to "protect the respective interests of I.B.I, the Mentor, and the Mentees" (File at 10 (emphasis added)), and the substantive provisions that the mentor is agreeing to go on to provide various protections for the mentee.

(4) The Remedy Provision, as Currently Drafted, may Introduce some Ambiguity

There is some argument that because the draft agreement includes a remedies clause that only lists I.B.I as being entitled to enforce a breach of the agreement, a future mentor could argue that the parties intended that no one but IBI have the ability to enforce the agreement. This argument likely would not be sufficient to outweigh the other evidence that mentees are third-party beneficiaries -- the fact that IBI can enforce the agreement does not mean that it is the exclusive party that can do so. However, as noted below, some clarification on this point could be considered for the next round of revisions to the draft agreement.

B. Duquesne's Concerns

(1) Protection of Mentees

As noted above, the fact that mentees are likely third-party beneficiaries is good from the perspective of enforcing their rights, should IBI not wish to do so for any reason. However, this fact could be made more explicit, if IBI wished to do so, by including in the "Remedies" section either an explicit mention of the mentee's ability to enforce its rights, or a disclaimer that enforcement by IBI will not preclude enforcement by any other party that may have rights under the contract.

In addition, and as discussed briefly in Part I above, the rights listed in the draft agreement, while enforceable, are few in number. IBI may wish to consider including a more general duty of good faith, loyalty, and competence towards the mentee, or else consider including a longer list or more specific requirements (e.g. a prohibition on

taking business opportunities from a mentee using confidential information learned from the mentee).

(2) Concern for Mentor Liability

Because mentees can enforce the contract, IBI may wish to reconsider the language of some of the specific provisions here, particularly in light of the fact that IBI will not in the future have the sole discretion about whether to initiate an enforcement action.

In particular, IBI may wish to consider modifying the prohibition on mentors discussing mentee information or the counseling relationship. While confidentiality is frequently meaningful and important, much of the value of these relationships is in the ability of a mentor to connect mentees to other people. Mentors who are worried about violating duties of confidentiality may not engage in the kind of free discussion and networking that could be deeply beneficial to mentees. Therefore, IBI may wish to consider something more flexible, for example noting that a mentor should not discuss "confidential information" or do so without the consent of a mentee.

In addition, the prohibition on charges or fees could be modified to account for the fact that mentors and mentees frequently do engage in business transactions of great benefit to both parties. The language currently in the draft agreement, prohibiting "fee[s] . . . for counseling or other services" may interfere with healthy development of business relationships.

(3) Avoiding Too Much Formality

Because mentees are likely intended third-party beneficiaries under the contract -- a legal status that could be solidified by making a few minor revisions, as noted above -- it

does not appear that any more formality would be required for mentees to have enforceable rights under the contract in the event that a mentor abuses their position. However, some of the additions suggested above, such as the suggestion that a Mentor could divulge information about the relationship with the mentee provided they get the consent of the mentee, may introduce some additional formalities or compliance in the relationship, a consideration which will have to be balanced against the value of clear steps that may protect both the mentor and the mentee.