



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM O-201 JANUARY 2022 COMMITTEE OF BAR EXAMINERS**

**DATE:** January 28, 2022

**TO:** Members, Committee of Bar Examiners

**FROM:** Christina Doell, Program Manager

**SUBJECT:** Approval of Report to the Supreme Court on the July 2021 California Bar Exam

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### **EXECUTIVE SUMMARY**

Approximately three months following the release of results for the administration of each bar examination, the Committee of Bar Examiners is asked to approve the report submitted to the California Supreme Court consistent with State Bar Rules. The draft Report to the Supreme Court submitted here for the Committee's review includes statistics about the composition of July 2021 Bar Examination takers and passers, a technical analysis prepared by the Committee's psychometrician, Roger Bolus, Ph.D., as well as test questions and selected answers.

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### **BACKGROUND**

Rule 4.60 of the *Admissions Rules* requires the Committee provide "...the California Supreme Court a report on each administration of the examination as soon as practical." Attached is the draft Report to the Supreme Court on the July 2021 California Bar Examination.

### **FISCAL/PERSONNEL IMPACT**

None

### **RECOMMENDATION**

It is recommended that the Committee of Bar Examiners approve the report to be finalized and transmitted to the Supreme Court.

## **PROPOSED MOTION**

If the Committee agrees with staff recommendation, the following motion is suggested:

**MOVE**, that the draft Supreme Court Report on the July 2021 California Bar Examination be finalized and submitted to the Court.

## **ATTACHMENT(S) LIST**

- A. Report to the Supreme Court on the July 2021 California Bar Examination



# The State Bar *of California*

## **Report to the Supreme Court on the July 2021 California Bar Examination**

**Committee of Bar Examiners**

January 28-29, 2022

## **JULY 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***

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4. July 2021 Performance Test and Selected Answers

## REPORT ON THE JULY 2021 CALIFORNIA BAR EXAMINATION

The State Bar of California received applications from 9,575 applicants to take the July 2021 California Bar Examination, which was administered on July 27 and 28, 2021. A total of 7,930 applicants completed<sup>1</sup> the exam and received results. Of those, 7,536 applicants completed the General Bar Examination and 3,990 passed (52.9 percent); 394 attorney applicants completed the Attorneys' Examination and 180 passed (45.7 percent). 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, and disciplined attorneys. Two of the 13 disciplined attorneys who took the exam as a condition of reinstatement passed the exam.

The July 2021 California Bar Exam was administered online and remotely proctored using ExamID and ExamMonitor software from ExamSoft. The 200-item multiple-choice Multistate Bar Exam (MBE) was provided by the National Conference of Bar Examiners (NCBE). The breakdown of the two-day General Bar Exam was as follows:

### Day 1:

- The morning consisted of three (3) one-hour essay questions administered separately with scheduled breaks in between each question,
- The afternoon consisted of two (2) one-hour essay questions and one (1) 90-minute Performance Test (PT), with scheduled breaks in between each question.

### Day 2:

- The morning consisted of two (2) 90-minute sessions with 50 multiple-choice questions each, and scheduled breaks in between each session,
- The afternoon consisted of two (2) 90-minute sessions with 50 multiple-choice questions each, and scheduled breaks in between each session.

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.

Early on the first day of testing, the State Bar began hearing that across all jurisdictions, a limited number of applicants reported experiencing a "black screen" or "blue screen" requiring them to restart their laptop to continue. Following an internal review, ExamSoft determined that the technological issue was attributable to high-memory utilization between ExamMonitor and the main software that generates digital images. The State Bar reviewed data provided by ExamSoft, emails submitted through the Applicant Portal, phone logs, and proctoring videos to determine the number of applicants that experienced the issue.

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<sup>1</sup> 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.

In furtherance of its commitment to grade examinees as fairly as possible, the State Bar worked with its psychometrician and the Supreme Court's liaison to the State Bar, to develop a grading approach that allowed for the fair assessment of work performed by those applicants who experienced this technological issue. As described in the [July 2021 Bar Exam Scoring Adjustment](#) document posted on the State Bar website, scoring adjustments were applied to applicants negatively affected during the July exam.

In addition to delivering the exam remotely, the exam was administered in-person at 6 test centers throughout the state for the small number of 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, for handwriters, and for applicants with circumstances that prevented them from securing an appropriate testing environment. A total of 560 applicants with disabilities were granted accommodations. Of those, 137 applicants were assigned to take the exam at testing accommodations test centers, while 423 applicants were granted accommodations that could be addressed in a remote setting.

Six grading groups, each consisting of up to 15 experienced and apprentice graders, were selected to grade the essay and PT answers. A member of the Exam Development and Grading Team (EDG Team) supervised each group of graders. The groups convened via videoconference for the purpose of calibration in August and September. Members of the Committee of Bar Examiners (CBE) were invited to attend the second calibration session.

At the first calibration session, the EDG Team led a discussion designed to reach agreement on what issues should be discussed in an answer and what tentative weights should be assigned to each issue. For calibration purposes, each grader was given a copy of the same 15 answers to their assigned question. Each grader read and graded the first answer in the set. The grade assignments were discussed until the group arrived at a consensus grade for the first answer. This process was repeated for each of the remaining answers in the set of 15, with consensus being achieved for each answer.

After the first calibration session, each grader was given a copy of the same 25 answers to independently grade. This second round of grading was designed to determine the level of calibration achieved by the grader panel during the morning session, and to what degree, collectively and individually, there is agreement amongst the group as to the relative quality of the second set of answers.

At the second calibration session, the EDG Team distributed and discussed the grading guidelines 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 discussed any of the answers that yielded 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.

The third calibration session is held mid-way through the grading cycle. During this meeting, graders

discuss any problems they had been experiencing with the answers they reviewed. The group grades an additional set of 15 answers, arriving at a consensus for each, to assure their continued adherence to the established guidelines.

The July 2021 California Bar Exam was graded using California's two-phased grading system. All written answers are read at least once before pass/fail decisions are made. 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. Applicants with total scaled scores of 1350–1389.9999 had all their written answers read a second time by a different set of graders (second read or Phase II). 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 July 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 July 2021 California Bar Exam, the mean scaled MBE score in California was 1409, compared with the national average of 1404. The scaled written score accounts for 50 percent of the total score, and the scaled MBE score accounts for the other 50 percent of the total score.

Results were made available to applicants via the Admissions Applicant Portal on November 12, 2021, and then were made available to the public on Sunday, November 14, 2021. For this exam, the State Bar launched a fully online process to distribute oath cards (also known as registration cards) and oath packets. Instructions for completing the State Bar registration card online were sent via email on November 15, 2021 to the successful applicants who completed all the requirements for admission to practice law in California. Applicants still have the option to use paper form under this new format, though use of the online process was strongly encouraged to streamline the distribution and processing of oath cards.





**General Statistics Report**  
**July 2021 California Bar Examination<sup>1</sup>**  
**Overall Statistics for Categories with More Than 11 Applicants Who Completed the Examination**

Applicant Group	First-Timers			Repeaters			All Takers		
	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
General Bar Examination	4,983	3,513	70.5	2,553	477	18.7	7,536	3,990	52.9
Attorneys' Examination	223	129	57.8	171	51	29.8	394	180	45.7
Total	5,206	3,642	70.0	2,724	528	19.4	7,930	4,170	52.6

**Disciplined Attorneys Examination Statistics**

	Took	Pass	%Pass
CA Disciplined Attorneys	13	2	15.4

**General Bar Examination Statistics**

Law School Type	First-Timers			Repeaters			All Takers		
	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
CA ABA Approved	2,878	2,305	80.1	572	159	27.8	3,450	2,464	71.4
Out-of-State ABA	936	703	75.1	267	60	22.5	1,203	763	63.4
CA Accredited	320	136	42.5	590	87	14.7	910	223	24.5
CA Unaccredited	52	20	38.5	159	13	8.2	211	33	15.6
Law Office/Judges' Chambers									
Foreign Educated/JD Equivalent + One Year US Education	80	20	25.0	213	24	11.3	293	44	15.0
US Attorneys Taking the General Bar Exam <sup>2</sup>	197	135	68.5	65	26	40.0	262	161	61.5
Foreign Attorneys Taking the General Bar Exam <sup>3</sup>	399	87	21.8	520	74	14.2	919	161	17.5
4-Year Qualification <sup>4</sup>				23	3	13.0	26	4	15.4
Schools No Longer in Operation	113	103	91.2	140	29	20.7	253	132	52.2

**\*Fewer than 11 Applicants**

<sup>1</sup> These statistics were revised as of January 7, 2022.

<sup>2</sup> 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.

<sup>3</sup> Attorneys admitted in foreign jurisdictions must take the General Bar Examination.

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

<sup>5</sup> 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 unaccredited law school program. Applicants from Pacific Coast University School of Law and Southern California Institute are included in the accredited law school program.

## July 2021 California Bar Examination

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

School Type	White		Black		Hispanic		Asian		Other *		Decline to Answer	
	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass
CA ABA Approved	1,162	86.0	99	60.6	350	72.3	423	80.1	601	78.5	243	74.9
Out-of-State ABA	441	81.4	74	58.1	59	61.0	162	76.5	170	70.0	30	73.3
CA Accredited	100	52.0	23	4.3	58	44.8	31	51.6	59	33.9	49	42.9
CA Unaccredited	16	62.5			17	29.4						
Other	235	66.8	37	35.1	52	34.6	372	25.8	71	62.0	30	70.0
Total	1,954	80.7	236	49.6	536	63.1	997	58.1	905	72.5	355	69.3

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

School Type	White		Black		Hispanic		Asian		Other *		Decline to Answer	
	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass	Took	%Pass
CA ABA Approved	171	29.8	49	32.7	106	24.5	124	23.4	91	30.8	31	29.0
Out-of-State ABA	63	28.6	58	13.8	45	22.2	69	29.0	22	18.2		
CA Accredited	187	16.0	67	3.0	132	14.4	96	15.6	83	21.7	25	12.0
CA Unaccredited	50	6.0	25	4.0	41	14.6	30	3.3				
Other	215	19.5	79	6.3	110	20.9	464	15.5	71	14.1	25	24.0
Total	686	21.0	278	11.5	434	19.4	783	17.5	277	22.0	95	20.0

\*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\*\*

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	1,150	81.2	1,662	79.3			240	28.8	327	26.6		
Out-of-State ABA	436	76.1	479	74.1			135	20.7	126	24.6		
CA Accredited	137	49.6	176	38.6			252	18.7	334	11.7		
CA Unaccredited	25	52.0	25	24.0			85	4.7	74	10.8		
Other	322	53.1	465	36.8			391	13.8	562	18.3		
Total	2,070	73.3	2,807	68.3	12	75.0	1,103	18.3	1,423	18.8	6	0.0

\*\*Number are for those reporting gender

## July 2021 California Bar Examination

### Number of First-Timers and Repeaters Taking and Passing and the Percent Passing: California ABA Approved Law Schools with 11 or More Takers

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
CALIFORNIA WESTERN SCHOOL OF LAW	129	84	65	63	19	30
CHAPMAN UNIVERSITY SCHOOL OF LAW	119	94	79	34	10	29
GOLDEN GATE UNIVERSITY SCHOOL OF LAW	116	44	38	74	15	20
LOYOLA LAW SCHOOL – LOS ANGELES	265	229	86	31	5	16
PEPPERDINE UNIVERSITY	96	82	85	19	5	26
SANTA CLARA UNIVERSITY SCHOOL OF LAW	183	123	67	43	13	30
SOUTHWESTERN LAW SCHOOL	200	155	78	44	13	30
STANFORD LAW SCHOOL	73	69	95			
UNIVERSITY OF CALIFORNIA – BERKELEY	245	234	96			
UNIVERSITY OF CALIFORNIA – DAVIS	174	142	82	16	6	38
UNIVERSITY OF CALIFORNIA – HASTINGS	257	213	83	48	14	29
UNIVERSITY OF CALIFORNIA – IRVINE	174	155	89	15	5	33
UNIVERSITY OF CALIFORNIA – LOS ANGELES	268	250	93			
UNIVERSITY OF PACIFIC MCGEORGE SOL	139	99	71	32	6	19
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW	188	152	81	30	5	17
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW	96	63	66	52	14	27
UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SOL	161	152	94	12	7	58
WESTERN STATE COLLEGE OF LAW WESTCLIFF UNIV	59	29	49	47	14	30
TOTAL	2,942	2,369	81	576	163	28

## July 2021 California Bar Examination

### Number of First-Timers and Repeaters Taking and Passing and the Percent Passing: Out-of-State ABA Law Schools with 11 or More Takers

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
AMERICAN UNIVERSITY – WASHINGTON COL	14	4	29			
ARIZONA STATE UNIVERSITY	16	11	69			
BOSTON COLLEGE LAW SCHOOL						
BOSTON UNIVERSITY SCHOOL OF LAW	14	11	79			
BRIGHAM YOUNG UNIVERSITY	16	15	94			
COLUMBIA UNIVERSITY LAW SCHOOL	43	40	93			
CORNELL UNIVERSITY LAW SCHOOL	17	13	76			
DUKE UNIVERSITY SCHOOL OF LAW	24	22	92			
EMORY UNIVERSITY SCHOOL OF LAW						
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL	31	21	68			
GEORGETOWN UNIVERSITY LAW SCHOOL	44	38	86			
HARVARD UNIVERSITY LAW SCHOOL	70	69	99			
HOWARD UNIVERSITY SCHOOL OF LAW						
NEW YORK SCHOOL OF LAW	30	28	93			
NORTHEASTERN UNIVERSITY SCHOOL OF LAW						
NORTHWESTERN SCHOOL OF LAW						
NORTHWESTERN UNIVERSITY PRITZKER SOL	35	32	91			
SUFFOLK UNIVERSITY LAW SCHOOL						
SYRACUSE UNIVERSITY COLLEGE OF LAW						
TULANE UNIVERSITY SCHOOL OF LAW						
UNIVERSITY OF ARIZONA JAMES E RODGERS COL	11	8	73			
UNIVERSITY OF CHICAGO LAW SCHOOL	33	31	94			
UNIVERSITY OF ILLINOIS COLLEGE OF LAW						
UNIVERSITY OF IOWA COLLEGE OF LAW						
UNIVERSITY OF MIAMI SCHOOL OF LAW	11	6	55			
UNIVERSITY OF MICHIGAN LAW SCHOOL	44	43	98			
UNIVERSITY OF NEVADA LAS VEGAS						
UNIVERSITY OF NOTRE DAME LAW SCHOOL	16	15	94			
UNIVERSITY OF OREGON SCHOOL OF LAW						
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL	24	21	88			
UNIVERSITY OF VIRGINIA SCHOOL OF LAW	27	25	93			
VANDERBILT UNIVERSITY LAW SCHOOL						
WASHINGTON UNIVERSITY SCHOOL OF LAW	21	15	71			
WESTERN MICHIGAN UNIVERSITY				15	1	7
YALE UNIVERSITY LAW SCHOOL	28	26	93			
YESHIVA UNIVERSITY BENJAMIN N. CARDOZO SOL						
ALL OTHER OUT-OF-STATE SCHOOLS	251	135	54	143	24	17
TOTAL	936	703	75	267	60	22

**July 2021 California Bar Examination**  
**Number of First-Timers and Repeaters Taking and Passing and the Percent Passing:**  
**California Accredited Law Schools**

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PAS S	TOOK	PASS	%PAS S
CALIFORNIA NORTHERN SCHOOL OF LAW						
CONCORD LAW SCHOOL – PURDUE UNIVERSITY GLOBAL				31	7	23
EMPIRE COLLEGE SCHOOL OF LAW	11	5	46	11	1	9
GLENDALE UNIVERSITY COLLEGE OF LAW	16	5	31	15	0	0
HUMPHREYS UNIVERSITY DRIVON SCHOOL OF LAW				30	6	20
JOHN F. KENNEDY SCHOOL OF LAW – NORTHCENTRAL	14	2	14	30	5	17
LINCOLN LAW SCHOOL OF SACRAMENTO	31	23	74	32	3	9
LINCOLN LAW SCHOOL OF SAN JOSE				24	3	13
MONTEREY COLLEGE OF LAW				19	4	21
NORTHWESTERN CALIFORNIA UNIVERSITY	11	7	63	34	6	18
SAN DIEGO LAW SCHOOL – ALLIANT INTERNATIONAL						
SAN FRANCISCO LAW SCHOOL – ALLIANT INTERNATIONAL	16	1	6	14	2	14
SAN JOAQUIN COLLEGE OF LAW	32	17	53	26	7	27
SAN LUIS OBISPO COLLEGE OF LAW						
SANTA BARBARA COLLEGE OF LAW				11	2	18
ST. FRANCIS SCHOOL OF LAW						
THOMAS JEFFERSON SCHOOL OF LAW	21	11	52	84	15	18
TRINITY LAW SCHOOL	21	7	33	67	6	9
UNIVERSITY OF LA VERNE COLLEGE OF LAW	69	35	51	37	5	14
UNIVERSITY OF WEST LOS ANGELES	32	9	28	88	8	9
VENTURA COLLEGE OF LAW				23	7	30
TOTAL	324	140	43	594	91	15

**July 2021 California Bar Examination**  
**Number of First-Timers and Repeaters Taking and Passing and the Percent Passing:**  
**California Unaccredited Law Schools, Fixed Facility**

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
CALIFORNIA DESERT TRIAL ACADEMY COL						
CALIFORNIA SOUTHERN LAW SCHOOL						
IRVINE UNIVERSITY COLLEGE OF LAW						
PACIFIC COAST UNIVERSITY SCHOOL OF LAW	21	6	29	38	4	11
PACIFIC WEST COLLEGE OF LAW						
PEOPLE'S COLLEGE OF LAW						
WESTERN SIERRA LAW SCHOOL						
TOTAL	35	10	29	71	7	10

**California Unaccredited Law Schools, Distance Learning**

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
ABRAHAM LINCOLN UNIVERSITY				35	4	11
AMERICAN HERITAGE UNIVERSITY SOL						
CALIFORNIA SCHOOL OF LAW						
SOUTHERN CALIFORNIA INSTITUTE – VENTURA				21	1	5
TOTAL	11	8	73	62	6	10

**California Unaccredited Law Schools, Correspondence**

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
AMERICAN INSTITUTE OF LAW						
AMERICAN INTERNATIONAL SCHOOL OF LAW						
CALIFORNIA SOUTHERN UNIVERSITY						
OAK BROOK COLLEGE OF LAW						
TAFT LAW SCHOOL						
TOTAL	8	4	50	26	0	0

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

**Roger Bolus, Ph.D.  
RESEARCH SOLUTIONS GROUP**

**December 2, 2021**

## SUMMARY

The July 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 third 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 7,389 applicants who completed all three sections, 33.5% 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. The PT score was multiplied by two (2) so that the maximum possible Written raw score was 700 points. Because of software technical issues that impacted about 30% of examinees, both written and scaled MBE scores for these examinees were eligible for a statistical adjustment. The adjustment process is described in Appendix C.

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 7,389 applicants<sup>1</sup> who had all of their answers read at least once and the subgroup of 698 applicants who had them read at least twice were as follows:

- After the first reading of all answers 37.8% of the applicants failed and 52.7% passed. An additional 1.3% passed after the second reading. Overall, 54.0% of the applicants passed the examination<sup>2</sup>.

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<sup>1</sup> 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 July 2021 GBX, 7,536 applicants sat for the exam. There were 147 applicants who had one or more zeros in their set of 6 written questions or did not take the MBE. Accordingly, there were 7,389 applicants who completed the GBX for purposes of the exam statistics (7,536 - 147).

<sup>2</sup> The bar passage rate for all 7,536 applicants taking the GBX, including those without complete scores was 52.9%. The passage rate for the 394 applicants taking the Attorney’s exam was 54.3%.



- The reliability of the Written and Total scores were .85 and .94 respectively, meeting standards for a high-stakes licensing examination.
- The correlation between MBE and Written scores was .76 which was the highest level ever for a July administration.
- Fully, 92 (13.2%) of the 698 applicants who went into regrade passed the examination. Only 4 applicants in the lower 10-point portion (i.e., < 1360) of the regrade range passed.
- The historic tendencies for males to score higher on the MBE than females (1433 vs. 1389) and vice-versa for the Written section (1399 vs. 11411) continued for this examination. However, on the Written section, the gap has narrowed relative to previous years. During the current administration, the average total score for Whites (mean=1458) was 114 points higher than Black (mean=1357), 101 points higher than Asians (mean=1357), and 74 points higher than Hispanics (mean=1369). These differences were similar for both sections of the examination. We did notice that Hispanics continue to score noticeably higher on the Written section than the MBE.
- 71.5% of the 4,916 first-time takers passed the exam, while 24.6% of the 798 repeating the exam for the first time passed. The chances of passing for those taking the exam for the 4<sup>th</sup> and 5<sup>th</sup> time were significantly smaller (14.0% and 13.5%), while only 11.2% taking the exam for more than a 5<sup>th</sup> 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.

TABLE A

PASS vs. FAIL STATISTICS BY NUMBER OF PREVIOUS EXAMS TAKEN

Decision	0	1	2	3	4	5	>5	Total
Fail	1,403	602	421	243	185	134	412	3,400
Pass	3,513	196	127	50	30	21	52	3,989
Total Takers	4,916	798	548	293	215	155	464	7,389
% Passing	71.5%	24.6%	23.2%	17.1%	14.0%	13.5%	11.2%	54.0%

## **ANALYSIS OF THE JULY 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. A significant technical issue with the software led to over 30% of test-taker experiencing some form of disruption. Appendix C discusses the procedures that were performed to adjust scores for those test-takers.

### **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:

$$\text{Written Scale} = (4.0198 \times \text{Written Raw}) - 306.326$$

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 1350<sup>3</sup>. 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 7,389 applicants who had both an MBE score and a complete set of Written scores. This is the smallest population of July test-takers since 1995. This sample contained 4,916 applicants who were taking the examination for the first time (67% of all takers) and 2,473 repeaters (33% 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 .76 correlation between MBE and Written scores which was the highest value since correlation statistics were calculated. Fully 53.9 % of the applicants passed the exam, 7% lower than 2020. The decrease can be attributed primarily to the 2.2-point decrease in the average MBE score (on the original 200-point MBE scale).

Table 1 - SUMMARY TEST STATISTICS AFTER ALL READINGS

Test Statistic	MBE Scale	Written Raw	Total Scale
Mean Score	1409	426	1407
Standard Deviation	175	44	164
Reliability	.94	.85	.94

## SUBGROUP ANALYSES

The gap in written score performance between men and women narrowed on this exam (12 points; 1399 vs. 1411), while the MBE gap widened. (44 points; 1433 vs. 1389). The net Total Score difference was 16 points (see Table 2). With respect to racial/ethnic groups, Whites continue to outscore all other racial/ethnic groups on both exam sections. On the MBE the differences ranged from 143 points for Blacks to 100 points for Hispanics. On the Written section, these differences ranged from 138 points for Blacks to 78 points

<sup>3</sup> The decision rules were modified by the CA Supreme Court and first applied during the Fall 2020 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.

for Hispanics. by over 100 points on the MBE and Hispanics scored 72 and 49 scale score points lower than Anglos.

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	1357	1314	1374	1452	1435	1411	1399
MBE	1356	1323	1363	1463	1431	1389	1433
Total	1357	1319	1369	1458	1433	1400	1416
N	1,711	503	955	2,610	1,162	4,162	3,095
% Male	37%	41%	41%	47%	41%	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 698 applicants who had their answers read at least twice. On the average, their mean Written scale score on the first reading (414.6) was 2.9 points higher than their mean on the second reading (411.7). The difference is 2.3 points higher than observed on the last administration. Some of this difference may be attributable to the adjustments made to scores because of the software issues (see Appendix C)

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 3,989 and 54%, respectively. Of these, only 92 examinees (1.3%) passed in the 2<sup>nd</sup> grading phase.

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	2,794	37.8%	3,897	52.7%	6,691	90.6%
2	606	8.2%	92	1.3%	698	9.5%
Total	3,400	46.0%	3,989	54.0%	7,389	100.0%

Table 4 illustrates continuing strong relationship between Phase 1 scores and final pass/fail status. Beginning with the previous Fall administration, in addition to 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). Along with adjustment, the pattern of having relatively few examinees in the lower portion of the range pass upon regrade continued. On this administration only 4 examinees out of 179 (2%) with an initial total scale score in the lowest regrade range (1350 to 1359) passed. Compare these to those examinees in the top of the regrade range (1380-1389) where 55 (23%) passed. Now, with three administrations of experience, it appears as though graders have adjusted well to regrading under current conditions where the regrade range was is narrower than in the past, and the examinees are of lower ability levels.

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	125	55	180	31%
1370 – 1379	150	21	171	12%
1360 – 1369	156	12	168	7%
1350– 1359	175	4	179	2%
Total	606	92	698	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
2021	7,389	54	1409	426	.85	.76

\* 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.

## APPENDIX C: TECHNICAL ISSUES ON THE JULY 2021 EXAMINATION AND SCORE ADJUSTMENTS

During this exam administration, the ExamSoft software that was used to deliver questions and record answers remotely, experienced problems related to excessive memory usage. As a result, some examinees experienced blank screens, some of which required restarting the system, once or multiple times. The problem was encountered on one or more of the written questions and/or on one or more of the four MBE sessions (50 multiple-choice items were asked per session). According to ExamSoft records, these problems were encountered by slightly more than 30% of the examinees.

In response to this issue, the State Bar of California opted to perform separate statistical analysis for any examinee who had one or more, documented technical problems on either the written section or the MBE with the objective of making adjustments to scores, where applicable.

**Adjusting the written scores:** For each question in which the problem occurred, the State Bar used a “pro rata” method to adjust the grade based on the individual’s scores on questions where there were no recorded problems, as well as data from examinees who did not encounter the technological issue. The adjustment consisted of two components:

The first component accounted for the relative difficulty of each question. This was determined by calculating the average score on each question in the population of examinees who did not experience this technological issue on any written question, and then, their overall average score on the written section. The difference between the individual question averages and the overall average was used to represent the relative difficulty of each question. For example, if the overall average across all questions was 56, and the average of the first question was 58, then that question would be considered more difficult than the average question by 2 points. The 2 points was therefore considered the “adjustment factor” for that question. Each question was given an “adjustment factor”.

The second component was based on scores of each individual who faced the technological problem. For each question on which the problem was encountered, the average score from the questions that were not affected by the irregularity was calculated. That average plus that question’s “adjustment factor” was calculated to come up with an “Expected Score”. If the actual score was less than the “Expected Score”, then an adjustment was made and the final score on the question was the “Expected Score”. If the actual score was greater than the “Expected Score”, then the final score on the question was not changed.

**Adjusting the MBE scores:** For applicants negatively impacted during any of the MBE sessions by this technological issue, the National Conference of Bar Examiners (NCBE) provided an adjusted score, which also utilized a pro rata-like method. Similar to the adjustment method for the written section, if the adjusted score calculated by the NCBE was lower than the original MBE score, then no adjustment was made; if it was higher, then the examinee's final score was the adjusted score calculated by the NCBE.

The above methods were used when less than half of the sections exhibited some form of the problem (i.e., 3 or less written questions or 2 or less MBE sessions). For the small number of examinees having 4 or more written questions affected or 3 or more MBE sessions affected, an alternative regression-based method was used to impute a total written raw score or a total scale MBE score.





# **California Bar Examination**

## **Essay Questions and Selected Answers**

**July 2021**



**ESSAY QUESTIONS AND SELECTED ANSWERS**

**JULY 2021**

**CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the July 2021 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered “model” or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number

Subject

- |    |   |
|----|---|
| 1. | Civil Procedure                           |
| 2. | Professional Responsibility               |
| 3. | Torts                                     |
| 4. | Criminal Law and Procedure                |
| 5. | Wills and Succession / Community 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**

Jiff, a California citizen who resides in Truckee, California, just west of Reno, Nevada, provides cleaning services. At Jiff's request, customers submit written evaluations of his services so he can monitor their satisfaction.

Jiff entered into a contract with Shearer, a Nevada citizen who operates a beauty salon in Reno, Nevada. The contract, signed in Reno, obligated Jiff to use due care in cleaning. One night while cleaning, Jiff accidentally broke an antique vase, which Shearer claimed was worth \$100,000.

Shearer sued Jiff for negligence in the United States District Court for the Eastern District of California, which includes Truckee. The complaint alleged that Jiff's lack of due care caused breakage of the vase. Shearer moved to compel production of evaluations completed by Jiff's customers in the past year. The court denied the motion.

Following a trial, the jury returned a general verdict in favor of Jiff and the court entered judgment on the verdict. Shearer did not appeal.

Six months later, Shearer sued Jiff again in the same court for breach of contract. The complaint alleged that Jiff's lack of due care caused breakage of the vase.

1. Was venue properly laid in the Eastern District of California? Discuss.
2. Did the court err in denying Shearer's motion to compel? Discuss.
3. May Jiff take advantage of the judgment in the first suit in defending against the second suit? Discuss.

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## QUESTION 1: SELECTED ANSWER A

### Applicable Law

The United States District Court for the Eastern District of California is a federal court. Because the cause of action at issue here is a negligence claim, the district court must have subject matter jurisdiction through diversity. Here, the requirements of diversity are satisfied because Jiff and Shearer are citizens of different states with no indication that they intend to reside elsewhere (California, and Nevada, respectively) and because the amount in controversy—the value of the broken vase—is \$100,000. However, when a federal court is sitting in diversity, it is necessary to determine which law applies: state law or federal law.

To determine the applicable law, the *Erie* Doctrine applies. Generally, federal courts apply state substantive law and federal procedural law. Here, state "substantive" law includes the negligence cause of actions, a statute of limitations, and other necessary substantive elements. Rules of venue and discovery are governed by the Federal Rules of Civil Procedure. However, rules of preclusion (discussed below) are governed by the substantive law of the state in which the court sits. Therefore, the federal court will apply California law in determining whether preclusion applies.

### 1. Venue

Venue is proper (1) in any district in which a defendant resides, if all defendants reside in the same district, or (2) in the district where the events giving rise to the cause of

action occurred, or where the subject matter of the action is located. If neither of these is proper, then venue may be proper in any district in which a defendant is subject to personal jurisdiction.

#### Defendant's Residence

Here, the defendant, Jiff, is a California citizen. Additionally, Jiff is the only defendant here. Further, the facts indicate that Jiff resides in the Eastern District of California, which includes Truckee. Therefore, because Jiff is the only defendant in this action, all of the defendants live in the same state, so venue will be proper in any district in which a defendant resides. Therefore, venue will be proper over Jiff in the Eastern District of California, because it is the district where Jiff lives.

#### Events Giving Rise to Cause of Action

Though venue is proper on the above ground, this ground would not be a satisfactory ground for venue: though a contract would generally give rise to venue in a district in which it was signed, the contract that governed Jiff's cleaning services was also signed in Reno. Second, Jiff was cleaning in Reno, Nevada, when he broke the vase.

Accordingly, the events giving rise to the cause of action, or the area where the property is located, do not give rise to proper venue in the Eastern District of California. However, venue will be proper on the first ground, as discussed above.

#### Conclusion

Venue is proper, therefore, in the United States District Court for the Eastern District of California.

## 2. Motion to Compel

### Discovery

Discovery enables parties to obtain information from one another relevant to their claims and defenses. As discussed above, the Federal Rules of Civil Procedure apply to the discovery here. Before parties may properly begin discovery, they must make initial disclosures of certain information, including names of those who have information, and other necessary information to disclose. Further, parties must also confer to create a discovery schedule. Here, there is no indication that such initial disclosures were made, nor that such a process was followed. Accordingly, discovery may have been improper on the grounds of improper procedure.

### Grounds for Motion to Compel

A motion to compel may be filed only upon a good faith certification by the person seeking discovery that they have either conferred or made a good-faith effort to confer with the opposing party in seeking the discovery, and the party opposing the discovery refuses to turn over the discovery regardless. Here, there is no indication that Shearer and Jiff have conferred, or that Shearer made a good faith effort to confer with Jiff. Accordingly, because the motion may not have been filed properly by Shearer, the court may have properly denied the motion to compel.

However, if this conferral and requisite procedure were properly made, then it is necessary for a court to determine if the information sought is within the scope of discovery.



### Scope of Discovery

Discovery is proper for any non-privileged matter that may lead to the discovery of any relevant evidence. Relevant evidence is evidence which tends to make any fact more or less likely. However, discovery does not have to be admissible in court in order to be discoverable; so long as it is relevant, the evidence may be properly discoverable.

Here, Shearer moved to compel production of evaluations completed by Jiff's customers in the past year, and the court denied the motion. Therefore, it is necessary to determine whether these evaluations are relevant to Shearer's cause of action. The evaluations likely contain information about Jiff's cleaning services, and the extent to which the customers are satisfied with the services. They may contain good reviews, bad reviews, and history of different incidents, including breakage of items. Shearer will argue, therefore, that because his cause of action is based on Jiff using due care in cleaning, then a history of different incidents and evaluations will demonstrate whether Jiff tends to use due care, or whether he does not. Though this information would not necessarily be admissible in evidence, this is certainly relevant to Shearer's cause of action, as it would likely tend to show Jiff's pattern of behavior while cleaning, as well as any unique incidents that occurred while Jiff cleaned.

On the other hand, Jiff may argue that the evaluations are not relevant because Shearer requested all evaluations from the last year. However, Shearer will argue that a year is likely a narrow enough time period that will enable Shearer to obtain information relevant to his cause of action.

Further, Jiff may point to the fact that he requests that customers submit written

evaluations. When a person operating a service business requests evaluations, it is likely that they are only requesting evaluations that will treat them favorably, meaning that such evaluations would not likely contain information about any negligence that Jiff was engaged in. Regardless, because Jiff cannot prove that the evaluations do not contain relevant information that can assist Shearer in preparing his claim or defense, the evaluations are properly within the scope of discovery.

### Request for Production of Documents

A party may properly request that another party produce documents. Though it may be possible to obtain such information from non-parties through a subpoena duces tecum, a subpoena would not be necessary here because Jiff is a party to the action.

Accordingly, this is a proper discovery request, because the evaluations are documents that are within the control of the other party. Though Jiff could argue that turning over the evaluations would impose too extensive a burden on him, the documents are within his control and do not appear to invade on too extensive a privacy interest, unlike the disclosure of emails between family members, for example. Accordingly, this is a valid request for the production of documents.

### Conclusion

If Shearer properly filed the motion to compel after an attempt to confer with Jiff, then the motion to compel is proper here because the information requested is within the scope of discovery, and the court erred in denying the motion. However, if Shearer failed to do so, which appears to be the case given that the facts do not mention any such conferral, then the court properly denied the motion to compel.

### 3. Judgment in First Suit

In order for Jiff to "take advantage" of the judgment in the first suit in defending against the second suit, he must either rely on principles of claim or issue preclusion.

Preclusion may either be used offensively or defensively—though certain states have different rules on the use of offensive preclusion. Here, Jiff would be using preclusion defensively in order to prevent a same claim or issue from being raised against him a second time.

#### Claim Preclusion (Res Judicata)

Claim preclusion prevents the same claim from being litigated multiple times, so long as it is (1) the same claim (2) between the same parties (3) that is a result of a final, valid judgment (4) on the merits.

#### Same Claim

To determine whether a second claim is in fact the same claim as the first, federal courts apply a "transactional" test, which requires determining whether the incident was a part of the same transaction or occurrence, or series of transactions or occurrences. However, because federal courts apply the law of the state court in which they sit when in diversity, California law would apply, as discussed above. Under California law, the test is whether the claim arises out of the same "injury," which is broader than the federal test.

Here, Shearer's initial claim was against Jiff for negligence, and alleged that Jiff's lack of due care caused breakage of the vase. Six months later, Shearer sued Jiff again in the same court for breach of contract, and alleged that Jiff's lack of due care caused

breakage of the vase. Shearer will argue that a breach of contract claim is different than a negligence claim, which arises out of tort, and that the underlying claims are not the same. However, under either the transaction or the injury test, the underlying claim is the same because it arises out of the same transaction and injury: the breakage of the vase and Jiff's alleged lack of due care as a result. Despite the different causes of action, the underlying claim in Shearer's second case is the same.

Therefore, this element is satisfied.

### Same Parties

A claim is between the same "parties" if the actual same parties are involved, or if it involves the parties' successors in interest. Here, the claim is between the same parties, meaning because the first suit was between Shearer and Jiff, and the second suit is between Shearer and Jiff.

Therefore, this element is satisfied.

### Valid, Final Judgment

In federal court, a valid final judgment is one that is the result of either a motion for summary judgment or a verdict. The judgment is final after the verdict has been rendered and there is nothing additional to perform other than entry of judgment. However, under California law, a judgment is generally not treated as final until the subsequent appeals have been exhausted. Because federal courts generally apply the preclusion law of the states in which they sit, the finality of the judgment will likely be determined by California law.

Here, however, Shearer failed to appeal the verdict. Because an appeal is generally

required to be filed within 30 days after entry of judgment, Shearer's appeal will be time barred, meaning that he has exhausted the appeals process. Accordingly, Shearer's failure to appeal the verdict means that the judgment is final. Further, the judgment was rendered by a jury after a general verdict, in Jiff's favor, and the court entered judgment on the verdict.

Therefore, this element of claim preclusion is satisfied.

### On the Merits

A judgment is on the merits if the court or a jury ruled on the case's substantive grounds, as opposed to dismissing the case on a procedural issue (though some procedural issues, too, may be treated as substantive, depending on the issue).

Here, the case was disposed of on substantive grounds because it occurred after a judgment by a jury through a general verdict in favor of Jiff. A general verdict means that the jury found that Jiff was not guilty. Accordingly, the case was properly decided on the merits, and the court later entered judgment.

### Conclusion

Accordingly, the elements of claim preclusion are satisfied, meaning that Jiff may take advantage of the judgment in the first suit in defending against the second suit. To do so, Jiff may file a motion to dismiss on grounds of claim preclusion, or a motion for summary judgment, so long as the motion is made within 30 days after the close of discovery (though discovery would not likely occur here).

### Issue Preclusion (Collateral Estoppel)

Jiff may also argue that the judgment is precluded on grounds of collateral estoppel.

### Valid Final Judgment

See rule and analysis above. Because the jury returned a general verdict in favor of Jiff, and the court entered judgment on the verdict, this is a valid final judgment.

### Same Issue

The same "issue" refers to the same factual or legal dispute as to a certain occurrence or transaction. Here, in the first case, Shearer's suit against Jiff alleged that Jiff did not exercise due care, which caused breakage of the vase. In the second suit, Shearer's suit was based on breach of contract, but still was based on litigating the same issue: that Jiff's lack of due care caused breakage of the vase. Therefore, because both suits deal with this same issue—whether Jiff failed to exercise due care such that there was breakage of the vase—then this element is satisfied.

### Actually Litigated

To determine if the same issue was actually litigated, it is necessary to determine if the parties were able to present evidence on the issue, call witnesses, and litigate the matter. Here, the matter appears to have been actually litigated because it was the sole issue in the initial case: whether Jiff's lack of due care caused breakage of the vase. The parties would have presented evidence on the matter, called witnesses, cross-examined them, and litigated the issue.

Accordingly, the same matter was actually litigated, and this element is satisfied.

### Necessarily Decided

An issue must have been necessarily decided, which means that the jury (or judge, in a bench trial) could not have ruled on some other grounds in its verdict for a party.

Though this may generally be difficult to decide in the case of a jury trial with multiple issues, this is a jury trial with only one issue: whether Jiff's lack of due care caused breakage of the vase.

Therefore, in the first case, the jury would have necessarily decided whether Jiff's lack of due care caused this breakage. However, Shearer may argue that the actual underlying "issue" that they might have decided could be different, based on a narrow interpretation of "issue." Specifically, maybe the first jury ruled the way it did because of the evidence to do with causation, or maybe it did because of the evidence of Jiff's breach. Shearer would argue that because it is impossible to identify the specific ground that the jury ruled on, especially in the absence of a special verdict, it is not possible to determine that Jiff's lack of due care was "necessarily" decided.

However, Shearer's argument would be too broad: in deciding the elements of due care, the jury would have properly considered the elements of negligence, and then decided that exact issue. Accordingly, Jiff's negligence was decided in the first case, despite the different cause of action in the second case.

Therefore, this element of issue preclusion is satisfied.

### Conclusion

Jiff will properly be able to take advantage of the judgment in the first suit in defending against the second suit based on grounds of claim preclusion and issue preclusion.

## QUESTION 1: SELECTED ANSWER B

### Was Venue Properly Laid in the Eastern District of California?

As the below analysis will show, venue was properly laid in the Eastern District of California.

#### *Preliminary Issues*

As a preliminary matter, a venue analysis is only proper after it has been determined that there is **personal jurisdiction** and **subject matter jurisdiction** to hear the claim.

In personam personal jurisdiction is the court's ability to have jurisdiction over the people involved in the claim. Subject matter jurisdiction is the ability to render a decision on the subject matter of the dispute, in line with the delimitations on subject matter jurisdiction of federal courts covered in Article III of the Constitution.

In personam jurisdiction has three traditional bases: *presence, domicile, and consent*. Here, Jiff is domiciled in Truckee, where the suit was brought and therefore the court has PJ over him through domicile and PJ over Shearer through consent (plaintiff who brought the suit consents). Therefore, no analysis needs to be made under a constitutional analysis using a long arm statute (which would be contacts (minimum contacts - purposeful availment and foreseeability), relatedness (specific or general PJ), and fairness (an analysis under specific jurisdiction)).

Article III federal courts have subject matter jurisdiction over **federal question cases and diversity cases**. Here, there is no federal question raised in the complaint of Shearer.



**Federal diversity jurisdiction** occurs when: the parties are citizens of different states and the cause of action is greater than \$75,000. Diversity jurisdiction is the mechanism through which federal courts can hear state law claims. **Diversity** is present here as the claim is for \$100,000 (it is a plausible amount based on the facts and a case will only fail this aspect if it is "beyond a legal certainty" that the amount in controversy is less than \$75,000). Also, the plaintiff is diverse from the defendant and there is complete diversity (no plaintiff can be of the same state as any other defendant). Jiff is a California citizen. Shearer is a Nevada citizen. Finally, the Eastern District of CA can hear the state law claim for negligence.

Thus, there is both personal jurisdiction and subject matter jurisdiction and a venue analysis can proceed.

### ***Venue Analysis***

Under the Federal Rules of Civil Procedure, venue is proper: (1) any district where *any defendant resides*, if all defendants are residents of the state where the district court is located; (2) where the events *relating to the cause of action* (contract formation or tort occurrence) *took place*; and (3), if (1) or (2) does not apply, in any district where personal jurisdiction can be had over a defendant.

#### ***Analysis Under Defendant Resides - Prong 1***

In this case, Jiff is a California citizen who resides in Truckee, California. As the facts provide, Truckee California is located in the Eastern District of California. Shearer, a Reno Nevada resident, sued Jiff for negligence in the United States District Court for the Eastern District of California. Since Jiff resides in the Eastern District of California

(for residency purposes under a venue analysis for *individuals*), residency is determined by **domicile** which is where an individual resides and intends to stay [no facts indicate that Jiff planned on shifting his domicile so he does reside in Truckee, California as provided for by the facts].

#### *Analysis Under Substantial Events - Prong 2*

Since we have found that venue is proper under Prong 1, the venue analysis concludes here. However, for hypothetical analysis, venue would also have been proper if Shearer had brought suit in the federal district court that encompasses Reno, Nevada. Venue would have been proper in the district court that embraces Reno because that is where the contract was signed and that is where Jiff performed the services under the contract (cleaning Shearer's beauty salon) and where the alleged tort of negligence occurred (the breaking of the vase due to an alleged lack of due care).

While it is unlikely under these facts, since Jiff is domiciled in the Eastern District of California and it is convenient to defend the case there (and Shearer elected to bring the case there), if the parties did make a motion to transfer venue, the judge may allow the transfer of the case to a venue within the same judicial system (here the federal court system) where venue would have been proper. If such a motion for transfer was made from either party from the Eastern District of California to the federal district that embraces Reno, such a motion should be granted as venue is proper there and there are interests in favor of such a transfer (that is where the contract was made and where the alleged tort occurred). The transferee court would apply the law of the original

transferor court since venue was proper.

### *Analysis Under Prong 3*

Since Venue is proper under prong 1, no analysis is needed under prong 3. This prong usually applies when there are multiple defendants and no determination is able to be made under prong 1 or 2. This option is the fallback option in the venue analysis.

### *Conclusion for Venue - Venue is Proper*

Venue was properly laid in the Eastern District of California. Here, there is only one defendant, Jiff. He is a California citizen who resides in Truckee, California. Shearer brought suit in the Eastern District of California, which encompasses Truckee, and therefore venue is proper under prong 1 of the three- prong venue test under the FRCP (it is a district where a defendant resides when all defendants reside in the same state [which has happened here since there are no other defendants]).

## **2. Did the court err in denying Shearer's motion to compel?**

The court did not err in denying Shearer's motion to compel because the evaluation records are both relevant and proportional to the discovery issues in this case relating to a claim of negligence, specifically a lack of due care.

Under the Federal Rules of Civil Procedure, **discovery** is the part of the case where the parties make requests (through interrogatories, depositions, and other mechanisms) for evidence which the other party has in order to put forth their case (and, indeed, based on discovery certain motions can be made such as a motion of summary judgment where one side alleges that based on the discovery available and the pleadings, there

exists no genuine issue of material fact). Therefore, discovery is a critical part of federal civil procedure.

Parties initially meet for a *Rule 26f conference* to meet and confer over the plan for discovery. There are certain mandatory disclosures that must take place including the identities of expert witnesses, presence of insurance, items that they will use to support their claims and other matters. From there, discovery begins and the court only gets involved when one party refuses to comply with the discovery request of another party.

It is unclear from the facts whether Shearer initially asked Jiff for the evaluations and Jiff refused. If this was the case, then Shearer is justified in bringing a motion to compel and involving the court, since the motion is asking the court to use its coercive power (the threat of sanctions as well as, in extreme cases, contempt of court or dismissal with prejudice) to compel the discovery of certain items.

#### *Standard in Discovery - Relevant and Proportional*

The key standard that a court must use when analyzing whether to grant a motion to compel (or to determine whether anything is discoverable) is whether the item in question is **relevant** to the case at hand and whether the request is **proportional** given the circumstances of the case. It is important to note that an item might be discoverable because it is relevant even though it might not be *admissible* later on under the rules of evidence (due to issues such as hearsay which might come into play here since it involves double hearsay statements of customers submitting their written evaluations of Jiff's services).

### *Evaluations are Relevant*

The evaluations are relevant to this case. At Jiff's request, customers have submitted written evaluations of his services in the past so that he can monitor their satisfaction. Shearer will argue that these evaluations are critical to understand Jiff's track record in the cleaning industry. These evaluations could provide other examples in which Jiff has acted negligently and not adhered to a proper standard of due care. It also would be helpful to understand whether other contracts with Jiff's other customers specifically contained obligations requiring Jiff to adhere to a standard of due care in cleaning. This is relevant to show that Jiff was aware of his duties. While legal relevance under FRE 403 is beyond the scope of this question, it is likely that these evaluations would also be admissible at trial (assuming hearsay can be overcome) since the probative value is not outweighed by unfair prejudice.

Jiff might argue against their ultimate admissibility as grounds for not allowing them to be discoverable but admissibility, as stated above, is not a key touchstone in discovery analysis.

### *Request is Proportional*

The request is proportional.

This case is for negligence and for damages of \$100,000. The cost on Jiff is small to produce these records in light of the circumstances, potential liability, and hardship that Shearer would have to undergo to subpoena and identify the past customers.

### *No Privilege Applies*

Jiff might argue that these evaluations were made in preparation for trial in an attempt

to shield them under the attorney work product doctrine. This would fail as these are preexisting evaluations that predate the litigation. Even if it were determined to be work product (not likely), that would be overcome by the substantial hardship Shearer would undergo to obtain similar information (and that there are no attorney mental impressions which are absolutely privileged).

### *Conclusion*

The court erred on denying the motion to compel since the evaluations are relevant and proportional to discovery and no defense applies.

### **3. May Jiff take advantage of the judgment in the first suit in defending against the second suit?**

Yes, Jiff may take advantage of the judgement in the first suit in defending against the second suit.

The doctrines of claim preclusion and issue preclusion are both applicable to this fact pattern.

### *Claim Preclusion*

The doctrine of **claim preclusion** prevents a party from relitigating an identical case. Claim preclusion applies when there is: **(1) the same parties; (2) the same cause of action or controversy and (3) a final judgment on the merits.** *Merger* occurs when a plaintiff wins in one case and attempts to relitigate an issue that he did not raise in the first case. Such an issue merges into the first judgment and cannot be brought in a subsequent action. *Bar* occurs where a plaintiff loses and then tries to

relitigate an issue he did not raise in the first case. Such an issue is barred in a subsequent action.

Here, Shearer sued Jiff for negligence in the Eastern District of California. Following Shearer's loss in a final judgement (which was not appealed), Shearer is now bringing another action 6 months later in the Eastern District (the same court). Therefore, issue preclusion applies because it is (1) the same parties [Shearer and Jiff]; (2) the same cause of action (the damages incurred when Jiff cleaned the beauty parlor in Reno); and (3) a final judgment was issued (the jury verdict against Shearer).

Shearer could have brought the contract claim in the first case but did not and is thus *barred* now under issue preclusion from doing so.

#### *Primary Rights Doctrine - Possible Defense to Claim Preclusion*

Some states, including California, adhere to the *Primary Rights doctrine*. This means that for the same cause of action, a claim is not barred if they involve different primary rights (an example would be property damage and personal injury). Here, Shearer would make an argument that different primary rights are involved due to a tort claim and a contract claim. Shearer would argue that this is a substantive law issue that the federal court must apply CA law under the *Erie* doctrine. However, since these are not separable actions as typically found in primary rights doctrine scenario as described above (ex. property damage and personal injury), a court would most likely deny this defense and say that it is barred under issue preclusion.

#### *Issue Preclusion*

**Issue preclusion** occurs when there is (1) a final judgment on the merits; (2) an

**issue was *actually litigated* in the first case; and (3) it was essential to**

**judgment.** Traditionally, only *completely mutual* issue preclusion was allowed meaning that it had to be the same parties. Under the modern view, *nonmutual issue preclusion* (either *defensive* where a defendant from a previous action can use a previous action to defend against a new plaintiff or *offensive* where a new plaintiff is attacking a defendant from a prior action). Here, there is *mutuality* of the parties so a nonmutual analysis doesn't apply (although it is worth noting that CA allows for offensive nonmutual issue preclusion).

Here, there was a final judgement on the merits. Shearer might have an argument to make as to whether the issue was actually litigated. In the first case, which centered around negligence, it is highly likely that Shearer would have pointed to the contractual language of due care in order to help establish the duty that Jiff owed to Shearer and to assist helping the trier of fact (the jury) find a breach of that duty. If Shearer had pointed this out and it was *essential* to the judgment, it is likely that issue preclusion would apply.

However, if Shearer did not point to the contractual language and/or relied primarily on general negligence principles (thereby relegating the contractual provision to a minor issue status), issue preclusion would not prevent this claim from going forward.

*Conclusion:*

Shearer will be prevented under claim preclusion from filing suit again. Depending on the role contractual language might have played in the first case, issue preclusion could also prevent the claim.



## **QUESTION 2**

Laura is a lawyer. She practices family law in a suite she shares with Alex, a tax attorney. Laura and Alex share a conference room, a printer, and a receptionist. Their receptionist is Laura's son, Sam. Laura and Alex each use separate letterhead, business cards, and telephone numbers.

Laura represented Wendy, who was divorcing her husband Henry. Laura filed a request for child support from Henry. In his financial statement, Henry claimed that he had no significant assets and that he lived alone. Wendy told Laura that she suspected Henry was not being truthful, that he had more income and assets than he claimed, and that he lived with and shared expenses with his girlfriend, Ginny.

One morning, while picking up papers from the office printer, Laura saw and read a document addressed to Alex left on the printer by Sam. The document was a property deed in the names of Henry and Ginny, and listed Ginny's address as the same as Henry's. Henry had not disclosed the property on his financial statement. Alex had received the document from Ginny, whom Alex represented on a matter unrelated to Henry's divorce.

Because Laura did not want to get her son into trouble, she never mentioned the property deed to Alex, Wendy, or the court. Wendy received a lower award of child support from the court than she should have, based on Henry's incorrect financial statement.

1. What ethical violations, if any, has Laura committed? Discuss.
2. What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

## QUESTION 2: SELECTED ANSWER A

1.

### Laura and Alex Office Arrangement

Laura and Alex are carrying on their respective practices in a shared family law suite.

They must be sufficiently separate or else they risk being considered a partnership, and thus would be facing potential conflicts of interests with clients. While they share the same suite and the same receptionist, which could raise concerns about the adequacy of their separateness, they have been using separate telephone numbers, letter head and business cards. They are also each in different distinct specialties of family law and tax law, which could indicate to potential clients that they are separate practices.

With this arrangement they run the risk of not being sufficiently separate such that they could be considered a partnership. The facts do not indicate that they are clearly separated by demarcated offices, or how their respective individual practices are presented on the door of the suite. If they were deemed to be one firm, or a partnership, then they would face conflicts of interest.

A conflict of interest would exist between Laura representing Wendy, while another lawyer in the firm represents an opposing party in the same issue. If they were deemed to be one firm or partnership, then Sally would have to withdraw from representation of Wendy, or Alex would have to withdraw from representation of Henry and they would

have to shield the other partner from the case. Or they would be required to receive consent from both conflicted parties to representation, with informed written consent (CA) or informed consent in writing (ABA).

However, it is likely that Laura and Alex would be considered to be separate entities and must continue to keep their work separate and maintain clear boundaries between the two individual firms. They would need to create a new process for printing materials and keeping their practice clients' information confidential.

#### Document Addressed to Alex: Inadvertent Disclosure

When an attorney inadvertently receives confidential information or work product from an opposing party under ABA Rules, they are required to notify the sending party of the error and must not continue to read or use the document and return the offending document. In CA, the rule is that they must also refrain from reading the material and inform the sending attorney, but are not required to return the document.

Here, Laura should have stopped reading when she saw that the document was addressed to Alex. She should have also informed Alex of the inadvertent disclosure.

#### Duty of Competence

Laura owes a duty of competence to her client Wendy that she will competently represent Wendy in her case-meaning without negligence or recklessness. Here, Laura breached this duty because she had information about Henry's property and assets that were essential to her competently representing Wendy in Wendy's divorce. The property deed of Henry was essential to the determining of child support. And in declining to inform Wendy and apply it to the request, Laura was not acting competently

nor in the best interests of her client. The result was that Wendy received lower child support than she should have.

### Communication

Additionally, Laura has a duty to communicate with her client and keep her client informed of key issues and steps in representation. Discovering that Henry had a property that he had not listed as a significant asset was important information for Wendy, as the client, to know. In failing to inform Wendy of this critical fact in her case, she violated professional ethics.

### Duty of Loyalty

Laura has a duty of loyalty to her client. As discussed above, she must act competently and diligently in their representation; she must also be in communication with her client and keep them informed of the case. Here, she was concerned about her Son getting into trouble, and as a result, breached her duty of loyalty to her client by not informing Wendy of the property deed.

### Duty of Candor

Laura owes a duty of candor to the tribunal. She is aware that Hugh said he lived alone, and that he had no significant assets; however now Laura is aware that there is a property deed in Hugh's name, and that Ginny resides at the same property, meaning that Hugh does not actually live alone.

Laura has a duty to inform the court of this discrepancy.

### Duty to Supervise

Attorneys have a duty to ensure that their staff are behaving ethically. Here, Sam is a staff member of Laura as well as Alex. Laura has a duty to ensure that Sam is complying with ethical standards, which means keeping client information confidential. She has failed to supervise Sam, and additionally has failed to take steps to inform Sam of his duties after finding the property deed.

2.

### Duty of Competence

Alex has a duty to act competently in the representation of his clients. He must not act with recklessness or negligence. Here, in leaving a property deed, a client's information, in a shared and potentially public space in the printer, is a breach of duty of competence.

### Duty of Diligence

Along with competence, Alex has a duty of due diligence. This means he must timely manage and handle cases and documents. Here, Alex was not diligent in handling the property deed for Hugh and Ginny because he left it out on the office printer in a shared space.

### Duty of Confidentiality

Alex has a duty of confidentiality to his client Hugh, and to possibly Ginny who is also his client, he cannot share information about representation of a client without consent

of the client or under various exceptions, such as he may reveal confidential information to prevent serious bodily harm or death. For a client to consent to attorney sharing revealing information about representation or privileged attorney client communication, the client must give informed written consent in CA or informed consent in writing (ABA). Here, the disclosure of the property deed was inadvertent, so it does not meet any exceptions like those that allow a client to reveal confidential information to prevent serious bodily harm or death (CA and ABA) or to prevent or rectify substantial financial harm where the client is using the lawyer's services in furtherance (ABA only).

Here, Alex negligently revealed confidential client information when the deed was left in the printer. He breached his duty of confidentiality to his client.

It is not clear if Alex was aware that the property deed was not disclosed in Henry's divorce case against Wendy. If Alex was aware, he could attempt to argue that this breach of confidentiality fell under the exception of revealing confidential information to rectify or prevent serious financial harm where the client is using the lawyer's services in furtherance (ABA only). However, the facts are not clear on the seriousness of the financial harm as a result of the lower child support payment, or that Henry was using Alex's services in furtherance. The information seems to have been inadvertently disclosed by Alex and Sam.

### Duty to Supervise

Alex has a duty to supervise his staff, including Sam, who acts as a receptionist for Laura and Alex. Alex has a duty to supervise staff to ensure that they conform to ethical standards. Sam leaving out information on a printer in a shared office suite is behavior

that risks the confidentiality of clients.

Alex has failed to supervise staff diligently.

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## QUESTION 2: SELECTED ANSWER B

### Laura's Ethical Violations:

#### **Duty of Loyalty: Self Interest**

Laura (L) represented Wendy (W) and therefore, owed Wendy a duty of loyalty under both CA and ABA rules. The duty of loyalty requires a lawyer to act in the client's best interests. Under both rules, if a lawyer knows or has reason to know that there is a substantial risk of materially limiting their ability to represent their client competently or diligently because of a personal conflict, they must withdraw from representation unless (1) they reasonably believe they can provide competent and diligent representation, (2) representation would not be against the law, (3) they are not representing two clients on opposing ends of the same litigation, and (4) they obtain informed consent, confirmed in writing under the MR, or informed written consent under CA. CA differed in consent requirements because it requires that both the consent AND the disclosure be in writing, whereas the MR only require the former to be in writing.

Here, L had a personal conflict of interest because her receptionist, Laura's son, Sam (S), accidentally left a property deed on the printer. L will argue that at the start of representation, there was no conflict of interest and thus she did not have a duty to inform nor withdraw. However, after L found out that her son made a mistake, she acted on her own interests because she did not want to get her son in trouble. Since L was in a position to pick her son over her client, there was a conflict of interest here and thus, L breached it by not getting informed written consent or informed consent confirmed in



writing from W. Even if L did get the consent, it is unlikely that she could have believed that she would be able to provide competent nor diligent representation because she would have to pick her own client and put her son at risk of getting in trouble. Thus, this was a breach of her duty of loyalty under both ABA and CA rules.

### **Duty of Diligence**

Under both CA and ABA rules, a lawyer must act with hard work and dedication, to diligently act in the best interest of their client. Under CA rules, a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation. This rule does not require an attorney to breach ethical rules in order to zealously represent their client; however, they must do their best to advance their client's non-frivolous interests.

Here, Laura had a duty to use all the information that she got to W's best interest. However, she did not use the information about the deed because she did not want to get her son in trouble. L will argue that she did not use this information because she did not want to breach confidentiality between Alex and his client, Ginny. However, by prioritizing Ginny and her son's interests above her own client, L failed to do all that she could to advance the best interests of her client. Therefore, L breached her duty of diligent representation to W.

### **Duty to Withdraw**

Under MR, a lawyer must withdraw from representation if representing the client would lead to a violation of the ethical rules, or any other law. Under CA rules, the lawyer must withdraw if continued representation would lead to a violation of the ethical rules. Here,

continuing to represent W led L to breach the ethical rules of diligence, conflict of interest, and more as discussed below. Therefore, by failing to withdraw, L was also in breach of this rule under both CA and ABA rules as well.

### **Duty of Candor**

An attorney owes a duty of candor to opposing parties and the tribunal. Under both ABA and CA rules, a lawyer must not knowingly make a false statement to the court or fail to correct a false statement previously made.

#### *Tribunal*

Here, L breached the duty of candor to the tribunal because she knew that the financial statement that Henry submitted claiming he had no significant assets and lived alone was false. She knew that the court would rely on this statement when awarding Wendy's lower award of child support. However, instead of being truthful with the court and informing the falsity of this statement that she KNEW was false, she never mentioned it. Therefore, not only was this a CLEAR breach of diligence to her client as explained above, it was also a breach of candor to the court under both ABA and CA rules.

#### *Alex*

L also arguably breached the duty of candor to Alex because she failed to tell him about getting this information about his client. L will argue that she does not owe A any duties because he isn't even opposing counsel. However, as discussed below, she did owe him a duty to inform him of the inadvertent disclosure; by failing to do so she probably breached her duty of candor to him as well. (*See below, duty of fairness*).

### *Duty not to assist in perjured testimony*

L may have also breached her duty not to assist in perjured testimony or false evidence. Here, H gave false evidence to the court that said he did not have significant assets and lived alone. However, L will likely be successful in arguing that H was not her client. She therefore did not have a duty to prevent him or try to dissuade him from offering false evidence like she would have if L were trying to offer that false document. Therefore, it is unlikely that L assisted H in providing false testimony. However, her failure to inform the court that she knew that this information was false due to her own self-interest will still likely be a breach of candor to the tribunal.

### **Duty of Communication**

Under both ABA and CA rules, a lawyer has a duty to reasonably communicate with their clients. In CA, this includes updates of any significant developments in the case, which includes all written settlement offers or plea deals. Under ABA, this includes keeping the client reasonably performed of the status of the matter. Under both rules, the lawyer must keep the client reasonably informed of details necessary to make an informed decision.

Here, W told L that she believed H was not being truthful about having no significant assets and living alone. However, L found out that there was a deed in the names of both Henry and Ginny. This is likely something that is necessary to communicate to a client because it is about the status of the matter for child support, and it is a significant development under CA rules because it makes W's chance of receiving a higher award of child support more likely. However, L did not inform W of the fact that she discovered

evidence that will help W's claim. Instead, she hid it and never mentioned it to Alex, Wendy, not the court. Therefore, she breached her duty of communication to W.

### **Duty to Supervise**

Under both CA and ABA rules, lawyers have a duty to adequately supervise the staff that they manage or exercise control over. Here, L practiced family law in a suit shared with Alex (A), a tax attorney. L and A both shared a conference room, a printer, and a receptionist, who was L's son, Sam. L will argue that since S was L and A's shared receptionist, she could not exercise control over him. However, a receptionist usually follows directions given by a lawyer that they are employed by, even if that means S was under the direction of both L and A. Moreover, S was L's son, which makes a stronger case that S was within L's control. Therefore, L breached a duty of supervising S and making sure that he did not leave confidential communications on the printer. L should have provided adequate training to ensure that things like this do not happen. By failing to provide such training and corrections, and denying that this whole incident didn't happen, L breached her duty to supervise under both MR and ABA rules.

### **Duty of Fairness: Inadvertent Disclosure**

Lawyers owe a duty of fairness to opposing counsel. Under both ABA and CA rules, when a lawyer receives information that that they know or reasonably should know was sent by mistake, they must take certain steps to mitigate the harm to opposing counsel. Under the ABA rules, the lawyer must notify opposing counsel as soon as possible that they received this information. Under CA, the lawyer must notify opposing counsel and also only read as much as necessary to determine that the information was

inadvertently sent.

Here, L saw that deed in the names of Henry and Ginny and knew that H did not disclose the property on the financial statement. Under both ABA and CA rules, L was in breach because she timely failed to notify A who was in the other office next to her. She clearly did not notify him because she didn't want to get her son into trouble; however, her failure to do so was a breach of fairness to opposing counsel. Additionally, it is unclear whether L read more than necessary before she would have been required to disclose receipt of the information, but since she failed to disclose at all, she would be in breach of both rules regardless of how much of the deed she examined.

### **Contingency Fees**

It is unclear what L and W's fee agreement was. In CA, the fee agreement may not be unconscionable and under ABA, the fees charged may not be unreasonable.

Contingency fee agreements must be in writing under both authorities, and they are not allowed for criminal cases where payment is based upon a favorable judgment, or for family law cases where payment is based upon an award of spousal or child support.

We would need more facts about the fee agreement between L and W to determine whether this would have been a breach. Since L is representing W on a divorce matter and L is seeking child support, a contingency fee agreement would not be appropriate, and if L did execute one, this would be an ethical violation under both ABA and CA rules.

### **Duty of Competence**

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a

lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly, fail to provide competent representation.

Here, it is unclear whether L acted competently because it seems she did not know of the property deed until after seeing it from the printer. Assuming that the deed was recorded, it is likely that a quick title search or further research would have revealed that H and G were living together to refute any claim that H did not own any property. Assuming a reasonable investigation would have revealed these facts, L breached her duty of competence by failing to find this out. Additionally, if she was able to find this out by a title search, she breached her duty because this makes a case even stronger that she breached her duty of diligence because this information could have been lawfully obtained even despite S's mistake. A lawyer would use this preparation necessary for competent representation; by failing to be thorough and adequately prepare, L breached her duty. Additionally, L breached her duty repeatedly by failing to search, failing to disclose, and failing to advocate for her client, therefore she also breached the duty of competence under the CA rules as well.

### **Alex's Ethical Violations:**

#### **Duty of Confidentiality**

Lawyers owe a duty of confidentiality to their clients under both ABA and CA rules.

Under ABA rules, the lawyer must not disclose information acquired through representation of the client, unless the client consents or it is impliedly authorized in the course of representation. Under CA rules, a lawyer must "maintain inviolate the

confidence and at every peril to himself to preserve the client's secrets." The duty of confidentiality lasts forever under the ABA rules, and ends when the client's estate is settled under the CA rules. Encompassed in both ABA and CA rules, a lawyer must take reasonable steps to avoid inadvertent disclosure of confidential communication.

Here, Alex (A) owed his client, Ginny (G), a duty of confidentiality. A received the property deed from G during his representation of her through a matter unrelated to Henry (H)'s divorce. He had a duty to exercise reasonable care to prevent inadvertent disclosure of documents received by her. A will argue that he did use reasonable care, and that it wasn't him who was careless, but L's son, S. However, assuming that S was subject to A's control, like he was subject to L's control discussed above, it is likely that A failed to use reasonable care to provide training to ensure that such careless mistakes would not happen. A should have also checked the printer from time to time to make sure that such communications would not inadvertently be shared with L. By failing to take any reasonable steps, it is likely that A breached confidentiality.

*Not confidential?*

A may also argue that the deed was confidential because it was readily available. Although the ABA rules make information that is readily discoverable not confidential, the CA rules differ in this regard. Therefore, the fact that the deed could have been discoverable by a quick title search (as discussed above), may make this not a breach of confidentiality under the ABA rules. However, under the CA rules, even if the deed was discoverable through some other means, this would not affect the analysis above.

## **Duty of Competence**

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly fail to provide competent representation.

Here, A did not use the thoroughness necessary to provide competent representation because a receptionist, subject to his control, left a document that was found by L who represented a client whose interests were related to G's interest (since they were in a relationship). A will claim he did not breach the CA rules because he did not do this repeatedly and did not know that L even had the document. It is unclear whether A was aware of this risk which make it reckless, but it is likely that if no reasonable measures were taken to make sure that Sam wasn't doing this all the time, this would be gross negligence at least. Therefore, it is likely A breached his duty of competence.

## **Duty of Loyalty, Conflict of Interest: Laura and Alex**

Certain measures must be taken under both ABA and CA rules when two lawyers are working in the same firm. It is unclear here whether A and L were working in the same firm. Although they shared a conference room, printer, and a receptionist, which suggest that they were sharing spaces, they also used separate letterheads, business cards, and telephone numbers, which suggests that they were just sharing an office space and not a practice. Moreover, since L practiced in family law and A was a tax attorney, they also practice in different areas, which still could make this analysis go either way.



## **Duty of Loyalty: Potential Conflict of Interest**

Since L and A were sharing common areas, even if they aren't working in the same firms, the policy reasons for both MR and CA rules would likely apply to their situation. Lawyers may not represent a client if there is a substantial risk that representation will be materially limited by the lawyer's duties owed to a different client, whether that client is represented by the firm or by the lawyer individually. There will be a substantial risk when the lawyer receives harmful material information adverse to one of the clients. Under CA rules, the information need not be harmful, but it must be material which means it is important to the subject matter of the case. The lawyer may only represent the client if they reasonably believe they can provide competent and diligent representation and they get informed written consent (CA) or consent confirmed in writing (MR).

Here, L and A were working in a common area and thus there was a substantial risk that their duties owed may be limited because harmful material information may have been shared among them with the use of a shared (arguably irresponsible?) receptionist. Therefore, they had a duty to inform both of their clients of the situation and get required consent under both rules. By failing to do so, both A and L breached their duties of loyalty. A will argue that there was no conflict of interest because he was representing W on a matter unrelated to H and W's divorce. A has a strong claim here because it is unclear whether there was a substantial risk of materially limiting representation with such different claims that are a bit removed. However, the fact that they shared so many common areas, and the fact that L's belief about H living with his girlfriend G was in direct dispute, this really could go either way.

## **Screening**

Lawyers working in a same firm, assuming that a court does apply these rules because of the shared space between L and A, are allowed to participate in a matter if the lawyer entering a firm is "screened." Screening procedures require that the lawyer is not apportioned any part of the fee from a case and the prior client is given notice and details of the procedures taken to ensure compliance with the ethical rules. CA rules also require that the former client receive a certification by a partner in the firm and from the attorney that procedures followed were in compliance with the ethical rules. Here, no such notice was given to either W, on behalf of L, or G, on behalf of A. Even though it is likely that L and A were not operating in the same firm anyway, we can confirm that no screening measures were taken absent any additional facts.

### **QUESTION 3**

State Hospital, a public hospital funded and managed by State, entered into a contract with Cook's Catering, a business owned and operated by Kimberly Cook, to provide on-site meal service to patients, staff, and visitors.

Recently, Denise Davis, the Chief Executive Officer of State Hospital, received a series of anonymous email messages threatening to carry out "a massive attack" at the hospital. In response to these threats, Davis decided to reassign a security guard from patrolling the kitchen area to patrolling the hospital lobby and entrance area. Davis did not share the information concerning these threats with anyone else at the hospital.

Several days later, Frank, a former patient, entered the hospital kitchen shortly before lunchtime and mixed peanut powder into a serving tray full of mashed potatoes. Neither Kimberly Cook nor any of her employees were present in the kitchen at the time because they had all left to use the restroom. A state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. At lunchtime, Patrick, a patient, consumed the mashed potatoes. Patrick, who had a serious allergy to peanuts, suffered severe injuries.

Patrick sued Cook, Davis, and State Hospital. Cook was found negligent for failing to comply with the state health code.

1. Is State Hospital liable for Cook's negligence? Discuss.
2. Does State Hospital owe Patrick a duty to protect him from Frank? Discuss.
3. What defense(s), if any, may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard from the hospital kitchen? Discuss.

## QUESTION 3: SELECTED ANSWER A

### PATRICK V. COOK, DAVIS, AND STATE HOSPITAL

#### (1) State Hospital Liability for Cook's Negligence

If State has waived sovereign immunity for negligence actions, then State Hospital may be liable for Cook's negligence under the doctrine of respondeat superior.

#### Sovereign Immunity

At common law, a State sovereign could not be held liable for the torts of its agents or of itself. However, most jurisdictions have passed statutes that waive sovereign immunity for negligence actions. Thus, a State can be held liable for its torts in most jurisdictions, subject to damage caps in some jurisdictions.

Here, State Hospital is a public hospital funded and managed by State. Thus, Hospital will be considered an agent of the State. Therefore, the traditional rule of sovereign immunity would prevent Patrick from holding State liable for both its own torts and the torts of Hospital's agents. However, since most jurisdictions have waived sovereign immunity for negligence actions, the suit against State can likely proceed.

#### Respondeat Superior

The doctrine of respondeat superior allows a plaintiff to hold a principal responsible for the torts of its agents so long as the tort was committed within the scope of the agent's employment. Principals are not liable for torts committed by independent contractors unless the principal owed a duty that cannot be contracted out.

### *Independent Contractor*

State will argue that it cannot be held liable for Cook's negligence because Cook is an independent contractor. A principal is not liable for the torts of independent contractors. To determine if an agent is an employee (servant) or an independent contractor, the Court will look to a variety of factors including (i) the business relationship and contract between State and Cook's catering; (ii) whether State had control over the **manners and means** in which Cook performed; (iii) whether the job performance provided by Cook was the kind of performance typically provided by an independent contractor; (iv) whether the parties had thought they were in an employee-employer relationship; and (v) whether the job performed included a **duty that could not be delegated**.

State will argue that Cook is not an employee, but rather an independent contractor. Cook's Catering is an independent company that State has contracted with in order to provide on-site meals. State will also point to the fact that it did not control the **manner and means** of Cook's work -- Cook was free to provide meals however it saw fit. But Patrick will argue that this was more akin to an employee (servant) -- employer relationship because Cook was not just providing a finished product. Rather, Cook was required to be at the hospital daily and worked on-site in preparing meals.

Patrick's strongest argument to hold State liable as master of the servant is to argue that the duty to provide safe meals **could not be delegated**. Patrick will argue that the safety of patients, staff, and visitors required that State provide safe food. A duty for safety of others cannot normally be delegated.

Therefore, the Court will likely conclude that Patrick can hold State liable for the torts of

Cook's Catering Service because the duty to ensure Cook's compliance with the safety code that applies to hospitals could not be delegated.

**(2) DOES STATE HOSPITAL OWE PATRICK A DUTY TO PROTECT FROM FRANK?**

**DUTY**

The question of whether a duty exists is one for the Court to decide. In most jurisdictions, a defendant owes a duty to act in a reasonable manner and this duty extends to everybody. However, a minority of jurisdictions have adopted the duty rule from *Palsgraf*, which limits the reasonable duty to only foreseeable plaintiffs.

Generally, there is no duty to protect from third-party tortfeasors / criminals. However, Patrick is a patient of the hospital and it is foreseeable that Patrick is a person that could be hurt if the Hospital is negligent. At common law, this would be a close call, but the court would likely find Patrick to be a foreseeable plaintiff.

The fact that the harm occurred due to a third-party tortfeasor will not be conclusive in determining duty

*Premises Liability*

Under the traditional approach, a person on premises is categorized as a trespasser, licensee, or invitee. The duty owed depends on the person's categorization. Here, Patrick will be categorized as an invitee and thus Hospital owed him a duty to ensure the premises were safe.

However, many jurisdictions, including California, have abolished categorizations and just hold that a landowner / possessor of real property owes a duty of reasonable care to everybody except **flagrant trespassers**. Here, Patrick would be owed a duty of care.

### *Inn Keeper*

At common law, certain businesses that catered to providing transport and lodging services owed a heightened duty of care. This included businesses like common-carrier and inns. These businesses owed a duty to provide the utmost care.

Here, State is a hospital, which is similar to an inn because people stay at a hospital with the intent to leave. Thus, they are relying on the owner of the premises for basic protection. However, the Court will likely hold that the common law duty of utmost care does not extend to a hospital because there is a statutory basis to find duty.

### Statutory Duty

In addition to duties provided by common law, the legislator can create duties via statute. Here, a state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. The legislation is clearly designed to protect those eating in hospitals.

Therefore, Patrick has a strong argument that the legislator created a duty for a hospital to provide safe food to all of those that would eat the food.

### **(3) WHAT DEFENSES MAY DAVIS ASSERT?**

#### **DUTY**

See rule above. Here, Davis owes a duty to use reasonable care in managing the Hospital.

#### **NEGLIGENCE / BREACH**

Negligence occurs when a party fails to use reasonable care, and as a result, the party breaches the duty it owes to the plaintiff. Negligence is found when the benefits of acting reasonably outweigh the potential harm.

Here, Davis can defend her actions by claiming they were not negligent.

#### *BPL Analysis*

The BPL analysis from Judge Learned Hand provides a formula for determining if a party has acted negligently. Under the analysis, a party has acted negligently if the benefits from acting outweigh the potential costs.

Here, Davis will argue that she acted in a reasonable manner by reassigning a security guard. Davis reassigned the security guard after receiving emails about a "massive attack" at the hospital. Thus, Davis will say the reassignment was the prudent action to take given the threat. However, Patrick can argue against this by pointing to the fact that a reasonable CEO would still have security in the cafeteria even if a reassignment was required.

Under a traditional analysis, a jury could come out either way on determining if Davis was negligent.



## Emergency Situation

In the event of an emergency, a party will be judged by the reasonable standard a prudent person would exercise *in an emergency situation*. If the Court finds that Davis failed to use reasonable care, Davis will attempt to get an emergency instruction to the jury which would require the jury to judge Davis' actions based on the fact he was acting in an emergency situation.

This argument will likely fail because there was **no present emergency**. Patrick will argue Davis received a series of emails over the course of a period of time. So, there is no reason to suspect that the attack is imminent because the emails keep on coming. Also, Davis did not tell anybody about these emails. If this were a true emergency, then Davis would have called in for backup by telling other hospital staff about the threat and potentially bringing in extra security. But Davis did none of that; all he did was reassign a security guard.

Therefore, Davis will likely be unable to get an emergency instruction to the jury.

## **CAUSE IN FACT**

The breach must be a factual cause of the injury. This is usually easily satisfied with the but-for test. Here, Patrick will argue that but-for the reassignment of security, the food would not have been tampered with. Davis can try to argue that the true but-for cause is that but-for Cook's staff going on a bathroom break, the food would not have been tampered with.

## **PROXIMATE CAUSE**

Proximate cause requires the harm that flows from the breach of duty be foreseeable.

Like with the factual argument above, Davis can further argue that the proximate cause to the incident is the lack of kitchen staff. Davis will argue that the security in the kitchen is not designed to secure the food -- that is Cook's job.

#### Superseding intervening cause

A superseding, intervening cause is an outside event that cuts one's liability off from the breach. Here, Davis will argue that the reassignment was not a proximate cause for the harm experienced by Patrick. Instead, Frank's criminal actions are a superseding, intervening cause.

#### **DAMAGES**

Patrick can show damages because of his allergic reaction.

### QUESTION 3: SELECTED ANSWER B

1. Is State Hospital liable for Cook's negligence?

Employers are generally liable for the torts of their employees conducted within the scope of their employed duties. On the other hand, a party is not generally liable for the torts of independent contractors, unless it concerns a non-delegable duty.

#### Employee vs. Independent Contractor

First, a court will need to determine whether Cook's is more similar to an employee of State Hospital or an independent contractor. The principal factor a court considers in determining whether a party is an independent contractor or an employee is whether, and the degree to which, that party was subject to the control of the employer. The more control, the more likely that party is to be an employee. Courts also consider whether the party conducts business regularly in the area in which it was contracted to perform, whether the employer supplied the tools and equipment, and other factors.

The facts do not indicate with sufficient detail the level of control that State Hospital had over Cook's. If State Hospital dictated the menu, for example, that would indicate an employer-employee relationship. But the facts only indicate that Cook's was to provide on-site meal service. Presumably, Cook's could decide which meals to prepare. On the other hand, if the hospital dictated meal- times, when staff had to arrive or leave, etc, that would indicate greater control.

The fact that Cook's Catering is in the business of catering (as evidenced by its name) and providing meals, indicates that it might be more of an independent contractor. On

the other hand, State Hospital seemed to have provided the kitchen that Cook's Catering used, since Cook's Catering was operating in the hospital kitchen. Moreover, the staff used the hospital restrooms. This seems to indicate more of an employer-employee relationship.

The question as to whether Cook's Catering is an employee or an independent contractor is a close one. But on balance, Cook's Catering is likely to be an independent contractor.

However, just because Cook's Catering is an independent contractor does not mean that State Hospital is not liable for the negligence of Cook's. Some duties are non-delegable. In such situations, a party will be liable for the breach of its non-delegable duties because it cannot delegate those duties away to an independent contractor to insulate itself from liability. For example, when a property owner invites the public onto its property, it is responsible for the safety of the public on its property, and for the negligence of independent contractors that create unsafe conditions on the property.

#### Non-Delegable Duty

Here, it is likely that State Hospital's provision of food to its patients is a non-delegable duty. Although the patients do not constitute the "public," by accepting the patients, the hospital has accepted them into its care, including providing them food. It is therefore likely that the hospital cannot delegate this duty to a catering company in order to avoid its duty of care to its patients.

Moreover, a statute may establish a duty, and here, the state health code likely established a non-delegable duty (see analysis below).

## Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against the states without the states' consent. It embodies the concept of sovereign immunity. Thus, if the State Hospital can be properly characterized as an arm of the state, it likely cannot be liable in tort to Patrick unless the State has consented to such suits (e.g. with something similar to the Federal Tort Claims Act).

Here, the State Hospital likely can be characterized as an arm of the state. It is a public hospital, and it is funded and managed by the State. The funding and management are prime indicators that it is not separate from the State (e.g. compare with a municipality, which may be sued if its funding does not come from the state).

Therefore, unless the state has consented, State Hospital is not to be liable on a negligence claim. It is unlikely that the state health code, which imposes a duty on hospitals (see below) constitutes an acquiescence to liability. The Supreme Court has held that any consent to be sued under the Eleventh Amendment must be clear and unequivocal. The statute is not such an unequivocal statement of consent. It can easily be interpreted to allow liability only for private hospitals.

2. Does State Hospital owe Patrick a duty to protect him from Frank?

## General Duty

By taking in Patrick as a patient, State Hospital assumed certain duties with respect to Patrick. In general, hospitals owe patients a reasonable standard of care in medical treatment. More generally, they owe patients a duty to act reasonably to protect them from foreseeable harms.

Here, whether State Hospital owed Patrick a duty to protect him from Frank likely turns on whether Frank's actions were foreseeable. Frank was a former patient. If Frank had a propensity to try to harm other patients and the hospital knew about it, or if Frank had come to the hospital in the past to harm other patients, then the hospital would owe its patients a duty to protect them from Frank. Even if the hospital was not aware that Frank, in particular, would likely attempt to harm its patients, but was aware that former patients or others in general have in the past tried to tamper with the hospital food, the hospital would have such a duty.

A minority of jurisdictions will find that the hospital had a duty to act reasonably to prevent harm that occurred, regardless of whether the harm was ultimately foreseeable (although the foreseeability of the harm affects proximate cause analysis in a negligence action).

### Statutory Duty

But independent of the above analysis, a statute or other law can give rise to a duty. A statute may give rise to a duty to protect a certain class of plaintiffs against a certain class of harms. If the statute is silent as to tort liability, then most jurisdictions will allow a finding of negligence per se based on the violation of the duty laid out in the statute if: a plaintiff in the class of plaintiffs the statute was designed to protect is harmed, and the harm is in the class of harms that the statute was designed to prevent.

Here, the state health code provides that food served in a hospital must never be left unattended before, during, or after meal service, in order to prevent contamination or tampering. The statute was likely designed to protect consumers of the food, e.g. the

patients. Here, Patrick was such a patient who ordinarily consumed the hospital's food. So, Patrick was in the class of plaintiffs the statute was designed to protect. Second, the statute was likely designed to protect against poisoning or other effects caused by "contamination or tampering." Here, Patrick suffered an allergic reaction, and this is likely in the class of harms that the statute was designed to protect against. So, the Hospital likely owed Patrick a duty to protect him from food contamination, whether from Frank, or someone else. This duty is also likely non-delegable (see above for analysis).

3. What defenses may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard?

### Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against a state without a state's consent. However, state officials performing official duties may be sued under the stripping doctrine. But this doctrine only allows suits for an injunction, applying prospectively, and not for retrospective damages.

Davis will argue that since she is the CEO of State Hospital, she is an employee of the state. Her decision to reassign the security guard was made as part of her official duties. She will therefore argue that a negligence suit against her is really a negligence suit against the state, that any damages would be paid out of state coffers since she was acting in her capacity as an employee of State Hospital (State Hospital is funded by the State), and that the Eleventh Amendment immunizes her against a suit for damages.

### Public Necessity

Davis may further argue that her actions in reassigning the security guard was in response to a public necessity. Where a party has a reasonable belief that actions need to be taken to protect the public interest, and reasonable actions are taken in response to such a belief, the doctrine of public necessity is a complete defense against negligence (as opposed to private necessity, which only provides a partial defense).

Here, Davis received email messages threatening to carry out "a massive attack" at the hospital. Davis will argue that there was a public need to re-assign the security officer to prevent or mitigate the consequences of such an attack. The harm arising from "a massive attack" could far exceed food contamination or tampering. And the re-assigning of a security officer was a reasonable response to such a threat.

However, Patrick will counter that the threats were all anonymous and therefore Davis' belief of a massive attack was not reasonable. Moreover, Patrick will argue that it is much more likely for food contamination or tampering to occur, since such occurrences are more frequent than "massive attacks."

It is unclear how a court would rule on this defense, but the court will likely side with Davis.

### No Breach of Duty

A breach of duty requires that the benefits of an action are outweighed by the risk and magnitude of the harm caused by the action. Using similar reasoning to the public necessity argument above, Davis can argue that she did not breach any duties at all.

The benefits of preventing a "massive attack" likely outweighs the risk of re-assigning a



security officer, because presumably the people from Cook's Caterer would still be in the hospital kitchen. Moreover, any harm from food tampering is likely to be small. So, Davis did not believe she was leaving the hospital unattended and was justified in acting reasonably in doing so.

### Comparative Fault

Davis can also further argue Cook's Caterer was contributorily negligent. Most jurisdictions allow a reduction of damages for the comparative fault of another party, e.g. if that party's negligence contributed to the damages. Davis' re-assigning of the security guard was not the sole contributor to Patrick's injury, Cook's Caterer also contributed by leaving the hospital kitchen unattended. In fact, Cook's Caterer was found negligent. Davis may therefore be able to seek contribution against Cook's Caterer against any award against her.

Davis can further argue that Frank's intentional tort constitutes an intervening action that was not foreseeable. If anything, Frank was the most culpable, having committed an intentional tort, while David and Cook's were only negligent. Most jurisdictions will allow a reduction for an intervening intentional tort, and some jurisdictions will eliminate negligence liability altogether for another's intervening intentional tort if it was not foreseeable. Because Frank intentionally contaminated and tampered with the food, leading to Patrick's injury, Frank is at least partially, and possibly fully liable.

## **QUESTION 4**

Detective Anna was about to subject David, who was lawfully in custody, to interrogation because she had received a tip from an anonymous informant that David was involved in transporting heroin. Detective Anna advised David of his *Miranda* rights and asked him if he knew anything about heroin shipments. David replied, "I am not sure if I need a lawyer or not." Detective Anna next asked David how he was transporting the heroin. David responded, "If I had anything to do with it, I would use my car." Detective Anna released David from custody when he refused to answer any more questions. Detective Anna then sent a message to all police officers, describing David's car, stating that it was believed to be involved in transporting heroin.

Later that day, Officer Baker, who had heard Detective Anna's message, saw the car described in the message. Officer Baker decided to follow the car to see if the driver would do anything that could justify stopping the car. When the car ran a red light, Officer Baker stopped the car and ordered the driver, who was in fact David, out of the car. Officer Baker then did a pat-down search of David and found a cell phone in his pocket. Officer Baker turned on the cell phone, saw a text message icon, clicked on the icon, and found a message to David stating, "The heroin is in the trunk; deliver it to the warehouse." Officer Baker then searched the trunk of the car, where he found 30 pounds of heroin. He arrested David and arranged for the car to be taken to the police impound lot for processing.

David is charged with transportation of heroin. David moves to suppress:

1. His statement, "If I had anything to do with it, I would use my car";
2. The text message that stated, "The heroin is in the trunk; deliver it to the warehouse"; and
3. The heroin found in the trunk of the car.

How should the court rule on each of the motions to suppress? Discuss.

## QUESTION 4: SELECTED ANSWER A

The defendant in a criminal case may bring a motion to suppress evidence asserting a violation of his Fourth, Fifth or Sixth Amendment rights. These amendments are incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The exclusionary rule provides that evidence obtained in violation of these constitutional rights is inadmissible in the state's case-in-chief against the defendant, unless an exception to the exclusionary rule applies. The purpose of the exclusionary rule is to deter illegal police conduct and the Supreme Court has decided there are certain exceptions to the exclusionary rule where the social costs to society outweigh the deterrence value in prohibiting illegal police conduct. The exclusionary rule prohibits the admissibility of all evidence directly obtained in violation of a defendant's constitutional rights and evidence later derived from such evidence as "fruit of the poisonous tree."

### **1. Statement, "If I had anything to do with it, I would use my car"**

#### *Fifth Amendment*

At issue is whether David had a viable argument for suppression of his statement under the Fifth Amendment. The Fifth Amendment protects the right of defendants to be free from compelled self-incrimination. The Supreme Court has decided that *Miranda* warnings are necessary to protect this right so that a defendant is made aware of his right to invoke his privilege against self-incrimination and his right to counsel. Waivers of a defendant's *Miranda* rights must be knowing and voluntary. *Miranda* attaches at "custody." A defendant is in custody based on the

"freedom of movement" test, or when a reasonable person would not feel that he is free to leave police custody. Here, the facts state that David was "lawfully in custody," so we must accept that David was in custody for *Miranda* purposes, and we will not analyze whether that custody was lawful.

*Miranda* only applies to interrogations. Interrogations include express questioning by police officers as well as any statements or conduct by the police that may reasonably lead to inculpatory statements by a defendant. However, statements that are spontaneous or voluntary by the defendant are not obtained in violation of *Miranda*.

In analyzing whether a defendant has properly invoked his *Miranda* rights, the critical question is whether he did so *unequivocally*. To assert his right to maintain silent, the defendant must unequivocally state that he wishes to maintain silent; even sitting there in silence for long periods is insufficient to expressly invoke. To assert his right to counsel, a defendant must unequivocally assert his right to speak to a lawyer.

Here, it appears that David was lawfully in custody and was about to subject David to interrogation, so both prongs of *Miranda* apply. Detective Anna properly advised David of his *Miranda* rights so there was no problem with the advisement. Once she did that, she did not need to wait for David to invoke his rights; she could ask him a question and then in response, David could waive or assert his right to silence or counsel. Therefore, asking David if he knew anything about heroin shipments was valid. David then replied, "I am not sure if I need a lawyer or not." While it is possible to suggest that David was uneasy about engaging in interrogation, that was almost certainly insufficient to invoke his right to counsel, because it was an equivocal statement. He would have needed to

say something like, "I would like to speak to a lawyer" or even "I'm not sure it's a good idea to speak to you so let me talk to a lawyer first." Detective Anna then properly asked him another question because she was allowed to do so since David had not yet asserted his right to counsel or silence and thus waiver was still in effect. David then made the inculpatory statement at issue here. Therefore, because David had waived his *Miranda* rights and not asserted his right to counsel or silence unequivocally, the statement is inadmissible both in the prosecution's case in chief and for impeachment purposes. (Evidence obtained in violation of *Miranda* is still admissible for impeachment purposes but that's not at issue here since it's admissible in the prosecution's case in chief, too).

The fact that David *then* said he did not want to answer any more questions does not retroactively make his earlier inculpatory statement involuntary or inadmissible and so it is still properly admissible in court. The court should deny the motion to suppress the statement.

### *Sixth Amendment*

A defendant has the right to counsel at all critical stages of the criminal case. The Sixth Amendment right to counsel attaches when a defendant is formally charged with a crime. Here, the facts state that David was only in custody and do not suggest that he had been charged with a crime at the time that he was interrogated. Therefore, even though interrogations are a critical stage, the right to counsel only applies to interrogations conducted *after* formal charges have been filed against the defendant, and so no Sixth Amendment rights were violated here.

## **2. Text message, "The heroin is in the trunk, deliver it to the warehouse"**

At issue is whether the text message that Officer Baker saw on the cell phone was admissible against David.

At the outset, we will note that any possible fruit of the poisonous tree argument that the stop was actually made as a product of the knowledge Detective Anna earlier obtained illegally should be denied because a) the police did not violate David's rights earlier in the interrogation and so it was totally proper for Detective Anna to tell her fellow police officers about the car and the information concerning it and b) the Supreme Court has actually said that information obtained in violation of *Miranda*, unless the police do so intentionally, is not subject to the fruit of the poisonous tree doctrine.

### *Stop of car*

The first issue is whether the stop of the car was valid. A stop of a car is a "seizure" under the Fourth Amendment, because a reasonable person under the circumstances would not feel free to leave when he is pulled over by the police, generally until the police tell him he is free to go. The Fourth Amendment protects the right to be free from unreasonable searches and seizures. The warrant requirement is the heart of the Fourth Amendment and the Supreme Court has held that warrantless searches and seizures are presumed to be unreasonable unless an exception to the warrant requirement applies.

To begin, we must note that a defendant only has standing to assert violations of his own constitutional rights in a suppression motion. When a car is stopped by the police, the driver (and actually the passengers, too) will have standing to challenge the validity

of the stop. Here, David is the driver of the car, so he has standing to challenge the stop.

One of the canonical exceptions to the warrant requirement is that the police may pull over a car without a warrant provided they have at least reasonable, articulable suspicion that an offense has been committed or is being committed. This can include any traffic violation. The point of this exception is that cars freely move throughout the world and so it would be wholly impractical for the police to obtain warrants to stop and search cars of automobiles. That is the rationale behind the basis for stops of cars as well as searches for cars that we will get to shortly.

Under *Whren*, a police officer's subjective intent for conducting a search or seizure is irrelevant; as long as the officer had an objectively reasonable basis for the search or seizure, whatever subjective motivation he had in addition, would not make it unreasonable. Additionally, people do not have a reasonable expectation of privacy when they drive around the world in their cars, so David can't claim that Officer Baker tailing him for some time already violated his right to privacy.

Here, Officer Baker heard Detective Anna's message and then saw the car described in the message. He therefore decided to follow the car for as long as it took for the driver to commit some kind of violation that would justify it. This is a pretext stop and as mentioned is completely valid provided that the officer had an objectively reasonable basis for the stop. Here, the car ran a red light, which is obviously an objectively reasonable basis for stopping the car, giving rise to far more than reasonable suspicion that an offense had been committed (in fact, probable cause). Therefore, the stop was

reasonable.

### *Search of David*

The next question is whether the pat-down search of David was reasonable. Again, David has standing to assert a violation of his rights here because he personally was searched. Officer Baker had a right to order David out of the car, so that is okay. The facts suggest that Officer Baker then did a "pat-down search of David." Under the *Terry* doctrine, a *Terry* stop is valid if the officer had reasonable suspicion that the person has committed a crime or is committing a crime or is about to commit a crime. The pat-down search is only valid if the officer had reasonable suspicion based on specific, articulable facts that the defendant was armed and dangerous. Here, the facts that are known to Officer Baker are that 1) there is an anonymous informant who said that David was involving in transporting heroin. Tips of anonymous informants alone do not give rise to reasonable suspicion unless they are corroborated by other evidence indicating their reliability. 2) That corroboration was likely sufficient because of the inculpatory statement David made about the transportation of heroin which indicated that he probably had something to do with transporting heroin and that if he did, he would use his car. So, there was reasonable suspicion that David was transporting heroin at the time and it was possible that that heroin or some other illegal material may have been contained in his pockets. The bigger problem is that the officer may not have had reasonable suspicion that David was armed and dangerous. There are no specific facts about guns here. The best the officer can likely say is that heroin traffickers are very likely to carry guns in their pockets because drug trafficking is a violent industry.



That may be sufficient for some courts and maybe not for others.

The even bigger problem for the officer is that a *Terry* frisk only allows the officer to seize material that he "immediately" recognizes as contraband or evidence of a crime. The officer here simply felt a cell phone, which would clearly not be immediately recognizable as contraband. Therefore, it was likely illegal to take the phone at all at this point.

An alternate theory for which this search could be justified is a search incident to an arrest. An officer may search the person's body and the area within one lunge of his body, but the search incident to arrest exception only applies when the officer has actually made an *arrest*. Here, the officer actually could have arrested David at this point under *Atwater* because he's got probable cause that David just ran a red light. But he clearly did not arrest David at this point so that is not a valid basis for justifying the search. Therefore, the pat-down exceeded the scope of *Terry*, which means the evidence obtained thereafter would be illegally obtained, too.

No other exception to the warrant requirement applies so far.

### *Search of phone*

Even if the officer's conduct so far had been reasonable, what he did next violated David's rights. David has a reasonable expectation of privacy in his phone because he is the owner of the phone and it was on his person at the time of the search.

Under *Riley*, officers need to get a warrant to search the electronic contents of a cell phone because people have an astonishing amount of private information stored on their cell phones and thus have a reasonable expectation of privacy in them. Warrants

must be based upon probable cause, or sufficient facts to convince a reasonably prudent person that a crime has been committed by the defendant and that evidence or instruments of the crime will be obtained in the place to be searched. However, officers do not need to get a warrant to simply physically handle the phone or to analyze the physical properties of the phone; e.g. an officer could pull off a phone case and see if there was any cocaine hiding in between the phone and the case. But here, Officer Baker did far more than that: he turned on the cell phone, saw the text message icon, clicked on the icon, and then found the message at issue here. That went far beyond physical examination of the phone because he began to scrutinize the electronic contents of the phone.

David did not consent to this, so that would not be a basis for searching the phone.

Therefore, the statement obtained on the phone was obtained illegally and should be suppressed under the exclusionary rule.

### **3. Heroin found in the trunk of the car**

At issue is whether the officer could validly search the car after finding the text message. David has standing to challenge the search of the car because it's his car - he owns it.

#### *Automobile exception*

If the search of the phone had been legal, there is no doubt that the search of the car would then be legal. Under *Carroll*, a core exception to the warrant requirement is that cars may be searched based upon probable cause, or sufficient facts to convince a reasonably prudent person that evidence of a crime or contraband will be found within

the car to be searched. The parts of the car that can be searched depend on what the probable cause is for, analogous to the "particularity" requirement of the warrant requirement: PC to search for machine guns will not justify opening up a tiny container in the car because machine guns can't fit in tiny containers. There is no doubt that once the officer has seen the text message he has probable cause to search the trunk; the text message says that heroin is in the trunk. It's hard to get much more probable than that.

However, under the fruit of the poisonous tree doctrine, evidence obtained from an illegal search cannot then be used to find other evidence of a crime, subject to certain exceptions. Various exceptions to this rule under *Wong Sun* include attenuation (where the illegal police conduct that led to discovery of the originally illegally obtained evidence is very far removed in the causal chain from the subsequent search or seizure at question) or independent source, where the police could have independently obtained the evidence from a different source. Those do not apply here because the search of the phone was immediately followed by the search of the trunk. Additionally, there is no independent source for the information that would give rise to searching the trunk.

#### *Search incident to arrest*

Another possible exception here would be search incident to arrest. Under *Gant*, when a police officer searches a car after arresting a defendant, the police officer may also search the passenger compartment of the car if 1) the defendant is unsecured and capable of reaching into the car or 2) the officer believes that evidence of the offense of

arrest may be found in the car. Here, though, the exception does not apply because David again was not arrested; he was only arrested after the heroin was found. Additionally, the search incident to arrest exception only applies to the passenger compartment of the car, not the truck, which is where the heroin was found. So that exception is not valid either.

*Inevitable discovery / impound search*

Because the search of the car was likely illegal based on the above arguments, the prosecution could argue that the heroin found in the car would have been inevitably discovered by the police. The police arrested David after finding the heroin and then the car would have been taken to a police impound lot for processing. When cars are taken to police impound lots, the police conduct an "inventory search" which is meant to protect the police from allegations that any material that has gone missing was done by the police. The police look through the car and write down the items found in the car on an inventory search. Inventory searches are valid as long as they are conducted according to routine, they are based on valid authority to actually impound the car in the first place, and they are not actually abused by the police in a "pretext" to search for evidence.

Here, the car would have inevitably been subjected to an inventory search, where the police would have almost certainly found 30 pounds of heroin in the truck. Therefore, the prosecution could argue that evidence would have been inevitably discovered. The problem for the prosecution is that there likely was not probable cause to search the car until the illegal search of the phone, and so it was not inevitable that the evidence would

have been discovered. However, if a court found that there was probable cause to search the car for heroin even before the text message was discovered, that would be a basis for not suppressing the evidence under the inevitable discovery rule.

If a court did not reject the suppression motion on that basis, the heroin found in the trunk of the car should be suppressed as it was obtained in violation of David's Fourth Amendment rights.

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

### **1. David's Statement "If I had anything to do with it, I would use my car."**

#### **Fifth Amendment Privilege Against Self-Incrimination**

The Fifth Amendment of the US Constitution guarantees people the right against self-incrimination. Miranda is a judicially-made doctrine that requires certain warnings when a defendant is in a situation of custodial interrogation. The Sixth Amendment guarantees criminal defendants the right to assistance of counsel and attaches at the time a defendant is formally indicted or charged. Here, David (D) can challenge the introduction of his statement on Fifth Amendment grounds, but the facts do not indicate that he has been formally charged with transportation of heroin. A only has an anonymous tip that he was involved in transporting heroin, which does not suffice for probable cause. Moreover, the facts do not indicate that he has been formally arrested, but rather that he is simply in lawful custody of the detective agents. Therefore, D must look to the Fifth Amendment when seeking exclusion of the elicited statement.

#### **Miranda Rights**

Miranda warnings must be given when a defendant is (1) in custody and (2) being interrogated by police or government agents. Custody is given a functionalist definition: a court will ask whether a reasonable person under the circumstances would have felt his freedom of movement restricted to the degree we associate with a formal arrest. Interrogation is the deliberate elicitation by the government of incriminating information. Here, D was "lawfully in custody" at the time that Detective Anna (A) was about to subject him to interrogation. These facts are sufficient to trigger Miranda. A discharged

her Miranda duties when she advised D of his Miranda rights, and then proceeded to ask him if he knew anything about heroin shipments.

### **Invocation of Miranda Rights**

After a defendant is Mirandized, he must either invoke his Fifth Amendment right to silence or his Fifth Amendment right to an attorney. Invocation must be clear and unambiguous, as the Supreme Court held in *Davis*, and must clearly indicate that the defendant intends to either (a) remain silent, or (b) seek counsel.

### **Invocation of Edwards Right**

If the defendant clearly and unambiguously invokes his right to counsel, this right must be scrupulously honored under *Edwards*: the interrogation must cease until defendant has an attorney present. If the interrogators fail to scrupulously observe invocation of this right, the interrogation will be the fruit of an Edwards violation, and inadmissible under the exclusionary rule. Here, after D was Mirandized and interrogated, he replied, "I am not sure if I need a lawyer or not." This is an ambiguous statement and is not a clear invocation of the right to counsel. A court will likely find that D did not invoke his Fifth Amendment right to counsel. A's persistence in interrogating D, given the ambiguity of D's statement, was not an Edwards violation. D's response that "If I had anything to do with it, I would use my car, was therefore not the fruit of an Edwards violation. It is admissible against him.

### **Invocation of Moseley Right**

If the defendant clearly and unambiguously invokes his right to silence, this right also must be scrupulously honored. The interrogation must cease unless either the

defendant voluntarily re-initiates contact, or a reasonable break in Miranda custody has occurred such that the coerciveness of the interaction has dissipated due to lapse of time and custody. Here, D refused to answer any more questions only after his statement, "If I had anything to do with it...". Detective A ceased the interrogation at this point. A has therefore not violated D's Moseley rights, and the statement is not the fruit of a Moseley violation, because D said it voluntarily before invoking his right to remain silent.

### **Waiver of Miranda Rights**

A defendant's waiver of Miranda rights must be knowing and voluntary, meaning it must be the product of his free will rather than the coerciveness of the interrogation setting. It is not necessary here to inquire as to whether D waived his Miranda rights, because he failed to clearly invoke his right to counsel or silence at any point prior to giving his statement that he now seeks to exclude. In the "grey space" in between invocation and waiver, interrogation is not prohibited.

In conclusion, A did not violate Miranda, Moseley, or Edwards, and so D's statement is not subject to the exclusionary rule.

## **2. Text Message Stating, "The heroin is in the trunk; deliver it to the warehouse."**

### **The Fourth Amendment**

The Fourth Amendment grants people the right to be secure from unreasonable search and seizure of their person, homes, papers, and effects; and provides that no warrant shall issue except on probable cause, supported by oath and affidavit, and describing



with reasonable particularity the place to be searched and the people or things to be seized. When challenging the admission of evidence on Fourth Amendment grounds, a defendant must show (1) state action; (2) that he has standing to challenge the search; (3) that a Fourth Amendment search or seizure occurred; and (4) that the search was conducted without a warrant and probable cause, and no exception to the warrant requirement applies.

### **State Action Requirement**

The Fourth Amendment requires state action, which is official conduct by the government or governmental agents. Here, the detectives are agents of law enforcement, so the state action requirement is met.

### **Standing**

A defendant has standing to challenge a search when he has a reasonable expectation of privacy in the place searched. Here, the text message was found by means of a pat-down search of David's person. The Constitution confers the greatest protection upon an individual's person (their body), and so D has challenging to challenge this search.

### **Search or Seizure**

Supreme Court caselaw provides two methods of defining a Fourth Amendment search or seizure. The first involves a two-pronged inquiry, set forth in Harlan's opinion in Katz. First, the court asks whether the individual had a subjective expectation of privacy in the place searched. Second, the court asks whether this expectation of privacy is one which society is prepared to accept as reasonable. The second method

is a property-based approach, whereby the court asks whether there was an intrusion into a constitutionally-protected area. Here, there are two searches: Officer Baker's pretextual stop and pat-down of D, and his search of D's cell phone. Each will be analyzed in turn.

### **(1) Pretextual Stop and Pat-Down**

Under the Fourth Amendment, pretextual traffic stops are permissible. A court will not inquire into the officer's subjective motivations when conducting traffic stops and policing traffic violations. Here, Officer Baker (B) saw the car described in A's message, decided to follow the car and conducted a pretextual arrest of D. He had probable cause to stop the car, because he witnessed the car running a red light. This was sufficient evidence of wrongdoing to allow B to pull D over and order D out of the car. D can therefore not challenge the introduction of the cell phone evidence on the grounds that it was the fruit of a pretextual stop.

A pat-down of a person, however, requires reasonable suspicion that the individual has weapons on his person. Reasonable suspicion is articulable facts that would lead a reasonable officer to believe that the person possessed a dangerous weapon, but is a standard short of probable cause. Here, B based his pat down on a message he received from A, describing D's car and stating that it was believed to be involved in transporting heroin. This message in turn was based on an anonymous tip, and D's statement he made in interrogation. These facts likely fall short of probable cause, because they do not suffice to create a reasonable probability that D has been or is guilty of possessing or transporting heroin. However, they do suffice to create

reasonable suspicion for the pat-down. Heroin dealers are often armed due to the nature of the trade. B could point to his personal experience that those who possess and deal drugs often are armed, and justify his pat-down of D on this basis.

Given that B's pat-down of D's person was permissible under the Fourth Amendment, the issue at this point was whether B could seize the cell phone. An officer conducting a reasonable pat-down can seize items that are evidently contraband under the "plain feel" doctrine. Here, however, B felt a cell phone in D's pocket. A cell phone is not contraband, and it feels markedly different from a gun or packet of drugs. The plain feel doctrine therefore does not operate to justify B's seizure of the cell phone. This was a Fourth Amendment violation.

## **(2) Cell Phone Search**

The issue was B's search of the cell phone after he had seized it wrongfully. The Supreme Court held in *Riley* that certain types of information are entitled to greater protection under the Fourth Amendment. In *Riley*, the Court held that Cell Site Location Information, obtained by means of cell phone searches by officers, were a type of information that was so broad, of such depth, and of such a personal nature that it was entitled to extra protection under a property-based conception of the Fourth Amendment. Officers need probable cause and a warrant in order to search a suspect's cell phone. Here, Officer B took a number of actions that together constitute a search: he (a) turned on the phone; (2) saw a text message icon, (3) decided to click on the text message icon; and (4) read the message therein. This is the message D now seeks to exclude from evidence. These actions are an unreasonable intrusion on D's Fourth

Amendment rights under Riley, because a cell phone contains a great degree of highly personal information that is entitled to Fourth Amendment protection.

In conclusion, B violated D's Fourth Amendment rights when he wrongfully seized D's cell phone from his pocket, and when he proceeded to search the contents of his cell phone. D has standing to challenge the fruit of this search--namely, the statement found in the text message.

### **3. Heroin found in trunk of car**

D seeks to challenge the evidence of 30 pounds of heroin found in the trunk of his car. We must first ask again whether D has standing, and also whether the heroin was the fruit of a Fourth Amendment violation.

#### **Standing**

See above rule for standing. D has standing to challenge the search, because he had a reasonable expectation of privacy in the trunk of his car.

#### **Fourth Amendment Violation**

When an officer seeks to search an automobile in the course of a lawful traffic stop, he may search the person and "grabbable area" around the driver and passenger compartments, provided that (1) the suspect is unsecured and could reach said areas; and (2) the officer has reasonable suspicion that these areas contain weapons. He may not search other inaccessible areas of the car unless he has probable cause to believe that they contain weapons or evidence of criminal wrongdoing. Here, B proceeded from searching D's person and cell phone to searching the trunk of the car. B will claim that

he had PC at this point to believe that the trunk of the car contained either weapons, or more likely, evidence of heroin. However, this probable cause was based on an unlawful search of D's cell phone (see above). Therefore, even if B had probable cause to search the trunk, which is all that is required for an automobile search (as automobiles are an exception from the warrant requirement), D can challenge the heroin as the fruit of an unlawful search.

### **Fruits Doctrine**

The exclusionary rule is a judicially-crafted remedy that seeks to enforce the Fourth Amendment right against unreasonable search and seizure. Courts have also crafted the "fruits" doctrine. Under this doctrine, fruits of unlawful searches and seizures are to be excluded from evidence. Evidence does not qualify as "fruit" of an unlawful search if (1) it is significantly attenuated from the wrongful search or seizure; (2) there are independent intervening acts, including voluntary acts by the defendant, that cut off the chain of causation; (3) law enforcement would have inevitably discovered the evidence; (4) law enforcement had an independent source to discover the evidence.

Here, D seeks to challenge the heroin found in the trunk as the fruit of the unlawful search of his cell phone. Indeed, but for the search of his cell phone and discovery of the incriminating text message, B would not have had probable cause to search the trunk. However, B may contend that law enforcement would have inevitably discovered the evidence, because it is common practice to impound a vehicle and conduct an inventory search of its contents upon arrest of the driver.

## **Inevitable Discovery and Inventory Searches**

An inventory search is a search done to account for the defendant's property; it must not be conducted pretextually for law enforcement purposes. However, evidence discovered in a lawful (non-pretextual) inventory search is admissible against the defendant. Here, B would have arranged for the car to be taken to the police impound lot for processing, and law enforcement would inevitably have uncovered the thirty pounds of heroin in the trunk. B therefore has a strong argument for the inevitable discovery of the heroin. D therefore will be prevented from invoking the fruits doctrine to exclude evidence of the drugs.

## **Conclusion**

In conclusion, D cannot challenge the first statement because it is not the fruit of a Miranda or other violation. The second statement will be excluded, because it was the fruit of an unlawful Fourth Amendment search. Finally, the third piece of evidence (the drugs) will not be excluded even though they are the fruit of an unlawful search, because of the inevitable discovery doctrine.

## QUESTION 5

In 2016, while single and living in State X, Hank downloaded a form will and filled it out, stating, "Because I have no children, I leave all my property to Sis." Hank signed his will in the presence of only two disinterested witnesses. Hank did not realize that a valid will in State X requires three witnesses.

In 2017, while still living in State X, Hank married Wendy. After the marriage, Hank kept land he had inherited from his mother titled in his name alone. Hank started working at a construction job, and kept all of the wages he received from the job in a bank account that he opened in his own name. Daughter was born to Hank and Wendy while they lived in State X.

State X is not a community property state.

In 2021, Hank and Wendy moved to California. Hank suffered a fatal injury on the first day of his new job in California. Hank never wrote any will after the State X will.

At the time of Hank's death, there was \$100,000 from his wages in his bank account, and he still owned the land inherited from his mother. In the probate of Hank's estate in 2021, claims have been made by Sis, Wendy, Daughter, and Son, a ten-year-old child who has proved by DNA testing that he is Hank's son, although Hank never knew of Son's existence.

1. Is Hank's will valid? Discuss.
2. What rights, if any, do Sis, Wendy, Daughter and Son have in Hank's estate? Discuss.

Answer according to California law.

## **QUESTION 5: SELECTED ANSWER A**

### **1. Is Hank's will valid?**

California courts will probate a will that was 1) validly executed as per the laws of California, 2) validly executed as per the laws of the state where the decedent was present at the time the will was executed, 3) validly executed as per the laws of the state where the decedent was domiciled at the time of the will's execution or death.

Here, opponents of this will might argue that the will should not be probated because it was not validly executed as per the laws of State X, which was the state where Hank was living at the time the will was executed. Note that nothing in the fact pattern tells us that Hank was not domiciled in the state where he was living in 2016, when the will was executed, so we can assume that the state where Hank was living in 2016 was also his state of domicile.

However, even if the will was not validly executed as per the laws of State X, California courts will probate it if the will was validly executed as per California law.

### **Was the will validly executed as per California law**

A will is validly executed according to California law if: 1) the testator has testamentary capacity, 2) the testator has present testamentary intent and 3) the will complies with applicable formalities.



## Testamentary capacity?

The testator has testamentary capacity if (1) the testator was at least 18 years or older, 2) the testator understands the nature and situation of her property, 3) the testator understands the natural objects of her bounty, and 4) the testator understands the significance of the testamentary act.

- 1) The testator was at least 18 years old – here, Hank is likely to be over the age of 18 in 2016 because we are not told otherwise and usually a person does not leave his property to his sister because he has no children if he himself is a child. The presumption people under the age 18 have is that they might have children later on in life. Also, people under the age of 18 rarely ever care about their own mortality enough to make a testamentary disposition of their wealth, assuming they have any wealth.

Thus, Hank is likely over 18.

- 2) The testator understands the nature and situation of her property-here, Opponents of the will might argue that Hank does not mention any of his property and so we cannot really be certain that he understood what property he owned. However, the bar for testamentary capacity is not that high and the fact that somebody will, who had not children, might want to simply leave all his property to his sister would suggest that he knows that he has property and wants to leave it to a sibling.

Thus, this requirement is likely satisfied.

- 3) The testator understands the natural objects of her bounty – Here, Hank displays that he understands natural objects of his bounty because generally we think of our family members, especially our children, as the people who we want to leave something to after we die. Since Hank states that he has no children at the time he is executing the will, it is fairly natural that he would leave his property to his sibling.

Thus, this requirement is likely satisfied.

- 4) The testator understands the significance of the testamentary act. Here, Hank downloaded the form and filled it out, assuming it was a will-writing form, rather than something silly with the fact pattern would likely inform us of, it would be fair to presume that he understood that he was making a will. Furthermore, Hank had two disinterested people witness the signing of his will, suggesting that he knew that he was doing a solemn testamentary act rather than just writing something out for fun.

Thus, this requirement is also likely satisfied.

Based on the above, I would conclude that Hank had testamentary capacity.

### **Present testamentary intent.**

Present testamentary intent exists if the testator intends to presently make a disposition of his property that will be effective upon his death.

Here, Hank downloaded a form will and signed it in the presence of two disinterested witnesses. In that form, he also stated that since he has no children, he is leaving all his property to Sis. This suggests that he does have the

intention to make a will and leave his property to Sis upon his death.

Thus, Hank had present testamentary intent.

### **Compliance with applicable will formalities**

In California, you can have an attested will or holographic will. California does not allow you to make an oral will.

#### **Attested will?**

An attested will is what we think of as a formal will or witnessed will, and it requires 1) a writing that is 2) signed by the testator or by someone at the testator's direction and presence, 3) in the simultaneous presence of two disinterested witnesses, 4) who understand the testamentary nature of the act, and 5) the witnesses sign the document within the testator's lifetime.

#### **A writing that is signed by the testator.**

Here we are told that Hank downloaded a form, filled it out, and signed it. Thus, we have a writing that was signed by the testator. Note that there is no subscription requirement in California, which means that the testator can sign anywhere on the will.

Thus, both of these requirements are satisfied.

#### **In the simultaneous presence of two witnesses.**

The rule is that the testator must either sign in the simultaneous presence of two witnesses or the testator can acknowledge his signature in the simultaneous presence of two witnesses.

Here, Hank signs in the presence of two disinterested witnesses.

Thus, this requirement is satisfied.

**Witnesses who understand the testamentary significance of the act.**

The witnesses must understand that what they are witnessing is the execution of the will. It is not required that the witnesses know exactly what is in the will, as long as they know that it is a will.

Here, Hank downloaded the form will, filled it out, and signed it in the presence of two disinterested witnesses, so even though we are not expressly told that the witnesses knew that they were witnessing the execution of a will, it is likely that Hank would've informed him that is what he was up to. Having two people standing in front of you watching you sign the document will likely make the two people ask what exactly are you citing and why are we there to watch it. The answers to those questions would likely be provided by Hank.

Thus, this requirement is likely satisfied.

**The two disinterested witnesses sign the document within the testator's lifetime.**

The two disinterested witnesses do not have to sign the document right after they witness the ceremony or in each other's presence; however, they must sign it while the testator is still alive.

There is no mention of this happening and none of the facts were actually leading us to presume that the two disinterested witnesses signed anything. Just because you're witnessing something being signed does not mean that you will naturally want to sign it yourself.

Thus, this requirement is likely not satisfied.

**California clear and convincing evidence standard.**

For deaths that occur on or after 1/1/2009, California allows a will that was not perfectly executed to still be probated if the proponent can show by clear and convincing evidence that the testator intended the document to be his will. For deaths prior to that date, California had a substantial compliance standard for an attested will to be probated.

One might argue that the fact that the disinterested witnesses did not sign the document creates a significant risk that this is not really Hank's will. However, here there is fairly strong evidence that Hank intended the document he executed in 2016 to be his will. He not only took the effort to download the form, fill it out, state why he was leaving his property to Sis, but also went into the trouble of getting two disinterested witnesses to be present while he signed it. The proponent can further strengthen his case and likely satisfy the clear and convincing evidence standards if he can get the two witnesses who witness the signing of the will to either testify to that or submit a sworn affidavit to that fact. Thus, there is likely to be clear and convincing evidence that the document is the will.

Therefore, it is likely that the will may be produced in California.

**Holographic will?**

In California, a holographic will is a will that is not witnessed by two witnesses but it is 1) in writing, 2) with material terms handwritten by the testator (e.g. gifts and recipients), 3) is signed by the testator, and 4) expressly states the present testamentary intent of the testator.

If he had failed to establish that the will complied with the formalities of an attested will, then we might want to have considered whether it would comply with the formalities for a holographic will.

However, we don't know whether Hank wrote out the beneficiary's name and the fact that she would be receiving all his property by hand or whether he typed it. Thus, it is unlikely to meet the requirements of a holographic will.

The overall conclusion is that the will is likely to be probated by the court in California as an attested will.

**2. What rights, if any, do Sis, Wendy, and him and his daughter and Sam have in Hank's estate?**

California is a community property state and so community property law applies. Community property is all property acquired during marriage, other than separate property, while domiciled in California. Separate property is all property acquired either before marriage or after the end of the marital economic community.

Separate property also includes all property acquired during marriage through gift, devise, bequest or descent. All profits, rents and issues of separate property also remain as separate property. All wages earned during marriage while domiciled in California is community property.

Quasi-community property is all property acquired during a valid marriage while not domiciled in California, that would have been community property had the acquiring spouse lived in California at the time of acquisition. During the lifetime of the acquiring spouse, quasi-community property is treated like separate property. However, upon the death of the acquiring spouse, quasi-community

property is treated like community property.

### **Hank's estate**

As Hank's is that we are told that he had \$100,000 from his wages in his bank account and that he also owned the land that he inherited from his mother.

### **Character of the \$100,000**

See above for rule regarding community property and separate property.

Here Hank died while on the first day of his new job after moving to California.

This means that all the wages he had earned were earned while he was living in a non-community property state. As per the rules above, that makes this quasi-community property because had Hank been domiciled in California all the wages would be community property. The fact that Hank kept all the wages in a bank account that was in his name alone does not defeat the community property character of his wage income.

Thus, the \$100,000 is quasi-community property.

### **Character of the land inherited from his mother**

See above for rule regarding community property and separate property.

Here, the land was an inheritance; this means that it is Hank's separate property and moving from a non-community property to a community property state does not change this. Furthermore, the land was always held in Hank's name so there is no issue as to whether Hank gifted the property to the community or whether he took any action that would lead to a transmutation, which is a change in the nature of the property from community property to separate property or vice versa.

Thus, the land is Hank's separate property.

### **Is Wendy an omitted spouse?**

An omitted spouse is the spouse who was married after the execution of the last testamentary instrument by the testator and the spouse is not mentioned or provided for in those testamentary instruments. An omitted spouse will receive an intestate share of the decedent's estate- half of the community property and an interstate share of the separate property not to exceed 50%. However, an omitted spouse will not receive an interstate share if 1) if the omission was intentional and appears on the face of the instrument, 2) the spouse is provided for outside of the testamentary instruments, or 3) there was no voluntary and knowing waiver by the spouse.

Here, Hank executed the will in 2016 and married Wendy in 2017. There is no mention of Wendy anywhere in the will and there is nothing telling us that he provided for her outside of the testamentary instrument. There is also nothing in the will that tell us that the omission was intentional. In fact, there is no mention of Wendy at all in the will. As for whether there was voluntary and knowing waiver by Wendy, we don't know anything about that. What it appears from the facts is that Hank made a will in 2016, and forgot all about it, so he never updated the will.

Thus, Wendy is an omitted spouse and will receive an intestate share as described above.



### **Is Daughter a pretermitted child?**

A pretermitted child is one who was born after the execution of the last testamentary instrument and is not mentioned or provided for in the testamentary instrument. A pretermitted child receives an interstate share of her parent estate unless: 1) the omission is intentional and appears on the face of the instrument, 2) the child is provided for outside of the testamentary instrument or 3) the testator had other children at the time of the execution of the will and transferred substantially all of the assets to the child's other parent.

Here, Hank executed the will in 2016 and Daughter was presumably on board after 2017 since that is the year when Hank and Wendy got married and Daughter is their child. As with Wendy, there is no mention of Daughter in the testamentary instrument and omission does not appear intentional but seems to be due to Hank forgetting to update his will. The fact that Hank died from a fatal injury that must have happened suddenly probably is the reason why Hank had not updated his will before dying since a lot of people think that they have more years to live than they actually do and don't plan for really bad accidents happening. There is also no mention of Daughter being provided for outside of the will and as mentioned above, the will transfers everything to Sis, and not to Daughter's other parent.

Thus, Daughter is likely to be a pretermitted child as described above.

**Is Son a pretermitted child?**

See above for rules regarding pretermitted children. Additionally, note that the child born before the execution of the last testamentary instrument may still qualify as a pretermitted child if the testator did not know about the child's existence.

Here, some would argue that Son is not a pretermitted child because he was born in 2011 and Hank executed his will in 2016. However, the rule mentioned above is likely to result in Son being classified as a permitted child since Hank never knew about his existence. As well as the court is satisfied that the DNA evidence establishes son as Hank's child and declares it so, then son will likely qualify as a permitted child and take a pretermitted child share.

Thus, Son is likely a pretermitted child.

**Share of the following individuals:****Wendy**

A spouse's intestate share includes the half of the community property plus and intestate share of the separate property, not to exceed 50% of the separate property. In a situation where the decedent leaves more than one issue, the spouse takes one third of the separate property.

Here, since quasi-community property is treated as community property at death, Wendy will end up with the entire \$100,000 since she already owns \$50,000 as her share of the community property and will get the remaining half as well. As for Hank's separate property, Wendy will end up with one-third of the land.

**Daughter and Son**

When there are two children and a surviving spouse, intestate share of the child will be half of the separate property that is left after the spouse takes her one-third share of the decedent's separate property.

Thus, here, Daughter will take one-third of the land and Son will take the other one third of the land.

**Sis**

Here, unfortunately Sis ends up with nothing because of abatement. The intestate share of the spouse and both the children will come out of her share and she ends up with nothing.

## QUESTION 5: SELECTED ANSWER B

1. Is Hank's will valid?

The issue is whether Hank's (H) will is valid. California, through the full faith and credit clause, will recognize a will that is validly executed in the state in which it is executed or the state in which the testator is domiciled when he makes the will. If the will is not valid under the state laws in which it was executed or in the state in which the testator was domiciled, CA will still recognize the will as valid if the testator is domiciled when he dies and the will conformed to CA requirements.

Here, H executed the will in State X and was domiciled in State X at the time. If the will is valid under the laws of State X, H's will will be treated as valid in CA probate.

However, the facts clearly tell us that H signed his will in the presence of two disinterested witnesses, and that State X law requires three witnesses. Thus, the will is not valid under the laws of State X. However, because H was domiciled and died in CA, CA will recognize the will as valid if it conformed to CA requirements.

CA requirements for a valid will.

In order for a will to be valid in CA, it must be written and signed by the testator (T). It also must be witnessed by two disinterested witnesses. Finally, the T must have a valid testamentary intent when executing the document.

*Written and Signed by T*

The will must be in writing and signed by the testator, who has capacity. There is no question that H signed the will as the facts tell us this. It also appears that H had capacity, which means that he is at least 18 and of sound mind. Although the facts don't tell us he is definitely 18, the circumstances of him creating a will and the fact he married the next year means he probably was and, thus, this analysis will assume it. There are also no facts indicating that he was not of sound mind, suggesting he has capacity.

The main issue with this requirement is whether the fact H downloaded a form will and filled it out meets the written requirement. Although handwriting or typing a will counts as written, form wills are a closer call. However, even if it does not quite meet the written standard, CA adheres to the substantial compliance doctrine. That means that if the testator substantially complies with the wills formalities but does not quite adhere to them, a court will still allow the will to be probated if it was in substantial compliance with the wills' formalities. As a result, the court will likely recognize that this at least met the substantial compliance, if not the written requirement on its own

### *Two Disinterested Witnesses*

CA wills, to be properly attested, require the signature of two disinterested witnesses. The witnesses do not need to be aware of the actual contents of the will, such as which people get which devices, but they must be generally aware that the document they are signing is a testamentary instrument and that the T has signed it. This is known as the conscious presence test, that the witnesses are generally aware that what they are signing is a testamentary instrument.

Here, H signed his will in front of the witnesses, so there is no question of whether they knew he had signed it (if he had signed it previously, he would have had to acknowledge his signature to the witnesses). Although the facts do not quite indicate whether the witnesses knew it was a will, the fact they were in H's presence when he signed and they signed it themselves, is likely satisfactory evidence that they were consciously present of the fact that the instrument was a will and that they were signing it.

### *Testamentary Intent*

The final element that a will needs in CA is that it is signed by the T with testamentary intent. The fact H downloaded a will and filled it out and went to the trouble of getting two disinterested witnesses to sign it is pretty clear evidence that he knew he was signing a testamentary instrument. He also wrote that he was giving his property to his sister, which is further evidence he knew he was signing a testamentary instrument.

Based on the analysis above, the will appears to have met all of the CA requirements. Even though it would not have been valid in State X, a CA court will recognize it as valid because it met the CA requirements and he died in CA while domiciled in CA.

### Holographic Will

In the unlikely event a CA court finds that the will was not valid (potentially because a form will may not have met the written requirement) and that substantial compliance doctrine will not save it, it may be viewed as a holographic will. A holographic will must have the material provisions in the testator's handwriting and be signed by the testator. There is no witness or date requirement. There is a requirement that the testator intend

the document constitute a testamentary instrument.

Although H downloaded a form will, it appears he handwrote the material provisions, such as how to dispose of his property. He also signed the will. As discussed above, his testamentary intent is also obvious. As a result, even if the court found it was not a valid will (although as explained above, this is very unlikely), it could still be probated as a holographic will.

### Conclusion

Because the will likely conformed to CA standards and H was domiciled in CA when he died, the will is valid. In the unlikely instance that it is not considered valid, a court can still probate it as a holographic will.

## **2. What rights do Sis (S), Wendy (W), Daughter (D), and Son (S) have in H's estate?**

California is a community property (CP) state. The marital economic community begins at marriage and ends upon divorce, death of a spouse, or permanent separation (constituted of one spouse indicating to end the marriage permanently and conduct consistent with that intent). Earnings, property, and debt acquired during the marriage are presumed CP. Earnings acquired before the marriage, by gift or inheritance during the marriage, or after divorce, death, or permanent separation are considered separate property (SP). Property that would have been classified as community property had the couple been domiciled in CA at the time they acquired it is considered quasi-community property (QCP).

## Effect of moving to CA on the classification of property

### H's Land

Presumption and tracing: Because the facts appear to show that H had already received the land from his mother via inheritance before his marriage, the presumption is that the land is H's SP. In addition, there is a special title presumption at death. If the land is only in one spouse's name, there is a special presumption the property was intended to be that spouse's SP. W may try to argue that the property should be QCP, or property that would have been considered CP if they had been domiciled in CA when H received it. However, because the land was inherited, the land would have been classified as SP. Absent a transmutation or act of titling the property jointly, the property will remain H's SP. There is no indication a transmutation occurred, because there is no writing signed by H, the adversely affected spouse, either converting it to CP or W's SP.

As a result, H's land is SP. As discussed below, it will be devised to W, Son, and Daughter in equal shares. Because co-tenancy is the default type of co-ownership, they will each receive a 1/3 share as co-tenants.

### H's Wages

Presumption and tracing: Because H did not start the job until after he married W, all of his wages he earned during this time are presumed to be QCP. H's estate may try to argue that the wages should be considered SP, because he put it in a bank account in his name alone. However, the mere fact the bank account was titled in H's name alone is not enough to change the nature of the property from QCP to SP. There is also no indication H and W entered into a premarital agreement that would have changed the



nature of their earnings. As a result, all of the wages he earned during are considered QCP, because they would have been CP had they been living in CA. The fact the account was titled in his name only is not enough to change the source, and tracing clearly shows all of this money is wages from during the marriage, and thus is QCP.

#### Conclusion

H's entire bank account, consisting of \$100,000, is QCP.

Assuming will is valid:

#### **Sis**

Assuming the will is valid, it clearly leaves all of his property to Sis (S). However, as discussed below, Sis will end up receiving nothing, because W, Son, and Daughter will be treated as omitted spouses and children. As a result, they will all receive an intestate share, which will leave nothing for Sis.

#### **Wendy**

Omitted Spouse: A spouse who does not take under a will is considered an omitted spouse, unless the omission was intentional, or the testator substantially provided for the spouse outside of the will. Because H never made another testamentary instrument after the 2016 will, the omission was not intentional, because he was not married at the time. In addition, H did not provide for W outside of the will. As a result, W will be treated as an omitted spouse. An omitted spouse is entitled to receive what they would have had the testator died intestate. When a decedent dies intestate in CA, the spouse is entitled to the decedent's 1/2 of the CP and QCP (meaning that the spouse will

receive all of the CP/QCP) and 1/2 of the decedent's SP if the decedent has one lineal descendant and 1/3 of the decedent if the decedent has more than one lineal descendant. As discussed below, Son and Daughter will each be treated as omitted children, and thus W will receive 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP.

## Conclusion

Because the wages are QCP, W already owns half of that as her share of QCP.

Because she receives an intestate share, she will receive the remainder, so she will get all \$100,000. She will also receive 1/3 of H's SP, which means she will get 1/3 of H's property that he inherited from his mother and take it as co-tenants with Son and Daughter.

## Daughter

Omitted child: A child who is omitted under a will is entitled to an intestate share, unless the omission was intentional, the decedent had other children when the will was made and left substantially all of his assets to their surviving parent, or provided for the child outside of the will, or did not know the child existed. Here, the omission was not intentional for two reasons: first, in his 2016 will, H prefaced his devise to his sister based on the fact "because I have no children." Second, he never made another testamentary instrument after D was born. If he had, and then omitted D, it might be considered intentional, but because she was not alive at the time, it is pretty clear that the omission was not intentional. In addition, because H only had one child that he knew of, the exception that occurs when the decedent had other children at the time the

will was made and left substantially all of his assets to the surviving parent does not apply. (plus he did not leave anything to W in his will). Finally, he did not provide for D outside of the will.

Because none of the exceptions apply, D will be treated as an omitted child and will receive an intestate share. As discussed above, when a decedent in CA dies intestate, the decedent's 1/2 of CP/QCP goes to the surviving spouse. If there is more than one lineal descendant of the decedent, the spouse receives 1/3 of the decedent's SP and the lineal descendants split the remaining 2/3 of SP. As discussed below, Son will also be treated as an omitted child, and thus H had two lineal descendants at the time of his death. Therefore, D will split the 2/3 of H's SP with the son, leaving them each with 1/3 of H's SP.

#### Conclusion

Daughter will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother. Daughter will take the land as a co-tenant with a 1/3 interest.

#### **Son**

Omitted Child. See rule above. W, D, and Sis may claim that Son should not be considered an omitted child because it appears he was born before the will was written in State X, and they will therefore argue he was intentionally excluded. However, the facts make it clear that H never knew of Son's existence. The facts also make it clear that Son has established by a paternity test that H is the father, so he will be treated as his child. Because H never knew of Son's existence, Son will be treated as an omitted child. There is also no indication that either of the other exceptions apply, because H

did not leave substantial assets to whoever Son's mother is, since his only will left it all to his Sis. Therefore, Son will be considered an omitted child and entitled to receive an intestate share. As described above, because the decedent has two lineal descendants (Son and Daughter), W will get 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP, leaving them with 1/3 of H's SP total.

DRR: Dependent Relative Revocation--alternatively, Son could argue that H had a mistake of fact when he made the will because he wrote "because I have no children," when in fact he did, and that if it weren't for this mistake of fact H would have devised his property differently. However, he won't need to make this argument.

#### Conclusion

Son will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother. Son will take the land as a co-tenant with a 1/3 interest.

If the will were not considered valid:

Even if the will were not considered valid, the disposition of property would remain the same. Because W, Son, and Daughter are all treated as omitted spouses or children, they receive intestate shares. In this circumstance, as described above, the spouse is entitled to all of the QCP/CP plus 1/3 of the H's SP if more than one lineal descendant. Son and Daughter are then entitled to split the remaining SP. As a result, the disposition would be the same regardless if the will were valid, and in neither case would Sis take anything.





# **California Bar Examination**

## **Performance Test and Selected Answers**

**July 2021**



**PERFORMANCE TEST AND SELECTED ANSWERS**

**JULY 2021**

**CALIFORNIA BAR EXAMINATION**

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

The selected answers are not to be considered “model” or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

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- I. Industrial Sandblasting, Inc. v. Morgan
- II. Selected Answers for Performance Test



**July 2021**

**California  
Bar  
Examination**

**Performance Test  
INSTRUCTIONS AND FILE**



## INDUSTRIAL SANDBLASTING, INC. v. MORGAN

Instructions .....

### FILE

Memorandum from Sylvia Baca to Applicant.....

Excerpt from Transcript of Testimony of Samuel Morgan .....

Excerpt from Transcript of Testimony of Roger Cole.....

Contract between Industrial Sandblasting, Inc.  
and Samuel Morgan (Excerpt) .....

## **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.

***Sylvia Baca and Associates, P.C.***  
**2343 Whitetail Road**  
**Columbia City, Columbia**

MEMORANDUM

TO: Applicant  
FROM: Sylvia Baca  
DATE: July 27, 2021  
RE: Industrial Sandblasting, Inc. v. Samuel Morgan

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The firm represents Samuel Morgan, who works as a sandblaster and bid manager for Columbia Coatings Corporation. Until about three months ago, Morgan worked for a competitor named Industrial Sandblasting, Inc. (Industrial). Morgan had a contract with Industrial that contained a covenant not to compete if Morgan ever left Industrial.

Industrial has sued Morgan for breach of contract. Industrial wants to enjoin him from doing any work at all at Columbia Coatings for one year. We agreed to a bench trial and held a hearing three weeks ago. I attach transcripts of the relevant portions of testimony at that hearing. I also attach the relevant provisions of the contract between Morgan and Industrial, dated February 15, 2016.

The judge has scheduled us for closing argument on whether the covenants are valid. Please prepare a draft of the oral argument that I might present, using the attached cases as authority.

**Excerpt of Transcript from Hearing  
Industrial Sandblasting, Inc. v. Samuel Morgan**

Held on July 6, 2021

**Testimony of Samuel Morgan**

.....

Att'y Baca: When did you start work at Industrial Sandblasting, Inc.?

Morgan: In February 2013.

Baca: What did you do for Industrial?

Morgan: I specialize in commercial sandblasting. For several years, I operated a crew and did estimates for my old employer, Industrial Sandblasting, Inc.

Baca: Describe what commercial sandblasting means.

Morgan: We take paint and rust off of buildings, industrial equipment, pipelines, that kind of thing. Then we recoat them with a more durable covering.

Baca: How much did Industrial pay you at the start?

Morgan: They offered me \$35,000 per year and I was glad to get it.

Baca: Did you have experience?

Morgan: No. It was entry-level, with no contract. They offered on-the-job training.

Baca: What happened after you got hired?

Morgan: They started me off with the simplest equipment. I figured that out pretty quickly and eventually learned how to operate all of the equipment. I got so good that different foremen would ask for me for the harder jobs.

Baca: How did your responsibilities change after those first few years?

Morgan: About five years ago. The company decided that it would help their business if they could advertise that they had people with certain kinds of certifications. So they paid me while I obtained certifications from the Society for Protective Coatings (SPC), starting six years ago. The SPC has different levels of certification, all labelled QP. In the end, I got a QP1 for external structures, a QP2 for removing hazardous coatings, a QP6 for applying metalized coatings, and a QP8 for coating concrete with polymer.

Baca: How long did that take you?

Morgan: A few months for each certification. I would find a course that introduced me to how to handle the particular task, then worked with the company to make sure that it had the equipment and management to meet SPC standards. Then we'd apply. An auditor would come and spend a week or so making sure of our capacity, and then we'd get the certification.

Baca: How did it help Industrial's business?

Morgan: We started to get a lot of different kinds of jobs, and a lot of different regular customers, mostly because we could handle a bigger range of work.

Baca: What other responsibilities did you take on?

Morgan: One year, I took over from the foreman of that crew who got sick and couldn't continue. So the company asked me to take over. I got it done early and under estimate. Both the town and the company were very satisfied. Industrial kept me with that team and promoted me to team manager.

Baca: What happened after that?

Morgan: My work was always on time and on budget and my people were always happy. One day, someone I knew in the home office asked me to help him put together a bid, as well as an estimate. He wanted to figure out how to make lower bids, and he knew that I had figured out how to do it.

Baca: How did that work out?

Morgan: It worked out well. Eventually the boss, Roger Cole, called me in and said that they couldn't promote me to the office, because they needed me in the field. But Cole also said that they wanted to keep me, so he offered me a raise and a contract. I accepted. It was good money.

Baca: Is that the contract they say you've broken?

Morgan: Yes. We signed it around 5 years ago.

Baca: What happened after you signed?

Morgan: Pretty much the same as before, except I was paid more. I kept bouncing between doing jobs and helping with estimates. Eventually, it became a strain.

Baca: Why?

Morgan: After the contract, I never got another raise. And he kept pushing me to take on more jobs. That was fine for my team; they got overtime. But I was on salary, which stopped going up.

Baca: At that point, what did you know about Columbia Coatings?

Morgan: Columbia Coatings started up about three years ago, but they were very aggressive about bidding, and often took jobs away from us – not always, but enough to notice. They never got one of my customers. Eventually, I got a call from them.

Baca: What did they say?

Morgan: They were up front. They said that they wanted to get more business, and they knew that I was valuable to Cole and Industrial. They asked whether I would come to work with them instead. I told them my problem with Cole, and they said no problem. They said that they would pay me \$20,000 more,

give me an office position, and let me work in the field as much or as little as I wanted.

Baca: When did this conversation occur?

Morgan: About three months ago. I thought it over, then let them know that I would accept. I gave Cole two weeks' notice and left.

Baca: How did Cole take it?

Morgan: He was angry. He asked where I was going, and he got angrier. He made all kinds of threats and cursed me out. He said I'd regret making this decision and that I'd never work in the industry again.

Baca: Just a few more questions. When you worked for Industrial, you said you worked only in Columbia City. Is that right?

Morgan: I did one job in Sidalia, in the northeast part of the state. I did one job in Crescent, a suburb about 20 miles from Columbia City. Otherwise, all the work was in Columbia City, in the northwest corner of the state.

Baca: Where does Columbia Coatings want you to work?

Morgan: I have jobs in the south and southeast. And my office work deals with work all over the state.

Baca: How long will it take Industrial to replace you?

Morgan: They hired another foreman the week before I left. They already had someone doing the bidding – the man in the home office who asked me to help with bids and estimates. He knew pretty much what I knew.

Baca: What would happen if the court applies the non-compete clause to you?

Morgan: I won't have any work at all, after years of experience in the field.

Baca: No further questions.

Att'y Rice: Cross-examination, Your Honor?

Judge Yan: Go ahead.

Rice: You learned everything you knew about sandblasting at Industrial. Isn't that right, Mr. Morgan?

Morgan: Yes.

Rice: They invested a lot in getting you trained and qualified, didn't they?

Morgan: No. They didn't.

Rice: They paid you to get trained, didn't they?

Morgan: No. I paid for the QP certifications myself; all they did was let me do some of the coursework during work hours. It didn't cost much, but Cole sure didn't pay out for it.

Rice: Without you, Industrial won't be able to use those certificates, will it?

Morgan: Wrong again. By now, other foremen have gotten certified. Industrial won't miss me.

Rice: Columbia Coatings doesn't have any of these certifications?

Morgan: They do not. But they have foremen who do.

Rice: You learned how to estimate job costs at Industrial, didn't you?

Morgan: Yes, I did.

Rice: And now you want to use that to harm Industrial, isn't that right?

Morgan: I just want a job that pays me what I'm worth.

Rice: No further questions.



**Excerpt of Transcript from Hearing  
Industrial Sandblasting Inc. v. Samuel Morgan**

Held on July 6, 2021

**Testimony of Roger Cole**

.....

Att'y Rice: What impact will Mr. Morgan's working at Columbia Coatings have on your business?

Cole: A big impact. Morgan was a key employee, especially when it came to pricing out jobs. He's bringing them expertise that we trained him to have. We can already see the effect it's having.

Rice: What do you mean?

Cole: We have lost several bids to Columbia Coatings already – bids we wouldn't have lost if Morgan weren't there.

Rice: You say that you trained him to have his current expertise. What do you mean?

Cole: We paid him for the days that he attended the QP certification courses. We gave him the work that let him figure out how to price jobs. We provided him with the support and equipment to work his projects. He got all of that while working for us.

Rice: What do you want this court to do?

Cole: Enforce the contract, keep him from working in the industry for one year, anywhere in Columbia.

Rice: Is that all?

Cole: At a minimum, the court should keep him out of Columbia City, at least for long enough for us to train someone the way we trained him.

Rice: You would accept that change?

Cole: Yes. He agreed to what's in the contract, so he ought to accept less.

Rice: No further questions.

Baca: No cross-examination, Your Honor.

## Employment Contract

The parties to this contract are Industrial Sandblasting, Inc. ("Employer") and Samuel Morgan ("Employee").

.....

11. For a period of one (1) year after the termination of Employee's employment for any reason, Employee will not own, operate, or work at any business in direct competition with Employer by providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia.

.....

---

Samuel Morgan, Employee

February 15, 2016  
Date

---

Michelle Abebe, President  
Industrial Sandblasting, Inc.

February 15, 2016  
Date



**July 2021**

**California  
Bar  
Examination**

**Performance Test  
LIBRARY**

# INDUSTRIAL SANDBLASTING, INC. v. MORGAN

## LIBRARY

*Strom v. Knox Broadcasting Corporation*

Columbia Supreme Court (2014) .....

*Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.*

Columbia Court of Appeal (2015).....

## **Strom v. Knox Broadcasting Corporation**

### **Columbia Supreme Court (2014)**

This appeal arises from a trial court decision upholding the non-compete provisions of an employment contract between George Strom and Knox Broadcasting Corporation. Strom left Knox Broadcasting Corporation to work for a competing broadcaster, WCAP-TV. WCAP-TV brought the action below to invalidate the non-compete provision and permit Strom to appear on air for WCAP-TV.

The trial court findings indicate that, from 2008 until 2013, George Strom was employed by Knox Broadcasting Corporation ("Knox") as a meteorologist and "television personality." That contract ended on September 1, 2013 and included the following contractual provision:

Employee shall not, for a period of one hundred-eighty (180) days after the end of the Term of Employment, allow his/her voice or image to be broadcast 'on air' by any commercial television station whose broadcast transmission tower is located within a radius of thirty-five (35) miles from Company's offices in Columbia City, Columbia.

During Strom's employment with Knox, Knox spent in excess of a million dollars promoting Strom's name, voice, and image as an individual television personality and as part of Knox's Action News Team. Strom is one of the most recognized television personalities in the Columbia City area. Local television personalities are strongly identified in the minds of television viewers with the stations upon which they appear.

In April 2013, Strom entered into a five-year contractual agreement with WCAP-TV, a competitor of Knox, to work for WCAP as a meteorologist and "television personality" when his contract with Knox expired.

After learning of Strom's prospective departure, Knox instituted a "transition plan" to reduce the impact Strom's departure would have on the station's image. That plan depended on Strom not appearing on air for WCAP-TV for at least six months after leaving Knox. To permit Strom to appear on air for WCAP-TV during those six months would disrupt Knox's plans for a transition to a replacement for Strom.

Strom's contract with WCAP-TV does not require him to appear "on air" during the first six months of his employment. Under this contract, Strom would perform substantial duties and services to WCAP-TV for which he is being compensated. To permit Strom to appear on air, WCAP-TV would take advantage of the substantial investment Knox had put into developing Strom's public persona, in which Knox had a legitimate and protectable interest.

Finally, Strom will suffer no financial harm from staying off the air during the six months following his departure from Knox.

This case requires us to apply Columbia Stat. Ann. § 24-6-53(a), which states in relevant part:

(a) Enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted.

The statute applies to contracts between employers and employees and thus applies to the contract between Strom and Knox.

Under the statute, we should uphold such a covenant only when strictly limited in time, territorial effect, and scope of the prohibited activities. In doing so, we must weigh the interest the employer seeks to protect against the impact the covenant will have on the employee.

The provision in this contract should be upheld. The time limit is appropriate, restraining Strom from appearing on air for six months, during which time he will

not appear on WCAP-TV in any case. It permits Strom to appear on air after a transition period tailored to allow Knox to develop an alternative broadcasting identity.

The geographical scope is appropriate, applying only to that broadcast area surrounding Columbia City. The provision restricts Strom's activity in the same media market as that in which his former employer operates.

The scope of the services covered is appropriate; the contract prohibits Strom from using an on-air personality in which Knox has a legitimate and protectable interest. Strom remains free to work for WCAP-TV as an off-air consultant.

Finally, enforcing the covenant in Strom's contract with Knox represents a fair balance of a distinct and substantial harm to Knox, when compared to a relatively minor and incidental harm to Strom.

We affirm.



## **Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.**

### **Columbia Court of Appeal (2015)**

Fawcett Railway Relief, Inc. (“Fawcett”) appeals from a declaratory judgment that voided a noncompetition covenant with Peter Markham (“Markham”), a former employee, and his new employer, Columbia Rail Services, Inc. (“CRS”).

Fawcett is in the business of providing emergency disaster remediation services for railroads and industries with rail siding and rail yards in the lower 48 states, Canada, and Mexico. Markham began work for Fawcett in 2006 in Illinois, and over the course of seven years provided services in parts of Tennessee and Kentucky before locating in Columbia and performing services entirely within this state.

On December 2, 2011, after the move to Columbia, Markham entered into a renewed employment agreement with Fawcett that contained a non-compete provision. The non-compete provision prohibited Markham from working for three years in all of Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee in any capacity.

On June 1, 2013, Markham left Fawcett and went to work for CRS, a direct competitor. Markham has worked for CRS only in Columbia. On April 7, 2014, CRS instituted this declaratory judgment action against Fawcett to have the covenant voided. The trial court agreed with CRS that the covenant involved was overly broad as to geographical scope, time period, and scope of services. It invalidated the covenant. Fawcett appealed.

The parties agree that Markham was an employee under this statute regulating covenants not to compete, Columbia Stat. Ann. § 24-6-53(a), and thus that the statute applied to this contract.

Fawcett contends that the trial court erred in invalidating the restrictive covenants as to their geographic scope, the scope of the services prohibited, and the time period of the restriction. For the reasons that follow, we disagree.

### *Geographic Scope*

This geographic scope far exceeds the area within which Markham worked for Fawcett. This Court will accept as prima facie valid a restriction that covers the territory where the employee worked and the employer does business. However, a restriction that extends that territory to areas in which the employee did not work is overly broad on its face, absent a strong justification other than the desire not to compete with the former employee.

This restrictive covenant prohibited Markham from providing competing services in Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee. The trial court's finding of fact noted that no east-west or north-south mainline railroad east of the Mississippi could operate without passing through this territory. Markham did not perform work in the entire eastern seaboard and in fact, performed work only in a limited area of some of the states listed in the restrictive covenant.

A restriction that covers a geographic area in which the employee never had contact with customers is overbroad and unreasonable. This covenant is unreasonably broad because it covers a region and areas of states where the plaintiff never worked.

### *Scope of Activity*

The restrictive covenant in this case prevented Markham from performing work for any competitors of Fawcett both in the provision of emergency remediation services and "in any other capacity whatsoever."

Under our cases, a former employer may validly restrict an employee from performing services for a competitor that are identical to those performed for the

former employer. Our courts have approved as reasonable restrictions that specifically state those activities related to the employer's business in which the employee was trained by the employer or worked for the employer. Such a restriction protects the employer's interests from competition in that area of service.

By contrast, a restrictive covenant that prohibits work for a competitor “in any capacity” does not protect a legitimate interest of the employer and imposes a greater limitation on the employee than is necessary. In this case, the contract prohibits Markham from working for a competitor in any capacity, including activities that have nothing to do with the services that he performed for Fawcett. This provision is unreasonably broad.

#### *Duration of Restriction*

The restrictive covenants in this case restricted Markham from competitive activity for a period of three years after the termination of his employment with Fawcett.

Our cases do not state a specific time period past which a given time restriction is per se unreasonable. Instead, the cases require employers who seek to uphold a time restriction to demonstrate how the restriction is necessary to the protection of the employer during the employee's transition to work for a competitor. An employer must prove specific facts and circumstances that support a finding of necessity. Absent such proof, our courts have invalidated time periods as short as one year or less.

The trial court in this case found that Fawcett offered no proof of the relationship between the time restriction and Fawcett's need for protection from competition. Moreover, we note that in none of our cases have we or our sister courts approved restrictions of longer than two years. We see no error in the trial court's conclusion that the three-year restriction in this case was unreasonable.

*“Blue Pencilling”*

Fawcett argues that the trial court erred in failing to “blue pencil” this covenant by modifying it to a more reasonable form, consistent with the situation and intentions of the parties. Fawcett argues that the court should have modified the provisions as follows: to restrict them to territories in which Markham had worked; to cover only the services that Markham had provided; and to be limited to the maximum time period approved by our prior cases (two years).

We disagree. The facts indicate that the covenants in this case bore no relationship to Fawcett’s need for protection from competitive practices after Markham left its employ. This covenant not to compete is invalid and should not be revised. In such a situation, a trial court does not err in refusing to “blue pencil” the contract.

For all of the foregoing reasons, we affirm.

## **PT: SELECTED ANSWER 1**

### **Draft Closing Argument Re: Industrial Sandblasting, Inc. v. Samuel Morgan**

May it please the court.

Over the course of this trial, you have heard testimony from my client, Mr. Samuel Morgan, about the hardship he would suffer if the court were to enforce the unreasonable restrictions that his former employer, Industrial Sandblasting, is attempting to place on his ability to earn a livelihood.

As this court is aware, Columbia Stat. Ann. Sec. 24-6-53(a) provides that restrictions in non-compete contracts may be enforced "so long as such restrictions are reasonable in time, geographic area and scope of prohibited activities."

Under the current authorities in the State of Columbia, the covenant that Industrial is attempting to enforce, which would prevent Mr. Morgan from competing with Industrial in providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia for a period of one year, is overly broad as to time, geographical area, and scope of activities. On top of that, Industrial's interests are nothing compared to the significant hardship enforcement of the covenant would have on Mr. Morgan.

#### **Geographic Scope**

The geographical scope in Mr. Morgan's contract, which applies to all of the State of Columbia, is overbroad and unreasonable because it includes areas where Mr. Morgan

did not perform work.

The *Fawcett* court set out the relevant standards for determining whether a geographical restriction is enforceable or not. A restriction is prima facie valid if it covers the territory where the employee worked and the employer has business (*Fawcett*). However, if the restriction extends the non-compete territory to areas where the employee does not work, that restriction is overly broad on its face, absent a strong justification other than simply the desire for the employee not to compete with the former employer (*Fawcett*). Here, Industrial has not provided a justification for enforcing a non-compete that covers all of the State of Columbia when the vast majority of Mr. Morgan's work for Industrial was in Columbia City, in the northwest corner of the state. Industrials' sole purpose for the state-wide restriction is to prevent Mr. Morgan from working for competitors like Columbia Coatings.

This instant case bears many parallels to *Fawcett*. In *Fawcett*, the court found that the geographical scope of the non-compete, which extended to all of Florida, Columbia, Illinois, Ohio, Georgia, and Tennessee, far exceeded the area within which Markham, the employee, worked for his former employer, which area was only Columbia. This was too restricted in *Fawcett* because the court found that in the case of the railroad business, no east-west or north-south mainline railroad east of the Mississippi could operate without passing through that territory, and because Markham did not perform work in the entire eastern seaboard and only performed work in a limited area of some of the specified states, the restriction was unreasonably broad. The *Fawcett* court also found that a restriction is overbroad and unreasonable if it covers areas where the

employee never had contact with customers.

Similarly, in Mr. Morgan's case, aside from Columbia City, he only did one job in Sidalia, in the northeast part of the state, and one job in a suburb just 20 miles outside of Columbia City. There is no reason for Industrial to prevent Mr. Morgan from doing field work in the south and southeast parts of the state for Columbia Coatings, which are places where Mr. Morgan has never interacted with Industrial's customers.

Mr. Morgan's situation can be distinguished from that of *Storm*, where the restrictive covenant was limited to a radius of 35 miles from the offices of the former employer, a news station. That may have been reasonable in the case of a news station because 35 miles encompassed the media market of the former employer (*Storm*), but here, there is no justification for why restrictions in the commercial sandblasting industry should apply to the entire state.

The geographical scope that Industrial is seeking to enforce is overly broad.

#### Scope of Activity

The scope of activities in Mr. Morgan's non-compete is also too broad. Here, the restriction applies to "providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia."

The *Fawcett* court articulated the standard for reasonable restrictions on scope of activities, which is that a former employer may restrict an employee from performing identical services for a competitor. Restrictions are reasonable if they "specifically state those activities related to the employer's business in which the employee was trained by the employer or worked for the employer" (*Fawcett*). However, a restriction that

prevents an employee from working for a competitor "in any capacity whatsoever", as was the case in *Fawcett*, is unreasonable as it does not protect a legitimate interest of the former employer and is more limiting than necessary.

Just as the *Fawcett* court found that a restrictive covenant preventing a former employee from conducting activities that had nothing to do with services he performed for his former employer is too broad, so too is the case here. Industrial is seeking to prevent Mr. Morgan not only from conducting field work, but also from doing estimates and doing an office job. This is unreasonable especially considering that Mr. Morgan was turned down for an office job.

The instant case can be distinguished from *Storm*, which found that the restriction on Storm's ability to appear "on air" for the period of the non-compete would not lead to financial harm for Storm because his contract with his new employer did not require him to appear "on air" during the first six months anyway. In *Storm*, the employee could still be compensated for performing other substantial duties and services to his new employer, but here, Mr. Morgan would not be able to do any of the duties for which Columbia Coatings has hired him to do.

This instant case can further be distinguished from *Storm* because Industrial does not have as significant or legitimate of an interest to be protected here. Whereas in *Storm*, the former employer spent more than a million dollars and five years to develop the television personality of one particular individual, here, Industrial did no more than pay Mr. Morgan for days off so that he could attend certification courses that he paid for himself, and that only took months to complete. Not only that, but Mr. Morgan's services



for Industrial are no means as unique as those of an on-air television personality. We can certainly appreciate that Mr. Morgan was a hardworking and effective worker, but Mr. Morgan was not the only employee capable of doing his job. As Mr. Morgan testified, other foremen have gotten the certifications that Mr. Morgan paid for himself, and there is someone else who is capable of doing bidding work.

Industrial's claim that it invested a lot into getting Mr. Morgan trained and qualified is simply not convincing. Not only did Industrial not pay for Mr. Morgan's certifications, but Mr. Morgan has already passed on what he learned from Industrial in terms of how to price bids to other employees at Industrial. Industrial already has all the capabilities they need to transition Mr. Morgan's responsibilities to others, and in fact, they already have before Mr. Morgan even left.

Mr. Morgan should not be prevented from being paid what he is worth and being promoted to a position at a competitor that makes the best use of his skills and talent simply because his former employer refused to recognize his value.

#### Duration of Restriction

The one-year restriction on Mr. Morgan is arbitrary and unreasonable.

Although the Columbia courts have not found a bright-line rule for when a given time restriction is per se unreasonable, an employer must provide specific facts and circumstances to support a finding that the time period they are attempting to enforce is necessary to protect their interests during the transition period (*Fawcett*). Absent such proof, time periods as short as one year or even less have been invalidated in Columbia (*Fawcett*).

In *Storm*, a six-month restriction was found reasonable because the former employer was able to show that six-months was required in the detailed transition plan they put into place to replace Storm as an on-air personality. Further, that six-month restriction only incidentally burdened Storm because his new employment contract did not require him to appear on TV during the first six months anyway, so the six-month restriction was appropriately tailored (*Storm*).

But here, because of how broad the restrictions are, it would put Mr. Morgan out of work for an entire year. Industrial has also not been able to provide any evidence to support the one-year period. As we heard from Mr. Morgan, Industrial already has other employees doing work that Mr. Morgan did before he left, such as bid estimations, and the week after Mr. Morgan left, they hired another foreman. Even if this foreman needed to obtain certifications that Mr. Morgan had, we heard from Mr. Morgan that such certifications only take months, not an entire year.

The one-year restriction appears to be fully arbitrary, and Industrial has not provided any evidence that any time period, let alone one as long as one year, is necessary to protect their interests.

### Balancing

Finally, the court should weigh the employer's interest against the impact on the employee (*Storm*).

In *Storm*, enforcing the non-compete was fair because there is a distinct and substantial harm to Knox, while the harm to Storm is relatively minor and incidental. Here, the situation is the exact opposite. The harm to Mr. Morgan would be distinct and

substantial because it would put him out of work for an entire year, while the harm to Industrial is relatively minor and incidental. While Industrial claims that they have lost several bids to Columbia Coatings already that they would not have lost had Mr. Morgan not transitioned to working for Columbia Coatings, that is simply not true. As Mr. Morgan testified, Columbia Coatings was taking jobs away from Industrial long before Mr. Morgan left.

### Blue Penciling

The court should not reform the non-compete to be limited to only Columbia City and for a period long enough to train someone the way they trained Mr. Morgan, as Industrial has requested.

As the *Fawcett* court ruled, a court will not "blue pencil" a covenant to modify it to be reasonable, and therefore enforceable, if the covenants bear no relationship to the former employer's need for protection from competitive practices after the former employee's services are terminated.

Just as the *Fawcett* court found the covenant to be invalid and therefore should not be revised, similarly here, the geographical limitation to Columbia City bears no relationship to their need for protection from competitive practices because Mr. Morgan will not be working for Columbia Coatings in Columbia City aside from an office job, a position Industrial specifically declined to give Mr. Morgan while he was in their employ. It also appears that Industrial already has employees that have the same qualifications and trainings as Mr. Morgan.

The scope of the non-compete that Industrial is seeking to enforce, even if limited to

Columbia City and for a period of time long enough to train a replacement, bear no relationship to Industrial's need for protection, as they do not need protection from competition by Mr. Morgan in Columbia City. The non-compete should be invalidated and not blue penciled.

### Conclusion

Industrial is seeking to place an undue burden on Mr. Morgan in restricting where he can work, what he can do, and for how long, not because they have any significant interest in enforcing the non-compete, but simply to be retaliatory and to make sure that Mr. Morgan, as Mr. Cole said, "never work in the industry again." And that is exactly what will happen if this restriction is enforced; Mr. Morgan will have no work at all, after years of experience in the field, making less than what he deserved. I respectfully request that this court finds the covenant overly broad and unenforceable in its entirety.

## **PT: SELECTED ANSWER 2**

To: Sylvia Baca

From: Applicant

Date: July 27, 2021

Re: Industrial Sandblasting, Inc. v. Samuel Morgan

### **Oral Argument Draft**

Good afternoon Your Honor and may it please the Court. Our client, Mr. Samuel Morgan, is a hard worker whose services were not appropriately valued by his former employer, Industrial. Because Mr. Morgan was consistently denied raises and promotional opportunities from his former employer, he accepted a new and substantially different position with Columbia Coatings. Industrial is seeking to enforce a non-compete agreement in Mr. Morgan's employment contract against him now, to preclude him from taking advantage of this valuable new employment opportunity.

Per Columbia statute, a non-compete agreement in an employment contract is only enforceable if it is reasonable in (1) time, (2) geographic area, and (3) scope of permitted activities. Because the non-compete clause Industrial is seeking to enforce is unreasonable on all three fronts, we respectfully request this Court to invalidate the non-compete agreement as unenforceable.

### **The non-compete agreement is not reasonable in duration**

As an initial matter, the non-compete agreement is patently unreasonable in duration. *Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.* [Columbia Ct. App. 2015] has established that there is no time that is per se unreasonable, though the court noted that Columbia appellate courts have never upheld an agreement beyond two years. Rather, the Fawcett court established that the burden is on the *employer* seeking to enforce a non-compete agreement to establish that the restriction is necessary to the protection of the employer during the employee's transition to working for a competitor. The Fawcett court was clear that the employer must present *specific* facts and circumstances to support a finding that the time period is necessary. Without these facts, even time periods of a year or less can be invalidated. *Fawcett. Strom v. Knox Broadcasting Corp* [Columbia 2014], for example, upheld a non-compete agreement of six months, since the six- month period was directly related to the duration of the former employer's transition plan. The plaintiff employer in Strom determined that six months was necessary to mitigate the public impact that Strom's loss would have on the network, and thus, the six- month period was upheld.

Here, however, Industrial has presented no concrete facts regarding why it is necessary to enjoin Mr. Morgan's work for Columbia Coatings for a full year. In fact, Industrial hired Mr. Morgan's replacement before he even left. Industrial hired another foreman the week before Mr. Morgan left, and the company already had another employee—a man that Mr. Morgan had worked alongside and helped to train—to do bidding work. [Testimony of Samuel Morgan.] Mr. Morgan indicated in his testimony that his replacement knew "pretty much what [he] knew." Therefore, the facts indicate that

Industrial has no concrete need to enjoin Mr. Morgan's work for a competitor for an entire year. Unlike in *Strom*, where a six month non-compete period was essential to the former employer's transition plan, the transition is already complete here.

Industrial may argue that the court should enforce the non-compete agreement for the time it takes to train an employee with identical QP certifications as Mr. Morgan. Mr. Morgan has four such certifications, each of which took several months to obtain. [Testimony of Samuel Morgan]. However, Mr. Morgan obtained those certifications with his own money, to further his own career. It is not essential to Industrial's interests in replacing Mr. Morgan's role as a sandblaster in the field to find and train a replacement with identical qualifications.

For the aforementioned reasons, the non-compete clause is clearly unreasonable in duration, since Industrial has not met its burden to establish why Mr. Morgan should be enjoined from work for a year—particularly since Industrial hired Mr. Morgan's replacement before he even left the company.

### **The non-compete agreement is not reasonable in geographic scope**

Furthermore, the non-compete agreement here is also unreasonable in geographic scope. *Fawcett* has established that a non-compete agreement's scope is prima facie reasonable if it covers only the territory where the employee worked for the employer. However, it is facially *invalid* if the restriction extends to geographic regions in which the employee did not work, absent a strong justification from the employer other than the desire not to compete with the former employee.

*Strom* upheld a distinguishable non-compete agreement, which applied only to the

city in which the defendant worked for the network, since that city was the relevant media market in which Strom had provided all his services for his former employer. Here, however, Mr. Morgan has worked *almost exclusively* in Columbia City during his time with Industrial. He also worked on one job in Crescent, a suburb of Columbia City, and performed one job in the northeastern part of Columbia. His contract, however, enjoins him from any similar work in the *entire* state of Columbia [Contract]. Because the restriction here extends to large swaths of the state in which Mr. Morgan performed no work for Industrial, it is facially invalid here.

Moreover, Mr. Morgan anticipates doing most of his work for Columbia Coatings in the south and southeastern portions of Columbia state. Columbia City, on the other hand, is located in the northwestern portion of the state. Thus, enforcing the non-compete agreement through the entire state will preclude Mr. Morgan from working in a geographic market completely distinct from the one he worked for Industrial in.

Additionally, Industrial does not have the requisite compelling justification beyond preventing competition, as discussed in *Fawcett*, for enforcing the agreement throughout the entire state. In fact, Roger Cole testified that he was willing to accept an agreement that applied only to Columbia City [Testimony of Roger Cole], further suggesting that Industrial has no legitimate interest in enforcing the agreement throughout the entire state.

Therefore, the agreement is also unreasonable in its geographic scope, and should be invalidated on those grounds as well.



### **The scope of activities covered by the agreement is also unreasonable**

The non-compete agreement is unenforceable for a third and additional reason: the scope of activities Industrial is attempting to prohibit under the agreement is unreasonably broad. The Columbia Supreme Court in *Strom* upheld an agreement that only prohibited a television personality's "on air" appearances for six months, while he was still permitted to work as an off-air consultant for a competitor during that time. *Fawcett*, on the other hand, held that prohibiting work for a competitor in *any* capacity does not protect the legitimate interests of the employer, and is unreasonable in scope. The Court of Appeal in *Fawcett* strongly suggested that an employer can only restrict in a non-compete agreement services *identical to*, or at least very similar to, those performed by the former employee.

Here, Mr. Morgan's employment contract mandates that he not work—in *any* capacity—for a business providing sandblasting or similar industrial cleaning services. [Employment Contract]. Clearly, Mr. Morgan's contract is not simply limited to the services he performed for Industrial. At Industrial, for example, Mr. Morgan largely worked in the field—whereas at Columbia Coating, Mr. Morgan anticipates primarily working as office staff. [Testimony of Samuel Morgan]. Clearly, the non-compete agreement Industrial is seeking to enforce goes far beyond the scope of activities Mr. Morgan provided for his former employer and attempts to prohibit a materially different type of employment.

Furthermore, the *Strom* court suggested that relevant to this inquiry of scope is whether a defendant's former employer "substantially invested" resources into training

the employee, such that the former employer has a "legitimate and protectable interest" in enjoining a particular type of work for a narrow period of time. In *Strom*, for example, the court upheld enjoining on-air work specifically, because Strom's former employer had invested over a million dollars into cultivating his public and on-air persona. Here, however, there is no indication that Industrial has similarly substantially invested into the work that Mr. Morgan will be performing for Columbia Coatings. Mr. Morgan testified that he obtained most of his training—particularly his four QP qualifications—entirely at his own expense (though Industrial did permit him to complete some of the trainings on company time) [Testimony of Samuel Morgan]. Thus, Industrial has no valid need to enjoin Mr. Morgan's work for Columbia Coatings in order to protect their own investment, because Industrial invested very little in Mr. Morgan overall. Industrial refused to promote Mr. Morgan despite his outstanding performance at work, only gave him one raise, and did not provide financial assistance to Mr. Morgan as he sought to obtain trainings that would further Industrial's interests as a company.

In short, because Industrial has no protectable investment interest in Mr. Morgan's training, and because the scope of the agreement extends far beyond the limited field work Mr. Morgan provided for Industrial, it is unenforceable on these grounds as well.

### **Fairness also favors invalidation of the non-compete agreement**

Moreover, the Columbia Supreme Court in *Strom* indicated that in considering the validity of a non-compete agreement, courts should consider whether the agreement strikes a "fair balance"—in other words, courts must weigh the interest the employer seeks to protect against the impact the covenant will have on the employee.

Here, as discussed above, there is no indication that Industrial is seeking to protect a legitimate, investment-backed interest here. Industrial invested very little into Mr. Morgan and his career during his tenure at Industrial, and suffered very little harm by his departure, since they replaced him before he even left the company. Mr. Morgan, on the other hand, would suffer severe and irreparable injury if the non-compete agreement were enforced here. He would be barred from practicing his chosen profession for an entire year [Testimony of Samuel Morgan], which would pose significant financial difficulties and will have a substantial detriment on Mr. Morgan's overall quality of life. Thus, the balance of fairness here further weighs in favor of invalidating the compete agreement.

**The court should not "blue-pencil" the agreement**

This court should also not follow the suggestion of Roger Cole and his counsel during his testimony and modify the non-compete agreement to conform to a more limited duration, geographic scope, and scope of services. *Fawcett* has established that if the covenant bears absolutely *no* relationship to the employer's legitimate need to protect its own interests, it should be invalidated, and the court should not make an attempt to revise the agreement in an attempt to salvage it. Here, as discussed above, the non-compete agreement bears no rational relationship to protecting Industrial's legitimate interests. The covenant is overbroad in time, geographic scope, and in the scope of services it prohibits Mr. Morgan to engage in. Thus, reformation of the agreement would be inappropriate here, and the court should invalidate it in its entirety.

In short, the non-compete agreement between Mr. Morgan and Industrial is patently

unreasonable in scope. Its year-long duration has no reasonable relation to the needs of Industrial to shape an appropriate transition plan, it applies throughout the entire state when Mr. Morgan only worked in a small portion of Columbia for Industrial, and applies to *all* services for sandblasting companies, beyond those Mr. Morgan provided for Industrial. For the foregoing reasons, we respectfully request this Court invalidate the non-compete agreement in its entirety, and permit Mr. Morgan to pursue his promising career opportunity with Columbia Coating.