



# The State Bar *of California*

## **Report to the Supreme Court on the February 2022 California Bar Examination**

**Committee of Bar Examiners**

July 13, 2022

## **FEBRUARY 2022 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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## REPORT ON THE FEBRUARY 2022 CALIFORNIA BAR EXAMINATION

The State Bar of California received applications from 4,731 applicants to take the February 2022 California Bar Examination, which was administered on February 22 and 23, 2022. A total of 3,451 applicants completed<sup>1</sup> the exam and received results. Of those, 3,113 applicants completed the General Bar Examination and 1,056 passed (33.9 percent); 338 attorney applicants completed the Attorneys' Examination and 209 passed (61.8 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. Six of the 20 disciplined attorneys who took the exam as a condition of reinstatement passed the exam.

The two-day General Bar Exam included the following: three one-hour essay questions administered in the morning, and two one-hour essay questions, and one 90-minute Performance Test (PT) in the afternoon. The 200-item multiple-choice Multistate Bar Exam (MBE) was provided by the National Conference of Bar Examiners. The one-day Attorneys' Exam included the same five one-hour essay questions and one 90-minute PT.

The February bar exam was administered at 12 test centers throughout the state, which included handwriting, laptop, and testing accommodations centers. In order to participate in the Laptop Computer Program, applicants were required to pay an additional fee and download special security software in advance. Following conclusion of the exam, applicants who completed their answers using their laptops were required to upload their answer files to a secure server no later than noon the day after the exam. The electronic answer files were downloaded from the ExamSoft secure server into the State Bar's Admissions Information Management System (AIMS) for electronic grading. A total of 3,267 applicants (94.7 percent) took the exam at laptop test centers.

A total of 386 applicants with disabilities were granted accommodations. Of those, 370 applicants were assigned to take the exam at testing accommodations test centers, while 16 applicants were granted accommodations at standard test centers. Forty-nine applicants who were granted accommodations either withdrew their applications, had their application abandoned, or were not eligible to take the exam. Of the 386 applicants who were granted accommodations, 42 did not show up.

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 (EDG) team supervised each group of graders. The groups convened through a videoconference for two calibration sessions in March and one in April. Members of the Committee of Bar Examiners were invited to attend the second calibration session.

At the first calibration session, the EDG team led a discussion designed to reach agreement on which issues should be discussed in an answer and what tentative weights should be assigned to each 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.

To determine proper calibration, 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, and to what degree, collectively and individually, there was agreement among the group on the relative quality of the second set of answers.

At the second calibration session, the EDG team distributed and discussed the grading guidelines that had been drafted based on 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 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.

During the third calibration session, held midway through the grading cycle, graders discussed any problems they had been experiencing with the answers they reviewed. The group graded an additional set of 15 answers, arriving at a consensus for each, to assure their continued adherence to the established guidelines.

The February 2022 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 1,390 or higher were considered as having passed the exam, and applicants with total scaled scores of 1,349.9999 or lower failed the exam. Applicants with total scaled scores of 1,350–1,389.9999 had all of 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 February 2022 exam were scaled to the MBE—that is, the written scores were converted to a score distribution with the same mean and standard deviation as the MBE score distribution. This procedure ensures that the difficulty of the exam remains consistent from one exam administration to the next. For the February exam, the mean scaled MBE score in California was 1,339 compared with the national average of 1,327. The scaled written score accounts for 50 percent of the total score, and the scaled MBE score accounts for the other 50 percent.

Results were made available to applicants through the Admissions Applicant Portal on May 6, 2022, and were made available to the public on Sunday, May 8, 2022. Since the July 2021 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 by email on May 9, 2022, to the successful applicants who completed all requirements for admission to practice law in California. While applicants still have the option to use a paper form under this new format,

use of the online process was strongly encouraged to streamline the distribution and processing of oath cards.



**General Statistics Report**  
**February 2022 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	1,090	575	52.8	2,023	481	23.8	3,113	1,056	33.9
Attorneys' Examination	230	162	70.4	108	47	43.5	338	209	61.8
Total	1,320	737	55.8	2,131	528	24.8	3,451	1,265	36.7

**Disciplined Attorneys Examination Statistics**

	Took	Pass	%Pass
CA Disciplined Attorneys	20	6	30.0

**General Bar Examination Statistics**

Law School Type	First-Timers			Repeaters			All Takers		
	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
CA ABA Approved	288	156	54.2	730	242	33.2	1,018	398	39.1
Out-of-State ABA	134	64	47.8	258	75	29.1	392	139	35.5
CA Accredited	158	52	32.9	453	65	14.3	611	117	19.1
CA Unaccredited	22	8	36.4	106	12	11.3	128	20	15.6
Law Office/Judges' Chambers									
Foreign Educated/JD Equivalent + One Year US Education	43	11	25.6	130	14	10.8	173	25	14.5
US Attorneys Taking the General Bar Exam <sup>2</sup>	251	195	77.7	41	21	51.2	292	216	74.0
Foreign Attorneys Taking the General Bar Exam <sup>3</sup>	174	75	43.1	216	37	17.1	390	112	28.7
4-Year Qualification <sup>4</sup>				21	3	14.3	23	4	17.4
Schools No Longer in Operation	15	13	86.7	66	11	16.7	81	24	29.6
Total	1,091	576	52.8	2,023	481	23.8	3,113	1,056	33.9

**\*Fewer than 11 Applicants**

<sup>1</sup> These statistics were revised as of June 15, 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> The following law schools were accredited by the Committee of Bar Examiners and are now reported in the accredited category: Concord Law School; St. Francis Law School; Northwestern California School of Law. Each of these law schools enrolls some students who are completing the law school's unaccredited JD program, while others are enrolled in the law school's accredited JD program.

## February 2022 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	125	64.0	14	28.6	33	39.4	30	50.0	73	50.7	12	50.0
Out-of-State ABA	46	67.4	16	6.3	20	45.0	26	53.8	21	33.3		
CA Accredited	51	49.0	14	21.4	44	27.3	13	15.4	29	17.2		
CA Unaccredited												
Other	195	70.3	33	36.4	35	25.7	150	56.7	63	68.3	12	83.3
Total	425	65.4	79	25.3	137	32.1	224	52.7	188	48.9	37	62.2

### 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	217	38.7	60	23.3	144	31.9	124	26.6	164	33.5	21	47.6
Out-of-State ABA	70	37.1	36	22.2	32	34.4	56	19.6	56	30.4		
CA Accredited	147	17.0	58	5.2	113	11.5	51	11.8	75	18.7		
CA Unaccredited	36	5.6	11	0.0	33	18.2	23	13.0				
Other	134	23.1	47	10.6	67	19.4	165	17.0	53	17.0		
Total	604	27.8	212	14.2	389	22.9	419	19.3	352	27.3	47	36.2

\*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	140	60.0	139	47.5			300	34.7	422	31.3		
Out-of-State ABA	67	49.3	65	44.6			117	34.2	134	23.9		
CA Accredited	61	36.1	92	28.3			200	17.0	249	11.6		
CA Unaccredited	15	46.7					57	10.5	50	12.0		
Other	226	65.5	260	56.2			195	20.0	277	17.3		
Total	509	57.8	564	47.5	2	50.0	869	25.7	1,132	21.8	6	33.3

\*\*Number are for those reporting gender



## February 2022 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	61	30	49	66	16	24
CHAPMAN UNIVERSITY SCHOOL OF LAW				39	16	41
GOLDEN GATE UNIVERSITY SCHOOL OF LAW	29	7	24	102	23	23
LOYOLA LAW SCHOOL – LOS ANGELES	16	13	81	52	19	37
PEPPERDINE UNIVERSITY				22	8	36
SANTA CLARA UNIVERSITY SCHOOL OF LAW	23	14	61	71	25	35
SOUTHWESTERN LAW SCHOOL	17	8	47	59	25	42
STANFORD LAW SCHOOL						
UNIVERSITY OF CALIFORNIA – BERKELEY						
UNIVERSITY OF CALIFORNIA – DAVIS				30	9	30
UNIVERSITY OF CALIFORNIA – HASTINGS	22	11	50	54	25	46
UNIVERSITY OF CALIFORNIA – IRVINE				21	11	52
UNIVERSITY OF CALIFORNIA – LOS ANGELES	11	6	55	11	8	73
UNIVERSITY OF PACIFIC MCGEORGE SOL	24	17	71	46	14	30
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW	11	6	55	42	19	45
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW				53	7	13
UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SOL						
WESTERN STATE COLLEGE OF LAW WESTCLIFF UNIV	19	7	37	41	2	5
TOTAL	288	156	54	730	242	33

### 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				12	3	25
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL						
GEORGETOWN UNIVERSITY LAW SCHOOL						
HARVARD UNIVERSITY LAW SCHOOL	11	11	100			
WESTERN MICHIGAN UNIVERSITY						
ALL OTHER OUT-OF-STATE SCHOOLS	107	46	43	223	65	29
TOTAL	134	64	48	258	75	29

**February 2022 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	%PASS	TOOK	PASS	%PASS
CAL NORTHERN SCHOOL OF LAW						
CONCORD LAW SCHOOL – PURDUE UNIVERSITY GLOBAL	12	5	42	17	2	12
EMPIRE COLLEGE SCHOOL OF LAW				12	5	42
GLENDALE UNIVERSITY COLLEGE OF LAW				18	4	22
HUMPHREYS UNIVERSITY DRIVON SCHOOL OF LAW				14	1	7
JOHN F. KENNEDY SCHOOL OF LAW – NORTHCENTRAL				18	3	17
KERN COUNTY COLLEGE OF LAW	12	6	50			
LINCOLN LAW SCHOOL OF SACRAMENTO				28	3	11
LINCOLN LAW SCHOOL OF SAN JOSE				13	4	31
MONTEREY COLLEGE OF LAW	11	4	36	16	0	0
NORTHWESTERN CALIFORNIA UNIVERSITY				19	0	0
SAN DIEGO LAW SCHOOL – ALLIANT INTERNATIONAL						
SAN FRANCISCO LAW SCHOOL – ALLIANT INTERNATIONAL				20	3	15
SAN JOAQUIN COLLEGE OF LAW				25	7	28
SAN LUIS OBISPO COLLEGE OF LAW						
SANTA BARBARA COLLEGE OF LAW				11	1	9
ST. FRANCIS SCHOOL OF LAW						
THOMAS JEFFERSON SCHOOL OF LAW	13	5	38	55	5	9
TRINITY LAW SCHOOL	14	3	21	38	5	13
UNIVERSITY OF LA VERNE COLLEGE OF LAW				49	10	20
UNIVERSITY OF WEST LOS ANGELES	18	0	0	73	10	14
VENTURA COLLEGE OF LAW	20	6	30	14	1	7
TOTAL	158	52	33	453	65	14

## February 2022 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				28	3	11
PACIFIC WEST COLLEGE OF LAW						
PEOPLES COLLEGE OF LAW						
WESTERN SIERRA LAW SCHOOL						
TOTAL	2	0	0	54	8	15

### California Unaccredited Law Schools, Distance Learning

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
ABRAHAM LINCOLN UNIVERSITY				24	1	4
AMERICAN HERITAGE UNIVERSITY SOL						
CALIFORNIA SCHOOL OF LAW						
SOUTHERN CALIFORNIA INSTITUTE – VENTURA						
TOTAL	8	2	25	36	2	6

### 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	13	6	46	17	2	12

**ANALYSIS OF THE FEBRUARY 2022  
CALIFORNIA GENERAL BAR EXAMINATION**

**Roger Bolus, Ph.D.**

**RESEARCH SOLUTIONS GROUP**

**May 14, 2022**

## SUMMARY

The February 2022 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. The combination of the essay and PT sections constituted the “Written” portion of the exam. There were 3,056 applicants who completed all three sections, 65.0% 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.

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

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

The major findings for the 3,056 applicants<sup>1</sup> who had all of their answers read at least once and the subgroup of 356 applicants who had them read at least twice were as follows:

- After the first reading of all answers 55.3% of the applicants failed and 33.1% passed. An additional 1.5% passed after the second reading. Overall, 34.6% of the applicants passed the examination<sup>2</sup>.
- The reliability of the Written and Total scores were .76 and .91 respectively, meeting standards for a high-stakes licensing examination.

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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 February 2022 GBX, 3,451 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 3,056 applicants who completed the GBX for purposes of the exam statistics (3,451 - 396).

<sup>2</sup> The bar passage rate for all 3,451 applicants taking the GBX, including those without complete scores was 36.7%. The passage rate for the 338 applicants taking the Attorney’s exam was 61.8%.

- The correlation between MBE and Written scores was .69, which was the highest level ever for a February administration.
- Fully, 46 (11.7%) of the 356 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 (1359 vs. 1321) continued for this examination. However, on the Written section, the gap has continued to narrow (8-points) relative to previous years. During the current administration, the average total score for Whites (mean=1374) was 90 points higher than Black (mean=1284), 74 points higher than Hispanics (mean=1300), and 47 points higher than Asians (mean=1327).
- 53.7% of the 1,070 first-time takers passed the exam, while 24.2% of the 1,986 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 (17.4% and 7.8%), while only 6.8% taking the exam for more than a 5<sup>th</sup> time passed. (see Table A 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	495	588	247	183	128	83	276	2,000
Pass	575	307	79	41	27	7	20	1,056
Total Takers	1,070	895	326	224	155	90	296	3,056
% Passing	53.7%	34.3%	24.2%	18.3%	17.4%	7.8%	6.8%	34.6%

## **ANALYSIS OF THE FEBRUARY 2022 GENERAL BAR EXAMINATION**

### **TEST SECTIONS, TIME LIMITS, AND SCHEDULE**

The examination had three parts: the Multistate Bar Examination (MBE), the California essay section, and the California Performance Test (PT). The combination of the Essay and PT sections constitute the “Written” section.

The MBE is a six-hour, 200-item multiple choice test, but only 175 of its items are scored. The applicants’ responses to other MBE items were analyzed for possible use on future exams.

As of this administration, the essay portion of the exam consists of one morning three-hour bloc and one afternoon two-hour blocs of five (5) essay questions. A single PT is given 90 minutes at the end of the afternoon session. The whole examination (MBE + Essay + PT) is administered over two consecutive days, with Day 1 dedicated to the Written Section. Day 2 is devoted to the MBE; 100 items given in a 3-hour morning session and the other 100 items given in a 3-hour afternoon session.

### **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 3,059 applicants who had their written answers graded first. The formula used to convert February 2022 Written Raw Scores to scale scores:

$$\text{Written Scale} = (3.9441 \times \text{Written Raw}) - 343.325$$

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 3,056 applicants who had both an MBE score and a complete set of Written scores. This sample contained 1,070 applicants who were taking the examination for the first time (35% of all takers) and 1,986 repeaters (65% 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 34.6 % of the applicants passed the exam, approximately 3% lower than 2021. The decrease can be attributed primarily to the .6-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	1339	426	1337
Standard Deviation	155	39	142
Reliability	.92	.76	.91

## SUBGROUP ANALYSES

Relative to the previous February administration, the gap in written score performance between men and women continued narrow (8 points; 1332 vs. 1340), while the MBE gap remained the same (38 points; 1359 vs. 1321). The net Total Score difference was 15 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 102 points for Blacks to 52 points for Asians.

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<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.



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	1322	1272	1306	1374	1345	1340	1332
MBE	1332	1296	1294	1374	1338	1321	1359
Total	1327	1284	1300	1374	1442	1330	1345
N	631	283	517	1,013	530	1,673	1,344
% Male	43%	47%	38%	48%	42%	0%	100%

### PHASED GRADING

A two-phased grading process was used to focus additional grader time on the applicants who were just below passing. There were 356 applicants who had their answers read at least twice. On the average, their mean Written scale score on the first reading (433.4) was 5.1 points higher than their mean on the second reading (428.3). The difference is 1.1 points lower than observed on the last February administration.

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 in the first phase were 1,010 and 33%, respectively. During the 2<sup>nd</sup> Phase, only 46 addition examinees (1.5% of all applicants) passed.

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

Phase	Fail		Pass		Total	
	Number	Percent	Number	Percent	Number	Percent
1	1,690	55.3%	1,010	33.1%	2,700	88.3%
2	310	10.2%	46	1.5%	356	11.7%
Total	2,000	65.5%	1,056	34.6%	3,056	100.0%

Table 4 illustrates continuing strong relationship between Phase 1 scores and final pass/fail status. In addition to the recent reduction in the passing standard to 1,390, the regrade band was tightened by 10 points; moving from 50 points (1390 - 1439) to 40 points (1350-1389). Because this is a February administration, there tends to be more examinees in the lower levels of the regrade range. However, as can be seen in Table 4,

the pattern of having relatively few examinees in the lower portion of the range pass upon regrade continues. On this administration only 4 examinees out of 98 (4%) 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 20 of 82 (24%) passed.

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	62	20	82	24%
1370 – 1379	61	13	74	18%
1360 – 1369	93	9	102	9%
1350– 1359	94	4	98	4%
Total	310	46	356	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
2022	3,056	35	1338	426	.76	.69

\* 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.



# **California Bar Examination**

## **Essay Questions and Selected Answers**

**February 2022**



**ESSAY QUESTIONS AND SELECTED ANSWERS**

**FEBRUARY 2022**

**CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the February 2022 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.

<u>Question Number</u>	<u>Subject</u>
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

## **ESSAY QUESTION 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**

Jim and Fred armed themselves with handguns and drove to a store on Avon Street. They both went into the store, drew their guns, and demanded that Salma, an employee, give them the store's money. After Salma handed Jim the money, he nervously dropped his gun. The gun discharged when it hit the floor, and the bullet hit and killed Chris, a store customer. Salma then got a shotgun from under the counter and shot Fred, killing him. Jim picked up his gun, ran out of the store, and drove back to his apartment.

Later that evening, Jim saw Salma while walking down Park Street. Thinking that he could eliminate her as a witness, Jim shot at Salma with his gun, but the bullet missed her. Jim then drove away in his car.

A few minutes later, Police Officer Bakari saw Jim driving down the street. Officer Bakari, who had no knowledge of the events at the store or on Park Street, pulled Jim over because Jim looked nervous. When Jim got out of his car, Officer Bakari noticed a bulge under his shirt. Officer Bakari then patted Jim down and found Jim's gun. Officer Bakari arrested Jim for possession of a concealed firearm and seized the gun.

1. With what crime(s) could Jim reasonably be charged regarding the events at the store? Discuss.
2. With what crime(s) could Jim reasonably be charged regarding the incident on Park Street? Discuss.
3. Under the Fourth Amendment to the United States Constitution, can Jim successfully move to suppress Jim's gun from being introduced into evidence at trial? Discuss.



## **QUESTION 1: SELECTED ANSWER A**

### **1. Jim's crimes at the store**

#### **Conspiracy**

A conspiracy is an agreement between two or more people to commit a crime. A conspiracy requires 1) an intent to enter into an agreement, 2) an intent to agree, and 3) an intent to carry out the target offense. Most modern jurisdiction also require an **overt act** which sets the conspiracy in motion. A conspiracy punishes the agreement.

However, a conspirator will be liable for not only the target offense, but for all substantive crimes that are the natural and foreseeable consequences of the target offense (Pinkerton rule).

Here, Jim(J) will likely be found guilty of a conspiracy with Fred(F) to rob the store. 1) J and F "Armed themselves" with guns and drove to the store. This act of supplying a dangerous weapon, coupled with driving to the store is circumstantial evidence of J and F's intent to enter into an agreement to rob the store. Thus, they intended to enter into an agreement to commit a crime. 2) They both armed themselves and endeavored on this venture **together**. This further indicates that they intended to agree with one another to fulfill their intent. 3) Finally, the fact that they grabbed weapons and drove to the store evidences an intent to commit the underlying offense of robbery (there is no other logical reason for driving to a store with likely illegal weapons other than for the purpose of committing some crime). Further, the act of driving to the store will amount to an **overt act** which set this conspiracy in motion.

Therefore, J will likely be charged with conspiracy and will be culpable not only for the underlying offense, but for all crimes which were the reasonable and foreseeable

consequences of committing a robbery.

### **Assault**

Assault is either 1) a failed battery (a non-consensual offensive touching), or 2) an intent to cause imminent apprehension in another of an imminent battery.

In this case, J will also likely be guilty of assault because by drawing his gun and pointing it at Salma (S) and demanding that she give him the money, he intended to put S in apprehension that if she did not comply, she might be shot (which would certainly amount to an offensive, non-consensual touching).

Therefore, J committed an assault.

### **Larceny**

Larceny is the 1) trespassory (without consent), 2) taking, and 3) carrying away (the slightest movement is sufficient) of 4) the personal property or 5) another with 6) the intent to permanently deprive that person of their property.

Here, J also committed a larceny because 1) S did not give voluntary consent when she gave J the money (rather, she was under threat of possible death if she did not), therefore making it trespassory, 2) he took the money when S handed it to him, 3) J carried it away when he "ran out of the store," 4) the property was cash (and therefore personal property), which 5) belonged to the store, not Jim, and 6) J intended to permanently deprive the store of this money because he obtained it by force and ran away. Clearly, he had no intention of returning it.

Therefore, J committed a larceny.

### **Robbery**

Robbery is essentially an assault plus larceny. It is the 1) taking of 2) the personal

property 3) from a person's presence, 4) by force or threat of force, 5) with the intent to permanently deprive that person of their property.

Here, J committed an assault and a larceny and thus also committed a robbery. He 1) took 2) the cash 3) from S, who was in charge of safeguarding it, 4) by threat of force by drawing his handgun and making S believe that she may be shot if she did not comply, and 5) intended to permanently deprive the store of its property because he had no intention of returning it.

Therefore, J also committed a robbery.

### **Burglary**

At common law, burglary was the 1) breaking and 2) entering of 3) the dwelling house 4) of another 5) in the nighttime 6) with the intent to commit a felony therein. However, many jurisdictions have eliminated the breaking and nighttime requirements and expanded "dwelling house" to include a multitude of enclosed structures.

Here, J and F did go into the store with the intent to commit a crime. However, there was no "breaking" because they went during store hours and thus had permission to be on the premises.

Thus, there was no burglary.

### **Murder (Chris)**

#### **Common Law Murder**

At common law, murder was the killing of one human being by another human being with malice aforethought. The intent to kill--malice--can take several forms: 1) the intent to kill (express malice), 2) killing with reckless indifference to human life (depraved heart murder), 3) intent to cause great bodily injury (GBI), or 4) felony murder.

### 1. Express Malice

Express malice requires the intent to kill.

Here, J "nervously dropped his gun" and it accidentally discharged. Therefore, J did not intend to kill Chris.

### 2. Depraved Heart

Depraved heart murder is a killing with a reckless indifference to an unjustifiably high risk to human life.

Here, J did not kill Chris with indifference to a high risk to human life because he dropped his gun. He did not know the gun was discharge and it was completely accidental. Therefore, he probably cannot be convicted of depraved heart murder.

### 3. Intent to Cause GBI

Malice can be inferred from the intent to cause GBI.

Again, J accidentally dropped his gun and did not intent to harm Chris and thus did not intent to commit GBI. This type of malice thus does not apply.

### 4. Felony Murder

Under the felony murder doctrine, malice is implied from the intent to kill the underlying felony. However, many jurisdictions have adopted the Redline theory, which states that a co-felon **cannot be guilty of felony murder for the killing of another co-felon during the commission of the felony by a third party.**

Here, J intended to commit a robbery, as discussed above. In all jurisdictions, a robbery is a felony. Therefore, J can be found guilty of felony murder for any killing that occurs during the commission of the robbery. Chris was a store customer, not a co-felon, so the Redline theory would not bar J from being convicted.

Therefore, J can be found guilty of felony murder of Chris.

### First Degree Murder

First degree murder is statutory in nature and most jurisdictions have held that it encompasses 1) premeditated and deliberate murder or 2) felony murder during certain inherently dangerous enumerated felonies (including burglary, rape, arson, robbery, and kidnapping).

#### 1. Premeditation and deliberation

As stated above, the killing of Chris was accidental, so it was not premeditated or deliberate.

#### 2. Felony Murder

Here, the killing occurred during the commission of a robbery--a first degree felony murder offense.

Therefore, J will likely be found guilty of first-degree murder.

### Second Degree Murder

Second degree murder includes all murders not in the first degree.

Here, J will not be guilty of second-degree murder because he can be found guilty of first-degree murder.

### **Murder (Fred)**

See rule above.

#### 1. Express Malice

Here, S shot F. Therefore, J did not have intent to kill F.

#### 2. Depraved Heart

Again, because S is the one who shot F, J would not have killed F with a depraved

heart.

### 3. Intent to Cause GBI

J did not intent to cause F GBI because he is not the one who shot him.

### 4. Felony Murder

Here, the state will argue that J is guilty of felony murder to F because it was a killing during the commission of a felony. However, if this jurisdiction has adopted the **Redline theory**, then J cannot be found guilty of murder of F because a third party---S--killed a co-felon.

Therefore, assuming the jurisdiction has adopted the Redline theory, J will not be guilty of murder of F.

### First Degree Murder

See rule above.

#### 1. Premeditation and deliberation

This was not a premeditated or deliberate murder because J did not plan to kill F.

#### 2. Felony Murder

This was a killing during the commission of an inherently dangerous felony. However, assuming this jurisdiction has adopted the Redline theory, J cannot be found guilty of murder of F.

### Second Degree Murder

See rule above.

This is inapplicable because J did not intent to kill F.

## **2. Jim's crimes on Park Street**

### **Attempted Murder (Salma)**

Attempt is a specific intent crime which requires 1) the specific intent to commit the underlying offense and 2) a substantial step toward the commission of that offense (the substantial step element requires that the crime come dangerous close to commission). Here, J will likely be found guilty of attempted murder of S because 1) he thought he could "eliminate her as a witness" and drew his gun at her, thereby evidencing his intent to kill S so that she could not testify against him. 2) There was a substantial step toward the crime because J actually "shot" and fired his gun at S.

Therefore, J will be guilty of attempted murder of S.

### **Assault**

See rule above.

J will also be guilty of assault because he attempted to shoot S (which would be a harmful or offensive touching, i.e., a batter), but he missed her.

Therefore, this was a failed battery and thus an assault.

### **3. 4th Amendment Claim**

#### **4th Amendment**

The 4th Amendment protects against unreasonable searches and seizures. A search without a warrant is per se unreasonable unless there is an exception to the warrant requirement.

Here, J was subject to a stop by the police when he was pulled over and this he was searched without a warrant. Therefore, this stop and seizure is per se unreasonable, and thus a violation of J's 4th Amendment rights, unless there is an exception.

### **Government Conduct**

The 4th Amendment only protects individuals from governmental conduct--it does not

govern purely private behavior.

Here, J was pulled over by a police officer--a government employee. Therefore, this element is met.

### **Search/Reasonable Expectation of Privacy**

A search is a governmental intrusion into an area where a person has a subjective expectation of privacy that society is willing to regard as reasonable, or a search into a constitutionally protected area. In order to assert a reasonable expectation of privacy, and thus have **standing** to make a 4th Amendment claim, the person must have had an ownership or possessory interest in the place searched or item seized.

Here, J has standing to object to the search because he was pulled over in his car which he presumably owned, and thus had a reasonable expectation of privacy in his vehicle (although the courts have held that there is a diminished expectation of privacy in one's vehicle, there is nonetheless some expectation of privacy). Furthermore, J's person was searched during a pat-down and the police officer took an item of personal property from him.

Thus, J has standing.

### **Warrantless Search**

As stated above, warrantless searches and seizures are per se unreasonable without a warrant expectation.

Here, the stop and seizure were without a warrant and is per se unreasonable unless there is an exception.

### **Vehicle Stops: Reasonable Suspicion**

A police officer may pull over a vehicle if they have reasonable suspicion, supported by



articulable facts, that criminal activity is afoot. Whether an officer has reasonable suspicion will be determined based on the totality of the circumstances, although the courts have held that it requires more than a mere hunch.

Here, the officer stopped J because he "looked nervous." The officer had no knowledge of any of the preceding events and thus no basis to believe that criminal activity was afoot. A person "looking nervous" is not enough for reasonable suspicion. There must be **facts** which support the officer's basis for concluding that some criminal activity is happening.

In this case, J's mere "nervousness" likely did not amount to reasonable suspicion such that the stop was unreasonable and thus a violation of J's 4th Amendment rights.

However, assuming the stop was not unreasonable, the state must further prove that the officer had grounds to search J.

### **Warrant Exception: *Terry* Stop and Frisk**

A stop and frisk, or *Terry* stop, permits an officer to stop a person whenever they have reasonable suspicion, based on articulable facts, that criminal activity is afoot. If the officer also believes that the person is armed and dangerous, then the officer can conduct a pat-down of their outer clothing in order to search for weapons.

Here, if the officer had reasonable suspicion for the stop, then the frisk was likely a permissible *Terry* frisk because the officer noticed a bulge under J's search. Based on his experience, the officer likely had justifiable grounds for believing that "bulge" could be a weapon, thereby supporting his basis for patting J down.

So long as the court finds that the stop was supported by reasonable suspicion, then the pat-down and seizure of the gun will also be permissible.

### **Exclusionary Rule/Fruit of the Poisonous Tree**

The exclusionary rule is a judge-made doctrine that states that any evidence obtained in violation of a person's 4th, 5th, or 6th Amendment rights is inadmissible (subject to a few exceptions not applicable here). Under the fruit of the poisonous tree doctrine, all secondary evidence obtained as a result of an unlawful search will also be excluded. Here, it is more than likely that the stop of J when the officer pulled him over was unreasonable because it was not supported by reasonable suspicion. Therefore, any evidence obtained as a result of the unlawful search, such as the gun, will also be inadmissible as fruit of the poisonous tree.

### **Conclusion**

Because J was stopped in violation of his 4th Amendment rights, J can successfully move to suppress the gun from being introduced at trial.

## **QUESTION 1: SELECTED ANSWER B**

### **(I) Events at the Store**

Jim could be charged with first- or second-degree murder depending on how a jurisdiction codifies those crimes. He can also be charged with robbery and conspiracy to commit robbery.

#### **Robbery**

J committed the crime of robbery. A robbery is the taking of property of another with force. Here, J took property of another, i.e., the cash of the store from the store whose property it was. J also used force to take that property. Specifically, he brandished his firearm, threatening the use of force if Salma the store employee did not comply. Thus, J committed the offense of robbery.

#### **Murder**

J committed the crime of murder. He could be found guilty of felony murder (which could be first- or second-degree murder depending on the jurisdiction) or involuntary manslaughter.

A. First degree murder is generally codified as one of two things (a) premeditated, calculated murder that occurs in a calm, dispassionate manner or (b) felony murder.

(a) Premeditated murder. Here, Jim (J) and Fred (F) armed themselves with handguns and drove to a store on Avon Street. They both went into the store with their guns drawn and demanded that the store employee Salma (S) give them money. It does not appear that J and F's intent was to murder anyone, nor did they premeditate committing a murder; rather, they were only interested in obtaining the money from the store. J only killed C when he nervously dropped his gun, and the gun fired a bullet. And F was killed

only when S shot him. Thus, J cannot be convicted of first-degree premeditated murder as he did not premeditate either of those deaths.

(b) Felony murder. Some jurisdictions codify felony murders as first-degree murder. If the state where J and F committed this offense is one of those states, then J could be found guilty of first-degree murder. Felony murder is found when a murder occurs during the commission of certain violent felonies, including burglary, kidnapping, robbery, assault, and rape. This is because the commission of these felonies is dangerous on their own, and it is foreseeable that a death could occur in their commission. To find felony murder, it must be first established that one of these underlying crimes occurred. Here, as discussed above, J intended to commit a robbery and did do so. Thus, the deaths that occurred can be considered under the felony murder rule.

Here, two deaths occurred--those of C and F--which we will discuss in turn. First, as to C's death, C was killed when J nervously dropped his gun and when S was handing J the money he demanded. C's death was not really in furtherance of the commission of the crime--J was already getting the money handed to him and probably would have left after that. And J and F did not point the gun at C or ask C for his money or expect C to hand them over the store's money. Nonetheless, it was a reasonably foreseeable consequence of the robbery, given how J and F chose to commit the robbery. J and F both brandished firearms at S. Because they have it pointed at someone and clearly there is no safety on, it is reasonably foreseeable that they would use the firearms in the commission of the offense or even that a firearm may accidentally discharge, harming someone. Thus, J could be found guilty of C's death under the felony murder rule.

As to F's death, there are two theories as to whether J would be liable for it. Under the majority theory, a defendant is not liable of a co-conspirator's death by a third party (such as a victim of the offense, here S). This theory believes that F's death is not foreseeable, since a third party took independent action and caused the death. However, under the minority theory, such an action is foreseeable since the defendant was already involved in such a dangerous offense and any resulting death is foreseeable. Thus, under the minority theory, J would be held liable, but J would not be held liable under the majority view. Accordingly, depending on whether the jurisdiction follows the majority or minority rule, J could also be found liable for F's death.

B. Second degree murder is the codification of common law murder. Common law murder has four variations: (a) a malicious intent to murder another (b) a malicious intent to cause substantial bodily harm (c) a disregard for human life, and (d) murder while committing a dangerous offense (i.e., felony murder).

(a) malicious intent to murder another. It does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(b) malicious intent to cause substantial bodily harm. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(c) disregard for human life. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed

towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(d) felony murder. As noted above, J could be found guilty of felony murder of C. And depending on the rules of the jurisdiction, he could also be found guilty of murder of F under this theory.

C. Voluntary Manslaughter. Voluntary manslaughter is the codification of murders committed while the defendant is still under the stress of an event. These murders are often described as heat of the passion murders. The prototypical example is when a husband walks in on his cheating spouse and immediately murders the spouse and/or spouse's lover. Here, the murder of F and C did not occur while J was under the stress of any event--the robbery was a pre-planned event between J and F. Thus, J could not be charged with voluntary manslaughter.

D. Involuntary Manslaughter. Involuntary manslaughter can be thought of as criminal negligence. This charge is generally used to charge drunk drivers when they murder someone. Here, it is possible that J could be convicted of involuntary manslaughter. Here, J, in holding the firearm, had a duty to take the precautions that someone holding a firearm should, i.e., hold it steady, don't drop it, keep the safety on until you are ready to discharge. J did none of those things. He did not have the safety on, he did not hold the firearm steadily, thus breaching his duty of care when he dropped it and it discharged. And his dropping of the firearm caused the death of C--but for him dropping it, C would still be alive. Thus, J could be charged under this theory as well for the death of C.

## Conspiracy

Also, J could be charged with a conspiracy. A conspiracy is an agreement between 2 or more persons for a criminal purpose to act in furtherance of that criminal purpose. The modern jurisprudence also requires the commission of an overt act in furtherance of a conspiracy. Under the modern jurisprudence, the crime is committed once an overt act has occurred, and the defendants can no longer withdraw from the conspiracy at that point. Here, although there is no written agreement between the J and F (and a written agreement is not required but would help if you're prosecuting these types of crimes), J and F are clearly in agreement that they were going to rob the store. J and F, prepared with guns, armed themselves with firearms and both drew their guns at the store clerk and demanded money. Here, their actions clearly demonstrate they were acting in concert with one another towards to the same agreed upon goal--the commission of a robbery. They have also clearly committed an overt act, in furtherance of their criminal purpose--they drew their guns and demanded money from the store employee S. Upon completion of the overt act, the crime of conspiracy is completed, and neither could withdraw from the conspiracy.

## **2. Incident at Park Street.**

Here, J could be charged for attempt 1st degree or 2nd degree murder. To be convicted of an attempt, a defendant must have the intent to commit a specific offense and take a substantial step in furtherance of that crime. The substantial step need not be criminal in nature, but it must be in furtherance of the offense (i.e., it takes defendant one step closer) and cannot simply be planning or preparation.

Here, J had the intent to commit 1st or 2nd degree murder. Specifically, he had the

intent to commit a premeditated murder (1st degree) or intent to maliciously murder another or cause substantial bodily injury (2nd degree). As to the premeditated murder, premeditation does not need to be a long-drawn out plan. Premeditation can occur instantly so long as defendant has sufficient time to intend to murder before attempting to do so. Here, upon seeing S, J believed that he should murder her to eliminate her as a witness to his robbery and other offenses. J had enough time to come to a decision to murder S in a cool, dispassionate matter. Alternatively, if J did not form the requisite intent and did not have time to premeditate, he could alternatively be charged with murder in the 2nd degree. As discussed above, murder in the second degree includes a malicious intent to kill or to cause substantial bodily harm. J clearly had both of those intents as he hoped to eliminate S as a witness by killing her. Thus, alternatively, if he did not have time to come to a cool dispassionate decision to murder S while he was driving past her, he did have the requisite intent to commit a second-degree murder. In addition, Jim took a substantial step towards his offense--he actually fired his gun at S hoping to kill her. Even though the bullet missed her and the substantive, underlying crime (murder) was not completed, J completed the crime of attempt when he took this substantial step.

Accordingly, J can be found guilty of attempt murder.

### **3. Suppression of the Gun**

The Fourth Amendment protects against unreasonable searches and seizures. To trigger the protections of the Fourth Amendment, the search/seizure must have been done by a government actor. Here, the search and seizure were done by Officer Bakari (Off B), who works for some type of government entity (either local, state, or federal



police department). And the search that was done was of Jim's person, thus Jim has standing to challenge the seizure of the firearm.

An unreasonable search/seizure is one that is done where an individual has a reasonable expectation of privacy. Those areas include an individual's person and their home. An individual has a lesser privacy interest in their vehicle.

Here, Off B pulled over J because J looked nervous. Off J had no knowledge of the events at the store or on Park Street. Off B just stopped J because J looked nervous.

An officer can stop an individual for a reasonable period based on reasonable suspicion that that individual committed a crime. The officer must be able to point to specific articulable facts justifying the reasonable suspicion/stop. Notably, a stop can be pretextual (see *Whren*), but there still must be reasonable suspicion for the stop. Here, at a suppression hearing, Off B would testify simply that J looked nervous. That is not sufficient to justify the stop, because nervousness, on its own, does not suggest any evidence of criminal activity. It is totally possible that J is simply a nervous driver.

Accordingly, the stop was in violation of the 4th Amendment. Any evidence that is found in violation of an illegal stop must be suppressed in accordance with the fruit of the poisonous tree doctrine. And accordingly, the firearm would be suppressed. (Also, note that there are no facts that would suggest that the firearm would be found in the normal course in the investigation, negating any exception such as inevitable discovery or collateral source doctrine).

Assuming *arguendo* that the stop was legal, Off B then did a pat down search of J. It should be first noted that an officer may ask an individual to exit their car during a lawful search. Searches generally need to be done in accordance with a search warrant;

however, there are exceptions to the warrant requirement, including but not limited to a search incident to arrest, exigent circumstances, Terry search, automobile exception, and administrative searches. Here, J was not under arrest at this time, there were no exigent circumstances justifying the search, and there was no administrative search. Off B could try to justify his search under the automobile exception. An individual has a lesser privacy interest in his/her vehicle because vehicles are so regulated. However, to search a vehicle after a lawful traffic stop, an officer must have probable cause that he will find evidence of an offense. (This most commonly occurs when the officer, after a stop, smells drug use or sees drugs/alcohol in plain view). Because Off B did not know of the previous crimes and was only stopping J because he looked nervous, Off B did not have PC that a crime had occurred and could not justify his search. Off B then could alternatively try to justify his search as a Terry frisk. A Terry frisk is not a search for evidence of a crime, but a safety pat down to ensure that an individual is not dangerous. To justify a Terry frisk, the officer must have reasonable suspicion that a defendant is dangerous or trying to flee. Here, Off B would testify that J looked nervous and that he had a visible bulge. There are no facts to suggest that the bulge was in the shape of a firearm or other weapon, however. Also, J looked nervous prior to the stop. Thus, a likely result is that the Terry frisk will be deemed a search without reasonable suspicion and thus found in violation of the 4th Amendment. Thus, the search of J's person was in violation of the 4th Amendment as no exceptions to the warrant requirement apply. Accordingly, because the stop and the search were both in violation of the 4th Amendment, the firearm will likely be suppressed.

## **QUESTION 2**

Harry had premarital savings of \$10,000 in a bank account when he married Winona in California in 2015. After the wedding, Harry started working at a new job and deposited his \$3,000 salary check into the account. Shortly afterward, he paid \$2,000 for rent and \$2,000 for living expenses with checks drawn on the account. He then bought \$1,000 in Acme stock in his own name with another check drawn on the account. The Acme stock increased in value over time.

During the marriage, Winona purchased disability insurance out of her salary. She later became disabled and could no longer work. As a result, she became entitled to monthly disability insurance payments, which will continue until she reaches the age of 65.

Thereafter, Harry and Winona decided to live separately, but to go to counseling with the hope of reconciling. After Harry moved out of the family home, he used his earnings to gamble at a local casino, winning a large amount of money with which he opened an investment account in his own name. Harry did not tell Winona about his winnings or investment account because she did not approve of gambling.

Subsequently, after a period of counseling, Harry and Winona concluded that they would not reconcile and Harry filed for dissolution. A few days later, Harry took out a loan to pay for a sailboat, hoping that sailing would relieve the stress of the divorce.

What are Harry's and Winona's rights and liabilities regarding:

1. The Acme stock? Discuss.
2. Winona's post-separation disability insurance payments? Discuss.
3. The investment account? Discuss.
4. The loan for the sailboat? Discuss.

Answer according to California law.

## **QUESTION 2: SELECTED ANSWER A**

### **INTRODUCTION**

California is a community property state. The marital community begins upon the formation of a valid marriage and terminates upon permanent separation, divorce, or death of a spouse. During marriage, all earnings and income of both spouses, and all property acquired by either spouse during the marriage with community funds, are part of the marital community and are considered to be community property ("CP"). All income and property owned by either spouse from before marriage, as well as earnings through inheritance, gift, or bequest during marriage, are separate property ("SP") of the recipient spouse. All debts and liabilities of both spouses from before and during the marriage are generally presumed to be CP. All debts and liabilities of each spouse after permanent separation or dissolution are generally SP.

### **1. ACME STOCK**

#### **Presumption--CP**

All property acquired by either spouse during the existence of a valid marriage is generally presumed to be CP. In this case, Harry acquired the Acme stock after the formation of the marital community. Thus, the stock will generally be presumed to be CP, although Harry will try to rebut this presumption.

#### **Action: Titling Stock in Harry's Name Alone/Transmutation**

If property is acquired as community property, the action of titling the property in one spouse's name alone will not suffice to change the nature of the property. Since 1984, in order to change the nature of acquired property from community property to separate property, there must be an express writing by the adversely affected spouse assenting

to the change in nature of the property.

In this case, Harry may attempt to argue that the Acme stock is his separate property because it is titled in his name alone. However, that alone is not sufficient to change the nature of the property. Moreover, the facts do not indicate that there is any writing by Winona acknowledging the nature of the change in status of the stock, or that she even knew about the existence of the stock. As such, Harry's titling the property in his name will not suffice to rebut the presumption of it being community property, without more.

#### **Source: Harry's Bank Account**

Harry will argue that the stock is his separate property because the purchase was conducted via a bank account that contains his premarital savings of \$10,000. Savings from before marriage are Harry's SP. However, the facts also indicate that following the marriage, Harry deposited \$3,000 of his salary into the account. All wages and salaries earned by both spouses during the marriage are for the benefit of the community and are community property. Thus, because Harry commingled community property and separate property in his bank account, he may attempt to rebut the presumption of community property through tracing.

#### Tracing

When separate property and community property are commingled, a spouse may establish that the source of funds was separate property through tracing.

#### *Direct Tracing*

A spouse may trace the source of funds to separate property by directly linking a deposit of separate property to a purchase, so long as the spouse had intent to purchase the property as separate property.

In this case, Harry had deposited \$3,000 of CP into the account before making the \$1,000 purchase of stock. All of the other deposits seem to have been made prior to the marriage. Thus, Harry will be unable to directly trace the source of the funds to SP. Moreover, the facts are unclear as to whether Harry intended the stock to be SP when he purchased it. He placed the stock in his own name, but without more, he probably cannot establish intent to keep the stock as SP.

### *Exhaustion*

Alternatively, a spouse may establish that any CP funds in a commingled account were exhausted prior to the purchase of purported SP.

In this case, Harry deposited \$3,000 of CP into the bank account. He then paid \$2,000 for rent and \$2,000 for living expenses. Rent and living expenses of spouses during the marriage are CP. When a commingled account is used to pay for CP liabilities, it is presumed that CP funds are withdrawn first, followed by the spouse's SP. Because the total of CP costs withdrawn from the account are \$4,000, which exceeds the CP deposit of \$3,000, Harry will be able to establish that the CP funds in his bank account were exhausted prior to the purchase of the stock, and that the source of the funds can be adequately traced to Harry's pre-marriage SP savings.

### **Distribution**

The Acme stock is Harry's SP, because the CP funds in the account were exhausted before he purchased the stock, and he will be able to establish the source of the funds for the stock as his SP savings. As such, the stock, along with the increase in value that occurred during the existence of the marriage, will be assigned to Harry upon divorce.

## **2. WINONA'S POST-SEPARATION DISABILITY PAYMENTS**

### **Disability Insurance--Presumed CP**

The disability insurance was purchased by W during the existence of the marriage.

Moreover, the source of the payment of the insurance policy was W's salary, which is CP. Thus, the insurance policy qualifies as CP.

### **Disability Payments**

When a spouse receives disability or other payments, the court will first look to whether the payments are intended to compensate for past work or to replace future earnings. In this case, W purchased the insurance policy during the marriage with CP, as discussed above. The facts indicate that the disability payments will continue until W is 65 years old. Thus, it appears that the disability payments are meant to replace future earnings, rather than compensate for past earnings. As such, all payments received by W prior to permanent separation are CP, as they acted as a replacement for W's earnings during the existence of the marriage.

### **When did separation occur?**

Since 2017, permanent separation occurs in California when one spouse indicates intent to permanently end the marriage, and that spouse's behavior is consistent with that intent. Living separately is not required but will be considered when examining the intent and behavior of the spouses.

In this case, the facts indicate that H and W decided to live separately but continued to go to counseling in the hopes of reconciling. After a period of counseling, H filed for dissolution after deciding that they could not reconcile. Even though the spouses were living separately, they were attempting to reconcile. As such, it cannot be said that

either spouse had intent to permanently end the marriage at that point. However, at a later point, W and H decided that they could not reconcile, and H then filed for dissolution. Because H's filing for dissolution is consistent with his intent to permanently end the marriage, the court will determine that permanent separation occurred at that point. Prior to H filing for dissolution, permanent separation had not occurred, even though the spouses were living separately.

### **Disability Payments Post-Separation**

When disability payments that replace future earnings are received by a spouse after permanent separation, those payments are that spouse's SP. In this case, W will continue receiving disability payments until she is 65. The payments she receives after dissolution will replace earnings that she would have acquired through labor. All payments received after H filed for dissolution will be considered to be W's SP.

### **Distribution**

All of W's disability payments prior to H filing for dissolution are CP and will be assigned to the marital estate. All payments received after H filed for dissolution are W's SP and will be assigned to her.

## **3. INVESTMENT ACCOUNT**

### **Presumption=CP**

As discussed above, the marital community did not end, and permanent separation did not occur, until H filed for dissolution. H may argue that the parties were separated and that the account is his SP. However, the purchase of the investment account occurred during the existence of the marriage because the spouses were attempting to reconcile at that point. As such, it is presumed to be CP.



**Action: Titling Account in Own Name/Transmutation**

See rule above. The fact that H titled the investment account in his name alone is not by itself sufficient to change the nature of the account. Moreover, the facts do not indicate that there is any writing by W acknowledging the change in character of the property, or that she knew about the account at all. Rather, the facts indicate that H did not tell W about the account because she did not approve of gambling. Thus, H will need to provide more facts in order to establish a change in the nature of the account.

**Breach of Fiduciary Duty**

Spouses are considered to be fiduciaries of each other and owe each other the highest duties of good faith and loyalty. When a spouse breaches his fiduciary duty, a court may take that into account when distributing community property and may assign the non-breaching spouse a higher share of the CP or take other action consistent with remedying the breach.

In this case, the facts indicate that H won a large amount of money gambling at a casino. Because W does not approve of gambling, H declined to tell her about the winnings and instead opened an investment account in his own name. The court will likely find that this action constituted a breach of H's fiduciary duty to W. H had a duty to keep W apprised of his financial status, and not to take actions in order to disadvantage W. When H opened the account without telling W, he was presumably attempting to hide earnings from W in order to benefit himself in a possible future divorce. This is a clear breach of fiduciary duty.

**Distribution**

Because the investment account was purchased during the existence of the marriage

and there are no facts indicating that a valid transmutation occurred, the account is CP and will be divided equally between the spouses upon divorce. However, because H breached his fiduciary duty to W by refusing to tell her about the account and attempting to hide its existence from her, the court may determine that W is entitled to a larger share of CP.

#### **4. LOAN FOR THE SAILBOAT**

##### **Debts**

All debts and liabilities of both spouses before and during the existence of the marriage are CP. All debts and liabilities by spouses after divorce or permanent separation are that spouse's SP. An exception exists if the debt or liability is for necessities of life, such as food or medical expenses.

##### **End of Marital Community**

See discussion above. Although H and W started living separately prior to H filing for dissolution, the court will determine that the marital community did not end until H filed for dissolution, because prior to that point the spouses were attempting to reconcile.

##### **Action: Acquiring the Loan After Filing for Dissolution**

Debts acquired by both spouses after permanent separation or dissolution are SP of the debtor spouse. In this case, the facts indicate that H took out the sailboat loan a few days after filing for divorce. Even though the marriage had not been formally dissolved at that point, the fact that H and W had decided that they could not reconcile, and that H had filed for dissolution indicates that permanent separation had occurred. Thus, the loan will be assigned to Harry as his SP.

### **Liability of H's SP for Loan**

Because the loan is H's SP, his SP will be liable for payment of the loan.

### **Liability of CP for Loan**

If a loan is acquired by a spouse following permanent separation, the loan will be the debtor spouse's SP, and the CP will not be liable for the debt. An exception exists for necessities of life, for which CP may be liable even following permanent separation. H may attempt to argue that the sailboat loan qualifies as a necessary, because it helped him to cope with the stress of the divorce. However, the court will not accept that argument, as the loan was not necessary to sustain H's health or life.

### **Liability of W's SP for Loan**

If a debt acquired after separation may be satisfied from CP, the non-debtor spouse's SP may also be reached if all other funds are exhausted. The non-debtor spouse may protect their SP from liability by keeping their money in a bank account titled in their name alone and to which the debtor spouse does not have access.

In this case, as discussed above, the CP is not liable for H's sailboat loan, because it was acquired after separation and is not a necessary of life. As such, W's SP will also be protected from liability for the loan.

### **Distribution**

The loan is H's SP and will be satisfied from his SP funds.

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

### **Community Property Essay**

California is a community property state. This means that the marital economic community begins at marriage and ends at divorce, or permanent separation, or the death of a spouse. All earnings made during a valid marriage are considered community property (CP), and all things purchased with those earnings are also considered CP. Property acquired before marriage or after divorce or permanent separation is presumed separate property (SP). Additionally, all property acquired during marriage by either gift or inheritance are considered SP.

#### **Valid Marriage**

In California, a valid marriage requires (1) consent, (2) capacity, and (3) legal formalities. Here, the facts simply state that Harry (H) and Winona (W) were married in California in 2015. Therefore, it is presumed they had a valid marriage that began in 2015.

#### **Permanent Separation**

Permanent separation ends the marital community. This occurs when one spouse (1) communicates to the other spouse a desire to end the marital community, and (2) conduct in conformity with that desire. Permanent physical separation is no longer required. Here, at some point, H and W decided to separate but continued to go to marital counseling before there was a final dissolution of the marriage. Although there was a physical separation between H and W when H moved out of the family home, the fact that both sought marriage counseling indicates that they wanted to work things out and there was no set intent on ending the marital community with conduct in conformity

with that intent. Therefore, although H and W physically separated, it is unlikely that the marital community ended until there was a final dissolution.

## **1. Acme Stock**

### CP Presumption

The general presumption is that all property acquired during a valid marriage is CP. This presumption can be rebutted by a preponderance of the evidence that the property acquired was traced from a separate property source or an agreement between the spouses to keep certain property separate.

Here, the Acme stock was purchased after H and W were married. Therefore, the general presumption is that it is CP.

### Earnings

A spouse's labor, skill, and effort are considered community assets and therefore, the earnings of a spouse during a valid marriage are CP, absent agreement between spouses to contrary. Here, Acme stock was purchased from funds in bank account that had H's earnings deposited into it, and those earnings were acquired during marriage. Therefore, account that purchased Acme stock had CP earnings in it. But H's account also had premarital savings of \$10,000 which are H's SP. H will likely want to claim Acme stock as his own SP and must therefore rebut CP presumption by tracing the purchase of stocks to his SP.

### Tracing to SP

CP presumption can be rebutted if spouse demonstrates that funds used to make purchase came from SP source. If this evidence is proffered, then spouse is entitled to refund of SP contribution but not any increase in the value of the property acquired with

SP funds.

Here, H will want to argue that Acme stock is his SP. Since it was acquired during marriage, H must overcome CP presumption. Since H purchased stock from commingled account that had both CP and SP in it, H can only establish Acme stock as his SP if he can show direct tracing or exhaustion method.

### Direct Tracing

Direct tracing requires that the spouse show that the funds used from commingled account to purchase property came from a SP deposit, and CP funds were not used. It is not enough for the spouse to show that the account had more SP funds than CP funds at time of purchase. Generally, a spouse can prove direct tracing by keeping conspicuous records of the deposits and credits of the account and their characterizations (CP or SP). With this information, the spouse must then show that he had the intent to make purchase with SP funds and the proof of the SP deposits and credits that demonstrate such SP funds were in fact used to make the purchase.

Here, H had \$10,000 SP funds in account and H also deposited CP earnings into same account. Facts are unclear as to whether H intended purchase of Acme stock to come from SP funds in account, and the facts are also silent as to H's accounting practices that would help corroborate that needed intent. For these reasons, it is unlikely that H can demonstrate direct tracing.

### Exhaustion Method

The exhaustion method of tracing requires that the proponent spouse show that the commingled account was depleted of all CP funds at the time of the purchase, and the only remaining funds in the account to make the purchase were SP funds. It is

presumed that family expenses are paid with CP funds first, and then SP funds. Here, account had \$10,000 SP, then H deposited \$3,000 salary check (CP), and thereafter withdrew \$2000 for rent and \$2,000 for living expenses. Since H and W lived in the family home prior to separation, the rent payment and living expenses payments are considered family expenses to be paid from CP funds first. Since CP funds in account only totaled \$3,000 and the family expenses totaled \$4,000, there was not enough CP in account to pay off those family expenses. Therefore, \$1,000 of H's SP funds were used to pay the rest. After this payment, the account only had \$9,000 left, which is considered H's SP. Thereafter, H made purchase of Acme stock. Since CP funds depleted from account at time of purchase, exhaustion method can be properly used here to help H prove that Acme stock was purchased with SP funds and therefore H is entitled to reimbursement for his SP contribution to the Acme purchase.

#### Title

A spouse placing title to property in his or her name alone does not change the character of the property without more, such as a valid transmutation. Therefore, the fact that H bought stock in his name alone is not determinative on this issue.

#### Conclusion

H can trace Acme purchase to SP funds using exhaustion method. Therefore, H is entitled to his \$1,000 SP contribution for the purchase of that property but not any increase in value of the stock beyond that amount. The appreciation is considered CP.

## **2. Post-Separation Disability Insurance Payment**

#### CP Presumption

See above rule. Here, W purchased disability insurance during marriage. Therefore, it is

presumed CP.

### Earnings

See above rule. Here, the insurance was bought with W's earnings made during marriage, which makes the earnings CP, as well as the property purchased with those earnings (i.e., the insurance policy).

### Disability Insurance Payment

Disability payments will generally be considered the disabled spouse's SP upon dissolution, but if the disability payments were, in part, given as a form of prior compensation, then the community is entitled to its proportionate share of the disability payments that reflects the compensation earned during marriage.

Here, W purchased the disability insurance during marriage with CP earnings.

Therefore, the community is entitled to an interest in the policy and the policy is generally considered CP until divorce. W became disabled while still married to H and began receiving disability payments. These payments made while H and W were still married will be considered CP. But after H and W dissolved their marriage, the court will likely find that it would be equitable for W to be entitled to most of the proceeds for the disability payments because she resultingly became disabled and likely needs the policy payments to replace her lost earnings. But the community will likely be entitled to any CP contributions made to acquire the policy (i.e., the premiums paid out of W's earnings).

## **3. Investment Account**

### CP Presumption

See above rule. As noted above, although H and W physically separated in prior to their



dissolution, since they both sought marriage counseling, it is likely that they would not be deemed to have permanently separated until the dissolution. Here, H acquired the gambling winnings used to fund the investment account after using his earnings made after separation. This would usually result in the investment account and the gambling winnings being considered SP because earnings after separation are SP as well as things purchased with SP earnings. But since there was no permanent separation at the point in time when H made those earnings (see above analysis) used to gain gambling winnings, the earnings were still CP and thus, the gambling winnings acquired from those earnings and the investment account funded with those winnings are also presumptively CP.

#### Breach of Fiduciary Duties

Spouses owe fiduciary duties to each other to act in the highest of good faith and fair dealings. Spouses must be loyal to each other, and each is entitled to a full account and disclosure of the community estate and in some instances, the other spouse's SP interests. It is a breach of a spouse's fiduciary duties to actively conceal property from the other in order to derive a secret profit from the property. This is a breach of the duty of loyalty.

Here, H likely breached his fiduciary duty of loyalty to W when H did not disclose the fact that he used CP earnings to gamble and take a substantial amount of gambling winnings to open up an investment account in his name alone. As noted above, the investment account is presumptively CP, and therefore, W has an interest in the winnings and investment account. The fact that H did not disclose any of this to W may be found to be active concealment which could lead the court to punish H for such

breach by depriving him of any interest in the investment account.

#### Title

See above rule. Here, although H titled the investment account in his name alone, this does not change the character of the account to SP.

### **4. Loan for Sailboat**

#### Debts and Creditor Rights

Generally, debts acquired before or during marriage, by either spouse are considered community debts. These community debts are first paid with CP and then the SP of the spouses. After permanent separation, debts acquired by either spouse are usually considered the separate debt of the debtor-spouse. While permanently separated but before divorce, the debts acquired by one spouse for necessities can result in the non-debtor spouse's SP being reached to satisfy those debts for necessities during separation.

#### SP Presumption

See above rules. Here, H acquired a loan for a sailboat. This loan was acquired after H and W concluded counseling would not help their marriage and H filed for dissolution. Since this debt was acquired either after permanent separation or divorce, the loan is the SP debt of H, rather than it being a community debt. Therefore, the loan on the sailboat will be H's separate debt.

### **Division of Community Estate**

At the end of the marital economic community, the community property is usually divided equally among the spouses. Each spouse is entitled to a 1/2 portion of the net community estate.

### **QUESTION 3**

Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue. On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene. When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater.

Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family.

As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise. Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end.

Pedro approached Diana. She explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything.

Pedro intends to sue Diana.

1. What claims may Pedro reasonably assert against Diana? Discuss.
2. What remedies may Pedro reasonably seek? Discuss.

### **QUESTION 3: SELECTED ANSWER A**

#### **Pedro v. Diana**

##### **1. Pedro's Claims Against Diana**

The issue is which claims that Pedro may assert against Diana.

##### **Private Nuisance**

The issue is whether Pedro may assert a claim for private nuisance against Diana due to the excessive noise and vibration from the open-air theater. A claim for private nuisance can be established by demonstrating that the defendant is causing a substantial and unreasonable interference with the plaintiff's use and enjoyment of the property. Interference is considered substantial when a reasonable person would find that there has been a significant deprivation of his or her ability to enjoy the property. A plaintiff's hyper-sensitivities are ignored when a court is adjudicating whether a nuisance exists.

Here, the facts describe the noise level coming from the rock concerts as "horrific." The floor shakes and Pedro is precluded from having even a normal conversation in his own home. Pedro purchased the home because he thought it was going to be a perfect place to raise a family. Much to his horror, the loud noise from the rock concerts coming from the open-air theater constitute a substantial and unreasonable interference with his use and enjoyment of his residence. Pedro does not appear to be hypersensitive to the noise, given that his neighbors have also complained to Diana about the noise level on the property. Further, a reasonable person would find a substantial and unreasonable interference with the enjoyment of his or her own home if the floor was shaking every weekend and conversations could not be had. Diana may argue that no reasonable

person would see this as a substantial interference because she has taken steps to mitigate the noise and resulting inconvenience as a result of the rock concerts (e.g., she only hosts rock concerts on weekends, the concerts must be done by 11:00 p.m., and she has set a maximum noise level). Diana also appears to be considering installing sound-deadening equipment as evidenced by her taking measurements in Pedro's backyard. But Diana's arguments are not likely to be availing given the significance of the disruption that Pedro is suffering.

Thus, Pedro can assert a viable claim for private nuisance against Diana.

### Public Nuisance

The issue is whether Pedro may assert a claim for public nuisance against Diana. A claim for public nuisance can be established by an unreasonable interference with the health, safety, and morals of the community at large. To recover under a theory of public nuisance, the plaintiff must suffer unique damages.

Here, Pedro will argue that the public health and safety is being threatened by horrific loud noise coming from the rock concerts at the theater every weekend. However, Pedro's claim for a public nuisance suffers because he cannot identify that he has suffered unique damages. In particular, Pedro's neighbors have already complained about the noise. Pedro also lives in a subdivision located adjacent to the theater.

Pedro's interest as a homeowner of one home in this subdivision that is experiencing noise is not unique as compared against to any other member of the residential community. Further, Diana will likely entirely contest that the theater is a public nuisance at all because the community thrives upon the inclusion of the theater; it is a cornerstone of the community and a focus of the cultural scene.

Thus, Pedro is not likely to assert a viable claim against Diana for public nuisance.

### Trespass to Land

The issue is whether Pedro may assert a claim for trespass to land against Diana. A trespass to land is an intentional tort. Trespass to land requires the showing of: (i) an intentional act on the part of the defendant, (ii) a physical invasion of real property, and (iii) causation, meaning that the defendant's conduct was a substantial factor in causing the injury.

Here, Diana went to Pedro's house without his permission. She intended to come onto Pedro's property to determine whether sound-deadening materials might be added. She then voluntarily let herself into Pedro's backyard, which constituted a physical invasion of Pedro's real property. Moreover, Diana caused the action to occur because her letting herself into the backyard was the substantial factor in causing the trespass.

Thus, Pedro can reasonably assert a claim against Diana for trespass to land.

### Conclusion

Therefore, Pedro can assert claims for private nuisance, public nuisance, and trespass to land against Diana.

## **2. Remedies that Pedro May Seek**

The issue is which remedies Pedro may seek against Diana.

### Compensatory Damages

The issue is whether Pedro may obtain compensatory damages from Diana for the nuisance claims. Compensatory damages are meant to compensate the plaintiff for foreseeable losses and may be pecuniary or non-pecuniary (such as pain and suffering). Compensatory damages must also be certain and unavoidable. Traditionally,

the method of damages calculation for a nuisance claim is the loss of use and enjoyment of the property plus any costs incurred while attempting to abate the nuisance. Courts will also offer an additional award to the plaintiff for the discomfort incurred as a result of the nuisance. Modernly, some courts are applying the doctrine of "permanent nuisance" when calculating a damages award in order to reduce the multiplicity of lawsuits that are being filed. Under this damages model, the plaintiff is entitled to recover as damages the diminution in value of his or her land.

Here, if the court applies a traditional damages calculation, Pedro will be entitled to his loss of use and enjoyment in his residence. The facts do not indicate that Pedro incurred any costs in an attempt to abate the nuisance. In fact, the only action that he took to abate the nuisance was when he approached Diana and explained to her the complaints about the nuisance. Pedro did not incur any costs as a result of having this conversation. The court will make a reasonable award of damages to compensate Pedro for the discomfort caused. Diana may argue that Pedro's damages award should be reduced by his knowing purchase of a residence in close proximity to a theater that is known to host rock concerts.

If the court applies the "permanent nuisance" doctrine, then Pedro will be entitled to recover the value of the diminution in his land as a result of the rock concerts. Diana will similarly argue that Pedro's recovery will need to be reduced by virtue of his assumption of the risk of coming to the nuisance.

Thus, Pedro can recover compensatory damages under either of the models above.

### Nominal Damages

The issue is whether Pedro may obtain nominal damages from Diana for the trespass to

land. Nominal damages are those that are obtainable by a plaintiff when no harm was actually suffered (as in a simple trespass to land case).

Here, Pedro did not suffer any damages as a result of Diana entering his property without his permission. The facts indicate that Diana left without disturbing anything in the backyard; thus nothing was damages as a result of Diana's conduct. Pedro can only be entitled to nominal damages from Diana for the trespass to land.

Thus, Pedro can recover nominal damages from Diana for her trespass to land.

### Punitive Damages

The issue is whether Pedro may seek punitive damages against Diana. Punitive damages are designed to punish a defendant for intentional conduct arising out of an intentional tort. Here, Pedro will not likely be able to recover punitive damages from Diana because she has acted in good faith by establishing reasonable parameters to confine the impact of the noise from the rock concerts. Thus, Pedro will not be able to seek punitive damages from Diana.

### Permanent Injunction

The issue is whether Pedro may obtain a permanent injunction against Diana enjoining rock concerts at the open-air theater. An injunction is an equitable remedy. A permanent injunction will last for the amount of time imposed by the court. A negative injunction enjoins the defendant from engaging in a specified activity. A mandatory injunction orders the defendant to perform an affirmative act. The elements of a permanent injunction are (1) inadequate remedy at law, (2) the injunction is feasible, (3) the balancing of hardships weighs in favor of granting the injunction, and (4) no defenses apply. Each element will be discussed in turn below.



### *Inadequate Remedy at Law*

The issue is whether there is an adequate remedy at law. If a violation is continuing, a court will deem that there is no adequate remedy at law.

Here, the nuisance is continuing. In fact, on weekend evenings, Diana hosts rock concerts at the theater. The theater is a large open-air theater and Diana explained that the loud rock concerts will need to continue.

Thus, there is no adequate remedy at law.

### *Feasibility of Enforcement*

The issue is whether an injunction is feasible. The feasibility of enforcement turns on whether the injunction will be mandatory or negative. See above for the definitions of mandatory and negative injunctions. There are no feasibility issues with negative injunctions because the court can merely exercise its contempt power and hold the defendant in contempt of court if the defendant commits an act that it is enjoined from engaging. There are feasibility issues with a mandatory injunction, however, because it requires the court to supervise the defendant in ensuring that the defendant is complying with the injunction. Generally, the scarcity of judicial resources precludes courts from acting as supervisors to enforce mandatory injunctions.

Here, Pedro will request a negative injunction in that the theater be enjoined from hosting further rock concerts. This will be feasible to enforce because the court can simply hold Diana in contempt of court if it learns that she sponsors a rock concert in violation of the injunction order.

Thus, enforcement of the injunction is feasible because it will be a negative injunction.

### *Balance of Hardships*

The issue is whether the balance of hardships will favor the granting of injunctive relief.

In effectuating the balancing test, the court will balance the interests of the plaintiff in obtaining the injunction against the interests of the defendant and the public. If the burden to the defendant and the public outweighs the benefit to the plaintiff, then damages will be deemed an adequate remedy and an injunction will not be proper.

Here, Pedro will argue that the balance of hardships tip in his favor because the noise from the rock concert is horrific and causing the floor to shake. Pedro cannot even maintain a conversation in his home due to the severe noise. Moreover, Pedro will argue that the public interest weighs in his favor because Pedro's neighbors have complained to Diana about the noise and vibration, and they received no meaningful response from Diana. Further, the theater is also rented to local dance companies during the week and generates revenue that way; it cannot be said that the theater is wholly dependent upon rock concerts for revenue generation.

On the contrary, Diana will argue that her interests and the public interests will be significantly burdened if an injunction is issued against her. With respect to Diana, she has owned the facility for 30 years; in fact, she built it. At the time that she built the facility, it was near the edge of the city, and it was only as time went by that the city development expanded to include housing in the vicinity of the theater. The theater cannot survive economically without rock concerts and thus Diana's financial interests could be wholly, negatively impacted. Moreover, Diana will argue that the public interest will lie against granting injunctive relief because the theater employs 200 people and has been a focus of the city's cultural scene for many years. Without the rock concerts, the theater will become bankrupt, and 200 citizens will be out of work.

Moreover, Diana has already taken steps that will work to mitigate the amount of the nuisance. Not only are rock concerts only on the weekend, but she requires that all concerts end by 11:00 p.m.; Diana also set a maximum noise level. Pedro's neighbors further dropped their complaints about the noise and Diana is taking reasonable measures to ensure that the nearby housing is only minimally impacted by the nuisance.

In consideration of all of this evidence, a court will likely side with Diana in concluding that the public interest and her interests outweigh the burden on Pedro. An injunction would have an overall negative impact of the economy and the culture of the community, force numerous people out of jobs, forfeit revenue brought in by the rock concerts, and cause the theater to close its doors.

Thus, on balance, the balance of hardships weighs against granting a permanent injunction.

#### *Defense - "Coming to the Nuisance"*

The issue is whether Diana can raise the defense of "coming to the nuisance" in precluding Pedro from obtaining injunctive relief. "Coming to the nuisance" means that the plaintiff voluntarily encountered the nuisance and decided to live near the nuisance anyway. "Coming to the nuisance" is generally not a defense to equitable relief.

Here, Diana may argue that Pedro came to the nuisance and thus assumed the risk because he knew about the theater when he purchased the house. But that will not be a successful defense in the injunction action. (Diana could assert this in response to the damages award so that Pedro's damages can be mitigated by those that would have been avoidable.)

Thus, "coming to the nuisance" is not a defense to the injunction.

### *Conclusion*

Thus, it is likely that Pedro may reasonably seek a permanent injunction from Diana, but it will likely be denied on the basis of hardship.

### Overall Conclusion

Therefore, Pedro may reasonably seek injunctive relief and damages remedies against Diana.

### **QUESTION 3: SELECTED ANSWER B**

#### **I. PEDRO'S CLAIMS AGAINST DIANA**

##### **Trespass to land**

Trespass to land is intentional physical invasion of the land of another. Knowledge of legal title or intent to legally invade is not necessary; only the intent to physically invade suffices.

Here, "A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything." As such, D physically entered P's backyard, which is P's land, without consent. Although D did not intend to interfere with P's rights, D intended in fact to enter P's backyard physically. This satisfies the intent requirement.

In conclusion, D committed trespass to land and is liable

##### **Defense of consent or private necessity fails**

Consent is a defense to trespass to land. Consent may be express or implied. Necessity is also a defense that exists when the action was justified because the trespass was done to prevent an imminent harm. Private necessity is when trespass was necessary to prevent harm to a private interest. Public necessity applies when the imminent or threatened harm was to the public. Public necessity is immune to damages caused by trespass. Private necessity claimant is still responsible for damages caused by trespass.

Here, D may raise the defense of consent or private necessity. Consent defense fails

because D did not seek P's consent expressly. Further, the mere owning of land does not imply consent to let others enter the backyard, even if they seek to enter to help the landowner. Further, any private necessity argument is weak. D could argue that it was necessary for D to measure P's land to help P. However, D could simply have asked P before entering. Since D forgot, D could have called P or returned at some other time. Since D simply entered P's backyard without seeking any form of consent, and since D had alternatives available and no imminent threat existed to make D's immediate entrance necessary, D will not establish these defenses.

#### Only nominal damages available

A physical trespass presumes that harm existed, and as such P does not have to prove that P suffered a specific pecuniary harm. However, based on the facts, D did not disturb anything and so it is unlikely P suffered any significant pecuniary damages. P will likely recover nominal damages, which are little amounts of damages that are awarded to vindicate the plaintiff's rights when not much harm was incurred in fact.

#### Conclusion

In conclusion, D committed trespass to land against P, and is liable. However, P can recover nominal damages, but will likely *only* recover nominal damages unless P can prove that P suffered some facts that indicated in the facts.

Pedro approached Diana. she explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

Pedro intends to sue Diana

## **Private nuisance**

Private nuisance occurs when the defendant substantially and unreasonably interfered with another private person's possession or use of private property. An interference is substantial when it would be offensive to a reasonable person. A hardened plaintiff who is subjectively not bothered by the interference can still recover if that interference is "substantial." An interference is unreasonable when the harm it causes is outweighed by the value it provides.

### **Whether interference is substantial**

Here, "As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise." It appears that the shaking is physical as P can feel the vibrations of the sound. This likely offends reasonable persons because although whether loud noise by itself offends a reasonable person is arguable, when the sound physically vibrates and causes movement the reasonable person is likely to be offended by it and be annoyed by it, and the reasonable person's life will be interfered by it and their enjoyment of their home is likely reduced, possibly significantly. Further, "Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end." As such, it appears that people other than Pedro were in fact offended by the noises and vibrations to the point that they instituted a good faith lawsuit. D will highlight that they decided to live with it, and this shows that the interference is not substantial. Had it been substantial, D will argue, then the neighbors could objectively not decide to live with it. Although whether

interference is substantial is a fact intensive inquiry, given the fact that the venue is surrounded by residences and the noise physically vibrates and quakes the neighbors, the court will likely deem the noise and vibrations substantial and offensive to a responsible person.

### *Whether interference is unreasonable*

Here, "D operates a large open-air theater. "On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene."" As such, it appears that D produces a lot of value to the community. Local dance companies likely need D's venue to do their performances and make their living. Further, rock and culture are important benefits to the community. It appears that culture is a major economic drive for the city. Further, the theater employs 200 people, which is a great benefit and contribution to the community. D will highlight that D's venue allows 200 people to make a livelihood while promoting the city's culture and fostering social ties and community bonds through art. Although P will counter that the harm is significant because it makes the lives of people around the venue difficult to live, to sleep, etc., D will counter that the very fact that the neighbors can decide to live with the noises attest to the fact that the harm is not significant, especially considering the great magnitude of value to the community - 200 jobs, cultural focus, tourism, economy, dancers, and musicians, etc.

### *Conclusion*

In conclusion, the court can rule either way, if this were a case of first impression and



preclusion was not a consideration. Although it appears that the interference is substantial, it also appears that an organized group of people can decide to live with it. Also, it appears that the venue provides a great amount of value to the public that cannot be denied. As such, the court may legitimately determine that the interference is not unreasonable and thus there is no private nuisance here.

*Coming to the nuisance is not a defense*

Coming to the nuisance is typically not a defense. Such consideration only is a defense when a party intentionally comes to the nuisance for the sole purpose of harassing or instituting a lawsuit. In general, coming to the nuisance is one of many factors considered in the overall analysis.

Here, "Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue." Then, "Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family." As such, it appears that P not only came to it, P knew of the theater and its potential consequences and P did not investigate at all. Since the neighbors had already brought a lawsuit before, a simple asking of questions around would likely give P notice of the theater's activities. As such, it appears that P was on inquiry notice to inquire into the theater's activities but failed to do so. However, coming to the nuisance is not dispositive in any way because P did not come to the nuisance solely to harass with a lawsuit; P genuinely came in good faith because P believed that it was a perfect place to raise a family. As such, the court will not outright dismiss P's private nuisance. However, the court may use the fact that P came to the nuisance and the fact that P

failed to inquire at all into the theater's activities to conclude on the substantial/unreasonableness analysis in favor of D.

### Neighborhood creeping into D's venue

Another factor is the neighborhood's creeping into D's venue. As mentioned above with P's coming to nuisance, the "neighborhood" coming to the nuisance will not be a dispositive factor and may merely be one of many other factors. However, it appears that the court should at least give some weight to the fact that "When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater." As such, D was operating D's venue in good faith.

### Conclusion

In conclusion, the court will likely side with D based on the totality of circumstances and find that the value of D's operation outweighs harms that apparently were accepted to by the neighbors. Further preclusion may or may not be a consideration as discussed below.

### **Public nuisance**

Public nuisance is substantial and unreasonable interference with health, safety, morals, or other rights of the community. When a private party seeks to bring a lawsuit for public nuisance, that party must have suffered a harm distinct from the harm suffered by the community.

Here, the harm as mentioned above might be ruled not unreasonable. Further, P has not suffered any harm from the noise or vibration that is unique from the harm suffered by other neighbors. P suffered the same exact harm that everyone around P suffers. As such, P cannot bring a public nuisance claim.

## **Preclusion**

Preclusion bars the re-litigation of issues already litigated. Claim preclusion and issue preclusion exist.

### **Claim preclusion**

Claim preclusion bars re litigation of same claims when there is a final valid judgment on the merits, asserted by same parties in same configuration, and the claims are the same.

Here, the parties are different because P was not part of the earlier lawsuit for relief. As such, claim preclusion does not apply.

### **Issue preclusion**

Issue preclusion bars re-litigation of same issues when 1) in a final valid judgment on the merits exist; 2) the issues was necessarily determined; 3) the issue was essential to the judgment; and 4) no mutuality problems exist.

Here, the prior parties were unsuccessful in obtaining relief, and they decided to live with it. As such, the prior lawsuit likely ended, and the plaintiffs decided against appealing. As such, the decision is final. It appears that the claim was not unsuccessful because of personal jurisdiction or other issues, and so it appears that the prior lawsuit went into the merits. The vibrations and noise are the whole point of the prior lawsuit and of this lawsuit as well. As such, the issue was both necessarily determined and essential to prior judgment. Finally, mutuality problems must not exist. First, D was party to the prior action and had a chance to defend D's self. Further, P was not party to the prior action. However, in this case since D was successful in the prior action, D will seek to assert issue preclusion against P. Since P was not party to the prior action, P had no

chance to be heard. As such, D cannot assert issue preclusion against P.

### Conclusion

In conclusion, D will not be able to assert issue preclusion against P. P will not want to assert preclusion because D prevailed (it appears) in the former action.

### **Negligent infliction of emotional distress**

### **Defenses: defense (self, property, others); consent; arrest; necessity**

### **Other torts (negligence, strict liability)**

## **II. REMEDIES PEDRO CAN SEEK**

Remedies for trespass to land was discussed earlier and is likely to be limited to nominal damages, especially since D will probably not come against and against and cause a multiplicity of suits problem. The remedies here will concern the case that P wins on the nuisance claim.

### **Money damages**

Tort money damages are primarily "compensatory damages" which seeks to compensate the plaintiff put make the plaintiff whole. Sometimes there are "nominal" damages that seek to vindicate a plaintiff who basically has not been harmed, as discussed above. There are also "punitive" damages which will punish the defendant for willful and wanton conduct.

Here, punitive damages should not be available because D is not engaged in willful and wanton conduct to harm P or others. Rather, D is engaged in a legitimate business that benefits the entire community which happens to also harm nearby neighbors, who came to the nuisance because both the neighborhood crept towards D's venue and the neighbors decided to purchase the homes or rent the homes (in which case it would not

be that costly for them to relocate or move away).

Further, P was seeking to raise a family here and live a quiet life here with P's family.

However, the value of what P is unable to do this because of the noise and vibrations.

First, it is not certain that P will win damages because of reasons discussed above - no nuisance might exist. Second, even if P wins on the private nuisance claim, it is possible

that P did not suffer much pecuniary harm. Perhaps P actually got the land for a cheaper price because the seller reduced the price because of the noise and vibrations.

As such, P might not have suffered harm in decrease of land value (P might have *gotten* the land cheaply to begin with). Third, it is possible that P will be culpable as well because P failed to inquire at all, as described above, when a simple few questions would have revealed the problem, or even a visit on a weekend.

If P's land value did go down because of the noise and vibrations, then P may be entitled to the difference between the value of the land as P purchased it without the noise and vibration issues.

### **Temporary restraining order, preliminary injunction, permanent injunction**

P may also seek equitable relief. Although P might go through temporary restraining orders and preliminary injunction, ultimately it is a permanent injunction that P would seek to try to enjoin D from having such loud noises.

Permanent injunction is appropriate when 1) legal damage is inadequate; 2) enforcement is feasible; 3) property right exists; 4) balance of harms and equities; 5) no defenses.

#### **1) legal damage is inadequate**

Legal damages might be inadequate when the conduct at issue might be repeated or

occur in the future; or when damages would be speculative or uncertain; or when the defendant is insolvent so a judgment would be meaningless.

Here, damages would be speculative because it would be difficult not only to measure the harm of constant noises and vibrations. Further, D seeks to play noises every weekend into possibly likely decades into the future. But D might stop the operation next year. As such, damages are speculative and uncertain. It can be argued that the decrease in value of land with the noises is a sufficiently certain measure of damages, however.

### 2) enforcement is feasible

A negative injunction prohibiting an action is easier to enforce than affirmative injunctions. One single act is easier to enforce than series of acts. An act requiring skills or personal taste is harder to enforce than objective acts. Involuntary servitudes are disfavored if not unconstitutional.

Here, the injunction sought is negative, which is not hard to enforce. Every time D engages in the making of noise, every neighbor would hear. As such, it would be noticed, and someone can make a complaint to the court and the court can issue contempt order. Further, since the land is in the state and city of the court, there are no jurisdictional issues and the injunction, and its enforcement is feasible.

### 3) property right exists

Traditionally, a protectible property right was needed. Modernly and in CA, property right is not necessary. Here, however, there is right in use and enjoyment of land property, quiet enjoyment, without the noise and vibrations. As such, this element would be satisfied.

#### 4) balance of harms and equities

The harms and equities must be balanced, including benefit to the public. Here, the harm to public would be high because 200 people would lose their jobs. The harm to P would be high as well because on every weekend P would suffer loud noises and vibrations until 11pm, which is arguably very late and offensive to reasonable ordinary persons. The harm to D would be significant, although perhaps D can still operate during weekdays because dance performances seem not to be the issue, only rock concerts.

#### 5) no defenses

It appears that P did not unduly delay and cause D prejudice (no laches). It also appears that P did not act in a culpable manner even if failure to inquire was a little neglectful (no unclean hands)

#### Conclusion

In conclusion, the analysis for permanent injunction does not appear to be one sided. As such, the court may likely refuse to grant it, as it did in the prior action by neighbors against the same D.

#### TROs and preliminary injunctions

The analysis for TROs and preliminary injunctions is similar to that for permanent injunctions. The major difference is that they require the necessity of maintaining status quo until a preliminary hearing can be held because of imminent harm (TRO) and until a full trial (preliminary injunction).

Here, it appears that neighbors can decide to live with the noise and vibrations. The neighbors had organized to file a lawsuit. As such, they would not merely decide to "live

with it" out of shyness, since they could commiserate with each other and feel free to complain and such feelings would avalanche and not be reduced. As such, it appears that there is no imminent irreparable harm that would justify TROs and preliminary injunctions.

Further based on the analysis above on private nuisance especially, likelihood of success does not appear to be great; It might be 60% at most.

other remedies

Other remedies such as constructive trust and equitable lien do not apply and are not relevant. Permanent injunction is the only relevant one and even that is unlikely.



## **QUESTION 4**

Dan is facing trial in the Superior Court of California for the murder of Victor. Dan entered into a valid retainer agreement with Attorney Anita for her to represent him. Anita met with Dan to discuss Dan's defense. In their interview, Dan claimed he had spent the entire evening when the murder occurred with his father, Frank. The next day, Anita sent an email to Dan expressing her concern that his alibi was weak. Dan replied to the email and admitted that he had lied about his alibi, but denied that he killed Victor.

Anita visited Dan's apartment and spoke with Dan's roommate, Ben, who said that Dan confided in him that he had killed Victor. Ben gave Anita a pair of Dan's pants that were covered in blood. The next day, Anita gave the prosecutor the bloody pants and the email exchange about Dan's alibi.

Anita then decided she did not want to represent Dan any longer because she was tired of his lies. Anita petitioned the court to withdraw as Dan's attorney. The court granted permission for Anita to withdraw. Frank then immediately hired another lawyer to represent Dan.

At Dan's trial, the prosecutor called Ben as a witness to testify to Dan's statement that he killed Victor. The prosecutor then called Anita to testify: (1) about Dan's statement that he had been with Frank on the night of the murder; (2) that Anita had received the bloody pants from Ben and turned them over to the prosecutor; and (3) that Ben had told Anita that Dan said he killed Victor.

1. Assume all proper objections have been made. Should the following items be admitted into evidence:
  - a) Ben's testimony? Discuss.
  - b) Anita's testimony regarding Dan's statement that he was with Frank the night of the murder? Discuss.
  - c) Anita's testimony that she had received the bloody pants from Ben and turned them over to the prosecutor? Discuss.
  - d) Anita's testimony that Ben told her that Dan said he had killed Victor? Discuss.

Answer each according to California law.

*QUESTION CONTINUES ON THE NEXT PAGE*

2. What ethical violations, if any, did Attorney Anita commit by:
- a) Turning over the bloody pants to the prosecutor? Discuss.
  - b) Turning over the email exchange regarding Dan's alibi to the prosecutor? Discuss.
  - c) Withdrawing from representing Dan? Discuss.

Answer each according to California and ABA authorities.

## **QUESTION 4: SELECTED ANSWER A**

Under Proposition 8 of the California constitution, all relevant evidence is admissible during a criminal trial, unless it is subject to an exclusion such as hearsay or privilege.

### **Logical relevance**

For any evidence to be admissible, it must be logically relevant. Evidence is logically relevant when it makes the existence of any fact of consequence more or less likely to be true. In California, the fact of consequence must also be in dispute.

### **Legal relevance**

Evidence is legally relevant when the probative value of the evidence exceeds the risk of undue prejudice, confusing the jury, or unnecessary delay.

### **1. (a) Ben's testimony**

#### **Logical Relevance**

See rule above.

Ben's (B's) testimony is logically relevant. B is able to testify that D admitted to killing Viktor (V). That is a fact at issue and of consequence, and highly relevant to this case.

#### **Legal Relevance**

See rule above.

B's testimony is also legally relevant. D's statement has substantial probative value. It wouldn't confuse the jury or cause undue delay. And while it would be prejudicial to D's case, it would not be unduly prejudicial, as the requirement of legal relevance does not prohibit any evidence that may show guilt.

#### **Witness Competency**

In order for witnesses to testify as to a certain topic, they must have personal

knowledge of the facts they are speaking to, and a present recollection of the events.

They must also take an oath to tell the truth and be able to present their testimony in a way that is helpful to the trier of fact.

Here, B is competent to give this testimony. It is based on his personal knowledge of his conversation with D, and he is able to presently recall it.

Accordingly, because his testimony is relevant and he is a competent witness, he was properly allowed to testify.

### Hearsay

However, the issue is whether D's statement that Ben is testifying to is hearsay.

Hearsay is an out of court statement offered for the truth of the matter asserted.

Hearsay is not admissible, because the party is offered against is not able to impeach the witness or make issue of the declarant's credibility.

Here, D's statement is hearsay. It was told to B out of court, and it is being offered by the prosecutor as evidence that D killed V. Accordingly, it is inadmissible as hearsay.

However, there are exceptions and exclusions to the hearsay rule. If one exists, the statement can still be offered into evidence.

### Party admission

A party admission is an exclusion from hearsay. It exists when the opposing party has offered the statement out of court, and it is an admission of a relevant fact.

Here, the statement is being offered into evidence by the prosecution, so D is the opposing party. Additionally, this constitutes an admission of the most important fact of all - that D killed V. Accordingly, D's statement could be offered into evidence as a party admission.

### Statement against interest

D's statement could also possibly be offered as a statement against interest. In order for this exception to apply, the defendant must make a statement that is against their proprietary, pecuniary, penal, or social interest, and they are aware it is against their interest when it is offered.

Here, this statement is clearly against D's penal interest. By admitting to a murder, he could be charged and sent to prison. This is also a fact that any reasonable person would be aware of.

However, in order for this exception to apply, the declarant must be unavailable. A declarant is unavailable when they are dead or sick, when they refused to testify, or when they assert a privilege, among other reasons. Here, it is possible that D, as the defendant in this case, will assert his right not to testify. If he were to do so, this exception would also be available.

In conclusion, this testimony was properly admitted as a party admission, and may also be proper as a statement against interest if D choose not to testify.

### **(b) Anita's testimony regarding Dan's statement.**

#### Logical Relevance

See rule above.

Anita's (A) testimony is logically relevant because it speaks to D's possible alibi.

Whether or not D was with Frank is a fact of consequence, and one that it is in dispute.

#### Legal Relevance

See rule above.

Her testimony is also legally relevant. Information concerning D's alibi has substantial

probative value and outweighs any of the other factors discussed above.

#### Witness Competency

A is competent to testify to testify on this topic because it is based on her conversation with D.

#### Attorney/Client Privilege

The issue is whether D's statement is covered by attorney/client privilege.

Attorney client privilege prevents the disclosure of any confidential information obtained from the attorney from their client for the purpose of furthering the representation. The privilege is held by the client, and only the client can choose to waive it, not the attorney. In California, the privilege lasts until the client's will has been probated after their death.

Here, D's statement to A was made during the representation. D and A entered into a valid retainer, and then the two of them met to discuss the case and provide A with the facts. The statement was provided as D's alibi, and while he later admitted that the statement was false it was still made as part of the representation and in furtherance thereof.

#### Hearsay

Additionally, the statement may be objected to as hearsay. However, it would not be provided into evidence for the truth of the matter asserted because (1) the prosecutor would not want to help D establish an alibi, and (2) D later admitted it was false.

In conclusion, the statement is protected by the attorney/client privilege and should not be admitted into evidence.

**(c) The bloody pants.**

### Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it speaks to the source of important evidence.

### Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

### Witness Competency

A is competent to make this testimony because it is based on her personal interaction with B, and she has a present recollection of the events.

### Attorney/Client Privilege

See rule above.

D may also assert that this evidence is subject to attorney/client privilege. However, information regarding where the bloody pants came from was not communicated to A by D. The attorney client privilege only covers statements made in confidence from the client to the attorney, not statements made by third parties, and not information obtained independently from the attorney. Because A received the bloody pair of D's pants from B, no information surrounding them is subject to attorney/client privilege.

In conclusion, the testimony regarding the bloody pants should be admitted into evidence.

**(d) Ben's statement that Dan had killed Victor.**

### Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it is an important admission by D as to his guilt.

#### Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

#### Attorney/Client Privilege

D may once again attempt to assert attorney/client privilege. However, for the reasons discussed above, statements by third parties are not covered by the privilege, only statements between attorney and client. Accordingly, this information is not subject to attorney/client privilege.

#### Hearsay

See rule above.

However, this statement is also hearsay, as it is being offered for the truth of the matter asserted. When there are two layers of hearsay, both of them must be admissible for the statement to be admitted into evidence. Here, D's statement to B that he killed V is hearsay, and B's statement to A that D admitted to killing V is also hearsay.

D's statement to B would be admissible for the reasons discussed above. It is a party admission, and potentially a statement against interest.

However, Ben's statement does not fit into any hearsay exception. Because the hearsay rules require that all levels of hearsay have an exception, this statement should not be admitted.



In conclusion, B's statement to A regarding Dan's admission should not be admitted.

## **2. Anita's ethical violations.**

### **(a) Turning over the bloody pants.**

#### Duty of confidentiality

A may have violated her duty of confidentiality to D under the ABA and California rules of professional conduct. An attorney owes their client a duty of confidentiality. All confidential info obtained by an attorney in the course of representation must not be disclosed to third parties, and only used for their client's benefit. This duty is broader than the attorney/client privilege, as it prevents all disclosures not just testimony. Here, that duty covers all confidential information A obtained about D during their representation. However, the duty of confidentiality does not extend to the fruits of a crime.

#### Fruits of a crime

If an attorney comes into possession of the fruits of a crime, that information cannot be protected by the duty of confidentiality. It must be turned over to the authorities. If a client informs their attorney where evidence of their crimes is located, the attorney is under no obligation to retrieve it. If they do, they must turn it in. However, an attorney is allowed to hold an item of evidence for a reasonable period of time in order to inspect it as part of building their client's case. Additionally, the attorney cannot disclose the source of the evidence when turning it over.

Here, A was under an obligation to turn in the bloody pants and did not violate her duty of confidentiality by doing so. However, if she was to disclose any information regarding where the evidence came from, that would have been a violation. Though that does not

appear to have occurred based on the facts presented.

Accordingly, A did not violate an ethical obligation by turning in the bloody pants.

**(b) Turning over the email**

Duty of confidentiality

See rule above.

However, A did commit a breach of her duty of confidentiality by turning over the emails from D. That information was protected by the duty of confidentiality, and A was under no requirement to turn that information over.

By disclosing this email, she breached her duty to D.

Duty of competence

A also may have breached her duty of competence. An attorney owes a duty to their clients to use their skill, knowledge, thoroughness, and preparation solely for their client's benefit. They must act prudently and diligently in their client's best interest.

By turning over an email admitting he lied about his alibi, A has violated that duty. A reasonably prudent attorney would not turn over confidential information regarding their client's case and alibi.

If D has insisted on testifying at trial that he had this alibi when A knew it was not true, she would have ethical obligations to dissuade him from testifying, to seek to withdraw if D insisted on offering false testimony, and to only allow him to testify in a narrative fashion if she could not withdraw. However, this was far before that point

Accordingly, A also breached her duty of competence owed to D.

In conclusion, by turning over the email, A breached her duty of confidentiality and duty of competence.

### **(c) Withdrawing from representation.**

#### Mandatory withdrawal

An attorney is required to withdraw when (1) they are terminated, (2) when their representation of the client violates the law or ethics rules (such as in the case of a conflict), (3) when a mental or physical condition prevents the attorney from undertaking effective representation, and (4) where the client's course of conduct requires the attorney to participate in or assist with a crime or fraud.

Here, A has not been terminated, there is no violation of law or ethics rules, she has no mental or physical condition preventing her from representing D, and D has not asked her to participate in a crime or fraud. Accordingly, there are no rules mandating that she withdraw.

However, there are also grounds that exists for permissive withdrawal.

#### Permissive withdrawal

Under the ABA, an attorney is permitted to withdraw if they can do so without prejudicing their client's case. This rule does not exist under the California ethics rules.

Under both sets of rules, an attorney can also withdraw if the client insists on a course of action the lawyer disagrees with or considers repugnant, if the client has misused the client's services in the past, or if the client has not performed their duties (such as the payment of fees).

The most likely reason for withdrawal that A could argue is that D is insisting on a course of conduct that she disagrees with or considers repugnant. If she believes based on the evidence that D is guilty, and is lying about his innocence, that may be sufficient grounds. As the court has allowed her to withdraw from this case, it appears that they

agree with her.

However, A is required to give D notice prior to withdrawal. It does not appear that she has done so. By not providing him notice, there is a risk that her withdrawal has prejudiced his case.

Additionally, A is required to return any portion of an unused fee that D has paid and return his files promptly. The facts don't appear to indicate that she has done this either.

In conclusion, A has violated a duty to D by improperly withdrawing.

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

### **Ben's Testimony**

#### **Relevance**

In order to be admissible, evidence must be both legally and logically relevant. Under the CEC, evidence is logically relevant if it tends to prove or disprove any fact in dispute related to the matter. However, judges have broad discretion to exclude logically relevant evidence if it is not legally relevant. Evidence is legally relevant if its probative value is not substantially outweighed by other factors such as unfair prejudice, waste of time, delay, unnecessarily cumulative evidence, or confusing the jury. Under Proposition 8, all relevant evidence is admissible in a criminal trial, subject to some exceptions such as hearsay and privilege rules.

Ben's testimony is logically relevant, since it tends to prove a fact in dispute (that Dan killed Victor). It is also legally relevant since its probative value is not substantially outweighed by unfair prejudice or other issues. Prop 8 will not apply because the statement is hearsay.

#### **Hearsay**

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception applies. Here, Dan's statement that he killed Victor is an out-of-court statement that is being offered to prove that Dan killed Victor (the truth of the matter asserted). Thus, the statement is hearsay and will be inadmissible unless an exception applies.

### **Statement by Party Opponent**

A statement made by a party to a proceeding will be admitted even though it is hearsay

if it is offered by the party's opponent. Here, the hearsay declarant is Dan, who is a party to the proceeding. The statement is being offered by his opponent, the prosecution. Thus, the statement qualifies as a statement by a party opponent and will be admissible.

### Statement Against Interest

A statement against interest is a statement that was against the penal, financial, or social interest of the declarant when it was made. In order to be admissible as an exception to hearsay, the declarant must be unavailable to testify. A declarant is unavailable to testify if they have a total loss of memory, are dead, or are unreachable by subpoena. Here, Dan's statement that he killed Victor was against his penal interest, since confessing to murder can get you arrested and sent to prison. However, if Dan is testifying in his own defense, then he is available, and the exception will not be available. If Dan is not testifying in his own defense (as is his right as a criminal defendant), then he will be considered unavailable, and the statement may come in under this exception. Regardless, the statement will be admitted under the "statement by party opponent" exception.

### Conclusion:

Ben's testimony is admissible.

### **Anita's Testimony: Dan's Statement**

#### **Relevance**

Anita's testimony about Dan's statement that he was with Frank the night of the murder is logically relevant, as it tends to make it less likely that Dan killed Victor. Additionally, depending on how the prosecutor tries to use it, it may be relevant as impeachment

evidence. However, it may not be legally relevant. Since Anita used to be Dan's attorney, having her testify against him may hold undue influence with the jury, and create unfair prejudice that substantially outweighs the probative value of her evidence. Thus, the evidence may not be legally relevant.

### **Privilege**

Even if the evidence is logically and legally relevant, it is protected by the attorney-client privilege. Attorney-client privilege is an evidentiary privilege held by the client, whereby an attorney may not disclose anything a client told her in confidence in the course of seeking legal services. Here, Dan clearly told her that he was with Frank in confidence, as they met (apparently alone) in order to discuss his case. Additionally, Dan told Anita this while seeking legal services, since they were discussing Dan's defense. Thus, Anita violated the attorney-client privilege by testifying against Dan without his waiver of the privilege. Under the CEC, the attorney may only violate the privilege in limited circumstances. For instance, the attorney may violate the privilege to prevent a crime that would result in substantial bodily harm or death to another. Here, the crime has already occurred, so Anita's testimony does not fall within the exception.

Prop 8 does not overcome attorney-client privilege.

### **Hearsay**

Dan's statement to Anita does not qualify as hearsay, because it is not being offered to prove the truth of the matter asserted (that Dan was with Frank). Rather, it is either being offered for impeachment purposes (to show that Dan was lying), or for some other purpose. However, the testimony was still improperly admitted as it violated the attorney-client privilege.

## **Impeachment**

If this statement is being offered for impeachment purposes, it is also improperly admitted, as it is not permissible to impeach a witness by prior inconsistent statement (in this case, Dan) who has yet to testify (and thus, there is nothing that his prior statement could be inconsistent with). It is also improper to impeach a witness by prior inconsistent statement if that witness is not given a chance to explain the inconsistency (which Dan will not get if he is asserting his Fifth Amendment right not to testify).

## **Character Evidence**

If this statement is being offered to show Dan's character for dishonesty, it was also improperly admitted. In a criminal trial, character evidence is only admissible about traits pertinent to the crime charged and is only admissible once the defendant has opened the door. Here, Dan has not opened the door, and honesty is not a pertinent trait in a murder trial. Thus, this would be improperly admitted character evidence.

## **Anita's Testimony: Bloody Pants**

### **Relevance**

Anita's testimony about the bloody pants is logically relevant, since the fact that Dan had bloody pants tends to make it more likely that he killed Victor. Additionally, Anita's testimony can be used to authenticate the pants. There is the same legal relevance issue as before, where the fact that Anita was formerly Dan's attorney might create unfair prejudice sufficient to outweigh the probative value of the testimony. Thus, this testimony likely should not be admitted unless Prop 8 overcomes this issue.

### **Privilege**

Receiving Dan's pants from Ben would not qualify as privileged information, since it was



not a statement made by Dan for the purpose of obtaining legal services. Thus, the attorney-client privilege does not apply.

### **Personal Knowledge**

A witness must have personal knowledge about the matter of which they are testifying. Anita knows that she received the bloody pants from Ben and turned them over to the prosecutor. Thus, she had personal knowledge sufficient for this requirement.

### **Conclusion**

The testimony about receiving Ben's pants was improperly admitted unless Prop 8 allows the evidence in despite the legal relevance issue.

### **Anita's Testimony: Ben's Statement**

#### **Relevance**

Anita's testimony about Ben's statement is logically relevant because Dan's statement that he killed Victor tends to make that fact more likely. Anita's testimony still has the same legal relevance issue related to her being Dan's prior attorney. However, other than that the probative value is not outweighed by unfair prejudice, and so the evidence is legally relevant.

#### **Personal Knowledge**

There is no personal knowledge problem, because Anita is testifying about what Ben told her Dan said, rather than testifying that she heard Dan said something to someone.

#### **Hearsay within Hearsay**

Anita's testimony contains two levels of hearsay: the outer hearsay is Ben's statement, and the inner hearsay is Dan's statement. Where there are multiple levels of hearsay,

each level must be admissible under an exception in order for the entire statement to be admissible.

#### Dan's Statement (Inner Hearsay)

Dan's statement is hearsay because it is being offered to prove the truth of the matter asserted (that Dan killed Victor). As discussed above, this is likely admissible as the admission of a party opponent.

#### Ben's Statement (Outer Hearsay)

Ben's statement is hearsay because it is being offered to prove that Dan said he killed Victor. This is hearsay not admissible under any exception. It is not the statement of a party opponent since Ben is not a party. It also was likely not an excited utterance to Anita, as there is no indication that Ben was under the stress of a stressful event when he made it. Thus, because the outer hearsay is inadmissible, the entire statement was improperly admitted. Prop 8 cannot overcome hearsay issues.

#### **Privilege**

Attorney-client privilege does not apply to this statement, since Ben was not Anita's client and Dan's statement was not made directly to Anita (because it was made to a third party, it was not confidential).

#### **Ethical Violations: Turning over Pants**

##### **Duty of Candor/Duty of Fairness to Opposing Counsel**

Attorneys have an obligation of candor to the tribunal and a duty of fairness to opposing counsel. This duty prohibits them from concealing evidence. While Anita likely should have refused to take the bloody pants in the first place, it was likely not an ethical violation for her to turn them over to the prosecutor once she had them.

## **Ethical Violations: Turning over Email Exchange**

### **Duty of Loyalty**

Lawyers have a duty of loyalty to their clients. Anita violated this duty when she turned over the email exchange about Dan's alibi to the prosecutor, since a defendant in a criminal case could reasonably expect his attorney not to help the prosecution in ways not required by law or the ethical rules. Thus, this constituted a violation of the duty of loyalty.

### **Duty of Confidentiality**

Under both the ABA and California rules, lawyers have a strict duty of confidentiality to their clients. This prohibits lawyers from revealing any information they learn related to their client's case that is not known to the general public. This rule is broader than the attorney-client privilege; the California rule is much stricter than the corresponding ABA rule.

Under the ABA rule, a lawyer may break the duty of confidentiality if it is necessary to prevent a crime, substantial bodily harm or death, or mitigate financial loss if the lawyer's services were used in connection with that financial loss. Additionally, if the lawyer's services were used or are currently being used to perpetrate a crime or fraud, the lawyer may break confidentiality to mitigate the harm. Under the California rules, confidentiality may only be broken in order to prevent a crime that is likely to result in substantial bodily harm or death.

Here, the breach of confidentiality was not permissible under either the ABA or California rules. Turning over the email exchange did not prevent or mitigate the harm from any crime or activity in which the lawyer's services were used. Anita might try to

argue that Dan was attempting to use her services to lie to the court by lying about his alibi. However, there is no indication that Dan was going to lie on the stand at trial, as he admitted his alibi was false. Additionally, even if he was planning on lying on the stand, Anita had a duty to try to mitigate by attempting to persuade him not to lie. If he insisted on lying on the stand, Anita would have been allowed to withdraw (under the ABA rules), or simply allow him to testify without engaging (the narrative approach, under the California rules). However, Anita did not attempt to dissuade Dan from lying, if that was even his intention in the first place. Thus, Anita violated her duty.

### **Duty to Communicate**

Lawyers have a duty to communicate with their clients. By not telling Dan that she was turning the email exchange over to the prosecutor, Anita likely violated her duty to communicate with Dan and keep him apprised of her actions related to the case.

### **Ethical Violations: Withdrawal**

#### **Duty to the Profession**

Lawyers have a duty to the profession that discourages them from withdrawing from the representation of clients simply because they are guilty, especially criminal defendants. Anita likely violated this duty by her withdrawal.

#### **Permissive Withdrawal**

Under the California rules, a lawyer is allowed to withdraw from representation if the client is making the representation unreasonably difficult. Here, the fact that Dan lied once about his alibi is probably not enough to meet the standard of "unreasonably difficult". It sounds like she has only had one conversation and one email exchange with him and did not even try to see if he had a different alibi. Additionally, just the fact that a

client is guilty is not "unreasonably difficult". Thus, Anita likely violated her duty under the California rules by withdrawing when it was not permitted.

Under the ABA rules, an attorney may withdraw if it will not result in unfair prejudice to the client. Here, the trial had not started, and Frank was immediately able to hire another lawyer for Dan. Thus, it is unlikely that there was unfair prejudice, and Anita did not breach her duty under the ABA rules. The ABA rules also permit withdrawal if a client's view is repugnant to the lawyer, which Anita can argue that Dan's views are.

### **Mandatory Withdrawal**

Mandatory withdrawal under the ABA and California rules arises when a client is insisting on a course of conduct that would violate the law or ethical rules, or if the client insists on a course of conduct solely to harass another person (California only), or if the lawyer's mental or physical condition make it impossible to continue. None of these exceptions apply, so Anita is not covered by mandatory withdrawal.

## **QUESTION 5**

Arnold and Betty agreed to launch a business selling a durable paint that Arnold had developed and patented. They agreed to share all profits and to act as equal owners. Betty agreed to contribute \$100,000 to the business venture. Arnold agreed to contribute his patent for durable paint. Arnold told Betty that he thought the patent was worth \$100,000. He did not tell Betty that he had previously tried to sell the patent to several reputable paint companies but was never offered more than \$50,000. Arnold and Betty agreed that Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating the business and taking care of any other steps needed to start the enterprise.

Arnold first located a building within which to operate the business, owned by Landlord Co., and entered into a one-year lease in the name of Durable Paint, Inc. Subsequently, after Arnold took the necessary steps, Durable Paint, Inc. was incorporated. At the corporation's first board of directors meeting, Arnold and Betty were named as sole directors and officers. During that meeting, Arnold and Betty voted for the corporation to assume all rights and liabilities for the lease and to accept assignment of Arnold's patent rights.

Over the next six months, Durable Paint, Inc. faced unforeseen and costly manufacturing and supply problems. At the end of the first six months, the corporation had exhausted all its capital and was two months behind on rent. To make matters worse, a competitor developed a far superior product, making Durable Paint, Inc.'s patent effectively worthless. Durable Paint, Inc. had no other assets.

Landlord Co. sued Arnold and Betty personally for damages for breach of the lease.

Betty sued Arnold.

1. On what theory or theories might Arnold be found personally liable for damages to Landlord Co.? Discuss.
2. On what theory or theories might Betty be found personally liable for damages to Landlord Co.? Discuss.
3. On what theory or theories might Arnold be found personally liable for damages to Betty? Discuss.

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

### **Arnold's Liability**

There are multiple theories under which Landlord Co. can try to hold Arnold personally liable.

#### Corporation Formation - when did Arnold and Betty form a corporation?

##### *De Jure Corporation*

A corporation is a business entity which is separate from its legal owners (shareholders). This means that the shareholders of the business are not personally liable for the obligations and liabilities of the business. They are only liable to the extent of their investment (and for their own torts). In order to form a corporation (known as a de jure corporation if properly formed), articles of incorporation must be filed with the secretary of state following certain required procedures and including certain information.

Here, Arnold did not take the necessary steps to form Durable Paint, Inc. until after entering into the lease with Landlord Co. Accordingly, a de jure corporation was not formed when Arnold entered into the lease.

##### *De Facto Corporation*

If a corporation is *not* properly performed, the corporation still may be treated as a corporation for purposes of personal liability of its shareholders if there is a corporation formation statute, there is a good faith attempt to comply with the statute, and the corporation acts as if it is a corporation. In this situation, the incorporator must not know that it failed to form a corporation.

Here, Arnold did not form the corporation or attempt to form the corporation until *after*

the corporation entered into the one-year lease with durable Paint, Inc. Accordingly, Betty and Arnold cannot take advantage of the de facto corporation doctrine.

### *Promotor Liability*

Promoter liability concerns a situation in which an individual enters into contracts on behalf of a corporation before the corporation is formed. In this scenario, the promoter is liable on the contract unless there is a later novation (between the corporation, third party and promoter) or the contract states that the promoter is not liable, in which case it is treated as a revocable offer for the corporation. The corporation is only liable on the contract if the corporation adopts the contract.

Here, while the corporation arguably adopted the contract, the facts do not state that there was a novation of Arnold or that the lease stated that Arnold was not liable for the lease. Accordingly, Arnold will be found personally liable on the lease as a promoter. The corporation, Landlord co. and the promoter would have been required to adopt a novation in order to release Arnold from the contract or the lease would have had to state that Arnold was not liable. Thus, Arnold will be found liable on the lease under the promoter theory (unless he is successful on his claim for corporation by estoppel).

### *Corporation by Estoppel*

Corporation by estoppel is another doctrine which allows an entity that is not a corporation to be treated as a corporation for purposes of personal liability. This has been abolished in most states, but if applicable, it is applied when the entity has been treated as a corporation by a third party. In this scenario, the third party is estopped from arguing that the corporation is not a corporation. This applies in contract actions, but not in tort actions (because tort plaintiffs do not voluntarily enter into torts). This can



also prevent the incorporator from stating that the corporation was not formed as well. Here, Arnold entered into a one-year lease with Landlord Co. in the name of "Durable Paint, Inc.". Accordingly, Arnold held out the tenant of the lease as being a properly informed corporation. Thus, Arnold can argue that Landlord Co. had the opportunity to investigate Durable Paint, Inc. and see that it was not incorporated. If Arnold is successful in having the court apply this doctrine, Landlord Co. will be estopped from arguing that Durable Paint Inc. is *not* a corporation because it treated Durable Paint, Inc. as a corporation, in which case both *Arnold* and *Betty* would not be personally liable (unless Landlord Co. is successful in piercing the corporation veil, discussed below). However, since Arnold never tried to incorporate the entity before signing the lease, the court may be reluctant to assert this doctrine.

### **Betty's Liability**

#### Partnership

*Formation - did Arnold and Betty enter into a partnership before incorporating the business?*

A partnership is an association of two or more persons to carry on a business for profits. Intent to carry on a business for profit is required, but intent to form a partnership is not. Sharing profits establishes a presumption that a business is a partnership. Equal management rights further add to such presumption. No formalities are required and there need be no written partnership agreement. A partnership is a separate entity from its partners; however, the partners are jointly and severally liable for all obligations and liabilities of the partnership. However, a person that is seeking remedies from the partnership must first extinguish all partnership assets before attempting to recover from

the partners personally.

Here, before the business was incorporated as a corporation, Arnold and Betty agreed to launch a business selling durable paint that Arnold had developed and patented.

They agreed to *share all profits* and act as *equal owners*. This created a presumption that they intended to carry on a business for profit. Accordingly, before Arnold and Betty entered into a corporation, they entered into a partnership. The fact that they "called" the partnership "Durable Paint, Inc." is irrelevant for purposes of establishing a partnership. Thus, Arnold and Betty were both personally liable for all obligations of the partnership

*Authority - is the partnership liable for the lease?*

A partner is an agent for the partnership and has the actual and apparent authority to enter into all ordinary business transactions on behalf of the partnership. Actual authority is authority the partner reasonably believes she has from the written partnership agreement or agreement of the partners. Apparent authority is authority a third party reasonably believes the third party has based on the manifestations of the principal. A partnership is liable for obligations and liabilities entered into by a partner acting with authority. Accordingly, the partners are personally liable for all such obligations and liabilities as well (see rules above).

Here, Betty and Arnold agreed that Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating the business and "taking care of any other steps needed to start the enterprise." Accordingly, Betty had actual authority to conduct market research and market the business and Arnold had actual authority to incorporate the business and take care of its other startup needs. Betty will

argue that entering into a one-year lease is not a step need to start the enterprise and that, therefore, Arnold had no actual authority to enter into the lease and that the partnership was therefore not liable on the lease. Landlord co. will argue that entering into a one-year (short-term) lease is a normal step needed to start an enterprise for developing paint. Landlord co. is likely to succeed on this point. As to apparent authority, entering into a one-year office lease is the type of ordinary business transaction that a third could reasonably think that a partner was entering into on behalf of the partnership. Accordingly, under either an actual authority or apparent authority theory, Arnold likely had authority to bind the partnership to the lease.

Therefore, Betty would be personally liable for the obligations of the partnership - i.e., the entering into of the lease. However, Landlord co. would first have to exhaust partnership assets (and the assets are apparently already exhausted).

Betty will argue she is not liable on the lease because the partnership turned into a corporation. While the partnership was dissolved when it turned into a corporation, the lease was entered into while the business was still a partnership. She may be able to argue that the liability (failure to make payments) was not incurred until the partnership was a corporation. If this is the argument, Landlord. Co. can attempt to proceed on a piercing the corporate veil theory.

#### Corporation's Adoption of the Contract

As discussed above, a corporation can assume a contract entered into by a promoter by adopting the contract after formation. In order for a corporation to adopt a contract, the directors, who are in charge of the management of the corporation, must vote by a majority to adopt the contract.

Here, the facts state that Arnold and Betty assumed all rights and liabilities for the lease. Arnold and Betty were named as the sole directors, and they both voted to adopt the contract. Accordingly, the corporation validly adopted the contract.

### Piercing the Corporate Veil

As discussed above, shareholders of a corporation are not ordinarily liable for the obligations of the corporation. However, they may be held liable when the court pierces the corporate veil to prevent fraud and abuse. This will occur (i) when the corporation does not observe corporate formalities (alter-ego theory), (ii) the corporation was undercapitalized, or (iii) to prevent a fraud.

Here, Landlord co. will argue the corporation was undercapitalized as Betty only contributed \$100,000 and Arnold contributed his patent. Landlord co. will argue that clearly the corporation was undercapitalized because it could not make payments on a one-year lease or take care of its startup costs. However, \$100,000 is not a minor amount, and the facts suggest that the manufacturing and supply problems were unforeseen. However, six months is a very fast amount of time to lose \$100,000.

Further, the rent may have been expensive if the lease was for manufacturing space. If the lease was for office space, the rent would be cheaper, and the capitalization amount may have been reasonable. Ultimately, this is a question for the court, but Betty is likely to succeed on this point. There are no facts to suggest corporate formalities were not formed as the corporation held a board of director's meeting where the directors were named, and no corporate funds are implied to have been used for private use. Further, there is no evidence of fraud.

Accordingly, Landlord Co. is probably unlikely to succeed on a claim for piercing the

corporate veil unless it can prove undercapitalization.

### **Arnold v. Betty**

#### *Contribution - Partnership*

When a partner is held personally liable for an obligation of the partnership, such a partner may be entitled to sue the partner who is actually responsible for such liability for contribution if they violated an obligation to the partnership. Further, a partner is a fiduciary to the partnership and partners and owes a duty of care to act in the best interest of the partnership and with reasonable care.

Here, as discussed above, Betty may be found personally liable to Landlord Co. for damages for the unpaid rent. However, as discussed above, Arnold entered into the partnership lease with Landlord Co. However, he did so with authority of the partnership. Accordingly, Betty will probably not succeed against Arnold in an action for damages based on contribution under a partnership theory.

Betty can argue that Arnold breached his duty of care in failing to form the corporation before entering into the relationship with Landlord and in failing to properly "capitalize" the corporation with a patent. However, Arnold will argue that it was Betty's job to conduct market research, not Arnold, and she should have known about the competitor. She will likely not succeed on this argument, but she may succeed in arguing that Arnold failed to properly form the corporation since he violated his duty of care in doing so and thereby injured the partnership.

#### *Fraudulent Misrepresentation*

A person may be found liable for fraud when they make a material misstatement of past or present fact upon which a reasonable person would rely and upon which the person

does, in fact, rely to their detriment.

Here, Arnold agreed to contribute his patent for durable paint to the partnership. He told Betty that he thought the patent was worth \$100,000. However, he did not tell Betty that he had previously tried to sell the patent to several reputable paint companies but was never offered more than \$50,000. Accordingly, at worst, he had no reasonable basis to believe the paint was worth \$50,000, and at best, he failed to disclose a material fact. It is likely that Betty agreed to enter into the partnership and corporation with Arnold due to an equal share of investment and that this induced her to enter into such business. She then lost her investment and was held personally liable for an obligation of the business. Accordingly, she may be able to succeed against Arnold on a theory of fraudulent misrepresentation for his nondisclosure regarding the true worth of the patent.

#### *Duty of Care - Corporation*

A director owes a corporation the duty of care. Betty can sue Arnold on a derivative claim for violation of the duty of care in mismanagement of the corporation in causing it to financially exhaust its resources, but the damages would go to the corporation, and not to Betty. Further, Arnold can rely on the business judgment rule, which defers to the judgment of the directors so long as they act reasonably and in good faith without a conflict of interest.

## **QUESTION 5: SELECTED ANSWER B**

### **ANSWER TO QUESTION 5**

#### **I. Arnold's Liability to Landlord Co.**

##### **A. Partnership Liability**

The issue is whether Arnold can be held personally liable as a partner of Durable Paint, Inc.

##### **i. Formation**

The issue is whether Arnold and Betty formed a valid partnership.

A partnership is the carrying on of a business for profit by two or persons as co-owners.

There are three types of partnerships: general partnerships, limited partnerships, and limited liability partnerships. There are no formalities necessary to create a general partnership. A general partnership will be presumed where two parties share the profits of a business venture. The parties' subjective intentions are irrelevant when considering whether a partnership was formed. Where a partnership is formed, the partnership agreement will generally control the rights and liabilities of the partners, but where the agreement is silent, the provisions of the Uniform Partnership Act will control.

Here, Arnold and Betty agreed to launch a business selling a durable paint that Arnold had developed and patented. Thus, they entered into an agreement to carry on a business for profit. Moreover, Arnold and Betty agreed to share all profits and act as equal owners in the partnership. Even though Betty contributed \$100,000 as a capital investment and Arnold only contributed a patent worth \$50,000, the two will likely be considered to have entered into a general partnership where Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating

the business and taking care of other steps to start the enterprise. They did not enter into a limited partnership or limited liability partnership, because each require filing for certification with the secretary of state.

Thus, Arnold and Betty were each general partners of a valid general partnership.

## ii. The Partnership's Liability on the Lease Contract

The issue is whether the partnership is liable on the contract entered into with Landlord Co., and if so, whether Arnold can be found personally liable.

A general partner is considered an agent of the partnership when acting in the ordinary course of business. An agent has authority to bind the principal where they have been given express authorization to do so. They have implied authority to do what is necessary to carry out their responsibilities. If the agent has authority to enter into a contract, either express or implied, the principal will be bound by the agreement. The agent will not be personally liable unless they did not disclose the identity of the agent. Here, Arnold was an agent of the partnership and thus could act as its agent. The partners expressly agreed that he would be responsible for incorporating the business, but also in taking care of any other steps needed to start the enterprise. Arnold entered into a lease with for a building in which the Arnold and Betty would operate the business. Entering into the lease would be considered a "step needed" to start he enterprise, and thus Arnold was acting according to his actual express authority when he agreed to the lease. Because Arnold is a general partner of the partnership and acted under his authority to bind the partnership, the contract is binding on the partnership. Moreover, Arnold disclosed that he was entering into the lease on behalf of the partnership, which he named Durable Paint, Inc. Thus, Arnold is not personally



liable for the contract.

### iii. Arnold's Liability as a General Partner

The issue is whether Arnold, as a general partner, is liable for the contracts.

General partners not in a limited liability partnership are personally liable for the obligations of the partnership. The general partners are jointly and severally liable and can seek contribution from any partners who do not pay their share. Absent any agreement otherwise, the partners are liable in the same proportions as they share in profits.

After six months, Durable Paint, Inc. breached the lease agreement. Arnold, as a general partner, would be personally liable for the breach by the partnership. However, though he is jointly and severally responsible to Landlord Co., the obligations of the partnership must be split equally between himself and Betty - which is the proportion in which they split profits. It is of no consequence that they contributed different amounts of capital investment. Thus, he can seek contribution from Betty for half of the debt.

### B. Corporate Liability

The issue is whether Durable Paint, Inc. can be liable for the agreement.

Promoters are those who take the preliminary steps to set up a corporation and incorporate it. Promoters are not agents of the to-be corporation, and thus have no power to bind it in a contract. However, once incorporated, the corporation can adopt the agreement either expressly or impliedly. Adoption can be by a valid resolution of the board of directors, which requires a quorum (meaning a majority of directors must be present) and a majority of the quorum must approve the resolution. If they do so, both the corporation and the promoter are personally liable on the contract. If the corporation

instead executes a valid novation, replacing the promoter with itself on the contract, the promoter is no longer liable.

Here, Arnold entered into a lease with Landlord Co. on behalf of Durable Paint, Inc. At the time, Durable Paint Inc. was not yet a corporation because it had not yet been incorporated. Because Arnold was taking preliminary steps to incorporate it and set up the enterprise, he would be considered a promoter at the time he entered the lease. Thus, as a promoter, he was personally liable on the contract. However, the board, consisting of Arnold and Betty, then voted to "assume all rights and liabilities for the lease." The vote was unanimous and with all the directors present, and thus they had a quorum, and the resolution was approved by a majority of the quorum. Thus, the corporation expressly adopted the contract. It did not, however, execute a novation, as it didn't enter into an agreement with Landlord Co. to relieve Arnold of his liability. Accordingly, both Arnold, as a promoter, and Durable Paint, Inc., by adoption, are liable on the contract.

Moreover, even if the adoption was invalid, the corporation would be estopped from denying liability. Under the doctrine of corporation by estoppel, an entity that enters a contract that was not yet properly incorporated will be stopped from asserting that as a defense to contractual liability where it would be unjust to the other party to do so. Here, Arnold entered into the contract and listed Durable Paint, Inc. as the lessee. The corporation will be estopped from asserting as a defense that the corporation was not yet an incorporation to avoid liability.

### C. Piercing the Veil

The issue is whether Arnold can be held personally liable for the obligations of Durable

Paint, Inc., as a corporation.

Generally, shareholders and directors cannot be held personally liable for the obligations of the corporation. However, if necessary to avoid a substantial injustice, the court can pierce the corporate veil and attach personal liability to shareholder where (1) corporate formalities are not observed, (2) the corporation is undercapitalized, and (3) the corporation is nothing but an alter ego of the shareholders.

Here, Arnold is presumably a shareholder of the corporation as well as an officer and director. Though he would generally not be personally liable for the corporation's obligations, the court may be able to pierce the veil. The corporation exhausted all its capital in only six months and was thus likely undercapitalized. Moreover, the sole directors and officers of the corporation were Arnold and Betty, who are also presumably the shareholders. Thus, Durable Paint, Inc. is likely considered merely an alter ego of Arnold and Betty. Even though it's unclear to what extent Arnold and Betty did not observe corporate formalities, the court will likely find that it can pierce the veil and attach personal liability for the corporation's obligations to Arnold. This especially true considering that the corporation no longer had any capital, had no assets, and the patent rights that it was assigned for Arthur's patent effectively became worthless, and thus Landlord Co. likely could not recover anything from the corporation and would be without remedy for the breach.

Thus, Arnold will be personally liable for the obligations of the corporation.

## II. Betty's Liability to Landlord Co.

The issue is whether Betty can be found personally liable to Landlord Co. for breach of

the lease.

#### A. Partnership Liability

The rules regarding partnerships are set forth above.

Just like Arnold, Betty was a general partner in the partnership that was formed prior to the incorporation. Thus, as a general partner, she is liable on the contract, as it was entered into while the enterprise was a partnership under the authority of the partnership.

Accordingly, like Arnold, Betty can be held personally liable for the debts of the partnership, which had no assets by which Landlord Co. could recover at the time of the breach.

#### B. Shareholder Liability

The rules regarding corporations and shareholder liability are set forth above.

For the reasons discussed above, like Arnold, Landlord Co. will likely be able to pierce the corporate veil to hold Betty, as a shareholder and director, personally liable for the obligation of Durable Paint, Inc.

### III. Arnold's Liability to Betty

#### A. Duty of Care

The issue is whether Arnold is liable to Betty for breaching his fiduciary duties to the partnership and corporation.

Each general partner in a partnership owes a duty of care in how they conduct the business of the partnership, just as each director owes a duty of care to a corporation.

Partners and directors must act with the reasonable care that an ordinarily prudent

person would under the circumstances. As a director, this requires acting in good faith and with a reasonable belief that your actions are in the best interest of the corporation. Under the business judgment rule, a director is presumed to have acted in good faith, on an informed basis, and with an honest belief that the action is in the best interest of the corporation. If a partner or director breaches a duty, he can be liable for any damages that result from the breach.

At the inception of their enterprise, Arnold falsely told Betty that he thought his patent was worth \$100,000 when it was in fact worth only \$50,000. As a result, he was not required to contribute any capital investment in the enterprise, as Betty assumed that he had made a contribution equal to her \$100,000 capital investment. Thus, Arnold breached his duty of care by not acting in good faith when starting the business with Betty. However, there is no indication that Arnold breached any duty in incurring the obligation to Landlord Co. that would have caused any damages to the enterprise. Nor is it clear what damages his breach caused the enterprise.

Accordingly, even though he breached a duty, he would not be personally liable to the partnership or the corporation because it is unclear what damages, if any, resulted.

#### B. Misrepresentation

The issue is whether Arnold can be liable to Betty for misrepresentation.

Misrepresentation occurs when one knowingly makes a material representation of fact with the intent to mislead, and the other person reasonably relies on it.

It appears Arnold knowingly made a false misrepresentation to Betty regarding the worth of the patent, and he did so with the intent to induce a similar value capital contribution. Betty then reasonably relied on that misrepresentation to invest \$100,000

rather than a lesser amount, which is now lost.

Thus, Betty may be able to recover for an excess she invested compared to how much she would have if she knew the patent was worth only \$50,000.



# **California Bar Examination**

## **Performance Test and Selected Answers**

**February 2022**



## **PERFORMANCE TEST AND SELECTED ANSWERS**

**FEBRUARY 2022**

### **CALIFORNIA BAR EXAMINATION**

This publication contains the performance test from the February 2022 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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- II. Selected Answers for Performance Test





**February 2022**

**California  
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**Performance Test  
INSTRUCTIONS AND FILE**

## IN RE PRICE

Instructions.....

### FILE

Memorandum from Debra Uliana to Applicant .....

Transcript of Interview of Mark Price .....

Transcript of Interview of Laila Sayed .....

## **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 separate sets of materials with which to work: a File and a Library.
4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.
5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them 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 references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.
6. In answering this performance test, you should concentrate on the materials in the File and Library. 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 restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.
9. Your performance test answer will be graded on its responsiveness to and compliance with the instructions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

**Office of the District Attorney**

**County of Dixon**

**600 Gordon Avenue**

**Mill Brook, Columbia**

**MEMORANDUM**

TO: Applicant  
FROM: Debra Uliana, Chief Deputy District Attorney  
DATE: February 22, 2022  
RE: In re Price

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Last December, the Superior Court dismissed an indictment charging Darryl Howe with murder. It concluded that Deputy District Attorney Mark Price committed prosecutorial misconduct. It found that Price's dealings with Howe on October 3 and November 18, 2021, without the consent of Howe's counsel, violated Howe's privilege against compelled self-incrimination and his right to the assistance of counsel under the Fifth and Sixth Amendments. In dismissing the indictment, the court stated that it had initially considered, but ultimately decided against, referring the matter to the State Bar to investigate whether, in his dealings with Howe on those dates, Price violated Columbia Rule of Professional Conduct 4.2. Rule 4.2, which is commonly referred to as the "no-contact rule," prohibits a lawyer from communicating with a person known to be represented by another lawyer without the other lawyer's consent.

District Attorney Hector Santiago has asked me to draft a proposed policy to assist deputy district attorneys in avoiding violation of Rule 4.2. As a first step, I have interviewed Price and have also interviewed Price's supervisor, Senior Deputy District Attorney Laila Sayed.

Before I begin drafting a proposed policy, I want to know whether, in fact, Price violated Rule 4.2 in his dealings with Howe on October 3 and November 18. To that end, please

prepare a memorandum addressing whether Price violated Rule 4.2 in his dealings with Howe on each date, including whether he could rely on Columbia Rule of Professional Conduct 5.2. Rule 5.2 provides that a lawyer does not violate any rule of professional conduct if the lawyer acts in accordance with a supervisor's reasonable resolution of an arguable question of professional duty. Do not include a separate statement of facts in your memorandum, but be sure to use the facts in your analysis.

# TRANSCRIPT OF INTERVIEW OF MARK PRICE

February 15, 2022

DEBRA ULIANA: Mark, thanks for sitting for an interview about the *Howe* case.

MARK PRICE: Of course, Debra. We wouldn't have to be going through this exercise if I hadn't botched the case.

ULIANA: Unfortunately, you're not the first deputy to get an indictment dismissed. I'm meeting with you because, in dismissing the indictment, Judge Gorence said she had initially considered referring the matter to the State Bar to investigate whether you violated Rule 4.2, but ultimately decided not to because this was your "first offense" in a long career. I'm meeting with you as a first step in drafting a proposed policy to assist deputy district attorneys in avoiding violation of Rule 4.2.

PRICE: I understand. I'm sorry I've put you and the office in this position.

ULIANA: That's okay. Let's get on with it. I see you've brought the chronology of events I asked you to prepare. Why don't you summarize what happened? I'll ask questions as I need to.

PRICE: Fine. Here we go.

As you know, on August 22, 2021, Billy Wilson was shot and killed in an apartment house here in Mill Brook. Within hours, Darryl Howe was arrested for Wilson's murder. Howe admitted being at the scene of the murder, but claimed he didn't do it.

On August 24, Howe was arraigned in the Superior Court before Judge Gorence. I appeared for the State; Deputy Public Defender James Gardner was appointed to

represent Howe; and Howe was ordered held without bond until a preliminary hearing could be held.

On September 6, I moved Judge Gorence to release Howe on his own recognizance pending further investigation of the case. Prior to Howe's release, I told Deputy Public Defender Gardner that I would like to speak with Howe about the case. He said he would consent only if I was willing to offer Howe complete immunity, which of course I was not.

On September 26, Howe called the office of Mill Brook Police Detective Donna Daichi from his home and left a voicemail message saying he wanted to talk to her about the Wilson murder. Detective Daichi immediately told me about the message. I had had no personal experience with a defendant who contacted the police to talk about his own case. I consulted with Senior Deputy District Attorney Laila Sayed, who as you know is my supervisor as the Chief of the Felony Section. She advised me that any statements Howe might volunteer would likely be admissible. She also advised me to instruct Detective Daichi that, if Howe were to call her, she should listen but not ask any questions, and then report what he said to me. I gave those instructions to Detective Daichi.

ULIANA: Mark, did you have any discussion with Laila about Rule 4.2?

PRICE: Yes. I don't remember whether I raised the issue or whether Laila did. But I'm sure she told me Rule 4.2 permitted prosecutors to communicate with defendants known to be represented by counsel without counsel's consent, so long as they are conducting an investigation.

ULIANA: Okay. Did Howe call Detective Daichi after September 26?

PRICE: Yes, he called her from his home on October 3. He made several statements to her about the Wilson murder. As I had instructed her, she listened but did not ask any questions, and reported to me what he said.

ULIANA: And then?

PRICE: And then, on October 5, Judge Gorence conducted a preliminary hearing, found probable cause to charge Howe with the Wilson murder, and remanded him to custody and ordered him held without bond. At the preliminary hearing, Deputy Public Defender Gardner learned of the events of October 3 and asked Judge Gorence to order Detective Daichi not to speak with Howe. Judge Gorence declined to do so, but observed that Gardner would undoubtedly instruct Howe that such dealings were not in his best interest.

On October 19, the grand jury handed up the indictment charging Howe with the Wilson murder.

Then, about a month later, on November 18, while Detective Daichi was in my office working with me on the Wilson murder case, I received a collect call from Howe from the jail on my private line. I accepted the call. I hadn't given Howe my number; he must have gotten it from Daichi. At my request, Daichi listened in on an extension. Although I advised Howe that he did not have to speak with me and that Deputy Public Defender Gardner would not be happy if he did, he nevertheless proceeded to talk about the Wilson murder for about 20 minutes while Daichi and I listened and took notes.

ULIANA: Any further discussion with Laila about Rule 4.2 around November 18?

PRICE: Probably the same as before, that Rule 4.2 permitted prosecutors conducting an investigation to communicate with defendants known to be represented by counsel without counsel's consent.

ULIANA: And then?

PRICE: Finally, as you know, on December 8, Judge Gorence held a hearing at the request of Deputy Public Defender Gardner. By this time, Gardner had learned of the events of November 18. Gardner moved to dismiss the indictment for what he claimed



was prosecutorial misconduct. Unfortunately, Judge Gorence granted the motion. And the rest is history.

ULIANA: Yes, Mark. Sad to say, it is. You've given me a good introduction. If I need to follow up, I'll let you know.

PRICE: Fine. Again, I'm sorry about all of this.

ULIANA: I understand. We've all got to be more careful in the future.

# TRANSCRIPT OF INTERVIEW OF LAILA SAYED

February 18, 2022

DEBRA ULIANA: Laila, thanks for coming for an interview about the *Howe* case.

LAILA SAYED: No problem.

ULIANA: You've had a chance to review any materials you might believe are relevant?

SAYED: Yes, but I must add that there were few such materials. In the Felony Section, we don't have much time to commit anything to paper.

ULIANA: I understand. Let me cut to the chase and ask about your discussions with Mark Price about the *Howe* case.

SAYED: Ready when you are.

ULIANA: Do you recall Mark consulting you, on September 26 of last year, after Howe had contacted Mill Brook Police Detective Donna Daichi and had made statements to her about the Wilson murder?

SAYED: Yes. Although I can't swear that we spoke on September 26, I remember we spoke about Howe's statements to Detective Daichi.

ULIANA: Do you recall Mark telling you something to the effect that he had had no personal experience with a defendant who contacted the police to discuss his own case?

SAYED: Yes.

ULIANA: Do you recall speaking with Mark about the admissibility of any statements Howe might make to Detective Daichi?

SAYED: Yes. I probably told him that any statements Howe might volunteer would likely be admissible.

ULIANA: Do you recall speaking with Mark about Detective Daichi's interactions with Howe?

SAYED: Yes. I probably told Mark to tell Detective Daichi to listen to Howe if he contacted her again, but not to ask him any questions, and to report to Mark what Howe said.

ULIANA: Why?

SAYED: To make sure any statements would be admissible.

ULIANA: Do you recall speaking with Mark about Rule 4.2, the no-contact rule?

SAYED: No.

ULIANA: You don't recall telling him that the no-contact rule or Rule 4.2 permitted prosecutors to communicate with defendants known to be represented by counsel without counsel's consent, so long as they are conducting an investigation?

SAYED: No.

ULIANA: Are you sure?

SAYED: Yes, I'm sure.

ULIANA: Why?

SAYED: Debra, you know that we have to refer any non-trivial question about professional conduct to Senior Deputy District Attorney Lamar Lewis, the Compliance Officer. And dealing with a defendant who is known to be represented by counsel without counsel's consent is certainly a non-trivial question. Had Mark raised any question about the no-contact rule with me, I would have referred it to Lamar. I didn't refer it to Lamar. That means that Mark didn't raise it with me.

ULIANA: Let's proceed to November 18. Do you recall Mark consulting you around that date, for a second time, about Howe and his statements to Mark as well as Detective Daichi?

SAYED: No. After speaking with Mark in September about Howe and his statements to Detective Daichi, I did not speak with him about the matter again, at least not before Judge Gorence dismissed the indictment. After Judge Gorence dismissed the indictment, as I believe you know, I had a long and unpleasant "discussion" with Mark about the matter.

ULIANA: Yes, I know about the "discussion." But you're sure you don't recall a second consultation on or around November 18?

SAYED: I'm sure. In my 20 years in the office, I've never heard of a defendant contacting a deputy district attorney. Had Mark told me that Howe had contacted him, I would have immediately referred the matter to Lamar Lewis. And I would certainly have remembered it.

ULIANA: Well, Laila, you've answered the questions I have now. If more occur to me, I'll let you know. Thanks.

SAYED: You're welcome.



**February 2022**

**California  
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**Performance Test  
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## IN RE PRICE

### LIBRARY

Selected Columbia Rules of Professional Conduct.....

*State v. Nelson*

Columbia Supreme Court (2015) .....

## SELECTED COLUMBIA RULES OF PROFESSIONAL CONDUCT

### Rule 4.2. Communication with a Represented Person

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

.....

- (c) This rule shall not prohibit: (1) communications with a public official, board, committee, or body; or (2) communications otherwise authorized by law or a court order.

.....

#### *Comment*

- [1] This rule applies even though the represented person initiates or consents to the communication. . . .

.....

- [3] The prohibition against communicating “indirectly” with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator or the lawyer’s client.

.....

- [8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person that would otherwise be subject to this rule. The law recognizes that prosecutors

and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. The rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law.

. . . . .

\* \* \* \* \*

## **Rule 5.2. Responsibilities of a Subordinate Lawyer**

- (a) A lawyer shall comply with these rules notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### *Comment*

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. . . .



**State v. Nelson**  
**Columbia Supreme Court (2015)**

We granted review in this case to address the question whether a prosecutor violates Rule 4.2 of the Columbia Rules of Professional Conduct, which is commonly referred to as the no-contact rule, by communicating, post-indictment, with a defendant known to be represented by counsel, without counsel's consent. The answer, as will appear, is yes.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

James Nelson and Philip Brooks were indicted for conspiracy to distribute cocaine in the Superior Court of the County of Pleasanton. Nelson retained attorney Barry Tarlow to represent him, and Brooks retained attorney James Young.

While awaiting trial, Nelson was detained with Brooks at the Pleasanton County Jail. Tarlow informed Nelson that he believed that he and Brooks had a viable entrapment defense and that, in any case, it was his general policy not to negotiate a plea agreement with the State at this stage in the proceedings.

Young had agreed with Tarlow to coordinate a joint investigation. In so doing, Young often spoke to both Nelson and Brooks by telephone and in person during visits to Pleasanton.

One day, Nelson and Brooks telephoned Young and expressed an interest in negotiating a plea agreement. Without informing Tarlow, Young twice traveled to Pleasanton in order to discuss negotiating a plea agreement with Nelson and Brooks. Nelson asked Brooks and Young not to reveal their discussions to Tarlow because he feared that, if Tarlow learned that he was involved in negotiating a plea

agreement, Tarlow would withdraw as his counsel and thereby deprive him of his services in the event the case were to go to trial.

Young contacted Deputy District Attorney Joan Lyons, who was prosecuting the case against Nelson and Brooks, on behalf of both men. Subsequently, along with Brooks and Young, Nelson met with Lyons twice in her office. Following the second meeting, Lyons sent Young a proposed plea agreement for Nelson and Brooks. After talking with Young, Nelson and Brooks rejected the proposal.

Not long thereafter, Tarlow discovered what had transpired and filed a motion to dismiss the indictment. Tarlow alleged that Lyons violated the Sixth Amendment, which granted Nelson the right to Tarlow's assistance, and also violated Columbia Rule of Professional Conduct 4.2, which prohibited her from communicating with Nelson without Tarlow's consent. After a hearing, the Superior Court concluded that Lyons did not violate the Sixth Amendment, since Nelson was not deprived of Tarlow's assistance. But it also concluded that she did indeed violate Rule 4.2. In the exercise of its supervisory powers, it dismissed the indictment against Nelson.

The State appealed from the dismissal. The Court of Appeal, however, affirmed. The State petitioned for review. We granted review, and now affirm the Court of Appeal's affirmance.

## DISCUSSION

The State does not dispute that, *if* Lyons violated Rule 4.2, the Superior Court properly dismissed the indictment against Nelson in the exercise of its supervisory power. The State claims only that Lyons did not violate Rule 4.2.

In support, the State argues that Rule 4.2 was not intended to apply to a

prosecutor. It is too late in the day to present such an argument. Years ago, we held that a “prosecutor is no less subject to the Columbia Rules of Professional Conduct than any other lawyer.” *State v. Mann* (Columbia Supreme Ct., 1976). It is true that, depending on the circumstances, a prosecutor may or may not be prohibited from communicating with a defendant known to be represented by counsel, without counsel’s consent, *before the defendant is indicted*. Such circumstances include whether the prosecutor knows that the defendant has expressed a willingness to communicate, a fact that would militate in favor of communication, and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would militate against communication. But it is also true that, in all circumstances, a prosecutor is prohibited from communicating with a defendant known to be represented by counsel, without counsel’s consent, *after the defendant has been indicted*. Indictment gives rise to a defendant’s Sixth Amendment right to rely upon counsel as a medium between him and the State. The defendant’s Sixth Amendment right would be meaningless if one of its critical components, a lawyer-client relationship characterized by trust and confidence, could be circumvented by a prosecutor under the guise of conducting an investigation.

The State then argues that Rule 4.2 does not prohibit a prosecutor from communicating with a defendant known to be represented by counsel, without counsel’s consent, *if the prosecutor is conducting an investigation*. The State relies on Comment [8] to Rule 4.2, which states that “[t]he rule is not intended to preclude communications with represented persons in the course of ... legitimate investigative activities as authorized by law.” We read Comment [8] to mean that a prosecutor is not prohibited from communicating with a represented defendant *if and to the extent that the prosecutor is authorized by law to do so*. In Columbia, however, a prosecutor is *not* authorized by law to communicate with a represented defendant where, as here, the defendant has been indicted.

Finally, the State next argues that, even if Rule 4.2 prohibits a prosecutor

from communicating with a defendant known to be represented by counsel without counsel's consent, it prohibits a prosecutor only from *speaking* and not from *listening*. While certainly one purpose of Rule 4.2 is to prevent attorneys from utilizing their legal skills to gain an advantage over an unsophisticated lay person, an equally important purpose is to protect a person represented by counsel not only from the approaches of his or her adversary's lawyer, but from the folly of his or her own well-meaning initiatives and the generally unfortunate consequences of his or her ignorance.

## CONCLUSION

Because Lyons did indeed violate Rule 4.2, the Superior Court properly dismissed the indictment against Nelson in the exercise of its supervisory powers.

And because the Superior Court properly dismissed the indictment against Nelson, the judgment of the Court of Appeal affirming the dismissal must be, and hereby is,

AFFIRMED.

## **PT: SELECTED ANSWER 1**

**TO: Debra Uliana, Chief Deputy District Attorney**

**FROM: Applicant**

**RE: In Re Price**

As you requested, below is a memorandum addressing whether Price violated Columbia Rule of Professional Conduct 4.2 ("Rule 4.2") in his dealings with Howe on October 3 and November 18, 2021, including whether he could rely on Columbia Rule of Professional Conduct 5.2 ("Rule 5.2") as an exception in each instance.

### **I. THE OCTOBER 3 DEALING LIKELY DOES NOT CONSTITUTE A BREACH OF RULE 4.2 UNDER THE TOTALITY OF THE CIRCUMSTANCES.**

#### **A. Price's October 3 Dealing with Howe Constitutes a Prima Facie Violation of Rule 4.2 Because He Used an Agent to Listen in On a Conversation with Howe.**

Rule 4.2, referred to as the "no-contact" rule, provides that "a lawyer shall not communicate directly or indirectly . . . with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." Rule 4.2(a). The Columbia Supreme Court, whose interpretation of Rule 4.2 is binding on Columbia courts, has held that a prosecutor is subject to Rule 4.2. *State v. Nelson*, Columbia Supreme Court (2015) (hereinafter "*Nelson*").

Indirect communication encompasses situations where a lawyer seeks to communicate with a represented person through an intermediary, such as an agent or investigator. In addition, the Columbia Supreme Court has held that Rule 4.2 applies even where the prosecutor is only *listening* rather than *speaking*, on the ground that barring the former

as well as the latter serves the purpose of protecting a defendant from his own folly as well as the advances of the prosecutor.

Here, Price was aware that Howe was represented (by Defender Gardner), per Price's interview transcript regarding the August 24 arraignment hearing. Price's interview transcript also shows that he instructed Detective Daichi to listen to Howe when he called her and report to Price what Howe said. Thus, Price used Daichi as an intermediary to indirectly communicate with Howe, who he knew to be represented.

There is a further somewhat unsettled point of whether merely listening while using an *intermediary* would fall under *Nelson's* extension of Rule 4.2 to listening-only conduct since *Nelson* did not squarely so hold, but a court would likely find that it does, because to find otherwise would allow prosecutors to defeat Rule 4.2 by using intermediaries such as detectives or other agents to silently listen to represented defendants without consequence.

Thus, Price committed a prima facie violation of Rule 4.2 in his October 3 dealing with Howe.

B. Because Price's October 3 Dealing with Howe Was Pre-Indictment, A Court Will Look to The Totality of the Circumstances and Likely Determine that Price Reasonably Relied on Howe's Attempts to Contact Daichi to Justify the Indirect Communication.

Although Rule 4.2 applies to prosecutors, it does make a fact-dependent exception for pre-indictment communications. *Nelson* held that Rule 4.2's application to prosecutors depends on whether the contact with the defendant is pre- or post-indictment. If it is pre-indictment, then courts will look to various circumstances, including whether the prosecutor knows that defendant has expressed a willingness to communicate (which

would militate in favor of communication) and whether the prosecutor knows that defense counsel has expressed an unwillingness to consent (which would militate against communication). *Id.*

Here, Price's October 3 indirect communication with Howe occurred before Howe's indictment by the grand jury on October 19. *Price Interview Tr.* Thus, a court would look to the circumstances surrounding Price's communication with Howe, mediated by Daichi. The *Nelson* factors cut both ways: prior to the October 3 conversation, Price reached out to Howe's counsel, who said he would consent to Howe speaking with Price only if Price was willing to offer Howe complete immunity. *Id.* However, a few weeks later, on September 26, Howe--apparently of his own accord--called Daichi affirmatively offering to speak with her about the Wilson murder, and in fact called Daichi back again, apparently unprompted, on October 3, when the relevant communication occurred.

On balance, these facts would seem to cut against Price, since he received a clear indication from Howe's counsel that he was not permitted to speak with Howe. Price might argue, however, that Howe's subsequent attempts to contact Daichi countermanded that lack of consent. Further on Price's side is that Judge Gorence, at the October 5 preliminary hearing, refused to order Daichi not to speak with Howe, instead placing the onus on Howe's counsel to instruct his client accordingly. *Price Interview Tr.* Considering all of the circumstances above, while it is a close call, it does appear that Price was likely within the boundaries of Rule 4.2 and *Nelson* to initiate the indirect communication with Howe, especially given the court's *post hoc* unwillingness to find an ethical violation.

C. The Rule 5.2 Exception Might Absolve Price of His Rule 4.2 Liability as to the October 3 Dealing, But the Facts Require Additional Investigation.

In the event that the court finds against Price on the pre-indictment totality of circumstances question, there is an exception under Rule 5.2 that must be considered. Rule 5.2 provides that, while a subordinate lawyer must comply with Rule 4.2 (among other rules) notwithstanding a supervisory lawyer's supervision, that subordinate lawyer will not be found in violation of Rule 4.2 where he acts in accordance with the supervisory lawyer's "reasonable resolution of an arguable question of professional duty."

The comment to Rule 5.2 makes clear, however, that if the question of a breach of an ethical rule can only reasonably be answered in one way, both lawyers are "equally responsible" for adhering to the duty imposed by the rule. If the question can be reasonably answered in more than one way, only then may the supervisory lawyer assume responsibility for which of the reasonable alternatives to select, and the subordinate may be "guided accordingly." Rule 5.2 Comment. This comment logically implies some duty of investigation and clarification on the subordinate lawyer's part, who cannot simply rely blindly on the supervisory lawyer's guidance, at least not without first determining whether the answer to the potential breach question can reasonably be answered in more than one way or not.

Here, the interview transcripts of Price and his supervisory lawyer, Laila Sayed, are conflicting on the extent of the advice given by Sayed to Price with respect to the October 3 communication with Howe. While Price stated that Sayed told him that Rule 4.2 permits prosecutors to communicate with defendants known to be represented



without counsel's consent, so long as they are conducting an investigation, Sayed denied that she told Price this, even suggesting if Price *had* raised the Rule 4.2 issue, she would have had to refer the matter for consultation with another attorney at the office.

Assuming for the moment that Price's recollection is correct, Sayed's purported guidance likely would have been sufficient to absolve him of breach of Rule 4.2. Per that purported guidance, Sayed was correct that Rule 4.2 does not foreclose communication with defendant where prosecutor is conducting an investigation *pre-indictment*, i.e., as authorized by law (here, *Nelson*) to do so. Price's independent research into this matter would have confirmed Sayed's guidance, and shown that, at the very least, Sayed could be correct, so the Rule 4.2 breach question could be answered in more than one way. However, given the factual uncertainty, there is a severe doubt that has been raised regarding Price's veracity by the two interview transcripts, and it would be prudent for our office to investigate further. Thus, in assessing Price's potential violation of Rule 4.2 here as to the October 3 dealing, we should not rely on this purported Rule 5.2 exception since it is unclear whether Sayed even provided the requisite guidance to trigger it.

However, as discussed above, a court would likely find that the pre-indictment circumstances as to Howe's repeated attempts to contact Daichi, along with the court's imposition of the duty on Howe's counsel rather than Price or Daichi, shows that the indirect communication with Howe on October 3 was not a breach of Rule 4.2.

## **II. THE NOVEMBER 18 DEALING LIKELY CONSTITUTES A RULE 4.2 VIOLATION BECAUSE IT OCCURRED POST-INDICTMENT AND BASED ON NO REASONABLE SUPERVISORY ADVICE TO THE CONTRARY.**

### A. Price's November 18 Dealing with Howe Constitutes a Prima Facie Violation of Rule 4.2 Because He Directly Communicated with Howe by Listening.

Please see the above rule described in Section I.A, *supra*. Here, even more egregiously than in the October 3 phone communication, Price not only utilized Daichi as an intermediary to listen in, but according to his own interview transcript, Price accepted a collect call from Howe and directly listened to Howe for 20 minutes. Thus, Price's November 18 communication with Howe constitutes a *prima facie* violation of Rule 4.2.

### B. Because Price's November 18 Communication with Howe Was Post-Indictment, It Was a Per Se Violation of Rule 4.2.

As noted above, *Nelson* held that Rule 4.2's application to prosecutors depends on whether the contact with the defendant is pre- or post-indictment. Where the contact is **post**-indictment, a prosecutor is subject to a blanket prohibition on communicating with a defendant known to be represented by counsel, without counsel's consent. As *Nelson* explained, this blanket prohibition is justified because a defendant's Sixth Amendment right to counsel would be "meaningless" if it could be "circumvented by a prosecutor under the guise of conducting an investigation."

Here, Price's direct communication with Howe on November 18 occurred almost a month after the grand jury indicted Howe on October 19. Thus, a court will not attempt to examine the circumstances around the communication (such as if Howe initiated); what is dispositive here is that Price knew Howe was represented and did not seek the

consent of Howe's counsel before listening to Howe for 20 minutes.

C. The Rule 5.2 Exception Does Not Absolve Price of His November 18 Breach of Rule 4.2 Because Price Failed to Conduct a Reasonable Investigation of Whether the Breach Question Could Be Answered in More Than One Way.

Please see the above rule described in Section I.C, *supra*. Here, in the interview transcripts of Price and his supervisory lawyer, Sayed, are once again in conflict. Price claimed that Sayed likely reiterated to him that Rule 4.2 permits prosecutors to communicate with defendants known to be represented without counsel's consent, so long as they are conducting an investigation. In contrast, Sayed strongly denied that she told Price this, again claiming that if Price had raised the Rule 4.2 issue, she would have been obligated to raise and investigate it.

This factual discrepancy need not be resolved, however, because as explained above, Rule 5.2 and its accompanying comment imply a duty on the part of the subordinate attorney (as well as the supervisory attorney) to first determine whether the breach of a rule question can be determined reasonably in more than one way. Here, if Price had conducted the minimal amount of research into Rule 4.2 and its case law--in particular, *Nelson*, which is squarely on-point Supreme Court case law that should have been immediately evident to Price--he would have noticed that *Nelson* **forecloses** the precise interpretation of Rule 4.2 that Sayed purportedly conveyed to Price, namely, that Comment 8 to Rule 4.2 only authorizes a prosecutor to communicate with a defendant known to be represented "*if and to the extent that the prosecutor is authorized by law to do so*"--such as where the defendant has been indicted. Thus, even if Sayed did in fact advise Price of Rule 4.2 as claimed, that advice was

unreasonable, and Price had his own independent duty to investigate and confirm that he could not rely on it.

### **III. CONCLUSION**

In sum, Price's October 3 dealing with Howe is likely excused under the totality of circumstances test advanced in *Nelson*. However, Price's November 18 dealing with Howe was strictly prohibited as it occurred post-indictment, and Price cannot rely on Sayed's purported guidance under Rule 5.2. I additionally recommend further investigation into Price's veracity as to what Sayed said.

## **PT: SELECTED ANSWER 2**

### **MEMORANDUM**

TO: Debra Uliana, Chief Deputy District Attorney

FROM: Applicant

DATE: February 22, 2022

RE: In Re Price

As you have requested, below please find a memorandum that addresses whether Deputy District Attorney Mark Price violated Columbia Rule of Professional Conduct 4.2 in his dealings with Darryl Howe on October 3 and November 18, and whether Price could rely on Columbia Rule of Professional Conduct 4.2 with respect to such dealings.

#### **I. October 3 Dealings**

##### **Whether Price Violated Rule 4.2 in His Dealings with Howe on October 3**

Rule 4.2 provides that in representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. However, this does not prohibit communications otherwise authorized by law or court order. In order to determine if this rule was violated on October 3, it's necessary to examine and analyze several different elements of this rule.

##### **Rules for Prosecutors**

First, it is necessary to determine if Rule 4.2 applies to prosecutors. State v. Mann established that a prosecutor is no less subject to the Columbia Rules of Professional Conduct than any other lawyer. Thus, even though Price is a prosecutor, Rule 4.2 applies to his conduct.

### Direct or Indirect Communication

It is also necessary to determine if the dealings that took place on October 3 amounted to a "direct or indirect" communication. The prohibition against communicating "indirectly" with a person represented by counsel is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator, or the lawyer's client (Comment 3 to Rule 5.2).

On October 3, the communication that is at issue that took place was a call between Police Detective Donna Daichi and Howe. Thus, it was not direct because Price was not involved. It is therefore necessary to determine if it was indirect and to do this, we must examine how the call came to take place. On September 26, Howe called Donna and left a voicemail saying that he wanted to talk to her, and Donna immediately told Price about the message. Based on instructions from his supervisor, Price advised Daichi that if Howe were to call her again, she should listen and not ask any questions, and then report what was said to Price. Accordingly, Price, a lawyer, sought to communicate to Howe, who was represented by James Gardner, through Daichi, an intermediary. Even though Daichi was only instructed to listen, a person's silence in order to listen and then report back on what was said still qualifies under the broad umbrella of communication, as further discussed below.

Thus, on October 3, indirect communication took place when Daichi listened to Howe when he called her, as instructed by Price.

### Person Initiates or Consents to Communication

Rule 4.2 applies even if a person initiates or consents to communication. Here, on

October 3, Howe called Daichi and initiated their conversation, in which he made several statements to her about the Wilson murder. Thus, Rule 4.2 applies even though it was initiated by Howe.

### Government Investigations

Rule 4.2 recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigations, but this is limited by relevant federal and state constitutions, statutes, rules and case law. In Columbia, a prosecutor is not authorized by law to communicate with a represented defendant when the defendant has been indicted (State v. Nelson). Prior to indictment, a prosecutor may or may not be prohibited from communicating with a defendant known to be represented by counsel based on circumstances including whether the defendant has expressed a willingness to communicate, a fact that would militate in favor of communication, and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would militate against communication (Id.).

The conversation on October 3 took place before indictment, which occurred on October 19. Thus, whether or not Price was prohibited from contacting Howe is based on the circumstances. In this case, Howe expressed a clear willingness to communicate when he called the detective on September 26th and then called her back on October 3rd, even though the facts don't indicate that she called him back. This militates in favor of communication. However, on September 6, when Price had asked Howe's attorney Gardner that he would like to speak with him on the case, he was unwilling to let Howe do so unless complete immunity was offered. This militates against communication.

Accordingly, it is hard to say if this factor clearly weighs in Price's favor.

### Listening v. Talking

Finally, Rule 4.2 also prevents a prosecutor from listening because one of the primary purposes of the rule is to protect a person represented by counsel from the folly of his or her own well-meaning initiatives and generally unfortunate consequences of his or her ignorance.

Here, even though Daichi was only instructed to listen on October 3, Rule 4.2 still applies.

### Conclusion

Price will be found to have violated Rule 4.2 only if a governing body were to find that the government investigation rule did not protect his actions based on the totality of the circumstances.

### **Whether Price Could Have Relied on Columbia Rule of Professional Conduct 5.2 with Respect to Same**

A lawyer must comply with rules notwithstanding that the lawyer acts at the direction of another lawyer or another person. A subordinate lawyer does not violate these rules if he acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. If a question can be answered in more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly.

Here, Price will argue that when he spoke with Sayed on September 26, he is "sure" that she told him that Rule 4.2 permitted prosecutors to communicate with defendants known to be represented by counsel without counsel's consent, so long as they were



conducting an investigation. This was a resolution because he had gone to her because he had never had a defendant reach out to a member of law enforcement after arrest. This resolution is also for an arguable question of professional duty because as mentioned above it's unclear if the investigation exception applied since it took place before indictment, when a totality of circumstances approach governed. Because a final decision on this duty could have gone either way, it was reasonable.

#### Conclusion

Howe could have relied on 4.2 if the conversation with Sayed happened, but it's unclear if it did since the parties have different recollections.

## **II. November 18 Dealings**

### **Whether Price Violated Rule 4.2 in His Dealings with Howe on November 18**

#### Rules for Prosecutor

See rule above. Even though Price is a prosecutor, Rule 4.2 applies to his conduct.

#### Direct or Indirect Communication

It is also necessary to determine if the dealings that took place on November 18 amounted to a "direct or indirect" communication. The prohibition against communicating "indirectly" with a person represented by counsel is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator, or the lawyer's client (Comment 3 to Rule 5.2).

On November 18, the communication that is at issue that took place was a call between Howe and Price. Thus, direct communication took place.

### Person Initiates or Consents to Communication

Rule 4.2 applies even if a person initiates or consents to communication. Here, on November 18, Howe called Gardner through a collect call on his private line. Thus, Rule 4.2 applies even though this communication was initiated by Howe.

### Government Investigations

Rule 4.2 recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigations, but this is limited by relevant federal and state constitutions, statutes, rules and case law. In Columbia, a prosecutor is not authorized by law to communicate with a represented defendant when the defendant has been indicted (*State v. Nelson*).

In *State v. Nelson*, the prosecutor communicated with a criminal defendant without such defendant's counsel, even though his alleged accomplice's attorney was present, after indictment in order to negotiate a plea deal. The court found that Rule 4.2 was violated in this case. Here, similar to Nelson, the conversation on November 18 took place after the indictment, which occurred on October 19. Thus, the government investigation exception does not apply.

### Listening v. Talking

Finally, Rule 4.2 also prevents a prosecutor from listening because one of the primary purposes of the rule is to protect a person represented by counsel from the folly of his or her own well-meaning initiatives and generally unfortunate consequences of his or her ignorance (*Nelson*).

Here, even though on the November 18th call, Howe spoke about the Wilson murder for

20 minutes while Price took notes, this doesn't change the fact that Rule 4.2 applies.

Additionally, although Gardner advised Howe that he didn't have to speak to him and his lawyer would be happy if he didn't, this also isn't relevant and doesn't change the fact that Rule 4.2 applies.

#### Conclusion

Price will be found to have violated Rule 4.2 because he spoke to Howe after indictment, when the government investigation exception did not apply.

#### **Whether Price Could Have Relied on Columbia Rule of Professional Conduct 5.2 with Respect to Same**

A lawyer must comply with rules notwithstanding that the lawyer acts at the direction of another lawyer or another person. A subordinate lawyer does not violate these rules if he acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. If a question can be answered in more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly.

Here, Price and Sayed don't agree on whether they spoke about Rule 4.2 regarding the November 18th conversation. It seems likely that it didn't take place because Howe called him out of the blue and he wouldn't have had time to confer with Sayed.

However, even if they did speak and Sayed approved of Price's conduct, this resolution was not reasonable because case law is very clear that the government exception does not apply following indictment.

#### Conclusion

Even if Price and Sayed did speak on Rule 4.2 regarding the November 18th

conversation, he couldn't have relied on Rule 5.2 because Sayed's resolution wasn't reasonable.