



The State Bar *of California*

OPEN SESSION AGENDA ITEM JUNE 2023 COMMITTEE OF BAR EXAMINERS

DATE: June 23, 2023

TO: Members, Committee of Bar Examiners

FROM: Christina Doell, Program Manager

SUBJECT: Approval of Draft Report to the Supreme Court on the February 2023 California Bar Examination

EXECUTIVE SUMMARY

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

BACKGROUND

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

DISCUSSION

The draft Report to the Supreme Court on the February 2023 California Bar Examination is attached for the Committee’s approval, along with the February 2023 Exam Statistics Report, Analysis of the February 2023 General Bar Exam, the February 2023 Essay Questions, Performance Test, and Selected Answers.

FISCAL/PERSONNEL IMPACT

None

RECOMMENDATIONS

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

PROPOSED MOTION

If the Committee agrees with the recommendation, the following motion should be made:

Move, that the draft Supreme Court Report on the February 2023 California Bar Exam be finalized and submitted to the Court.

ATTACHMENTS LIST

- A. Report to the Supreme Court on the February 2023 California Bar Examination
- B. February 2023 California Bar Examination Statistics Report
- C. Analysis of the February 2023 General Bar Examination, prepared by Roger Bolus, Ph.D., Research Solutions Group
- D. February 2023 Essay Questions and Selected Answers
- E. February 2023 Performance Test and Selected Answers



The State Bar *of California*

Report to the Supreme Court on the February 2023 California Bar Examination

Committee of Bar Examiners

June 23, 2023

FEBRUARY 2023 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 2023 CALIFORNIA BAR EXAMINATION

The State Bar of California received applications from 5,362 applicants to take the February 2023 California Bar Examination, which was administered on February 21 and 22, 2023. A total of 4,125 applicants completed¹ the exam and received results. Of those, 3,765 applicants completed the General Bar Examination and 1,225 passed (32.5 percent); 360 attorney applicants completed the Attorneys' Examination and 205 passed (56.9 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. One of the 16 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 10 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 3,861 applicants (93.6 percent) took the exam at laptop test centers.

A total of 371 applicants with disabilities were granted accommodations. Of those, 358 applicants were assigned to take the exam at testing accommodations test centers, while 13 were granted accommodations at standard test centers. Nineteen applicants who were granted accommodations either withdrew their applications, had their application abandoned, or were not eligible to take the exam. Of the 371 applicants who were granted accommodations, 24 did not show up for the exam.

Six grading groups, each consisting of up to 12 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. To determine proper calibration, each grader was given a copy of the same 15 answers to their

¹ 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.

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 answers distributed at the first meeting and discussed any answers that yielded significant disagreement. An additional 10 answers 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 2023 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 2023 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 1320 compared with the national average of 1,311. 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 5, 2023, and were made available to the public on May 7, 2023. Instructions for completing the State Bar registration card (also known as oath card) were sent by email on May 8 to the successful applicants who completed all requirements for admission to practice law in California.



General Statistics Report

February 2023 California Bar Examination¹

Overall Statistics for Categories with 11 or More Applicants Who Completed the Examination

	First-Timers			Repeaters			All Takers		
Applicant Group	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
General Bar Examination	1,100	490	44.5	2,665	735	27.6	3,765	1,225	32.5
Attorneys' Examination	255	165	64.7	105	40	38.1	360	205	56.9
Total	1,355	655	48.3	2,770	775	28.0	4,125	1,430	34.7

Disciplined Attorneys Examination Statistics

	Took	Pass	%Pass
CA Disciplined Attorneys	16	1	6.3

General Bar Examination Statistics

	First-Timers			Repeaters			All Takers		
Law School Type	Took	Pass	%Pass	Took	Pass	%Pass	Took	Pass	%Pass
CA ABA Approved	237	117	49.4	1,015	375	36.9	1,252	492	39.3
Out-of-State ABA	116	54	46.6	324	109	33.6	440	163	37.0
CA Accredited	140	43	30.7	552	99	17.9	693	142	20.5
CA Unaccredited	30	7	23.3	123	13	10.6	153	20	13.1
Law Office/Judges' Chambers	*			*			12	3	25.0
Foreign Educated/JD Equivalent + One Year US Education	84	17	20.2	170	40	23.5	254	57	22.4
US Attorneys Taking the General Bar Exam ²	195	151	77.4	64	24	37.5	259	175	67.6
Foreign Attorneys Taking the General Bar Exam ³	274	88	32.1	326	58	17.8	600	146	24.3
4-Year Qualification ⁴	*			20	2	10.0	22	3	13.6
Schools No Longer in Operation	13	10	76.9	67	14	20.9	80	24	30.0
Total	1,100	490	44.5	2,665	735	27.6	3,765	1,225	32.5

*Fewer than 11 Applicants

¹ These statistics were revised as of June 12, 2023.

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

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

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

⁵ 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 2023 California Bar Examination

Number of Applicants Completing the Examination & Percent Passing by Racial/Ethnic Group General Bar Examination First-Time Takers Only⁵

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	89	51.7			18	38.9	43	51.2	65	46.2	14	71.4
Out-of-State ABA	51	49.0			13	23.1	16	43.8	23	43.5		
CA Accredited	40	47.5	14	0.0	31	19.4	13	46.2	34	23.5		
CA Unaccredited	13	30.8										
Other	197	65.5	25	28.0	52	21.2	230	35.2	57	54.4	15	60.0
Total	390	57.2	57	22.8	122	23.8	305	38.0	180	44.4	46	63.0

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	287	41.1	82	25.6	195	30.8	178	37.1	241	40.2	32	40.6
Out-of-State ABA	83	36.1	59	30.5	49	36.7	53	30.2	66	37.9	14	14.3
CA Accredited	149	13.4	63	9.5	156	20.5	67	14.9	98	26.5	20	20.0
CA Unaccredited	35	20.0	18	0.0	34	8.8	23	8.7				
Other	164	33.5	66	10.6	80	12.5	268	20.9	60	15.0	11	18.2
Total	718	32.0	288	18.1	514	23.9	589	25.5	475	33.3	81	25.9

*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	110	50.0	119	47.9			388	34.5	605	38.2		
Out-of-State ABA	52	42.3	60	46.7			134	34.3	182	33.5		
CA Accredited	55	32.7	83	27.7			222	14.4	324	19.4		
CA Unaccredited	16	31.3	15	20.0			64	10.9	60	10.0		
Other	232	48.7	335	43.9			256	19.1	388	23.2		
Total	465	45.8	612	42.2	3	66.7	1,064	25.2	1,559	28.9	14	42.9

**Number are for those reporting gender

February 2023 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	42	14	33	101	28	28
CHAPMAN UNIVERSITY SCHOOL OF LAW				50	22	44
GOLDEN GATE UNIVERSITY SCHOOL OF LAW	23	11	48	91	20	22
LOYOLA LAW SCHOOL – LOS ANGELES	17	10	59	79	43	54
PEPPERDINE UNIVERSITY				41	16	39
SANTA CLARA UNIVERSITY SCHOOL OF LAW	20	9	45	89	31	35
SOUTHWESTERN LAW SCHOOL	24	11	46	122	45	37
STANFORD LAW SCHOOL				10	5	50
UC COLLEGE OF THE LAW, SAN FRANCISCO				91	39	43
UNIVERSITY OF CALIFORNIA – BERKELEY				18	10	56
UNIVERSITY OF CALIFORNIA – DAVIS				36	20	56
UNIVERSITY OF CALIFORNIA – IRVINE				22	9	41
UNIVERSITY OF CALIFORNIA – LOS ANGELES				23	12	52
UNIVERSITY OF PACIFIC MCGEORGE SOL	22	13	59	64	24	38
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW				62	22	35
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW	12	6	50	60	17	28
UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SOL				16	5	31
WESTERN STATE COLLEGE OF LAW WESTCLIFF UNIV				40	7	18
TOTAL	237	117	49	1,015	375	37

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				13	5	38
GEORGETOWN UNIVERSITY LAW SCHOOL						
HARVARD UNIVERSITY LAW SCHOOL						
HOWARD UNIVERSITY SCHOOL OF LAW				12	5	42
NEW YORK LAW SCHOOL						
WESTERN MICHIGAN UNIV. THOMAS M. COOLEY				15	1	7
ALL OTHER OUT-OF-STATE SCHOOLS	98	41	42	266	92	35
TOTAL	116	54	47	324	109	34

February 2023 California Bar Examination
Number of First-Timers and Repeaters Taking and Passing and the Percent Passing:
California Accredited Law Schools with 11 or More Takers

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
CAL NORTHERN SCHOOL OF LAW				11	1	9
CONCORD LAW SCHOOL – PURDUE UNIVERSITY GLOBAL	13	8	62	24	6	25
EMPIRE COLLEGE SCHOOL OF LAW						
GLENDALE UNIVERSITY COLLEGE OF LAW				17	3	18
HUMPHREYS UNIVERSITY DRIVON SCHOOL OF LAW				20	2	10
JFK SCHOOL OF LAW AT NATIONAL UNIVERSITY				16	0	0
KERN COUNTY COLLEGE OF LAW						
LINCOLN LAW SCHOOL OF SACRAMENTO				36	5	14
MONTEREY COLLEGE OF LAW				19	1	5
NORTHWESTERN CALIFORNIA UNIVERSITY SOL				26	5	19
SAN DIEGO LAW SCHOOL – ALLIANT INTERNATIONAL						
SAN FRANCISCO LAW SCHOOL – ALLIANT INTERNATIONAL				28	7	25
SAN JOAQUIN COLLEGE OF LAW				34	14	41
SAN LUIS OBISPO COLLEGE OF LAW						
ST. FRANCIS SCHOOL OF LAW						
THE COLLEGES OF LAW – SANTA BARBARA						
THE COLLEGES OF LAW - VENTURA				27	2	7
THOMAS JEFFERSON SCHOOL OF LAW	24	6	25	55	13	24
TRINITY LAW SCHOOL	12	3	25	59	8	14
UNIVERSITY OF LA VERNE COLLEGE OF LAW				56	15	27
UNIVERSITY OF WEST LOS ANGELES SOL	20	1	5	94	12	13
TOTAL	140	43	31	553	99	18

February 2023 California Bar Examination

Number of First-Timers and Repeaters Taking and Passing and the Percent Passing: California Unaccredited Law Schools, Fixed Facility with 11 or More Takers

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
CALIFORNIA DESERT TRIAL ACADEMY COL						
CALIFORNIA SOUTHERN LAW SCHOOL						
LINCOLN LAW SCHOOL OF SAN JOSE				11	2	18
PACIFIC COAST UNIVERSITY SCHOOL OF LAW				36	4	11
PACIFIC WEST COLLEGE OF LAW						
PEOPLES COLLEGE OF LAW						
WESTERN SIERRA LAW SCHOOL						
TOTAL	9	3	33	71	8	11

California Unaccredited Law Schools, Distance Learning with 11 or More Takers

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
ABRAHAM LINCOLN UNIVERSITY				28	3	11
CALIFORNIA SCHOOL OF LAW						
IRVINE COLLEGE OF LAW						
SOUTHERN CALIFORNIA INSTITUTE – VENTURA						
TOTAL	14	3	21	40	4	10

California Unaccredited Law Schools, Correspondence with 11 or More Takers

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
AMERICAN INSTITUTE OF LAW						
AMERICAN INTERNATIONAL SCHOOL OF LAW						
OAK BROOK COLLEGE OF LAW						
TAFT LAW SCHOOL						
TOTAL	8	2	25	13	1	8

**ANALYSIS OF THE FEBRUARY 2023
CALIFORNIA GENERAL BAR EXAMINATION**

Roger Bolus, Ph.D.

RESEARCH SOLUTIONS GROUP

June 4, 2023

SUMMARY

The February 2023 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 3,700 applicants who completed all three sections, 71.4% 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 3,700 applicants¹ who had all of their answers read at least once and the subgroup of 463 applicants who had them read at least twice were as follows:

- After the first reading of all answers 56.0% of the applicants failed and 31.5% passed. An additional 1.6% passed after the second reading. Overall, 33.1% of the applicants passed the examination².
- The reliability of the Written and Total scores were .76 and .90 respectively, meeting standards for a high-stakes licensing examination.

¹ Applicants who had completed all sections of the examination, including the MBE. Note that the manner in which the scaling formulas, data analytics, and technical reports are done for each examination uses only complete sets of applicant scores. By definition, a “complete set of scores” for these purposes would not include any applicants who have a grade of less than 40 on any of the 6 written questions on the examination or a missing MBE score. In contrast, the manner in which numbers are reported for purposes of “Allocation of Applicants, Production of Examination Statistics and Law School Lists” and the Report to the Supreme Court on the California Bar Examination uses a definition of applicants who “completed” the exam that also includes applicants who have a grade of less than 40 (i.e., zeros) on any of the 6 written questions, so long as they are in attendance for the entirety of the exam. Thus, that latter number will be larger in comparison to the former number, as it is more inclusive. For the February 2023 GBX, 4,125 applicants sat for the exam. There were 425 applicants who had one or more zeros in their set of 6 written questions or did not take the MBE. Accordingly, there were 3,700 applicants who completed the GBX for purposes of the exam statistics (4,125-425).

² The bar passage rate for all 4,125 applicants taking the GBX, including those without complete scores was 34.6%. The passage rate for the 360 applicants taking the Attorney’s exam was 56.9%.

- The correlation between MBE and Written scores was .64, which remains among the higher levels for a February administration.
- Fully, 59 (12.7%) of the 463 applicants who went into regrade passed the examination. Only 5 applicants in the lower 10-point portion (i.e., < 1360) of the regrade range passed.
- Women continued to perform better than men on the written section (1336 vs 1305), while the opposite was true for performance on the MBE (1314 vs. 1339). With respect to racial/ethnic groups, Whites continue to outscore all other racial/ethnic groups on both exam sections, though the size of the gap between Whites and Blacks was smaller than last February but slightly larger for Whites and Hispanics.
- 46.3% of the 1,059 first-time takers passed the exam, while 27.8% of the 2,641 repeating the exam for the first time passed. The chances of passing for those taking the exam for the 5th time were significantly smaller (15.8%), while only 7.5% taking the exam for more than a 5th 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	569	859	270	226	116	101	335	2,476
Pass	490	494	85	76	33	19	27	1,224
Total Takers	1,059	1,353	355	302	149	120	362	3,700
% Passing	46.3%	36.5%	23.9%	25.2%	22.1%	15.8%	7.5%	33.1%

ANALYSIS OF THE FEBRUARY 2023 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 3,699 applicants who had their written answers graded first. The formula used to convert February 2023 Written Raw Scores to scale scores:

$$\text{Written Scale} = (4.335 \times \text{Written Raw}) - 468.1455$$

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

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

A two-phased grading process was used to determine an applicant's pass/fail status. In Phase 1, applicants passed if their Total scale score was 1390 or higher and failed if it was less than 1350³. The remaining applicants, i.e., those with total scale scores of 1350 to 1389.99, then have their essay and PT answers read again. The second Grader was a different Grader than the first one and did not know the score assigned by the first Grader. The final score for these applicants was the average of the two graders.

ANALYSIS

Analyses were conducted with the 3,700 applicants who had both an MBE score and a complete set of Written scores. This sample contained 1,059 applicants who were taking the examination for the first time (29% of all takers) and 2,641 repeaters (71% 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 .64 correlation between MBE and Written scores which is among the highest value since correlation statistics were calculated. Fully 33.1% of the applicants passed the exam, the lowest pass rate ever on a February administration. The pass rate can be directly attributed primarily to the 1325 average MBE score; also, the lowest recorded since the MBE became part of the examination program.

Table 1 - SUMMARY TEST STATISTICS AFTER ALL READINGS

Test Statistic	MBE Scale	Written Raw	Total Scale
Mean Score	1325	413	1324
Standard Deviation	155	36	140
Reliability	.92	.76	.90

SUBGROUP ANALYSES

Women continued to perform better than men on the written section (1336 vs 1305), while the opposite was true for performance on the MBE (1314 vs. 1339). With respect to racial/ethnic groups, Whites continue to outscore all other racial/ethnic groups on both exam sections, though the size of the gap between Whites and Blacks (56 points) was smaller than last February (90 points) but slightly larger for Whites and Hispanics (74 points vs 57 points).

³ 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	1295	1280	1306	1356	1344	1336	1305
MBE	1316	1282	1294	1358	1330	1314	1339
Total	1305	1281	1300	1357	1337	1325	1322
N	868	340	624	1,099	645	2,133	1,503
% Male	38%	42%	38%	43%	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 463 applicants who had their answers read at least twice. On the average, their mean Written raw score on the first reading (422.5) was 5.8 points higher than their mean on the second reading (416.7). The difference is slightly higher 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 1,165 and 31%, respectively. During the 2nd Phase, only 106 additional examinees (1.6% of all applicants) passed; a similar proportion to the February 2022 administration.

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

Phase	Fail		Pass		Total	
	Number	Percent	Number	Percent	Number	Percent
1	2,072	56.0%	1,165	31.4%	3,237	87.5%
2	404	10.9%	106	1.6%	465	12.5%
Total	2,476	66.9%	1,224	33.1%	3,700	100.0%

Table 4 illustrates the continuing strong relationship between Phase 1 scores and final pass/fail status. In addition to the reduction in the passing standard to 1,390 a few years ago, 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 relatively more examinees in the lower levels of the regrade range. On this administration only 7 examinees out of 226 (3%) with an initial total scale score in the two lowest regrade range (1360 to 1359) passed. Compare these to those examinees in the top of the regrade range (1380-1389) where 29 of 118 (25%) 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	89	29	118	25%
1370 – 1379	96	23	119	19%
1360 – 1369	97	2	99	2%
1350– 1359	122	5	127	4%
Total	404	59	463	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
2023	3,700	33	1325	413	.76	.64

* 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
2022	6,990	54	1403	432	.78	.73

* 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 2023



ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2023

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2023 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 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.	Civil Procedure
2.	Constitutional Law
3.	Real Property
4.	Professional Responsibility
5.	Evidence

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 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 to the facts.

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 resolution of the issues raised by the call of the question.

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

QUESTION 1

DuraTires manufactures and installs specially coated tires. DuraTires advertised that a scientific report declared that its tires will not go flat for the first 7,000 miles of use if driven properly. DuraTires' scientific report was created at the direction of its legal counsel and contained research on flat tire incidents involving DuraTires.

Pam purchased four new tires from DuraTires and had them installed by Maurice, a mechanic. Pam drove 100 miles and one tire went flat, causing Pam to swerve and crash into another car. Pam was not physically injured in the accident. Pam gathered a written statement from the other driver, Wynne, who suffered a minor injury. Wynne's statement was favorable to Pam's case.

Pam filed and properly served a complaint in federal court against DuraTires for breach of warranty and negligent installation and manufacture of the tires. The federal court had proper jurisdiction over Pam's complaint. Pam alleged that she suffered property damage and emotional distress as a result of the accident.

DuraTires filed a motion to dismiss for failure to join Maurice as a defendant. The court denied DuraTires' motion. DuraTires filed and properly served an answer to Pam's complaint.

Pam served her initial disclosures on DuraTires, but did not produce Wynne's statement. DuraTires filed and served motions to compel Pam to produce Wynne's statement and for Pam to submit to a physical examination. The court granted both of DuraTires' motions.

DuraTires served its initial disclosures, but did not include the advertised scientific report. Pam met and conferred with DuraTires, which refused to produce its scientific report. Pam filed a motion to compel DuraTires to produce its scientific report. The court granted Pam's motion and ordered DuraTires to produce its scientific report.

1. Did the court properly deny DuraTires' motion to dismiss? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Did the court properly grant DuraTires' motions:
 - A. To compel production of the statement from Wynne? Discuss.
 - B. To compel a physical examination of Pam? Discuss.
3. Did the court properly order DuraTires to produce its scientific report? Discuss.

QUESTION 1: SELECTED ANSWER A

1. D's Motion to Dismiss

A party may move to dismiss for failure to join a necessary party. A party is deemed necessary when its participation is required for a just adjudication. A court will consider the risk of prejudice to the current parties, as well as the potentially "necessary" party if the party is absent.

Specifically, it will analyze whether the existing parties can achieve complete relief without the "necessary" party. It will also consider the risk of multiple or inconsistent obligations that may occur if that party is absent. When a party is necessary, that party must be joined if it is feasible, meaning adding them will not defeat the court's subject matter jurisdiction and there is personal jurisdiction over the party. If it is not feasible to join such a party, a court will decide whether to proceed without them, or whether to deem them "indispensable" and dismiss the entire case, so the case may be re-filed with that party. Factors that will be considered in making such a determination are the extent of prejudice that may result, and potential ways that prejudice can be mitigated.

Here, DuraTires filed a motion to dismiss for failure to join Maurice as a defendant.

Maurice is relevant to the litigation because he was the mechanic who installed the tires that allegedly caused Pam's harm. Additionally, P specifically alleges a claim for "negligent installation" of the tires, which was done by Maurice.

Potentially jointly and severally liable tortfeasors, meaning those who are both liable for a single, inseparable harm, are not necessary parties. Here, P will argue that DuraTires and Maurice fit that description, as P is suing for "negligent installation and

manufacture," which combined led to her harm, so the court properly denied the motion to dismiss for that reason. D manufactured the tires, and M installed them. It appears M was likely working for or with D, as the facts state D is in the business of "manufacturing and installing tires." The plaintiff P may still obtain complete relief from the existing defendant D, because when defendants are jointly and severally liable, the plaintiff can obtain complete relief from any one of the defendants. Further, the existing defendant D is not prejudiced because he can later seek contribution or indemnification from the third party (or seek to implead him in the current case). The third party, Maurice, is not prejudiced because he may still defend his interest in such a later contribution or indemnification claim by DuraTires. Thus, Maurice is not a necessary party and did not need to be joined.

2a. Motion to Compel Production of Wynne's Statement

The scope of discoverable material includes all material that is relevant to a party's claim or defense, is not privileged, and is proportionate to the needs of the case. Discoverable material need not be admissible, but it does need to be reasonably calculated to lead to the discovery of admissible material.

Initial disclosures must include the names and contact information of likely witnesses, relevant tangible evidence (documents and things), and insurance policies, that are in the party's possession and that the party may use to support its claims or defenses.

Prior to filing a motion to compel evidence, the opposing party must attempt in good faith to confer with the other party to try to get the relief sought without court intervention.

Here, P had possession of W's statement, which was favorable to her case, so she would likely be using this to support her claim at trial. W was also injured as part of P's accident, so her statement regarding that accident is relevant to both P's claim, and D's potential defenses.

Additionally, there is no undue burden that appears present from P being required to compel this, and she would likely need to produce it anyway as part of her final pretrial disclosures, which requires production of likely testimony of witnesses who will be testifying. Therefore, W's statement is within the scope of discovery. However, it appears that DuraTires failed to attempt to confer with P prior to making this motion to compel, so P will likely argue that the granting of this motion was improper for that reason. On balance, it is likely that the court still properly granted this motion, because the statement fits the scope of discovery, but it may sanction D for failing to confer first.

2b. Motion to Compel a Physical Examination of Pam

A party may compel a physical examination of an opposing party when it obtains a court order to do so, after showing good cause for the examination, and that the physical condition of the party is at issue. D will argue this examination is relevant because it will assist it in preparing its defense against P's claims. However, this will be unsuccessful.

A physical examination of Pam is inappropriate here because she has not alleged that she was physically injured as a result of the accident. She is only seeking relief for her property damage and emotional distress that resulted from the accident. Thus P's physical condition is not in issue, and there is no good cause for this examination. D instead could have sought a *mental* examination, because P's mental state (her alleged

emotional distress) is at issue. The court properly denied this request for a physical examination.

3. DuraTires' Scientific Report

See rule above for scope of discovery, which excludes privileged material. D's scientific report is relevant to this case because it specifies the warranty that P is claiming was breached by D-- that the tires will not go flat for the first 7,000 miles of use if driven properly, as the tires went flat after she only drove 100 miles. Further, it is tangible evidence within the possession of D, that will likely be used to support its defense, as it states that the 7,000 mile warranty is only in place when the car is "driven properly." Additionally, P properly conferred with D regarding this piece of evidence prior to filing the motion to compel. Further, if D will likely have the expert who prepared the report testify at trial, or another expert who uses this report as the basis for his opinion, the report could also be compelled as part of the mandatory disclosure of expert witness materials, which include the bases each testifying expert relied upon. However, D will likely argue that it should not have been required to produce this report because it is privileged.

Work product protects from discovery documents that were created by or at the direction of the opposing party's attorney, in anticipation of litigation or for trial. The scientific report here was created at the direction of its legal counsel, but it is unclear whether that was done in anticipation for litigation. D will argue that it was, because it contained research on flat tire incidents involving D, which D likely anticipated being sued about. Based on those facts, it is likely the document is protected by work product privilege. However, work product that does not include the attorney's mental impressions,

opinions, or legal theories or research; and instead only contains factual information relevant to the case, is discoverable when the opposing party demonstrates a substantial need for the material, and that there would be an undue burden in obtaining it from other sources. Here, the scientific report contains factual information about flat tire incidents, so if it does not also contain mental impressions, opinions, or legal theories or research (which is not indicated by these facts), it may be compelled if P shows such a substantial need and undue burden. P likely does have a substantial need for this information, as research on other flat tire incidents involving D would be highly material to her claim regarding this accident caused by such a flat tire. Additionally, conducting this research herself would be very burdensome and expensive, which would likely cause her prejudice. On balance, the court properly ordered D to produce this report under the exception to work product.

Attorney-client privilege protects against compelled disclosure of confidential communications between attorney and client, made for the purpose of obtaining legal representation or advice. D will also likely argue that the scientific report is privileged because it was created at the direction of the attorney. However, it does not appear on these facts that this was a confidential communication between D and their attorney (or investigators employed by the attorney for purposes of legal services), although more facts are needed to properly determine this. Further, because the report was the basis of D's advertisements, it does not appear that D attempted to keep this confidential or private from third parties. When material portions of an allegedly privileged communication are voluntarily communicated to third parties, the privilege as to that information is generally waived. More facts are needed regarding whether D attempted

to maintain the confidentiality of this communication. However, if D's experts will be relying on this material as basis for their opinions, it will likely be discoverable as part of the mandatory expert witness disclosures.

QUESTION 1: SELECTED ANSWER B

1. Did the court properly deny DuraTires' motion to dismiss?

The Federal Rules of Civil Procedure ("FRCP") govern the procedural process in federal court. Pursuant to the FRCP 10, a defendant may file a motion to dismiss in response to a complaint filed against them. There are numerous grounds for filing a motion to dismiss. For example, a defendant can file a motion to dismiss for failure to state a claim upon which relief may be granted, or for lack of personal jurisdiction. Here, DuraTires ("DT") filed a motion to dismiss for failure to join Maurice as a defendant. Maurice is the mechanic who installed the four new tires that Pam purchased from DT. Failure to join a necessary party is a permissible ground for filing a motion to dismiss. So, the first issue is whether Maurice was a necessary party.

Failure to Join a Necessary Party

A party is a necessary party under the FRCP if complete relief cannot be granted without them or if their absence from the case subjects them to inconsistent judgments. Generally, joint tortfeasors are not necessary parties. Joint tortfeasors are jointly and severally liable to successful plaintiffs and tortfeasor defendants may thereafter seek contribution from joint tortfeasors who have not paid their fair share of the award. However, because a plaintiff can collect their full damages from any one tortfeasor, tortfeasors are not generally necessary parties. In other words, tort plaintiffs can go after tortfeasors in one combined action, or in consecutive actions,

and tortfeasors themselves can go after joint tortfeasors in separate actions if they were not joined in an initial action.

Here, Pam is bringing suit for breach of warranty and negligent installation and manufacturer of the tires. She has chosen to sue DT, the manufacturer and installer of the tires. Despite the fact that Maurice, the mechanic, may have been negligent in installing the tires, Pam is permitted to bring her suit solely against DT. Maurice is not a necessary party and the federal court properly denied DuraTires' motion to dismiss for failure to join Maurice as a defendant.

If Pam successfully proves her claims against DT, DT can go after Maurice for contribution if he was contributorily negligent in installing the tires. Pam may also bring a second action against only Maurice for his negligence. There are many reasons for why Pam might not have brought suit against Maurice (maybe it would destroy diversity jurisdiction in federal court or maybe he's insolvent) and the court will not dismiss the claim because she did not include him.

If DT wants to join Maurice in the case, they may be able to file a third party claim against him. Third party claims are permissible in federal court. However, DT will have to ensure that the federal court has subject matter jurisdiction over that claim and personal jurisdiction over Maurice. Because this is a diversity case (we have no reason to believe that breach of warranty and negligent installation and manufacture arise under federal law), complete diversity and \$75,000 in controversy will be required. If this is not satisfied, DT will have to show supplemental jurisdiction, which will require them to show that their claim arises from the same transaction or occurrence.

2(A). Did the Court properly grant DuraTires' motion to compel the production of the statement from Wynne?

In federal court, parties are entitled to seek discovery of all relevant non-privileged information that is proportional to the needs of the case. Discoverable information is broader than admissible information. Relevant information is any information that has any tendency to make a fact of consequence more or less likely. The proportionality requirement ensures that parties do not request unduly burdensome amounts of information.

Under the FRCP, parties are required to file initial disclosures. In their initial disclosures, parties must identify and/or produce the names of all individuals who are reasonably expected to have discoverable information relevant to the claims or defenses. Parties are also required to identify and produce the documents in their possession which they intend to rely on in proving any of their claims or defenses. Opposing parties do not have to request this information prior to the initial disclosure deadline. Finally, in initial disclosures, parties must identify whether they have an insurance policy covering the claim.

Motions to compel are a discovery tool that enable a party to seek discoverable information from an opposing party when the opposing party has failed to produce the information. Generally, before filing a motion to compel with the court, parties should attempt to meet and confer regarding a discovery dispute. The point of a meet and confer is to attempt to work out reasonable disagreements about the discovery process between the parties before involving the judge. If a party has attempted to meet and confer with opposing counsel and the parties have failed to reach an

agreement, or the opposing party refused to engage in negotiations, the moving party should file a motion to compel. Pursuant to FRCP 11, the court has wide discretion to impose sanctions on a party that files frivolous discovery motions or fails to engage in the meet and confer process regarding reasonable discovery disputes. In some instances, the court could order a losing party to pay the costs of the motion to compel if they did not engage in good faith.

Here, Pam served her initial disclosures on DT, but did not produce Wynne's statement. Wynne was the other driver in Pam's accident. Pam gathered the written statement from Wynne after the accident. Wynne suffered a minor injury in the accident and her statement was favorable to Pam's case. There is no indication that DT sought to meet and confer with Pam before filing a motion to compel.

The court properly granted DT's motion to compel production of the statement from Wynne. Because the statement from Wynne was favorable to Pam's case, and it is in Pam's possession, Pam will reasonably rely on it in proving her case for breach of warranty and negligent installation and manufacture of the tires. Wynne's statement could presumably say something about what Wynne witnessed regarding the state of the tires during the accident. Pam will want to rely on this to prove her case. Accordingly, the court properly granted DT's motion to compel production of the statement from Wynne.

(Please note that if the statement was not in Pam's possession, DT may have needed to subpoena Wynne as a third party to obtain the statement. Because it appears Pam

gathered the written statement, and it is thus in her possession, and because she is a party, a subpoena is not required.)

2(B). Did the Court properly grant DuraTires' motion to compel a physical examination of Pam?

The FRCP provide for certain circumstances in which a party is permitted to compel an opposing party to submit to a physical examination or psychological examination.

Generally, for these rules to be relevant, the party's physical condition (for a physical exam) or psychological condition (for a psychological exam) must be relevant to the claims. A psychological exam always requires court involvement.

Here, the issue is whether the court properly granted DT's motion to compel a physical examination of Pam. The court erred in granting this motion because Pam's physical condition is not relevant to the case. Pam was not physically injured in the case. Her complaint alleges only that she suffered property damage and emotional distress as a result of the accident.

Accordingly, Pam has not put her physical condition in issue in the case, and the court erred in granting DT's motion to compel a physical examination of Pam.

3. Did the court properly order DuraTires to produce its scientific report?

The next issue is whether the court properly ordered DT to produce its scientific report.

DT advertised that a scientific report declared that its tires will not go flat for the first 7,000 miles of use if driven properly. DT's scientific report was created at the direction of its legal counsel and contained research on flat tire incidents involving DT.

As set forth above, all relevant, non-privileged information is discoverable, subject to the proportionality requirement. Privileged information is not discoverable. Privileged information can be information protected by the attorney-client privilege or the work product doctrine. The attorney-client privilege protects confidential communications made by a client to counsel in furtherance of the representation. The privilege belongs to the client and survives the attorney-client relationship and the client's death. The work product doctrine protects information prepared in anticipation of litigation. These doctrines do not protect underlying facts.

Here, DT served its initial disclosures on Pam but did not include the advertised scientific report. After unsuccessful meet and confers, DT continued to refuse to produce the report. Thereafter, Pam filed a motion to compel, which the court granted.

As an initial matter, the advertised scientific report is clearly relevant to the dispute. Apparently, the report declared that DT's tires will not go flat for the first 7,000 miles of use if driven properly. This is presumably the basis for Pam's breach of warranty claim. What the report says thus is clearly relevant to Pam's claim that she had only driven 100 miles when one tire went flat, causing her to swerve and crash into Wynne's car.

The issue is whether the report is protected by the attorney-client privilege or work product doctrine. The attorney-client privilege does not apply because the report is not confidential information communicated to counsel. However, DT will likely argue that the report is protected work product because it was prepared at the direction of its legal counsel and contained research on flat tire incidents involving DT. This is a

losing argument. As set forth above, the work product doctrine protects documents prepared in anticipation of litigation or for the purpose of litigation. While DT may try to argue that the report was prepared for litigation generally, Pam will counter that "anticipation of litigation" means specific litigation. For example, work product will protect an attorney's report summarizing an interview with the client or relevant witnesses. It will also protect a report prepared by a retained expert regarding the circumstances giving rise to litigation.

This report was prepared at the direction of counsel, but before Pam's accident, so it cannot fairly be said to have been prepared in anticipation of Pam's litigation.

Another important factor weighing in favor of finding that the report is not protected by the work product doctrine is the fact that DT advertised the report. DT will argue that it did not waive its work product protection by advertising the report because it only advertised a specific claim that the tires would not go flat for the first 7,000 miles. It did not publish the entire report. If the entire report was published or advertised, then presumably Pam wouldn't need to file a motion to compel to obtain it. Pam will argue that, even if the report was prepared "in anticipation of litigation," DT waived the work product protection by advertising the report.

Additionally, the work product doctrine is intended to protect attorney mental impressions and general litigation strategy. As set forth above, it does not protect underlying facts. So, to the extent the report contains only research on flat tire incidents and scientific reporting about the efficacy of DT's tires, it will be admissible. It is important to note that if the report contains attorney mental impressions, notes or

litigation strategy information, the court should permit DT to redact this information before producing it. However, there is no reason to believe in this situation that there is anything that requires redaction.

It is also worth noting that Pam followed the required procedures and met and conferred with DT before raising the motion to compel with the court.

In sum, the scientific report is clearly relevant and is not protected by attorney-client privilege or the work product doctrine. Thus, the court properly ordered DT to produce its scientific report.

QUESTION 2

In response to a significant rise in diabetes among school-age children, and based upon links between diabetes, exercise and diet, Congress has passed, and the President has signed, the Childhood Physical Education Act (the Act). The Act, administered by the Federal Department of Education, provides significant additional funds to states for public schools with daily physical education classes for students. These funds are to be used for the hiring of additional physical education teachers and purchase of physical education equipment.

Testimony before Congress has revealed that, on average, public schools spend only 25% of their school lunch budgets on fresh fruits and vegetables. The Act requires that states accepting the funds must enact legislation setting as a minimum that 50% of public school lunch food budgets be allocated to the purchase of fresh fruits and vegetables.

Testimony has also revealed that rates of childhood diabetes tend to be highest in minority and low-income communities. The Act has significant additional subsidies for public schools where the majority of the student population is non-Caucasian.

Before the Act has gone into effect, State X, through its attorney general, has brought suit in federal court seeking a declaratory judgment that the Act is unconstitutional. The National Association of School Dieticians (NASD) is seeking to intervene in the attorney general's lawsuit. According to NASD's charter, it seeks to promote healthy diets for school-age children, especially through school lunch programs. The attorney general opposes NASD's intervention.

1. What constitutional challenges can the attorney general make to the Act and are they likely to succeed? Discuss.
2. Does NASD have standing to intervene? Discuss

QUESTION 2: SELECTED ANSWER A

1. Constitutional challenges to the Act

The Act was properly passed by Congress and signed by the President, so the AG cannot challenge the Act on those procedural grounds.

Spending Clause

The AG might argue that the Act is not a proper exercise of Congress's spending power. However, this argument will fail. Congress may spend to promote the general welfare; spending is itself an enumerated power of Congress, so spending bills do not have to be rooted in a different enumerated power. Other than the requirement that states pass certain laws, discussed more below, the Act is purely a spending bill, and any enumerated powers challenge will fail.

Spending requirement on fruits and vegetables

The Act's requirement that states enact legislation setting a minimum of 50% of public school lunch budgets be allocated to fresh fruits and vegetables is permissible under the constitution.

1. Anti-commandeering

If the requirement were a direct requirement that states pass laws, then it would be unconstitutional as a violation of the Tenth Amendment. The Tenth Amendment reserves all powers not given to the federal government to the states (or to the people). The Tenth Amendment embodies the principles of federalism, and core

among those principles is that the federal government may not command state legislatures to pass certain laws, because states are sovereign governments and not merely local agents of the federal government. This is called the "anti-commandeering" principle. To demand a state pass a certain law violates that principle.

(Further, if the law were written that way--as a direct command--then the Spending Clause would not provide a basis for Congress's act, and another basis would be required. The Commerce Clause might provide such a basis, except that Congress's commerce power cannot force anyone, which presumably includes the states, to engage in commerce.)

2. Condition on funding - Dole test

However, that is not the way the Act is written. Instead, it is a requirement for states that accept the funding to pass these fruit-and-vegetable laws. Such conditions on funding are permissible, even if they require states to pass a law, so long as the *Dole* test is satisfied: The funding must be reasonably related to the spending and it must not be such a great amount of money as to be coercive. This inquiry also looks at whether the program is well- established. Because this test is rooted in the Tenth Amendment, the separate anti- commandeering test is not further applied.

Here, the conditions are reasonably related to the spending, because the purpose of the bill is to combat childhood diabetes. It does that in several ways, including providing the spending for PE classes and the other subsidies. The fit need not be perfect; for example, the federal government may require seatbelt laws and a minimum drinking age in exchange for highway funding. The connection between the low budgets for fruits and

vegetables and combatting childhood obesity is sufficiently tight: All the federal funding for PE education may be essentially wasted if the children then go eat very unhealthy foods at lunch right after class.

The facts don't say whether the amount of money is large or small. However, state lunch programs should be quite small as a proportion of state budgets: While education is a big part of state budgets, the lunch money is a relatively small fraction of that--most of the education budget will be the buildings and buses and teachers, not the lunch food. Therefore, it is not coercive to require states to spend this amount of money on lunches (especially because it is structured as a fraction of the total public school lunch budget).

Further, the programs at issue are brand-new, so a state is especially free to turn down the funding and opt out of the program entirely. This is quite different from a situation like Medicaid, where states have long-established budgets built around Medicaid funding from the federal government. The states will not be coerced in this way either.

An additional requirement of *Dole* is that the required state act may not violate another constitutional right, such as the First Amendment. Spending money on fruits and vegetables will not violate any other such right.

Therefore, since this provision is a condition on the other funding, this requirement does not violate the constitution.

Equal Protection

The Equal Protection Clause (EPC) of the Fourteenth Amendment requires the government to treat people the same in various ways.

The EPC by its text applies to the states; but the same rules apply to the federal government via the Due Process Clause of the Fifth Amendment, which "reverse-incorporates" the EPC against the federal government.

The EPC can only be violated by the government, not private parties. There is such "state action" here in the form of the federal government passing the law and spending the money, and the states being forced to pass the lunch money laws.

1. First two provisions

The first two parts of the law, appropriating funding for PE classes and requiring states to budget lunch money for vegetables, do not differentiate on any suspect class such as race, gender, national origin, or legitimacy. Therefore, only rational basis review applies. Rational basis review requires that the government have a legitimate interest and that the means are rationally related to that interest. Both are satisfied for the first two provisions: Congress has factual findings about a significant rise in childhood obesity and the links between diabetes, exercise, and diet. Childhood diabetes is a legitimate concern of the government because it hugely affects the lives of children. And to combat childhood diabetes, the government is rationally focusing on physical education (exercise) and lunch quality (diet). (The evidence for this review need not be very strong, and can be hypothetical. But here, there is specific evidence about exercise and state budgets.) These two provisions definitely do not violate the EPC.

2. *Extra subsidies*

However, the last provision of the Act is constitutionally problematic. That provision provides "significant additional subsidies" for public schools based on whether the majority of the school is Caucasian. That is, it treats people differently based on their race (and the race of those around them). Race is a suspect class and triggers strict scrutiny under the EPC. Strict scrutiny requires that the government have a compelling government interest and take action that is necessary to accomplish that action.

Here, childhood diabetes does not rise to the level of a compelling government interest, despite its importance, because there are simply too many concerns of similar importance (even among health conditions alone) to justify the extraordinary step of discriminating on the basis of race. (Nor is there past specific discrimination that Congress is rectifying, which can be a compelling interest.)

But even if it were, the action here is not necessary or narrowly tailored. Congress is allocating "significant" budgets to schools based on their students' races. This is not "necessary" to fixing differential childhood obesity rates. For one thing, Congress could allocate such additional funds to all schools.

In any case, the action is not properly tailored: Congress has findings that diabetes is most prevalent in minority *and* low-income communities. But the funding is directed solely based on the race of the community, not its income level. So some funding will go to wealthy schools who are mainly minorities, while funding won't go to poor white

schools with sky-high diabetes rates. (Note that income is not a protected or suspect class.)

This provision of the Act violates the EPC, so the challenge to it should succeed on the merits.

Additional issues

State X standing

Standing (discussed more below) is present for State X because the law requires them to take action (passing laws) and affects their state budgets. States also get "special solicitude" in the standing analysis, so even if it were a close question, a court would likely find that there is standing.

Ripeness

Article III's "cases or controversies" requirement means that courts will not hear cases before they are ripe--before the injury is present or imminent. Here, the Act has not yet gone into effect. This might mean that the case is not ripe yet. However, a court is not likely to rule on this ground because the law has been passed by Congress and signed by the President, so the question of whether it is constitutional is ready to be adjudicated. States are now faced with the certainty of the law going into effect unless it is blocked, and must prepare themselves and their budgets now, not later.

2. NASD standing

Article III limits the federal courts to hearing "cases" or "controversies." This limitation has been interpreted to include the requirement of "standing." Standing's irreducible constitutional minimum has three components: Injury in fact, causation, and redressability.

Injury in fact

The injury-in-fact requirement means that a party must have a real, concrete harm that is actual or imminent, and not just hypothetical. Economic losses are the classic form of injury in fact.

NASD has no economic losses. Their argument will be that they still have an injury because the implementation or non-implementation of the act will further or harm their group's mission. But there is no standing based on merely an interest in seeing that the laws are applied correctly; groups cannot intervene merely because they are interested in the policy question at stake. A mission statement cannot confer standing.

A better argument is that NASD's budget will be severely affected by this legislation: if it goes into effect, they will have to spend less money advocating for healthy lunches, because states will be required to spend more money. That argument is too hypothetical, because NASD may have to spend the same or even more money as the policy space evolves. Therefore, any such injury is too hypothetical to be an injury in fact (which must be more certain).

Causation

Causation means that the other party's actions are the cause of the party's injury.

Even if a court accepted the knock-on argument about NASD's budget, the causation would be too diluted, because NASD is not itself spending its budget on fruits and vegetables. The state's expenditures would not neatly replace NASD's, so any economic harm to NASD's budget is not caused by the law going into effect or not.

Redressability

Redressability means that a court's judgment would fix or cure the injury in fact (at least in part). Here, because the injury and causation prongs are not met, the redressability prong is not met either (though arguably the court could let the law go into effect, but all three prongs must be met, so this prong need not be reached).

Other theories of standing also fail.

Associational standing

An association has standing when its members would have standing to bring the suit themselves. The NASD members appear to be school dietitians. For the reasons explained above, any given school dietitian does not have an injury-in-fact, because they are not personally harmed by the law going into effect or not going into effect.

Taxpayer standing

NASD or its members cannot have standing on the basis of their status as taxpayers.

Taxpayer standing argues that the party's interest is in the correct use of their tax

dollars. But absent extremely narrow circumstances (mainly religious establishment clause issues), there is no taxpayer standing because it would swallow the "cases or controversies" requirement.

Conclusion

Therefore, NASD does not have standing to intervene.

(However, it is common in federal courts to allow a party like NASD to participate as amicus curiae in a lawsuit, but not as a party. In this capacity NASD could file amicus briefs to let the court benefit from its expertise. However, as a non-party, it could not bring claims or defenses or engage in discovery. An amicus curiae does not have to meet the standing requirement because it is not a party.)

QUESTION 2: SELECTED ANSWER B

(1) Constitutional challenges against the Act

The first issue is what constitutional challenges the attorney general ("AG") may bring against the Act. The AG can challenge the legislation as a (1) violation of the Tenth Amendment's anti-commandeering principle and (2) a violation of the equal protection clause.

1. Violation of the Tenth Amendment anti-commandeering principle

The AG can first challenge the Act as a violation of the Tenth Amendment's anti-commandeering principle. The federal government is one of limited powers, and can only act with authorization under the Constitution. States, on the other hand, have general police powers. The Tenth Amendment of the U.S. Constitution provides that all powers not vested in the federal government are reserved to the states.

The first issue is whether the federal government had power to enact the legislation. The U.S. Constitution grants to Congress the power to tax and spend for the general welfare. This power is very broad, and just requires a rational connection to a legitimate purpose. Here, the Act was enacted in response to a significant rise in diabetes among school-age children, which affects the health and welfare of the nation's citizens. The Act provides additional federal funding for the hiring of P.E. teachers, purchase of P.E. equipment, and healthier school lunches. The Act's purpose is to increase the physical education in schools and also improve the health of school lunches, which was based on the link between diabetes, exercise, and diet. Because the Act was rationally related to the goal

of reducing diabetes and improving the health of school-age children, the Act was within Congress's taxing and spending power.

The next issue is whether the federal government's act nonetheless violated the Tenth Amendment and principles of federalism. The federal and state governments are separate sovereigns, the federal government may not exercise its spending and taxing power in such a way as to "commandeer" the states to act. This is called the anti-commandeering principle.

Under the anti-commandeering principle, a spending measure enacted by Congress will be invalidated if it (1) directly compels the states to act or (2) is unduly coercive, such that the states are left with no choice but to comply with the federal government's directives.

Here, the Act does not directly force the states to enact legislation, so (1) is not applicable. However, the Act does involve strings or conditions on the receipt of federal funding that the AG may argue are unduly coercive.

Here, the Act makes receipt of the "significant" additional funds conditioned on the states enacting certain legislation related to the Act's purpose. Specifically, if the states receive the funding, they are required to set as a minimum that 50% of public school lunch food budgets be allocated to the purchase of fresh fruits and vegetables.

The AG may argue that this spending condition is unduly coercive, effectively "commandeering" the state legislatures to enact legislation that the federal government desires. AG's strongest argument is that the Act provides "significant funding," and states

may therefore feel compelled to comply with the conditions because the financial upside is so high (and public schools are notoriously under-funded.)

This argument, however, is not likely to succeed. The Act does not make any changes to the federal funding states already receive for the administration of public schooling; it merely adds additional funds. A spending condition is more likely to be found to be unduly coercive where, for example, the condition threatens a significant portion of the state's budget. For example, if the Act made the receipt of *all* federal funding for public schools conditioned on enacting the desired legislation, the AG would have a stronger argument. But the Act here keeps schools' normal amount of federal funding intact; it just gives them the option of obtaining *more* federal funding.

The AG will therefore likely not succeed in a challenge to the Act based on the anti-commandeering principle of the Tenth Amendment.

2. Violation of the Equal Protection Clause

The AG may also argue that the Act's additional subsidies to majority-non-white schools violates the equal protection clause.

The Equal Protection Clause ("EPC") of the Fourteenth Amendment provides that the government shall treat similarly-situated people or entities in a similar way. Although the Fourteenth Amendment is applicable only to the states, the Fifth Amendment's due process clause -- applicable to the federal government -- has been held to contain an identical guarantee.

The level of review applicable to a challenge under the EPC depends on whether the government's action burdens a suspect or quasi-suspect classification. Suspect classifications (including race, national origin, and alienage) are subject to strict scrutiny, meaning that the government must prove that the action is narrowly tailored to serve a compelling government purpose. Quasi-suspect classifications (gender and legitimacy) receive intermediate scrutiny; the government must prove that the action is necessary to achieve a substantial government interest. All other classifications receive rational basis review, which means the government action must be rationally related to a legitimate government purpose.

Here, the Act provides significant additional subsidies for public schools where the majority of the student population is non-Caucasian. Accordingly, the Act, on its face, draws a distinction between schools with majority white students and schools with majority non-white students. Because this is a classification based on race, the government must prove that the action is narrowly tailored to serve a compelling government purpose. The government, not the AG, bears the burden on this issue.

The stated purpose for the Act's additional subsidies is that rates of childhood diabetes tend to be highest in minority and low-income communities, so it is providing the additional funding to provide extra help to those schools in combatting these issues. The government can likely prove that reducing the rate of childhood diabetes is a compelling government purpose. The diabetes and obesity epidemic in this country results in a huge burden on the country's public health infrastructure and leads to countless deaths each year. The fact that there is a "significant rise" in childhood diabetes makes it even more crucial to combat the disease earlier rather than later.

The government, however, likely cannot prove that the additional subsidies are narrowly-tailored to serve that purpose. The facts state that there has been a significant rise in diabetes among *all* school-age children, not just minority children. The additional subsidies are based on testimony that the rate of childhood diabetes "tends to be higher" in minority and low-income schools, but there is no additional evidence that the Act's "significant additional funds" that already will be provided to all schools will not be enough to address this issue, such that the minority and low-income schools need even more funding. Moreover, the evidence of higher diabetes rates also applies to low-income schools, which may be predominantly white, and those schools will not be eligible for the additional funds since the classification was drawn entirely on race. (The government would have been better off drawing the classification on socioeconomic status, since many low-income schools are also heavily minority, and wealth is not a suspect class under the EPC.)

Accordingly, the AG can likely succeed in a challenge to the additional subsidies based on the EPC.

(2) Whether NASD has standing to intervene

All parties in federal court must have standing to assert their claims. Standing means that a litigant has a concrete stake in the outcome of the case. Standing requires (1) an injury in fact, that is concrete and particularized; (2) traceable to the challenged conduct; and (3) that can be redressed by a favorable court decision.

For an organization to have standing, it can either (1) base standing on an injury to itself, or (2) assert a claim on behalf of its members, where (a) the members would

have individual standing to assert their claims and (b) the nature of the suit or remedy requested does not require that the members participate individually.

Here, the organization is a non-profit that seeks to promote healthy diets for school-age children, especially through school lunch programs. However, it will likely be unable to prove standing to intervene because it is unclear what concrete stake it has in the case. Although the legislation is related to its stated purpose and it would therefore prefer that the legislation be upheld, an injury-in-fact must be concrete and particularized.

NASD likely lacks standing to intervene.

QUESTION 3

Tuan sells antique furniture. He signed a ten-year lease for a warehouse owned by Leo at \$1,000 a month, with a start date of January 1. The warehouse would be used to store Tuan's inventory. When Tuan attempted to occupy the warehouse on January 1, he discovered Annika there pursuant to her validly executed lease, which was not due to end until January 31. Tuan then immediately rented another almost identical warehouse from Bruno, on a month-to-month basis, for \$1,500 a month.

When Tuan returned to Leo's warehouse on February 1, Annika told Tuan she was not leaving until May 31.

When Tuan visited the warehouse on June 1, he discovered that Leo had stored equipment in the warehouse that made 25% of the space unusable. Tuan refused to take possession and informed Leo that he was terminating his lease immediately.

The next day, Leo retook possession of the warehouse and placed "For Rent" signs in several windows. Shortly after, Leo executed a ten-year lease with Juanita for the warehouse at a monthly rent of \$500, with a start date of July 1.

Tuan rented Bruno's warehouse from January to June. He later signed a new lease for 9 ½ years starting on July 1 with a monthly rent of \$1,500.

Tuan has never paid any rent to Leo.

Tuan decided to sue for damages based on his rights under his lease with Leo.

1. What claim(s), if any, may Tuan reasonably assert against Leo? Discuss.
2. What claim(s), if any, may Tuan reasonably assert against Annika? Discuss.
3. What counterclaim(s), if any, may Leo reasonably assert against Tuan? Discuss.

QUESTION 3: SELECTED ANSWER A

1. TUAN'S CLAIMS AGAINST LEO

A. Violation of Duty to Deliver Possession

The question is whether Annika's continued residence from January 1st to January 31st under a valid unexpired lease or from February 1st to May 31st without a valid lease constituted a violation of Leo's duty to deliver possession. A landlord has a duty to deliver possession of a leased premises to a tenant. Under the majority English rule, this duty is the duty to deliver both actual possession of the premises and a legal claim to superior title over the premises. Under the minority American rule, a landlord only has the duty to deliver legal possession of the premises. In either case, a tenant has the right to evict a holdover tenant.

Here, Leo violated the duty to deliver possession under both the majority and the minority rule from January 1st to January 31st. The reason is that Annika continued to have a validly executed lease that gave her priority of legal possession over Tuan. Therefore, Tuan did not have legal possession. In addition, under the majority English rule, Leo likely violated the duty to deliver actual possession from February 1st to May 31st because, although Annika did not have a legally superior right to Tuan at the time, Annika was still in physical possession so that Tuan could not retake the premises without legal action. Under the minority rule, Tuan would have had an obligation on February 1st to evict Annika himself.

In contracts, a party is generally entitled to expectation damages consisting of the benefit the party would have received from the bargain. Additionally, because the duty to deliver

possession and the duty to pay rent are dependent covenants, Tuan would not have had to pay rent for the period in which he was out of possession. During the periods when Tuan was out of possession, he could sue for the difference between the rent he should have paid for the warehouse and the rent he had to pay in order to obtain substitute space, or \$500 a month. This would give him damages of \$500 for the period from January 1st to January 31st. For the four-month period after that when Annika was not staying under a valid lease issued to her by Leo, it is less clear what Tuan's damages would be.

Even under the majority rule it is unclear whether Tuan could sue for the full period from February 1st to May 31st because Tuan appeared to fail to inform Leo of the holdover tenant, and to surrender the premises even though he had the legal right to it. A tenant who surrenders the premises in this way does so at the tenant's own peril and may not receive full damages. A party to a contract typically has their damages reduced by any amount that the party could have avoided through reasonable efforts. Tuan could have brought an ejectment or unlawful detainer suit against Annika, or he could have asked Leo to do so if Leo had a duty to deliver actual possession.

B. Actual Eviction

A tenant is actually evicted when the tenant is denied physical possession of all or some part of the premises. If a third party has evicted the tenant from even part of the premises, then the tenant is typically not obligated to pay rent any longer. Indeed, the tenant may abandon the premises. However, if a landlord deprives a tenant of only a portion of the premises, then the tenant's obligation to pay rent is merely decreased proportionally.

Thus, Tuan may have a defense to paying rent from the entire period lasting from January 1st to May 31st because he was evicted from the premises-- a third party (Annika) was in physical possession and he could not access the premises. (As mentioned above, Tuan's failure to make any moves to evict Annika may reduce this recovery). Tuan could have justifiably abandoned the premises but didn't. Additionally, for the period from June 1 to July 1 wherein Leo stored equipment in the warehouse making 25% of it unusable, Leo had taken physical possession of 25% of the premises from Tuan, thus actually evicting him. For that period, then Tuan would have owed proportionally less rent by 25%. Tuan could not justifiably abandon the premises because he was only deprived of part of it, however (unless he proves a constructive eviction claim-- see point 1C below).

Notably, however, Tuan could not recover double on both his claim of failure to deliver possession and actual damages. In addition, Tuan's eviction claim would be subject to the same duty to mitigate discussed in A, above.

C. Constructive Eviction

The final issue is whether Leo's possession of 25% of the space in the warehouse constituted constructive eviction that would justify Tuan's abandonment and give him a claim for damages for the rest of the lease term. A tenant may claim constructive eviction if the landlord's actions or failure to act deprive the tenant of the substantial enjoyment of the premises. A constructive eviction suit justifies a tenant in abandoning the premises. To prevail in this suit, the tenant must notify the landlord of the problem, give the landlord a reasonable amount of time to fix the problem, and then vacate the premises.

Here, because the nature of the commercial property was a warehouse used to store inventory, Tuan could make a strong claim that being deprived of a quarter of the space he had bargained for deprived him of substantial enjoyment of the premises. Assuming that he selected the spot in a cost-conscious manner and only had just enough space to suit his needs, he would no longer be able to profitably operate his business with a quarter of his inventory out on the street. However, Tuan failed to inform Leo that the arrangement was unacceptable (which was likely necessary because from Leo's perspective Tuan hadn't been occupying the warehouse at all). Furthermore, Tuan gave Leo no time to remedy the problem. Instead, Tuan immediately quit the premises. Thus, it is unlikely that Tuan will be able to claim constructive eviction.

Because Tuan cannot claim he was justified in abandoning the premises, Tuan likely cannot collect the difference of \$500 monthly for the rest of his 9-1/2 year lease term under this theory.

2. TUAN'S CLAIMS AGAINST ANNIKA

A. *Trespass*

The question is whether a holdover tenant may be liable for trespass for either (1) a period during which both the tenant and the claimant held a valid lease or (2) a period during which the holdover tenant's lease had expired and the tenant had a current lease entitling the tenant to possession. The elements of trespass are an intentional entering or remaining on the land of another without the consent of the other. A tenant with a valid lease has a term of years or other present possessory interest, while a landlord holds a reversion.

Here, Annika is not liable for trespass for the period lasting from January 1st to January 31st because Annika had a right to possession of the property as demonstrated by her valid lease. The property she entered or remained on would not be the property of "another" because it was her leasehold property at the time. However, for the period from February 1st to May 31st, when Annika's lease had ended, she was not the owner of the property. Thus, if Tuan asked her to leave, she would have been trespassing because she would not have had consent from the current holder of a present possessory term of years on the premises.

Tuan's best remedy in that instance would have been an action for ejectment, which would have constituted a request to order the sheriff to remove Annika from the property. Tuan did not. However, insofar as trespass results in injury to the property or a substantial interference with the owner's right to the enjoyment of the property, the owner may also seek damages. In this instance, Annika deprived Tuan entirely of the property for four months. He could request the fair rental value of the property at that time as a measure of the use of the property he was deprived of.

3 LEO'S CLAIMS AGAINST TUAN

1. Abandonment

The issue is whether Tuan unjustifiably abandoned the premises in violation of Tuan's lease agreement, entitling Leo to damages for future rent he would have obtained under the ten-year lease. A tenant typically has a duty to occupy or pay rent on the leased premises for the entire term of the lease. A tenant violates this duty by unjustifiably abandoning the property. Abandonment occurs when a tenant quits the premises, has no

intention of returning, and defaults in the payment of rent. Here, Tuan left the premises on January 1st; however, he didn't form an intent not to return until June 1st, when he told Leo he was terminating the lease. Before that, Tuan continued to return on the dates he was told the warehouse would be available. Tuan has paid no rent, so he defaulted on rent as of February 1st, when the first payment of \$1,000 was due under the lease term. Thus, all elements for abandonment were present by June 1st. As noted above, while Tuan likely would have been justified in abandoning the premises from January 1st to May 31st when he was completely evicted, Tuan did not. Instead, Tuan selected June 1st, a date on which he was not justified in abandoning the premises (see point 1C above).

When a tenant abandons the premises, a landlord has one of several options. First, the landlord may accept surrender, which terminates the tenant's duty to pay rent. Acceptance of surrender may be implied if the landlord remodels or alters the premises so they are no longer suitable for the tenant's use, or it may be an explicit declaration to the tenant.

Another option is that the landlord may treat the abandonment as unjustified but relet the premises for the tenant's remaining term on the tenant's behalf and hold the tenant accountable for a difference in the value of the rent, if any. Finally, in a minority of jurisdictions wherein a landlord does not have a duty to mitigate damages, the landlord may simply leave the premises open and sue for rent as it accrues over the lease term.

Here, the facts indicate that Leo treated the surrender as unjustified and relet the premises for Tuan. Leo made no representation to Tuan that he accepted Tuan's surrender. The facts do not indicate that Leo said anything to Tuan. While Leo retook possession of the warehouse, he did not relet it for the exact period remaining on Tuan's

lease, but 10 years is close to 9.5 years and it was likely necessary to round up for the sake of a new tenant. This indicates he was merely reletting to minimize damages.

Typically, Leo's damages would be measured by the difference between the contract price and the substitute contract he was able to obtain. Tuan's lease was \$1,500, while Juanita's was \$500. This would make Tuan accountable for a difference of \$1,000 a month. However, Tuan would be able to contest these damages if the relet to Juanita was not commercially reasonable. If there were other tenants willing to pay closer to the amount that Tuan paid and Leo failed to rent to those tenants because of a non-commercial preference for Juanita, Leo's damages would be reduced proportionally.

Additionally, if Tuan made an argument that his abandonment of the premises was justified because Leo breached the lease first through Tuan's eviction from January 1st to May 31st (almost half a year) (see points 1A and 1B), then Leo would not be entitled to any future damages. A party that materially breaches first is no longer entitled to expectation damages or return performance. A material breach occurs if the other party is deprived of the benefit of their bargain. Factors in whether a breach is material include the extent of the deprivation, whether the deprivation can be cured with money damages or other remedies, the likelihood of cure, and whether breach was willful. We do not have facts indicating whether Leo knew that Tuan had been evicted or Annika was holding over. However, six months out of possession is a long time, even for a ten-year lease. While Tuan could be compensated for his extra rental expenses, property is considered unique and so his loss of use might not be able to be cured, particularly if he chose Leo's warehouse as a strategic location. Therefore, if a court does not find that Tuan's

failure to take steps to evict Annika renders the breach immaterial, Leo will not recover future damages.

2. Rent

A tenant has a duty to pay rent. If a tenant violates this duty, then a landlord is entitled to damages for the accrued unpaid rent. Here, Tuan has failed to pay rent for six months from January through June. Therefore, in the absence of Leo's breach, Leo would have been entitled to \$1,500 for each of the six months he has already rented to Tuan.

However, a party in material breach has no right to a return performance, as discussed above. Leo failed to deliver possession to Tuan from the beginning of the lease. From January 1st to January 31st, Tuan certainly would not owe rent because Annika's lease still gave her a legal right to possession. From February 1st to May 31st, Tuan also was evicted and Leo did not deliver on his duty to deliver possession. Leo would have to demonstrate that Tuan was at fault for failing to notify him or bring an eviction suit in order to recover rent for this period. If Tuan had occupied the premises in June, then Leo would have been entitled to 75% of rent because he was only occupying 25% of the warehouse. However, if a court finds that Tuan's obligations had already ended due to Leo's material breach by June, then Tuan would owe nothing after that period.

QUESTION 3: SELECTED ANSWER B

1. Tuan's Claims Against Leo

Failure to Provide Right to Possession

A landlord owes a tenant a duty of providing the actual right to possess the property throughout a valid lease, as well as the legal right to possess it, at least in most states. (In a minority of states, a landlord need only provide the legal right to possess.) The right to possession is the right to maintain exclusive control of the whole of the property. A tenant-possessor must have the ability to exclude anyone that he does not want on the property or else he is not in full control of all of his rights under the lease.

For the first month, from January 1 to January 31, Leo provided Tuan neither the legal right nor the actual right. Leo signed two leases for the same month governing the same property, with Tuan and Annika. Leo's failure to provide either right to Tuan for that month is a material breach of the lease, and in every state Tuan may bring a claim against Leo for that.

Actual Right to Possession

For the months February through May, Leo again failed to provide Tuan with the actual right of possession of his property. Annika remained at the property in a tenancy at sufferance, preventing Tuan from accessing or possessing it. The tenancy at sufferance began at the expiration of Annika's lease and continued throughout the period that she remained in control of the property without a lease or other tenancy.

In most states, Leo's failure to provide Tuan with the actual right of possession for these four months is a material breach of their lease. For much the same reasons as *supra*, Tuan could not access the property or control it for use of the storage of his inventory. Tuan would thus have a claim against Leo for these four months in addition to the month of January in most states.

In a minority of states, however, Leo need only provide Tuan with the legal right to possess the property. Tuan's valid lease is that legal right beginning on February 1. In this minority of jurisdictions, Annika's holdover tenancy does not mean that Leo breached the lease with Tuan. It would require Tuan to pursue his own legal action against Annika for this four-month period (discussed *infra*).

Implied Covenant of Quiet Enjoyment

Every lease includes an implied covenant of quiet enjoyment (ICQE). This requires a landlord to permit the tenant the use of and control over the property in legitimate and legal ways. It bars the landlord from substantially interfering with the tenant's right.

Tuan will argue that Leo's equipment storage - rendering 25% of the warehouse unusable - was a violation of the ICQE. Because of that violation, Tuan will argue that he was constructively evicted. A constructive eviction can occur when a landlord's substantial interference with the ICQE is not resolved within a reasonable time of the landlord's receipt of notice of the interference and the tenant elects to break the lease and leave the property. Upon a constructive eviction, the lease terminates.

The storage of goods rendering 25% of the warehouse unusable is likely a violation of the ICQE. It is a substantial interference with Tuan's use and enjoyment of the

property. Tuan leased the warehouse for the storage of his own inventory, and Leo is instead holding back 1/4 of the property for his own storage. The analysis may be different if Leo used the property in a different way that did not affect the capacity of the warehouse to store Tuan's goods, or if Leo's use of the property rendered 1% or 2% of it unusable for Tuan. But making 25% of it unusable for Tuan's storage is a substantial interference with his use of the property, and thus Leo has breached the ICQE. (A discussion of constructive eviction is *infra*.)

Mitigation and Damages

In January, upon learning Leo failed to deliver both legal and actual possession of the property, Tuan promptly mitigated his damages by renting an almost identical warehouse for \$1,500.

Tuan acted reasonably, because the replacement warehouse is nearly identical and because Tuan elected to sign a month-to-month periodic tenancy rather than a lengthy tenancy for years. Tuan would then be able to end his tenancy with Bruno's warehouse to come to Leo's warehouse as soon as it was made available for him.

Leo will likely argue that Tuan did not reasonably mitigate because he found a replacement property at a 50% cost increase. That suggests that Tuan did not shop around or that he got an unreasonably poor deal from Bruno. But Tuan will argue that Leo's failure to provide possession on January 1 forced him to immediately sign another lease to allow him a place to store his goods on that same day. Tuan did not have to spend much time shopping around, because it was already January 1 when he learned that his lease starting that same day would not be honored. A 50% price

premium - especially considering the month-to-month nature of the lease will not be seen as unreasonable on Tuan's part, and Leo will be responsible for it.

Tuan paid \$500 extra for this warehouse in January. In every state, Tuan could seek this \$500 from Leo.

Tuan also paid a total of \$2,000 above and beyond his lease with Leo to use Bruno's warehouse for the four months of February through May. Tuan's ability to pursue these funds from Leo would vary by state. In most states, because Leo failed to provide Tuan with actual possessory rights in addition to legal possession rights, Leo is liable to Tuan for his damages accrued over those four months. In a minority of states, though, because Leo provided Tuan with legal possession rights as the sole holder of a valid lease for those four months, Leo fulfilled his duties and complied with the law. Thus, Tuan would be forced to pursue Annika for those funds (see *infra*).

Finally, Tuan will argue he was constructively evicted on July 1 and was required to then pay \$500 extra per month in perpetuity for the remaining 9.5 years of the lease lifetime, a total of \$57,000 in damages. Tuan will seek this \$57,000 from Leo.

9.5 Year Lease

Tuan will argue that his constructive eviction forced him to continue using Bruno's warehouse for the remaining 114 months at the \$1,500 price. Leo will argue it is neither reasonable nor fair to require him to pay the lease-price difference in perpetuity. First, the reasons underscoring the reasonableness of the \$1,500 price in January are not present here. Tuan is no longer paying a month-to-month price premium and should be able to secure a price closer to \$1,000 for such a lengthy lease, assuming

the \$1,000 lease was in line with market conditions. Second, Leo will argue Tuan needed only a warehouse for the 25% of his goods that could not be stored in Leo's warehouse, since Tuan could still use the 75% of Leo's warehouse that remained available to him. This will turn on the constructive eviction question discussed *infra*.

The court will likely evaluate the reasonableness and foreseeability of Leo having to pay damages for the increased rent price Tuan was subjected to by leasing Bruno's warehouse. On one hand, Leo was aware that Tuan sought a 10-year storage lease because he entered into one with Tuan. It is foreseeable that Tuan could have damages for that full lease period if Leo failed to live up to the lease. Assuming Tuan was constructively evicted, a court could find that he acted reasonably in a foreseeable way.

But on the other hand, a court could find that Tuan's decision to stick with the same warehouse that he found on short notice on January 1 for a 9.5-year lease, at the same price that he originally got the warehouse when he needed it that same day and on month-to-month terms, was not reasonable. The court could determine Tuan was required to analyze market conditions and seek better terms, even if Tuan could have stayed with Bruno for another month or two on the month-to-month lease before doing so. Ultimately, if Tuan truly was constructively evicted, this middle approach is likely. The court will consider expert testimony or other evidence about market conditions and decide, after reviewing all of the facts, whether Tuan should have spent one or two more months with Bruno before signing a 110+ month lease with some other party at a price closer to \$1,000 a month.

Total of Claims

Thus, Tuan will argue Leo breached the lease by failing to provide him possession of the warehouse from January through May and that Leo constructively evicted him through a breach of his ICQE. Tuan will seek \$500 for January, \$2,000 for February through May, and another \$500 for every month after that through the end of his 10-year lease term. But Tuan is unlikely to get all of it, even if he was constructively evicted.

2. Tuan's Claims Against Annika

Tuan's claims against Annika depend on which rule the jurisdiction follows. He also can bring a tort claim for trespass to land.

Majority Rule

Under the majority rule, Leo owed Tuan actual and legal possession as of the start of the lease. Leo breached that duty throughout the entire time Annika was present because he did not deliver actual possession. Thus, Tuan will pursue remedies from Leo for that period relating to the lease. But this does not affect a trespass analysis; see *infra*.

Minority Rule

Under the minority rule, Leo complied with his duty to provide legal possessory rights as of February 1, when the conflicting leases no longer overlapped. Thus, Tuan's claims for possession of the property under the lease would be brought against

Annika. Annika would be solely responsible to Tuan under this role for any of his foreseeable damages as a trespasser to his land.

Trespass to Land

Trespass to land is an intentional tort. It is committed when a party encroaches on another's property and interferes with it. Trespass to land can be very slight, and nominal damages are available. It need not be a significant trespass to be cognizable.

Here, Annika's trespass is certainly significant. Annika is trespassing to the extent that she is using the whole of the property for herself. Tuan cannot use the property to store his goods. Thus, Annika has committed a trespass from which significant damages may flow.

Tuan may seek from Annika the \$500 per month extra that he was forced to spend in renting Bruno's warehouse from February through May. But Annika is not responsible for the \$500 extra Tuan spent in either January or June. In January, Annika was present at the property as the holder of a valid lease. Tuan's damages for January may only be sought from Leo, who unlawfully rented the same warehouse to both Annika and Tuan. And in June, Annika had terminated her lease and vacated the premises.

Still, Leo may argue that it is Annika who should be responsible for the 9.5 years' worth of \$500 additional rent. Leo will say that, because Annika held over in sufferance, Tuan gave up and left on June 1. Had Annika not held over beyond February 1, Leo will argue, Tuan never would have left. But this argument is likely to fail. It is too attenuated in its causal chain, and it is neither foreseeable nor reasonably certain that Tuan would

have stayed under Leo's lease long-term had Annika not overstayed her lease after February. Thus, Annika is not going to be liable for Tuan's damages after May.

3. Leo's Counterclaims Against Tuan

Leo will argue that Tuan breached their lease when he departed on June 1 and refused to pay. Leo was forced then to mitigate his damages and rent to Juanita for only \$500 a month. Thus, Leo will argue that the \$500 delta in rents he was paid for that 9.5 year period are Tuan's fault and Tuan owes him damages.

To determine who is right, a court will analyze whether Tuan was constructively evicted by Leo's actions. A constructive eviction occurs when a landlord violates the IWQE, the tenant notifies the landlord of that violation, the landlord does not remedy it within a reasonable time, and the tenant leaves and considers him or herself evicted. Upon constructive eviction, the lease ends. Thus, if Tuan was constructively evicted, he owed Leo no duties after June 1 and Leo cannot recover from him.

Substantial Interference

Leo will argue his use of 25% of the warehouse wasn't a substantial interference. This will likely fail for the reasons in the IWQE section *supra*. Using 25% of the warehouse that Tuan wanted to store his goods is a substantial interference.

Constructive Eviction

Leo will argue that Tuan's constructive eviction was wrongful because Tuan did not give him notice and a reasonable opportunity to cure. When Tuan arrived on June 1 and found 25% of the warehouse unusable, he terminated his lease immediately.

Tuan did not give Leo notice then and a chance to cure. This is Leo's strongest argument.

Tuan will argue that the "notice" relates back to at least January 1, when he found Annika in his warehouse. Because Leo executed valid leases with both Tuan and Annika for that month, Leo is considered to have actual knowledge of that conflict. Tuan will say that Leo was on notice as of that time. In addition, in some states, Tuan may be excused from the notice requirement for futility. Tuan may argue that it would have been futile to give Leo notice of yet another breach of his lease, because Leo had already failed to perform it for five months. Rather than the June 1 event being the sole thing giving rise to eviction, Tuan will argue, it was the last in a long series of events that gave rise to it.

The notice and opportunity to cure issue is the crux of Tuan and Leo's dispute. Tuan will argue that he was done at that point with Leo's repeated breaches of their lease. Upon showing up on June 1 - five months after his lease was supposed to start - he saw that Leo had reserved an entire quarter of the facility for his own use. Tuan will say that such a blatant disregard of the lease shows that any notice to Leo would have metaphorically gone in one ear and out the other, or alternatively, that Annika's presence for the months prior was sufficient notice.

But Leo will argue that Tuan never told him Annika overstayed her lease. While Leo will be considered to have known Annika was there in January due to the overlapping leases, no facts suggest that Tuan contacted Leo between February and June to inform him of Annika's tenancy at sufferance or to ask (or demand) that Leo provide him with

the warehouse. Leo will argue that, had Tuan told him of that, he would have fixed it. Instead, Leo simply stored some things in the warehouse on the same day Tuan was moving in. Leo might argue that he would have immediately removed those items had Tuan asked him to do so.

Because Tuan never asked Leo to move the items, it is likely a court will find Tuan was not strictly constructively evicted.

If the court decides that Tuan was constructively evicted on July 1, it will not require Tuan to pay back Leo for anything under the lease after that point. Tuan will not be liable to Leo for his cheaper lease with Juanita.

If the court decides that Tuan was not constructively evicted because he failed to give notice and a chance for Leo to remedy the issue, then Leo will be able to sue Tuan. Leo will argue that he expected \$1,000 a month for that property for the 10-year lease. His damages are \$1,000 for the month of June, in which no one paid rent, and \$500 a month for the 9.5 years after that when he only was able to get \$500 from Juanita.

Tuan will argue the \$500 lease with Juanita was not sufficient mitigation. He will likely use his lease with Bruno as evidence of market conditions. If warehouses are going for \$1,500, then why is Leo renting his for \$500? Leo will argue in return that he put "For Rent" signs in several windows to attempt to rent the warehouse. The reasonableness of this mitigation measure will likely be judged by context and business custom. If the warehouse is in the middle of a busy area in Los Angeles or San Francisco, such that many people would have seen those signs, then it will be seen as a more reasonable mitigation measure. But if the warehouse is in a rural area, or if it is intended for use

for some specialized storage purpose that a narrow class of renters might need, then Leo might have been expected to take other measures to market its availability, such as advertisements or Internet marketing.

QUESTION 4

LawnCare Company (LawnCare) manufactured and sold a liquid weed killer for lawn care. Paula brought a personal injury suit against LawnCare when her children developed breathing problems after LawnCare's weed killer was applied on her lawn. LawnCare entered into a valid retainer agreement with Andy, an attorney, to defend LawnCare in the action.

Andy is a member and financial supporter of Citizens Concerned About Chemicals (C2AC), a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as LawnCare's weed killer from the market as unsafe. Andy provided pro bono free legal advice to C2AC in the past regarding an unrelated corporate matter, but did not enter into a formal attorney-client relationship with C2AC.

Since Andy is convinced that his association with C2AC will not affect his representation of LawnCare, he did not tell LawnCare about his relationship with C2AC. LawnCare is impressed with Andy's reputation as a litigator, and Andy did not want to jeopardize losing LawnCare as a client by discussing his private concerns about their chemicals.

In response to an anonymous questionnaire sent to all C2AC members, Andy mentioned the publicly available information regarding Paula's complaint filed against LawnCare, but did not provide any other details. One week after Andy returned the questionnaire to C2AC, Andy received a call from the Chief Executive Officer ("CEO") of LawnCare, who said a representative of C2AC had called to ask about Paula's lawsuit. Andy told the CEO that he did not know where C2AC would have received that information from and recommended that LawnCare not disclose any details about the lawsuit.

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

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

Retainer Agreement:

Under ABA there is no writing requirement for a representation of a client, unless it is a contingency case. Similarly in CA, there is no writing requirement for representation up to \$1,000, corporate client, or in the case of an emergency. Here, the facts suggest that LawnCare and Andy entered into a valid retainer agreement to defend LawnCare in a personal injury case against Paula when her children developed breathing problems after LawnCare's weed killer was applied on her lawn.

Corporate Client:

An attorney representing a corporation owes a duty of loyalty to the corporation itself and not its employees. If an attorney believes that the employees of the corporation are being misled to believing that the attorney is representing them directly, the attorney must make it clear that his attorney-client relationship belongs to the corporation. Here, Andy is defending LawnCare Company in a personal injury case and if at any time during the representation any employee is misled, Andy must make it clear that he represents LawnCare and not the employee. This is done to avoid any confidential information or conflict of interest arising during the representation.

Duty of Loyalty:

An attorney owes a duty of loyalty to his client. The duty of loyalty includes refraining from conflict of interest (COI) that will materially limit the representation of the client. An attorney should not materially limit the representation of a current client by the attorney's own interest, interest of a previous client, or current client. If the

attorney reasonably believes (subjectively & objectively) that he can competently and diligently represent the client, not prohibited by the law, and gets informed consent (ABA) or informed consent, confirmed in writing (CA), then the attorney may represent the client. Limitations of the attorney's own interest in the representation can be evidenced by relationship with the opposing attorney, stake in the outcome, membership in organizations that are against what the attorney is advocating for the client. A COI may arise during representation of a client or be apparent before the representation begins.

Association with C2AC:

Andy is a member and financial supporter of C2AC, a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as LawnCare's weed killer from the market as unsafe. Unless Andy reasonably believes that he can defend LawnCare in the case without materially limiting LawnCare's representation and gets informed consent (ABA) or informed consent, confirmed in writing (CA), disclosing his membership with C2AC he may be in violation of ethical rules. Andy is convinced that his association with C2AC will not affect his representation of LawnCare and he did not disclose his relationship with C2AC; however, that is not enough because under both ABA and CA Andy should've disclosed his association with C2AC because there is a potential conflict of interest. Andy will argue that he simply wants to support organizations that care about the safety of the public and the current personal injury case between LawnCare and Paula has no bearing on it. This argument may not prevail as the facts later suggest that he even provided pro bono work for C2AC. Lastly, the COI became apparent because

Andy knew that if he reveals his personal concerns about chemicals, it'll jeopardize looking LawnCare as a client.

Conflict of interest between current and former client:

An attorney who represented a previous client may not represent another client that would materially limit the current client or potentially reveal confidential information regarding the former client, unless the attorney reasonably believes that he can competently and diligently represent the current client, not prohibited by the law, not advocate an issue that is the opposite of what the attorney previously advocated for the former client, and gets informed consent (ABA) or informed consent, confirmed in writing (CA).

Pro Bono for C2AC:

Andy provided pro bono free legal advice to C2AC in the past regarding an unrelated corporate matter, but did not enter into a formal attorney-client relationship with C2AC. Although Andy provided pro bono legal advice, that does not make any difference that C2AC is still be considered a previous client of (discussed below). Andy may have reasonably believed that his previous pro bono work for C2AC will not have any bearing on his representation with LawnCare, because there was no apparent conflict of interest; however, Andy should've disclosed the potential conflict to both LawnCare and C2AC. Andy's previous knowledge about corporate matters may materially limit his representation with LawnCare, or in the alternative will require him to reveal confidential information regarding C2AC. Additionally, the COI existed once

Andy responded to the questionnaire and at this point Andy should've disclosed to both LawnCare and C2AC his limitation.

Attorney-Client Relationship:

An attorney-client relationship begins when the client reasonably believes that a relationship has begun. Additionally, under ABA, the attorney-client relationship lasts forever and under CA, the relationship terminates once the client has died and his estate has been settled. In the case of corporate clients, it is upon dissolution of the company. Here, Andy believed that he did not enter into a formal relationship with C2AC; however, it is not the attorney who has to believe that he did or did not enter into the attorney-client relationship, but rather the client.

Anonymous Questionnaire:

An attorney owes his client a duty of confidentiality to not reveal any confidential information regarding the representation. Confidential communication encompasses anything that the client has communicated to the attorney in confidence for the representation or the attorney has gathered in anticipation of litigation.

In response to an anonymous questionnaire sent to all C2AC members, Andy mentioned the publicly available information regarding Paula's complaint filed against LawnCare, but did not provide any other details. Since the information was available only, Andy would successfully argue that he did not reveal any confidential information regarding the representation. However, it is also possible that, but for Andy's anonymous tip, C2AC would have never known about the lawsuit. Now that C2AC

knows about this, they may further push their lobbying for environmental regulations to remove LawnCare's weed killer from the market. Thus, Andy's anonymous response created a snowball effect on his clients.

Duty of Competence:

Under ABA, an attorney must represent its client with competence which includes knowledge, thoroughness, and completion. Under CA, an attorney's duty of competence is defined as the attorney must not act with reckless disregard, with gross negligence, or willfully when representing its client.

When Andy responded to the anonymous questionnaire he acted with reckless disregard, gross negligence because a competent attorney, regardless if information is publicly available or not, will not reveal any information that could potentially harm his client. Thus, under CA, Andy has failed to act with competence.

Duty of Diligence:

Under ABA, an attorney must represent its client with diligence which includes knowledge, thoroughness, and completion. Under CA, an attorney's duty of diligence is defined as the attorney must not act with reckless disregard or with gross negligence when representing its client.

Similarly here, Andy acted without diligence when he answered the anonymous questionnaire.

Duty to Communicate:

An attorney has a duty to communicate with his client regarding all critical stages of the case and disclose all potential or apparent conflicts.

Here, Andy did not want to jeopardize losing LawnCare as a client by discussing his private concerns about their chemicals. Andy had the duty to communicate with LawnCare his affiliation with C2AC, his personal concerns about their chemicals, and the pro bono work he did for C2AC.

Lying to your client:

An attorney must never lie to their client even if doing so would jeopardize their relationship with their client. An attorney has the duty to be truthful and communicate to the client about all critical stages of the case. In the case of the attorney made a mistake, the attorney should still stay truthful to the profession and notify the client about his mistake.

Andy received a call from the CEO of LawnCare, who said a representative of C2AC had called to ask about Paula's lawsuit. Andy told the CEO that he did not know where C2AC would have received that information from and recommended that LawnCare not disclose any details about the lawsuit. At this point, Andy has committed multiple ethical violations. To begin with, he has materially limited his former client (C2AC) and his current client (LawnCare). Andy has lied to his clients and has acted without competence, diligence, or any respect for the profession of law. Instead, Andy should've come forward and disclosed to LawnCare's CEO that he has made the mistake of making an anonymous response letting C2AC know that there is a pending case going.

Withdrawal:

Under both ABA & CA, an attorney must withdraw when their representation is in violation of ethical rules. At this point after Andy did not disclose his association with C2AC, has personal belief against what LawnCare does, made an anonymous response about the pending case, lied to the CEO of LawnCare about how C2AC found out about the case, Andy must give notice to LawnCare to withdraw from the representation while he does not incur further damages to the case. When giving notice of withdrawal, Andy should give enough time for LawnCare to find an alternative attorney for the representation. Andy should return any money that has not been used for the case and turn over all documents that were gathered.

QUESTION 4: SELECTED ANSWER B

1. DUTY OF LOYALTY TO LAWNCARE

The first issue is whether, by failing to inform or receive LawnCare's consent to represent LawnCare despite the fact that C2AC is his former client, Andy has violated his duty of loyalty to LawnCare.

A lawyer has a duty of loyalty to operate in the best interests of the lawyer's client, and to exercise independent legal judgment in evaluating the client's case. Therefore, under both the Model Rules and California law a lawyer has a duty not to represent a client if either (1) the client's interests are directly adverse with those of another client the lawyer has in the same or a different matter; or (2) there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's obligations to a current client, former client, third party, or by the lawyer's own interests. If either of these situations arise, a lawyer may only represent the client if the lawyer reasonably believes the lawyer can competently represent the client, the representation is not prohibited by law, the client and another client are not opposing parties in the same litigation, and the lawyer obtains informed consent, confirmed in writing (under the Model Rules) or informed written consent (under California law). Informed, written consent requires an attorney to inform a client of all of the surrounding circumstances and risks of representation, as well as reasonable alternatives.

Here, C2AC is not a current client, so the rule about directly adverse client interests does not apply. However, C2AC is a former client. The question is thus whether Andy has any

continuing commitments to C2AC as a former client that would materially limit his obligations to LawnCare. This is unlikely. The prior representation was limited to free pro bono legal advice in an unrelated corporate matter. Andy would not have acquired confidential information he would have to avoid sharing with LawnCare as a result of the representation because it wasn't about weedkiller such as LawnCare would be using, but corporate matters.

That said, Andy's relationship with C2AC as a third-party organization of which he is a member creates a significant risk of materially limiting his representation. It is clear that Andy deeply cares about C2AC's mission because he's provided free advice and given the group financial support. In addition, while Andy believed his representation of LawnCare would not be affected, he created a situation in which his obligations to C2AC and LawnCare conflicted by informing all C2AC members about Paula's complaint. This has materially limited his representation to LawnCare because Andy is now lying about his role in C2AC to LawnCare and informing the organization about LawnCare's litigation. Thus, Andy has violated his duty of loyalty by failing to inform LawnCare of this relationship and receive its informed consent to continue representation.

Finally, an attorney is permitted to be a member of a nonprofit legal services group, even if it advocates for legislation and rulings that are adverse to the attorney's client. However, an attorney is not permitted to take any action within that group if it would (1) adversely impact the attorney's current client or (2) if the attorney would be making a decision for the organization that impacts a person with interests adverse to the attorney. Here, by informing an advocacy group about LawnCare's pending litigation so that they could potentially begin a campaign about LawnCare, Andy has acted adversely to LawnCare's

interests. When an attorney acts adversely to a client's interests this violates their duty of loyalty.

2. DUTY OF LOYALTY TO C2AC

A lawyer owes a duty of loyalty to former clients not to represent future clients in the same or a substantially related matter if the future clients' interests are materially adverse to the former clients'. If the lawyer does so, the lawyer must obtain the clients' informed consent, confirmed in writing (under the ABA) or their informed written consent (under California law). Here, C2AC is a former client because they sought legal representation and Andy provided it, regardless of whether Andy and C2AC entered into a formal attorney-client relationship. However, LawnCare's personal injury litigation regarding weedkiller is not the same or substantially related matter as the corporate matters Andy handled for C2AC. Therefore, Andy did not violate a duty of loyalty to C2AC.

3. DUTY OF CONFIDENTIALITY

A lawyer owes a duty of confidentiality to all prospective, current, and former clients until the client is deceased and the client's estate is settled. Under the Model Rules, a lawyer must take reasonable care not to reveal confidential information the lawyer obtains about the client in the course of representing the client-- whether from the client or a third-party source. In California, the duty is to maintain a client's confidentiality inviolate at every peril to the attorney's self. Here, it is a close question whether Andy breached a duty of confidentiality. On the one hand, Andy only disclosed publicly available information to C2AC members. However, on the other hand, the existence of the lawsuit and its

relevance to C2AC were matters Andy would have become familiar with only through his representation of LawnCare. This indicates that the information is something Andy should have held in confidence. In summary, the claim for a violation of a duty of confidentiality is weaker than the claim that there was a violation of Andy's duty of loyalty not to take adverse action against his client-- but using information he learned through his representation likely qualifies as a duty of confidentiality violation, even if he also derived it from public sources.

4. DUTY TO INFORM A CLIENT

A lawyer has a duty to keep a client reasonably informed of the status of a matter under the ABA. Under California law, a lawyer must inform a client of all significant developments related to a case. The lawyer must also respond to all the client's reasonable requests for information related to the status of the case. Here, Andy likely had a duty to inform LawnCare of his relationship with C2AC. In addition, Andy may have had a duty, once he learned C2AC might be going after LawnCare in a way that might negatively impact trial publicity, to inform LawnCare of the risk. This would have been necessary for LawnCare to plan a public relations mitigation strategy. Regardless, however, Andy breached this duty when LawnCare directly requested information about how C2AC received information about Paula's complaint and Andy failed to respond truthfully.

5. DUTY OF CANDOR

A lawyer has a duty not to make a false representation of fact to any person, including the client. This duty applies under both the ABA and California law. Here, Andy has violated

this duty because, when LawnCare asked him how C2AC learned of Paula's lawsuit, Andy responded that he did not know. Andy did know because he supplied the information.

Therefore, Andy violated this duty.

QUESTION 5

Pedro brought a fraud and breach of contract action against Gallery in federal court.

At a jury trial, Pedro testified that he purchased a painting from Gallery for \$200,000 after seeing an advertisement bearing Gallery's logo stating that the painting was the only painting by a noted 17th century artist available for sale in the world. On Pedro's motion, a photocopy of the advertisement was admitted into evidence. Pedro also testified that the painting was worth only \$10,000 because it was a reproduction of the original and that he based his valuation on the average of three appraisals of the painting by art dealers.

Pedro called Rex, a chemistry professor, who had been retained by four art galleries to determine the age of paintings. Rex testified that the painting had been painted within the past 50 years and was a painted reproduction of the original painting. He testified that he had used the XYZ technique on Pedro's painting to arrive at his conclusion. Rex testified that he had tested the XYZ technique on paintings of known ages and that the results corresponded with their known age. He testified that the XYZ technique was reliable and used by most experts to determine the age of paintings. After cross-examination, Rex was excused and left the courtroom.

Gallery called Marie, and both parties stipulated that she is an expert in dating works of art. She testified that a publication entitled "The Science of Dating Works of Art" is generally recognized as a reliable authority. She then quoted an excerpt from that publication that asserted the XYZ technique is not reliable for determining the age of works of art. Gallery moved, and the court received, the excerpt into evidence as an exhibit.

Gallery then offered into evidence a journal article authored by Rex that included a statement that the XYZ technique is not reliable for determining the age of works of art.

Assuming all proper objections and motions to strike were timely made, should the court have admitted:

1. The photocopy of the advertisement? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Pedro's testimony about the value of the painting? Discuss.
3. Rex's testimony about the age of the painting? Discuss.
4. The excerpt from "The Science of Dating Works of Art"? Discuss.
5. Rex's journal article? Discuss.

Answer according to the Federal Rules of Evidence.

QUESTION 5: SELECTED ANSWER A

1. Photocopy of Advertisement

Relevance

Evidence must be relevant to be admitted. Evidence is logically relevant if it tends to prove or disprove a fact of consequence. Otherwise, relevant evidence may be excluded under the rule for legal relevance if its probative value is substantially outweighed by the danger of undue prejudice, confusing the jury, or undue consumption of time.

Here, since Pedro has brought an action for fraud, he is trying to prove that Gallery made a fraudulent misrepresentation in claiming that the painting was the only one of its kind. Therefore, as the advertisement with Gallery's logo stating that the painting is the only one available for sale by this artist, this advertisement tends to prove the disputed fact that Gallery made this representation. Therefore, it is logically relevant.

As there is no indication that the probative value will be outweighed by a substantial danger of undue prejudice, the evidence is legally relevant.

Therefore, this evidence is relevant. Authentication

To be admitted, evidence must be shown that it is what it is purported to be. A document or writing can be authenticated by the testimony of a person familiar with it. Additionally, documents with a trade seal may be self-authenticating.

Here, as the advertisement has been introduced on Pedro's motion and Pedro himself saw the ad, he may have authenticated the advertisement through his testimony of his familiarity with it. Additionally, since the advertisement bears the Gallery's logo, it may be considered to be self-authenticating if the logo is considered a trade seal.

Therefore, it is authenticated.

Best Evidence Rule

When the contents of a writing are at issue, the original is required. Generally, photocopies are as admissible as originals, unless a genuine question is raised as to its authenticity.

Since the case pertains to the fraudulent misrepresentation that the painting was a valuable one-of-a kind, the contents of the advertisement and its claim are at issue to show that there was fraud. While the copy admitted is a photocopy, this will satisfy the best evidence rule unless a genuine question is raised as to its authenticity.

Therefore, this rule is satisfied.

Hearsay

Hearsay is an out-of-court statement by a human declarant, offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless an exception or exemption applies.

The advertisement contains the out-of-court statement made by Gallery about its painting. Therefore, if offered for the truth that the painting was the only one by this

painter available for sale, it will be hearsay and inadmissible unless an exception or exemption applies.

Nonhearsay Purpose

Where the purpose of the out-of-court statement is not to prove the truth of the matter asserted, the statement is admissible under a nonhearsay purpose. Where the statement itself is a legally operative act, such as words of a contract, will, or deed, the statement is admissible.

Here, since the statement is part of the alleged fraud, it is a legally operative act.

Therefore, it is offered to show that Gallery committed fraud, not for the truth of Gallery's statement.

Therefore, the statement is admissible under a nonhearsay purpose.

Hearsay Exemption

An out-of-court statement by an opposing party, that is relevant, and offered against that party is admissible for the truth of the matter asserted.

As the statement in the advertisement was made by Gallery, is relevant, and is being offered against Gallery, it also satisfies the exemption for statement by an opposing party. Therefore, even if the statement is offered for its truth, it will be admissible.

Therefore, the court should have admitted this evidence.

2. Pedro's testimony about the value of the painting

Relevance

Rule given above.

As Pedro's testimony to the actual value of the painting tends to prove that its value was significantly misrepresented by Gallery, this evidence is logically relevant. While it is unfavorable to Gallery, its probative value is not substantially outweighed by danger of undue prejudice, so it is legally relevant.

Therefore, this evidence is relevant. Competence

Under the FRE, everyone is presumed competent to testify.

Therefore, Pedro is competent to testify.

Personal Knowledge

A lay witness must have personal knowledge of the matters to which he testifies.

Personal knowledge may be proven by the witness's own testimony.

Here, as Pedro has testified that his opinion of the painting's value is based on the average of three appraisals done by art dealers, his testimony is not based on his personal knowledge of the painting's value, but rather on the opinions of others.

Therefore, Pedro does not have adequate personal knowledge to testify to the value of the painting.

Lay Opinion

Generally, lay witnesses testify to facts, not opinions. Lay opinion is appropriate where it is rationally based on the witness's perception and helpful to the jury in deciding the

issues. Generally, lay witnesses can testify to perceptions, such as those of emotional states or of the value of property.

As Pedro is giving a valuation of the painting, he is offering opinion, not facts as a lay witness. Since as discussed above, his valuation is not rationally based on his own perception of the painting, but rather on the opinions of others, it is not proper.

Additionally, since the jury does not get to hear from the art dealers appraisals, but rather only hears Pedro's averaging of the dealers with actual personal knowledge, this lay opinion will not be helpful to the jury.

While value of property is often a proper subject for lay opinion, Pedro's testimony here is improper lay opinion.

Therefore, Pedro's testimony should not be admitted.

3. Rex's testimony about the age of the painting

Relevance

Rule given above.

As an issue in the case is that Gallery misrepresented the painting as a valuable original from the 17th century, expert testimony that the painting was done within the past 50 years tends to prove that Gallery fraudulently presented the painting as from the 17th century. Therefore, it is logically relevant. As its probative value is not substantially outweighed by a danger of undue prejudice, Rex's testimony is also legally relevant.

Therefore, the testimony is relevant. Competence

General Rule given above.

Therefore, Rex is competent to testify.

Expert Opinion

An expert must be qualified as an expert by their technical experience, specialized knowledge, education, or otherwise relevant experience in the relevant field. To be admissible, expert opinion must be believed by the expert to a reasonable certainty and based on reliable methods that are reliably applied. An expert may base his opinion on his own tests and experience as well as information that is presented to him at trial.

Under the *Daubert* test, courts test the reliability of a scientific technique by evaluating factors such as: whether it has been tested, the rate of error, and whether it has been peer reviewed. Under the minority *Frye* test, the method must be generally accepted in the relevant community.

As Rex is a chemistry professor who has been retained by art galleries to date paintings, he appears to be qualified in dating paintings, based on his education in the area and experience. While the opposing side may impeach his level of experience in only four galleries, he nonetheless appears qualified to testify. As he used the XYZ method to arrive at his conclusion, he is able to properly testify to out-of-court tests performed to render his opinion. Here, as Rex has testified that the XYZ method is reliable and used by most experts to determine the age of paintings, his method appears to be a reliable method reliably applied. This method is approved under the

Frye test if accepted by most experts to date paintings. While not all the *Daubert* factors are clear, Rex has testified to testing it himself to determine the accuracy. While other facts, such as high rate of error or lack of peer review may render the method unreliable, the method appears acceptable under the facts presented in Rex's testimony.

Therefore, Rex's testimony should be admitted.

4. Excerpt

Relevance

Rule given above. Evidence to impeach another witness is always logically relevant.

Here, Gallery has offered the excerpt that XYZ is unreliable to impeach Rex's testimony and disprove the claim that the painting was dated within the past 50 years.

As impeaching a witness's testimony is always relevant, this evidence is logically relevant. Moreover, it tends to disprove the assertion that the painting is from within the last 50 years. As undue prejudice will not substantially outweigh prejudicial value, it is legally relevant.

Therefore, the evidence is relevant.

Authentication

General Rule given above. Periodicals and some books are often considered self-authenticating.

Here, the excerpt has been authenticated because Marie has testified to its authenticity. Moreover, since it is a publication, it may also be self-authenticating.

Therefore, it is authenticated.

Hearsay

General hearsay rule stated above.

Since the excerpt stating that XYZ is not reliable was made out of court and is being offered for the truth of the matter asserted, it is hearsay and will be inadmissible unless an exception or exemption applies.

Learned Treatise

Under the Learned Treatise exception to hearsay, statements from a learned treatise that is generally recognized as a reliable authority and relied on by experts may be admitted. Select excerpts may be read to the jury, but the learned treatise itself is not received as an exhibit because of the concern of how juries may interpret the learned treatise.

Here, since the publication was testified to by a stipulated expert to be a reliable authority, it fits the learned treatise exception for hearsay and the statements may be admitted. However, while the excerpts may be read to the jury, they are not received into evidence as an exhibit under this exception.

While the excerpt may be properly read to the jury, it should not be received as an exhibit.

5. Rex's Journal Article

Relevance

Rule given above.

As Rex's statement in the journal article contradicting his testimony that XYZ is reliable is impeachment evidence, it is logically relevant and casts into doubt the truth of his testimony. Its probative value is high and not outweighed, so it is legally relevant.

Therefore, the journal article is relevant.

Authentication

Rule stated above.

As periodicals are considered self-authenticating, the article was authenticated.

Hearsay

Rule given above.

Since the statements in the journal article are offered to prove that XYZ is not reliable and were made out of court, they are hearsay and inadmissible without an exception or exemption.

Learned

Treatise Rule

given above.

If the statement is from a learned treatise, it may be admissible under this exception substantively and may be read to the jury, but not received as an exhibit.

Prior Inconsistent Statement

Prior inconsistent statements are hearsay exemptions, admissible to impeach testimony. The witness must be given a chance to explain or correct the statement. If they were not sworn statements, they are not admissible substantively.

Here, Rex's statement in the journal was a prior inconsistent statement to his testimony about XYZ. Therefore, it may be offered for the limited purpose of impeaching him, provided that Rex is given an opportunity to explain. Since Rex left the courtroom, he was likely not given this opportunity. Since the statement in the article was not sworn, it is not admissible substantively under this exemption.

Therefore, Rex's statements may be admitted under learned treatise or prior inconsistent statement, provided he has an opportunity to explain.

QUESTION 5: SELECTED ANSWER B

1. The Photocopy of the Advertisement

Relevance - Logical and Legal

To be admissible, evidence must be both logically and legally relevant. Evidence is logically relevant if it tends to make a fact at issue more or less likely. Evidence is legally relevant if its probative value is not substantially outweighed by the danger of unfair prejudice or confusing the jury.

Here, Pedro is claiming that Gallery committed fraud when they advertised that the painting he purchased was the only painting by a noted artist for sale in the world. The advertisement is logically relevant because it supports Pedro's claim that Gallery made this representation. The advertisement is legally relevant because it is unlikely that the advertisement will unfairly prejudice Gallery - it does not appear that they are denying the advertisement, and it does not contain any inflammatory or misleading content.

Thus, the photocopy of the advertisement is relevant.

Authentication

When submitting documents into evidence, the proponent must demonstrate that the evidence is what it purports to be. A witness's testimony about the document is generally sufficient to satisfy the authentication requirement. Here, Pedro testified that he saw an advertisement bearing Gallery's logo, and submitted a photocopy of the advertisement. Pedro's testimony is sufficient to authenticate the document.

Best Evidence Rule

The Best Evidence Rule states that when a witness is testifying about the contents of a document, the document itself is the best evidence and must be produced and submitted to the jury. Here, the Best Evidence Rule applies, because Pedro is testifying about the contents of the advertisement.

However, the Best Evidence Rule states that photocopies of documents satisfy the rule. Therefore, because Pedro submitted a photocopy of the advertisement, the Best Evidence Rule has been satisfied.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally inadmissible as evidence unless an exception applies. Here, the advertisement was circulated out of court, and it is a statement because it is a written claim about the painting.

However, Pedro will point out that he is not offering the advertisement for its truth - that is, he is not offering it as evidence that the painting is the only painting by a noted 17th century artist. In fact, Pedro is offering it while claiming it is *not true* - that the statement is fraudulent. If he is not offering it for its truth, the statement is not hearsay and not barred by this rule.

Hearsay Exception - Admission by Party Opponent

If the court deems that Pedro is offering the advertisement for its truth, there is an exception to the hearsay rule for a statement made by a party to a case offered into evidence by the opposing party. Here, Pedro's party opponent is Gallery. He will point

out that the advertisement bears Gallery's logo and that Gallery sold him the painting referenced in the advertisement. This is sufficient to establish that the advertisement is properly considered a statement made by Gallery, and it is admissible under the admission by party opponent exception.

Hearsay Exception - Independent Legal Significance

There is an exception to the hearsay rule when the act of making the statement is an element to the cause of action. For example, in a defamation case, the fact that a statement was made is independently legally significant, because the making of the statement is an element of a defamation claim.

Here, Pedro is claiming fraud. He alleges that Gallery's claim in their advertisement was materially false, induced him to purchase the painting, and that he suffered harm. Gallery's claim has independent legal significance because the existence of the advertisement is one of the elements of Pedro's cause of action. Thus, it is admissible.

Conclusion: The court correctly admitted the photocopy of the advertisement.

2. Pedro's Testimony about the value of the painting

Relevance - Logical and Legal

(See Rules above.) Pedro is claiming that the painting he purchased is only worth \$10,000. If proven, this would make it more likely that Gallery had committed fraud when they sold the painting to Pedro for \$200,000. Thus, it is logically relevant.

The main hurdle for Pedro here is whether his testimony is legally relevant. The probative value and danger of unfair prejudice depend largely on the source of Pedro's claim, and

whether it is likely to confuse or mislead the jury. Therefore, to assess whether the testimony is legally relevant, we must assess the basis of Pedro's opinion.

Opinion Evidence - Lay Witness

A lay witness is permitted to testify to opinions rationally based on their perceptions. Lay witnesses are not permitted to provide lay opinions based upon specialized or technical knowledge.

Here, Pedro is testifying that the painting is worth \$10,000 because it is a reproduction of the original. This testimony is based on his valuation based on three appraisals made by art dealers. The appraisals made by art dealers require specialized or technical knowledge, because art appraisals are not the type of thing that an ordinary person would be able to conclude based on their perceptions.

Thus, Pedro's testimony is not a permissible lay opinion.

Opinion Evidence - Expert Witness

An expert witness is a witness who has specialized knowledge or training in an area. They may provide expert opinions if those opinions are based on their training and experience and methods sufficiently reliable as to pass the *Daubert* test. The *Daubert* test assesses whether the methods are generally accepted in the field, if there is a known error rate, if the methods have been subject to peer review.

Here, there is nothing to suggest that Pedro is an expert in art appraisals. Rather, he is introducing his conclusion based on appraisals by experts. Although the appraisals might well be acceptable expert opinions, Pedro has not established the training and experience of the dealers, nor the methods utilized to establish the appraisals.

Thus, the testimony about the value of the painting is not a permissible expert opinion.

Hearsay

(See Rules above.) Pedro is claiming that his valuation is based on the appraisals of three art dealers. The art dealers made those appraisals out of court, and Pedro is offering them for their truth - that is, the valuation of the painting. Thus, the appraisals of the art dealers are hearsay and inadmissible unless a hearsay exception applies.

Otherwise inadmissible hearsay may be admitted if it forms the basis of an expert opinion. However, as discussed above, Pedro's conclusion is not a proper expert opinion. Thus, it is inadmissible under the hearsay rule.

Best Evidence

(See Rule above.) Pedro is testifying about three appraisals that formed the basis of his opinion. If the appraisals were in writing, then Pedro's testimony about their conclusions would be subject to the Best Evidence Rule, and the appraisal documents themselves must be admitted into evidence. If the appraisals were made to Pedro verbally, the Best Evidence Rule does not apply.

Returning to Legal Relevance

Because Pedro's opinion is not based on his own expertise, and because the methods have not been confirmed to be reliable, the probative value of his own opinion is likely low. On the other hand, testimony that the painting is worth \$10,000 -- absent a sufficient basis for that opinion -- is unfairly prejudicial to Gallery, who was not permitted to cross-examine the art dealers on their conclusions. Therefore, it is not legally relevant.

Conclusion: The court should not allow Pedro's testimony about the value of the painting, because it is an improper opinion, it is hearsay, and its probative value is substantially outweighed by the danger of unfair prejudice.

3. Rex's testimony about the age of the painting

Relevance - Logical and Legal

(See Rules above.) Rex's testimony is logically relevant because he claims that the painting is a reproduction, which makes Pedro's claim of fraud more likely. Legal relevance will be discussed further below.

Opinion - Expert Opinion

(See Rule above.) Here, Rex has specialized training and knowledge because he has been retained by art galleries to determine the age of paintings. It's not clear whether Rex's expertise in chemistry is related to the XYZ technique, but assuming that the technique involves chemistry, his specialized knowledge would qualify him as an expert.

The issue is whether the XYZ technique is sufficiently reliable to meet the *Daubert* standard. Rex testified that the principles are reliable, because he has used it in the past and his results have corresponded with the known age of paintings. He testified that it was reliable and used by most experts in his field.

Gallery's Challenge to the Reliability of the XYZ Technique

After Rex was excused from testifying, Gallery brought claims that the XYZ technique is not reliable. (Discussed more below.) However, if they wished to preclude Rex's testimony on grounds that it is not reliable, they should have raised the issue before

Rex delivered his opinion. Gallery should have requested the court make a determination about the reliability of XYZ technique outside the presence of the jury. If the court determined the technique was not sufficiently reliable, Rex's testimony would have been precluded. The fact that the court allowed it suggests that either the issue was not raised prior to Rex's testimony, or that the court determined it was sufficiently reliable.

Returning to Legal Relevance

The evidence is probative because it helps the jury understand the age of the painting and the likelihood that it is a reproduction. Although there may be some unfair prejudice if it turns out the XYZ technique is not reliable, there was a sufficient basis for the court to conclude that it satisfied *Daubert*.

Conclusion: The court properly admitted Rex's testimony about the age of the painting

4. The excerpt from The Science of Dating Works of Art

Relevance - Logical and Legal

(See Rules above.) The publication is logically relevant because it suggests that the XYZ technique is not reliable for determining age of works of art, which is at issue in this case. It is legally relevant because there is not a danger of unfair prejudice to Pedro. Thus, it is relevant.

Hearsay

The publication was created out of court, and is being offered for its truth - that is, that the XYZ technique is not reliable. Thus, it is hearsay and is inadmissible absent any exception.

Hearsay Exception - Learned Treatise

Learned treatises, or documents that are generally recognized as reliable authority, are permitted to be read to the jury despite the general rule against hearsay. Here, "The Science of Dating Works of Art" is generally recognized as a reliable authority.

However, while the learned treatise exception allows the text to be read to the jury, it does not permit the text to be introduced into evidence as an exhibit.

Thus, although the court properly allowed Marie to quote an excerpt from "The Science of Dating Works of Art," the excerpt should not have gone back to the jury as an exhibit.

5. Rex's journal article

Relevance - Logical and Legal

(See Rules above.) The article is relevant because it undermines Rex's claim about the reliability of the XYZ technique, which is an important issue for the jury. Although it harms Pedro's theory and the credibility of his expert, this prejudice is not *unfair*. Thus, it is logically and legally relevant.

Best Evidence

(See Rule above.) This is satisfied because the article itself was offered into evidence.

Hearsay

Rex authored the journal article out of court, and Gallery is using it for its truth - that is, that the XYZ technique is not reliable. Thus, it is hearsay and is inadmissible unless an exception applies.

Hearsay Exception - Prior Inconsistent Statement

When a witness testifies under oath, the opposing party is permitted to introduce a prior inconsistent statement made by that witness. This can be used as impeachment evidence, which means it can be used to undermine the credibility of the witness.

Here, Rex had testified in court that the XYZ technique is reliable. His prior statement was that it was not reliable. Thus, the prior statement is inconsistent.

However, this exception requires that the party seeking to introduce the inconsistent statement confront the witness about it and give them an opportunity to explain. Here, Gallery did not introduce this during cross-examination of Rex, where he would have had the opportunity to explain or defend his positions. Instead, they introduced it after Rex was excused and left the courtroom.

Because Gallery did not introduce this statement while Rex had an opportunity to explain it, it is not properly admitted as a prior inconsistent statement.

Hearsay Exception - Learned Treatise

The evidence at issue is a journal article. Some journal articles may qualify as learned treatises, as explained above. However, it does not state that the journal article is generally recognized as a reliable authority. In fact, Rex's own testimony suggests that the journal article may not be reliable. Therefore, it should not be allowed under this exception.

Conclusion: Although the journal article would have been proper if Gallery had sought its admission during Rex's cross examination, the attempt to introduce it during their

case-in-chief is improper because it is hearsay not within any exception. Therefore, the court should exclude it.



California Bar Examination

**Performance Test
and
Selected Answers**

February 2023



PERFORMANCE TEST AND SELECTED ANSWERS

FEBRUARY 2023

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2023 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 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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February 2023

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

STATE v. HUGHES

Instructions.....

FILE

Memorandum to Applicant from Jan Dauss

Transcript of Pretrial Hearing

Transcript of Interview of Sebastian Hughes.....

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.
2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.
3. You will have two 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 directions for the task you are to complete. The other documents in the File contain 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 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 directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

**OFFICE OF THE STATE ATTORNEY
County of Gaston
Littleton, Columbia**

MEMORANDUM

TO: Applicant
FROM: Jan Dauss, State's Attorney
DATE: February 21, 2023
RE: State v. Hughes

Defendant, Sebastian Hughes, is charged with murder after he fatally stabbed his uncle, Peter Gault, during a dispute over a Corvette car engine. Defendant asserts he acted in self-defense. A centerpiece of our case against Defendant is a recorded statement Defendant made to detectives while he was in the hospital recovering from a stab wound inflicted by his uncle.

Defendant originally moved to suppress the statement based on a failure to be given *Miranda* warnings. The judge ruled in the State's favor on that motion. Defendant now argues that the statement was not voluntary and therefore should be excluded from his trial. The court decided that this new motion does not need to be briefed, but the court does want oral argument.

Please draft the oral argument I will give in opposition to suppression of the statement. Our success depends on our ability to marshal the facts. Do not start with a statement of facts as you would if you were writing a brief. Rather, weave the specific facts into your argument as they relate to each of the elements of the controlling law.

Attached are the transcript of the recorded statement and a portion of the transcript where the court refused to suppress the statement on *Miranda* grounds. While

you are not to address the *Miranda* issue, the court's characterization of the interview may be helpful to your argument.

State v. Hughes

Transcript of Pretrial Hearing

February 17, 2023

COURT: Let's first deal with defense counsel's motion to exclude Defendant's statement for failure to be given *Miranda* warnings. I have read counsels' briefs and listened to the recorded statement. I have decided that the circumstances in this case overwhelmingly demonstrate that Defendant was not in custody for *Miranda* purposes. The motion is denied.

Does Defendant plan any other motions?

DEFENSE COUNSEL: Your Honor, Defendant moves to exclude the statement made while confined in the hospital as involuntary. At the time of his questioning, Defendant was not sufficiently lucid and the coercive surrounding circumstances of the questioning were such that, under the United States Supreme Court's *Mincey v. Arizona*, his statement was not the result of a rational intellect and free will. Defendant was at the complete mercy of the detectives because he was in physical shock from being stabbed in the lung and in mental shock from being involved in the death of his uncle. I think everyone will agree that Defendant sustained a stab injury. He had to go through surgery in order to recover from that injury. He was administered pain medication. Further, he was still under the constant care of a medical professional while the interview began and as it progressed. I don't know exactly what the medication was at that point, but it was pain medication consistent with surgery.

COURT: Does the State stipulate to these facts?

DISTRICT ATTORNEY: We certainly do not stipulate to the allegations characterizing the lucidity of Defendant or the coercive nature of the questioning. It is also unclear what medication Defendant was on at that point. The rest of the facts we would

concede.

COURT: All right. As I said, I have listened to the recording of the statement. I don't think I need briefs on this motion. The law is pretty straightforward. I would, however, like to hear counsels' arguments on the point. Let's schedule those arguments five days from today at 9:00 a.m. See you then counsel.

**Transcript of Interview of Sebastian Hughes
with Detectives Ray and Martindale
August 22, 2022**

DETECTIVE RAY: Good evening Mr. Hughes, I'm Detective Ray and this is

HUGHES: He's dead?

RAY: If you mean Peter Gault, yes, he's dead. Mr. Hughes, this is my partner, Detective Martindale. We need to ask you some questions about what happened. You understand you're not under arrest, right? You do? You're nodding yes. Are you able to speak?

HUGHES: I've got tubes in both my lungs and I'm a little drugged up, but yeah, I can speak. It's just, I can't believe it.

RAY: We need to interview you. Our job is to come in when someone passes away. We weren't there. We don't know what happened. If it's okay, we are going to tape record our interview.

HUGHES: It's okay.

RAY: We are starting the interview with Mr. Sebastian Hughes in the surgical observation unit of the hospital at 7:50 p.m., after calling the hospital about three or four times throughout the day to see if you were well enough to speak with us. We understand that you were injured around 11:30 this morning. You've been in the hospital about 8 hours. You got out of surgery two hours ago.

Just for our record, Mr. Hughes, I want to describe what I see. Mr. Hughes is shirtless and lying down kind of in a quasi-seated position with his back kind of at maybe a 45-degree angle in his bed in his room. Mr. Hughes has redness or an abrasion on his forehead, and a stab wound on his right side near the right chest area under the armpit.

Can you tell us what happened?

HUGHES: I've got to call my mom.

RAY: Mm-hm. What happened?

HUGHES: I received a phone call from my mom's brother, Peter Gault, this morning around 11:00 o'clock. He wanted to know the whereabouts of a Corvette engine he had been storing in the garage of my mom's house. I had sold the engine for \$800 several months ago, and told him about the sale at that time. I reminded Peter that he had sold the engine to me and I figured it was mine to sell. He became angry.

RAY: Mm-hm.

HUGHES: I heard my mom crying in the background. I feared for her safety because Peter had a short temper and he was hot-headed when it came to her. I decided to leave work and drive to the house to make sure she was okay.

RAY: Did you go directly there?

HUGHES: I've really got to call my mom.

RAY: Yeah, yeah, will get to that. So, you were at work and decided to leave. What happened next?

HUGHES: I stopped at my work locker on my way out and placed an eight-inch wrench in my shirt pocket as protection, just in case it came to that.

UNIDENTIFIED VOICE: Excuse me officers, I'm from Cardiology and need to draw some blood from Mr. Hughes.

RAY: We'll get out of your way here.

HUGHES: You guys aren't leaving, are you?

RAY: No, we're not going anywhere. We will turn the tape off while medical staff draws blood and Detective Martindale and I stretch our legs.

BREAK IN RECORDING

RAY: Okay, we're back, Mr. Hughes. We left off just as you were going to the house. What happened when you got to the house?

HUGHES: Peter and my mom were standing in the driveway in front of his van. Peter was furious. My mom stood between Peter and me, crying her eyes out trying to keep us separate. She grabbed the wrench from my pocket. I guess to make sure I didn't use it on Peter.

We argued at first. Then things got wild. Eventually, Peter knocks me to the ground. He pushed my mom a couple of times and grabbed the wrench from my mom and tried to hit me with it. At some point, Peter either dropped the wrench or threw it at me. Somehow, it ended up on the ground.

RAY: So what happened then?

HUGHES: I bent down and tried to pick up the wrench. Peter said, "You're not gonna do anything with that," and kicked me real hard on the right side of my forehead. I wound up on the ground between the van and the truck. He had the wrench in his hand.

RAY: Mm-hm.

HUGHES: Peter ran to the back doors of his van. I thought he was going to grab a knife or tool from the van. So I pulled my knife from my boot. Peter saw me getting up with the knife and ran toward the front of the van and got his own knife. I chased him. He tripped and fell near the porch, but got up right away. He lunged at me, saying, "I'm

gonna kill you,” and that’s when I stabbed him with my knife.

RAY: I’m sorry. I guess I missed where your knife comes into the story. Were you wearing the knife while at work?

HUGHES: Yeah, I guess I forgot to mention that I got it from my work locker when I got the wrench. I placed a big knife in my boot, underneath my pant leg. Because, you know, I know how he is.

I realized I had been stabbed only when I saw blood all over myself and could not breathe. I thought I was going to die and walked over to a neighboring house to lie in the shade.

RAY: Do you think that, if you didn’t bring the knife, your uncle would be alive right now?

HUGHES: Probably, but I would still be in the hospital.

RAY: How do you know that?

HUGHES: I know. This was all self-defense, man. If I had not stabbed Peter, Peter would’ve killed me. You guys don’t know what that man was capable of. Look, I see you’re skeptical. You can give me a lie detector test, or check my phone records, or talk to my family to confirm the truth I’m telling you.

RAY: We may do that Mr. Hughes, but for now I think we have enough. You’ve been generous with your time and we need to let you rest.

HUGHES: I may stay awake. I’m going to try to watch the University of Columbia game on TV. I went there for a couple of years.

RAY: Enjoy. We'll be in touch.

Interview concluded at 8:20 p.m., August 22, 2022.



February 2023

**California
Bar
Examination**

**Performance Test
LIBRARY**

STATE v. HUGHES

LIBRARY

State v. Perdomo

Columbia Supreme Court (2007)

State v. Perdomo
Columbia Supreme Court (2007)

Defendant Gerson Perdomo was involved in a single-car accident in which he and another occupant of the car, Marco Quinonez, were seriously injured. A third occupant, Ismael Rodriguez, was killed. Defendant was convicted by a jury of felony vehicular manslaughter while driving intoxicated. The only seriously contested issue at trial was whether Defendant was the driver.

After a night of heavy drinking, at around 2:45 a.m. on August 23, 2003, Defendant was allegedly driving on the freeway at approximately 80 miles an hour when he crashed into, and nearly went over, the concrete center median. Rodriguez, found in the back seat, was pronounced dead when taken to a nearby hospital. Quinonez and Defendant were found in the front seat. Each had serious injuries.

Defendant based his defense on the contention that the other surviving occupant, Marco Quinonez, was driving at the time of the accident. Defendant moved pretrial to exclude the evidence of inculpatory statements he made to the police officers. Near the end of the interview, Defendant admitted he sometimes smoked marijuana and then said, "Maybe that day I was smoking. I'm not going to mess with you guys. I was driving Marco's car."

Defendant argued that admission of his statements violated his Fifth and Fourteenth Amendment rights to a fair trial. He claims it was error of constitutional dimension to admit statements he made to officers who interrogated him in the intensive care unit of the hospital while he was recovering from surgery and heavily sedated with narcotic pain medications.

Defendant suffered severe traumatic injuries to his chest area. Several of his ribs were fractured. He underwent emergency surgery to remove his spleen. He also had some bleeding in his brain.

Four days after the accident and Defendant's surgery, medical personnel in the intensive care unit of the hospital finally granted Officer Laubscher and his partner Officer Jensen permission to speak to Defendant. Medical personnel directed the officers to keep their discussion brief. Around 6:30 a.m., the officers interviewed Defendant in the intensive care unit of the hospital. The interview was tape recorded.

Defendant was lying flat on his bed, recovering from the splenectomy, broken ribs and head injury. He was in obvious pain. Defendant had received his last pain medication five and a half hours earlier. He was still connected to intravenous solutions and monitors. He had been on a ventilator since the surgery, but this device had been removed the day before and he was breathing on his own. Defendant's speech was slow and deliberate but not slurred or overly raspy from the intubation. The officers' questions were also slow, subdued and deliberate. The interview, with numerous pauses, lasted approximately 20 minutes.

The officers questioned Defendant about the events occurring before and after the accident. Defendant's answers were responsive to the officers' questions. Most significantly, according to Officer Jensen, who was present and later transcribed the tape, Defendant admitted he had been driving the car when the accident occurred.

A statement is involuntary if it is not the product of "a rational intellect and free will." *Mincey v. Arizona* (U.S. 1978). The question posed by the Due Process Clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.

In determining whether or not an accused's will is overborne, an examination must be made of all the surrounding circumstances, including: 1) the characteristics of the accused, including such factors as the defendant's maturity, education, physical condition, and mental health (including mental acuity), and 2) the details of the

interrogation that indicate coercion, which include the length of the interrogation, the location of the interrogation, and the interrogation's continuity. Additional factors that might indicate coercion include whether the officers dominated or controlled the course of the interrogation; whether they allowed defendant to tell his story, then asked follow-up questions to clarify the details; whether their questions were open-ended and neither aggressive nor particularly accusatory in nature; and whether there is evidence that the officers had or drew weapons or otherwise employed threatening or intimidating interrogation tactics. No single factor is dispositive.

Defendant asserts there are numerous parallels between his case and the factual circumstances of *Mincey v. Arizona*, sufficient to find his statements involuntary and require reversal of his convictions.

Surrounding Circumstances

1. Characteristics of the Accused

In *Mincey v. Arizona*, Mincey was shot in the hip by police officers in a raid on his apartment. Mincey was transported to the hospital where he received emergency treatment. When he arrived at the hospital, he was almost to the point of coma. The shot caused damage to the sciatic nerve and partial paralysis of his right leg. In the emergency room, tubes were inserted into his throat to help him breathe, and through his nose into his stomach to keep him from vomiting. A catheter was inserted into his bladder. He received various drugs, and medical personnel attached a device to his arm so he could be fed intravenously. Mincey was then moved from the emergency room into the intensive care unit.

Around 8:00 p.m., a police detective came to the intensive care unit to interrogate Mincey. The detective told Mincey he was under arrest for the murder of the police officer. He gave *Miranda* warnings to Mincey and then started questioning him about the activities and shooting at his apartment. Mincey could not talk because of the tube in his

mouth. He responded to the detective's questions by writing answers on pieces of paper. The detective continued to question Mincey until almost midnight. During the interrogation, Mincey repeatedly asked for the interrogation to cease. Several times, Mincey requested the assistance of counsel before responding. He complained to the detective that the pain in his leg was unbearable. Some of Mincey's written responses were incoherent and on their face showed he was confused and unable to think clearly about the events at his apartment or about the interrogation.

The Supreme Court concluded Mincey's statements were not the product of his free and rational choice: "To the contrary, the undisputed evidence makes clear that Mincey wanted *not* to answer Detective Hust. But Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne. Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial."

Like the situation in *Mincey*, here Defendant was questioned while lying in a hospital bed in the intensive care unit. As in *Mincey*, no family members or friends were then with him. He was recovering from surgery for the injuries he received four days earlier. Intravenous tubes were still attached to his body. Defendant had been receiving narcotic pain medications since his admission to the hospital. According to the interrogating officers, Defendant appeared to be in pain and also appeared to still be under the influence of the narcotic pain medication.

However, this is where the similarities end. Unlike what occurred in *Mincey*, Defendant was not interrogated within hours of his injuries, and not interrogated only a few hours after receiving medical treatment. Also unlike in *Mincey*, Defendant was not interrogated while going in and out of consciousness. In this case, the officers were not permitted to interview Defendant until four days after Defendant's surgery. Hospital personnel did not permit the officers to talk to Defendant until they determined he was "alert," "oriented," and could "obey commands," as indicated by his medical chart. By this time, Defendant no longer needed the assistance of a respirator and medical

personnel had removed it the day before the interview.

On the day of the interview, hospital staff determined Defendant's condition had improved sufficiently so that he could safely be cared for in a regular hospital room. At 8:30 a.m., and two hours after the interview, Defendant was moved out of the intensive care unit, taken off intravenous pain medications and thereafter given oral doses of Vicodin for pain as needed.

The evidence showed Defendant was probably still under the influence of the pain medications, although the effect of the morphine he received five and a half hours earlier had likely diminished over the hours.

Nothing on the tape shows Defendant's thinking was impaired by the medications. Defendant's speech is slow and deliberate, but is not slurred or incoherent. Each of Defendant's answers is appropriate to the question asked. In some instances, his answers were detailed. For example, when asked the name of the security company for which they all worked, Defendant stated the name for the officers, spelled out the company name several times, and even recited the company's telephone number.

At the beginning of the tape it appears Defendant was even alert enough to attempt to deceive the officers. He initially told the officers the night of the accident that he had been driving his mother's Nissan, alone, and without passengers. He later acknowledged being with Rodriguez and Quinonez in Quinonez's mother's Honda.

2. Details of the Interrogation

In *Mincey*, the detective ceased the interrogation only during the intervals when Mincey lost consciousness or received medical treatment and after each such interruption returned relentlessly to his task. The statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness.

Most importantly, the interrogation in the present case exhibits none of the coercive police activity found in *Mincey* and other cases finding statements to have been involuntary. The interview in the present case was relatively short. It lasted a maximum of 20 minutes, as compared to the three hours Mincey was forced to endure. The officers in the present case posed their questions in a calm, deliberate manner. The officers' voices on the tape are very quiet and subdued, perhaps in deference to the other patients in the unit, and/or because of the relative lack of privacy in the room. The 20-minute interview includes several pauses as well, as medical personnel enter and exit the room providing treatment for the other patients. Unlike Mincey, who had asked for the interrogation to cease and had refused to answer some questions without the assistance of counsel, Defendant made no such requests and did not express distress or otherwise indicate any unwillingness to speak to the officers.

As the trial court noted, the officers' tone was conversational and not threatening. One of the subjects discussed was how supportive and attentive Defendant's mother had been. Defendant expressed gratitude for his recovery. He asked the officers questions regarding his friends' conditions. At the end of the tape the officers wish Defendant good luck and a speedy recovery.

In short, the record is devoid of any suggestion the officers resorted to physical or psychological pressure to elicit statements from Defendant. Absent some indication of coercive police activity, an admission or confession cannot be deemed involuntary within the Due Process Clause of the Fourteenth Amendment.

The judgment is affirmed.

PT: SELECTED ANSWER 1

Good morning and may it please the court. Jan Dauss on behalf of the State, Your Honor.

After a 30-minute interview in which the defendant spoke in complex, complete sentences, painted a vivid, self-serving story that he had acted in self-defense, and even invited the detectives to stay when they left the room so he could receive medical care, the defendant now moves to suppress his confession on the basis that it was not the result of his rational intellect and free will under *Mincey v. Arizona*. The defense argument fails for multiple reasons and is squarely foreclosed by the Columbia Supreme Court's decision in *Perdomo*.

The *Perdomo* Court announced multiple factors that courts should consider when confronted with involuntary-confession suppression arguments. They're grouped into two main categories: the defendant's maturity, education, and health, and the details of the interrogation itself. I want to start first with a focus on the defendant, and then I'll move into the conduct of the detectives in the interrogation.

Let's look first at the defendant's characteristics. The defendant is employed. He spent two years in college. This is a man who has a place in society and is not vulnerable to coercion. The statements he made in his interrogation confirm that he's a smart guy.

When the detectives asked him what happened, he said, quote, "I received a phone call from my mom's brother, Peter Gault, this morning around 11 o'clock. He wanted to know the whereabouts of a Corvette engine he had been storing" These are cogent

sentences, Your Honor. They are not the product of a man unable to think. The defendant talking about how he "received a phone call from" his "mom's brother," and saying the victim "wanted to know the whereabouts of a Corvette engine"? How often do you come across the word "whereabouts" in normal conversation? The defendant is intelligent, and he was intelligent at the time of the interrogation.

The defendant was aware of specific key facts that he could recall from memory. He mentioned to the detectives he had sold a Corvette engine for \$800 several months ago. This is not the kind of fact that a person struggling with mental function is able to recall on the spot. And that example is a lot like *Perdomo*, where the defendant was able to name the company he worked for and recite its telephone number from memory. The *Perdomo* Court held that defendant gave a voluntary confession in part relying on that finding.

Here, when the defendant was questioned, he said he was "a little drugged up," but he could speak. And he spoke in full sentences. He told a story from beginning to end about what happened. Over the course of multiple questions, the defendant offered longer and longer explanations and excuses for his conduct. This was not a man who "wanted *not* to answer" the detectives, like in *Mincey*. This was a man who wanted to exculpate himself, right then and there.

The context confirms this, Your Honor. The defendant's story paints him in the best light over and over. The defendant makes a conscious choice to frame himself as acting in self-defense. Right off the bat, the defendant tells the detectives that the victim, Mr. Gault, "became angry." The defendant says he feared for his mother's safety and that the victim "had a short temper and . . . was hot-headed." The defendant's story portrays

himself as the hero. He's going to go save his mother from Mr. Gault. This is not the interrogation of a man who is "weakened by pain and shock" and "barely conscious," so that "his will" is "simply overborne" by the detectives, like in *Mincey*. This is the calculated attempt to get away with it from a guy who's able to think about the best way to try to do that.

The defendant's cold calculation is really drawn into focus by his deception. The defendant deceived the officers about the knife. Early on in the questioning, the defendant tells the officers that he took an eight-inch wrench from his work locker for "protection." Later on in his story, he tells the detectives that - after the victim said "I'm gonna kill you," according to the defendant, of course - he stabbed the victim with his knife. When the detectives asked where the knife came from, the defendant said, "I guess I forgot to mention that I got it from my work locker when I got the wrench." This kind of deception was a key factor in *Perdomo* in finding that defendant's confession was voluntary.

I expect you'll hear the defense argue that the defendant was not given the opportunity to tell detectives about the knife, because hospital staff caused the interview to break just after the defendant mentioned the wrench. That's no excuse. The defendant repeatedly volunteered facts about what happened rather than needing to be asked for them, and he said later in the interview that he "forgot to mention" the knife. It wasn't that his opportunity to mention it was cut off. It's that he didn't want to bring it up, because he thought it would be bad for his self-defense story.

Because this picture of the defendant as an intelligent, savvy, shrewd communicator

is so clear, the court need not focus too much time on the defendant's physical condition at the time of questioning. But even if you choose to do so, Your Honor, the defendant's physical condition confirms the finding that his confession was voluntary.

The defendant had been injured at 11:30 a.m. before the detectives interviewed him at 7:50 p.m. That's more than eight hours later. At that time, the defendant was sitting in a hospital bed at a 45-degree angle. He had a stab wound and a "redness" on his forehead. He said he was "a little drugged up."

A comparison on this point to *Mincey* and *Perdomo* is especially useful. In *Mincey*, the defendant had a tube in his mouth and could not speak at all. The defendant had to communicate in writing, and some of those writings were "incoherent" and "on their face showed he was confused and unable to think clearly." That defendant was going in and out of consciousness during questioning, Your Honor. The *Mincey* Court found his confession was "the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness" and thus involuntary.

In *Perdomo*, the defendant suffered from bleeding in his brain and was in "obvious pain" at the time of questioning. He had been in surgery to have his spleen removed, and was lying flat on his bed, broken ribs all over his chest, intravenous solutions hooked to his veins. And the *Perdomo* defendant was still under the influence of narcotic pain medication at the time he was questioned. In fact, he received morphine five and a half hours before the interrogation and he received multiple doses of Vicodin after questioning.

Still, the *Perdomo* Court held that the defendant's confession was not involuntary. It

found that it did not rise to the level of not being the product of a rational intellect and a free will, like in *Mincey*. Even the *Perdomo* facts were not enough. And the facts here are nowhere near as bad. *Perdomo* involved a brain bleed - this case has "redness" on the forehead. *Perdomo* involved a defendant flat on his back, no spleen, broken ribs, tubes hooked up to his veins - this case has a mostly upright defendant, who is speaking in clear, complete sentences through some breathing tubes. And *Perdomo* involved a defendant who had taken morphine within five and a half hours of questioning. This case has a defendant who said he was "a little drugged up" before he went on to construct his self-defense story. In fact, the defendant wanted to stay up after the interview to watch the UC game. He was in good enough spirits and health to stay up and watch the game, Your Honor.

The defense is going to tell you that the *Perdomo* interrogation was four days after his accident. But that was due to the extent of the *Perdomo* defendant's injuries. His injuries were far more extensive. The detectives in that case waited for the hospital to give permission for them to speak with him. And the detectives in this case did the same thing. They called the hospital to ask if the defendant was medically cleared to be interrogated, and they waited until they got that permission.

When we look at the defendant's maturity, education, and mental and physical health, we get a clear picture, Your Honor. The defendant is college educated. He is someone who knows that self-defense is his only way out. And he is someone who had the capacity to develop a story in his self interest and then tell that story to the detectives. His physical health is worlds apart from *Perdomo*, let alone *Mincey*. And even *Perdomo* was not enough for the defendant to establish his confession was

involuntary. This category of factors weighs heavily in the state's favor.

Turning next to the second category, there is vanishingly little in the interrogation that could suggest coercion by the detectives. It simply isn't there. The *Perdomo* Court has instructed to look at the duration, location, and continuity of the interrogation as three factors that could suggest coercion. Starting with those, none of them establish an involuntary confession.

The defendant was questioned for less than 30 minutes. The questioning began at 7:50 p.m., included a short break for medical care, and concluded at 8:20 p.m. A 30-minute interview – max – is not coercive. In *Mincey*, the interview was 3 hours. The *Perdomo* interview was 20 minutes. Again, comparing this case to those, this one is much, much more like *Perdomo*.

The location is also entirely reasonable. The defendant was partially upright in his hospital bed. The *Perdomo* interview was at the hospital too. This is where these conversations should be expected to be had. The defendant was injured in the course of murdering Mr. Gault, so of course the detectives are going to come to him there.

And the interview - even though it was just 30 minutes - was not continuous. This is a key fact in *Mincey*. The *Mincey* defendant repeatedly asked for the questioning to stop. He even invoked his right to counsel several times. The officer in *Mincey* just kept pushing for three hours. We don't have anything like that here. In fact, when hospital staff came into the room to provide medical care to the defendant, the officers stopped questioning immediately and took a break. So this 30-minute interrogation wasn't even a continuous 30 minutes, Your Honor. There was a break in there.

I want to point out something here that I think is a key fact in support of the voluntariness of the defendant's confession. When the officers took that break, the defendant said, "You guys aren't leaving, are you?" He asked for them to stay. The defendant wasn't done with them yet. Why was that? Because he hadn't finished his story. The defendant saw the detectives as his chance to spin a yarn about self-defense. The defendant needed those detectives in the room with him. That's the complete opposite of an involuntary statement, Your Honor. The defendant insisted on those detectives staying with him so that he could keep talking.

And that goes directly to the remaining factors that the *Perdomo* Court explained we should focus on here: whether the officers dominated the conversation and whether they allowed the defendant to tell his story and try to clarify with follow up questions. Looking through the transcript, it's clear that if anyone dominated the conversation, it was the defendant. Multiple times, he told multiple sentences of his story in response to "Mm-hm" from a detective. The detectives also asked questions like "So what happened then?" and "How do you know that?" Your Honor, this reads more like a direct examination of a friendly witness than it does an interrogation. And through it all, the defendant is speaking clearly, he's using complete sentences, he's using that college-educated grammar, and he's building a self-serving story of self-defense.

Finally, these officers' questions aren't aggressive or accusatory, and they weren't threatening to the defendant at all. They didn't have their weapons drawn or anything like that. They keep asking him what happened. In fact, throughout the entire interrogation, the officers brush off the defendant one time - and it was to keep him on track about what happened when he said that he wanted to call his mother. It wasn't

aggressive like the defense will tell you, Your Honor: it was an open-ended attempt to keep the conversation on track. The question was simply "What happened next?" And the defendant picked up there and kept telling the story he wanted to tell.

Throughout the whole time, the detectives are very gracious to the defendant. When the defendant slips up and mentions the knife for the first time, a detective says "I'm sorry. I guess I missed where your knife comes into the story." They don't get aggressive or accusatory with him. And they tell him that he's been generous with his time and should rest. They tell him to enjoy the UC game that he insists on staying up to watch. They are professional and polite throughout, just like they're trained to be. There's no evidence at all that they were coercive.

Your Honor, the *Perdomo* factors overwhelmingly establish that the defendant's confession was voluntary. The defendant's education and maturity levels are well above average. The defendant's health at the time of questioning was strong relative to *Perdomo*, where the Columbia Supreme Court held the confession to be voluntary. And the details of this interrogation show that it was brief, it had a break, and it involved no coercive questions or behavior whatsoever. I ask that the Court deny the defendant's motion to exclude the statement as involuntary. I welcome any questions the Court may have.

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PT: SELECTED ANSWER 2

To: Jan Dauss

From: Applicant

Re: State v Hughes - First Draft of Oral Arguments for Voluntariness Motion

Ms. Dauss,

You have asked me to prepare the first draft of your oral arguments in the Hughes matter concerning voluntariness of the Defendant's statement. You have asked me to weave the facts into your argument as they relate to each of the elements of the controlling law. I also understand that I am not to address the *Miranda* issue itself.

Please see the draft below. I am available to discuss.

Applicant

DRAFT BEGINS

Your Honor,

The defense seeks to have Mr. Hughes' statement excluded on the basis that it was involuntarily made in violation of Mr. Hughes' rights against making coerced confessions under the Due Process Clause.

The key issue before the court is whether Mr. Hughes' statement was not the result of a rational intellect and free will. As the parties and Your Honor discussed in the pretrial hearings, the controlling precedent in this case is *Mincey v Arizona* (U.S. 1978) ("*Mincey*"). In that case, the Court established that the question posed by the Due Process clause is whether the influences brought to bear upon the accused were such as to overbear the individual's will to resist and bring about confessions not freely self-determined." The *Mincey* court established that this is a contextual analysis that requires the court to 1) assess the maturity of the defendant and their education and physical condition, and 2) assess the facts of the interrogation itself, with regards to whether the facts of the interrogation itself indicate that a voluntary statement was not made.

If it pleases the court, the State of Columbia will present its argument on the *Mincey* factors by presenting that the characteristics of the accused and the interrogation show that the statement was made voluntarily and knowingly and was not the result of undue coercion by officers. Your Honor, we also note that the facts of this case bear a strong resemblance to a 2007 decision of the Columbia Supreme Court, *State v Perdomo*. In that case, the Court also applied the *Mincey* factors. Where helpful, the State will draw comparisons to that case to highlight the key issues.

The Characteristics of Mr. Hughes

Mr. Hughes is educated and mature

As noted by the court in *Mincey*, the education, maturity, and characteristics of the individual are relevant to the analysis. Where the speaker is educated and

knowledgeable and mature, they are more likely to have been able to understand the nature of the questioning and to govern themselves in a voluntary manner.

Here, Mr. Hughes is educated, having spent two years at the University of Columbia. His answers also evidence a feeling of responsibility and involvement for his mother, and also to engage in the purchase and sale of goods, indicating that he is mature and thinks that he is capable of acting to protect himself and his loved ones. In short, Mr. Hughes' education and the manner in which he describes his own decision-making indicate that he is mature and thinks of himself as someone that has agency, and is capable of acting to preserve his own rights.

Therefore, because Mr. Hughes is educated and appears to be mature for his age and interested in asserting his own rights, it is more likely that the statement was made voluntarily.

Mr. Hughes wanted to participate in the interview

In *Mincey*, the court stressed that the accused had clearly not wanted the interview to take place, requesting many times that the interview end. Where the individual clearly does not want to participate in the interview, the *Mincey* court found, there is a stronger likelihood that any statement they made implicating themselves was not voluntary and was not made in a communicative effort to be helpful or to discuss the issues.

Here, Mr. Hughes clearly wanted to participate in the interview. The transcript shows that Mr. Hughes repeatedly exclaimed his side of the story, adding details and rationalizations and explanations. Importantly, he also asked, "You guys aren't leaving,

are you?" when the detectives indicated that they would be pausing the interview while Mr. Hughes received care. Similarly, the court in *Perdomo* found that the accused had clearly wanted to talk to the officers, discussing his gratefulness at being OK and discussing his mother, and other matters. In that case, as here, the fact that the accused wanted to speak to officers and did not try to end the interview or otherwise evidence a lack of intent to talk, is evidence in support of the fact that Mr. Hughes made his statements in a voluntary manner.

Therefore, because Mr. Hughes wanted to help detectives, it is more likely that his statement was voluntary.

The interview took place a reasonable time after treatment

The *Mincey* precedent makes clear that a key question is whether the interview was conducted a reasonable time after the accused was receiving treatment so as to ensure that the accused was not still under active treatment and therefore not in a physical or mental condition to speak to anyone.

Here, Detectives spoke with Mr. Hughes in the evening, around 7:50 PM in the hospital unit, 2 hours after surgery. At this time, Mr. Hughes was sitting upright, was not still in treatment, and was not sedated. It is true that in the *Mincey* decision, the court found that the accused was being interviewed only mere hours after intensive surgery, and that this contributed heavily to the court's assessment that the statement was not voluntary.

However, the *Mincey* court's analysis can be distinguished here on the facts. In *Mincey*, the court found that the accused could not talk because of tubes in his mouth,

and he wrote on a piece of paper, and his responses were incoherent and often related to the issue of pain and asking the interrogation to cease. Here, Mr. Hughes' treatment was not as invasive or intense as in *Mincey* and, unlike the accused in *Mincey*, Mr. Hughes did not have any tubes in his mouth and was able to speak freely, if a little awkwardly. Mr. Hughes also was not actively being treated. While a medical professional did come in to take his blood, that kind of minimally invasive check-up is not akin to the active sedation and treatment of the accused in the ICU as in *Mincey*.

Therefore, while the interview did take place only a few hours after treatment like in *Mincey*, *Mincey* is distinguishable on the facts, and the interrogation here was not done while the accused was still clearly sedated and actively being treated.

Mr. Hughes was lucid and he spoke clearly and deliberately

In *Mincey*, the court held that the accused was clearly not lucid because many of his writings to the police were incoherent and he was still on intravenous pain medications. The defendant actually lost consciousness many times during the interrogation. The court found that because of these factors, it was likely that the accused was not in a position to voluntarily offer any information or to protect his own rights vis-a-vis the State as it tried to obtain information from him.

Here, by contrast, Mr. Hughes was not under intravenous medication like the accused in *Mincey*. Rather, he appears to have been given normal pain medication, which he said made him feel "drugged up." However, Mr. Hughes' drugged-up state looks far more like the drug state of the accused in *Perdomo*, where the accused was being given simple vicodin for pain as needed, and not like the heavily sedated and

intravenously sedated accused in *Mincey*. In that case, the court found that, while he was clearly feeling the effects of medication, the lucid nature of his responses indicated that they were not intense effects that overrode his ability to recall and discuss facts and make decisions.

Similarly here, Mr Hughes was clearly lucid and he spoke deliberately. He was able to provide extensive detail regarding the incident as he remembered it, showing that his short-term memory was functioning adequately. Further, he also had long-term memory to communicate, in discussing the issue of the Covette engine that had been bought and sold months ago. Mr. Hughes also communicated and clearly discussed his recollection of how his mother and uncle both acted and spoke, and so Mr. Hughes was clearly lucid despite the normal pain medication he was receiving. His speech did not appear to be slurred or confused like the writings in *Mincey*, nor did he lose consciousness during interrogation.

Therefore, because Mr. Hughes was not intravenously sedated, and because he was clearly lucid, his use of pain medication is distinguishable from the accused in *Mincey* and is more like the accused in *Perdomo*.

The Interrogation Itself

The interview was casual in tone, open-ended and not aggressive, and Mr. Hughes was allowed to tell his story without interruption.

A key finding in the *Perdomo* case was that the interview was casual, open-ended in the scope of discussion, and not at all aggressive. By contrast, the *Mincey* interrogation included a relentless series of questions posed at an accused coming in

and out of consciousness. In each of these cases, the nature of the conversation was crucial to a finding that the statements were and were not voluntary, respectively.

Here, as in *Perdomo*, the conversation was open-ended. Mr. Hughes was allowed to generally describe the events as they unfolded. He was able to provide follow-up details and further explain his meaning and his intent. The officers did not cut Mr. Hughes off and direct the conversation entirely. Rather, they allowed Mr. Hughes to direct the subject matter of the interrogation. They also spoke in a casual and frank manner, for example stating that they would "hang around" and "get out of Mr. Hughes" hair. This casual, open-ended conversation allowed Mr. Hughes to be comfortable and know that he was having a conversation of which he was a participating member, not that he was being subject to a one-way interrogation controlled and directed entirely by the officers.

Therefore, because the conversation here was open-ended and casual, and Mr. Hughes was largely allowed to control the discussion and the manner of speaking, it is far more akin to the permissible conversation in *Perdomo* as compared to the one-way relentless and intense interrogation in *Mincey*.

The interview lasted a reasonable duration, and included breaks and pauses

The *Mincey* court found that the interrogation in that case was intense and went for hours, ceasing only during intervals when the defendant lost consciousness. The statements at issue were thus found to be the result of relentless interrogation on a painfully and seriously wounded man, and deemed coercive and involuntary.

Here, the interrogation was paused casually to allow for a blood sample to be taken, and Mr. Hughes expressed hope that it would resume. The interview only lasted 30

minutes, and ended in time for Mr. Hughes to watch the football game. Accordingly, this case is heavily distinguishable from the events in *Mincey*, and more akin to the short, 20-minute duration interview in *Perdomo*, which the court found to be appropriate and supported the finding that the statement was voluntary and not the result of impermissible coercion.

Therefore, the short nature of the interview, which included a break for a blood treatment, supports the finding that the statement was not the result of a relentless interrogation of a wounded man, and rather a short reasonable interview with a person that was relaxing following a surgery.

Conclusion

For the reasons set out above, the interrogation in this case is clearly akin to the permissible interrogation in the *Perdomo* matter, and entirely distinguishable from the facts of the *Mincey* precedent. For this reason, we request that the court dismiss the motion to exclude the statement as being unduly coercive and a violation of the Due Process Clause as it applies to the State through the 14th Amendment.