

California  
Bar  
Examination

Essay Questions  
And  
Selected Answers

February 2011



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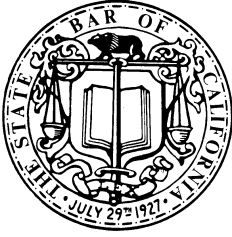
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**ESSAY QUESTIONS AND SELECTED ANSWERS  
FEBRUARY 2011  
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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FEBRUARY 2011  
ESSAY QUESTIONS 1, 2, AND 3

# California Bar Examination

Answer all three questions.  
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and facts 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 law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little 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 which are not pertinent to the solution of the problem.

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

## Question 1

In 2004, Tess, a widow, executed a valid will leaving her estate to her children, Abel, Bernice, and Cassie *per stirpes*.

In 2009, Tess, Abel, and Bernice quarreled and Tess decided to draft a new will. She went to an office supply store, got a preprinted will form, and filled in the following in her own handwriting:

Because my son Abel and daughter Bernice have been unkind to me, I specifically disinherit them. I give and bequeath all my property to University.

Tess signed and dated the form. No one was present when she signed and dated the form and hence no one signed as a witness to her signature. At the time, she was addicted to prescription pain killers and was an alcoholic.

In 2010, Cassie adopted David as her son. Soon thereafter, Cassie died, survived by David.

In 2011, Tess died, leaving an estate worth \$1,000,000.

Tess's 2009 will has been offered for probate.

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will? Discuss.

(2) Does David have any claim to a share of Tess's estate? Discuss.

Answer according to California law.

## Answer A to Question 1

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will?

A. Was the first will revoked?

Abel and Bernice can first object that Tess's 2004 will wasn't revoked by the subsequent will drafted in 2009. A will can be revoked either expressly or impliedly. Express revocation requires the testator to use language that makes his intent clear that the original will is revoked by a later will. A will can be impliedly revoked if the second will contradicts with the first will and the second will bequeaths substantially all of testator's property. Here, unlike in the first will where Tess left Abel and Bernice part of her estate, Tess specifically disinherited Abel and Bernice. A testator can disinherit those who would take if testator died intestate (here, her children) by expressly using language that she intends to disinherit them in her will. Because the second will contradicts the first will and bequeaths all Tess's property to a different person (University), the will was validly revoked by implication and the second will can be probated if it is proved valid. It is clear Tess intended the second will executed in 2009 to revoke the 2004 will and not be a codicil because she specifically contradicts a provision stated in her first will (to Abel, Bernice, and Cassie per stirpes) and then Tess in her later will left all of her property instead to University.

B. Objection that 2009 will is not a valid will

(1) Was this a valid attested will?

California does not allow oral wills. Therefore, a valid attested will must be (1) Written, (2) Signed by Testator, (3) in the presence of 2 witnesses who have to sign before testator's death, but not necessarily in his presence. Also, [if] testator doesn't

sign in the two witnesses' presence, it can be valid if he later acknowledges the signature on the will as his with witnesses present, who sign then or before T's death. Even if there are no witnesses, as long as (1) and (2) (writing and signed by T) are satisfied, extrinsic evidence or testimony can be offered that proves that T either in writing or orally expressed his intent that this writing be his will. This has to be proved through clear and convincing evidence. Here, Tess's will is likely not a valid attested will. Even though the will was in writing and signed by Tess, there were no witnesses to her signature. For this will to be considered valid, there would need to be clear and convincing evidence that Tess intended this to be her will or that later Tess acknowledged the signature as hers and witnesses sign. Since those facts are not included here, Tess's will is not a valid attested will.

## (2) Valid holographic will?

Tess's will will likely be considered a valid holographic will. A holographic will doesn't have to be fully in the testator's handwriting, but all material provisions must be solely in the T's handwriting. Material provisions include the beneficiaries who will take must be named and specify the gifts they will receive. A holographic will must also be signed by T to be valid. Here, Tess's 2009 will includes all material provisions. Tess specifically names University as the beneficiary and specifically names the gift they will take - "all my property". Tess signed the will, satisfying the signature requirement. The holographic will is also dated, which is not required but helps a court when a will is offered for probate to know the order in which wills were executed. Even though the will was printed on a preprinted will form, this is not of consequence. Therefore, since Tess named a specified beneficiary (University) and specifically named what property they would take (all) in her own handwriting, and signed the will, all material provisions required of a holographic will exist and Tess's 2009 will would be considered a valid holographic will in California. For the reasons listed above, Tess's 2004 will was revoked, and her 2009 will should be probated, if it is found that Tess had the capacity at the time of execution of the 2009 will (discussed below).

### C. Did Tess lack capacity when the 2009 will was executed?

A testator who executes a will must have capacity when the will is executed for the will to be considered valid and to be offered for probate. Capacity requires several things: (1) T must be at least 18, (2) T must understand the natural objects of her bounty, (3) must understand the nature and value of property, and (4) T must understand she is making a will. Here, Tess's capacity could be questioned because she was both addicted to prescription painkillers and was an alcoholic at the time she executed the will. A person could be considered to lack capacity normally but have times of being lucid. If the will is executed during a lucid period, then T will be considered to have met the capacity requirement. (1) The first element required for capacity here can likely be assumed. It seems Tess is over the age of 18 since she was already widowed and had three children, and presumably died of natural causes not many years after her 2004 will. (2) It appears that T understood the natural objects of her bounty (her children). This is possible because she specifically refers to her children who she knew would take either under her 2004 will or by intestate succession - Abel and Bernice. She made a point to disinherit them, and at least knew some of the natural objects of her bounty. Though, because Tess didn't list Cassie (who would also be a natural object of her bounty), it is possible she didn't understand all the natural objects of her bounty. (3) It is not clear that Tess understood the nature and value of her property. She only stated "all my property". She didn't specifically list any property but only made a blanket statement referring to the whole of her property. It is not clear that she understood the disposition of her property. (4) It is clear that Tess understood she was making a will. Her language specifically "disinherited" two of her children and then she "bequeathed" her property to University. Tess also wrote these statements on a preprinted will form that she went to an office supply store to buy. It appears that because Tess used certain language and wrote her bequests on a will form, she understood that she was making a will. Because Tess didn't even refer to Cassie (which questions whether she understood the natural objects of her bounty) and because Tess only bequeathed "all" her property instead of listing out certain

dispositions, it is possible that Abel and Bernice could prove that Tess lacked the capacity to make the 2009 will.

(2) Does David have any claim to a share of Tess's estate?

#### A. Capacity

It is possible that David has a claim to Tess's estate. Adopted children inherit from their parents just as if they were natural born children, so David will be able to take any gift that his mother Cassie would've been able to take had she been living. If it is found that Tess lacked the capacity to execute the 2009 will (for the reasons listed above), and the 2004 will was never validly executed, then David could take his mother's share that was devised under the 2004 will. Since Tess wanted her estate distributed to Abel, Bernice and Cassie per stirpes, that means that the estate is divided equally at the first level where there is issue left (whether anyone is living on that level or not). Here, if Tess's estate was divided per stirpes, Abel, Bernice and Cassie's issue - David - would all inherit equal shares - 1/3 of the estate.

#### B. Pretermitted child

If the 2009 will is found to be valid, then David could argue that Cassie was a pretermitted child, but this argument is likely to fail. A pretermitted child will be provided for if they were born/adopted after a will was executed, were not provided for in the will, and (1) were not provided for outside of the will, (2) all the estate wasn't left to their other parent, or (3) they weren't expressly disinherited. Here, because Cassie was already living when Tess's will was executed, she cannot claim as a pretermitted child, even though she wasn't expressly disinherited. David would not be able to argue under the pretermitted child statute, even though he was adopted after the will, because he is the grandchild and not child of T. Therefore, Cassie nor David would be considered a pretermitted child and David does not have a claim under as a pretermitted child.



## **Answer B to Question 1**

1. Arguments Abel and Bernice can make objecting to the validity of Tess's 2009 Will:

### Revocation of the 2004 Will

In 2004, Tess executed a valid will leaving her estate to Abel, Bernice, and Cassie. The issue is whether Tess's 2009 will revoked the 2004 will. A will may be revoked by a subsequent will (1) if the subsequent will is validly executed; and (2) if the testator simultaneously had the intent to revoke the prior will. Revocation may be express (e.g., "I revoke all prior wills and codicils"), or implied (a) to the extent that the wills are inconsistent; or (b) if the subsequent will makes a complete disposition of the testator's entire estate, then the prior will is revoked in its entirety.

Here, [Tess] did not expressly revoke the 2004 will in her 2009 will, because the 2009 will did not mention the prior will. However, Tess stated in her 2009 will that she "specifically disinherit[s]" her son Abel and Bernice. This statement is inconsistent with the 2004 will's disposition of Tess's entire estate to her children Abel, Bernice, and Cassie, so the 2004 will would be implicitly revoked as to its devises to Abel and Bernice, provided that it is validly executed or a valid holographic will. Moreover, Tess's 2009 will stated that she bequeaths "all my property to University," which is a complete disposition of her estate. As such, a court would likely find the 2004 will to be revoked in its entirety, if the 2009 will is valid.

The issue, therefore, is whether the 2009 will is a validly executed attested will, or a valid holographic will.

### Validly Attested Will

Abel and Bernice will argue that the 2009 will failed to comply with the required formalities for a validly executed attested will. To be valid, an attested will must be: 1) in writing; 2) signed by the testator, or by another person in the testator's presence and at her direction; 3) the testator's signing or acknowledgement of the will must occur in the

joint presence of at least two witnesses; 4) the two witnesses must sign the will within the testator's lifetime (though not necessarily in the testator's presence, or in the presence of each other); and 5) the two witnesses must have understood at the time that they were witnessing the testator sign her will.

Here, Tess's 2009 will was in writing (on the preprinted will form), and she signed and dated the document. However, there were no witnesses to Tess's signing of the will, and no witnesses signed the document. Thus, Tess's 2009 will failed to comply with the formalities required of a validly attested will.

#### Clear and Convincing Evidence Exception After 2009

After Jan. 1, 2009, a will which complies with the signature and writing requirements, but fails to comply with the witnessing requirements, may nonetheless be admitted to probate if the proponent of the will is able to produce clear and convincing evidence that the testator intended the document to be her will. Here, University (the party who stands to benefit from the 2009 will being valid) will argue that, since Tess's 2009 will was executed after this new rule went into effect, and since she signed and wrote portions of the will in her own handwriting, there is sufficient evidence to admit the will into probate.

This argument will probably fail. Abel and Bernice will argue that, as discussed *infra*, the fact that Tess was on painkillers and was an alcoholic at the time she signed the 2009 will weighs strongly against finding that there was clear and convincing evidence of her intent. Moreover, Abel and Bernice will argue that the clear and convincing evidence exception is usually only successfully employed when a testator attempts to comply with the witnessing requirements, but fails due to a technicality such as the two witnesses not being jointly present at the same time, or failing to sign the document within the testator's lifetime. Here, Tess had no witnesses present whatsoever. Moreover, Tess created the will on a preprinted will form, rather than going through the more formal procedure of having an attorney draft up a customized will. They will also point out that the will illogically does not mention Cassie. All of these

circumstances will likely persuade the court not to apply the clear and convincing evidence exception in this case. As such, the 2009 will will not be admitted to probate as a validly attested will.

### Holographic Will

University will argue that, even if the 2009 will is not validly attested, it qualifies as a valid holographic will. A holographic will is valid if (1) the material terms (including all beneficiaries and bequests) are in the testator's own handwriting; and (2) the testator signs the will. A holographic will can indeed revoke a prior attested will (that was typed).

Here, all material terms in the 2009 will were in Tess's own handwriting. This included specifically disinheriting Abel and Bernice, and bequeathing "all my property to University." Tess additionally signed and dated the will. (A holographic will need not be dated, but an undated holographic will would be invalid to the extent that it conflicted with other wills. Since this will was dated, that is not a problem.)

Abel and Bernice will argue that not all material terms were included in Tess's handwriting because she failed to mention Cassie in the 2009 will. This argument will likely fail. Tess's statement in her own handwriting that "I give and bequeath all my property to University" is a complete disposition of her estate. Specifically mentioning Cassie was not necessary. As such, a court would likely admit the 2009 will to probate as a valid holographic will, provided that they find there was sufficient evidence of testamentary intent.

### Capacity

Abel and Bernice will argue that Tess lacked capacity at the time she executed the 2009 will. To have capacity to execute a will, a testator must: 1) be over 18 years old; 2) know the extent of her property; 3) know the natural objects of her bounty (e.g., heirs); and 4) understand the nature of the act of executing a will.

Tess was presumably at least 18 years old in 2009, seeing as she was a widow and had three children. Abel and Bernice will argue that Tess lacked capacity because she was addicted to prescription painkillers and was an alcoholic. However, this evidence will likely be insufficient under these facts. All testators are presumed to have capacity, and the burden will be on Abel and Bernice to present evidence that Tess lacked capacity at the precise time she executed the 2009 will. Merely showing that she was addicted to painkillers and was an alcoholic will not be enough. They would need to prove that she was high or drunk at the time she executed the document. Given that she had the capacity to go to an office supply store, purchase a preprinted will form, and write legibly in her own handwriting, it is likely that she knew the nature and extent of her property. She also specifically referenced the natural objects of her bounty (Abel and Bernice), although they will point to the fact that she left Cassie out of the will as evidence that Tess was not completely aware at the time. However, Tess did mention that Abel and Bernice "have been unkind to me," which logically might be a reference to the fact that they quarreled recently. Ultimately, the fact that Tess left out Cassie will likely not be sufficient to prove that she lacked capacity at the time she executed the will. She clearly understood the nature of the act of executing a will; otherwise she would not have been able to purchase the will form and execute it without help. Accordingly, Abel and Bernice's capacity defense will fail.

### Insane Delusion

Even if a testator had capacity at the time she executed a will, affected parts of a will will be invalid if (1) the testator had a false belief; (2) which was the product of a sick mind; (3) there was no evidence supporting the belief; and (4) it affected the will.

Here, there is no evidence that Tess had any false beliefs about her quarrel with Abel and Bernice. Accordingly, this defense will fail.

### Conclusion

Because Tess's 2009 will is a validly executed holographic will, and because Abel and Bernice's capacity and insane delusion defenses will fail, Abel and Bernice likely will fail in objecting to the validity of the 2009 will.

### Final Note re Dependent Relative Revocation

Under the doctrine of dependent relative revocation, a will which the testator revokes in anticipation that a subsequent will would be valid may nonetheless be admitted to probate if the prior will turns out to be invalid. However, this doctrine would not apply here in any instance, because the 2004 will was not revoked by physical act. If the 2009 will was invalid, then the 2004 will would have never been revoked. As such, the doctrine of dependent relative revocation would not need to be invoked to save the 2004 will, because the 2004 will would have never been revoked by the 2009 will in the first place.

## 2. David's Claim:

### Adopted Children / Intestacy

David is an adopted child of Cassie, who is Tess's son. When a child is adopted, it severs any right to inherit from their blood parents, and the adopted child is treated the same as a blood child of the adopting parent for purposes of wills and intestacy. Here, Cassie died in 2010, survived by David. If Cassie died intestate (i.e., without a will), and if David is her only son, David would inherit Cassie's entire estate. The question, therefore, is whether Cassie would have inherited any of the \$1,000,000 in Tess's estate.

### Per Stirpes

If Cassie were to inherit under the 2004 will, she would receive a "per stirpes" split of the \$1,000,000, which would be one third (an equal division between all three of Cassie's children), for about \$333,333. [David] would inherit this amount as the only

heir of Cassie. However, we must first determine if Cassie would take anything after the 2009 will.

#### Pretermitted Heir

David might try to claim that Cassie was a pretermitted heir. A child which is born after the testator executed all testamentary instruments (wills, codicils, and trusts), but is not provided for in any of them, may nonetheless receive her intestate share. This doctrine will not apply here because Cassie was already alive when both the 2004 and 2009 wills were executed by Tess.

#### Revocation of 2004 Will

Because Cassie is not a pretermitted heir, whether David can take will depend on whether the 2009 will is valid, and whether the 2004 will was revoked by the 2009 will. As discussed above, the 2009 will is likely a valid holographic will, and because the 2009 will made a complete disposition of Tess's estate ("all my property to University"), a court is likely to find that the 2004 will was implicitly revoked in its entirety. If the court adopts this view, Cassie would not inherit under the 2009 or 2004 wills, and David accordingly would be entitled to no share of Tess's estate.

#### Assuming the 2009 Will is Invalid

Assuming, *arguendo*, that the 2009 will is invalid, then David would argue that he is entitled to a 1/3 share of Tess's estate because (a) Cassie would have inherited 1/3 under the 2004 will, and (b) David is Cassie's only heir. The issue, under these circumstances, would be whether the fact that Cassie predeceased Tess caused her bequest to Cassie under the 2004 will to lapse.

#### Lapse

Under the common law rule of lapse, if a beneficiary of a testator's will predeceased the testator, any bequests to the beneficiary would lapse (i.e., fail), and would fall into the residuary of the will (the block of remaining property after all specific,

general, and demonstrative devises). Here, because Cassie predeceased Tess, her bequest would lapse under the common law rule, and David would take nothing.

#### Antilapse Statute

However, California, like most states, has adopted an antilapse statute. Under the statute, a bequest will not lapse if (1) it is to the testator's kindred, or kindred of a former spouse; and (2) the beneficiary leaves issue. Here, Cassie is Tess's kindred because she was Tess's daughter. Moreover, Cassie left David as issue. Accordingly, her bequest would not lapse under the antilapse statute, and Cassie's bequest of 1/3 of Tess's estate (under the 2004 will) would pass to her issue, David.

#### Conclusion

The 2009 will is likely a valid holographic will which revoked the 2004 will in its entirety. As such, Cassie's estate would be entitled to nothing under the 2009 will, and David would take nothing. However, if the court finds that the 2009 will was invalid, then Cassie's estate would take 1/3 of the \$1,000,000 in Tess's estate under the 2004 will, which would pass to David via intestacy.

## Question 2

Out of a sense of patriotism, Charles enlisted in the United States Army. Charles had risen to the rank of Captain.

Shortly after that promotion, after serious reflection, Charles began to rethink his previous religious, philosophical, and political views. He modified the religious preference he listed on his Army records from “Christian” to “Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You.” Charles concluded that his belief did not prohibit his assignment to duty in Country A, but it did preclude his assignment to duty in Country B.

Federal law requires military personnel to accept any assignment to duty, but when Charles was assigned to duty in Country B, he declined to go, and was charged with refusing to deploy. Since the charges were brought, Charles has frequently criticized American involvement in Country B.

Charles wishes to raise a defense against the refusal to deploy charge based solely on (1) the Free Exercise Clause and (2) the Establishment Clause of the First Amendment to the United States Constitution.

What is the likelihood of Charles prevailing? Discuss.



## **Answer A to Question 2**

The First Amendment prohibits the federal government from interfering with the free exercise of religion, and it also prohibits the federal government from establishing a religion. In general, because the First Amendment protections are so important, laws are subject to strict scrutiny, which means they must be necessary to achieve a compelling state interest. Additionally, there must be no less restrictive alternative.

### **(1) FREE EXERCISE OF RELIGION**

#### **MUST THE RELIGION PROTECTED BE A RECOGNIZED RELIGION?**

As indicated above, the federal government cannot enact laws that interfere with the free exercise of religion. A necessary threshold question, therefore, is which religions are protected by the First Amendment Free Exercise Clause. The Supreme Court has indicated that the religion need not be a generally accepted or recognized religion, so long as the individual who practices the religion has a genuine belief in the religion.

In this case, Charles' new religion, "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You," is not a generally accepted or recognized religion. However, no facts indicate that Charles does not have a genuine belief in this religion. As indicated in the facts, he had rethought his views, which gives credence to the fact that Charles genuinely considered and believes in his new religion.

Accordingly, Charles' new religion qualifies as one which is subject to First Amendment limitations.

#### **FREE EXERCISE OF RELIGION V. LAWS OF GENERAL APPLICABILITY**

The Supreme Court has indicated that a law will be struck down as violative of a person's free exercise of religion only in the event that the law was enacted with the

purpose of interfering with the person's religion, and the law in fact does so interfere. Thus, laws of general applicability will not be struck down under the Free Exercise Clause. A good example of this is where the U.S. Government prevents mind-altering substances (i.e., drugs). In Native American religions, the Native Americans use peyote, a mind-altering substance, in the exercise of its religion. However, because the Supreme Court determined the law against drugs was one of general applicability and not directed at inhibiting Native Americans from practicing their religion, the law was upheld. Notably, two exceptions have been found: 1) The Amish do not have to send their children to school until age 16; and 2) people may still receive unemployment benefits if they quit a job due to religious beliefs. Neither exception is applicable here.

Rather, in this case, as is similar to the Native American peyote example, it appears the federal law is one of general applicability. Specifically, federal law requires military personnel to "accept any assignment to duty." Therefore, because the law was not enacted with the intent to interfere with religion [sic].

The law may, however, actually interfere with Charles' exercise of religion. Because he must accept any assignment to duty, and because he was charged with refusing to deploy, he therefore cannot exercise his religion which necessitates he refuse assignment to Country B. However, as indicated above, because the law was not enacted with the purpose of interfering with Charles' religion, it is one of general applicability and will be upheld.

#### NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST

Even if the federal law to "accept any assignment to duty" was enacted with the intent to interfere with religion, it may still pass muster under the Free Exercise Clause if it is necessary to achieve a compelling state interest. Of note, under this strict scrutiny standard, the burden is on the government to so prove the law passes muster.

Here, the law is necessary, as the U.S. military must maintain order with respect to its troops. There are hundreds of thousands of people in the U.S. military, and for

efficiency and administrative purposes alone, it would not make sense to allow individual military personnel to "pick and choose" where they are assigned. Indeed, the U.S. might have to forego a presence in dangerous areas if such was the case, as some military personnel may decline to go to war-torn parts of the world. Moreover, it is important that the military retain obedience from its troops and reduce tension, given the gravity of their missions and likelihood that American troops may be killed. Indeed, once Charles was assigned to duty in Country B, he frequently criticized American involvement in Country B, thereby disrupting efficiency and perhaps causing others to lose faith in the mission. Accordingly, the law is necessary.

There is also a compelling state interest - the protection and defense of the United States. Because national security and defense is such a profound interest to the United States, it qualifies as "compelling."

Moreover, there does not appear to be any less restrictive alternative. For example, the law could not allow some military personnel to accept some duties and reject others, while maintaining that others must accept any assignment (as such a law would be subject to equal protection claims).

Accordingly, because the law is necessary to achieve a compelling state interest, as maintaining order in troops in order to accomplish national security and defense, the law is valid. The government meets its burden in so proving.

Thus, given all of the above, Charles cannot successfully raise a defense based solely on the Free Exercise Clause.

## (2) ESTABLISHMENT CLAUSE

As indicated above, the First Amendment prohibits the federal government from establishing a religion.

## APPROVING ONE SECT OF RELIGION OVER ANOTHER

In the rare event that the U.S. government might establish one sect of religion over another, said law would be subject to strict scrutiny, as described above. Here, it does not appear that the federal government is approving one sect over another, as one must accept assignment to duty regardless of religious sect.

Therefore, the government is not approving one sect of religion over another.

## LEMON TEST

The basic test the Supreme Court uses in determining whether the federal government has established a religion is the Lemon test, which is comprised of three inquiries: 1) was the law enacted for a secular purpose; 2) does the primary effect neither inhibit or advance religion; and 3) is there no excessive entanglement by the government? If all three inquiries can be answered affirmatively, the law passes the Lemon test, and accordingly, the Establishment Clause is not violated.

### A) SECULAR PURPOSE?

As indicated above, the first inquiry is whether the law was enacted for a secular purpose. Here, the law that military personnel must accept any assignment to duty does not reference religion whatsoever. Moreover, it appears the purpose of the law was to maintain order and faith in the military missions, and not to establish a religion.

Accordingly, there is a secular purpose behind the law.

### B) PRIMARY EFFECT?

It must be decided whether the primary effect is to advance or inhibit religion. The effect of the law is that a person in the military will have to accept assignment regardless of his religious preferences, and without taking said preferences into account. Thus, it cannot be said that the law advances or inhibits religion, as the fact that one has a religious leaning toward a particular assignment in a particular country is inconsequential as to whether the person is eventually assigned to a particular country.

Rather, the primary effect of the law is to maintain order and administrative military efficiency.

Accordingly, the primary effect of the law neither advances or inhibits religion.

### C) EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION?

In order for a law to be valid under the Lemon test, there must not be excessive government entanglement with religion.

This inquiry may be Charles' best argument that the law should fail the Lemon test. Specifically, he can argue that the Army records list a religious preference. Accordingly, because he listed his religious preference, the military was on notice that his beliefs under his religion may conflict with assignment into particular countries.

However, the government can argue that any preference that Charles indicated has little to do with where he is eventually assigned to duty. Rather, military personnel are assigned where they are needed; where ongoing conflicts arise; etc. Thus, the law that a person must accept any assignment to duty, even if the military knows your religious preference/beliefs, does not excessively entangle with religion.

Accordingly, there is no excessive government entanglement with religion.

Thus, because the Lemon test is not satisfied, a court will likely find that the Establishment Clause has not been violated.

Charles will not succeed under either the Free Exercise Clause or the Establishment Clause.

## Answer B to Question 2

### 1. Free Exercise Clause

Under the First Amendment's Free Exercise Clause, the federal government may not prohibit the free exercise of any religion.

#### Are Charles's beliefs religious?

The first question is whether Charles's nontraditional belief system is religious. A religion need not be a popular or generally recognized system of belief, like Christianity, but it must be religious rather than political or philosophical in nature. There is no single test for determining whether a belief system is religious, but courts look to factors such as whether the system has indicia of traditional religious beliefs like dealing with questions about the existence and nature of a higher power, life after death, holidays, rituals, and moral teachings for living one's day-to-day life.

Here, Charles's belief system seems to lack any of these traditional indicia of religious beliefs. The single belief that his religion espouses is one of noninterference, but that gives only limited guidance on how to live one's day-to-day life. There is no indication of beliefs in a god or gods, views on life after death, holidays, or rituals. Moreover, the fact that Charles's beliefs here are tied closely to the situation in particular countries (rather than, for example, a belief in nonaggression to all) and that Charles has been criticizing U.S. policy on this basis suggests that the beliefs are more political than religious.

A court likely would conclude that Charles's belief system is only political or philosophical, not religious, and therefore his Free Exercise Clause claim will fail on this basis alone.

#### Genuineness

Religious beliefs also must be genuinely held to qualify for First Amendment protection. Here, there does not seem to be any question that Charles genuinely believes in his principle of noninterference, and thus this requirement would be met.

### Religious accommodation

The Free Exercise Clause generally does not require accommodation of religious beliefs. The government may require a person to comply with neutral laws of general applicability even if doing so violates that person's genuinely held religious beliefs.

Here, the federal law requiring military personnel to accept any assignment is a neutral law of general applicability. It does not target only the religious or single out one religion for disfavored treatment, and there is no indication that it was adopted specifically to disadvantage religious persons. To the contrary, it probably was adopted for purely secular reasons, to prevent soldiers from undermining military planning by refusing to serve when deployed.

Even if it were not a neutral law of general applicability, the statute would be lawful if it satisfied strict scrutiny -- that it was necessary to achieve a compelling governmental interest and the least restrictive means of doing so. Although strict scrutiny is a demanding standard and the burden of proof is on the government, this law has a good chance of surviving this standard. The federal government has a compelling interest in military readiness and discipline among the troops; indeed, raising an army is one of the federal government's most important functions. The law is necessary to achieve that interest because if soldiers could refuse deployments, it would become difficult if not impossible to plan troop movements adequately and to keep units that trained together intact for battlefield activities. Even allowing a few religious exemptions could severely complicate these efforts if, for example, the objecting soldier had a unique role. And here the fact that Charles is a Captain rather than a low-level soldier suggests that there would be disruption in the chain of command if the unit were deployed without him. Therefore, the law should survive strict scrutiny even if that were the standard.

(I should note that Charles might have a claim under the Religious Freedom Restoration Act, which subjects all Free Exercise Claims to strict scrutiny. Although the law was struck down as applied to States, most courts continue to find it valid as applied to the

federal government. This is beyond the scope of the question, but as explained above Charles likely loses even under strict scrutiny.)

Therefore, the government can require Charles to comply with this law even if doing so violates his religious beliefs. Charles is likely to lose on this basis alone as well.

### Military exception

Finally, another barrier to Charles's claim is the fact that he voluntarily enrolled in the army. Soldiers give up many of their constitutional rights, to the extent that they are inconsistent with important military functions. And as noted above the military has a strong interest in enforcing its requirement that soldiers accept all assignments. While conscientious objectors -- those who are religiously or philosophically opposed to all use of military force -- have traditionally been exempted from military service entirely, those who object to some but not all wars have never been exempted. And because Charles enrolled voluntarily rather than through the draft, his claim to an exemption would be particularly weak.

### Conclusion

Charles will not prevail on his Free Exercise Clause claim.

## 2. Establishment Clause

The Establishment Clause prohibits the federal government from establishing an official religion or preferring religion over irreligion. A federal statute passes muster under this clause if it (1) has a secular purpose, (2) does not have the primary effect of promoting religion, and (3) does not excessively entangle the government in religious or ecclesiastical matters.

### Secular purpose

As noted above, the federal statute has a valid secular purpose of promoting military readiness and troop discipline. Because this has nothing to do with religion, Charles will not prevail under this test.



### Secular effect

The primary effect of this statute also does not seem to be promoting religion. The primary effect is to keep military units intact no matter where they are deployed. Religious and irreligious soldiers are treated the same way regardless of their belief. In fact, if the rule was to the contrary and religious soldiers could refuse particular deployments, that would at least raise serious Establishment Clause questions about whether the government was promoting particular religious beliefs (although most religious-accommodation statutes have been upheld against Establishment Clause challenges). Therefore, Charles is likely to lose under this test too.

### Excessive entanglement

There is no real risk of entanglement between the government and religion under the statute. The statute does not require the government to make any quintessentially religious determinations because it applies equally to all regardless of religion or belief. Again, the rule Charles seeks would raise more difficult questions than this one does if it required the government to decide whether a person had a genuine religious belief precluding a particular deployment. Therefore, Charles will lose under this test too.

### Conclusion

Charles will not prevail on his Establishment Clause challenge.

### Question 3

Leo owned three consecutive lots on Main Street. At one end, Lot 1 contained an office building, The Towers, leased to various tenants; in the middle, Lot 2 was a lot posted for use solely by the tenants and guests of the other two lots for parking; at the other end, Lot 3 contained a restaurant, The Grill, operated by Leo.

In 2008, Leo leased The Grill to Thelma for 15 years at rent of \$1,000 per month under a written lease providing in relevant part: "Tenant shall operate only a restaurant on the premises. Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease. Tenant and his or her guests shall have the right to use Lot 2 for parking."

In March 2009, Thelma assigned the lease to The Grill to Andrew after he had reviewed it. The lease did not contain any provision restricting assignment. Although Leo did not express consent to the assignment, he nevertheless accepted monthly rental payments from Andrew.

In April 2010, Leo sold Lot 1 and Lot 2 to Barbara after she had inspected both lots. Barbara immediately recorded the deeds. Leo retained ownership of Lot 3.

In June 2010, Leo informed Andrew that, within a month, he intended to open a restaurant across the street from The Grill.

Also in June 2010, Barbara announced plans to close the parking lot on Lot 2 and to construct an office building there. There is no other lot available for parking within three blocks of The Grill.

1. Andrew has filed a lawsuit against Leo, claiming that he breached the provision of the lease stating, "Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease." How is the court likely to rule on Andrew's claim? Discuss.

2. Andrew has filed a lawsuit against Barbara, claiming that she breached the provision of the lease stating, "Tenant and his or her guests shall have the right to use Lot 2 for parking." How is the court likely to rule on Andrew's claim? Discuss.

## Answer A to Question 3

### 1. ANDREW (A) V. LEO (L)

#### Applicable Law

Service contracts, including leases, are governed by the common law. These contracts involve a lease of land, which is a service. As such, the common law will govern these transactions.

#### Validity of Lease from L to T - Statute of Frauds

The Statute of Frauds prevents the introduction of a contracts for services that takes more than one year to complete, unless the statute of frauds has been satisfied by a writing, performance, or a judicial assentation. In this case, the lease between L and T [was] for a sum of 15 years, but it was in writing and presumably signed by both parties. Therefore, the Statue of Frauds has been satisfied. Therefore, there was a valid lease from L to A.

#### Assignment from T to A

An assignment occurs when a person who is in rightful possession of property transfers all of her rights to another person. An assignment will be presumed valid, unless there is a no-assignment provision in the lease which is valid and has not been waived. Once rights have been assigned, the original assigning party, the assignor, remains in privity of contract with the lessor and the new assignee is not in privity of estate. As such, both the assignor and the assignee may assert their rights against the landlord, and the landlord may similarly assert his rights against both assignor and assignee.

In this case, A will easily be able to show that T assigned the lease to him since she transferred all of her rights in The Grill to him. Additionally, the original lease between L and A did not contain a 'no assignment' provision. T transferred all of her rights in Lot 3 to A for the balance of 14 years on her lease, which falls within the statute of frauds. Accordingly, A and T's assignment needs to be in writing. Because A and L both

“reviewed” the assignment, it is likely that the assignment was indeed in writing and is therefore valid under the Statute of Frauds.

Therefore, the assignment will be deemed valid.

### Equitable Servitude

An equitable servitude (ES) is a promise in relation to land that does not necessarily burden one party's land, but it will concern the land of the other party. The benefit of an ES will be deemed to run with the benefitted land if the following are found: (i) generally, a writing; (ii) intent of the parties that the benefit run; (iii) touch and concern of the land; and (iv) notice. The recovery of an equitable servitude is equitable relief, rather than damages.

In the present action, the lease between T and L contained a promise by L not to open a restaurant within 5 miles of Lot 3, which contained The Grill that T leased. That lease was then validly assigned to A. In order for A to enforce the contract provision against L, he will need to show that the promise was an equitable servitude that was intended to “run with the benefitted estate”, in this case Lot 3.

### Writing

Generally, a writing is required for an ES to run with the benefitted land. In this case, there was a writing between L and T, which included the covenant. Additionally, the assignment from T to A was also in writing, as discussed above. Therefore, this requirement is met.

### Intent

However, L will argue that he did not intend for the ES to run with the land, since it is not evidenced “to successors or assigns” in the lease. However, because there was a valid assignment and because it is very likely that a 15-year lease will be assigned at some point, A will argue that the fact that a non-assignment provision did not appear in the lease is sufficient to show intent to run. Additionally, A will argue that because L

accepted monthly rental payments from him, that he was well aware that the lease had been assigned and had made no efforts to refuse the assignment or show his intent not to let the ES run with Lot 3.

### Touch and Concern

The ES must also directly affect the benefitted party's use of the land. Here, A will argue that the ES concerns his ability to use Lot 3 as a restaurant, which was the purpose of his taking over the lease. L will argue that the provision only refers to restaurants and only inhibits A's ability to run the restaurant, which may be located on land, but does not directly affect the land. However, because A took the land as a restaurant and it is likely that he took it as a restaurant, the fact that the provision goes to preventing L from opening a restaurant within 5 miles directly affects his use of Lot 3. Therefore, the ES does touch and concern the land.

### Notice

Finally, the parties must have had notice. L will argue that the assignment between T and A did not contain the provision restricting assignment, and therefore the benefitted land did not have notice. However, notice can be gotten by looking to the record and inspecting the previous documents in the chain of leases. As such, A did have valid notice by looking to the lease between L and T. Additionally, L will be deemed to have notice because he was a party to the first lease between him and T. Therefore, this element is met.

### Conclusion

It is most likely that A will want to seek equitable relief in the form of an injunction, to enforce the provision preventing L from opening a restaurant within 5 miles of Lot 3. For the reasons stated above, A will likely be able to show that the ES was validly formed and runs with Lot 3. Accordingly, the court will likely order an injunction against L to enforce the ES and prevent him from opening a restaurant within 5 miles.

### Covenants to Run with Burdened Land

A may also argue that the provision is a covenant. A covenant is a contractual provision in a writing whereby one promises not to do something in relation to land. It is very similar to an ES, described above. However, money damages can be awarded, which A won't want.

## 2. ANDREW V. BARBARA (B)

### Easements

An easement is a non-possessory interest in the use of someone else's land. An easement appurtenant involves the two properties, a dominant (the benefitted land) and a servient (the burdened land) tenement. An easement is created a number of ways, including by grant (which is a writing), prescription, implication, and necessity. It can be terminated, generally by release or abandonment, which takes a physical act. An easement will pass to a burdened estate so long as the new owner has notice of the easement, which is found by record (looking to previous conveyances), inquiry (looking to the land), and actual notice (being informed of the easement).

In this case, there was a provision in the original lease between L and T that allowed T and her clients to use the parking lot that was located in Lot 2, next door [to] T's leased premises. Because there were two lots, one burdened (lot 2), and the other benefitted (Lot 3), this is an easement appurtenant. Additionally, because the easement was granted in the writing between L and T, this was a valid easement by "grant". L then sold his property to B, who took the property and recorded the deeds. B will argue that because she was not informed of the easement by L and because her deeds did not include the provisions from L to A, since that was simply a lease and B's deeds were actually recorded conveyance documents, that she did not have notice. However, she did inspect both lots, Lot 1 and Lot 2, before purchasing them. In this regard, she most likely noticed that there were many people walking from Lot 2, where they parked their cars, to Lot 3 where they dined at The Grill. Additionally, she would have noticed that there were most likely more cars present in Lot 2 than would normally be for Lot 1

alone. This should have led her to inquire as to whether an easement or agreement existed to allow Lot 3 to use the Lot 2 parking lot. As such, the Court will likely find that B had inquiry notice of the easement and the easement will pass with the burdened Lot 2.

Therefore, B had inquiry notice of the easement and A will most likely be successful in enforcing the easement against her.

## Answer B to Question 3

Thelma=T

Leo=L

Andrew=A

Barbara=B

### 1) Restrictive Covenant/Equitable Servitude

A covenant is a promise to do or not do something on or near one's land. Here L promised in his lease to T that "landlord shall not open a restaurant within 5 miles of the premises during the terms of the lease." Since it is a promise not to do something near his land, it is a covenant.

### Equitable Servitude

Whether a covenant is a restrictive covenant or an equitable servitude depends on the types of damage that the plaintiff seeks. If A is seeking money damages, then it is a restrictive covenant. If he is seeking injunctive relief, then it is an equitable servitude. Here, A is suing to prevent L from opening a restaurant, which he said he would do in one month. Since he is seeking injunctive relief, it is an equitable servitude.

Here, the issue is whether the benefit and burdens of the equitable servitude run to A, who is a successor to the original tenant, T. For the benefit to run, the original agreement 1) must have been in writing, 2) parties intended the benefit to run to future successors, 3) the agreement touches and concerns the land, and 4) the parties had notice.

Here, the original equitable servitude was from a written lease signed by L and T in 2009. Therefore, the writing requirement is satisfied.

Here, L could argue that there was no intent by the original parties that the benefit would run to future successors because there is nothing said in the lease about the



benefit running to future successors. However, A could argue that because it said that the agreement would last "for the term of the lease" and the term was 15 years, it was intended that the benefit would be valid for the entire period of the 15 years. There was no clause restricting assignment and under the common law a tenant is free to assign her rights under the lease unless the lease or the landlord objects. Because the benefit was to last 15 years and T was free to assign her rights to another, it can be said that the parties intended that the benefit would run to future successors of the lease.

Touches and concerns the land means that whether the agreement affects the parties as landowners, not just community members. Here the agreement affects the tenant because the Grill is a restaurant and the previous owner of the restaurant opening up a new restaurant within five miles of the old restaurant brings along competition and hurts the tenant. It affects the landlord as a landowner because it prohibits him [from] doing something on his land.

Here A had notice of the agreement because it was in the lease and he reviewed it. L could argue that he did not have notice that the agreement was going to be able to [be] used to T's assignee, L. A could argue that L did have notice because he accepted rental payments from A, which presumably were checks written by A and should have then alerted L that A has taken over for T.

### Restrictive Covenant

If L brought a claim for money damages, then it would have to be analyzed as a restrictive covenant. All the elements are the same except the original parties must have had horizontal privity and the assignor-assignee would have had to have vertical privity. Vertical privity is any nonhostile nexus. Here T (assignor) and A (assignee) have an assignment relationship which qualifies as nonhostile vertical privity. Horizontal privity means that the original parties must have had a relationship apart from the covenant. Here, T and L were landlord-tenant apart from the covenant. Therefore, horizontal privity is established. A would also prevail under a restrictive covenant theory.

## 2) Easement

An easement is the nonpossesory property interest to use another's land for one's benefit. Using another's land for the use and enjoyment of one's land is an easement appurtenant.

Here, the agreement that tenants should have the right to use lot 2 for parking is an easement because it gives the tenants a nonpossesory property interest to use lot two for their benefit. It is an easement appurtenant because it is for the using [of] another's land for the use and enjoyment of one's land. Lot 3 is the dominant tenement and lot 2 is the servient tenement.

Here, an express easement was created because it is written in a lease between T who was the tenant for lot 3, dominant tenement, and L who was the owner of lot 2, the servient tenement.

The benefit to an easement appurtenant runs with the land passes automatically with the transfer of the dominant tenement. Here, T, the original leasee of lot 3, assigned her rights under the lease to A. When an assignment of a lease happens, the new assignee and the landlord are in privity of estate and can enforce covenants that run with the estate/estate. Here, A, the assignee, would be able to enforce the easement because it runs with the land.

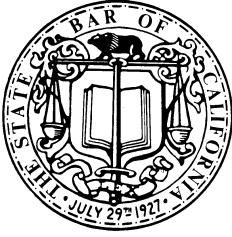
The burden of an easement appurtenant also passes automatically with the transfer of the servient tenement. Here, the servient tenement, lot 2, was sold by L to B. Therefore, the burden of the easement passes to B. However, the burden would not pass if B was a bona fide purchaser without notice (BFP). A BFP is someone who pays valuable consideration for the land and takes the land without notice of the burden. Here, B did pay valuable consideration for the land by buying it. However, she is not a BFP if she had notice of the easement.

One form of notice is record notice. A buyer is on record notice of what a record search of the grantor-grantee index would reveal. However, in this case L did not sell the land to T but instead leased it. Therefore, the lease containing the easement would not be found through a record search.

Another form of notice is inquiry notice. A buyer has a duty to inspect the land she buys and is on inquiry notice of reasonable inquiries that she should have made. Here, lot 2 was a parking lot of tenants of lot 3 before B bought it and it would have been obvious if she went there and saw that there were cars parked there. She should have asked L why there were cars there. Therefore, she is on inquiry notice of what L would have told her, which is that there is an easement on lot 2.

#### Easement by implication

Even if the easement from the lease is not enforced, it could be argued that when L sold the land to B he created an easement by implication. This requires a prior use that was reasonable [and] necessary to the owners of the dominant tenement and that this was reasonable [and] apparent when the land was bought. Here, when B bought the land it was apparent that lot 2 was being used as a parking lot. Also, it is reasonable [and] necessary for owners of the dominant tenement because other than lot 2 there is no parking available within three blocks of lot 3.



FEBRUARY 2011  
ESSAY QUESTIONS 4, 5, AND 6

# California Bar Examination

Answer all three questions.  
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and facts 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 law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little 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 which are not pertinent to the solution of the problem.

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

## Question 4

Gayle is 16 years old and attends high school in School District.

One day, Gayle's teacher was relaxing in the teacher's lounge during the first ten minutes of class time, as he usually did, leaving the students unsupervised. School District had long been aware of the teacher's practice, but had done nothing about it.

That day, in the teacher's absence, Gayle walked out of class and out of school. She got into her car and drove to the house of an adult friend, Frances. Gayle had promised Frances that, for \$10, she would help her move some paintings.

Arriving at Frances' house, Gayle carelessly parked her car several feet from the curb and entered the house. She came out later, carrying paintings to her car. In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Frances caught sight of the patrol vehicle and told Gayle, "Quick, move your car to the curb."

Gayle jumped into her car just as Paula was walking towards it. Suddenly, without looking, Gayle swung her car toward the curb, hitting and severely injuring Paula.

After Paula was transported to a hospital, she was visited by her husband, Harry. Shocked at Paula's condition, Harry collapsed and suffered a broken arm in the fall.

1. Under what theory or theories, if any, might Paula bring an action for damages against (a) Gayle, (b) Frances, and (c) School District, and how is she likely to fare? Discuss.
2. Under what theory or theories, if any, might Harry bring an action for damages against any defendant, and how is he likely to fare? Discuss.

## Answer A to Question 4

1. What theories may Paula bring [in] an action for damages against the following defendants:

(a) Paula v. Gayle

### Negligence

In a negligence case, the plaintiff must show that the defendant owed a duty of care to the plaintiff. They also must show that the defendant's conduct breached the standard of care owed to the plaintiff and the breach was the actual and proximate cause of the injury to the plaintiff. The plaintiff must be able to show damages to recover in a negligence case.

### Duty of Care

The defendant owes a duty of care to all foreseeable plaintiffs. Under the Cardozo view, foreseeable plaintiffs are those who are within the zone of danger. Under the Andrews view, the test is broader, and considers all plaintiffs to be foreseeable plaintiffs. In this case, Paul was a foreseeable plaintiff under the Cardozo view because as a driver on the street she was within the zone of danger of other cars on the street, including Gayle's parked car that was far away from the curb and onto the street. Similarly, Paula would be a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable.

### Police Officer Exception

Members of certain professions, like police officers and firefighters, cannot recover for injuries that are inherent in the risk of their job. Gayle may argue that as a police officer with a patrol vehicle, the risk of being hit by someone's car is inherent to the job. Paula will argue that being hit by a car is a general risk that everyone on the street takes, and is not a special risk that comes along with being a police officer. If Paula is successful

in rebutting the exception, she must prove that Gayle acted below the standard of care expected.

### Standard of Care

The standard of care determines the particular duty of care the defendant owed to the plaintiff so it can be determined whether the defendant breached the duty or complied with the duty. Generally, in a negligence action, the plaintiff must exercise the level of care of a reasonably prudent person in the plaintiff's position. Since Gayle is a child, she will argue that the child standard should be used. Under the child standard of care, the child must exercise the level of care of a child of similar age, intelligence, education, and experience. Paula will argue that the adult standard should be applied because Gayle was engaging in an adult activity. Because driving a car is an adult activity, Paula is correct and the court will hold Gayle to the standard of a reasonably prudent person in her position.

### Breach

Paula must show that Gayle breached a duty owed to her by acting below the standard of care. Paula will argue that Gayle breached a duty to her by parking far away from the curb, and suddenly, without looking, swinging her car to the curb. This is wrongful because a reasonably prudent driver always looks both ways before they move their car on the street, to look for other vehicles. Moreover, Gayle knew Paula was in the vicinity since Frances told Gayle that a police officer was around and suggested she move her car. Thus, this element is met.

### Causation

The breach must be the actual and proximate cause of the plaintiff's damages for the defendant to be held liable.

### Actual Cause

An act is the actual cause of an injury when it is the but for cause. If the injury would not have occurred, but for the defendant's act, the actual causation element is satisfied.

Paula will argue that but for Gayle jumping into the car and swinging it toward the curb without looking, Paula would not have been hit by Gayle's car, and would not have been injured. The court will agree. It should be noted that Frances' act of yelling at Gayle to move her car was not a superseding force that cuts off Gayle's liability because it occurred before Gayle's negligent act. Thus, this element is also met.

### Proximate Cause

The defendant also must prove that the act was the proximate cause. To be the proximate cause, the act must have been foreseeable at the time the act was committed. Here, this was a direct cause case. As soon as Gayle swung her car toward the curb, Paula was hit and injured. There was no superseding intervening act that would cut off Gayle's liability. Thus, Gayle's breach was the actual and proximate cause of Paula's injury and if Paula can prove damages, she will recover.

### Damages

The plaintiff must prove her damages. Under the "eggshell" plaintiff rule, the defendant must take the plaintiff as she finds them and is liable for the recovery no matter how surprisingly great it is considering the particular plaintiff. Here, Paula was injured from Gayle's car.

### Compensatory Damages

The purpose of compensatory damages is to put plaintiff in the position she would have been in had the injury not have occurred. Paula may recover general damages for her injuries as well as the cost of the treatment of the injuries at the hospital. If she lost earnings, she may recover special damages subject to the certainty, avoidable, and mitigation principles.

### Defenses

There are no applicable defenses because there is no indication Paula was contributorily negligent, assumed the risk, or comparatively negligent in a jurisdiction that recognizes these respective principles.



## Conclusion

Gayle is liable for negligence against Paula and Paula may recover the damages noted above.

## (b) Paula v. Frances

### Negligence

Paula will have to prove the same elements above to hold Frances liable for negligence.

### Duty/Standard of Care

Paula was a foreseeable plaintiff under the Cardozo view because Paula was within the zone of danger as a driver on the street. When Frances told Gayle to move her car, it was foreseeable that Paula was within the zone of danger. Paula is also a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable using this standard. Since Frances is an adult, she must exercise the level of care that a reasonably prudent person in her position would. Paula will argue that Frances owed a duty of care to Paula because Frances, as an adult, should have supervised Gayle and made sure she never carelessly parked her car far from the curb, and made sure she was careful when trying to move her car to the curb. She may also argue that Frances had a duty to make sure that Gayle was not skipping school.

Frances will argue there is no duty to act affirmatively. Frances, as an adult friend, is not responsible for Gayle's actions, and therefore had no duty to supervise her. The only time a duty to act affirmatively arises is when there is a close relationship (usually a familial one), when the defendant puts the plaintiff in peril, when the defendant undertakes to rescue the plaintiff or when there is a duty imposed by law or by statute. A duty also arises when an employer is vicariously liable for employees.

### Vicarious Liability

Paula will argue that because Gayle promised to pay Frances \$10 for moving her paintings, Gayle was an employee of Frances, making Gayle vicariously liable for

Gayle's torts. Vicarious liability attaches to an employer, when the employee commits a tort while performing an act in the scope of their employment. In this case, Gayle was loading paintings into her car when Frances told Gayle to move her car so the police would not see the car parked illegally. Because Gayle was performing an act in the scope of her employment with Frances, Frances may be held vicariously liable for the negligent torts of Gayle.

### Breach

Paula will argue that Frances breached a duty by allowing her employee to park in the middle of the street and telling her to move her vehicle to avoid the police. She will say this is wrongful because someone could have been injured by Gayle moving her car so quickly toward the curb. However, Gayle had no duty to review the way her employee parked her car before she arrived at Frances' house to do the job.

Still, because Frances is vicariously liable for the torts of her employee, she will be liable for Paula's injuries and damages in the same manner that Gayle will be liable, as indicated above. Because Frances did not independently breach a duty owed to Paula, it is unnecessary to continue with the causation and damages analysis since she will only be liable for Gayle's negligence which was analyzed above.

### (c) Paula v. School District

#### Negligence

##### Duty/Standard of Care

The same rules above apply here. Paula was a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable. Under the Cardozo view, it is less clear whether Paula was in the zone of danger. Paula will argue that she was in the zone of danger because Gayle left school in a car and Paula was a driver on the road. School District may argue Paula was not in the zone of danger because Paula was not on school property, or anywhere near the property. Moreover, Gayle is 16 years old and

presumably has a license to drive a vehicle. Thus, there is no clear indication that the School should have a duty to protect third parties from a licensed driver. However, because students are in custody of schools during school hours, it is foreseeable that children who are not in school at the time they are supposed to be will injure a third party. Thus, School District likely owed a duty to Paula under both the Andrews and Cardozo views.

School District owed the duty of care of other reasonably prudent school districts.

#### Vicarious Liability

Because the school district itself did not commit a tort, Paula will have to hold it liable on a theory of vicarious liability. As mentioned above, an employer is liable for the torts of its employees during the scope of their employment. Gayle's teacher was on school hours, relaxing in the lounge. Class had already started, thus she was in the scope of her employment when she left the students unsupervised and School District will be vicariously liable.

#### Breach

Paula will argue that School District breached the duty of care owed to Paula when it knowingly allowed Gayle's teacher to leave Gayle's class unsupervised. This is wrongful because children in high school need to be supervised. School District will argue that Gayle is 16 and is almost an adult; thus it was not wrongful to leave her unsupervised for only ten minutes. Although this is a close call, because schools are responsible for students during school hours in the same manner that a parent is responsible for a child during other hours, Gayle's teacher, and the school district through vicarious liability, probably breached a duty.

#### Actual Cause/Proximate Cause

School District was the but for cause because but for the negligent supervision, Gayle would not have been allowed to leave the property. School District will argue the teacher was not the proximate cause because Gayle's actions of hitting the teacher in

the car was a superseding intervening act. Because it was not foreseeable that a student would leave school and drive negligently into a police officer, School District will not be liable and Paula cannot recover damages.

#### Defenses

There are no defenses for the same reason noted above.

## 2. Harry's Theories

### Negligent Infliction of Emotional Distress

To make a claim for negligent infliction of emotional distress, Harry must show that the defendant was negligent, and that he was part of a near miss situation, or a bystander on the scene who witnessed a close family member's injury. He also has to show some manifestation of a physical injury.

Gayle and Frances were negligent. Harry was not in a near miss situation himself, and he was not a bystander present on the scene. Although he suffered a physical injury, it is not enough to make out a case for bystander emotional distress because he did not collapse until he saw Paula in the hospital, which was not the scene of the accident.

## Answer B to Question 4

### **Paula v. Gayle**

#### Negligence

Paula has a good cause of action for a negligence claim against Gayle. To make out a prima facie negligence case, Paula must show that Gayle (1) owed a duty to Paula, (2) breached that duty, (3) the breach was both the cause-in-fact and proximate cause of Paula's injuries, and (4) that Paula sustained damages.

#### Duty

Under the Cardozo standard, plaintiffs owe a duty of due care to all foreseeable victims of their conduct. Under the broader Andrews standard, plaintiffs owe a duty of due care to everyone else in the world. The law defines "due care" as that of a reasonably prudent person. However, since Gayle is only 16, she will argue that she be held to a lesser standard: that of a reasonably prudent person of like age and experience. Paula will contend, however, that since Gayle was engaged in an adult-oriented activity, that of driving an automobile, that the law should make no exception for Gayle's age. Courts have consistently held that children engaged in adult activities must perform those activities with the care of a reasonable person, so Gayle will not be able to lower her standard of care to take her age into consideration.

#### Breach

A duty is considered breached when the defendant's conduct falls below the standard of care. Here, Gayle swung her car towards the curb "suddenly" and "without looking," conduct which clearly falls below the standard of care. Automobiles are inherently dangerous and heavy, and proper vision and care are required. Moreover, since Frances caught sight of the patrol vehicle and told Frances, "Quick, move your car to the curb," it likely put Gayle on notice that someone was coming, making her sudden and quick movement of the car without looking that much more unreasonable. Paula will probably have no problem proving this element.

Another theory of breach would be that Gayle breached when she "carelessly" parked too far away from the curb, as a reasonable person would have parked next to the curb.

### Causation

Courts have traditionally divided the causation element into two parts: (1) cause in fact and (2) proximate cause. Under the cause in fact, the traditional test is whether the harm would have occurred "but for" defendant's breach. Under proximate cause, the harm will be said to proximately cause the injury if the harm is a foreseeable result of the breach. Here, Paula will be able to establish both cause-in-fact and proximate cause. If not for the fact that Gayle quickly turned her car into Paula, it would not have "hit and severely injured" her. As for the proximate cause, the very reason prudent care is required while driving a car is because they are extraordinarily heavy and can cause severe damage to people and property they come into contact with. This makes the danger of hitting someone clearly a foreseeable result of driving negligently. Paula will satisfy both elements of causation.

On the second breach theory, that Gayle parked too far from the curb, the proximate cause prong will be harder to satisfy. It is true that, had she parked closer to the curb, Paula would not have had to get out of her car, and therefore the "but for" cause is met. But not parking near a curb is not reasonably prudent because you do not leave space for other cars on the road, and generally accidentally hitting someone is not something thought of as a foreseeable risk of parking too far from the curb. However, since Paula satisfies both elements under the first theory, she will probably stick with that one, and jettison the second theory of breach.

### Damages

In a negligence action, the plaintiff must prove damages. The damages need not be economic, but must be real. Here, Paula will once again have no problem making out a case for damages because she was "severely injured" and taken to a hospital.

## **Defenses**

### Comparative Negligence

Gayle will try to argue that Paula was comparatively negligent because Paula saw the car near the curb and could likely have seen Gayle walking towards the car. After all, she would be hard to miss carrying some paintings. Gayle would also point out that since Frances called out "Quick, move your car to the curb," that Paula had notice that the car was about to be quickly moved to the curb. Therefore, by standing within a reasonable distance from a car that Paula knew was about to be quickly moved, Paula was also negligent. Paula will reason that as a police officer she has a duty

### Fireman's Rule

Under the fireman's rule, firefighters and police officers who engage in dangerous activities in connection with their jobs are barred from bringing suits for injuries sustained from those activities. The rationale is that the nature of the job is such that the police assume the risk of their jobs. Under this theory, Paula will not be able to recover for damages incurred if she was acting in connection with her job. Since she was coming to the curb to talk to Gayle about her car being illegally parked, it is clear that she was doing something in connection with her job. On this theory, Paula will probably be barred from recovery.

### Battery

Paula may be able to make out a battery action against Gayle, but it will be more difficult. Battery is defined as the (1) intentional, (2) harmful or offensive contact (3) with Plaintiff's person.

### Intentional

Contact is intentional if the conduct is voluntary and there is a substantial certainty that the contact will occur. This is the most difficult for Paula to prove. There is nothing in the facts to indicate that Gayle acted voluntarily, or that she had any intention of hitting Paula. While her conduct was likely negligent and maybe even reckless, it does not contain the requisite intent. So while elements 2 and 3 will easily be met--hitting

someone with a car is indisputably harmful, and the car hit Paula directly--the first element will not be proven, and the battery action will fail as a result.

## **Paula v. Frances**

### Agency

In order for Frances to be liable for Gayle's negligence, there needs to be an agency relationship between Frances and Gayle. This may be established under the doctrine of Respondeat Superior.

Under the doctrine of Respondeat Superior, employers are liable for the torts of their employees, so long as the conduct was within the scope of employment. So Paula must first prove that Gayle was an employee of Frances. If so, Paula must then establish that Gayle was acting within the scope of her employment when she injured Paula. If it is found that Gayle was merely an independent contractor, Paula must prove that either the duty was non-delegable or that [sic].

### Employee versus Independent Contractor

The major test to determine whether someone is an employee or an independent contractor is whether the employer had a right to control the method and manner of the work. Factors that the court looks to include the degree of control, whether the pay was hourly or by piece, whether the employer furnished the tools and other items, whether the job was for the benefit of the employer's business, and the length of the working relationship.

Here, the job was done at Frances' house, was for a seemingly short duration, and does not appear to have much supervision. Moreover, the fact that Gayle received a one-lump sum of 10 dollars for the work suggests that it was not an employee relationship, but rather an informal, independent contractor type relationship. There is nothing to suggest a long-term commitment, and the movement of paintings is the type of job that needs to be done only once in a great while. Additionally, there was no benefit to



Frances' business objectives because the paintings were being moved from Frances' home. This is in fact a prototypical independent contractor relationship.

### Scope of Employment

Assuming Gayle is considered Paula's employee, [sic].

### Negligence

Paula might also be able to make out a negligence action against Frances' own negligence. For the negligence framework, see above.

### Duty

See above.

Since Frances is an adult, she owes that of a reasonable person. Clearly she saw that Paula was approaching the car, otherwise she would not have shouted to Gayle to quickly move her car. Therefore, Paula was a foreseeable victim.

### Breach

See above.

The theory would be that Frances breached the duty of reasonable care by instructing a sixteen year-old to "quickly" move her car to avoid being cited for a minor traffic ticket. A reasonably prudent person would not have instructed an impressionable minor to move such heavy machinery "quickly."

### Causation

See above.

As for cause-in-fact, Frances will argue that even in the absence of her instruction, Gayle would have likely moved her car quickly and hit Paula. Paula will counter that Gayle was in fact acting under Frances' instructions and would not have moved the car quickly unless Frances did not tell her. Since Gayle "jumped" into her car right after being told to move it quickly, it is more probable than not that Gayle was acting at the direction of Frances, and therefore Frances' instruction was the "cause in fact" of

Paula's injury. However, Frances probably has the better argument on the issue of "proximate cause." While instructing someone to move their car quickly might not be the most prudent thing to do, it is likely not foreseeable that the mere suggestion that someone act in haste will result in a haste so overwhelmingly that it would cause injury to someone who, at the time of your instruction, was in their own car. Paula will argue that when police officers see something suspicious or in violation of the law, it is reasonable to expect them to get out of their cars. However, while true, this is probably not enough to overcome the foreseeability on the part of Frances.

#### Damages

See above.

#### **Defenses**

Frances will avail herself of the same defenses that Gayle did.

#### **Paula v. School District**

##### Agency

Paula will argue that the school district is acting as the agent.

##### Negligence

Paula once again will have a negligence claim against the School district. Her claim will be based on the school district's own negligence in allowing their students to roam freely.

##### Duty

See above. Here, however, it is unlikely that Paula is a foreseeable plaintiff. The chain of events leading from Gayle's ditching school to Paula's injury is extraordinarily remote, and has several intervening forces.

### Breach

See above. Paula will claim that the district breached their duty by knowing that the teacher relaxed in the teacher's lounge during the first ten minutes of class time, and permitting him to do so. The reasonably prudent school district would make sure the teachers are supervising the children so they do not leave or otherwise misbehave.

### Causation

See above. Here, Paula will claim that, but for the teacher's negligence in leaving the students unsupervised--and but for the school's negligence in allowing the teacher to do so--the injury would not have occurred. Once again, however, Paula has the problem of proximate cause. While the school district understands that schools have to protect their students, and the students could have dangerous propensities if permitted to leave school grounds, the situation here is pretty remote from those duties. However, if the jury finds that the student is likely to commit some harm while ditching school, Paula could be a foreseeable victim of that harm.

### Damages

See above.

### **Defenses**

The district will avail themselves of the same defenses that Gayle and Frances did, above.

### Respondeat Superior

Paula may also have the claim that the school is negligent due to the teacher's negligence. Since the teacher was an employee of the school district (see respondeat superior discussion, above), the district is vicariously liable for his conduct. The teacher here is likely an employee of the school because the manner of his work is substantially controlled by the district. Moreover, since he was on school property and during school hours, the harm will be said to be within the scope of his employment. The rest of the analysis is substantially the same as the school district's own negligence, above.

## **Harry v. Gayle**

### Negligent Infliction of Emotional Distress

Harry can possibly bring a negligent infliction of emotional distress action against Gayle. Under this theory, Gayle is liable for (1) negligent conduct (2) in plaintiff's presence, and (3) plaintiff suffers subsequent physical symptoms.

### Negligent Conduct

See above.

### In Plaintiff's Presence

This is where Harry will have trouble. Since Harry did not see the accident, and only later saw Paula in the hospital he was not in the presence of the negligence, nor was he in the zone of physical danger.

### Physical Symptoms

Under Negligent Infliction of Emotional Distress, plaintiff has to suffer subsequent physical manifestations of the distress. Here, since Harry collapsed at the sight of Paula's condition, breaking his arm, he should be able to prove subsequent physical manifestations. And since the broken arm was a result of the collapse, under the eggshell-skull principle, he would be able to recover for all damages.

However, since he cannot prove he was in the plaintiff's presence, he will not be able to recover.

## **Harry v. Frances / Harry v. School District**

Harry can claim Negligent Infliction of Emotional Distress under the theories of respondeat superior and vicarious liability, the analysis of which will be identical to the analysis above, and will lose once again due to his lack of presence.

Therefore, Harry will be unlikely to succeed against any of the parties for his damages.

## Question 5

Bob owns 51 percent of the shares of Corp., a California corporation. Cate owns 30 percent. Others own the remaining shares.

Bob and Cate have entered into a shareholder agreement stating they would vote their shares together on all matters, and that, if they fail to agree, Dave will arbitrate their dispute and Dave's decision will be binding. Bob and Cate also executed perpetual irrevocable proxies granting Dave the power to vote their shares in accordance with the terms of the shareholder agreement. Attorney Al handled Corp.'s incorporation and drafted the shareholder agreement and the proxies.

Bob and Cate have been able to elect the entire board of directors every year. The board currently consists of Bob, Cate, and Bob's wife, Wanda. Bob and Wanda decided, as directors, to sell substantially all of Corp.'s assets to Bob's sister, Sally. Cate thinks the price is too low. Bob claims he no longer regards their shareholder agreement as binding. He has gone to Al for advice in the matter, and Al has agreed to provide it.

At the shareholders' meeting at which the matter is to be put to a vote, Bob announces he is voting his shares in favor of the sale. Dave says that since Bob and Cate disagree, he is voting the shares against the sale.

1. Is the shareholder agreement between Bob and Cate enforceable? Discuss.
2. Are the perpetual proxies executed by Bob and Cate enforceable? Discuss.
3. Would any sale of Corp.'s assets to Sally be voidable? Discuss.
4. What ethical violations, if any, has Al committed? Discuss. Answer according to California and ABA authorities.

## **Answer A to Question 5**

### **1. Shareholder agreement between Bob (B) and Cate (C)**

A shareholder's agreement is an agreement whereby shareholders agree to combine their votes for voting matters related to their rights as shareholders. The agreement is less formal than a voting trust and requires simply that the shareholders agree to the course of action. Where a voting trust is required to notify the Secretary of the Corp. the shareholder agreement need not be recorded by the Secretary. In addition, where a voting trust is only good for 10 years, a shareholder agreement has no durational requirement.

In this case, B and C have entered into a shareholder agreement stating they would vote their shares in agreement or else submit to Dave to arbitrate any disputes. Dave's decision would be binding. While B and C have entered into a valid shareholder agreement, as they can agree to arbitration to settle disputes, it is necessary to look at Dave in this instance.

It is not clear what, if any, relation Dave has to the corporation. If Dave is familiar with the corporation, then there would be no issues with him arbitrating disputes. If he is a true "outsider" he may not have the knowledge and ability to make the informed decisions in the corp's best interest. In this case, B and C would violate their fiduciary duties to the corp. and the agreement would be ineffective.

### **2. Perpetual Proxies**

A proxy is an agreement between shareholders to have one vote on their behalf. The corp. must be notified and a proxy is valid for 11 months, unless otherwise agreed. An irrevocable proxy requires that the proxy be labeled irrevocable and must be coupled with an interest.

In this case, the proxies are perpetual and irrevocable. As stated above, an irrevocable proxy must be labeled such and be coupled with an interest. It is not clear here what, if any, interest Dave received as part of the proxy agreement, or if the proxies were

labeled irrevocable. If neither requirement was met, the irrevocable proxies would be unenforceable.

If both conditions were satisfied, it would be necessary to determine if the corp. was notified. In addition, proxies typically last for only 11 months. Because the facts state this is perpetual, it is likely that the courts would find this unenforceable.

### 3. Sale of Corp. Assets

Directors have a duty to manage a corporation. Directors also have fiduciary duties of Care and Loyalty in managing the corporation. Directors may be insulated from violating the duty of care by the Business Judgment Rule.

#### Duty of Care

Directors have a duty to manage a corporation as a reasonably prudent person would in handling his/her own affairs. Directors must act in the best interest of the corporation.

Here, it is not clear from the facts if Bob and Wanda, as directors, are acting in good faith as reasonably prudent persons would in their own affairs.

#### Business Judgment Rule

Directors are protected from liability under the Business Judgment Rule when they act in the corp.'s best interest and make a reasonable, innocent mistake.

Here, because it is not clear if Bob and Wanda acted in good faith, it is not possible to determine if this is a simple mistake.

#### Duty of Loyalty

A director has a duty of loyalty to his corporation, which means that without full disclosure and independent ratification, a director cannot engage in a self-dealing transaction or usurp a corporate opportunity.

In this case, Bob and Wanda, as directors, have voted to sell substantially all assets to Sally, who is Bob's sister. A self-dealing transaction is one that benefits the director or his family members. In order for the transaction to be valid, there must be independent ratification, as defined above. It would be impossible to obtain independent ratification as 2 out of the 3 Directors will not be independent. Both Bob and Wanda, Bob's wife, stand to benefit from the self-dealing transaction, and it does not appear that there was full disclosure, so independent ratification is impossible.

### Controlling Shareholders

Controlling shareholders have fiduciary duties to other shareholders in a corporation. As defined above, the controlling shareholder has a duty of loyalty and care as fiduciary duties.

As described above, Bob will have violated his fiduciary duty of loyalty to the corp. by engaging in a self-dealing transaction. In addition, courts have held controlling shareholders liable for looting a corporation in the event the corp. is substantially sold to a 3<sup>rd</sup> party and that party loots the company. It is not clear here what Sally will do.

### Fundamental Change

A corporation must hold a special meeting when a fundamental change is proposed for that corporation. A fundamental change would include selling substantially all assets to another corporation. Therefore, the corporation would be required to have a special meeting.

A special meeting requires that a special notice be mailed to shareholders. This notice must include the reason for the special meeting, date and time, and place. It is important because no other business can be discussed at a special meeting that was not included in the notice. In addition, holding the meeting is important because it gives rise to appraisal and dissenter rights whereby the corporation would be required to repurchase a dissenter's shares.



Because Bob violated his fiduciary duties as a director and controlling shareholder, and because the corp. was undergoing a fundamental change without a properly scheduled special meeting, any sale to Sally would be voidable.

#### 4. Ethical Violations

##### A. Duty of Loyalty

Al owes a duty of loyalty to the corporation. Al has drafted the incorporation of the corp. and has drafted agreements on behalf of the corporation. Therefore, Al's client is the corporation.

Al has a potential conflict in that he represented the corporation and then drafted the shareholder agreement and proxy on behalf of 2 shareholders. This is permissible under ABA rules and CA rules whereby an attorney can represent multiple parties if he reasonably believes that he can provide necessary legal services without impact. The attorney must also get this consent in writing.

Al has another potential conflict by representing Bob at a later time. As stated above, an attorney can represent multiple parties if he reasonably believes that representation of both will not impact either party. He must get consent in writing. Al would have violated his duty of loyalty if he did not get consent in writing.

This potential conflict would become an actual conflict when Bob has gone to Al for advice and Al agreed to provide it. Al previously represented Bob and Cate in drafting a shareholder agreement and proxies. CA Rules of Ethics strictly prohibits an attorney from representing a client when that client is being represented by the same attorney. Only when the matter ends can the attorney represent another client whose interest is adverse to a current client.

Al will have violated his duty of loyalty.

### Duty of Confidentiality

An attorney has a duty to keep all communications with a client confidential. When an attorney represents 2 parties, and one party then approaches the attorney for representation on a similar matter, the attorney will not be able to represent the client because he has confidential information from both clients.

Here, Al arguably represents both parties, as he has drafted a shareholder agreement and proxy for both Bob and Cate. Al should advise both parties to obtain separate Legal Counsel instead of continuing to represent them, as by doing so, he may disclose confidential information received by Cate in representing Bob.

### Duty of Competence

An attorney should have the skill and training to be able to competently represent a client. If not the attorney should be able to receive such training in a reasonable time.

In this case, as described above, it is not clear if the proxies were drafted correctly; therefore Al may have breached his duty of competence.

## **Answer B to Question 5**

### **SHAREHOLDER AGREEMENT**

Shareholder agreements in which shareholders agree to vote their shares together are valid, although historically they were not permitted and voting trusts were required. They must be in writing and signed by both parties. Shareholder agreements are governed by regular contract principles, and are not revocable unless as a contract they would be revocable. A valid contract requires mutual assent and consideration. Bilateral contracts are contracts in which the parties exchange promises, and the promises can constitute consideration for the contract.

In this case, the shareholder agreement appears to be in writing, and signed by the parties. It was prepared by an attorney, Al, and so presumably has been validly drafted. In this case, the shareholder agreement is a mutual agreement for Bob and Cate to vote stocks together. It appears that there has been valid mutual assent to the contract, including offer and acceptance. Because the parties have exchanged promises to vote together, it is a bilateral contract. As a result, the contract is supported by consideration based on the exchange of mutual promises to vote together or have disputes decided by arbitration. Thus, Bob would be unable to revoke the shareholder agreement at will, and Cate could sue for damages or for specific enforcement of the agreement.

### **PERPETUAL PROXIES**

PROXY GENERALLY - A proxy agreement must be in (1) writing, (2) signed by the party whose shares are affected, (3) addressed and delivered to the corporation's secretary, (4) clearly state they are delegating the authority to vote.

In this case, it appears that the requirements for a valid proxy agreement have been met. The agreement appears to be in writing, the problem notes it was executed so presumably is signed, it clearly states the procedures for the proxy, indicating that the

shares will be voted in line with the shareholder agreement. Although the facts do not indicate whether the proxy was filed with the corporation, because Al the attorney assisted, presumably the requirement was met.

**IRREVOCABLE PROXY** - A proxy is normally for a duration of 11 months, and will be revocable at will. To be irrevocable, a proxy must be (1) supported by an interest and (2) clearly state it is irrevocable.

In this case, it appears that the proxy agreement did state that it was irrevocable, and thus the agreement has met the second requirement. However, there is no indication that the agreement was supported by any interest. Normally, the interest must be some exchange for value or, for example, a situation where the record date holder sells his shares to the owner and executes a proxy, and thus the new owner's purchase creates an interest. In this case, there is no interest to support the agreement. Cate may argue that the exchange of promises provides consideration for the proxy in the form of the mutual promises, as was the case for the shareholder agreement, and therefore that the mutual promise is a sufficient interest to meet the element and make the proxy irrevocable. However, the exchange of promises is not a sufficient interest to support a proxy as being irrevocable because the promisor has no interest in the shares to which she is making a promise, and therefore this element has not been met. As a result, Bob is free to revoke the proxy agreement at will.

While the proxy agreement would be revocable because it is not supported by an interest, the shareholder voting agreement would not be. As a result, Cate could sue Bob to enforce the agreement and then Dave would have the power as the arbitrator to vote the shares under the agreement as he saw fit.

### **WOULD SALE OF CORP BE VOIDABLE**

**FUNDAMENTAL CORPORATE CHANGE** - A fundamental corporate change includes a (1) merger, (2) consolidation, (3) amendment of the articles of incorporation, or (4) a

sale of all or substantially all of the business assets. A fundamental corporate change must be approved by a majority of all shareholders at a special noticed meeting in which notice of the change was given before the meeting. Additionally, the corporation must give dissenters rights of appraisal if the transaction is approved.

In this case, the sale of substantially all of Corp.'s assets is a fundamental change and thus must be approved by a majority of all shareholders in Corp.

DECISION OF DIRECTORS - All decisions of directors must either (1) be approved at a board meeting or (2) be approved by unanimous written agreement of the board. At a board meeting the majority of all directors must be present to have a quorum. A resolution will be adopted if a majority of the directors present approve. Before a fundamental corporate change is brought before a special meeting of shareholders, it must be approved by the board of directors.

In this case, the facts indicate that Bob and Wendy agreed to the sale, but that Cate disagreed. It is unclear if they met at a board meeting and the majority of directors, Bob and Wendy, approved. This would be a requirement that if not met, could lead to a rescinding of the transaction or allow Cate and other shareholders to sue Bob and Wendy for losses suffered as a result of the transaction.

DUTY OF LOYALTY OF DIRECTORS - A Director has a fiduciary duty of loyalty to a corporation to not engage in self-dealing or usurp business opportunities. Self-dealing includes transactions in which the director has a conflict of interest.

In this case, Bob is a member of the board of Corp, and thus has a duty to not engage in self-dealing.

CONFLICT OF INTEREST TRANSACTION - A conflict of interest transaction is one in which the director or his close relative is (1) a party to the transaction, (2) has a financial interest so closely linked to the transaction that would reasonably be expected to affect

her judgment, or (3) is a director, officer, employee or agent of the other party to the transaction and the transaction is of such importance that it would normally be brought before the board. If a Director enters into a transaction in which he has a conflict of interest without approval, that transaction can be rescinded and the director can be held liable for any losses to the shareholders.

In this case, Bob is engaging in a sale of Corp's assets to Sally, Bob's sister. Thus Bob, a director, is engaged in a transaction in which a close relative, his sister Sally, is a party to the transaction, and therefore Bob would have a conflict of interest in the transaction. Thus, unless Bob has the transaction approved, it could be rescinded. Furthermore, because Wanda is also a director, and Sally is also a close relative of hers, her husband Bob's sister, she would also have a conflict of interest.

**CONFLICT APPROVAL** - A conflict of interest transaction will be considered approved if (1) after full disclosure a majority of the disinterested directors, if more than one, approve; (2) after full disclosure a majority of disinterested shareholders approve; and (3) if it is fair under the circumstances.

**DISINTERESTED SHAREHOLDERS** - In this case, it is unclear if Bob fully disclosed. Even if he did, the transaction would not be considered to be approved by shareholders if Bob used his 51% of shares to approve the sale because he is not disinterested due to his conflict of interest created by his sister, Sally, being the purchaser. Thus, a majority of the outstanding, the remaining 49% would need to approve. Because Cate owns 30% of the shares, she could essentially block the transaction because she owns more than 50% of the disinterested shares. Thus approval by disinterested shareholders would not be possible.

**DISINTERESTED DIRECTORS** - Similarly, both Wanda and Bob are considered to have a conflict of interest. Therefore the only disinterested director is Cate. Cate would not approve the transaction and furthermore, for a transaction to be approved by the majority of disinterested directors there must be more than one disinterested director.

Thus, the directors could not approve the transaction because 2 of the 3, Bob and Wanda, are not disinterested.

FAIR - As a result, the only way the transaction could be upheld is if under the circumstances at the time it was entered into it was fair. In this case, Cate claims that the price is too low, but there is no indication if this is really the case. If Bob could show that the price was fair, and thus the transaction was fair then the conflict of interest transaction would be upheld despite the lack of approval from disinterested shareholders and directors.

ACTING AS SHAREHOLDER NOT DIRECTOR - Bob may argue that in voting to approve the sale he is acting as a shareholder, and not as a director and thus does not owe the same duties to the corporation. However, this argument will fail because (1) a director has a duty of loyalty to the corporation even when selling his own shares, and (2) Bob may also have a duty as controlling shareholder.

DUTY OF CONTROLLING SHAREHOLDER - While a shareholder is normally not liable beyond the value of their shares, a controlling shareholder may be liable towards other shareholders if she uses her power in a way to disadvantage the minority shareholders. This is because a controlling shareholder has a fiduciary duty to minority shareholders to not use their controlling share to the minorities' disadvantage.

In this case, because Bob owns 51% of the shares, he is a controlling shareholder. He has a fiduciary duty to not use his controlling share to gain unfair advantage over the minority shareholders. This would likely include selling substantially all of Corp.'s resources to his own sister, Sally, if the price was not fair. Thus, even if Bob is successful in arguing that he is not under a duty as a director when trading on his shares, as a controlling shareholder he would still be liable for breaching his fiduciary duty.

## **AL'S VIOLATIONS**

**DRAFTING ARTICLES AND SHAREHOLDER AGREEMENTS** - When an attorney represents a corporation, he represents the organization itself and not the directors or officers. While an attorney may also represent the directors and officers separately, these representations are governed by normal rules of conflict of interest. A lawyer may represent two clients so long as he reasonably believes he can do so and that there is no conflict of interest between them. If there is a conflict of interest he must (1) reasonably believe he can adequately represent each of them, (2) disclose the conflict, under the Cal RPC such disclosure must be in writing, and (3) must get the clients' consent in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, there is no conflict of interest, potential or otherwise, between Corp and its shareholders. Therefore, Al did not violate any rules by drafting the agreement.

## **ADVISING BOB** -

CONFLICT BETWEEN BOB AND CATE-

CURRENT CLIENTS- As noted previously a lawyer may not represent one client who has a conflict of interest with another client unless (1) the lawyer reasonably believes he can adequately represent each of them, (2) the lawyer discloses the conflict, under the Cal RPC such disclosure must be in writing, and (3) the client consents in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, it is unclear who Al represented in the drafting of the shareholder agreement and whether or not he continues to represent Cate. If Al does represent Cate



then agreeing to represent Bob in this matter constitutes a current conflict between clients, and Al would have to provide written disclosure and receive written consent. However, even if he did he would not be able to maintain representation because a reasonable lawyer would not believe he could adequately represent both Cate and Bob because their conflict is not just potential, it is an actual conflict.

FORMER CLIENTS- A lawyer may not represent a current client (1) in a matter that is the same or substantially the same as a matter he represented a former client, and (2) the current client's interests are adverse to the former client unless he gets written consent from the former client.

In this case, if Al represented Cate in drafting the shareholder agreement and proxy agreement then he would likely be in violation of this rule. Cate is a former client, and the matter now in dispute is whether the very agreements Al drafted for Cate are valid, and thus it is the same matter. Furthermore, Bob's position, that the agreements are not binding, is directly in conflict with Cate's interest. As a result Al could not represent Bob without Cate's approval because doing so would be in violation of his duty of loyalty to a former client.

Al could also be disqualified if he had gained confidential information in representing Cate, though that is unlikely here, considering he was drafting a shareholder agreement.

## Question 6

Green's Grocery Outlet ("Green's") sponsors a lawful weekly lottery. For one dollar, a player picks six numbers. All persons who select the six winning numbers drawn at random share equally in the prize pool.

Each week, for the past two years, Andrew has played the same numbers—3, 8, 10, 12, 13, and 23—which represent the birth dates of his children.

On June 1, Andrew purchased his weekly lottery ticket. Barney, a clerk employed by Green's, asked, "The usual numbers, Andrew?" Andrew replied, "Of course."

Barney entered the numbers on the computer that generates the lottery ticket and gave the ticket to Andrew. Without examining the ticket, Andrew placed it in his pocket. Unbeknownst to either Andrew or Barney, Barney had accidentally entered the number "7" on the computer rather than the number "8."

The winning lottery numbers that week were Andrew's "usual" numbers. Much to his horror, Andrew discovered Barney's error when he showed his wife the "winning" ticket. Andrew filed suit against Green's seeking to reform his lottery ticket by changing the "7" to an "8." Green's cross-complained seeking rescission.

1. At trial, Green's objects to Andrew's testimony about (a) Barney's question, (b) Andrew's answer, and (c) Andrew's attempt to explain what the phrase "the usual numbers" means. Should the court admit the testimony? Discuss. Answer according to California law.

2. How should the court rule on each party's claim for relief? Discuss.

## **Answer A to Question 6**

1. How will the court rule on Green's objection to

a) Barney's question "The Usual Numbers, Andrew"

### Relevant

All evidence must be logically and legally relevant.

Logical: Under California Rules of Evidence, evidence is relevant if it tends to prove or disprove a disputed fact. In this case, Green is disputing the fact that there is a contract or the terms of the contract. Therefore, Andrew's testimony regarding Barney's statement tends to prove that Andrew bought the ticket from Barney and that the terms were for the usual numbers. Andrew can show this is logically relevant.

Legal: To be legally relevant the probative value should outweigh the prejudicial effect. The probative value in this case is that this tends to show Andrew bought the ticket and that he had a usual set of numbers. While this may be prejudicial, the probative value is high and outweighs the prejudice because it establishes the facts of the situation.

### Hearsay

Green will object that the evidence is inadmissible hearsay. Hearsay is an out-of-court statement made by a declarant used to prove the truth of the matter asserted.

### Out-of-Court Statement by a declarant

In this case Barney's question was made out-of-court and by Barney, therefore meeting this element.

### Truth of the Matter Asserted

The statements presented to prove what the statement is asserting. In this case Green will argue that Andrew is introducing Barney's statement to show that Barney knew about the usual numbers and that Andrew asked for the usual numbers.

### Act of Independent Legal Significances

Andrew will argue he is not introducing to prove the truth of the matter asserted, but rather to show that there was a contract created when Andrew got the ticket. At this point this statement does not provide a contract.

### Knowledge of facts stated

Andrew may also be using it to prove that he always purchased the same numbers and that Barney knew about his practice or habit. It is likely that Andrew can show this is not hearsay, but being used to show Barney had the knowledge of his usual numbers.

Even if this is being introduced for the truth of the matter asserted Andrew can see if it falls under an exception to the hearsay rule.

### Party-opponent admission

Admissions by a party-opponent are an exception to the hearsay rule. Vicarious admissions by an agent are only attributed to the principal if the statement was made in the scope of the agency and the principal would be liable.

In this case Green will argue Barney made a mistake, but Barney was doing his job within the scope of the agency and principals are liable for the mistake of their agents.

Andrew can show this was a party-opponent admission.

### Conclusion:

Barney's question is admissible evidence and the court should admit Andrew's testimony on this issue.

a) Andrew's answer

Relevant (see rule above)

Logical: (See previous rule.) Green may argue that the creation of a contract is not in dispute and Andrew's testimony only tends to prove the existence of a contract. Andrew will argue the testimony also refers to the question Barney asked and that he wanted his usual numbers. Andrew can likely show this is logically relevant because it tends to prove a disputed fact.

Legally: See previous rule: This is similar to the previous piece of evidence and tends to establish the facts of the incident and therefore the probative value outweighs the prejudicial effect.

Hearsay

Green will object that this testimony is hearsay. See previous rule. Green will assert that this is an out-of-court statement by Andrew to prove that he assented to the purchase of the lottery ticket which is the contents of his statement.

Independent Legal Significance

Andrew can show in this case as previously discussed that his statement created a contract and is therefore not being used to prove the truth of the matter asserted, but rather to prove the formation of a contract. Andrew's assent in this case does form a contract and is therefore not hearsay.

Party-opponent Exception (See previous rule)

In this case the statement is by Andrew and not a party-opponent because Andrew is testifying and Andrew is not the opponent against Andrew himself. So this exception does not apply.

## Conclusion

Andrew's testimony about his own statement should be ruled admissible because it is not hearsay and is relevant.

### b) Andrew's explanation of "usual numbers"

#### Relevant:

Logical: This is the issue in dispute. Therefore Andrew's testimony is highly relevant.

Legal: In this instance, this testimony is highly prejudicial to Green and therefore might be excluded. However it is also the main issue of the case and its probative value outweighs its prejudicial effect.

#### Character Evidence

Evidence of a person's character cannot be used to show they acted in conformity therewith on a particular occasion.

In this case Green will argue that the introduction of this evidence is trying to show Andrew acted similarly as he had on other occasions.

#### Habit

Evidence that shows specific instances of conduct to prove that they have a regular habit are allowed. Andrew will argue that in this case he is establishing a habit he has had every week for the past 2 years. Andrew can likely show this is habit evidence and not character.

#### Parol Evidence

Green may argue that the evidence violates the parol evidence rule because it is evidence prior to formation of an integrated contract to contradict the terms of that contract.

Andrew will likely be able to introduce this because he is trying to show a mistake and not to contradict the terms of an integrated contract. In this case there was a mistake Barney made and Andrew is trying to prove the mistake.

### Conclusion

The court should rule that this evidence is admissible.

## 2. How should the court rule on each party's claim for relief?

### Reform

The court will grant reformation of a contract when each party knew what the terms were and they both had the same mutual mistake.

Green will argue that Andrew had the opportunity to look at the ticket and negligently failed to do so and therefore assumed the risk of the ticket being wrong. Andrew will argue the prior course of dealing with Barney and Green establishes that lottery ticket was supposed to contain a seven instead of an eight.

### Rescission

The court will assert rescission when there is evidence the contract was not valid or lacked assent on a material term.

Green will make the same argument that there was no meeting of the minds and as such the contract should be rescinded. Andrew will argue that this was just a transcription error and does not rise to a level warranting rescission of the contract.

### Conclusion

The court should reform the contract because there is evidence that the mistake was mutual, but the mistake was a transcription rather than the objective belief of the parties. Both Barney and Andrew thought that the ticket should contain one number eight and not seven. The court should reform the contract.

## **Answer B to Question 6**

(1) Green's (G) objections to Andrew's (A) Testimony

### **(a) A's testimony re Barney's (B's) question**

Green will object to A's testimony re B's question as irrelevant and inadmissible as hearsay.

Under California law, evidence is relevant if it has any tendency to make a disputed fact of consequence to the action more or less likely to be true. In this case, A is suing Green for breach of contract, and there is a dispute between the parties as to the terms of that contract (i.e., the lottery numbers A picked). As a result, A's testimony about B's question is relevant because it goes to whether A & B agreed about the numbers that should be on A's lottery ticket, and if so, what A & B agreed to, both of which are disputed facts in this case.

Under California law, a relevant statement may nonetheless be excluded if it is substantially more prejudicial than probative, a waste of time, or likely to confuse the jury. The probative value of B's question here outweighs any potential prejudice or confusion.

Under California law, hearsay is an out-of-court statement offered for the truth of the matter asserted. In this case, B's question to A is an out-of-court statement because it was made before the suit on the day that A bought the lottery ticket in question. But A will argue, persuasively, that he is not offering B's question for the truth of the matter asserted. A will argue that he is offering B's statement to establish a verbal act -- the fact that B asked A the question, "The usual numbers, Andrew?" As such, the statement is being offered for a non-hearsay purpose because it is not being offered to prove the truth of the matter that Andrew asked for the usual numbers.



A could also argue that B's question should be admitted for the truth of the matter because B's question shows B's then-existing mental condition, an exception to the hearsay rule. A will argue, persuasively, that B's questions shows that B knew that A wanted A's usual numbers.

A could also argue that B's question is offered for the effect it had on A, the listener, another non-hearsay purpose. Under this argument, A is offering B's question to show that A inferred from B's statement that B knew A's usual numbers.

A could also argue that B's statement is admissible hearsay in California because it is an admission of a party. Green will argue that B is not a party to the case, but A can persuasively respond that Green should be bound by B's statements because B was acting within the scope of his employment when he made them, i.e., part of B's job is to sell lottery tickets to customers.

**(b) A's testimony re A's answer**

B will argue that A's answer is irrelevant and inadmissible hearsay.

A will argue that his answer is relevant because it goes to the disputed facts of whether A & B agreed to the numbers in A's lottery ticket, and what those numbers were. Moreover, A will argue that his answer has great probative value because [it] is directly related to a key disputed fact in the case, i.e., what numbers A & B agreed to put in A's lottery ticket. A's answer is relevant for those reasons.

B will argue that A's statement was made out of court -- on June 1 -- and is being offered to prove the truth of the matter asserted, that A asked for his usual numbers.

A will also argue, persuasively, that his answer is not offered for hearsay purpose because he is not offering it for the truth of the matter asserted. Rather, it is being offered as a verbal act -- agreement to the offer from B. Alternatively, A could argue

that A's answer is being offered for the non-hearsay purpose of showing the effect on the listener B, i.e., that B understood that A wanted his usual numbers.

A's answer will be admissible on these grounds.

**(c) Andrew's attempt to explain what "the usual numbers" means**

B will argue that A is attempting to offer parol evidence regarding the terms of the contract in violation of the parol evidence rule.

The parol evidence rule excludes evidence extrinsic to a contract where that contract is considered a final, or integrated writing. There are exceptions to the parol evidence rule, including to show a clerical error.

Here Green will argue that any testimony regarding what "the usual numbers" means is extrinsic evidence because the lottery ticket is the contract, and there is no evidence within the ticket regarding what A's usual numbers are.

A will argue, persuasively, that parol evidence should be admitted in this case to prove that B made a clerical error in entering A's numbers into the computer that generated A's ticket, the contract. A's testimony on this point will be allowed under the clerical error exception to the parol evidence rule.

(2) The parties' claims for relief

**Reformation**

Reformation is an equitable remedy that is available where one party can show, among other things, a unilateral mistake of material fact that caused A irreparable harm.

In this case, A will argue that he is entitled to reformation because he suffered irreparable harm as a result of B's unilateral mistake -- a clerical error in entering his

usual lottery numbers. A will argue that Green should be bound by B's error because B is Green's agent and was acting within the scope of his employment at the time of B's mistake. And A will argue that he was irreparably harmed by B's mistake because but for B's mistake he would have won the lottery, and that A's harm was foreseeable because only a ticket that has all the winning numbers will win the lottery, and it is foreseeable that a clerical error in entering one number could cause a party to lose a lottery he otherwise would have won.

Green will argue that A is not irreparably harmed, because Green can refund A the price of the lottery ticket, and that there was no mistake because the numbers A paid for are the numbers that are clearly printed on his lottery ticket. Moreover, Green will argue that A does not have clean hands, because he could have and should have confirmed that the right numbers were on his ticket, and that by failing to do so, A waived his right to complain after the fact that he got the wrong numbers.

### **Rescission**

Green will argue for rescission because there was no meeting of the minds as to a material term of the contract. Rescission is an equitable remedy available where one party can show, among other things, mutual mistake of fact. Here Green will argue that there was a mutual mistake of fact as to what numbers A wanted on his lottery ticket, and that therefore there was no meeting of the minds required to form a valid contract. Green will argue that B thought A wanted the number 7 on his ticket, and A wanted the number 8 on his ticket, and that the numbers on the ticket were material elements of the contract between Green and A. As a result, there was no meeting of the minds as to a material term of the contract, and the contract should be rescinded.

A will argue that there was a meeting of the minds based on the question and answer between B and A -- "The usual numbers, Andrew?" "Of course." A will argue that B's question shows that B knew A's usual numbers and offered A a ticket with those numbers. A will argue that A accepted B's offer of those numbers, and that there was

consideration in A's payment of the price of the lottery ticket and Green's promise to pay A the winnings if the numbers of A's ticket matched the winning numbers.

This is a close question, but in this case, because all of the testimony discussed above is admissible and support's A's position, a court would likely find that A is entitled to reformation and B cannot rescind the contract. A wins the lottery.