

**THE COMMITTEE OF BAR EXAMINERS  
OF  
THE STATE BAR OF CALIFORNIA**

**July 2001  
California Bar Examination  
Essay Questions  
and  
Selected Answers**

**ESSAY QUESTIONS AND SELECTED ANSWERS  
JULY 2001 CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2001 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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## **ESSAY EXAMINATION INSTRUCTIONS**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little 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

Pam took an indefinite leave of absence from her job, sublet her apartment in State A, and went to care for her elderly mother in State B. Approximately six months later, while Pam was walking to her car in the parking lot of Don's Market in State B, Rita, a resident of State C, struck Pam with her car. In Rita's car were three friends from State C who were traveling through State B with Rita. The friends told the police officer called to the scene of the accident that Pam was reading a magazine as she walked across the parking lot and was therefore not watching where she was going. Pam told the police officer that she had just walked out from behind a large concrete column in the parking lot when Rita's car struck her.

Pam sued Rita and Don's Market in federal court in State B. Pam's complaint sought \$60,000 in damages against each defendant. It also asked the court for an injunction ordering Don's Market to tear down the concrete column in the parking lot.

Don's Market moved to dismiss Pam's complaint on the ground that the court lacked subject matter jurisdiction. The court denied the motion.

Rita then moved for a change of venue of the action to federal court in State C on the grounds that she is a citizen of State C and that it would be a hardship for her and her witnesses to travel to State B for trial. The court denied Rita's motion for change of venue.

Rita then filed a notice of appeal of the court's denial of her venue motion. The appellate court dismissed Rita's appeal.

1. Was the trial court correct in denying the motion of Don's Market to dismiss the complaint on the ground that the court lacked subject matter jurisdiction? Discuss.
2. Was the trial court correct in denying Rita's motion for change of venue? Discuss.
3. Was the appellate court correct in dismissing Rita's appeal? Discuss.

## ANSWER A TO ESSAY QUESTION 1

### I. Trial Court's Denial of Don's Market's Motion to Dismiss for Lack of Subject Matter Jurisdiction

Federal courts are courts of limited subject matter jurisdiction (SMJ). Generally, a plaintiff's cause of action must be based on a federal question or on diversity of citizenship for a federal court to have SMJ.

#### A. Federal Question Jurisdiction

A federal question exists when plaintiff sues to vindicate a federal right, often under a federal statute or the Constitution. Here, it is not clear what Pam's lawsuit is specifically about. However, since the incident was a car accident in a private parking lot, it is probably a negligence action. Accordingly, this is not a federal question since no federal issue is raised, and so the court does not have federal question SMJ.

#### B. Diversity of Citizenship SMJ

For a federal court to have SMJ based on diversity, each plaintiff must be diverse from each defendant and the amount in controversy must exceed \$75,000.

##### a. Diversity of Citizenship

Rita (R) is a resident of State C. An individual's citizenship is that of their domicile; since R appears to be domiciled in C, where she resides, R is a citizen of C.

Don's Market is probably a corporation. A corporation's citizenship includes its state of incorporation and the state in which it has its principal place of business. We are not told in which state Don's Market (DM) is incorporated. The market itself is in State B. If this is the only store DM operates, then its principal place of business is in State B and so it is a citizen of State B. Accordingly, DM is probably a citizen of B.

Pam, as an individual, is a citizen of the state of her domicile. Pam originally lived in State A, but left her job there indefinitely, subletting her apartment, to come to care for her mother in State B. Domicile is determined by physical residence combined with intent to make the state a permanent home. Pam (P) is physically residing in B. Her indefinite leave of absence from her job in State A may indicate she intends to eventually move back to A. If she intended to make B her permanent home, she probably would have quit her job in A and terminated her lease rather than subletting it. Accordingly, P probably does not have the intent to make B her permanent home. She is therefore still domiciled in State A and is a citizen of A.

Because P is a citizen of A, and R is a citizen of C, and DM is a citizen of B, complete diversity exists.

##### b. Amount in Controversy

For diversity SMJ, the amount in controversy must exceed \$75,000. Here, P is claiming

\$60,000 from each defendant. A plaintiff's good faith claim in excess of the required amount is sufficient.

P may aggregate her claims for \$60,000 against each defendant. A plaintiff may only aggregate claims against multiple defendants if they are joint tortfeasors. Here, P appears to be claiming that R and DM jointly caused her injury through their individual negligence: R's negligence in driving and DM's negligence in placing the concrete column. Since these acts of negligence combined to cause P's injury, DM and R are joint tortfeasors. Accordingly, P may aggregate her separate \$60,000 claims together, making \$120,000, in excess of \$75,000.

Additionally, P is seeking an injunction. An injunction may be valued by either the value of the benefit to plaintiff or the cost of compliance for defendant. The value of removing the column to P is probably not great. However, if the cost to DM of removing the column is over \$15,000, then the injunction against DM plus the damages claim would exceed \$75,000. Note P may then argue she has supplemental jurisdiction over the claim against R. However, as a plaintiff in a diversity case, she may not join additional claims under the supplemental jurisdiction statute.

Accordingly, since the parties are all diverse, and the amount in controversy exceeds \$75,000 either through aggregation or the injunction, subject matter jurisdiction was proper.

The motion was therefore properly denied.

## II. Denial of Motion for Change in Venue

### A. Proper Venue in State B

To determine if R's motion should have been granted, we must see if venue was originally proper.

In a diversity case, venue is proper in any district where all defendants reside; or where a substantial part of the claim arose; or, if neither is possible, any district where any defendant is subject to personal jurisdiction.

### 1. Residence

A corporation resides where it is subject to personal jurisdiction. Jurisdiction is proper under traditional bases, such as presence or citizenship in a state, or under minimum contacts analysis, in which the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. Here, DM is a citizen of B since it has its principal place of business there. Personal jurisdiction will be proper under traditional grounds over a corporation present as a citizen in a state. Accordingly, DM is subject to personal jurisdiction in B as a citizen. Additionally, DM certainly has minimum contacts with State B. It does substantial business there, purposefully availing itself of State B's laws, since its market is in State B. Also, the accident arose directly out of DM's contacts with B, since its market parking lot is in State B and it was certainly foreseeable that DM could be sued in State B arising out of incidents involving its market in State B. Accordingly, DM is subject to personal jurisdiction in State B, and so, for venue purposes, it resides in State B as well.

R, as a citizen and domiciliary of State C, resides in State C.

Accordingly, since DM resides in B and R resides in C, there is no district in which all defendants reside.

### 2. Substantial Part of the Claim

The accident occurred entirely in State B, in the DM parking lot. Accordingly, a substantial (indeed, all) part of the claim arose in the district in which DM's store is located.

We are not told whether P's suit was filed in the district encompassing DM's market (sic). If State B only has one district, then venue is proper since the accident necessarily occurred within that district. If the accident and lawsuit are in different districts, then venue may not be proper where filed. More information is needed.

### 3. Any District Where Any Defendant is Subject to Personal Jurisdiction

Here, R, as a citizen of C, is subject to personal jurisdiction in C; as noted above, DM is subject to personal jurisdiction in B. Accordingly, if no district fulfilling either of the first two requirements exists, then venue would be proper in R's home district or in B. However, as explained above, venue is proper in the district encompassing DM's market (sic), where the accident occurred.

Accordingly, assuming the lawsuit was filed in the same district encompassing DM's market (sic), venue was proper. Thus R's motion was properly denied on this basis.

### B. Transfer of Venue

Even if venue is originally proper, a court may still transfer venue to another court where the suit could originally have been brought, if the interests of justice so require.

R will argue that the interests of justice require transfer to C because her three witnesses

reside in C, and travel to B would be highly inconvenient. Certainly R's witnesses are very important, since their testimony presumably will state that P, in reading a magazine while walking, was at least contributorily negligent. The convenience of witnesses is normally a valid reason to transfer venue.

However, the action must have been bringable in the transferee district. Here this means all defendants must be subject to personal jurisdiction in C, the C court must have had SMJ, and venue must be proper in C.

1. SMJ in C

Diversity of citizenship would provide valid SMJ in C.

2. Personal Jurisdiction

R, a citizen and domiciliary of State C, is subject to personal jurisdiction in C under traditional bases.

DM may not be subject to personal jurisdiction in State C. We are not told State C's long-arm statute, but it does not appear that DM is a citizen of C, or even that it does any business there. Without any contacts with State C, DM cannot be said to have purposefully availed itself of C's laws, nor is it foreseeable that DM would be sued in C if it has no contacts there. Finally, the accident occurred in State B, so not only does State C have little interest in exercising jurisdiction over DM, but there is no relationship between DM and State C and the cause of action. Accordingly, it is highly unlikely that State C could exercise personal jurisdiction over DM, since no traditional bases exist, and there are apparently no contacts between DM and C, much less the constitutionally required minimum contacts.

Since DM is not subject to personal jurisdiction in State C, then the action could not have been brought originally in State C. Therefore, venue cannot be transferred to State C.

3. Venue

As explained previously, a district exists where a substantial part of the claim arose: the district encompassing DM's market (sic), in State B. Therefore, since such a district exists, venue would not be proper in State C, since the only means of proper venue in State C would be under the "last resort" option of any district where any defendant is subject to personal jurisdiction. This option is unavailable where, as here, a district exists where a substantial part of the claim arose.

Accordingly, since transfer of venue to State C could not have been proper since neither venue nor personal jurisdiction over DM existed in C, the trial court properly denied R's motion to transfer venue.

III. Did the Appellate Court Correctly Dismiss Rita's Appeal?

Appellate courts generally review final judgments. Here, the denial of R's motion to transfer



venue was not a final judgment. An appellate court may consider interlocutory appeals on certain matters, particularly if the matter is of great importance and, if not settled immediately by the appellate court, will substantially affect subsequent litigation.

Here, the denial of the motion to transfer venue was not a final judgment. In addition, since venue was proper in State B, since the accident occurred there and so the claim arose there (see previous analysis), the denial of transfer of venue did not confer improper jurisdiction on the trial court. Accordingly, there was no compelling need to consider the denial of the motion on immediate appeal.

Even had the appellate court heard the appeal, it would have reviewed the denial on an abuse of discretion basis. While the requirements of personal jurisdiction must be properly met, and cannot be waived, the determination of whether transfer would be in the interests of justice is for the discretion of the trial court. The court could have found that, while R and her witnesses would be inconvenienced in State B, that P and DM would be more inconvenienced in State C, especially since P cares for her elderly mother in State B. Since this decision would be one of the trial court's discretion, the appellate court would have been unlikely to overturn it.

Therefore, the dismissal of R's appeal was proper.

## ANSWER B TO ESSAY QUESTION 1

### (1) Subject Matter Jurisdiction

Pam brought suit in federal court in State B. For a federal court to have subject matter jurisdiction, there must be a federal question or complete diversity of citizenship between the parties. Because no federal statute or constitutional claim is involved, jurisdiction can only be based on diversity.

### Diversity Jurisdiction

Federal court jurisdiction based on diversity requires complete diversity of citizenship between the parties and an amount in controversy over \$75,000.

### A. Complete Diversity of Citizenship

For Pam to sue Don's Market and Rita in federal court, she must be a citizen of a different state than each of them.

#### 1. Pam's Citizenship

An individual's citizenship is based on their domicile, or where they intend to make their permanent home. For Pam to be diverse from Don's Market, her domicile cannot be in State B. Pam will argue that she is domiciled in State A, because that is where she was living until 6 months ago. Pam will argue that she left only for a temporary period to care for her elderly mother in State B, and that her intent to return is evidenced by the fact that she did not give up her apartment, only subletted it. Also, she did not quit her job, but only took a leave of absence from it.

Don's Market will argue that Pam is a citizen of State B because she is living there presently. He will argue that Pam's subletting her apartment was giving up her residence there, and that it was subletted just so Pam could avoid breaking her lease. Don will argue that she did not merely take a vacation from her job in State A, but has left it indefinitely.

Although it is a close question, the fact that Pam has retained both her apartment and her job in State A shows her intent to keep her permanent home there. The court should find that she is domiciled in State A.

#### 2. Don's Market's Citizenship

The citizenship of a business is its principal place of business and, if it is incorporated, where it is incorporated. The facts do not state whether Don's Market is a corporation, but its principal place of business is in State B, so it is a citizen of State B. Therefore Don is diverse from Pam.

#### 3. Rita's Citizenship

Since Rita is an individual, her citizenship, like Pam's, is based on her domicile. Since the facts state that she is from State C and was just driving through State B, her domicile can be

assumed to be in State C, where she lives. Therefore, Rita is diverse from.

Since both the defendants, Don's Market and Rita, are diverse from the plaintiff, Pam, complete diversity of citizenship exists.

#### B. Amount in Controversy

Diversity jurisdiction requires an amount in controversy of over \$75,000. The amount is based upon the plaintiff's good faith allegation and can only be challenged if it is clear to a legal certainty that she cannot recover that amount.

##### 1. \$60,000

Here, Pam claims \$60,000 in damages against each defendant. Presuming that is her total claim against each one, including punitives and attorneys' fees if available, it does not satisfy the jurisdictional amount.

However, a plaintiff can aggregate her claims to meet the \$75,000 requirement in certain circumstances. A plaintiff can aggregate her claims against the same defendant, but cannot aggregate her claims against different defendants unless they are joint tortfeasors against any of which she could recover the full amount. Here, there are facts to indicate that Don's Market and Rita are jointly liable, since they each caused the accident (Don's Market by placing a column improperly and Rita by driving carelessly). If they are jointly liable, Pam has met the jurisdictional amount because her claim is \$120,000. If they are not, she cannot meet the requirement solely through her claimed damages.

##### 2. Injunction

However, Pam is also asking for an injunction to make Don's Market tear down the offending column. In a majority of states, injunctions are valued at their value to the plaintiff. Here, the injunction has little value for Pam, as she has already been injured and is unlikely to be injured by the column again. In the majority of states, then, this would not help Pam reach the jurisdictional amount against Don.

A minority of states allow injunctions to be measured by their cost to the defendant. Here, the cost to Don of tearing down the column may be high enough to raise her \$60,000 claim to the required \$75,000. If it does, the injunction will give the court diversity jurisdiction over Pam's claim against Don, but not over her claim against Rita. Nor is supplemental jurisdiction available over the claim against Rita based on the claim against Don, because this is not a federal question claim, and it is being brought by the plaintiff.

In conclusion, if Don's Market and Rita are jointly liable, the court's denial of Don's motion to dismiss for lack of jurisdiction was proper because there is complete diversity of parties and the amount in controversy exceeds \$75,000 when the claims are aggregated. If they are not jointly liable, jurisdiction over Don may still be proper due to the injunction, but not as to Rita.

(2) Change of Venue

A. Venue in State B Federal Court

Venue is proper where any defendant resides if all reside in the same state, or where a substantial part of the events forming the basis for the claim arose.

Here, Don's Market resides in State B, where it is located and does business, but Rita resides in State C. However, since the accident that is the basis for the claim took place in State B, venue is proper there even though not all defendants reside there.

B. Transfer to State C

Where venue is proper to begin with, a court may transfer to any other venue where the case could originally have been brought for the convenience of the parties or witnesses or in the interests of justice.

1. Convenience

Here, Rita argues for transfer to State C on convenience grounds because that is where she resides, and it would be a hardship for her and her witnesses to defend in State B.

It is true that Rita and the three primary eyewitnesses, who also reside in State C (her friends who were in the car at the time of the accident and allege they saw Pam reading a magazine and not watching her step), would incur hardship in coming to State B to defend.

However, this hardship will be balanced against the hardship Pam and Don's Market will face in having to defend in State C, a foreign state for them. Pam is caring for her elderly mother and will find it hard to leave, and it will be hard for Don's Market to leave its business, especially as it is likely a sole proprietorship. Also, witnesses regarding the construction of the column, police who were called to the scene afterwards, and doctors who treated Pam are all located in State B. These factors weigh in favor of denying the motion to transfer.

2. Venue Proper in State C

Moreover, venue may not be proper in State C because the case could not have originally been brought there, nor did the claim arise there. Although Rita resides there, Don's Market resides in State B, so venue cannot be supported on this basis. Also, the only event involved in the claim, the accident, occurred in State B, so venue is not proper on that basis either.

In conclusion, because the convenience to the parties and witnesses weighs in favor of State B and because venue would not be proper in State C, the court was correct to deny Rita's motion.

(3) Dismissal of Appeal

A. Final Judgment

A case can only be appealed from a final judgment on the merits in the lower court. If there are issues remaining for the lower court to decide, appeal will not be taken.

Here, the lower court has dismissed Rita's motion for change of venue, but that is not a final judgment. The court has not dismissed the underlying case, which still must be tried and decided.

B. Interlocutory Appeal

A party may appeal before a final judgment on certain matters by right, such as a granting of an injunction, or if the lower court certifies that the issue is a close one and the appellate court agrees.

Because there is no right to an interlocutory appeal for a denial of a change of venue motion and the lower court did not certify, the dismissal of the appeal was proper.

## QUESTION 2

Artist owns a workshop in a condominium building consisting of the workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople. The covenants, conditions and regulations (CC&Rs) of the building provide for a board of managers (Board), which has authority to make "necessary and appropriate rules." Board long ago established a rule against the sale within the building of items not created within the sellers' workshops.

Artist accepted a three-year fellowship in Europe and leased the workshop to Weaver for that period. The lease prohibited an assignment of Weaver's rights. Weaver used the workshop to produce custom textiles.

A year into the term, Weaver transferred her right of occupancy to Sculptor for one year. Sculptor moved into the workshop with his cot, electric hotplate, and clothes. He also brought several works of art that he had created during a stay in South America and offered them for sale along with his current works. Sculptor mailed his rent checks every month to Artist, who accepted them. Both Weaver and Sculptor knew the terms of the CC&Rs and Board's rules when they acquired their interests in the workshop.

Three months after Sculptor moved in, Board told Sculptor to stop selling his South American pieces. He refused to do so and thereafter withheld his rent and complained that the regulation was unreasonable and that the building's heating was erratic.

1. What action, if any, may Board take against Artist to enforce the rule against the sale of Sculptor's South American pieces? Discuss.
2. Can Artist recover from Weaver the rent that Sculptor has refused to pay? Discuss.
3. Can Artist evict Sculptor from his occupancy? Discuss.

## ANSWER A TO ESSAY QUESTION 2

### 1. Action Board may take to enforce rule against sale of South American pieces

Whether the Board may enforce the rule against the sale of Sculptor's South American pieces depends on whether the covenant contained in Artist's lease runs to Sculptor. First, it must be determined if Sculptor ("S") is properly occupying the workshop. If S is not allowed to be in the workshop because of A's lease with the Board, the Board may be able to evict S.

#### Assignment/Sublease of A's workshop to S

An assignment occurs when a tenant transfers the complete tenancy in a lease to another party. The original tenant has no right to reoccupy the leased premises under an assignment. A sublease occurs when a tenant leases the premises to another tenant for a period of time less than the complete lease that the original tenant has with the Board. Artist had a three-year lease from Weaver in the workshop. Because A only transferred a right of occupancy for one year to S, this is a sublease, and not an assignment. The Board will argue that the lease expressly prohibits these types of transfers. However, the lease only prohibits assignments and does not mention subleases. When the lease is silent as to one or the other, the courts will strictly construe the lease as only prohibiting that which is named in the lease. Therefore only assignments are leased since that is all that is named in the lease. Furthermore, the fact that A accepted rent checks may prohibit the Board from taking any action.

#### Enforcement of Covenant -- Equitable Servitude

The Board will argue that the covenant agreed to by A when he purchased the workshop should also govern any interests between those that are using the workshop in place of A. Because this covenant is being enforced as an injunction (to stop S from selling South American art), it will be easier for the Board to enforce than if they were trying to recover damages. Because the covenant will stop A from selling South American art, it is being enforced as a burden against A. For the burden to be enforced against A, there must be intent between the original parties, there must be a writing satisfying the Statute of Frauds, notice between the parties, and the covenant must touch and concern the land.

#### Intent between original parties

The Board and Artist intended that the covenant be binding. The Board has the authority to make "necessary and appropriate" rules that are binding on those occupying the building. Since the Board established the rule "long ago" the original parties, A and the Board, intended the covenant to be followed.

#### Statute of Frauds

As long as there is a written agreement signed by S, the Statute of Frauds is satisfied. This appears to be satisfied since there are no facts suggesting a written agreement was not entered into. Also, since the transfer between A and W is for more than one year, it had to be in writing. Because a tenancy is an interest in land, the Statute of Frauds must be met.

### Notice between the Parties

Both Weaver and S knew about the terms of the CC&Rs when they acquired their interests in the workshop. Therefore, all parties were on notice of the restriction.

### Touch and Concern

The most challenging requirement for a burden to run with the land between occupiers the Board must meet is that the covenant touches and concerns the land. Here, a promise not to sell items not created within the sellers' workshops does not seem to touch and concern the land. In order for a covenant to touch and concern the land, the land must be benefitted in some way. The only people that are benefitted from such a covenant are those that own workshops in the building. They may argue that such a covenant does touch and concern the land because it makes their workshops more valuable. If this is the case, then the Board may have satisfied all the requirements to enforce this restrictive covenant. By not selling artwork not created in their workshops, the artists that own workshops there may have a protective interest. If selling only local work increases the value of their units, the covenant touches and concerns the land. It seems likely that purchasers of artwork would like (sic) to be able to buy a variety of work, so it is unlikely (sic) that this covenant actually increases the value of the workshops. Therefore, this covenant does not touch and concern the land and therefore does not run with the land.

### Breach of Covenant -- Damages

The Board may also attempt to recover damages against A for failing to abide by the covenant. In addition to the elements discussed above, in order to enforce a covenant and recover damages there must also be vertical privity between the parties. This means that the parties must share an interest in land. The Board is just responsible for managing the complex, and does not appear to own the building. Therefore, no interest in land is shared, and there is no vertical privity.

### Estoppel

S will argue that the Board is estopped from enforcing the covenant since they have waited three months after he moved in before requesting S to stop selling his South American pieces. S will argue that because they did not do anything, he assumed it was okay to sell that art.

### Laches

S will also argue that too much time has elapsed for the Board to enforce the covenant. They waited three months before asking him to stop, and therefore should be barred from enforcement because of laches (defense that occurs when [sic] passage of time).

## **2. Ability of Artist to recover rent**

Artist will be able to recover rent from Weaver if Weaver remains liable under the lease between A and W. As discussed above, the lease between A and W only prohibited assignments. Courts strictly interpret such provisions, and therefore will allow a sublease. S's



interest in the workshop is a sublease since he did not take the full term of the original lease, but only took a one-month occupancy. Although W may not be in privity of estate with A during the time that S is in possession of the workshop, he is in privity of contract. A will argue that W is in privity of estate as well as contract. Privity of estate is present when two parties share an interest in land. Because this is only a sublease, A will argue that W still shares an interest in the workshop with A and that there is privity of estate. Privity of contract between A and W exists because A and W signed the original lease. W remains liable for any defaults of his subleasees since he is still in privity of contract with A. S has a duty to pay rent, and W has a duty to pay rent to A. Therefore A should be able to recover from W the rent S has refused to pay.

There is a duty to pay rent imposed on all tenants, unless this duty has been excused. S will argue that A breached an implied warranty of habitability by providing better heating to the condo. However, because this condo is being used for commercial purposes, A does not owe a duty of habitability. While A must maintain basic utilities, such as heat, it is understandable that the heating [will] be erratic in a commercial building. Heat is often turned down at night and during the weekend in order to save energy. Therefore, it is not a breach of habitability, and S must still pay rent.

### **3. Ability of Artist to evict Sculptor**

Artist may evict S if S was not in rightful possession of the workshop, or if S has breached any duty owed to A. As discussed above, S is in rightful possession of the workshop, as a subleasee. Therefore W owes a duty to pay rent unless A has breached any of his duties owed to tenants.

#### Implied Warranty of Habitability

The implied warranty of habitability only applies to premises that are leased for residential purposes. It appears that this workshop was not leased for a residential purpose, and therefore no duty of habitability is owed. Although the workshop is located in a condominium, which is traditionally regarded as a residential property, the fact that all the other units in the condominium are used as workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople suggests that the condominium was not rented for residential purposes. Furthermore, the fact that S moved into the workshop, bringing with him his cot and electric hotplate, suggests that the condo did not contain a stove and therefore was not intended to be used as a residence.

#### Unreasonableness of Regulation

The covenant was agreed to by the owners of the building and the Board has the authority to enforce it. If the covenant was properly instituted by the Board it is not unreasonable. Although the authority that gives the Board the power to pass such covenants, "necessary and appropriate rules," seems vague, the covenant is clear. Only items created in the building are offered for sale. This is probably an appropriate rule considering the interests of the other artists that work in the building. The fact that W and S knew of the terms before accepting the

lease implies that they consented to the covenant.

### Erratic Heating

When a property is to be used as a residence, the landlord is under an implied warranty of habitability. One of the warranties is that heat be provided to a building so that it is liveable. However, as discussed above, it does not appear that this workshop was intended to be used as a residence. It would make sense that the heat would be erratic in a commercial office space. In normal office space, heating is often turned off at night and weekends, times when workers are not usually there. This would be appropriate in this case. Even [if] A is found to owe a duty of habitability, the fact that there is erratic heat does not excuse the tenant from withholding rent. If anything, the tenant will be allowed to abate the rental price by the amount it costs to repair the heater. The landlord should repair the heater first, but if the landlord has been notified and fails to repair, the tenant is allowed to repair and abate the purchase price. Therefore, S was still owed a duty to pay rent.

### Breach of Quiet Enjoyment

S will also argue that there was a breach of quiet enjoyment when A did not provide constant heat to the building. As discussed above, this was probably not breached since erratic heat can be expected in commercial buildings. It would also be helpful, though, to know if erratic means the heat is not working during the day (times when it is expected that people would be using the building). Even so, S should only be allowed to abate rent, not discontinue payment of rent.

### Privity of Contract

S will argue that he only owes rent to W, and not A, because he is a subleasee and therefore not in privity of contract with A. However, he is in privity of estate, and therefore owes the owner of the property rent. If W is also not paying rent (assuming this is the case, since S is not paying rent), then A can evict W, which would also have the effect of evicting S. If W continues to pay the rent to A, despite the fact that S is not paying rent to W, then A will not be able to evict S on the grounds that he is not paying rent.

### Breach of Covenant

As discussed in part one, the covenant not to sell art not created in the workshop probably does not extend to S, since it does not touch and concern the land. If the court does find the covenant to extend to S, such that he is bound by the covenant, A will have grounds for eviction based on the fact that S is violating the covenant.

## **ANSWER B TO ESSAY QUESTION 2**

1. What actions, if any, may Board (B) take against Artist (A) to enforce the rule against the sale of Sculptor's (S) South American pieces?

B, as a representative body of the condominium, has been granted the authority to make necessary and appropriate rules. B also presumably has the authority to enforce the CCRs of the condominium on behalf of the individual owners. The rules regarding sale of items not created in Seller's workshops are long established. Where the board of a condominium has established rules under proper authority for a condominium (i.e. under authority in the CCRs, which are generally recorded), the board may enforce these rules as either a restrictive covenant or an equitable servitude if the proper requirements are met.

#### Artist's liability for Sculptor's (S) acts

A, as the owner of S's workshop may be liable for S's violation of the CCRs. The B may seek to enforce the CCRs as either a restrictive covenant or equitable servitude if proper conditions are met.

#### Real Covenant

In order to enforce a restrictive covenant against a party (enforce the burden), the burdened party must have notice, the parties creating the restrictive covenant must have intended the restrictive covenant to continue indefinitely and against successor parties, the restrictive covenant must touch and concern the land, and both horizontal privity and vertical privity must exist.

Where these conditions are met, the party seeking to enforce may seek a money judgment.

#### Intent

When the B created the rule, they likely intended it to continue and to bind successor parties. The condominium has established an identity and enforcement of this rule is an important part of maintaining that identity.

#### Notice

Where the party creating a condominium has established CCRs, the parties purchasing units in the condominium may be determined to have constructive knowledge if the CCRs are recorded or included or provided as part of the purchase transaction.

Here, A had notice of the terms of the CCRs when he acquired his interest in the condo. So, he had constructive notice.

#### Touch and Concern

Real covenants that touch and concern the land are those that generally relate physically to the property in a way that increases its value. Here, the rule relates to what may or may not be sold on the property. While this is not necessarily physically related to the property, it is part of the overall function of the condo as a location for artisans. While A may argue that this does not touch and concern the land, a court would likely view it as being closely related to the purpose and function and therefore find that the rule touches and concerns the land.

### Vertical Privity

Vertical privity exists where the party is a recipient of the same possessory interest as the person who agreed to the restriction. A owns the workshop and is therefore in vertical privity with whatever party originally agreed to the rule.

### Horizontal Privity

For horizontal privity to apply, the party agreeing to the restriction must have had a common property interest with the other party. Here, the original purchaser would have received property from the owner of the condominium. Also, all owners of workshops possess an interest in property that was once a single ownership interest.

Therefore horizontal privity is present.

The B may enforce the rule as a restrictive covenant and sue A for money damages.

### Equitable Servitude

A party may enforce a restriction as an equitable servitude against a burdened party when the restriction touches and concerns the land, the parties creating the restriction had intent that it run against subsequent parties, and the burdened party had notice.

As discussed above, the rule touches and concerns the land, was intended to burden subsequent parties, and A had notice.

The B may enforce the rule against A as an equitable servitude and seek to enjoin the sale of South American goods on the premises.

### 2. Can Artist (A) collect from Weaver (W) the rent that Sculptor has refused to pay?

As the landlord, A may collect rent from a party with whom he is in privity of estate or privity of contract.

The duty to pay rent runs with the land and is an independent covenant of the tenant.

Here, although W has sublet his property, he is still in privity of contract with A and has a duty to pay rent. W would only be able to avoid this obligation if A agreed to a novation, which has not occurred.

W may try to argue that he is not obligated to pay rent because he has been constructively evicted (he would argue this based on the assertions of his sublessee) from the workshop due to the unreasonableness of the regulation and the erratic heating. However, in order for a tenant to assert constructive eviction under the landlord's covenant of quiet enjoyment, the tenant must move out of the premises within a reasonable time. Both W and S would also likely fail on the basis of the reasonableness of the regulation since it is being enforced by a third party. Finally, both W and S may be estopped from asserting the unreasonableness of

the rule because they had notice when they accepted their interests.

In sum, A will be able to recover from W because they are in privity of contract, the tenant has a duty to pay rent, and W's defenses would not likely succeed.

3. Can Artist evict Sculptor from his occupancy?

A will likely attempt to evict S based on the prohibition against assignment and the violation of the rule on sale of outside goods. Both of these are likely to fail and so A will have to attempt to terminate his lease with Weaver or evict Weaver in order to retake possession.

Prohibition Against Assignment

Prohibitions against assignment are enforceable. However, courts construe these prohibitions narrowly and will not interpret a prohibition against assignment to prohibit a sublease. A court will also be quick to find a waiver of a prohibition against assignment.

Here, the lease with W prohibited assignments, not subleases. W has subleased his property to S since W will retake possession for the last year of his own lease. In addition, A accepted rent checks from S and thereby likely waived any right he might have had. A will not be able to evict S due to the prohibition against assignment.

As a sublessee, S is not subject to restrictive covenants and so A may not evict S on this basis either. A sublessee is not viewed as being in either privity of estate or privity of contract.

If A attempts to evict S based on nonpayment of rent, he will also likely lose for the same reason that a landlord is not viewed as being in privity of estate with a sublessee.

A will likely have to sue W for damages and attempt to evict W. An eviction of W would also evict S since all rights of a sublessee are derivative of the sublessor.

### QUESTION 3

Walker sued Truck Co. for personal injuries. Walker alleged that Dan, Truck Co.'s driver, negligently ran a red light and struck him as he was crossing the street in the crosswalk with the "Walk" signal. Truck Co. claimed that Dan had the green light and that Walker was outside the crosswalk. At trial, Walker called George Clerk and the following questions were asked and answers given:

17. Would you tell the jury your name and spell your last name for the record, please?  
A. George Clerk. C-l-e-r-k.
- [1] Q: Where were you when you saw the truck hit Walker?  
A: I was standing behind the counter in the pharmacy where I work.
- [2] Q: What were the weather conditions just before the accident?  
[3] A: Well, some people had their umbrellas up, so I'm pretty sure it must have been raining.
- [4] Q: Tell me everything that happened.  
[5] A: This guy rushed into my store and shouted, "Call an ambulance! A truck just ran a red light and hit someone."  
Q: What happened next?  
[6] A: I walked over to the window and looked out. I said, "That truck must have been going way over the speed limit." Then I called an ambulance.  
Q: Then what happened?  
[7] A: I walked out to where this guy was lying in the street. Dan, the driver for Truck Co., was kneeling over him. A woman was kneeling there too. She spoke calmly to Dan and said, "It's all your fault," and Dan said nothing in response.

At each of the seven indicated points, what objection or objections, if any, should have been made, and how should the court have ruled on each objection? Discuss.

### **ANSWER A TO QUESTION 3**

For ease of reference, D will be Truck Co., C will be Clerk, and W will be Walker.

"Where were you when you saw the truck hit Walker?"

The objections that can be raised to the question include: Argumentative, assumes facts not in evidence, and lack of foundation.

Assumes facts not in evidence.

A lawyer may not use his/her questions on direct examination to argue the facts or issues of a case. The lawyer must ask questions and allow the witness to testify. Although we have no background evidence, we know Clerk (C) has not yet testified that he saw the truck hit Walker. Thus, the question assumes facts not in evidence, and an objection should be sustained.

Lack of personal knowledge/foundation

A witness may only testify based upon his/her personal knowledge, and the lawyer must present the basis for the witness's knowledge before a witness may testify as to facts in the trial relating thereto. Here, all we know is the name of this witness. We do not know where he was, who he was, or even whether he observed any accident. This assumes not only that he saw the accident, but that the truck hit Walker -- which has not yet been established. Thus an objection for lack of personal knowledge is sustainable.

Argumentative

A lawyer may not use his/her questions on direct examination to argue the facts or issues in a case. The lawyer must ask questions and allow the witness to testify. An argumentative question is one which argues the facts or issues of the case rather than just eliciting a direct response. This question is argumentative in that it assumes as the truck "hit" Walker rather than Walker "walking out in front of" the truck. Any objection should be sustained.

"What were the weather conditions like just before the accident?"

The statement could be objected to based on lack of personal knowledge. The attorney has not laid a foundation that C had an opportunity to observe the weather conditions on that day. However, it could also be argued that it is within a witness's personal knowledge to remember what the weather conditions were like that day, so it is arguable that the statement did not need a foundation to be laid. Thus, an objection may be proper here, but it is not likely to be sustained unless the witness actually does not have personal knowledge (see below).

The statement could also be objected to on the basis of relevance. A statement is relevant if it makes some fact more or less likely. Although the weather conditions do not appear to make a difference in the accident claims (red light/green light issue), it could be relevant to show the ability of each party to see one another. Thus, the weather conditions are probably relevant, and the objection should be overruled.

"Well, some people had their umbrellas up . . ."

Here, a motion to strike should be made because the answer is speculation. A motion to strike must be made immediately after a witness's response, and can only be made when the original question did not obviously contemplate an objectionable response. If granted, the jury will be instructed not to consider that portion of the witness's answer. A witness must base his testimony on personal knowledge, and cannot speculate as to the conditions surrounding his/her answer. As discussed above, the weather conditions may be within C's personal knowledge. However, upon his answer, it becomes obvious that the questions actually led him to speculate and base his answer on something other than personal knowledge -- he made an inference that it was raining because of the umbrellas. W's attorney may argue that this is not speculation but rather based on personal knowledge because he remembers the umbrellas, and as such if anything only the portion about the "must have been raining" must be stricken. The court will probably agree, and only strike the parts based solely on speculation. Thus, the failure to object in the first place is excusable, the motion to strike is proper, and it should be sustained in part.

"Tell me everything that happened."

An objection should be made that the question calls for the witness to give a narrative account. The lawyer interrogating the witness on direct examination must ask specific questions and lead the witness through his or her testimony. This question calls for a narrative by the witness, and as such it is an improper question. The objection should be sustained.

The "call an ambulance" statement

An objection should be made based on hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. A statement can be words or conduct. If a statement is found to be hearsay and does not fit into a hearsay exception, it must be excluded from evidence. Here, the statement is hearsay because it was made out of court by a "guy" -- a declarant who is not testifying at trial and it is being offered for its truth -- that a truck ran a red light and hit someone. It could be argued that the statement is being offered for the nonhearsay purpose of showing its effect on the listener, C, in which case it would not be hearsay, because it would not be offered to show the truth that the truck ran the light but to show the effect the statement had on C. However, this argument will fail because what C did is not relevant in this case.

Likely, W's counsel will argue that the statement is a present sense impression or an excited utterance. A present sense impression is a statement that is made contemporaneous with an observation or a physical condition that is so trustworthy because there is not much time for contemplation to lie. It must be very contemporaneous, and very little time can lapse. Here, this statement would be admissible if it were made while the accident was happening, but the lapse of time between the declarant's coming in and the accident is not established as short and we do not know what he was doing at that time. Thus, it may not be contemporaneous enough to come in a present sense impression.



However, it will likely come in as an excited utterance. An excited utterance is a statement made under the stress of excitement of some event. Here, the time period can be longer than in a present sense impression so long as the stress of excitement remains. It seems apparent that the declarant was still under the stress of excitement when he made the statement, as he was exclamatory in doing so. Also, a short period of time passed -- as no ambulance had yet been called, so this makes it more likely that he was under the stress of excitement. Watching a car accident is definitely stressful and exciting. Thus, it is likely that the statement is trustworthy enough to come in under the excited utterance exception, and the objection should be overruled.

"That truck must have been going way over the speed limit."

Hearsay. D's counsel will object based on hearsay. This is an out-of-court statement made to prove the truth of the matter asserted. Even though the statement was made by the witness, the statement was made out of court, and as such it still is classified as hearsay. C can testify on the stand as to what he or she recalls of the events, but C cannot testify as to what he/she said about them then unless they fall into a valid hearsay exception. This statement could probably not be classified as an excited utterance because C did not observe the events and there is no indication that he was particularly excited about what occurred. Further, it cannot be classified as a present sense impression unless there would be some foundation laid as to why he thought that (e.g., what did you observe, etc.) and then it could be argued that the statement was made as a present sense impression of what it was that he saw. (However, this may still be an impermissible opinion; see below.) It could not be argued that it is an effect of hearsay scenario (see above) because it does not demonstrate why he called the ambulance, his action, but rather is being offered to show that the truck was speeding -- the truth. Thus, the objection should be sustained based on hearsay grounds.

Calls for an opinion.

The statement itself is an opinion statement, and lay witnesses may not testify as to their opinions unless they have personal knowledge, the information in the opinion cannot be derived from a better source and will be helpful to the trier of fact, and it is not scientific or technical in nature. Here, the statement is not based upon personal knowledge (at least not from the foundation we have here), and as such it is an impermissible opinion. Not only could the hearsay statement not come in, but the statement made by the witness on the stand himself [sic] could not come in either. C did not observe the events; rather, C only observed the aftermath. Thus, he did not know that the truck was speeding and was basing this information on evidence not offered forth as a foundation. Thus, although his statement would be permissible if he actually saw the truck speeding, because he did not he has no basis for knowledge of this fact and his opinion is inadmissible. The objection should be sustained.

Woman's statement to Dan: "It's all your fault."

Hearsay!

D's counsel is likely to claim that this is a hearsay statement. Woman's statement is an out-of-court statement offered to prove the truth of the matter asserted. As such, her statement itself

is hearsay unless it can fall into one of the exceptions. Here, the statement is not offered for a non-hearsay purpose, so it must fall into an exception. Because of the time lapse, present sense impressions and excited utterance exceptions are probably not viable. However, C's counsel can argue that D's response to the statement, his failure to respond, is an adoptive admission. An admission is deemed to be "not hearsay" by the Federal Rules of Evidence, and as such they are not subject to hearsay objections even though they go to the truth of the matter asserted. An admission is a statement made by a party offered by his/her opponent in a case. Here, it must first be determined whether Dan is a party opponent in the case against Truck Co. Dan may be a party due to the doctrine of vicarious admissions. If an employee is acting within the scope and course of his or her employment, then all admissions made by that employee are imputed to the employer. Here, we do not have definite facts as to the activity that D was engaged in at the time of the accident; however, if it is found that D was acting in the scope and course of his employment then any statement he made concerning the accident can be considered an admission and be vicariously imputed to his employer, Truck Co.

However, it must also be shown that D's failure to respond was an adoptive admission. An adoptive admission is an admission by silence, and it is only allowed when relating to an accusatory type statement that is made that would likely invoke a denial or response by the party, when the party does not deny it, and when the party is physically and mentally capable of denying it. D's counsel will argue that it is not necessarily true that a person would deny liability in this case. D will claim that Dan was stunned and was unable to mentally grasp what was going on. Thus, he would lack the mental capacity to deny the statement. Further, D's counsel will argue that many people know that it is not in their best interest to deny or admit liability at the scene of the accident, and that they should just keep quiet. Thus, the average person would not be expected to deny the statement, but silence would in fact be appropriate. Thus, although D is probably liable for anything he did say as a vicarious admission, this statement does not qualify as an adoptive admission and the objection should be sustained.

#### Improper Opinion

Counsel may claim that this is an improper opinion because no foundation was laid as to whether W saw the accident or not. This would be sustainable.

### **ANSWER B TO QUESTION 3**

1) Where were you . . .

Assumes facts not in evidence.

The question asks where George was when he saw the truck. This assumes that George did in fact see the truck. There is no foundation for this assertion in the testimony at this point.

A judge would find that the question was improper and would probably ask to rephrase the question. Such question would be relevant because it would indicate facts about George's ability to perceive the action.

2) What were the weather conditions . . .

Relevance

In order to be admitted, the testimony must be relevant. Relevant testimony is usually admitted. Relevant evidence is evidence that tends to make a fact more or less likely.

Truck would say that the statement was irrelevant because the issue is not loss of control of the vehicle but running the red light or not. Therefore, driving conditions were irrelevant. W would respond that the information was relevant to determining if Dan could see the red light and whether George could see the incident. It seems that George did not see the incident.

A court would find that the question would be relevant because it would shed light on Dan and W's ability to see the signals.

3) Umbrellas up

Speculation

Truck would say that George was speculating whether it was raining or not. He lacked personal knowledge of whether it was raining but speculated that it was raining from open umbrellas. W would say that George may have had personal knowledge about the umbrellas and that would be sufficient.

A court would find that the fact was not established by his personal knowledge and hence the raining part would not be allowed.

Relevance

There would be the same objection as for question 2.

4) Tell me everything

Calls for a narrative.

Truck would say that the question was too open-ended. The point of direct exam is to ask specific questions and not allow ramblings that may lead to inadmissible evidence. Here, there are no bounds to the way that George could answer.

A court would find that there was a call for a narrative and would ask for a more specific question.

5) Guy's shouted statements

Hearsay

Hearsay is an out-of-court statement that is being offered to establish the truth of the matter asserted. Here, Truck would say the statement of the guy would be an out-of-court statement offered to prove that indeed the truck ran the red light. In fact, it was being offered for the truth, so if there is no exception, then it would be struck as hearsay.

Excited utterance

W would say that it was an excited utterance. An excited utterance is a statement made about a startling event that was made under the excitement of that event. W would say that seeing the accident would be sufficient excitement and that it was indeed made under the influence of that excitement. Here, there is an urgent call for an ambulance -- this would indicate that the statement about the red light was also made under the excitement.

A court would find that there was an excited utterance.

Present sense impression

W would say that there was a PSI. There must be a statement about what someone currently is sensing. Here, the guy is making a statement about a past sensation -- seeing the accident.

A court would not find PSI.

A court would allow the testimony as an excited utterance.

6) Truck over the speed limit

Personal Knowledge -- speculation

Truck would say that George lacks personal knowledge. He did not see the accident and therefore cannot make an assessment of its speed.

Here, a court would say that he did not have personal knowledge and would disallow the statement.

Lay opinion.

Truck would say that it was an improper opinion. Lay opinions are allowed if they are helpful, do not require expertise, and can be made on the facts.

Here, it would be helpful to know the speed. However, he did not have the fact because of lack of personal knowledge. Generally, there is lay opinion allowed for estimations of speed.

Here a court would find that it was an inappropriate opinion because there was no personal knowledge.

Hearsay

Truck would say that it is hearsay because it was offered to prove that it was speeding. This was an out-of-court statement even by the guy testifying.

A court would find that it was offered to prove the truth and not admit it because there was no exception.

7) Woman's statement; Dan's silence

Hearsay.

Truck would say that it was offered to prove that it was Dan's fault.

There would be no exception because it was not under excitement (she said it calmly) and it was an opinion based on a recollection that would not allow a PSI.

A court would not allow it to be admitted.

Admission by silence and vicarious liability

W would say that it is not hearsay at all because it is an admission by a party opponent. Dan's silence would be a hearsay statement as an admission of his guilt. He would be subject to the rule about admissions of party opponents because he was working for Truck and the comment was in the scope of his employment.

It would be an admission if: 1) a reasonable person would respond and 2) he had an opportunity to respond. Here, he could say something but did not. Also, with an accusation like that, he should have denied it. He would say he did not have to.

A court would allow the admission by silence because it was not hearsay -- as an omission by a party opponent. His statement would be inadmissible because he was in the scope of employment.

## **QUESTION 4**

To prepare herself for a spiritual calling to serve as a pastor at City's jail, Ada enrolled in a nondenominational bible school. After graduating, Ada advised the pastor of her own church that she was ready to commence a ministry and asked that her church ordain her. While sympathetic to her ambition, Ada's pastor accurately advised her that their church did not ordain women.

Ada began going to City's jail during visiting hours and developed an effective ministry with prisoners, particularly women inmates who increasingly sought her counsel. Ada noticed that ordained ministers who visited the jail received special privileges denied to her.

Dan, the jail supervisor, told Ada that ministers who were ordained and endorsed by a recognized religious group were designated "jail chaplains" and, as such, were permitted access to the jail during nonvisiting hours. He told Ada that she too could be designated a jail chaplain if she obtained a letter from a recognized religious group stating that it had ordained her as a minister and had endorsed her for such work.

Ada replied that her church was not part of any recognized religious group and would not ordain her anyway because she was a woman. She asked Dan nonetheless to designate her a jail chaplain because of the effectiveness of her work.

Dan refused to designate Ada a jail chaplain or to allow her the access enjoyed by jail chaplains. He acted pursuant to jail regulations adopted to avoid security risks and staff involvement in making determinations as to who was really a "minister."

Ada has brought suit in federal court to obtain an injunction requiring that she be designated a jail chaplain or be granted access to City's jail equivalent to those who have been designated jail chaplains. Ada's complaint is based on the grounds that the refusal to designate her a jail chaplain violates rights guaranteed to her and the prisoners by the First Amendment to the U.S. Constitution and also violates rights guaranteed to her by the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

How should Ada's suit be decided? Discuss.

## **ANSWER A TO ESSAY QUESTION 4**

Standing -- Federal courts are only empowered to hear cases involving real controversies, and a plaintiff has standing to bring a case only if he or she suffers, or will imminently suffer, an injury in fact that may be remedied by the court's action.

Here, Ada (A) alleges that she is being denied privileges that are afforded to others because of her particular religion, which is not "recognized," and because she is not ordained by her religion. Both, she argues, violate her constitutional rights under the first and fourteenth amendments to the U.S. Constitution. Thus, she has alleged an injury in fact sufficient to give the federal court the power to hear the case. Further, an injunction, if granted, directing the jail to grant her the additional privileges would remedy the injury. Thus, A has standing to bring the case.

Ada also appears to be raising the rights of prisoners in her action. A plaintiff may only raise her own constitutional rights, unless the persons she is seeking to represent are unable to vindicate their own rights, the proposed plaintiff has the same motivation to pursue the litigation as the rightholder, and the proposed plaintiff is capable of doing so. Prisoners are capable of raising their own rights, and A's motivations are not necessarily the same as the prisoners. Therefore, she will be precluded from raising the prisoners' rights in her lawsuit.

Eleventh Amendment -- In general, the eleventh amendment prevents a private individual from bringing suit in federal court against a state government. However, this prohibition does not apply to local governments, nor to individual state officers. A is bringing her suit both against "City" jail and, apparently, against Dan, the jail supervisor. She is also seeking injunctive relief. For these reasons, the eleventh amendment is not a bar to this suit.

State Action -- Generally where a plaintiff alleges violation of personal rights under the constitution, the violation must have been committed by a state or federal actor in order to be actionable. Here, A is primarily arguing that City Jail's actions violate her rights. City Jail is a political subdivision of state, and is therefore a state actor. However, Jail may argue that it is only implementing a classification (ordained vs. unordained) that is established by a private church, and therefore A's real injury is caused by a private, not state actor. However, the fact that Jail adopts the private entity's classification is enough to establish state action.

The fourteenth amendment clearly applies to the state. The first amendment only applies to the federal government, but the rights under the first amendment have been incorporated into the fourteenth amendment and are therefore applicable to the state as well.

### First Amendment

A may argue that the jail's policy of granting special privileges only to ordained pastors of established religions violates both the free exercise of religion clause and the establishment clause of the first amendment.

Free Exercise Clause -- The state may not impose restrictions on the free exercise of religion unless the restriction serves a compelling state interest and is narrowly tailored to serve that interest. A law of general applicability, however, which merely incidentally burdens religious practices will not be subject to invalidation. A will argue that the jail regulation is not generally applicable, since it focuses directly on "established" religions, and singles out these religions for special privileges. She will also argue that the regulation inhibits her ability to preach to inmates who are interested in receiving her ministry, and therefore impairs her free exercise of religion. Therefore, the burden will be on the state to demonstrate the necessity of the regulation to serve a compelling interest.

The jail will argue that the regulation serves important security interests, and that if all self-proclaimed ministers were given security clearances, it would raise the risk that some ministers are falsely representing themselves. However, the jail has alternative means of determining the security risk of a person claiming to be a minister other than classifying them as "ordained" and from "established" religions. Since the regulation is not narrowly tailored, the regulation does not pass the strict scrutiny test.

No Inquiry into Legitimacy -- Further, the regulation differentiates between established and non-established religions. This in effect amounts to an inquiry into the legitimacy of [sic]. The supreme court has held that the government may not inquire into the legitimacy of a religious belief. The regulation is invalid for this additional reason.

Establishment Clause -- The first amendment also prohibits the government from establishing a religion. A will argue that by giving preference to established religions, the Jail is giving support to those religions, and in effect establishing them. The establishment clause is not violated, however, if the regulation or statute at issue serves a secular purpose, has primarily a secular effect and does not entangle the government in religious matters.

Here, the jail will argue the regulation has the secular purpose of increasing security at the jail by limiting the number and types of outside visitors allowed in. However, the regulation clearly does not have a secular effect -- it impacts religious practice directly, by limiting the right of non-established religions to send their ministers, and it prevents unordained ministers from receiving privileges. Therefore, the second prong is not met.

The third prong is also not met. A will argue successfully that by allowing only established religions to send ministers to the jail, the state must get involved in determining what is an established religion. Although the jail has argued that it is limiting its entanglement with religious affairs by allowing the particular religion to determine who can be ordained, the mere acceptance of these decisions necessarily entangles the public entity in the religious organization's decisions.

The regulation will be found to be a violation of the establishment clause because, although it may serve a secular purpose, it has a non-secular effect and entangles the state in religious



affairs.

In addition, as discussed above, the regulation is a violation of the free exercise clause.

Equal Protection -- State and local governments may not discriminate against individuals on the basis of a suspect class unless the discrimination serves a compelling state interest and is necessary and narrowly tailored to serve that purpose. A classification based on a quasi-suspect class is subject to intermediate scrutiny -- the state must show an important interest being served, and the regulation must be necessary for the purpose. Further, if the disparate treatment is in relation to the exercise of a fundamental right, the state must also meet the stricter scrutiny standard of review.

A will argue that the disparate treatment is based on her affiliation with a non-established [sic] religion, her status as a non-ordained [sic] minister, and, indirectly, on her status as a woman (since her church won't ordain her because she is female). Further she will argue that the disparate treatment relates to the exercise of a fundamental right (the free exercise of religion).

Non-ordained [sic] and Non-Established [sic] -- Classifications based on religious titles or on membership in a particular religion are not suspect classes for purposes of the equal protection clause. Therefore, A must prove that the regulation serves no legitimate purpose and is not rationally related to this purpose.

The stated purpose is to increase security at the jail. This is a legitimate purpose. Further, limiting the ministers who are allowed to serve as chaplains to those who are endorsed by established religions tends rationally to limit these outside influences in a jail to those who are legitimately there for religious, and not ulterior, motives. Therefore, the regulation passes this low level of scrutiny.

Gender-Based Class -- Gender discrimination is a quasi-suspect class (see above for standard of review). The jail's regulation itself does not on its face differentiate between male and female chaplains, but A will argue that since some religious organizations, such as her own church, refuse to ordain females, the regulation has a discriminatory effect on women. However, A will have to show that the discrimination by the state was intentional, and there is no indication of this here, unless the jail knew when it passed the regulation that no, or almost no, religions ordain female ministers. The regulation also allows "endorsed" ministers to be considered chaplains, and arguably even those religions that don't ordain women may at least "endorse" them.

A will also argue that the private church's discrimination, though not directly actionable under the equal protection clause, has been endorsed by the jail through the use of the religion's classification system. This argument will succeed, and the jail will therefore have to meet the midlevel scrutiny.

Although security is an important issue, as discussed above, the regulation limiting chaplains to those who are ordained or endorsed does not appear to be necessary to ensure security. Therefore, if the church's discrimination against women will be applied to the jail, the regulation will be struck down for this additional reason.

Exercise of a Fundamental Right -- Because the classification involves the exercise of a fundamental right, the regulation is subject to strict scrutiny under the equal protection clause. However, the standard of review is identical to that provided under the first amendment, and therefore the discussion above is applicable here as well.

Thus, the regulation should be found invalid, and A should be given access to the jail as a chaplain (access during non-visiting hours) as requested in her injunction.

## **ANSWER B TO ESSAY QUESTION 4**

### Justiciable

For Ada's (S) suit to be heard in federal court, it must involve a case or controversy. The justiciable requirements ensure that the case or controversy requirement of Article III are met.

### Ripeness

A plaintiff's suit must represent a case ripe for review by federal courts. A suit for a declaratory judgment or a pre-enforcement injunction against a regulation or law may present an issue as to whether a case is ripe for review.

Here, A has already sought to be named a jail chaplain or receive jail chaplain privileges. Thus, her suit is ripe for review, because A is not seeking either a declaratory judgment or pre-enforcement review. A's injury by being denied the privileges as a jail chaplain is ongoing and occurring now.

### Mootness

Mootness doctrine prevents a federal court from continuing to hear a case when the case is no longer a live controversy, because the real world injury to the plaintiff has already ended. Here, A's case is not moot -- she is still being denied the rights of a jail minister.

### Political Question

Federal courts may not hear non-justiciable political questions. This case does not involve a political question.

### Abstention

Federal courts will in general abstain from enjoining an ongoing state criminal prosecution. There is no criminal prosecution in this case -- abstention does not apply.

### Standing

To be able to sue in federal court, a plaintiff must have standing, which includes injury in fact, causation and redressability.

### Injury in fact

A plaintiff must have suffered (or be about to suffer with a significant likelihood) an injury in fact. The injury may be the denial of constitutional or statutory rights, economic injury, or even environmental or aesthetic harm.

Here, A is suffering an alleged denial of her first and fourteenth amendment rights. Her first amendment rights to freely exercise her religion and to not have state action force an established religion on her have been allegedly denied -- her fourteenth amendment right to equal protection has also been denied. Moreover, A's desire to serve as a jail chaplain, and the denial of that by the jail, would alone probably qualify as enough of an injury in fact.

### Causation

The plaintiff's injury must have been caused by the defendant's action. Here, the denial of A's rights was caused by the City's refusal to allow her to be a jail chaplain. Thus, City's action caused A's injury.

### Redressability

The plaintiff's injury must be redressable by a court order. Here, an injunction from the court to require City to admit A as a jail chaplain would redress A's injury. Thus, there is redressability.

### Third Party Standing

Generally, plaintiffs may not assert the rights of third parties in filing suit. However, there is an exception when either the relationship between the plaintiff and third party is close (e.g.) doctor -- patient; buyer -- seller) or where the third party would be unlikely to assert their rights on their own.

Here, A is attempting to also assert a violation of the prisoner's first amendment rights. A court might hold that this is not appropriate because it is third party standing.

However, a court might also hold that the exceptions apply. Here, A does have a close relationship with the prisoners, as she is effectively serving as a minister to them. Also, the prisoners might be unlikely to assert their rights to have A serve as a jail chaplain, since they may not even know this is an issue. Thus, a court might allow A to assert the prisoners' rights in this case.

### State Action

The first amendment applies to states because it has been incorporated through the fourteenth amendment. The fourteenth amendment only applies to state action -- action by state governments.

This includes branches of state governments. Here, City is the party allegedly denying A's rights by not allowing her to be a jail chaplain. City is a municipality, and so is a branch of state government. Thus, there is state action.

### First Amendment

#### Free exercise clause: Ada

The first amendment prohibits state action that interferes with the free exercise of religion. However, neutral laws of general applicability with no intent to infringe on free exercise, but which happen to prohibit religious activity, are allowed under the first amendment.

Here, A would argue that the City rule prohibiting her from being a jail chaplain violates her free exercise of religion, because it keeps her from expressing her religion by ministering to inmates after visiting hours.

The City might respond that the law is of general applicability because it restricts access to visiting hours to everyone who is not a jail chaplain.

However, A would respond that the law is not a neutral law, because only members of "recognized religions" can become jail chaplains. Thus, the law explicitly distinguishes among religions and is not neutral.

### Strict Scrutiny

Since the law is not a neutral law of general applicability, and infringes on A's free exercise rights, it will be only upheld if it meets strict scrutiny. This requires the government to show that the law is necessary to fulfill a compelling state interest, and is narrowly drawn to meet that interest.

Here, the state has two possible interests: avoiding security risks and not having staff determinations as to who is really a minister. Avoiding security interests in a jail is clearly a compelling interest. However, avoiding staff determinations as to who is a minister does not appear to be compelling, because there is no clear reason why it matters if someone is a minister -- a non-religious psychiatrist, for example, might be just as helpful to the inmates. Thus, the security risk interest is the only compelling interest.

It also does not appear that the rule is narrowly drawn (and thus necessary) to serve the compelling interest of jail security. It is unclear that ministers from recognized religious groups would pose any less of a security threat than other ministers. Instead, background checks or the monitoring of visits would seem to serve the security interest much better.

Thus, the City policy would not meet strict security and should be struck down as violating free exercise.

### Free Exercise Rights of Prisoners

The prisoners have a free exercise right to receive A's ministry services, and to participate in those services after visiting hours.

On the other hand, prisoners' rights in jail may be curtailed more than other individuals' rights for valid penological reasons -- such as security.

However, again, the City policy is not neutral on its face, and thus strict scrutiny would apply. This is because inmates who share A's faith are denied A's help outside visiting hours, while others can receive chaplains at that time. The same analysis would be undertaken as above -- security would be a compelling interest, but the policy is not necessary to that interest, and so it would also violate the prisoners' free exercise rights.

### Establishment Clause

The first amendment also prohibits states from establishing any form of religion. The test as

to whether a state action establishes a religion is whether it (1) has a valid secular purpose, (2) has a primary effect that neither inhibits nor advances religion, and (3) does not result in excessive entanglement of the state with religion.

#### Secular Purpose

Here, City's policy has a secular purpose of reducing security risks and of avoiding staff determinations as to who is a minister. Thus, there is a valid secular purpose for the "recognized religion" requirement.

#### Primary Effect

However, City's policy does have the primary effect of advancing some religions, and inhibiting others. Here, "recognized religion" chaplains may enter the jail after visiting hours, while non-recognized chaplains may not. Thus, some religions have considerably greater access to prisoners, which they might use to proselytize, etc. Thus, the state action advances some religions and inhibits others.

City might argue that City's effect is not "primary" because non-recognized chaplains may still visit during visiting hours, so the impact is minimal. This would depend on how large a difference in time there is between visiting and non-visiting hours -- unless the difference is minimal (e.g., visiting hours last 20 hours/day), then this argument would probably fail and the effect would be primary.

#### Excessive Entanglement

The jail officers must determine what religions are "recognized." This is an excessive entanglement of the City with religion.

Thus, the City policy also is an unconstitutional establishment of religion.

#### Fourteenth Amendment

##### Equal Protection

##### Religion

A might argue that the City policy classifies and discriminates based on religion, and this either involves a suspect class or fundamental right. If the court argues with this, the analysis would be the same as for the free exercise clause of the first amendment, above.

##### Gender

The equal protection clause requires states to grant equal protection of the laws to all citizens. If one state denies a fundamental right to some citizens, or distinguishes based on a suspect classification, then the state action will undergo a heightened level of scrutiny. Otherwise, the rational basis test applies.

If a state law improperly classifies on the basis of gender, then intermediate scrutiny applies. The state must show that the classification is substantially related to an important government

interest (and also must provide an exceedingly persuasive justification).

Gender is only a classification for equal protection analysis if the law facially discriminates based on gender, or there is a discriminatory impact and a discriminatory intent to the law.

Here, the City policy does not facially discriminate against women, but only based on the type of religion.

A might argue that the city policy has a discriminatory impact -- most organized religions (including A's) do not ordain women. Thus, it is much more difficult, if not impossible, for women to qualify as jail ministers. Thus, there is a discriminatory impact.

However, there does not appear to be any discriminatory intent to City's action -- City's policy is instead based on staff and security concerns.

#### Rational Basis

Thus, no suspect class is involved, and only a rational basis test would apply. The burden is on the plaintiff to show that there is no conceivable legitimate state interest that could rationally be served by the policy.

Here, the City clearly has a legitimate interest in security. While City's policy may not be narrowly tailored to that policy (see above), it is certainly rationally related. Thus, any gender discrimination claims by it would fail.

#### Fundamental Rights

Strict security applies to any discriminatory denial of a fundamental right under the equal protection clause. Here, A's freedom of religion is allegedly denied because she is not part of an organized religion. Thus, strict scrutiny would apply under this claim -- the same analysis as for free exercise (above) would apply and the policy would be struck down.

## QUESTION 5

Ann, an attorney, represented Harry in his dissolution of marriage proceedings, which involved an acrimonious dispute over custody of Harry and Wilma's minor children.

Ann advised Harry that a favorable custody ruling would be more likely if he could show that Wilma had engaged in improper behavior. Two days after receiving this advice Harry came to Ann's office with his wrist heavily bandaged. Harry told Ann that, when he went by the family home the prior evening to get some of his things, Wilma had tried to run over him with her car, actually hitting him. This was the first suggestion of any violence between Harry and Wilma. After listening to Harry's story, Ann urged Harry to sue Wilma for assault and battery. Ann said: "Filing this suit will improve our bargaining position on custody." Ann did nothing to investigate the truth of Harry's story.

Just before the hearing on custody, Ann filed a tort action on Harry's behalf alleging Wilma had committed an assault and battery on Harry. Ann referred to the tort action at the custody hearing, and Wilma denied that the incident ever occurred. The judge, however, believed Harry's version and awarded sole custody to Harry.

Three months later, Ann learned that Harry had fabricated the story about how he injured his wrist. Ann did not report Harry's lie to anyone and merely failed to prosecute the tort action, which, as a result, was dismissed with prejudice. Wilma then sued Ann for malicious prosecution, abuse of process, and defamation. Wilma also filed a complaint against Ann with the State's office of lawyer discipline.

- A: What is the likelihood that Wilma can succeed on each of the claims she has asserted in her civil suit against Ann? Discuss.
- B: Did Ann's conduct violate any rules of professional ethics? Discuss.



## **ANSWER A TO QUESTION 5**

### **I. What is the likelihood that Wilma (W) can succeed on the following claims against Ann (A)?-**

#### **A. Malicious Prosecution-**

Malicious prosecution requires (1) filing of a claim against a party for a purpose other than seeking justice, (2) the claim being dismissed in the defendant's favor (3) that there was a not sufficient probable cause to bring the claim, and (4) damages.

On the first element, W will likely argue that A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, W may assert that the fact A filed the claim right before the custody hearing suggests that A's intent was to use the claim against W in the custody hearing. Because A did use the information of the claim in the custody hearing, W will likely meet the requirements of this element (additionally, that A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it).

On the Second Element, the claim was dismissed with prejudice in favor of W because A failed to prosecute the claim prior to filing. Therefore, this element is satisfied.

On the Third Element, W will argue that because the event did not occur, that it was impossible for A to have sufficient probable cause that the event occurred. W will further argue that A failed to make a reasonable investigation to determine whether there was any substance to H's claims (such as inspecting the car, arranging to depose W to determine if W was the driver . . . etc . . . .). While A may assert that she had probable cause due to H's injuries, such a line of argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there was insufficient probable cause to bring the claim for either battery or assault, W will win on this element.

On the Fourth Element, W must establish some form of pecuniary loss. Because W was required to undergo the expense of preparing to defend the claim against her, W has suffered loss.

Because W has met her burden on all of the elements, she will likely win here.

#### **B. Intentional Infliction of Emotional Distress-**

Further, W may seek damages for emotional distress under IIED. Because A's conduct was beyond the scope of social tolerance, and A had demonstrated recklessness by not pursuing an investigation, if W has suffered severe emotional distress, W may recover here.

#### **C. Abuse of Process-**

To establish abuse of process, a party must show (1) that a claim was brought to further an improper purpose, (2) that there was a sufficient act or threat used to accomplish that purpose, and (3) damages.

With regard to the first element, W may argue that the claim was not brought to adjudicate H's injuries, but rather to create false evidence to use against W in the child custody hearing. W may demonstrate that there was no proper purpose by showing that the claim was brought immediately before the child custody hearing even though the claim was not ready to file due to an insufficient investigation. Further, W may assert that the claim was raised as evidence in the hearing, and that after its usefulness had been served, A left the claim to wither by failing to even try and prosecute it. (Additionally, A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it.) While A may assert that she had a justification to file the claim due to H's injuries, such an argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there is sufficient evidence that the claim was brought to further H's interests in the custody hearing and not to adjudicate the alleged battery or assault, W will win on this element.

On the second element, W may assert that the act of filing the claim was intended to place pressure on the judge to award H custody by discrediting W's character. Because A filed a frivolous tort claim against W to achieve those purposes, A has engaged in a sufficient act under this element.

Because W has undergone damages, both emotionally (from the claim itself, and its effect in causing W to lose custody of her children) and economically (expenses in fighting the claim), there is sufficient damage here. Therefore, because W has satisfied all of the elements of the claim, she will likely win here.

**D. Defamation-** To establish a claim for defamation, the plaintiff must prove the following elements:

1. Defamatory Statement-

A statement satisfies the defamatory element if the statement causes harm to a person's reputation. W will argue that a charge of assault and battery ruined her reputation (as evidenced by the judge's decision not to grant W custody of the children). Unless A can show evidence that W had a reputation for being violent, W will win this element.

2. Of or Concerning the Plaintiff-

A statement can be said to be "of or concerning the plaintiff" if a reasonable person would know that the statement was about the plaintiff. Here, the claim was filed in W's name. Therefore, a reasonable person would be able to determine that the statement was concerning W.

3. Publication-

The publication element requires that the statement be memorialized in some medium, or communicated to a 3rd party. Here, the statement that W had assaulted H was not only written in a claim that is public record, the claim was raised in the presence of several persons in the courtroom. Therefore, this element is satisfied.

4. Damages-

As a general rule, a plaintiff does not need to establish damages if the statement was either libel or slander per se. Because the statement was recorded in writing and became public information, the statement is libel. However, W may assert that the statement was slander per se as well. A statement that reflects a crime of moral turpitude will fall under slander per se. W may argue that the battery against a spouse carries a high stigma in our society (and may use the judge's reaction as evidence). Because there is libel and slander per se, W will win on this element.

5. Are there any defenses?-

a. **Absolute Privilege-**

A may assert that absolute privilege applies here. Although A is not a state actor, she is an officer of the court and the statements made against W were in furtherance of her duty to her client as an officer of the court. However, A may assert that A's intention in bringing the claim was not to further H's interests with regard to the assault and battery and that A failed her duty to the court by bringing frivolous claim and should not be entitled to immunity. Because A did not know that H was fabricating his story at the time A filed the claim (even if filed for improper purposes), A should be entitled to privilege here and should not be held liable for defamation.

b. **Qualified Privilege-**

Does not apply.

II. Did Ann's conduct violate any rules of professional ethics?-

A. **Duties to the Court-**

1. Filing Frivolous Claims (Rule 11 FRCP)-

Under Rule 11, an attorney, by signing the pleading, agrees that: (1) attorney has brought an action for a proper purpose, (2) the attorney has not brought a frivolous claim, (3) the claim is supported by admissible evidence, and (4) a reasonable investigation have [sic] been conducted to ensure the above.

Here, A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, prior to filing the claim A was required to ensure that the claim was supported by admissible evidence. Because A failed to conduct a reasonable investigation to determine whether the evidence was valid, and the claim was meritorious prior to filing the claim, A has violated the rules of ethics.

2. Duty to not allow client to commit perjury-

Under the model rules, if a client admits that he/she has committed perjury, the attorney must advise the client to inform the court. If the client refuses, the attorney must attempt to withdraw from representation, and if withdrawal is not possible, the attorney must disclose the perjury to the court. However, under the CA rules, once an attorney has advised the client to disclose the perjury to the court, and the client refuses, the attorney cannot disclose the perjury.

Here, A discovered that H had lied about W trying to hit H with the car, and that H had feigned his injury. Under either of the above stated rules, A had a duty to advise her client to disclose the perjury to the court. However, A did not advise H to disclose the fabrication, but instead chose to allow the case to die without prosecution. Because A failed to take the critical step of advising H to disclose the lie, A has violated the rules of ethics under both the model rules and the CA rules.

3. Duty to Withdraw-

Under the model rules, an attorney cannot assist her client to commit fraud or a crime and must withdraw if the client insists that the attorney pursue these ends. In CA, an attorney's duty to withdraw is permissive, but not required. Here, although H did not ask A to commit fraud, A's failure to withdraw from representing H after learning that H had created his claim against W is questionable. That A failed to at least request H to drop the claim she knew was frivolous may rise to the level of participating in H's fraud.

**B. Duties to Client-**

1. Breach of Client's Authority-

While an attorney has the right to control the arguments and claims put forth, the client (in civil cases) has the right to determine the objectives of the case. Here, A has asked Harry (H) to file a claim against W for assault and battery. However, H did not consent to filing the claim prior to A's filing. However, because H did not challenge A's filing, H will likely be held to have implicitly ratified A's filing of the claim.

## **ANSWER B TO QUESTION 5**

### **1. Wilma v. Ann**

#### **a. Malicious Prosecution**

Malicious prosecution in a civil setting is usually referred to as malicious institution of civil proceedings. It occurs when: 1) a plaintiff institutes civil proceedings against a defendant; 2) the proceedings are instituted for an improper purpose; 3) the proceedings are resolved in favor of the defendant; 4) the proceedings were instituted without probable cause or a reasonable basis for believing their merit; 5) harm.

First, Ann instituted the tort action against Wilma for assault and battery of Harry.

Second, the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle. Additionally, Ann failed to investigate the facts involved in this situation before bringing the case. When a lawyer brings an action for any reason other than to vindicate the rights of the plaintiff, the purpose is improper. Therefore, Ann acted improperly when she instituted the proceedings against Wilma.

Third, the tort action was dismissed with prejudice when Ann failed to litigate it. Dismissal with prejudice means that Harry is precluded from bringing the action in the future. Therefore, this designation suggests that Wilma is "off the hook" for this tort action and the proceedings were, in fact, resolved in her favor.

Fourth, the facts suggest that Ann brought the action without a reasonable factual basis for believing in its merit. Ann suggested that Harry would have an advantage if he could show that Wilma had engaged in improper behavior. The fact that Harry came into Ann's office just 2 days after hearing this, claiming that Wilma had attempted to run him over with the car, creates a suspicious causal connection between the advice and the claim. Additionally, the facts indicate that this was "the first suggestion of any violence between Harry and Wilma" and should have put Ann on notice that the claim needed more investigation before bringing suit.

Ann will argue that she is entitled to believe in Harry's account, and the fact that he had a noticeably bandaged hand gave her a reasonable basis for bringing the suit. Since the judge in the custody hearing believed Harry, he must have been quite convincing. However, as discussed above, this probably is not enough basis to bring the suit, given the circumstances between Harry and Wilma's acrimonious custody battle.

Fifth, Wilma will certainly be able to show harm because the judge awarded full custody to Harry and she has no custody of her children.

Therefore, because all of these requirements indicate that Ann acted improperly, Wilma will likely be successful on her claim of malicious institution of civil proceedings.

b. Abuse of Process

Abuse of process occurs when a legal process or proceeding is used to gain an improper advantage and such advantage results in harm to the plaintiff. Here, Ann used the legal process of a civil claim in tort against Wilma for allegedly assaulting and battering Ann's client, Harry.

As discussed above, Ann used this process to gain an improper advantage in the custody hearing between Harry and Wilma. Her advantage was improper because the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle.

Wilma was also likely disadvantaged by Ann's use of the tort action against her. The facts indicate that the judge believed Harry's version of the story over Wilma's and awarded him sole custody of their children. Therefore, Wilma suffered harm and will be successful in showing that Ann abused process by bringing the tort action against her.

c. Defamation

Defamation is the: 1) publication 2) to a third party 3) of a statement about the plaintiff 4) that tends to adversely affect the reputation of the plaintiff. Here, Ann instituted a tort action for assault and battery against Wilma. By filing this complaint, she published in writing the accusations that Wilma acted violently with her husband. This publication is a form of libel. The publication was to a third party because it was filed with the court. Ann published the statements a second time by arguing about them before the judge in the custody hearing. This oral publication is a form of slander.

Because Wilma is not a public figure and the matter is not one of public concern, Wilma does not need to prove that the statement was false.

The statements were clearly about Wilma as the complaint had to name her as defendant and the statements in court must have expressly indicated Wilma as the tortious batterer. These accusations probably tend to adversely affect Wilma's reputation. The accusations suggest that Wilma has violent tendencies against her ex-husband. While some listeners might readily forgive such tendencies, a judge considering whether Wilma is a proper parent certainly would not. Therefore, the accusations not only tend to adversely affect Wilma's reputation but, in fact, hurt her reputation with the judge presiding over the custody hearing.

Defenses

No adequate defenses exist for the malicious prosecution or abuse of process actions.

### Common Interest

Ann will try to argue that she had a defense to the defamation action because she made the statements to parties with a common interest. However, this privilege is only a qualified privilege that can be extinguished with abuse. Even though Ann's publication to the judge and the court were to interested parties, Ann did not make any efforts to investigate the truth of the accusation and therefore she abused her privilege of spreading the accusations about Wilma.

### Absolute Litigation Privilege

Ann will argue that her comments to the court were privileged because comments in a courtroom have an absolute privilege. Because Ann's publications were to a judge and were in a tort complaint, they do qualify as protected under the absolute privilege for statements made in a courtroom. Therefore, Wilma's defamation action against Ann will fail.

## **2. Professional Conduct**

### Duty of Candor to the Court

As an officer of the court, lawyers owe the court a duty of candor. This requires that lawyers do nothing to promote fraud on the court. Ann may have violated this duty by instituting a tort action against Ann without fully investigating the facts first and for the improper purpose of gaining an advantage in the custody battle. Furthermore, she planted the idea in Harry's mind to fabricate conduct about Wilma, thus aiding a client to defraud the court.

When a client seeks representation that would require the attorney to engage in conduct that violates a law or ethical standard, the attorney must withdraw from the representation. Ann should not have represented Harry in this action and should not have counseled her client to improperly gain an advantage by claiming a tort injury. Therefore, Ann will be subject to discipline for this conduct.

Additionally, Ann may have violated her duty of candor to the court when she learned that Harry's story about Wilma was fabricated and merely failed to prosecute the tort action against Wilma.

The ABA Model Rules require that lawyers may not assist their clients in lying to the court. The ABA and California rules say that lawyers may withdraw if they learn that a client has used the lawyer to assist them in a past crime or fraud. California rules of conduct say that lawyers must do nothing to further the deception.

Here, when Ann found out about Harry's lies, she merely failed to prosecute the action against Wilma rather than withdrawing the action. This may have violated her duty of candor to the court because she allowed the case to remain on the docket even after finding out about the lie. Therefore, Ann may be subject to discipline for this action.

### Duty Not to Suborn Perjury

Lawyers must not aid clients in suborning perjury. Here, Harry lied to the judge during the custody hearing by claiming that Wilma had engaged in tortious conduct. The ABA would allow Ann to withdraw. California does not allow Ann to do so but she must do nothing to further the deception. In either case, Ann should have counseled Harry to retract his lies to the judge so that the judge would be able to properly rule on the custody matter with truthful facts.

### Duty of Fairness to the Adversary

Lawyers owe a duty of fairness to their adversaries. This duty precludes lawyers from engaging in conduct that obstructs the truth-seeking process. By filing a suit to gain an advantage in the custody battle, Ann violated her duty of fairness to Wilma as the adversary. Therefore, Ann is subject to discipline for this violation as well.

### Duty of Competence

The rules of professional conduct require that lawyers competently serve their clients. The duty of competence requires lawyers to possess all of the knowledge, skill, thoroughness and preparation necessary for the representation.

Here, Ann may have violated her duty of competence by suggesting that Harry find some improper behavior in Wilma and by urging Harry to file a tort claim for assault and battery without first investigating all of the facts. When Harry came to Ann just two days after Ann's suggesting that Wilma's improper behavior would advantage [sic] Harry in the custody battle, Ann failed to prepare for tort litigation by investigating the facts of the incident. She merely accepted Harry's word.

Additionally, because this was the first suggestion of violence between Harry and Wilma, Ann should have been on notice that investigation was necessary. Therefore, Ann is also probably subject to discipline for violating her duty of competence in failing to adequately prepare for the tort claim against Wilma.



## **QUESTION 6**

Ted, a widower, had a child, Deb. He had three brothers, Abe, Bob, and Carl.

In 1998, Abe died, survived by a child, Ann. Ted then received a letter from a woman with whom he had once had a relationship. The letter stated that Sam, a child she had borne in 1997, was Ted's son. Ted, until then unaware of Sam's existence, wrote back in 1998 stating he doubted he was Sam's father.

In 1999, Ted executed a will. With the exception of the signature of a witness at the bottom, the will was entirely in Ted's own handwriting and signed by Ted. The will provided that half of Ted's estate was to be held in trust by Trustee, Inc. for ten years with the income to be paid annually "to my brothers," with the principal at the end of ten years to go "to my child, Deb." The other half of the estate was to go to Deb outright. One month after Ted signed the will, Ted's second brother, Bob, died, survived by a child, Beth.

In 2000, Ted died. After Ted's death, DNA testing confirmed Ted was Sam's father.

What interests, if any, do Deb, Sam, Ann, Beth, and Carl have in Ted's estate and/or the trust? Discuss. Answer according to California law.

## ANSWER A TO ESSAY QUESTION 6

### In re: Estate of Ted (T)

I will first discuss the validity of the will, and then discuss the terms of the will, which includes the trust. Then I will discuss how the estate should be distributed, according to those terms, and then how that distribution would be altered by Sam's claims.

#### I. Validity of Will

Under California law, a valid will must be signed by the testator, signed or attested before two witnesses at the same time, who know the items in a will, and who then sign the will. Further, the testator must have the intent that this document be his will.

Here, while the will was signed by T, it was not properly witnessed -- it appears only one witness signed, and the law requires that two sign. Therefore, this will does not comply with will formalities.

However, this will is valid as a holographic will. Holographic wills are valid in California. A holographic will is one in which all of the material terms of the will -- testamentary intent, property to be distributed, and intended beneficiaries -- are all in the testator's handwriting (intent can be found as a commercially prepared will form, but that is not applicable here). Next, the holographic will must be signed by the testator.

Here, those requirements are met. The entire will was written by T (under the witness' signature), so the material portions are in T's handwriting (he expressed his intent, disposed of his property, and named his beneficiaries) and he signed the will.

#### II. Terms of the Will

Half of the estate goes to Deb (D). The other half goes to the trust.

A trust is a disposition of property which separates equitable title, held by the beneficiaries, from the legal title, held by the trustee. The trustee must manage the trust for the benefit of the beneficiaries.

#### A. Validity of Trust

For a trust to be valid, there must be: 1) a trustee; 2) funding of the trust; 3) ascertainable beneficiaries; and 4) no violation of public policy.

Here, a trustee has been named -- Trustee, Inc. Even if Trustee, Inc. is not actually still in existence, the trust will not fail. Trusts do not fail for want of a trustee -- the court will just name one.

Next, the trust has ascertainable beneficiaries. The trustee must be able to identify the

recipients of the trust. Here, Deb may argue that the beneficiaries are not ascertainable because none are listed by name. However, here there is a class gift. T left the income of the trust for 10 years "to his brothers." A trustee can identify his brothers.

D may argue this class gift violates the Rule against Perpetuities. Under the rule, an interest must vest if at all with 21 years of a life in being at execution. Here, D would argue that T could still have more brothers. However, at T's death, the class closes due to the Rule of Convenience, so the interest vests.

Next, the trust is funded by the transfer from the will to the trust at death. This is called a testamentary trust and is valid.

Finally, there is no improper purpose for this trust. Therefore, the trust is valid.

### III. Distribution

Here, I will discuss the distribution as if Sam's claims are denied. I will discuss the impact of his claims on this distribution later.

#### A. Deb's ½ of Estate in the will

Deb takes this share outright.

#### B. Distribution of trust.

As discussed above, the income of the trust is distributed to T's brother for ten years. The issue is which brothers or their issue share in this class gift.

When T died, Carl was still alive, and Abe and Bob had already died. Carl will argue that he is the only surviving member of this class, so he takes the ½ interest outright. He would argue that Abe and Bob's interests had lapsed, and so failed.

However, California has an anti-lapse statute. Under the statute, if: 1) the dead beneficiary was related to the testator, 2) the dead beneficiary was survived by issue, and 3) there is no contrary intent, then the dead beneficiary's issue represent him and take his share. In California anti-lapse also applies to member of a class gift, unless a member of that class died before execution and the testator knew that.

Here, Bob died one month after T executed the will, so he qualifies for anti-lapse application under the statute. Further, Bob satisfies the statute -- he is related to T (his brother), he is survived by issue (Beth) and there is no contrary intentions in the will, like a survivorship clause. Therefore, Beth joins Carl in the class.

However, Abe died before execution of the will, and provided T knew this, which he probably did because people usually know when their siblings die, Abe does not qualify for protection under the statute because he fails the class gift requirements. Therefore, even though Abe

satisfied the statute, Ann cannot avail herself of the statute and so will not join the class.

Therefore, Carl and Beth are entitled to the income from the trust for 10 years. Once the ten years are up, Deb gets the principal and therefore, the entire estate.

#### IV. Sam's Claims

Sam, if he can prove he is T's son, has several claims.

First, Sam must prove he is T's son. During life, Sam could prove paternity by admission of T, being listed on a birth certificate with T as father, or by being born in marriage between his mom and T. Here, during T's life paternity was never established. T wrote back to Sam's mom saying he doubted he was Sam's father, and T was unaware Sam existed, so they never held out a relationship.

After death, paternity can be proven, but it must be by clear and convincing existence. Here, DNA confirmed T was S's father, which is convincing and clear evidence, so Sam can pursue the following claims.

##### 1. Pretermitted Child

By statute, a child born after execution of a will can take an intestate share if he was not taken care of in the will, outside of the will, there is no contrary interest, and the parent did not leave most of the estate to the surviving spouse.

Here, S was born in 1997. T learned of this in 1998. T executed his will in 1999. Therefore, because T executed his will after S was born, S cannot avail himself of this statute.

##### 2. Unknown Child

By statute, a child born before the will was executed, who was not provided for in the will or outside the will in other instruments, is entitled to an intestate share if the testator did not know of the child's existence, and did not provide for the child because of that belief, either by mistakenly believing the child was dead or never born.

Deb will argue that T knew of Sam's existence when he executed the will. T received a letter in 1998 telling him he was Sam's dad. Therefore, Sam cannot qualify under the statute.

Sam will argue that, although T knew Sam existed, he did not know Sam was his child. This proof did not come out until after T died, with the DNA testing. Sam will argue that had T known S was his child, T would not have omitted him.

However, that belief must be the but/for cause of the omission. Here, it appears that T was not interested in Sam -- he made no attempt to determine paternity, or to establish a relationship with Sam, so Sam cannot qualify under this statute.

If he did, he would get an apportioned share of the entire estate.

## **ANSWER B TO ESSAY QUESTION 6**

Validity of Will: CA recognizes the validity of wills that are valid under CA law or the law of other states where a person executed the will. I will assume Ted died and executed his will in CA.

CA recognizes attested, statutory and holographic wills. A holographic will must be signed by the testator and the material provisions in the handwriting of the testator. Here, Ted signed the will and the entire will, which would include material provisions, was in his handwriting. Therefore, the will is valid.

Validity of Trust: A will may create a trust. Ted's will created a trust. A trust must have: (1) settlor with capacity. Ted is a settlor and has capacity. (2) Present intent to create: Ted intended [that] his will create the trust. (3) Trust property existing and ascertained. Ted's estate meets this requirement. (4) Beneficiaries existing within the rule of perpetuities. All Ted's provisions require that beneficiaries take within 10 years. Therefore, all beneficiaries will be existing within the Rule Against Perpetuities, and (5) Valid Purpose: A trust for relatives is a valid purpose. Further, Ted already has a trustee. The trust is valid.

Ann, Beth and Carl:

Carl: Carl definitely takes a share of the trust income because he is a surviving member of a named class: "Ted's Brothers." The share he takes, however, depends on the claims of everyone else.

Beth: Any rights Beth have come from her father, Bob. Bob predeceased Ted. Therefore, Bob and his issue do not take under the instrument. However, Beth may take under CA Anti-lapse, which states: if a beneficiary predeceases the Testator (Note: Anti-lapse applies to all testamentary instruments including trusts), that person's issue takes his share unless a contrary intent. Class gifts are included in Anti-lapse. Therefore, Beth will take her father Bob's share. (See Ann for more Anti-lapse)

Ann: Same analysis except as Abe's daughter as Beth until Anti-lapse. Another exception to anti-lapse is that if a class gift is made and one member of the class is dead when made, anti-lapse does not apply to that person if testator knew he was dead.

Here, Ted likely knew his brother Abe was dead (Abe died in 1998) when he made his will in 1999. Plus, Abe is a member of a class gift. Therefore, Ann will not take unless Ted did not know of Abe's death; then she will take his share of anti-lapse.

Deb: Deb will take the shares described in the instrument because the trust and will are valid. However, her share may be altered by Sam's claims.

Sam: Sam will not take under the instruments. Sam may take under CA's Omitted Child

Provisions. Since Ted died in 2000, the omitted child provisions apply to all testamentary documents.

An omitted child is a child: born after execution of the instrument(s), thought dead, or not known by testator to be born.

Here, Ted knew of Sam, but did not know Sam was his child. However, after execution of the instrument(s) and in fact after Ted's death, DNA proved Sam was the child of Ted. Therefore, Sam may qualify as constructively being born after execution or that he was not known to be born. One of these arguments should work because as to Ted Sam was not known to be born.

Therefore, the omitted child provision should apply unless Ted provided for Sam outside the instrument, intended to exclude or gave most property to the surviving parent.

Deb will argue that Ted intended to exclude Sam because Ted knew of Sam and doubted that he was Sam's father. Deb's argument likely fails because Ted never knew Sam was his child and neither of the other exceptions even remotely qualifies.

Therefore, Sam will very likely take his omitted child's share, which is his intestate share.

Sam's Intestate Share: Since Ted had no surviving spouse, his issue are his intestate successors. Ted had two issue, Deb and Sam. The intestate share is  $\frac{1}{2}$  of Ted's estate each. However, since Deb takes under the will, she does not take under intestacy.

Sam's Share:  $\frac{1}{2}$  the estate prior to it going into the trust or to Deb if he is an omitted child. If not, he gets nothing.

Summary:

1. Beth and Carl likely split the trust income for 10 years unless Ted did not know of Abe's death. In that case, Ann, Beth and Carl split the income.
2. Deb takes the principal of the trust after 10 years and  $\frac{1}{2}$  the estate outright subject to Sam's interests.
3. Sam likely takes  $\frac{1}{2}$  the estate before any other dispositions are made. Or he takes nothing.