



California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

July 2004

**ESSAY QUESTION AND SELECTED ANSWERS**  
**JULY 2004 CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from July 2004 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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TUESDAY MORNING  
JULY 27, 2004

# California Bar Examination

Answer all three questions.  
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and 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 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

On August 1, 2002, Dan, Art, and Bert entered Vince's Convenience Store. Dan and Art pointed guns at Vince as Bert removed \$750 from the cash register. As Dan, Art, and Bert were running toward Bert's car, Vince came out of the store with a gun, called to them to stop, and when they did not do so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert's car and fled.

Dan and Bert drove to Chuck's house where they decided to divide the \$750. When Chuck said he would tell the police about the robbery if they did not give him part of the money, Bert gave him \$150. Dan asked Bert for \$300 of the remaining \$600, but Bert claimed he, Bert, should get \$500 because his car had been used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the remaining \$600 for himself and removed the money from Bert's pocket.

On August 2, 2002, Dan was arrested, formally charged with murder and robbery, arraigned, and denied bail. Subsequently, the court denied Dan's request that trial be set for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3, 2003, the court granted, over Dan's objection, the prosecutor's request to continue the trial to September 1, 2003, because the prosecutor had scheduled a vacation cruise, a statewide meeting of prosecuting attorneys, and several legal education courses. On September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if so, on what theory or theories, for:
  - a. The death of Art? Discuss.
  - b. The death of Bert? Discuss.
2. May Chuck properly be convicted of any crimes, and, if so, of what crime or crimes? Discuss.
3. How should the court rule on Dan's motion to dismiss? Discuss.

## Answer A to Question 1

1)

### 1. A. Dan - Liability for Art's Death

#### Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice can be shown by either intent to kill, intent to cause grievous bodily harm, or reckless indifference to human life. Here, Dan is probably not liable under any of these theories. Because Vince, the shopkeeper, shot Art, causing his death, Dan did not exhibit intent to kill or cause grievous bodily harm. Likewise, fleeing probably does not constitute reckless indifference to human life.

#### Felony Murder Rule

However, Dan might be convicted under the felony murder rule. The felony murder rule holds defendants liable for foreseeable killings committed during the commission of inherently dangerous felonies. Here, Dan, Art, and Bert were engaged in a robbery. A robbery is the taking and carrying away of the personal property of another by force with the intent to permanently deprive the victim of the property. Dan, Art and Bert robbed Vince because they took \$750 from him at gunpoint, with the intent to keep the money. A robbery - especially an armed robbery of a convenience store - is likely an inherently dangerous felony. Art's death was the kind of death that frequently results from armed robberies, and thus was foreseeable.

#### Limitation of Felony Murder Rule - Fleeing

Liability for felony murder generally ends when the felons reach a place of safety after the felony. Here, because Art was killed while fleeing - before the felons reached a place of safety - this limitation will not apply.

#### Limitation on Felony Murder Rule - Death of a Co-Felon

However, most states have enacted limitations on the felony murder rule when the death of a co-felon is at issue. Under states that follow the agency rationale, a defendant can be found guilty if the killing was done by a felon or his agent. Under this view, Dan is likely not liable for felony murder because it was Vince rather than Dan or Bert who shot Art.

Under the proximate cause view of the felony murder rule, any killing proximately caused by the felony can make a defendant liable for felony murder. Under this rule, it is arguable that Dan should be liable for Art's death. Being shot while fleeing from a convenience store robbery is foreseeable. Thus, if the jurisdiction follows this view, Dan might be liable

for Art's death under a felony murder theory.

### First Degree Murder

In most states, first degree murder requires premeditation or deliberation. Many states also include murders that fall under the felony murder rule in the definition of first degree murder. Thus, if this jurisdiction adheres to that view, Dan may be liable for first degree murder for Art's death.

### Second Degree Murder

Second degree murder generally is murder that does not involve premeditation and deliberation, but also does not amount to any form of manslaughter. If the applicable statute defines felony murder as second degree murder, Dan may be liable for that crime instead.

### Conspiracy

Conspiracy requires an agreement to commit a crime between two or more people, an intent to agree, an intent to commit a crime, and an overt act. A conspirator is liable for all reasonably foreseeable crimes committed in furtherance of the conspiracy. Here, Art, Dan, and Bert clearly agreed to rob Vince's store with the intent to commit the crime. Conspiracy does not merge with the completed crime. Thus, if Dan was liable for conspiracy, and a court found that Art's death was foreseeable, Dan could potentially be liable on these grounds as well. However, this is a stretch, especially since Vince killed Art.

## B. Dan's Liability for the Death of Bert

### Murder

As mentioned, one potential grounds of liability for murder is intentional killing or killing with an intent to cause great bodily harm. Here, Dan probably intended to kill Bert or at least intended to cause him great bodily harm. Dan simply shot Bert - there is no indication that he was merely trying to scare him.

### First Degree Murder

Dan may be liable for first degree murder. Although premeditation and deliberation are generally prerequisites to a charge of first degree murder, some courts have held that one can premeditate or deliberate in very short periods of time. However, Dan will argue that he was "enraged" and had no time to deliberate or premeditate. Due to the spontaneous nature of the crime, Dan will likely not be found guilty of first degree murder. In addition, as discussed below, he is likely not guilty of felony murder. Thus, even if the state murder statute includes felony murder as first degree murder, Dan will likely not be liable for this

crime.

### Second Degree Murder

Dan is much more likely to be guilty of second degree murder. As discussed above, he intended to kill Bert, but likely did not premeditate or deliberate. As discussed below, he is unlikely to be guilty of voluntary manslaughter or felony murder.

### Felony Murder

A felony murder charge against Dan would be problematic. For one, liability for felony murder generally ends when the perpetrators have reached a place of safety. Dan and Bert had reached Chuck's house when Dan killed Bert. Indeed, they had begun to divide up the money. This would likely cut off any liability for felony murder based on the robbery of Vince's store.

In addition, the prosecution might argue that Dan is liable for felony murder because he took \$600 from Bert's pocket. The prosecution might argue that this is a robbery, and that Dan's killing was a foreseeable result of the robbery. However, this is a weak argument. Dan only decided to take the money from Bert after he shot him. In addition, Dan might also be able to argue that since Bert did not have lawful title to the money, no robbery took place. This is because one element of a robbery is that the money be "property of another." Thus, Dan is likely not liable for felony murder for Bert's death.

### Voluntary Manslaughter

Dan may argue that he is only liable for voluntary manslaughter. Voluntary manslaughter is a killing that would be murder, but was conducted while the perpetrator was highly upset. The upsetting incident must be the sort that would upset a reasonable person, the defendant must have been upset, a reasonable person would not have had time to cool off, and the defendant must not have cooled off. Dan will argue that he was "enraged" by Bert's demand of extra money. However, this argument is unlikely to succeed. For one, Bert's actions do not rise to the type of extremely upsetting provocation that generally suffices to reduce a murder charge to voluntary manslaughter. Moreover, there is no indication that a reasonable person would have had such a violent reaction to Bert's demand for money. Thus, Dan is likely not liable for voluntary manslaughter.

### Conspiracy

As discussed above, any underlying conspiracy to rob Vince's store had likely ended by the time that the robbers reached Chuck's house.

## 2. Chuck's Liability

### Accessory After the Fact

Chuck is likely guilty of being an accessory after the fact. An accessory after the fact is one who shields, shelters, or assists criminals after a crime. Chuck is clearly aware that Dan and Bert have committed a robbery. He threatens to tell the police about the crime unless he receives some of the money. He provides his house as a safe haven for Dan and Bert. If found guilty of this charge, Chuck would not be guilty as an accomplice - he would simply be guilty of an independent, lesser offense.

### Accomplice

Chuck is probably not an accomplice to either Dan's killing of Bert or the robbery of Vince. To be an accomplice, one must assist a crime with the intent that the crime be committed. Here, there is no indication that Chuck had any idea that Dan, Art and Bert were going to rob Vince's store. In addition, given the spontaneous nature of Dan shooting Bert, there is no indication that Chuck intended that crime either. Mere presence at a crime scene does not necessarily result in accomplice liability.

### Extortion

Chuck perhaps is guilty of extortion. Extortion involves the obtaining of property through threats. Here, Chuck threatened to tell the police about the robbery. As a result, he obtained \$150 from Dan and Bert. Thus, because he obtained property through the use of threats, he might be guilty of extortion.

### Conspiracy

There is no indication that Chuck was involved in any agreement - or even knew about - the convenience store robbery. Also, Dan seems to have acted alone when he shot Bert. Accordingly, Chuck is likely not be [sic] guilty of conspiracy.

### Misprisi]on of Felony

If the jurisdiction recognizes this crime, Chuck may be guilty because he aided and assisted Dan and Bert to cover up their crime.

### 3. Dan's Motion to Dismiss

The Sixth Amendment to the United States Constitution protects an accused's right to a speedy trial. When evaluating whether such a right has been violated, courts consider several factors. Among them are the reason for the delay, whether the defendant has objected to the delay, and the length of the delay.



Here, Dan's strongest argument is that the prosecutor's reasons for delaying the trial are simply not compelling enough to warrant impinging upon his constitutional rights. The prosecutor's desire to go on vacation and attend meetings and legal education classes seems more like a personal pred[ic]tion than a good reason to delay Dan's trial. Dan will languish in jail during this time - nearly thirteen months after he was arrested and arraigned. Moreover, with the exception of the vacation, it is not at all clear why the prosecutor cannot attend the meeting or legal education courses on his own time. Finally, in any event, it is not clear why those events warrant delaying the trial from January 3 to September 1 - a delay of nine months. Dan will also note that he initially moved to have trial set in October, 2002. Finally, Dan will point out that the prosecutor's motion was granted on Jan. 3, which was essentially the eve of trial. Waiting until the last minute to continue a trial so long seems unfair and may have prejudiced his ability to mount an effective defense.

However, the prosecution will counter that Dan should have moved to have his charge dismissed on Jan. 3. Indeed, Dan waited until September 2 to move to dismiss. Although he "objected" on Jan. 3, he should have moved to dismiss then. By waiting to move to dismiss until after the trial began, Dan likely waived his rights. Accordingly, Dan's motion should be denied.

## Answer B to Question 1

1)

May Dan ("D") be convicted of murder.

The first question is whether Dan may be convicted of murder in the 1<sup>st</sup> or 2<sup>nd</sup> degree. At common law, murder was the unlawful killing of a human being with malice aforethought. Malice aforethought was committing murder with any of the following mental states (1) intent to kill, (2) intent to do serious bodily harm, (3) reckless indifference to the unjustifiably high cost to human life and (4) intent to commit a felony. The types of felonies included in felony murder were inherently dangerous felonies.

Murder in the first degree is a statutory creation that involves the unlawful killing of another human being with premeditation and deliberation. In addition, many state statutes have also included in the definition of murder in the first degree murders committed while committing a felony -- also enumerating inherently dangerous felonies.

Voluntary manslaughter is the unlawful killing of a human being which would be murder but for the existence of adequate provocation, and involuntary manslaughter is the killing of another human being with criminal negligence or during the commission of an unenumerated felony or misdemeanor.

2d Degree murder is a residual murder category that covers the unlawful killing of another human being that does not fall within the Murder in the 1<sup>st</sup> Degree or Voluntary or Involuntary Manslaughter categories. With this in mind, we can investigate whether Dan is liable for murder in the first or second degree.

All homicide crimes also require actual and proximate causation as well as the result of death.

### KILLING OF ART.

Here, Dan did kill Art. Vince killed Art. Thus, the only theory that could convict Dan of the murder of Art would be the felony murder. Here, Art and Dan and Bert were committing robbery, an inherently dangerous felony.

Robbery is the taking of personal property of another from their person or presence by force or threats of force with the intent to permanently deprive.

Here, Dan, Bert and Art entered the convenience store and pointed guns at Vince (the requisite threat of force) and took \$750 (personal property) from Vince's person. This, especially because of the existence of guns, qualifies as an inherently dangerous felony that should rise to the level of a felony that would qualify for Felony murder. Thus,

because the killing of Art took place whil[e] Dan was committing an inherently Dangerous felony, if this occurred in a jurisdiction where felony murder is included in the definition of first degree murder, Dan could be guilty of first degree murder.

There are however some limiting doctrines to felony murder. Notably in this instance, the killing must be a foreseeable result of the felonious conduct, and the redline view of felony murder provides that defendants cannot be guilty of felony murder for the murder of one of their co-felons by the police or by third parties. Thus, although the killing of Art certainly is a foreseeable result of committing a robbery, if this is a jurisdiction that follows the redline view, Dan will not be guilty of felony murder for Art, and will not be guilty of either first or second degree murder for Art.

It is noteworthy that Vince's killing of Art was not lawful because one may never use deadly force in defense of property, and here, Vince chased Art out of the store (after the physical danger to him passed) and killed Art, when Art failed to stop.

### FOR DEATH OF BERT

The next question is whether Dan can be guilty of murder in the first or second degree of Bert.

The standards for murder in the first and second degree are set forth above. Here, the question will revolve around whether (1) Dan possessed the requisite premeditation and deliberation to kill Bill, (2) whether Dan could be guilty of felony murder, since this happened right after the robbery, or (3) whether adequate provocation existed to reduce the killing to a charge of involuntary manslaughter.

#### Premeditation.

Dan can be guilty of first degree murder of Bert if he committed the murder with premeditation and deliberation. Here, the facts do not indicate that he possessed that premeditation. Dan and Bert just committed a robbery together and were returning to divide the money. There is nothing to suggest that he had a prior plan to kill Bert. In fact, he only became enraged when Bert insisted on taking the entire share for himself. Thus, on these facts, he cannot be convicted of first degree murder on a premeditation and deliberation theory.

#### Felony Murder

The next question is whether he could be convicted of felony murder for the murder of Bert. Dan did just commit a felony (robbery) as discussed above. He had the requisite intent to commit that felony and it was an inherently dangerous felony. Thus, could his killing of Bert qualify for felony murder?

The felony murder rule also has the limited doctrine that the killing must occur during the commission of the felony. Once the felons reach a point of temporary safety, they are no longer considered as carrying out the felony for purposes of the felony murder rule.

Here, Dan and Bert had reached the safety of Chuck's house and[,] therefore, were no longer in the commission of a felony and[,] therefore, Dan cannot be guilty of felony murder.

### 2d Degree Murder and Voluntary Manslaughter

The next question is whether adequate provocation existed to make the killing a voluntary manslaughter. If not, the murder will fall into the residual category of Murder in the 2d degree. Here, since Dan acted with intent to do serious bodily damage to Bert (he shot and killed him), or at a minimum proceeded with reckless disregard for the unjustifiably high risk to human life, he will be guilty of second degree murder if the charge isn't reduced to voluntary manslaughter.

Vol manslaughter requires (1) provocation arousing extreme and sudden passion in the ordinary person such that he would not be able to control his actions, (2) the provocation did in fact result in such passion and lack of control, (3) not enough time to cool off between the provocation and the killing [g] [gna] d (4) the defendant did not in fact cool off.

Here, Bert refused to give Dan his \$300. While it is understandable that the failure to give such money would arouse anger in an ordinary person that had just put their freedom and life on the line in a robbery attempt, we are only talking about \$300. While understandably angry, it is hard to imagine that an average person would lose control over \$300 to the point of taking another person's life. Thus, Dan will not qualify for the reduction to voluntary manslaughter and will be convicted of 2d degree murder.

### MAY CHUCK BE CONVICTED OF ANY CRIMES

The possible crimes Chuck could be convicted of is [sic] either all of the crimes that the principals committed (under an accomplice liability theory), or at a minimum an Accessory After the Fact.

### ACCOMPLICE LIABILITY

If one aids, abets or facilitates the commission of a crime with the intent that the crime be committed, one can be found guilty on accomplice liability theories. The scope of liability includes liability for the crimes committed by the principals and all other foreseeable crimes. The common law used to distinguish between principals in the first and second degrees and accessories before and after the fact. Largely those distinctions have been discarded, although, most jurisdictions still do recognize the lesser charge of accessory after the fact.

Here, there is no evidence that Chuck aided, abetted or facilitated the crime until after it was committed. He provided a safehouse and subsequently demanded money. But mere presence or knowledge is not enough to ground accomplice liability.

### ACCESSORY AFTER THE FACT

However, Chuck did assist after the crime happened (he provided a safehouse, and agreed not to tell the authorities in exchange for money), so at a minimum he will be guilty of accessory after the fact.

### Extortion

Chuck may also be liable for extortion. Extortion is the illegally obtaining property through threats of force or threats to expose information. Here, he threatened to expose the criminals to the police if he didn't get paid, and so he will be liable.

### Receiving Stolen Property

Chuck also will be liable for receiving stolen property. The requirement for this crime are [sic] that you know the circumstances around the property (ie, that it is stolen) and that you willing [sic] receive it. Chuck knew this money was the fruit of a robbery and received it in exchange for his providing a safehouse. Thus he will be liable of receipt of stolen property.

### CONSPIRACY

Chuck also could be guilty of conspiracy. Conspiracy is (1) an agreement between two or more people, (2) the intent to agree, (3) the intent to pursue an unlawful objective and (4) in some jurisdictions, some overt act. Conspiracy does not merge into the completed crime.

### HOW SHOULD COURT RULE ON DAN'S MOTION TO DISMISS.

The 6<sup>th</sup> amendment provides each defendant the right to a speedy trial. The 6<sup>th</sup> amd is applied to the states through its incorporation into the due process clause of the 14<sup>th</sup> amendment. The right to a speedy trial attaches post charge. Whether the defendant has been given a speedy trial depends on an analysis of the totality of the circumstances.

Here, Dan was arrested on August 2, and immediately charged. Thus his right to a speedy trial attached sometime in early August. The initial trial date was set for January 5, 2003. It is not likely that the denial of Dan's request for a trial 2 months after his charge is a violation of his constitutional rights since the court set a date very closely thereafter in January. However, the prosecutor's delay subsequent to that date does not rise to the level of providing adequate excuse for moving Dan's date (coupled with the fact that the request was made only days before the January trial was to commence). Here, the

prosecutor wanted to take a vacation cruise and take some legal education classes, and meet for a statewide meeting of prosecutors. First, none of these seem to rise to the level of an adequate excuse to delay a trial 9 months. Particularly since the defendant was denied bail and was sitting in jail. While the court could have granted a continuance for a short period of time for the meeting or to accommodate the prosecutor, given the defendant's status (sitting in jail), it was improper for the court to grant this motion, and the court may dismiss Dan's case.

It should be noted, however, that Dan should have moved earlier than September 2, as this would have permitted the court to fashion relief without having to dismiss the charge altogether. Accordingly, a court could find that he was not entitled to dismissal because of his delay.

## Question 2

State X amended its anti-loitering statute by adding a new section 4, which reads as follows:

A person is guilty of loitering when the person loiters, remains, or wanders about in a public place, or on that part of private property that is open to the public, for the purpose of begging.

Alice, Bob, and Mac were separately convicted in a State X court of violating section 4.

Alice was convicted of loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts in violation of section 4.

Bob was convicted of loitering for the purpose of begging on a waiting platform at a stop on City's subway system in violation of section 4.

Mac was convicted of loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers Building located in the business district of City in violation of section 4.

Alice, Bob, and Mac have each appealed their convictions, and their appeals have been consolidated in the State X appellate court. It has been stipulated that Alice, Bob, and Mac are indigent, that section 4 is not void for vagueness, and that the only issue on appeal concerns the validity of section 4 under the First Amendment to the United States Constitution.

How should the appellate court decide the three appeals, and why? Discuss.

## Answer A to Question 2

2)

### STANDING

Since the question states that the only issue on appeal concerns the validity of section 4 under the First Amendment, it is assumed that all standing requirements are met.

### STATE ACTION

The constitutional provisions of the first amendment are only applicable to state action which deprives a citizen of his/her right to free speech. Here, State X passed a loitering law affecting speech (expression), and later enforced that law by their police. Therefore there is state action and Alice, Bob and Mac can allege their first amendment rights.

### SPEECH

The first amendment is raised with respect to a citizen's rights for free speech or religion. Here, State X passed a law concerning loitering. This law concerns the right to free speech, however, because speech is not limited to words spoken or written, but can also apply to free expression or demonstrative speech. Since this law affects where a person can legally go (in public space) and what they can do in that public space, it does affect speech.

### CONTENT-BASED

Speech regulations can be either content-based or content-neutral. Content neutral regulations on speech are viewed more favorably than content-based regulations, because there is no discriminatory purpose on the face of the regulation. Here, however, the regulation affecting Alice, Bob and Mac concerns only those on the property "for the purpose of begging." Since the statute concerns only those who have particular purpose, a particular message (i.e. "please give me money if you can spare it"), the statute is content-based and will have to survive stricter scrutiny.

### OVERBREADTH

While the statute is not void for vagueness, it could be challenged by all three for being over broad. That is, it may not be narrowly tailored to serve the interest they are seeking to regulate. The statute seems aimed at prohibiting begging. However, it does not merely prohibit begging but "remain[ing] or wander[ing] about in a public place for the purpose of begging." This statute is arguably overbroad. Here, an officer can arrest someone, not for committing the actual act of begging, but for having that purpose. How can an officer, or judge, or a jury possibly know whether a person has the purpose of begging? This statute



invites abuse of indigent or undesirable people. Furthermore, the statute regulates “remaining” or “wandering about” in a public place. Again, this is overboard because it punishes not only the act of begging but the right of a person to remain in a public place or wander about there. Under this statute, an indigent could arguably be arrested for taking a walk on the sidewalk or sitting in a public park -- if the officer believes that he has the “purpose of begging.”

## INDIGENCE

It is unconstitutional to pass a statute that places an unreasonable burden on indigents with the respect to compliance (for example, unreasonable fines). Here, the statute & question do not say anything about fines or fees, so it is presumed that there is no undue financial burden on indigent people.

Alice should win her Appeal

## SIDEWALK = PUBLIC FORUM

Alice should win her appeal because she was “loitering...for the purpose of begging” on the sidewalk outside the Public Center for the Performing Arts. First, a sidewalk is generally a public forum. In a public forum, a person is given greater leeway to exercise their rights of free speech. The city would have to have a strong justification for repressing Alice’s right of self-expression on a sidewalk, such as public safety.

## NO DANGER TO THE COMMUNITY

While Alice might not be able to loiter on the sidewalk begging in front of a Fire Station (for example) for public safety reasons, she should be able to do so in front of the public center. There is no indication that there is any danger to the community in letting her exercise her free speech rights. Rather, her speech rights are being suppressed likely because the well-to-do do not want to suffer a beggar when they go out to the theater. This is not sufficient justification to violate Alice’s right of free expression.

Bob should lose his appeal:

## SUBWAY PLATFORM = QUASI-PUBLIC FORUM

A subway is not a public forum, like a park or a sidewalk. To access a subway platform one has to pay money. Therefore, it is more like a private forum, to which the rider has a license to be on the property. However, the grantor of the license is still a public entity (the city). So the subway platform is like a quasi-public forum. It has elements of being both a public and a private forum.

## POTENTIAL DANGER

A quasi-public forum faces a standard of scrutiny similar to the public forum. Here, there is arguably a potential for danger to both Bob and the public. Subway platforms can be crowded places, and the subway trains typically approach at dangerous speeds in close proximity to the waiting passengers. Furthermore, even the rails of the train are often electrified. Finally, the crowds of people on subway trains are often hot, sweaty, in a hurry, tired, and thus more likely to have short tempers. For all these reasons, regulating begging has more value in this forum than on the sidewalk. It is possible that the crowds might push or shove one another (or Bob) to get away from the beggar. Furthermore, allowing begging on the platform would further congest an already dangerously congested area as other beggars moved in to beg in a beggar-friendly zone. Therefore, the state and city have reasonable justification to regulate begging on the subway platform (provided, of course, the statute is not overbroad).

Mac should lose his appeal:

#### STATE ACTION

Even though Mac was arrested in a private building, he was arrested subject to state action, and state action is what is at issue in his case. The state passed the anti-loitering statute, and the state enforced that statute with its police powers.

#### PRIVATE FORUM -- OPEN TO THE PUBLIC

The Downtown Lawyers Building is a private building. The state could not regulate what kind of speech could occur in a completely private building, in a completely private setting. But in a setting where the private owner(s) invite the public to their private space (e.g. bringing in employees, or, as here, a lobby open to the public) the state has the right to regulate speech.

#### PUBLIC CONCERN

Mac should lose his appeal because there is a public concern at stake when a beggar begs in a private, customer-driven establishment. There is not the danger that inheres in the subway platform, but there is a strong potential for a loss of revenue due to the begging. Customers will tire of the begging and may stop frequenting the lawyers building. If beggars could beg in every establishment open to customers, the aggregated effect may be that people will go out less and business, the economy, tax revenues and social programs will suffer. Therefore, the state has sufficient reason to regulate Mac's type of begging (again, assuming that the statute is not overbroad).

## Answer B to Question 2

2)

### Validity of Section 4 Under the First Amendment

Alice, Bob and Mac have challenged their convictions under State X's loitering statute under the First Amendment of the Constitution. Although Alice, Bob, and Mac are indigent, the only issue on appeal is whether their rights under the First Amendment have been violated. Thus, there is no issue on appeal of whether the statute violates their rights under the Equal Protection Clause because they are indigent. There is also no issue of whether the statute is void for vagueness under the First Amendment because the parties have stipulated that is not void for vagueness.

### Incorporation of the First Amendment Against State Governments

To challenge a statute on the basis that it violates their First Amendment rights, Alice, Bob, and Mac must demonstrate that there is some type of government action that has violated their rights. Under the due process clause of the Fourteenth Amendment, the limitations that the First Amendment places on federal government action have also been incorporated against the states.

### Constitutional Standing

To bring a constitutional claim, a plaintiff must have adequate standing. This requires a showing of a personal injury; causation of that injury by state action; and redressability, which means that a favorable outcome in the case will result in the injury being redressed. Third party standing, which is the bringing of a suit by one person when another has suffered an injury, is prohibited in most circumstances. Similarly, generalized grievances are prohibited in most circumstances. A plaintiff must also show if she is seeking to prevent government action, that the controversy is ripe to be heard by the court, meaning that there is adequate factual development and it is an appropriate controversy for the court to hear. Finally, a case can be dismissed for mootness if the court will not be able to change the outcome, as a result of the Article III prohibition on courts issuing advisory opinions.

### State X Government Action

Alice, Bob, and Mac must demonstrate that an arm of the State X government has taken some type of action which has violated their First amendment rights. Here, the state has convicted them of violating the anti-loitering statute. Thus, although it is unclear exactly what the penalty for conviction is, it is clear that Alice, Bob, and Mac have been penalized in some way by State X. Thus, the conviction constituted state action sufficient to allow Alice, Bob, and Mac to challenge the statute.

## **Implication of the First Amendment**

The First Amendment prevents the government from limiting the rights of citizens to free speech. Although there are some circumstances in which this right can be limited, the government action must have sufficient justification. Here, the anti-loitering statute appears to be directed primarily at conduct, because it prohibits loitering, remaining, or wandering about in certain types of places. However, conduct, under certain circumstances[,] can also constitute speech. The statute also prohibits loitering for the purpose of begging, which may mean that people are penalized under the statute for what they are doing in specific areas. Thus, a person's right to both conduct as speech and to begging, which is a type of speech, may be limited under the statute. Therefore, the statute must satisfy the requirements of the First Amendment.

## **The Statute's Regulation as a Discrimination on Content and the Requirement of Strict Scrutiny.**

If a state undertakes to regulate the speech of citizens in a way that discriminates on the basis of certain content, the statute must satisfy strict scrutiny to be upheld when the statute is enforced in certain areas. Similarly, if a statute regulates speech on the basis of the viewpoint it expresses, it also must satisfy strict scrutiny. A discrimination based on content means that certain types of speech are regulated or prohibited on the basis of what they say. Such an exercise of government power in choosing the types of speech that are appropriate is particularly disfavored under the First Amendment.

Here, Section 4 prohibits the activities of loitering, remaining, or wandering on certain property for the purpose of begging. Thus, the statute specifically prohibits activities associated with begging, which is a type of speech. If the statute only prohibited the activities of loitering or wandering, it might be argued that it was content neutral. Then, the statute could be upheld if it was demonstrated to be a reasonable time, place, or manner restriction enacted by the state to regulate the places or times at which speech might occur, rather than the actual content of the speech. But instead, this statute forbids speech related to begging. As a result, it can be argued that it is not content-neutral. The statute thus must withstand strict scrutiny to be upheld.

## **The Standard for Strict Scrutiny**

To demonstrate that a restriction withstands strict scrutiny, the state has the burden of proving that the regulation is narrowly tailored to achieve a compelling government purpose. The regulation must be the least restrictive means of the state achieving its purpose.

## **Alice's Case**

### **Alice's Standing**

Alice has standing to challenge her conviction under the anti-loitering statute. She has been personally injured by being convicted of the statute, which probably carries with it imprisonment, a fine, or some other type of punishment. The injury was caused directly by State X promulgating and enforcing a statute which violates her constitutional rights. Her injury is redressable, because if the appeals court decides on her behalf the conviction will be reversed. There are no ripeness or mootness concerns.

### **State Action**

As discussed previously, the conviction in State X is adequate state action.

### **Alice Violated Section 4 on a Sidewalk, which is a Public Forum**

Alice was convicted for loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts. The location in which Alice was convicted of violating Section 4 is important, because a state has different abilities to restriction[sic] First Amendment rights depending upon where those rights are being exercised. Here, Alice's activities took place in what is called a public forum. A public forum is an area which is traditionally available to the public as a place in which they may exercise their First Amendment rights to free speech. Sidewalks and parks are classic public forums. In addition, the sidewalk on which Alice's activities took place was adjacent to the City's Public Center for the Performing Arts. This appears to be a municipal building. Sidewalks near public buildings are particularly important public forums because those are areas in which people may express their views in an effort to influence the way the city is governed.

### **Applicable Standard for Content Specific Restriction of First Amendment Rights in a Public Forum is Strict Scrutiny**

The fact that Alice's activities took place in a public forum is important for determining the standard the city must satisfy to demonstrate that its restriction of her activities did not violate the First Amendment. As discussed previously, the city has the burden of showing that its regulation is narrowly tailored to achieve a compelling government interest.

### **The Compelling Government Purpose**

Here, the purpose the government is attempting to achieve is unclear. It may be to deter what is seen as nuisance when people ask others for money on the sidewalk. It also might have something to do with the state's interest in preserving its aesthetic environment. These are unlikely to be found to be compelling government purposes that outweigh the exercise of others' First Amendment rights.

If there is crime affiliated with these activities related to begging, that might serve as a government purpose for the statute. Although reducing crime can be a compelling government purpose, the statute will also have to be narrowly tailored.

### **The Narrow Tailoring Requirement**

Because it is unclear what exactly the government's purpose is, it is difficult to tell how narrowly tailored the statute is. However, if the statute was enacted to reduce crime, there are certainly ways that the government could address that crime more specifically by prohibiting the actual criminal activity rather than the begging that creates an environment in which such criminal activity may take place.

### **Validity of Alice's Conviction**

Alice's conviction under the statute is thus invalid, because her activities took place in a public forum. The city may not curtail such activities in a public forum on the basis of content without a compelling government purpose that the statute is narrowly tailored to effectuate. Alice was penalized for exercising her First Amendment rights in an unconstitutional manner, and thus her conviction should be reversed.

### **Bob's Case**

#### **Bob's Standing**

Like Alice, Bob has a personal injury in his conviction. That injury was caused by application of the statute to his activities, and may be redressed through the reversal of his conviction. Thus, he has standing to challenge the statute.

#### **Bob's Activities Took Place in a Semi-Public Forum**

Bob was convicted of violating the statute on a waiting platform at a stop on the city's subway system. This is likely to be found to be a semi-public forum. Such forums are not always open for speech activities like a public forum. Instead, the standard applied to regulation of speech in a semi-public forum depends on the type of speech the City permits there. If the City permits other First Amendment activities in the semi-public forum, it may not discriminate against other First Amendment activities on the basis of content or viewpoint.

#### **Applicable Standard is Also Strict Scrutiny**

If a semi-public forum is open for speech, content or viewpoint neutral restrictions on speech must also satisfy strict scrutiny. However, the type of forum may make this standard easier to fulfill. Here, the government has a compelling interest in making the subway stop a place in which traffic may smoothly operate so that the subway station may

fulfill its duties in transporting people through the city. Thus, activities which may [sic] it difficult for traffic to operate smoothly may be restricted. However, because this statute targets only particular types of speech, it may not be the appropriate method of ensuring that traffic operates smoothly. Such a regulation would likely target particularly problematic conduct, and not types of speech. Therefore, this statute is not narrowly tailored to uphold the state's interest in making sure the subway stop operates effectively.

### **Validity of Bob's Conviction**

Because Bob's conviction for speech at the waiting platform took place under a content-discriminatory statute that was not narrowly tailored to effectuate the government's compelling interest, it should be reversed.

### **Mac's Case**

#### **Mac's Standing**

Mac's conviction was a personal injury that was caused by State X's enforcement of its statute and is redressable through the overturning of the conviction. Thus, Mac has standing to challenge his conviction.

#### **Mac was Loitering in a Non-Public Forum, on Private Property**

Mac's conviction was for loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers' building in the business district of city. Thus, Mac's conviction took place as a result of his activities on private property.

#### **Mac's Conviction is not Subject to Strict Scrutiny unless the Building is Serving a Public Function**

Mac does not have the same right to speak on private property that Alice and Bob had in public of[sic] semi-public forums. The sole exception to this is if the private forum is serving a public function, which means that the private forum is serving a role typically served by public buildings or areas. However, there are very few examples of private property which serve a public function, other than private company towns that replace a public municipal government. This appears to be a private office building which is not implicated in any function of governing. Thus, the building is not a public forum. Therefore, his conviction is not subject to strict scrutiny.

### **Validity of Mac's Conviction**

Mac cannot challenge his conviction under the First Amendment because he was conducting his activities on private property on which he had no First Amendment right to speak. Therefore, his challenge to the statute will be unsuccessful and his conviction will

be upheld.

Validity of the Conviction



### Question 3

Hank, an avid skier, lived in State X with his daughter, Ann. Hank's first wife, Ann's mother, had died several years earlier.

In 1996, Hank married Wanda, his second wife. Thereafter, while still domiciled in State X, Hank executed a will that established a trust and left "five percent of my estate to Trustee, to be paid in approximately equal installments over the ten years following my death to the person who went skiing with me most often during the 12 months preceding my death." The will did not name a trustee. The will left all of the rest of Hank's estate to Wanda if she survived him. The will did not mention Ann. Wanda was one of two witnesses to the will. Under the law of State X, a will witnessed by a beneficiary is invalid.

In 1998, Hank and his family moved permanently to California. Hank then legally adopted Carl, Wanda's minor son by a prior marriage.

In 2001, Hank completely gave up skiing because of a serious injury to his leg and took up fishing instead. He went on numerous fishing trips over the next two years with a fellow avid fisherman, Fred.

In 2003, Hank died.

In probate proceedings, Wanda claims Hank's entire estate under the will; Ann and Carl each claim he or she is entitled to an intestate share of the estate; and Fred claims that the court should apply the doctrine of *cy pres* to make him the beneficiary of the trust.

1. Under California law, how should the court rule on:
  - a. Wanda's claim? Discuss.
  - b. Ann's claim? Discuss.
  - c. Carl's claim? Discuss.
  
2. How should the court rule on Fred's claim? Discuss.

### Answer A to Question 3

3)

1. UNDER CALIFORNIA LAW, THE COURT'S RULING ON:

A. WANDA'S CLAIM

Wanda will argue that the will is valid and she is therefore entitled to at least 95% of Hank's estate, as described under the will.

1. Validity of the Will

a. Choice of Law

In order to determine whether the will is valid, it must first be decided what law will apply. The facts state that Hank dies while living in California. A will will be valid if it is valid in the state in which it was executed, the state in which the testator was domiciled at the time of execution, or the state in which the testator died. The will was executed in State X, and while Hank was domiciled in State X. Although the facts state the will would be invalid in State X, it is not necessarily invalid in California, the state in which Hank was living at the time of his death. The following is a discussion of the will's validity in California.

b. Requirements for an Attested Will

Under California law, for an attested will to be valid, it must be signed by the testator in the presence of two disinterested witnesses. An interested witness is one who is a beneficiary under the will. If a witness is "interested", the entire will is not invalid, but there is a presumption that the portion which the interested witnessed[sic] received is invalid.

Under the facts of this case, Wanda was to receive 95% of the estate. In addition, she was one of two witnesses to the will. Therefore, there is a presumption that the portion left to her is invalid. If Wanda cannot overcome this presumption, she will not be left with nothing; rather, she will still be entitled to her intestate portion under the will.

c. Wanda's Intestate Portion

Under intestacy, a spouse is entitled to receive all community property, and at least 1/3 and up to all of her deceased spouse's separate property, depending on whether or not the decedent left any surviving kin. In the present case, Hank left Ann and Carl. Where two children are left, the testator's estate is divided in 1/3 portions among the spouse and the two children. Therefore, Wanda will obtain 1/3 of Hank's remaining estate.

B. ANN'S CLAIM

1. Omitted Child

Ann will argue that she was an omitted child and, in the event the will is found valid in its entirety, other interests should abate and she should receive an intestate portion of Hank's estate. However, Ann will be unsuccessful in this argument because Ann was alive and known about prior to Hank's execution of the will, and she was not provided for on the will.

2. Intestate Portion

Ann will therefore argue that the aforementioned devise to Wanda is invalid and that she is in this way entitled to her intestate portion of the remaining interest. As discussed above, Ann will be entitled to 1/3 of Hank's estate through intestacy.

C. CARL'S CLAIM

1. Pretermitted Child

Carl will first argue that he was a pretermitted child, as he was adopted after the will was executed. Therefore, he will argue that, if the devise to Wanda is valid, her interests should abate to account for his intestate portion. However, the fact that Ann was excluded from the will harm Carl's interest, as this will evidence as intent not to devise any portion of his estate to his children.

2. Intestacy & Adopted Children

Therefore, Carl will argue that the devise to Wanda is invalid and that he should be entitled to a portion of the remainder of the estate through intestacy. The fact that Carl is adopted and not a child by Hank's blood will not affect Carl's portion because under California law, adopted children are treated the same in intestacy as children by blood.

2. COURT'S RULING ON FRED'S CLAIM

Hank's Will also included a trust. This is called a pour-over will. In order for the pour-over will to be valid, it must meet the requirements of a valid trust.

A. Validity of the Trust

1. Requirements

In order for a trust to be valid, it must have 1) an ascertainable beneficiary, 2) a settlor, 3) a trustee, 4) a valid trust purpose, 5) intent to create a trust, 6) trust property

(res), and 7) be delivered.

## 2. Lack of Trustee

The facts state that the trust lac[k]ed a trustee. The lack of a trustee, however, is not fatal, as a court can appoint a trustee to administer the trust.

## 3. Trust Property

The trust property is clearly identified in the will, as “five percent of my estate...to be paid in approximately equal installments over the 10 years following my death...” Therefore, this requirement is satisfied.

## 4. Delivery

The delivery requirement is met through the inclusion of the trust into Hank’s will.

## 5. Unascertainable Beneficiary

The fact that the beneficiary is not named poses the biggest problem for the trust. In order for the trust to be valid, a beneficiary must be ascertainable. In the present case, the beneficiary is not named, but rather is described as “the person who went skiing with me most often during the 12 months preceding my death.” Courts can use a variety of methods to ascertain the identity of a beneficiary when he or she is not specifically named on a will, such as: Incorporation by Reference or Facts of Independent Significance. Neither one of these are helpful in the present case.

Incorporation by reference allows a testator to incorporate into a will a document or writing if it is in existence at the time of the will, a clear identification is made, and the intent to incorporate is present. In the present case, the identity of beneficiary was not presently in existence. Therefore, this method fails to assist in ascertaining the beneficiary.

Facts of independent significance can also be used to incorporate outside items into a will. Although the identity of the person most frequently skiing with Hank would have independent significance, it is of little help here since Hank suffered a serious injury to his leg and thus gave up skiing. Therefore, this method also fails to assist in ascertaining the identity of a beneficiary.

When there is no ascertainable beneficiary, a resulting trust occurs. This means that the trust property returns to the settler’s estate.

## 5. Cy Pres

Fred, however, will argue that under the doctrine of cy pres, the property should not

be returned to the settlor's estate, but should go to him instead.

Cy pres is a doctrine which provides that, where a charitable trust fails for lack of a beneficiary or other impracticality, the court should apply cy pres and grant the trust property to another charity which conforms with the trust purpose.

In the present case, Fred will argue that the purpose of the trust was to further leisurely sports and camaraderie. Fred will compare fishing with skiing, and argue that the two activities were similar in that they provided the opportunity for friends to come together and enjoy each other. Therefore, because it [sic] the two purposes are so similar, and because Fred went on numerous fishing trips with Hank, Fred will argue that he should be entitled to the trust property.

However, in order for cy pres to apply, the purpose of the trust must be charitable. Under the Statute of Elizabeth or the common law, this trust purpose, however Fred defines it, is not charitable. It does not alleviate hunger, help sick, further education, or health. Therefore, the doctrine of cy pres is inapplicable, and a resulting trust will occur. Therefore, the 5% will retain to Hank's estate and be divided among Wanda, Ann, and Carl accordingly.

Therefore, Fred will get nothing, and Wanda, Ann, and Carl will each get 1/3 of Hank's separate estate, and Wanda will get all of her and Hank's community property.

### Answer B to Question 3

3)

1. Under California law, how should the court rule on:

a. Wanda

Wanda (W) claims that she is entitled to Hank (H)'s entire estate under the will. In order to make that claim, the will must first be proved to be valid.

Valid Will?

Choice of Law

The will was executed in State X, and under State X's laws the will would be invalid because a will witnessed by a beneficiary is invalid. W, as a beneficiary receiving the residue of H's estate, was one of the witnesses, and therefore the will would be invalid under the laws of State X.

However, the parties moved and became domiciled in California. Under California law, a will is valid if it complies with the statute of the place where the the will was executed, where the decedent was domiciled when the will was executed, or in compliance with the statute of the jurisdiction where the decedent was domiciled when he died.

Here, while the will is not valid under State X's laws, H was domiciled in California when he died. If the will is valid under California laws, then the will is valid and will be probated. A formally attested will to be valid in California must be in writing, signed by the testator or a third party at his or her direction, in the presence of two witnesses, and the witnesses understand what the testator is signing is his or her will.

Here, the will is valid under California law. First, the will is in writing, and it was executed by H. Further, two witnesses signed the will (but please see "interested witness" below), thus meeting that requir[e]ment. Presuming that the witnesses understood that what H was signing was his will, then California will formalities have been complied with.

Interested Witness

It is important to note that California does not invalidate a will because one of the witnesses is a beneficiary under the will. A witness is interested if the witness will directly or indirectly benefit from the will. If there is a necessary interested witness, California validates the will, but there is a presumption that improper means were used by the interested witness to obtain the gift. A witness is necessary if without her there is only one other witness. If the interested witness overcome[sic] the presumption, she will take under

the will. If, however, the presumption cannot be overcome, then she will only get to take her intestate share of the estate, and no more.

Here, W was an interested witness because she is taking under the will. Further, W was necessary to make the will valid because without her signature, there was only one other witness. Therefore, a presumption of improper influence arises. However, W should be able to easily overcome this presumption. W, being the wife of H, is a natural object of H's bounty. Common sense would dictate that W would receive a substantial share of H's estate. If W can provide some evidence that they had a good relationship, and that he had told her she would get a good share of her estate, that should be enough to overcome the presumption.

### Intestate Share

Even if W is unable to overcome the presumption, W is entitled only to her intestate share. However, W's intestate share would be a sizeable share. W would be entitled to H's  $\frac{1}{2}$  of the community property and quasi-community property. Community property is that property acquired during marriage while the parties were domiciled in California. Here, this would include all the property acquired through the earnings of H and W and the rents, issues, and profits therefrom, since 1998 when the parties were domiciled in California through H's death in 2003.

W would also be entitled to  $\frac{1}{2}$  of the quasi-community property. Quasi-community property is property that was acquired while the parties were domiciled elsewhere that would have been community property had the parties been domiciled in California. Therefore, all property acquired during the marriage between 1996 and 1998 would be quasi-community property. Upon the acquiring spouse's death, that property would go to the surviving spouse. Because W would already own  $\frac{1}{2}$  of the community and quasi-community property, W would end up with all of the community and quasi-community property at the end.

Regarding H's separate property (sp), H has the power to dispose of all of his separate property as he sees fit. However, W, as H's surviving spouse, would be entitled to an intestate share of H's separate property if she cannot overcome the presumption. In California, if the decedent dies without any issue, then the sp goes all to the surviving spouse. If he dies with one issue or parents or issue of parents, then the surviving spouse gets  $\frac{1}{2}$  of H's sp. If the spouse dies with two or more issue (or issue of a predeceased issue), then the surviving spouse gets  $\frac{1}{3}$  of H's sp.

Here, H died with two issue surviving- Ann and Carl. Therefore, W's intestate share of H's sp would be  $\frac{1}{3}$  of all separate property.

Therefore, even if W is unable to overcome the presumption of improper influence, she still will be able to obtain quite a bit of property because of the intestate succession

laws.

### In Other Claims

F's claim will be discussed below, as well as C's and A's claim. This is just to note that if all of these three claims fail, then W will take the entire estate of H, both sp and cp. However, if any of these claims do not fail, then W will not get to take the entire estate because the claimant will be entitled to whatever stake his or her claim had.

#### b. Ann's Claim

A's claim will be based on California's pretermitted child statute. A, a child of H, was left out of H's will. Under the pretermitted child statute, a child that is born or adopted after the will or codicil is executed, and is not mentioned in the will, will be able to receive an intestate share of the decedent's estate, unless the decedent made it clear in the will that a pretermitted child will not inherit, the child is being supported outside of the will, or the decedent has another child and leaves all or substantially all of his estate with the parent of that child.

Here, A's claim will fail because she was alive when H executed his will, and H did not include her in the will. The only exceptions to this rule are if the decedent thought the child is dead or did not know the child existed. Neither of these two are applicable here. H and A lived together in State X, so it is clear that H knew of A and did not think she was dead. A's claim for an intestate share will fail because she was not a pretermitted child.

#### c. Carl's Claim

C's claim will also be on the pretermitted child statute. Please see immediately above for a discussion on the statute. Here, C was a pretermitted child because he was adopted after H's will was executed. For an adopted child the time is when the child is adopted, not when the child was born. Therefore, unless one of the three exceptions applies, C will receive an intestate share.

First, there is nothing in the facts indicating that the H's will says he won't take. Second, there is nothing demonstrating that C is provided for outside of the will.

However, H does have one child surviving (A), and all or substantially all of the assets are being given to the parent of C, W. Under the third exception, C will not be able to receive an intestate share. C may argue that A is not a child of W. However, the statute says that if the decedent has one child, and the assets are given to the parent of the child claiming, then the exception applies. Here, because those two requirements are met, C will not be entitled to an intestate share. Note that if the statute said the other child living had to be the child of the parent receiving the assets, then the exception would not apply and C would receive an intestate share.



## 2. Fred's Claim

Fred (F)'s claim depends on whether there was a valid private express trust, and if so, whether the doctrine of cy pres even applies to this trust.

### Valid Trust

A trust must have trust property, a trustee, beneficiaries, manifestation of intent by the testatory, creation, and a legal purpose.

### Property

First, there is trust property because the will says the property will be 5% of H's estate.

### Trustee

Second, there is no trustee named. While a trust must have a trustee, a trust will not fail for want of a trustee. Therefore, a court will appoint someone to be the trustee.

### Beneficiary

Third, there is an issue as to whether there is a definite and ascertainable beneficiary. In a private express trust, there must be a definite and ascertainable beneficiary. From the face of the will, there is no beneficiary, and so this may be a problem for F. F will want to resort to other methods to prove it was him.

Integration nor incorporation by reference will not work because both require a writing or document, and there is no writing or document here.

However, F may be able to prove himself under the doctrine of facts of independent significance. The question here is: Would this fact have any independent significance other than the effect on the will? If the answer is yes, then parol evidence may be introduced and that fact will become part of the will. Here, F can make a good argument that whoever is fishing (or skiing) with H the most before his death is a fact that has independent significance outside the will. H will be fishing (or skiing) with this person because they like each other's company, a fact that is significant outside the will. Therefore, F should be allowed to introduce evidence that he was the beneficiary under this doctrine.

But note- if F is not really the beneficiary because he does not meet this requirement, then this trust will fail for lack of beneficiary (please see below, towards the

end).

### Manifestation of Intent by Settlor

H, the settlor, clearly had the present intent to create a trust when he executed his will. The terms of the will, using words of direction directing the trustee to pay the beneficiary. Thus, there is sufficient intent.

### Creation

A trust may be created either inter vivos or testamentary. A testamentary trust is a trust that is contained in a will. In order for a testamentary trust to be valid, the will must have been executed with the proper formalities.

Here, H has created a testamentary trust by placing the trust in the will to take effect upon H's death. As discussed above, the will was properly executed under California's will statute. Therefore, there was sufficient creation.

### Legal Purpose

A trust must serve a lawful purpose. Here, there is a lawful purpose in giving a beneficiary an installment of money over a period of ten years. Nothing in this trust is unlawful.

Therefore, all of the requirements for a trust have been met and there is a valid trust.

### Cy Pre[s]?

The trust's terms specially said that the payments would go to whoever was skiing with H the most during the last 12 months of his life. F fished with H the most during the last 12 months of H's life, and now seeks to have the doctrine of cy pre[s] apply.

The doctrine of cy pres applies to charitable trust, when the settlor had a general charitable intent, but the mechanism for expressing the intent has been frustrated. If this is the case, the court will order a new mechanism to express the settlor's charitable intent.

### Charitable Trust?

A charitable trust is a trust created for the benefit of society, for such purposes as education, the arts, etc. It is very similar to a private express trust (requiring trust property, a trustee, a beneficiary, manifestation of intent, creation, and lawful purpose), but has two significant differences: first, the beneficiaries must be unascertainable, ie, a large class,

because the “real” beneficiary is considered the public. Second, cy pres only applies to charitable trusts, not to private express trusts. Note also that the Rule Against Perpetuities does not apply to a charitable trust either.

Here, the trust created is not a charitable trust for several reasons.

First, there was no general charitable intent. Nothing in the trust was to benefit education, etc. This lack of charitable intent is shown by the fact that the beneficiaries are not a large class. Rather, the beneficiary is one person. Therefore, this is too ascertainable to be a charitable trust.

Because this is not a charitable trust, the doctrine of cy pres will NOT apply because the doctrine does not apply to private express trusts. F will not get to share in the estate.

### Trust Fails For Lack of Beneficiary

This trust will now fail for lack of a beneficiary. F does not meet the terms of the trust, and neither does anyone else. Therefore, there is no beneficiary. When a trust fails for lack of beneficiary, a resulting trust in favor of the settlor or settlor’s heirs occurs. A resulting trust is an implied in fact trust based on the presumed intent of the parties. Therefore, the 5% of the estate will result back to H’s heirs- which is only W under the will. W therefore, will end up taking H’s entire estate under the fact pattern presented in this question.

THURSDAY MORNING  
JULY 29, 2004

# California Bar Examination

Answer all three questions.  
Time allotted: three hours

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

principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

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

## Question 4

Victor had been dating Daniel's estranged wife, Wilma. Several days after seeing Victor and Wilma together, Daniel asked Victor to help him work on his pickup truck at a nearby garage. While working under the truck, Victor saw Daniel nearby. Then Victor felt gasoline splash onto his upper body. He saw a flash and the gasoline ignited. He suffered second- and third-degree burns. At the hospital, he talked to a police detective, who immediately thereafter searched the garage and found a cigarette lighter. Daniel was charged with attempted murder. At a jury trial, the following occurred:

- a. Tom, an acquaintance of Daniel, testified for the prosecution that Daniel had complained to Tom that Victor had "burned" him several times and stated that he (Daniel) would "burn him one of these days."
- b. Victor testified for the prosecution that, while Victor was trying to douse the flames, Daniel laughed at him and ran out of the garage.
- c. At the request of the prosecutor, the judge took judicial notice of the properties of gasoline and its potential to cause serious bodily injury or death when placed on the body and ignited.

In his defense, Daniel testified that he was carrying a gasoline container, tripped, and spilled its contents. He denied possessing the lighter, and said that the fire must have started by accident. He said that he ran out of the garage because the flames frightened him.

- d. On cross-examination, the prosecutor asked Daniel, "Isn't it true that the lighter found at the garage had your initials on it?"  
The prosecutor urged the jury to consider the improbability of Daniel's claim that he had accidentally spilled the gasoline.

- e. During a break in deliberations, one juror commented to the other jurors on the low clearance under a pickup truck parked down the street from the courthouse. The juror measured the clearance with a piece of paper. Back in the jury room, the jurors tried to see whether Daniel could have spilled the gasoline in the way he claimed. One juror crouched under a table and another held a cup of water while simulating a fall. After the experiment, five jurors changed their votes and the jury returned a verdict of guilty.

Assume that, in each instance, all appropriate objections were made.

1. Should the court have admitted the evidence in item a? Discuss.
2. Should the court have admitted the evidence in item b? Discuss.
3. Should the court have taken judicial notice as requested in item c? Discuss.

4. Should the court have allowed the question asked in item d? Discuss.
5. Was the jury's conduct described in item e proper? Discuss.

### **Answer A to Question 4**

4)

#### **A. Tom's (T) Testimony Re Daniel's (D) Statement**

The issue is whether T's testimony regarding Daniel's prior statement that D would "burn him (Victor- V) one of these days" is admissible against D.

#### **Logical Relevance**

Evidence is logically relevant if it has the tendency to make any fact of consequence in the case more probable or less probable than it would be without the evidence. Here, the main issue of the case is whether D tried to murder V. The statement that D would burn V at some point is relevant to prove that D acted intentionally, rather than accidentally, as claimed.

#### **Legal Relevance**

Evidence must be discretionarily relevant and there must not be any extrinsic public policy reasons against its admission. The judge has the discretion under FRE 403 to exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, jury confusion, misleading or waste of time, among other reasons.

Here, the statement that D would "burn" V is probative of D's motive for acting and for rebutting D's claim that it was an accident, however it is also highly prejudicial to D. All evidence is prejudicial to one party, however, and 403 will only exclude it if the prejudice substantially outweighs probativeness, which is not the [sic] case here.

As there are not public grounds for excluding the evidence, it would be logically and legally relevant.

#### **Presentation**

T testified apparently in the prosecution's case-in-chief. Because T was the person spoken to, he has personal knowledge of the statement and, so long as he could communicate it and appreciate his oath to tell the truth, would be competent to testify.

#### **Hearsay**

Hearsay is a statement made by the declarant other than at trial that is introduced for the purpose of proving the truth of the matter asserted in the statement. Hearsay is inadmissible unless it falls within one of the hearsay exceptions within the federal rules. Here, the statement was made out[-]of[-]court by D in a conversation with T.

### Truth/Non-Hearsay

The prosecution will argue that it is not introducing the statement for its [sic] truth, but rather as circumstantial evidence of D's state of mind, which is not hearsay under the rules. The prosecution will claim that the statement indicates that D had a grudge against T and his state of mind was one of hatred or disdain. Because attempt is a specific intent crime, this non-truth assertion could be relevant to show that D had the intent to harm T. This argument has merit, however, it would be better for the prosecution's case if it can get the statement in for the truth.

### Admission by a Party Opponent

A statement by a party opponent is not hearsay under the federal rules and comes in for the truth. It need not be against interest when made and may be based on hearsay. In this case, D made the statement to T and it could come in against him as non-hearsay under the FRE.

### Hearsay Exceptions Present Intent

A statement made by a person showing an intent to do something is an exception to the hearsay rule and may be admissible to show that the declarant actually followed through with the act in question. Though more commonly associated with statements like "I'm meeting Joe at 10 on Tuesday" to show that the meeting with Joe happened, here it could be admissible to show that D followed through with what he said he was going to do and actually burned V.

## **B. V's Testimony that D Laughed While V was Trying to Douse Flames** Relevance

V's testimony is logically relevant because it tends to prove that D acted with an intent to harm V in that, if he hadn't meant for V to catch on fire he would not have been laughing and he would try to help V. Also, it contradicts D's claim that he ran out of the garage frightened.

V's testimony is prejudicial against D, as it tends to paint him as quite the villain, however it is not unduly so and it does not substantially outweigh the probative value. No public policy considerations apply. Accordingly the evidence is relevant.

## Presentation

V is testifying in the prosecution's case[-]in[-]chief. As the victim, V was present at the accident and has personal knowledge of the events, although V could be subject to impeachment regarding his ability to really perceive what was happening (he was on fire, after all). However, V has personal knowledge and is competent to testify so long as he has memory, can communicate and can appreciate the requirement of telling the truth.

## Hearsay

As mentioned, hearsay is an out[-]of[-]court statement made by the declarant for the purpose of proving the truth of the matter asserted in the statement.

### Statement

The issue here is whether D's laughing was a statement. Assertive conduct is treated like a statement and subject to all the hearsay rules. Generally, assertive is that which tends to substitute for a statement, such as nod of the head instead of "yes" or pointing in a direction instead of "turn left." Because it has the effect of a statement, assertive conduct is treated like a statement.

D will argue that the laughing is assertive conduct and thus inadmissible to prove the truth, that D laughed, unless it fits within a hearsay exception or may be non-hearsay. He will argue that it is the equivalent of a statement such as "this is great" or "I said I would burn you."

The prosecution will counter with the argument that it was merely laughing and, unlike assertive conduct such as pointing or nodding, there is no way to determine what was meant by it so it cannot be assertive. It is more likely that a judge would overrule an objection by the defense and that V's testimony comes in and is not hearsay.

### Exceptions/Non-hearsay

Even if the judge were to reject the prosecution's argument, the statement could come in as an admission by a party opponent, as discussed earlier. Alternately[sic], it could be admissible as an excited utterance because the laughter was made while D was under the stress of the excited event and arguably related to the startling event.

## **C. Judicial Notice of the Properties of Gasoline**

It is proper for a court to take judicial notice of things that are easily proven or of common knowledge in the community. If evidence is required to demonstrate the fact in question, judicial notice may not be proper. The effect of judicial notice in a criminal case



is to satisfy the prosecution's burden of proof, but the jury may elect to disregard the judicially noticed fact and decide otherwise.

The issue is thus whether the properties of gas and its potential to cause serious bodily injury or death when placed on the body and ignited was proper. On the one hand, most adults drive and are familiar with gas stations and the warnings that are all over the station regarding no flames. On the other hand, most people have not played around with gasoline and matches and are not likely familiar with the effects it can have on the body-how long it will burn, how much gas needs to be on the person, when it will explode, etc. This is important because if there is a certain amount of gas required, D could argue the amount spilled on V was insufficient.

While it may have been proper to take judicial notice of the flammable quality of gasoline, the effects of its ignition are not so likely common knowledge. Accordingly, the judge erred in taking judicial notice of this fact and should have required the prosecution to present expert testimony regarding the specific potential of gas to cause serious injury or death when placed on the body and ignited.

#### **D. Cross-Examination of D re Lighter**

##### Relevance

The question tends to prove ownership of the lighter and refute D's claim that he did not own it/impeach him on that issue. It is highly probative and, while somewhat prejudicial, the prejudice does not substantially outweigh the probative value. There are no policy[-]based reasons for exclusions and, accordingly, the evidence is properly admissible.

##### Form

###### Leading

A question that suggests the answer is a leading question and is generally not allowed. Here, the prosecutor's question suggests that the lighter had D's initials on it, and is thus leading. Leading questions are allowed, however, on cross-examination, preliminary matters, hostile witnesses and witnesses who are having trouble remembering. Accordingly, because this was cross[-]exam, the leading question was proper.

###### Assumes Facts in Evidence

The question assumes that, one, there was lighter [sic] found that has been introduced, which on these facts has not been introduced into evidence. The lighter could be an exhibit and would have to be introduced by someone with knowledge[,] who could authenticate the lighter and indicate the chain of custody. After this a proper foundation would be laid and the prosecution could ask the question.

The lighter may self-authenticate, however, as sort of a label, but that is generally

reserved for commercial items.

### Best Evidence

The initials on the lighter could be considered a writing and the question is aimed at oral testimony to prove its contents. The best evidence rule requires that, before testimony regarding contents may be given, the original, in this case the lighter[,] must be produced or a decent reason for its absence must be given. Here, there is no indication that the lighter has been introduced and thus the content of it, the initials, could not be testified to by D if his only knowledge of the content came from the lighter.

### **E. Jury's Conduct**

Juries are prohibited from conducting independent investigations of the case, and such conduct may result in a mistrial for the defendant. Here, one juror when [sic] and measured the clearance on a pickup and the jury tried to re-enact the "accident" in the jury room. Jurors are not restricted to what they can do in the jury room and may use any means to explore and discuss the facts. The only real issue is whether the measuring of a, not D's, pickup truck was independent investigation, plus it was done while the jury was in recess and should not have been discussing the case.

It is likely that the act by the juror was impermissible independent investigation, because he went outside the evidence presented in court. Accordingly, the case should be declared a mistrial unless it can be shown that it was harmless error.

### Harmless Error

An error is harmless if, even without the error, there is no reasonable doubt that the case would have come out differently. Here, the independent investigation resulted in a demonstration that changed the minds of 5 jurors, which would have resulted in a hung jury. On the other hand, the jurors, in their deliberations may have eventually decided to act out the event and could have guessed at the clearance of the truck and come to the same conclusion. Although a jury is not allowed to testify regarding what happens in the jury room, unless 3 or more of the 5 would not have eventually changed their minds the error would be harmless. Because it is likely that the jury would have eventually acted out the incident, the error is likely harmless and the juror misconduct, though improper, will not have an effect on the outcome of the case.

## Answer B to Question 4

1) The issue is whether the ct should have admitted T's testimony that D complained of being "burned" by V & that he would "burn" V one day.

### Relevance

Evidence is relevant if it tends to make any fact of consequence in a proceeding more or less probable. Here this evidence is relevant b[e]c[ause] it tends to make it more likely that D was the one who caused the fire that burned V & more likely that it was not an accident as D claims it was, but deliberate.

However, even evidence that is logically relevant may be excluded if the court finds that its probative value is substantially outweighed by its unfair prejudicial effect to the party ag[ains]t whom it is offered. Here, T's st[ate]m[en]t is offered ag[ains]t D to show the fire wasn't an accident. It's [sic] probative value is great b[e]c[ause] it is a st[ate]m[en]t that D himself said he wanted to "burn" V & V was in fact literally burned in a fire D claims he started by accident. It is very prejudicial to D b[e]c[ause] it tends to completely negate D's accident defense. However, it is not unfavorably prejudicial - it doesn't increase the chances that the jury will convict just b[e]c[ause] D is a bad guy, rather it goes right to the central issue in the case of whether the fire was deliberate or accidental. Thus, the court shouldn't exclude it on this basis.

### Character Evidence in Crim Case

The prosecution cannot present evidence of bad character of a Δ in a criminal case unless character is directly at issue or unless the Δ initiates by putting a pertinent trait of his own or the victim's character substantively at issue. In addition, the prosecution can't use evidence of specific instances, only reputation or opinion evidence to establish character.

Here, this testimony about D is being offered in our attempted murder case where character is not an element of the crime. It is being offered in the prosecution's case[-]in[-]chief, it is arguably character evidence b[e]c[ause] the statement about D casts D in a bad light b[e]c[ause] it makes him look like a vindictive person out to get V b[e]c[ause] he feels V has "burned" him by dating his estranged wife. In addition, it is evidence of a specific instance where D told T something, not evidence of D's reputation for vindictiveness or violence or T's opinion to that effect. Thus, it seems at first glance that it is barred by the rules against character evidence in criminal cases offered by the prosecution.

However, the prosecution is entitled to offer evidence of specific instances by the Δ even if it reflects negatively on the Δ' s character if offered for a non-character if offered for a non-character purpose such as sharing motive or intent to commit a crime.

Here, D's st[ate]m[en]t about feeling burned by V is relevant to show he had a motive to

harm V deliberately. This is especially true in light of the fact V was seeing D's estranged wife b[e]c[ause] that gives meaning to what D meant when he said he felt burned. In addition, his saying he was going to burn V someday is evidence of intent to do the instant crime. Thus, T's st[ate]m[en]t is admissible even if it is specific instance that reflects badly on D's character offered in the state's case[-]in[-]chief.

### Personal Knowledge

Witnesses can only testify as to matters of which they have personal knowledge. Here T has personal knowledge of D's st[ate]m[en]t because it was made directly to him.

### Hearsay (HS)

HS is an out[-]of[-]court st[ate]m[en]t offered for the truth of the matter asserted therein.

D's st[ate]m[en]t was made to T out of court before the burning incident took place. It is being offered to show that D wanted to burn V & had motive to do so. Thus, it is hearsay & should be excluded unless an exclusion or exception applies.

### Party Admission

St[ate]m[en]ts by a party, offered against a party[,], are deemed non-HS under the criminal law & the FRE.

Here the statement is by D - the  $\Delta$  in this case & it is being offered ag[ains]t him. Thus it is non-HS and can come in.

### St[ate]m[en]t ag[ains]t Interest

Statements by any person that are against their penal, property, or civil liability interest at the time made are admissible even if HS as long as the declarant is unavailable at trial.

Here D's st[ate]m[en]t was arguably ag[ains]t his penal interest when made b[e]c[ause] it clearly showed he had intent to do harm to V. However, D is not unavailable b[e]c[ause] he has taken the stand in this case & has waived his privilege against self[-]incrimination w[ith] respect to his motive using an accident defense. Thus this exception doesn't apply.

### State of Mind of Declarant

St[ate]m[en]ts offered as direct evidence of a declarant's state of mind are admissible HS. Here, this st[ate]m[en]t is being offered to show that D had a motive & intent to hurt V & the st[ate]m[en]t is precisely about D having had that state of mind. Thus it is admissible under this exception.

The court didn't err in admitting T's st[ate]m[en]t.

## 2) V's Testimony Relevance

V's st[ate]m[en]t about D laughing and running out while V was burning is relevant b[e]c[ause] it tends to show D wanted V to burn & again makes his accident defense less likely.

However, the probative value of this is low, the mere fact that D didn't help V & may have laughed doesn't necessarily mean D deliberately set the fire, although his general animosity towards V may have led him to laugh at V's misfortune & leave instead of helping him. On the other hand, the potential the jury will convict D b[e]c[ause] he was coldhearted & callous & not just b[e]c[ause] he actually deliberately set the fire is great. Thus the court should use its discretion to exclude this testimony.

## Character Evidence

This was evidence of a specific instance where D laughed & declined to help V, & it reflects very poorly on his character. It was offered by the prosecution in its case[-]in[-]chief. Thus it should be excluded as impermissible character evidence b[e]c[ause] it doesn't seem relevant to any noncharacter purpose & will only inflame the jury against D b[e]c[ause] he acted in a morally reprehensible way by laughing & turning his back on V.

## Hearsay

A nonverbal act can be a st[ate]m[en]t for the purposes of the HS rule if it is intended as an assertion. Here D laughed & walked out on V. This may arguably be intended as an assertion by D to V of his hatred for V & his delight that V was burning. Thus, it might be subject to exclusion as an out[-]of[-]court st[ate]m[en]t.

However, even if this argument were accepted[,] it would come in under the party admission exclusion b[e]c[ause] it was conduct by D, and is being offered ag[ain]st him.

## 3) Judicial Notice

Judicial notice of adjudicative facts (facts that have to be proven in a case) is proper when the facts noticed are either ① notorious facts commonly known to the public or ② facts capable of ready & accurate verification.

Here the prosecution formally requested the court notice the fact that gasoline has certain chemical properties & has potential to cause serious injury or death when placed on the body & lit.

These facts will probably qualify under both categories. It is common knowledge that gasoline is highly flammable & even if lay people weren't aware of all its properties these are scientific facts capable of ready verification. In addition, it is common knowledge that

person's[sic] can be seriously hurt or killed if doused w/ gasoline that is then ignited. Moreover, that is again something capable of verification by expert testimony/scientific experiment. Thus, it was proper for the judge to notice these facts.

#### Effect of Notice

Since this was a criminal case, the effect of this notice was to relieve the prosecution of its burden of proving these facts & the jury could be told that the prosecution had met its burden but didn't have to accept it as conclusively proven.

#### 4) Question on X

Every party has an absolute right to cross any live witness - even if that witness is the Δ in a criminal case.

Here D took the stand & testified, thus he is subject to cross[-]examination on matters relating to his testimony on direct, or else his direct must be stricken.

D testified that he didn't have any lighter w/ him when he was in the garage. Thus it is proper for the prosecution to question him about the lighter on X.

#### Impeachment

Any witness can be impeached w/a prior inconsistent statement that is materially different from his testimony at trial.

Here D, [sic] testified that he didn't have any lighter when at the garage. The prosecutor is asking him about the lighter found at the scene that has his initials on it which clearly states that the lighter was in fact his. Since this is materially different from what D said at trial, the prosecution is entitled to use it to impeach D & discredit his testimony.

In addition, b[e]c[ause] the prior inconsistent st[ate]m[en]t of D's initials written on his lighter qualifies as a party admission, (st[ate]m[en]t by D, offered ag[ains]t him), the prosecution can use it as substantive evidence that the lighter did in fact belong to D.

5) The issue is whether the jury's conduct during deliberation was proper.

Jurors are not permitted to conduct independent investigations of the facts. Rather they are supposed to look at the facts presented by the parties & to apply the law as instructed by the judge.

Here, the jurors took their own initiative to go out & measure a truck that wasn't even the truck involved in the accident, & to reenact the accident themselves in the jury room. This was prohibited conduct, & in a criminal case could be grounds for mistrial if it had a

substantial effect on the outcome of the case.

Here the experiment led 5 jurors to change their votes. Thus they clearly affected the case & therefore a mistrial should be declared.

## Question 5

After working for ten years as a deputy district attorney, Lawyer decided to open her own law practice and represent plaintiffs in personal injury actions. In order to attract clients, Lawyer asked her friends and family to “pass the word around that I have opened a solo practice specializing in personal injury law.”

Lawyer’s brother, Bert, works as an emergency room admitting clerk at a local hospital. Whenever he admits patients who appear to be victims of another’s wrongdoing, Bert gives them Lawyer’s business card and suggests that they talk to her about filing a lawsuit. Each time Lawyer is retained by someone referred by Bert, Lawyer takes Bert out to lunch and gives him \$500.

One such referral is Paul, who suffered head injuries when struck by a piece of heavy equipment on a construction site at Dinoworld, a local amusement park. Recently Lawyer filed a personal injury action on Paul’s behalf against Dinoworld. Dinoworld’s attorney immediately filed an answer to the complaint. Lawyer and Dinoworld’s attorney agreed to set the deposition of the Chief Financial Officer (CFO) of Dinoworld within the next ninety days.

Lawyer’s brother-in-law holds an annual pass to Dinoworld. Two weeks ago, he invited Lawyer to a special “passholders-only” event at Dinoworld, at which Dinoworld’s CFO led a tour and made a presentation. At the event, Lawyer declined to wear a name tag and avoided introducing herself. She asked CFO several questions about Dinoworld’s finances, and made some notes about his responses.

What ethical duties, if any, has Lawyer breached? Discuss.



## Answer A to Question 5

5)

### Duty of loyalty: special concerns for prior government lawyers

A lawyer has a duty of loyalty to her client. This includes a duty to avoid conflicts of interest. Under the ABA rules, a lawyer who was a previous government lawyer, must avoid working on the same matter in private practice as she worked on as a government lawyer unless there is informed consent from the client and agency. In California, there is no such general rule; however, the rule does apply to former prosecutors representing defendants. There does not appear to be any conflict here, regarding Lawyer's new work. First, she is going into personal injury law. Therefore, she is unlikely to work on the same matters as she worked on as a prosecutor. Second, there are no facts in this problem that show any conflict of interest has arisen. Therefore, Lawyer has violated no rules, but she must be careful to avoid conflicts of interest.

### Duty to profession: Lawyer's request of family and friends

Previously, lawyers were not permitted to advertise their services because it was considered unprofessional. However, the United States Supreme Court has since held that lawyers have a constitutional right to engage in truthful, non-misleading advertising. A lawyer may not, however, solicit clients in person or hire others to do so as her agents if she has no prior relationship with the person she is soliciting.

Here, Lawyer asks her friends and family to pass on the word that she has opened a solo practice. This does not appear to be direct, in person solicitation or requesting her friends to solicit. Rather, it appears to more [sic] just "getting the word out," which is really the same as advertising. She is simply letting her friends and family know, so that they can let others know, about her practice. There does not appear to be anything misleading about what she is asking them to do. They are not expected to make any representations about her practice, only to let people know that the practice exists. Therefore, this appears to be proper.

### Duty to profession: getting clients from hospitals

In California at least, it is presumed to be misleading advertising to advertise at a hospital. Here, the facts show that Bert works as an emergency room clerk at a hospital, and that there, when he admits patients, he advertises Lawyer's business by giving people her business card. This is presumptively misleading because people are in an especial vulnerable state when they are very sick or injured. Therefore, Lawyer would have to somehow overcome the presumption that she has mislead [sic] people by advertising her services at a hospital.

A lawyer must also not use cappers to do what she could not do. As noted above, in person solicitation of people with known legal problems when there is no prior relationship with those people is prohibited, and it is prohibited if someone else does it for the lawyer as well. A lawyer cannot avoid the rules by having someone else do the act. Here, the facts show that Bert is soliciting clients for Lawyer; he is acting as a capper. He is suggesting that the injured people “talk to her about filing a lawsuit.” This is direct solicitation. There is no evidence that Lawyer previously knew the people he is soliciting. The fact state [sic] that he does this “whenever he admits patients,” which implies that Lawyer does not know any of the people solicited. This is improper solicitation, so the Lawyer has breach [sic] a duty to her profession.

#### Duty to profession: Sharing fees with non-lawyers

A lawyer cannot pay a fee to a non-lawyer to refer him. All a lawyer can do is pay regular costs for advertising or join a referral service.

Here, the facts state that “each time” Lawyer is retained after Bert refers someone, Lawyer takes Bert out to lunch and gives him \$500. This is improper. First, it is improper because Bert is not a lawyer. He works as an emergency room clerk at a local hospital. Second, the lunch and the \$500 are evidently consideration for his referral. Lawyer may argue that Bert is her brother, and that she is simply taking him out to lunch to be with him, and that there is nothing usual [sic] about a sister taking her brother out. However, the correlation of the lunches with the referrals would belie this assertion. Additionally, the brother-sister relationship does not explain the \$500. No facts indicate that Lawyer should have any motive for giving Bert the money except that he made the referral. Therefore, this practice is improper and violates Lawyer’s duty to her profession.

#### Duty of Competence

A lawyer owes her client a duty of competence. This means she must keep the client informed, and act with the legal knowledge, skill, thoroughness and preparedness necessary for the work. Here, the facts show that after being retained by Paul, Lawyer filed a personal injury action on Paul’s behalf and that she and Dinoworld’s attorney arranged for a deposition. Assuming all proper consultation with Paul regarding the filing of this suit, there does not appear to be any violation here. As long as there was a basis for the suit, Lawyer did the proper research before filing it, and Lawyer prosecutes it faithfully and vigorously, there is no violation of the duty of competence.

#### Duty of Loyalty: trip to Dinoworld

A lawyer has a duty of loyalty, including a duty to avoid making her client’s interests adverse to her own personal interest.

Here, the facts show that after filing a lawsuit against Dinoworld, Lawyer accepted a special “passholders-only” invitation to the amusement park. This may or may not be a conflict of

interest. On the one hand, it seems like Lawyer is accepting personal benefits from Dinoworld. The facts imply that the ticket was free, but it sound [sic] like the ticket came from her brother-in-law. But Lawyer is getting a benefit from Dinoworld. She is receiving a special tour and is permitted to enjoy herself at Dinoworld's invitation. Arguably, this places her personal interest adverse to her client["s]. Lawyer would probably argue that this was a one-time event, and that it is not the sort of event that would compromise her representation with her client. This is probably true. However, on the whole, this action creates an appearance of impropriety, which a conscientious lawyer should avoid. Probably, Lawyer should have informed her client of her intent to go to Dinoworld and gotten Paul's informed consent. Then, Lawyer would not be putting Paul in a position where he could potentially question her loyalty and there would be some question as to whether he should trust her. Whether or not this was strictly a violation of the rules, probably not. Whether Lawyer could have avoided even the appearance of a problem, she could have, and probably should have proceeded accordingly.

#### Duty to Opposing Parties: duty to avoid deception

A lawyer has a duty of fairness to opposing parties. This involves avoiding making material misstatements of fact or omission where there is a duty not to omit.

Here, the facts state that at the event, Lawyer declined to wear a name tag and avoided introducing herself. This makes it sound like she was being deliberately deceptive as to Dinoworld's CFO, that she did not want him or her to know who she was. This is material omission. The CFO probably would have been more on guard about answering Lawyer's questions, or he or she would not have answered them at all, if he/she was aware who Lawyer was. Her efforts not to introduce herself seem to be motivated by a desire to ask the CFO questions and receiving unguarded responses. Therefore, she is deliberately deceiving the CFO in order to receive information. Lawyer will argue that she did not want to introduce herself or wear a name tag because she was simply trying to enjoy a day at Dinoworld without the lawsuit becoming the focus of the event. She will argue that this was to avoid any conflicts. However, this assertion is countered by her decision to ask the CFO questions. The facts that she chose to ask questions speaks to her motive not to wear a name tag. Therefore, Lawyer violated her duty of fairness to opposing parties in failing to identify herself.

#### Duty to 3d parties: Duty not to speak with parties represented by counsel

A lawyer had a duty not to speak to someone she knows is represented by counsel without the counsels' permission. When the "person" is a corporation, it is less clear who the lawyer may or may not speak to. This is because corporations tend to have many employees, some of who would be considered the "client" and others who would not. To determine who[m] is covered by this rule, who is the "client" of the other lawyer, courts look at the nature of the employee. People who (1) regularly consult with or supervise; (2) people who can bind the corporation with their statements; and (3) people whose statements may be imputed to the organization are considered the client, and a lawyer

must not speak with those people without the corporation's counsel's permission.

Here, the CFO is probably the "client" for purposes of this rule (and probably for most other purposes as well). The CFO is the Chief [F]inancial [O]fficer, and the person whose deposition will be given within the next 90 days. As the CFO, this person is the corporation's agent. This person's statements can be imputed to the organization, and this person can bind the organization. The CFO is one of the "highest" people in an organization. Therefore, Lawyer has a duty not to knowingly speak with him because Dinoworld has an attorney. The facts state that Lawyer and Dinoworld's attorney decided mutually that Lawyer could depose CFO within the next 90 days. This facts [sic] shows two points: first, it shows that Lawyer knows that Dinoworld is represented by counsel and that the CFO is a person who can bind the corporation. Otherwise, she would not want his deposition. Second, it shows that she did not have consent to speak with CFO. If she has consent to speak with him outside of the deposition, there probably would not have been a reason to schedule the deposition. Additionally, it is reasonable to assume that Dinoworld's attorney would want to be present when the CFO was giving information so she could properly prepare him/her. She would not want him/her to talk unwittingly to opposing counsel. Finally, no fact states that any permission was given. Therefore, Lawyer violated a rule by talking to the CFO without his/her attorney's permission.

## Answer B to Question 5

### 1. Duty of dignity to legal profession

#### – Solicitation –

Neither a lawyer nor his agents may approach a party for potential representation in person, by telephone or in real time electronic manner for the purpose of pecuniary gain if that party is not an existing client or relative.

Here, Lawyer (L) through her brother Bert (B) contacted clients in person upon their arrival at a local hospital. In California, such activity is presumed to be improper solicitation. It is solicitation in violation of ethical rules in California to approach an injured person while they are in a vulnerable state. When an individual is being admitted to the hospital for injuries they are clearly vulnerable and solicitation is impermissible.

Such solicitation is a violation of ethics. B is definitely an agent/runner for L. B assesses each individual upon their arrival at the hospital and if B believes their injury is the result of another's wrongdoing, B gives them L's business card. Also, B is given lunch and money for these actions by L so he is clearly acting on L's behalf.

Thus, although L herself is not approaching these accident victims while in a vulnerable state, her agent B is and that is impermissible and an ethical violation.

#### – Referrals –

Payment to another by a lawyer for referral of a client is not permissible. Referral payments are an ethical violation.

Here, L pays B \$500 each time L is retained by someone referred by B. B also gets lunch. This is especially improper because B is an emergency room admitting clerk and not a lawyer.

Thus, L is also in violation of the no referral rule.

#### – Advertising –

Generally, advertising of a lawyer's services is permissible if it is not false or misleading. All advertising must be labeled as advertising and at least one person responsible for the ad must be identified. General written advertising is also permissible (like direct mail).

Here, L's request of her friends and family to "pass the word around" could be advertising. This is problematic because it is not labeled as advertising or doesn't appear to be and it is unclear who is responsible for it.

Most significantly, L asks her friend[s] and family to pass the word that she is “specializing in personal injury law.” Traditionally, the only specializations that were recognized were patent and admiralty law. However, certain other specialties are recognized if they are approved and if the lawyer is certified by the appropriate organization approved by the ABA or state.

Here, nothing indicates that L has received any special certification for her “specialty” in personal injury law.

Thus, this “ad” by her friends and family is both false and misleading. Therefore, L is in violation of the duty to advertise truthfully.

## 2. Duty of Candor/Fairness

A lawyer is also bound by a duty of candor and a duty of fairness to both the court and the other side or opposition.

### – Represented Person –

One of the major issues of fairness and candor is to the other side and involves speaking to individuals who are represented by counsel without getting permission.

Here, L went to Dinoworld and approached Dinoworld’s CFO. Without identifying himself, in fact purposely concealing his identity, D spoke with the CFO about finances and made notes about the conversation.

What makes this a problem is that L knew CFO was represented by counsel because L had already spoken with CFO’s attorney about the deposition of CFO.

Thus, L had a duty to get permission from Dinoworld’s attorney before speaking to anyone associated with Dinoworld, including the CFO. So, L knowingly spoke with a represented individual before obtaining permission from the attorney and thus violated her duty of fairness.

In conclusion, L is in violation of her duty to the dignity of the profession because of her solicitation, advertising and referrals. Also, she violated her duty of fairness by talking to a represented person without permission.

## Question 6

Jack owned the world's largest uncut diamond, the "Star," worth \$1 million uncut, but \$3 million if cut into finished gems. Of the 20 master diamond cutters in the world, 19 declined to undertake the task because of the degree of difficulty. One mistake would shatter the Star into worthless fragments.

One master diamond cutter, Chip, studied the Star and agreed with Jack in writing to cut the Star for \$100,000, payable upon successful completion. As Chip was crossing the street to enter Jack's premises to cut the Star, Chip was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though an ordinary person would have recovered easily, Chip was a hemophiliac (uncontrollable bleeder) and died as a result of the injury. Chip left a widow, Melinda.

Jack, who still has the uncut Star, engaged Lawyer to sue Wilbur in negligence for the \$2 million difference between the value of the diamond as cut and as uncut. Lawyer allowed the applicable statute of limitations to expire without filing suit.

1. What claims, if any, may Melinda assert against Wilbur, and what damages, if any, may she recover? Discuss.
2. What claims, if any, may Jack assert against Lawyer, and what damages, if any, may he recover? Discuss.

## Answer A to Question 6

6)

**WHAT CLAIMS, IF ANY, MAY MELINDA ASSERT AGAINST WILBUR, AND WHAT DAMAGES, IF ANY, MAY SHE RECOVER?**

**Standing** - Melinda, the widow of Chip, will sue Wilbur either as his representative under a survival action or for wrongful death as his widow.

### Melinda v. Wilbur

**Negligence** - a breach of duty which is the actual and proximate cause of damage to the plaintiff.

**Duty** - as the driver of a car, Wilbur owed a duty of reasonable care to the people who were within the zone of danger (Cardozo) or the entire world (Andrews view). Chip, as a person crossing the street in front of Wilbur, was within the zone of danger and therefore owed a duty by Wilbur.

**Breach** - Wilbur drove through a red light and hit Chip because he did not see him. In driving through the red light, Wilbur was probably negligent. Negligence per se may be implied if driving through a red light is a violation of an applicable law, since Chip would be the kind of person that such a law would be designed to protect.

**Causation - actual** - but for Wilbur driving through the light and striking Chip, Chip would not have died.

**Causation - proximate** - it was foreseeable on Wilbur's part that driving through a red light would injure someone. The fact that Wilbur did not see Chip would not relieve him of liability. Wilbur may argue that the fact that Chip actually died was the result of his hemophilia, which caused him to bleed to death when another person would have easily recovered from the gash in his leg. Wilbur may argue that it was not foreseeable that Chip had this condition and that therefore the cause of Chip's death was not caused by Wilbur.

However, hemophilia is a pre-existing condition, and the rule in negligence cases is that the defendant takes his victim as he finds him. This is analogous to the "soft skull" cases where a particular plaintiff was particularly susceptible to injury. Therefore, the hemophilia defense will not work.

### **Damages:**

. **Lost earnings** - future earnings are allowed in negligence actions. The court would compute the amount of time that Chip probably would have lived, using some form of



actuary table. The fact that Chip was a hemophiliac would be relevant to possibly reducing the amount of future earnings allowed by discovering what the expected lifespan of a hemophiliac of Chip's age and general health is. The amount of future earnings would be reduced to present-day value, because only one recovery is allowed. However, no reduction would be allowed for the fact that Chip is engaged in an especially lucrative profession; again, Wilbur has to take his victim as he finds him.

**Particular earnings** - the \$100,000 under the contract is not going to be earned at this point, because the contract between Jack and Chip said that the \$100,000 would only be paid upon successful completion. Completion will never take place, because Chip is now dead, and Chip's performance was a condition precedent to Jack's obligation to pay. This money would have gone to Chip, but Melinda can bring the suit as the representative of his estate. She does not need to show that she is a third party beneficiary because she is not attempting to enforce the contract itself, but to show that Chip would have recovered under the contract if he had not been injured. However, if forced to rely on a third-party beneficiary claim she would probably fail because she was not an intended beneficiary of the contract between Chip and Jack, but merely an incidental beneficiary.

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this \$100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the \$100,000 would have been recovered had Wilbur not knocked down Chip.

Melinda will probably not recover the \$100,000.

**Loss of consortium** - as Chip's wife, Melinda can get damages for loss of companionship.

**Punitive damages** - not usually available in negligence cases unless the action of Wilbur in driving through the red light was gross negligence. We have no evidence of gross negligence here, however, since Wilbur was moving slowly at the time he struck Chip.

**WHAT CLAIMS, IF ANY, MAY JACK ASSERT AGAINST LAWYER, AND WHAT DAMAGES, IF ANY, MAY HE RECOVER?**

**Jack v. Lawyer**

Jack will sue Lawyer for malpractice.

**Duty** - Lawyer had a duty to act in a competent manner and as a reasonable attorney under the circumstances. There was a client-lawyer relationship between Jack and Lawyer, and so the duty was owed to Jack.

**Breach** - Lawyer breached this duty by not filing the lawsuit until the statute had run. This was something that a competent attorney would not have done.

**Causation - actual** - but for Lawyer failing to file the suit, the statute would not have run and Jack would still have a cause of action against Chip.

**Causation - proximate** - it was foreseeable that failing to file the suit would result in the suit being barred by the statute.

**Damages** - Jack will claim that he should recover from Lawyer the same thing he would have recovered had Lawyer not been incompetent and failed to file the suit. This means we must look to Wilbur's liability to Jack, because the mere fact that Lawyer was incompetent does not mean that Jack is immediately entitled to a recovery; the lawyer is not the insurer of the validity of the client's claim such that a client can get an automatic recovery from the lawyer if the lawyer breaches some duty of care in regards to the client where the claim was one which had a low chance of success.

**Hypothetical lawsuit - Jack v. Wilbur**

**Negligence** - supra.

**Duty** - Jack will have a very difficult time proving that Wilbur owed him a duty. Wilbur was driving down the street and ran a red light. It is difficult to argue that Wilbur owes a duty to Jack, who was probably in his house across the street and was not physically harmed by Wilbur's actions. Jack was probably well outside the zone of danger which resulted from driving a car down the street.

Jack can probably not show that he was owed a duty by Wilbur. If he can, then he will attempt to show breach, causation, and damages.

**Breach** - If Jack can show a duty owed by Wilbur, then driving through the light probably breached this duty.

**Causation** - but for Wilbur driving through the light, Chip would not have been injured.

**Causation - proximate** - it was probably not foreseeable that driving through the light and hitting someone would cause damages to Jack, who was not at the scene; furthermore, these are only economic damages without physical damages[,] which are not the kind of harm anticipated by the breach of duty.

**Damages** - Jack would have had the same problem showing that the job would have been completed as Melinda: the chance of the job actually being finished is so low and difficult to prove that a court would almost certainly not allow a recovery in this case.

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this \$100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the \$100,000 would have been recovered had Wilbur not knocked down Chip.

Furthermore, Jack only has economic damages under a contract to which Wilbur was not a party.

**Contract** - because Wilbur was not a party to the contract and did not intentionally interfere with the contractual relations of Wilbur and Jack, it is unlikely that Wilbur can be sued for interference with this contract.

Jack will probably not recover from Lawyer, due to the fact that Chip actually cutting the Star properly was extremely unlikely to occur.

## Answer B to Question 6

6)

1. Melinda v. Wilbur

The issue is what claims if any may Melinda, Chip's widow, assert against Wilbur, and what damages, if any, may she recover?

### Survival/Wrongful Death

The executor of a decedent's estate or certain other individuals (spouses, children) enumerated by the state's wrongful death statute may assert a claim against a tortfeasor for damages caused by the tortfeasor's negligence through a wrongful death claim. In a wrongful death action, the executor or other specifically enumerated individual steps into the shoes of the decedent for purposes of asserting the claim on the decedent's estate's behalf. If the decedent survived for even a brief period of time, a claim for survival is also permissible. In both actions, the party asserting the claim is required to prove the underlying tort she alleges led [sic] to the decedent's death. Thus, Melinda may assert a wrongful death and survivorship claim against Wilbur because Chip survived long enough to bleed to death after the accident before dying.

### Negligence

Melinda should claim that Wilbur's negligence in running through a red light caused Chip's death. To assert a successful negligence claim, the plaintiff must demonstrate: (1) a duty owed to her by the defendant; (2) a breach of that duty by the defendant; (3) causation; and (4) damages. As explained below, she can establish each element.

An individual owes a duty to others to act as a reasonably prudent person would in similar circumstances. A reasonably prudent person does not drive through red lights. Thus, Wilbur owed a duty to Chip to not drive through a red light.

A breach is demonstrated by showing that the defendant failed to act as a reasonably prudent person would've acted in similar circumstances. Here, Wilbur breached that duty by driving through a red light. This action also likely constitutes negligence per se. Negligence per se arises when a statute prohibits behavior engaged in by the defendant (here, running through a red light) to protect individuals (like Chip) from harm (injury by failure to stop at a red light). In the presence of such facts, a duty and breach is presumed.

Causation is divided into two parts: (1) factual causation and (2) proximate causation. Factual causation is typically referred to as the "but-for-test," i.e., but for the defendant's negligent conduct the plaintiff would not have been harmed. Here, but for Wilbur's failure to stop at the red light, Chip[,] who was crossing with the light[,] would not

have been injured and then died.

Proximate causation relates to issues of foreseeability. The question is whether the harmed [sic] suffered by plaintiff is foreseeable or rather if some intervening act cuts off the defendant's liability. Wilbur will likely claim that Chip's injuries were not foreseeable because an ordinary person would not have died from a gash on his leg. Here, Chip was a hemophiliac and died as a result of this condition[,] not because of a gash. Running a red light, however, may result in injury to another which could include death, thus proximate causation is clearly present.

Wilbur may also attempt to argue that a defense exists because Chip was comparatively negligent and had the last clear chance to avoid the accident. Defenses to negligence include contributory negligence, which cuts off a plaintiff's right to damages if he shares in the negligence in any way, comparative fault[,] which apportions damages based upon the plaintiff's negligent acts (and in some states limits recovery all together if the plaintiff is more negligent than the defendant), and the last clear chance doctrine, which denies a plaintiff recovery if he had the last opportunity to avoid the accident.

Contributory negligence has been abolished in almost all states and should not come into play here. But what about comparative fault? Wilbur was in a slow moving car so that Chip might have avoided the accident by merely stepping out of the way. This defense seems likely to fail since the facts indicate Chip was crossing with the light. Even if Chip is somewhat negligent for failing to avoid the accident, it is doubtful that his negligence is enough to deny him recovery.

### Negligence Damages

A successful negligence plaintiff may recover compensatory damages. Compensatory damages must be certain, foreseeable, and unavoidable. These damages can be divided into economic and non-economic damages which include medical bills, lost wages, and pain and suffering. Chip's estate is entitled to medical bills, funeral expenses, lost wages, and pain and suffering damages. These damages must be reduced to present value after inflation is taken into account.

Here, Wilbur will attempt to argue that some if not all of the damages were not foreseeable. Specifically, he will claim that Chip's death was unforeseeable because an ordinary person would not have bled [sic] to death after suffering a minor gash to the leg. This claim will fail because of the eggshell-skull doctrine which requires the defendant to take the plaintiff as he finds him. This plaintiff, unfortunately for Wilbur, was a hemophiliac and dies. It sucks to be Wilbur.

Wilbur may also attempt to argue that some if not all of the damages were unavoidable because his car was moving slow and Chip could've avoided the accident. As explained above, this factor may limit damages but not preclude them completely.

Finally, Wilbur may argue that some damages like lost wages (for instance the \$100,000 Chip would've made to cut the Star) are not certain. This may work as to this claim since 19 expert diamond cutters refused to take the job. But again it will simply limit recovery, not result in a denial altogether.

### Loss of Consortium

A spouse may also assert a claim for loss of consortium if her spouse is injured by a tortfeasor. Here, Melinda may assert her own claim based on the fact that she lost certain benefits because of Chip's death. She will lose companionship; she will lose his assistance around the house and may have to hire someone to come in and take care of the chores he performed; and she may lose sex.

Since Wilbur caused Chip's death because of his negligence, Melinda should prevail on this claim. She can recover damages based on the amounts if any she paid for substitute services as well as for any other damages she can demonstrate based on the foregoing test.

### Negligent Infliction of Emotional Distress

A family member may assert a claim for negligent infliction of emotion[al] distress by demonstrating that she was within the zone of danger when the defendant's extreme and outrageous actions resulted in harm to a fellow family member. Although Melinda may assert the claim, Wilbur's actions do not appear to be extreme and outrageous and it is unlikely that she will recover on this claim.

### Jack v. Lawyer

The next issue is what claims if any may Jack assert against Lawyer for failing to file his negligence claim against Wilbur within the applicable statute of limitations, and what damages may he recover if any.

### Malpractice

A lawyer may be sued for malpractice if she breach[es] a duty to her client and this breach results in a harm to the client. To assert a successful claim against Lawyer, Jack must show the Lawyer's conduct fell below that of any other attorney practicing in the locale and that but for this breach of duty he would have not been harmed. Specifically, Jack must show the Lawyer (1) breached a duty to him; (2) causing damages.

A lawyer owes her client a duty to act as a reasonably prudent lawyer would while representing a client under similar circumstances. Here, a reasonable lawyer does not blow a statute of limitations. Lawyer's failure to file a negligence claim against Wilbur on Jack's behalf within the applicable statute of limitations is a breach of that duty. To demonstrate causation, Jack must show that but for the plaintiff's failure he would've

succeeded on his claim against Wilbur.

This requires a brief analysis of Jack's potential negligence claim against Wilbur. The elements of a successful negligence claim have been stated above. First, Jack must show that Wilbur owed him a duty. A person owes a duty to act as reasonable person would [sic] in similar circumstances. But the duty extends only to all foreseeable plaintiffs per Pfalsgraf. Here, Wilbur didn't owe a duty to Jack because Jack was not a foreseeable victim to Wilbur's failure to stop at a red light. Accordingly, Jack cannot show that but for the Lawyer's failure to file a claim within the applicable statute of limitations his claim would've succeeded. Even if the Lawyer had filed the claim, which seems a bit frivolous, Jack still loses.

Accordingly, Jack cannot succeed on his claim against the Lawyer for failing to file that claim. Since his claim will not be meritorious, he cannot recover the damages ordinarily available to a successful claimant in a malpractice action, which include compensatory damages and might well have included damages resulting from his failure to be able to have the "Star" cut since no other master diamond cutter is willing to do it.

### Breach of Contract

A contract is a legally enforceable agreement between two people. The facts only indicate that Jack hired Lawyer to file this lawsuit. In California, however, a Lawyer is generally required to enter into a written agreement with a client relating to her representation of him. Assuming the presence of such an agreement, it was likely valid as a bilateral contract (mutual assent plus consideration based on the promises between both parties).

A breach occurs where no conditions exist to performance and the party required to perform fails to do so. Here, the Lawyer failed to file a claim even though she was required to do so. Accordingly, a breach occurred.

When a breach of contract occurs, several remedies are available to a successful party including compensatory damages (those necessary to place the non-breaching party in the same position he would've been in but for the breach), consequential damages (all damages foreseeable as a result [o]f the breach), perhaps liquidated damages. Restitutionary damages are permitted when the defendant confers a benefit on the plaintiff and it would be unjust for her to retain it. In the appropriate situation, injunctive relief, specific performance, rescission or reformation might also be appropriate.

Here, if the Lawyer breached a contract, then she owes Jack compensatory damages - - those necessary to place him in the same position he would've been in but for the breach. As explained above, he would still have lost so this is probably nothing. He is also not likely to recover consequential damages for the same reason. However, if he paid the Lawyer any money for her services she may be requi[r]ed to return any amounts that were not used to institute this action

Jack might also consider contacting the local bar association to report Lawyer's actions.