



California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

July 2006

TUESDAY MORNING  
JULY 25, 2006

# 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

After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed \$1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, "Come back here, thief!" Paul said, "I paid. Look on the counter." Clerk replied, "I've got your license number, and I'm going to call the cops." Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room to wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room.

Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. Mark attributed his forgetfulness to his medication, which is known to impair short-term memory.

Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning. He recalls that, while in the back room, he heard a running engine and felt ill before passing out.

A state statute provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing upon any perceptible grade, turning the front wheels to the curb or side of the highway."

1. Can Paul maintain tort claims against (a) Clerk for false imprisonment and (b) Mark for negligence? Discuss.
2. Is Delta Gas liable for the acts of (a) Clerk and (b) Mark? Discuss.

## Answer A to Question 1

1)

1.

### Paul v. Clerk

#### False Imprisonment of Paul

False imprisonment is an intentional tort. The elements for false imprisonment are that the tortfeasor must have intended to confine the victim in a bounded area and that the victim have no reasonable means of leaving the bounded area. The extent of the false imprisonment is usually not [of] importance[;] mere seconds can amount to false imprisonment. Courts often will forgo the intent requirement in regards to the tortfeasor if the victim suffered harm as [a] result of the confinement.

Here the facts indicate that Clerk intended to keep Paul in a bounded area until Mark, the store manager[,] was able to come back from his errand. Clerk had the requisite intent to confine Paul. Clerk will argue that the area was not bounded as he did not lock the door. Clerk will attempt to argue that Paul had a reasonable means of leaving the area[;] thus he cannot be guilty of false imprisonment.

Paul will reply that Clerk had the requisite intent and that it is not relevant whether the door was locked or not. The area was confined[;] Paul did not have a reasonable means of leaving as Clerk threatened to call the police on him. Paul will argue that even though the door was not locked, he was still confined for purposes of false imprisonment. Furthermore, Paul will argue that even with [sic] Paul did not have the requisite intent to confine him, the harm he suffered will be construed by the Courts as a substitute for intent.

Paul should succeed in his assertion of false imprisonment against Clerk barring any defense, discussed below.

#### Clerk's defense of Shopkeeper's Privilege

A defense to the tort of false imprisonment is that a storekeeper or his employees are allowed to detain an individual if they reasonably suspect that person of stealing. They are then allowed to detain that individual for a reasonable period of time in order for them to ascertain the validity of the theft. Courts have often held that reasonable usually cannot exceed 30 minutes, at time[s] have held 15 minutes was not reasonable, depending on the circumstances.

Clerk will argue that he was reasonable in his belief because he did not see actually see [sic] Paul pay for the candy, thus allowing him to assert the right. Clerk will also argue he

acted reasonably in taking Paul to the back room, and that leaving him for 25 minutes was not unreasonable. Clerk will argue the 25 minute stay was reasonable because he had to wait for the store manager to come back.

Paul will reply that Clerk's belief was unreasonable because Clerk was not paying attention in the first place, and that all Clerk had to do was look on the counter to see if the \$1.50 was there. If nothing else, Clerk could have simply checked the register. Paul will then argue that the 25 minute detainment was unreasonable because of the type of room he was placed in. Paul will argue that putting him in a [room] that was full of carbon monoxide was unreasonable, even if it was only for one minute.

Paul should succeed in rebutting Clerk's defense of SP b/c it was not a reasonable suspicion and the time constraint was unreasonable.

### Clerk's unlawful arrest of Paul

For purposes of demonstrating intent and unreasonable belief, Clerk's arrest of Paul can be analyzed. It has been held that when a citizen arrests another citizen, for purposes of a misdemeanor (which these facts indicate as the candy was only \$1.50), require that the Clerk had been reasonable in his belief that the individual conducted the act, that act was done in his presence, and it had to be a breach of the peace.

Clerk may try to argue that it was done in his presence, and it technically was, but Clerk never actually saw it. Clerk may argue that regardless of [whether] he actually saw it, his belief was reasonable. Clerk may attempt to argue that a theft amounts to a breach of the peace and that he did not unlawfully arrest Paul.

Paul will argue that even if Clerk was reasonable in his belief, this was not a breach of the peace. Paul took \$1.50 worth of candy from a gas station and threw the money on the counter. This simply cannot amount to a breach of the peace, no matter how strict a state's law might be.

Therefore, Clerk unlawfully arrested Paul.

### Conclusion

Therefore, because Clerk intended to confine Paul, and did indeed confine Paul (and caused an injury[,] no less), that Clerk did not satisfy the elements of shopkeeper's privilege as the belief was unreasonable, as was the time constrained. Finally, Clerk's unlawful arrest of Paul also goes towards the intent of illegal confin[e]ment. Thus, Paul should succeed in a false imprisonment claim again[s]t Clerk.

## Paul v. Mark

### Negligence

Negligence is a tort that requires the following factors: Duty, Breach of Duty, Foreseeability (Actual/Proximate Causation), and Damages.

### Negligence per se

Negligence per se occurs when there is a[n] ordinance that prohibits some type of conduct that occurred. If it's intended to cover the type of occurrence it speaks to, one may be guilty of it without demonstrating all the elements of negligence.

Here, the statute refers to stopping a car on the curb/highway, and turning the wheels. This would indicate it's to prevent cars from sliding if the parking brakes don't work. Thus, this statute was not intended to protect people from carbon monoxide poisoning.

Thus, negligence per se doesn't work.

### Duty

Duty requires that the tortfeasor have some duty to victim. Generally speaking, we all have a duty not to act negligently. Essentially this is requiring that we act in a reasonable manner that does not put others in a[n] unnecessary state of harm. In order to make out a case for negligence, Paul needs to show that Mark owed him a duty.

Mark will argue that he has no general duty to everybody in the world. To hold him to such a high duty is improper. In addition, Mark will argue that the medicine he was taking made him forgetful, thus absolving [him] of his duty.

Paul will argue that nobody's asking Mark to have a duty toward the whole world, just those who enter his store[.] Paul will state that shopkeepers are held to a much higher degree than normal guys just walking on the street. Paul will also argue that Mark's tendency to forget while taking the medicine does not absolve him because he knows that the medicine makes him forgetful. Thus Mark must act in accordance with that knowledge.

In order to properly examine duty, it's necessary to look at the duties owed to a trespasser, licensee and invitee.

### Trespasser

An undiscovered trespasser is owed no duty under the common law. Anticipated trespassers need to be warned of active operations and artificial conditions that are unreasonably dangerous.

Mark will try to argue that Paul was a trespasser because (b/c) Mark was being held for alleged shoplifting. Mark will argue that Paul was in an area that is not generally open to members of the public, thus his duties will amount to that owed to a trespasser only. Mark will argue that he was not aware of Paul's presence[;] therefore, he owed Paul no duty.

Paul will reply that holding him as an undiscovered or unanticipated trespasser makes no sense. He was discovered and most likely anticipated, although the facts do state the room was seldomly used. Paul will argue that he was owed, at worst, a duty that's granted to an anticipated/discovered trespasser. Thus, Mark will argue that he was entitled to a warning in regards to the carbon monoxide.

### Licensee

A licensee is one who is invited onto the land of another as a social guest. They are owed to [sic] warnings regarding unreasonably dangerous conditions involving active operations, hidden but discovered dangers, artificial and natural conditions.

Because Paul was not invited as a social guest, whether into the gas station or the back room, the licensee standards do not apply to him and need not be discussed here.

### Invitee

An invitee is one who has been invited onto the land of [sic] property of another for the property owner's benefit. The rule for invitees is that the property owner owes all the same duties that is [sic] owed to licensees, plus the owner needs to make reasonable inspections for unreasonable dangerous conditions existing on the premises.

Mark will argue that Paul was not an invitee because he had allegedly stole [sic]. Mark will argue that while Paul may have started off as an invitee, by stealing, he exceeded the scope of the invite and became a trespasser. Mark will argue that because of that, Paul is not entitled to the protections of an invitee.

Paul will argue that he was an invitee as he went to the station to buy gas. He was there for the benefit of Delta. Paul will argue that just because he allegedly stole, that does not change his status because he did not in fact steal, that Clerk false[ly] imprisoned him, and the false imprisonment cannot change the scope of duty owed to him.

Paul will then argue that because an invitee is entitled to have the owner inspect the premises for dangerous conditions, this means that there was a duty to inspect the back

room before sticking him in there. Paul will argue that carbon monoxide is an unreasonably dangerous condition.

### Was there duty?

The duty owed to Paul was most likely that of a[n] invitee. He was there for Delta's benefit. The fact that Clerk thought he stole does not change that fact b/c Clerk's defenses do not work. Further, the medicine making Mark forgetful cannot be construed against Paul because Mark knew the medicine makes him forgetful[;] thus he had a duty to act extra carefully when on the medicine.

### Breach of Duty

This examines whether the tortfeasor breached the duty that's was [sic] owed to the victim in this case.

Mark will argue no duty was breached because he had no duty in the first place. Mark will make the same arguments regarding duty as above. Mark will argue that if he had no duty, he cannot be guilty of breaching it.

Paul will argue that duty [existed] for the same reasons as above. Paul will argue that Mark owed him a duty because he was the store manager and further that Mark owed a duty b/c he knew the medicine made him forgetful.

Thus, there was breach of duty of [sic] Mark's part.

### Foreseeability

There are two inquiries in regards to foreseeability/causation: 1) actual (but-for), and 2) legal (proximate cause). But-for cause can be quite broad and is usually easy to satisfy. Proximate cause is a bit more difficult as it requires that the victim be foreseeable. The most prominent test is [sic] the "zone of danger" (or Cardozo test), while the less used one is the Andrews test.

A but-for cause simply asks: but-for defendant's actions, would the injury have occurred? In this case, but-for is easy to satisfy. But-for Mark's actions of leaving the exhaust on, Paul would not have been injured. This test is extremely broad and almost anything can qualify as a but-for cause. Perhaps that is why the courts instituted a legal cause as well.

The Cardozo Test will consider proximate cause satisfied only if the individual was in the zone of danger. Thus, it requires that the chain of events leading up to the injury was

reasonably foreseeable to the defendant. It requires that there not be some superseding (i.e. extremely unnatural consequences that comes in the middle) cause.

The Andrews [test] is extremely broad. It merely says that as soon as a negligent act is done, the zone of danger basically expands to everyone and everything.

Using the Cardozo test, Mark will argue that Paul was not within the zone of danger (ZOD) because Mark simply had left the exhaust on his truck. Mark will argue that by leaving the exhaust on, it was not foreseeable that Clerk would take Paul into a seldom-used backroom and have the Carbon Mono leak into that room. Mark will further argue that Clerk's actions were a superseding cause because if Clerk hadn't taken Paul into the room, there would be no injury.

Paul will reply that he was in the ZOD because the backroom was next to the garage. Paul will say that leaving the exhaust was a legal cause because he was a foreseeable plaintiff. Paul will argue that it is foreseeable that an exhaust, which everyone knows emits carbon monoxide, will seep into an adjoining room. Paul will further argue that while Clerk did falsely imprison him, this does not amount to a superseding b/c generally unless it's an Act of God or crime by 3<sup>rd</sup> party[,] many acts by another 3<sup>rd</sup> party do not amount to superseding causes.

Under the Andrews test, Mark really had no arguments b/c it's essentially another but-for test.

Paul should succeed in demonstrating foreseeability/caus[a]tion because it seems pretty clear he was in the ZOD. Paul was placed in a room adjoining the garage[;] most people should have the knowledge that it's dangerous activity. Further, the acts of the Clerk probably will not be construed as a superseding cause, even though it is an intentional tort.

### Damages

Damages here would amount to Paul's medical expense and whatever suffering that has occurred.

### Defenses

Paul will attempt to argue that he was not contributorily negligent or did not assume the risk.

Contributory negligence requires that the victim do something that contributed to the neglig[ig]ence, thereby depriving of his right to damages (in a c/n jurisdiction).

Mark will argue that Paul was c/n because he should have realized the[re] was CO and that any reasonable person would have ran [sic] out the door or at least pounded on the door.

Paul will reply that CO cannot be smelled, that it simply knocks a person out. Paul will reply that there was no way for him to know that there was CO[;] therefore he cannot be contributorily negligent.

Assumption of risk requires that the victim voluntarily assume the risk of whatever occurred to him.

The facts do not indicate that Paul voluntarily assumed any risk. While the door was unlocked, he could not have voluntarily assumed the risk that there would be CO leaking from the garage. Therefore, AOR is a bad defense for Mark to assert.

Further, comparative negligence will only serve to decrease some of Mark's liability. In some jdx's, one who is over 50% negligent cannot recover. In pure jdxs, P can always recover something, unless she is 100% negligent. The facts do not seem to indicate any negligence on Paul's part[;] therefore Mark will be responsible for 100% of the neglig[ig]ence, as it relates to Paul.

## 2. Vicarious Liability/Respondeat Superior

### Vicarious Liability/Respondeat Superior

Generally, an employer is guilty for the acts of his employees, provided that it is within the scope of his employment.

In the case, Clerk was acting within the scope of his employment. He was trying to protect the store from being robbed. The store may try to argue by falsely imprisoning Paul, Clerk was acting outside of it. Further, store will try to argue that b/c Clerk was talking on the phone, he was also acting outside the scope of employment.

The store's arguments probably will not work because Clerk undoubtedly in [sic] given the privilege by his employer to detain those he believes is stealing. It would appear from the facts that Clerk was acting within the scope of his employment[;] surely his job entails detaining those who he believes was [sic] stealing from the store. Thus, the store cannot relieve itself of Clerk's false imprisonment tort.

Mark, on the other hand, left his truck on while running on a personal errand. The store will try to claim he was acting outside the scope of employment because he was on a detour. The general rule is that when an employee detours from his employment functions, the employer might not be held responsible.

The store will argue b/c Mark left on a personal errand, his actions cannot be attributed to them. This argument probably will not work b/c Mark left his truck at work. Mark did not take his truck on a personal errand and run somebody over. It is given that people

generally take their cars to work, and if that car poses a problem and causes injury to a customer, that is within the scope of the employment.

Therefore, the store will be held under the vicarious liability/respondeat superior theories.

### Trespasser/Licensee/Invitee

All of the rules and arguments above apply to the Employer as well.

Since Paul was a[n] invitee, the Store (or its employees) owed a duty to inspect the premises and by failing to do so, Store is liable for the employer's acts.

### Defenses

All the same defenses from above apply.

## Answer B to Question 1

1)

I. Can Paul maintain tort claims against Clerk for false imprisonment?

In order to prevail under a claim of an intentional tort, such as false imprisonment, the plaintiff must show an action of the defendant, made with requisite intent, causation and damages. False imprisonment specifically requires the following: (1) an act or omission of the defendant that causes the plaintiff to be restrained to a bounded area. This can be done through a physical act or under an imminent threat. There must be no reasonable means of escape. (2) The defendant must have acted with specific intent to confine or general intent, meaning he acted with substantial certainty that he was acting in the proscribed manner. (3) It was the actions of the defendant that caused the harm to the plaintiff. The action must have been at least a substantial factor. (4) Damages. The plaintiff had to suffer some harm so he must have known of the restraint or suffered damage because of it.

### Action of the defendant (C)

In this case, C did ask P to go with him to the back of the store, which P did. Though C may argue P was free to leave, P should argue that he only went to the back room under threat of having trouble with the police. He knew C had taken down his license number, and P arguably was willing to go into the back room so he could have a chance to explain himself. P was put into the room and C closed, though did not lock [,] the only door to the room, which contained no windows. This should be enough to meet the requirement that there be no reasonable means of escape. Even though P could have physically opened the door and may have been able to walk out, he was being held there under threat of having to deal with the police.

M may argue that the threat of calling the police should not be considered to be a threat that confined the P. If P was truly innocent, all he would have to do is give his story to the police. Plus, P should have known that his money was still on the counter, and if he could convince C or the police to look for [it], this story would

be shown to be true. Therefore, C would argue, P did not really have to stay in this back room [;] it was only P's desire to avoid dealing with the cops that caused him to be back there. This is probably not going to work because the [sic]

### Intent

Here, P should argue that C acted with the specific intent to hold P in the bounded area. The facts do support this argument, because C did specifically tell P to go into the back room to wait for Mark, the store manager. C also intentionally made the statement that caused P [to] feel that he had to stay in the back room. Therefore, this element is met.

### Causation

The causation element is also met because there is a direct link from C's actions to P being held in the store room. The facts state that P went into the back room after hearing C threaten to call the police.

C may try to argue that, while his action may have caused P to be bounded to the room, it did not cause P's harm because of the intervening force of M. This is discussed below in the section on defenses.

### Damages

The facts state that as a result of being held in the back room for 25 minutes, P was knocked unconscious from carbon monoxide poisoning. Therefore, he did suffer actual physical harm at the time. He also continues to suffer headaches as a result of that, so he has ongoing damage. He also may have suffered damage even before being knocked unconscious. The facts state that he recalls feeling ill even before he passed out, so he may have been afraid or suffered emotional distress.

## Defenses

Because P does not seem to have met the above elements for a claim of false impri[s]onment against C, C will need to offer up some defenses if he is to shield himself from liability. The following defenses should be considered by C:

### Storekeeper privilege

Tort law does permit storekeepers to retain customers suspected of shoplifting. The idea is that storekeepers are permitted to try to recapture their chattels by using reasonable means and holding the suspected thief for a reasonable amount of time. The shopkeeper is protected against making reasonable mistakes as to whether or not the suspect actually stole anything.

In this case, C should argue that he was reasonable to suspect P of shoplifting. There are facts to support this claim [.] C did witness P pocket [sic] the candy and was not aware that P had paid. It is true that P had tossed money on the counter to cover the cost of the candy, but it was reasonable for C not to have seen this. This is because it is customary for customers to pay for items by going up to the cash register and being rung up by the cashier, and giving money directly to the cashier. Clerks are not used to having to look for money dropped on counters to be sure if someone has paid or not. Therefore, C was reasonable to think P was shoplifting, so he was covered by the privilege.

However, P has a very good claim to shoot down this defense. The detention by a shopkeeper asserting this privilege must be reasonable. Here, C held [sic] P in the back room for 25 minutes while he was waiting for Mark (M) to arrive. Arguably, this is too long to hold someone in a windowless back room by themselves to discuss stealing a candy bar that cost \$1.50. C will of course argue it was reasonable for C to make P wait for the manager, and that 25 minutes really is not that long. However, he was held in the back room and was never once checked on to be sure he was okay. This is arguably unreasonable. Also, the harm that came to P as a result of being in the room was clearly not reasonable. Therefore, C was outside the bounds of the storekeeper privilege and this defense is not available to him.

### Superseding force

As discussed above, C may also want to argue that it was not his tortious act that caused the harm, but rather it was Mark's supervening actions. C would argue that if M had not left his truck running in the garage for so long, the exhaust would have not leaked into the back room and P would not have

suffered any damages. Therefore, it is M's negligence (either in merely running the engine or in failing to take his medication) that was the real cause of the harm.

The rule for causation in tort cases is that the defendant's act was a substantial factor. P should easily be able to show that C was a substantial factor in the harm, because C left him there by himself for long [sic]. Therefore, the superseding force will not absolve his liability.

### Consent

C may also try to argue that P consented to the imprisonment. Consent is a valid defense against intentional torts. C would argue that P went to the back room of his own volition, because he made the choice to go back there rather than have the police be called by C.

The problem with this defense, P will argue, is that consent must be given voluntarily, and the actions of the defendant must not exceed the bounds of the consent. Here, the consent was not voluntary, because P was acting under threat of having the police be called, even though he did pay for his item. Also, even if P did arguably consent to going into the back room, he surely did not consent to being held for 25 minutes by himself and to suffer such physical harm.

### Conclusion

Based on the above, it appears that P does have a tort claim against C for false imprisonment. Though there are defenses that C will try to argue, he will probably not succeed with any of them.

## II. Can P maintain a tort claim against M for negligence?

A basic cause of action for negligence requires a showing of the following elements: (1) existence of a duty with an accompanying standard of care; (2) a breach of that duty; (3) defendant's actions were the but [-] for and proximate cause of the plaintiff's injury and (4) the plaintiff was actually damaged. Therefore, P must show all of these elements in order to prevail against M for negligence.

### Duty and Standard of Care

A duty of care is not owed to all. However, a duty of care is owed to all people who can foreseeably be injured by the actions of the defendant. In this case, the vicinity of P to the area of where M was running his engine would make him a foreseeable plaintiff. M may argue that no duty of care is owed to P because M had no idea P was back there, and had no reason to know because the store room was seldom used. However, this probably will not absolve M of his duty of care, because it is foreseeable that someone will be in the back of the store or garage at some point, and that leaving an engine running for so long in a closed area will cause harm to someone.

The standard of care owed is usually that of a reasonable person acting under similar circumstances and with ordinary prudence. This will be the standard of care applied in this case.

### Breach

Now it must be determined if M's conduct fell below the standard of care. There are several ways that P can argue that it does. First, P could argue that M was negligent merely in leaving the engine running for so long in the closed area. Certainly, reasonable people know that they should not allow highly toxic carbon monoxide to fill a small space, especially when the small space is so close to a public business where it is certain people will be found. Second, P could argue that M was negligent because M failed to take his medication. A person who knows that they are likely to forget doing things that would make their actions safe (like, in this case, turning off [the] engine of his truck) arguably should not be engaged in those actions. Here, M must have known of his likelihood of forgetting such things, since he has a prescription for short-term memory impairments. Therefore, he was negligent in failing to remember to take the medication in the first place that would have allowed him to avoid putting P at risk. P should be able to show breach on both of these points, since no

reasonable person would leave their car on when it[']s confined to such a small place.

Finally, P may argue that M's action is negligence per se. Negligence per se may arise when there is a statute that provides for penalties, that states the conduct that is required, that is meant to address the sorts of injuries caused [by] the defendant, and that is meant to protect peo[p]le in the plaintiff's position. In this case, P would argue that the state statute is meant to protect people from suffering carbon monoxide poisoning, by requiring everyone to shut off their car before leaving it unattended. Therefore, M's action was covered by the statute, and P's injury was meant to be addres[s]ed by the statute. However, M should be able to strike down this argument fairly easily. M should argue that the point of such statute is to prevent vehicles from causing accidents because the vehicle rolls while being unattended. The language of the statute makes it pretty clear that this is the injury the statute is meant to protect against, since the statute specific[a]lly addresses setting the brake on the vehicle and curbing wheels so the vehicle does not roll. Nothing indicates the statute is meant to protect against carbon monoxide poisoning.

### Causation

C will have to show M's actions were both the but[-]for cause and the proximate cause of his harm. It is the but[-]for, or legal, cause, because were it not for the negligence of the defendant, P clearly would not have suffered any injury. Nothing indicates that he would have suffered such harm just by being in the room. Also, it is the proximate cause. There is a direct link from the actions of the defendant to the harm suffered by P.

M will certainly try to argue that there were superseding forces that were the actual cause of P's harm. His best argument would be that it was C's false imprisonment of P that was the true cause of P's injury. However, superseding forces will not absolve a defendant of negligence unless they are unfor[e]seeable. Here, it should have been foreseeable [to] M that someone, at

some point, would go into the back room or even into the garage. The facts do state that the back room is seldom used, which may seem to support M. However, this does mean that the back room is sometimes used. Therefore, the superseding force was foreseeable and will not break the chain of causation.

### Damages

As discussed above, P did suffer damages. These damages can be attributed to M's actions just like they can be attributed to C's intentional tort. The likely result is therefore that P will be able to collect from both C and M, as joint and several tortfeasors.

### III. Is Delta Gas (DG) liable for the acts of (a) Clark and (b) Mark?

Though the facts do not specifically say it, C and M both appear to be employees of DG. Therefore, if DG is liable for the acts of C or M, they would be liable under the theory of vicarious liability. Vicarious liability states that an employer is liable for the torts of an employee if that employee is acting within the scope of the employment. The court will consider the time and place of the employee's act, and will also consider if the employee is acting for the benefit of the employer. In general, the scope is broad.

### Liability for the tort of C

In this case, DG would argue that C was not acting within the scope of the employment. Certainly, DG would not authorize its employees to commit intentional torts, such as false imprisonment, against its customers.

However, the mere fact that DG did [not] authorize this action will not get it off the hook. All P would have to show to hold DG liable for C's act is that C was acting in the interests of the employee. It is clear that C held P only because he thought P had stolen something from DG. Therefore, C was acting to held [sic] the employer. This is going to be consider[e]d within the scope of employment, even though it was not specifically authorized. Therefore, is [sic] C is going to

be liable, so too will DG. P should also point out that C was on the clock and was at the place of employment when the tort occur[re]d, strengthening the argument that this is within the scope.

#### Liability for the tort of M

The same rules will apply to determine if DG is liable for the torts of M. M's tort occurred when he was running the engine of his personal truck in the back room of the garage. Nothing indicates that M was on the clock at this time. Also, nothing indicates that M was doing this with any intention of helping employer. Rather, it appears he was doing this only for himself. Therefore, it is unlikely that DG will be liable for the act of M.

The best argument P could make to hold DG liable would be the close proximity of M to the place of employment. However, this probably will not overcome the facts that he was not on the clock and was not acting to benefit the employer.

#### Independent contractors?

If for some reason C and M are ICs and not employees, then a different standard would apply. Employers of ICs are generally not liable for the torts of ICs. However, they are liable if the tort involves a non-delegable duty, such as the duty of care owed to an invitee. In this case, P would be an invitee of the business, so he would be owed a very high standard of care. The employer would be charged with warning him of any latent dangers that the employer knows or should have known about. Clearly, carbon monoxide is a latent danger, since it is one that is not immediately apparent and cannot be seen. Also, P would argue that the defendants should be charged with knowing when there are gas leaks in the store. It would not matter that they did not have actual knowledge. The standard is that they should have known. Failing to warn of the latent danger would therefore be a breach, and DG would be liable for the torts of

M and C, even if they are construed as independent contractors and not employees.

## Question 2

In an effort to “clean up Columbia County,” the County Board of Supervisors recently passed an ordinance, providing as follows:

“(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.

(2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.

(3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.

(4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a \$5,000 fine, or by both.”

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

## Answer A to Question 2

The First Amendment protects the freedom of speech. It is imputed to the states through the Fourteenth Amendment.

### Facial Attacks

#### Prior Restraint

Under the 1<sup>st</sup> Amendment, speech cannot be enjoined before it occurs. With regard to licenses & review panels, which determine whether speech should be allowed before it occurs, they may be valid under certain circumstances. They do not violate the 1<sup>st</sup> Amendment when they: 1) are based on definite criteria and are not left up to the discretion of certain persons; and (2) are appealable.

Here, the statute mandates that sexual material may only be sold if it is first submitted to the panel and the panel, in its sole discretion, determines the item is not pornographic. As indicated above, submission to a panel itself is not unconstitutional.

However, the “sole discretion” of the panel is problematic. Sole discretion allows the panel to prohibit speech it does not like. It may even prohibit speech that it finds acceptable, but due to the person or business attempting to disseminate the material, deny it on those grounds. This discretionary review is inequitable and risks the danger of chilling speech. Because there is no set criteria for the review & it is left to the discretion of the panel, the section is unconstitutional as a prior restraint[.]

In addition, the statute does not mention any procedural safeguard. A person who is denied permission to sell must be able to appeal the decision. Because of the statute’s lack of appellate review procedure, it is unconstitutional as a prior restraint.

### Overbroad

A law is overbroad under the 1<sup>st</sup> Amendment when it prohibits more speech than is constitutionally allowed. Here, the statute prohibits “sexually graphic material.” This would prohibit not only obscene material (which is unprotected & can constitutionally be prohibited – see below), but also the majority of R[-]rated movies which are released. Such R[-]rated movies may be sexually explicit at times, but they are protected under free speech. Therefore, the statute regulates too much & is unconstitutionally overbroad.

### Vagueness

A law is vague under the 1<sup>st</sup> Amendment when one cannot tell which speech is prohibited & which is allowed. The speech prohibited under the statute – “sexually graphic material” – is unclear because you cannot tell what is allowed & what is not. For example, are nude

scenes in art films allowed? Nude scenes in pornographic films? A passage in a classic novel where the protagonist kisses his wife before going off to battle? Due to the vagueness of the statutory standard, it is impossible to discern which speech is allowed & what is prohibited. Therefore, the statute is likely to be found unconstitutionally vague.

## Regulation of Speech

### Content[-]Based Regulations

Again, the 1<sup>st</sup> Amendment protects the freedom of speech. Regulations based on the content of the speech – either its subject matter or its viewpoint – are subject to the highest standard of review, strict scrutiny. The content-based regulation must be necessary to achieve a compelling state interest, and must use the least restrictive means.

However, some content-based regulations concern unprotected speech and need not meet strict scrutiny.

### Obscenity

Obscenity is a form of unprotected speech. It can be regulated, based on content, without meeting strict scrutiny.

There is a three-part test to determine whether material is obscene: 1) it appeals to the prurient interests of people in the community; 2) it is patently offensive to people in the community; and 3) based on a national standard, it lacks any redeeming artistic, literary, or scientific value.

Here, the statute may regulate obscenity without meeting the strict scrutiny test. The provision prohibiting the sale of “sexually graphic material” may be valid if “sexually graphic material” is defined as limited to obscene material as set forth above.

### Profane & Indecent Speech

However, if the statute extends to all sexually graphic material, not merely the “obscene”, the statute may be unconstitutional.

Under the 1<sup>st</sup> Amendment, profane & indecent speech is fully protected (with the exception of such speech disseminated on free broadcast media [like radio] & schools). Therefore, any content-based regulation is subject to strict scrutiny.

Here, the statute is regulating “sexually graphic material”. This is a content-based regulation because it deals with the content[,] or subject matter, of the speech. Therefore, it must be necessary to achieve a compelling statute interest & use the least restrictive means.

### Compelling State Interest

Generally, when indecent speech is involved, the interest is in protecting children from sexual material. This is of the utmost importance in providing a safe & moral environment in which to grow up. Therefor[e] it most likely qualifies as a compelling state interest. Note: merely regulating the morals of the community is not compelling.

### Necessary & Least Restrictive Means

A law is necessary when it provides the only way to achieve the compelling state interest. Here, ther[e] are other ways to prevent the dissemination of indecent sexual material to children. For instance, the statute can limit the sale of sexual material to those over the age of 18. Or, a regulation can validly control the zoning & location of shops which sell sexual material so they are not near schools.

Therefor[e], because there are other options to achieve the compelling interest, least restrictive means have not been used. The law fails strict scrutiny and is therefore an unconstitutional violation of the 1<sup>st</sup> Amendment.

### Punishment

The final issue is whether the provision of the statute which authorizes imprisonment and/or fines for the violation of the statute is valid.

First, for this provision to be valid, the substantive portions of the statute must be valid. Because the statute is unconstitutional as a prior restraint, overbroad & vague & does not meet strict scrutiny (unless the statute is limited to "obscene" material), the punishment clause is invalid.

However, the punishment clause raises the issue of compliance.

### Collateral Bar Rule

The collateral bar rule applies when a person violates a statute. The rule states that if a person does not comply with a statute, the person cannot use the unconstitutionality of the statute as a defense in a criminal contempt proceeding. Therefor[e], even though the statute at issue is likely unconstitutional, a violation of the statute could result in punishment for contempt.

Thus, the best option is to comply with the statute for the time being, while appealing the decision of the panel and/or challenging the constitutional validity of the statute in court.

## **Answer B to Question 2**

### Videorama v. Columbia County

#### State Action

To bring a First Amendment claim, the plaintiff must assert state action, because the First Amendment only applies to the government, not private action. State action is present here because the ordinance was passed by the Columbia County Board of Supervisors, an instrument of the local government.

#### First Amendment Freedom of Speech

The First Amendment, applicable to the states through the 14<sup>th</sup> Amendment, provides that no government shall interfere with the right to free speech.

The Columbia County ordinance interferes with the right to free speech because it restricts the ability of video stores and individuals to sell, and correspondingly to buy, sexually graphic material. The ordinance imposes monetary fines and imprisonment for violation. Thus, the ordinance must be scrutinized under the First Amendment.

#### Overbroad

A statute may violate the First Amendment if it is overbroad. A statute is overbroad if it restricts protected speech as well as unprotected speech. Even if some of the speech restricted is not protected by the First Amendment, the statute will fail if it also draws unprotected speech.

In this case, the ordinance restricts both protected and unprotected speech. Obscene speech is a category of unprotected speech, and enjoys no protection at all under the First

Amendment. Obscenity is speech that (1) appeals to the prurient interest, as defined by a local standard, (2) is patently offensive, as defined by local law, and (3) lacks serious scientific literary, artistic, or political value, as defined by a national standard.

Some of the speech restricted by the Columbia County ordinance may be obscene speech. The ordinance targets sexually graphic material, and obscene speech is probably included in that category. The obscene material restricted by this statute presents a First Amendment problem.

However, the problem is that the ordinance restricts a broader category of speech, including some speech that is protected speech. Sexually graphic material that has serious scientific, literary, artistic, or political value is not obscenity and therefore is protected speech. The ordinance does not adopt the three part obscenity test, or make an exception for material that has serious value. Therefore, the statute is overbroad.

### Unfettered Discretion

The First Amendment is also violated where an official is given complete discretion on whether to allow or prohibit speech. Requiring an individual or entity to obtain a license or authorization to engage in certain speech, before engaging in the speech, is a prior restraint. Prior restraints are disfavored because they quell speech before it is even uttered. However, a licensing scheme, even though a prior restraint, can be constitutional if (i) no official has complete discretion over whether to grant a license, (2) specific, articulated standards are used to grant the licenses, and (3) judicial review or some other appellate process is available as a check.

The ordinance fails this test because it gives “sole discretion” to the Review Panel. The statute does not provide any standards whatsoever that the Panel should use to evaluate requests. The only standard given is that “sexually graphic material” may be prohibited by

the Panel. That is not a standard at all, because it does not articulate the factors the Panel will use to decide requests to sell such material.

Moreover, the ordinance requires potential vendors to get authorization from the Panel before selling any sexually graphic material. Thus, the ordinance is a suspect prior restraint. Without the procedural safeguards listed above – no sole discretion, articulated standards, and appellate review – the ordinance’s authorization scheme is an invalid prior restraint.

The statute gives no indication of any type of appellate review of the Panel’s decisions. The Panel has “sole” and apparently final discretion. This kind of unchecked power over free speech violates the First Amendment.

### Vague

The First Amendment also requires that laws restricting speech not be overly vague. A vague law is one that does not give fair notice of what speech it prohibits and what it allows. As such, it will deter protected speech, speech that is not meant to be restricted by the law, because people will fear that such speech is in fact prohibited.

The ordinance here is vague because it gives vendors no fair warning about what kind of material is “sexually graphic” and what is “not pornographic.” As stated above, the ordinance provides no standards or factors or definitions that enable anyone to determine what exactly is prohibited. Instead, only the Panel knows what is prohibited, and only after they have reviewed the material and decided that it is or is not sexually graphic.

Since material is not clearly “sexually graphic” until the Panel decides that it is, the ordinance does not enable individuals to predict their own liability. They cannot predict ahead of time whether selling certain material will violate the ordinance or not. Since

violation could lead to both a hefty fine and imprisonment, people will err on the side of restricting their own speech to make sure they are not in violation.

As a result, video stores, magazine stores, and often individuals and entities that sell graphic material will all have to censor themselves until they obtain Panel approval. Moreover, Panel approval is required for each individual item, not for each vendor, so the self [-] censorship will be ongoing.

Because the ordinance will end up restricting protected speech, since it does not give fair warning of what is prohibited, it is unconstitutionally vague.

### Content-based Restriction

A content [-] based restriction on speech is one that restricts speech according to what is being said or depicted or expressed, instead of according to the manner of the speech, or its time or place. Content-neutral time, place, and manner restrictions need only pass intermediate scrutiny to be constitutional. However, content-based restrictions must pass strict scrutiny.

The ordinance here is content [-] based because it restricts speech according to what it depicts – sexually graphic material. Although it does regulate the manner in which this speech can be sold, that does not make it a time/place/manner restriction. Because the restriction or the manner of sale only applies to sexually graphic material, the ordinance is targeting certain content. Therefore, it must pass strict scrutiny.

### Strict Scrutiny

For a content-based law to pass under the First Amendment, it must be necessary to achieve a compelling state interest. The government has the

burden of proving that it passes this test.

### Compelling State Interest

Columbia County's purpose in enacting this ordinance is to "clean up Columbia County." Presumably this means to regulate the distribution of sexually explicit material in order to have a more civil, professional, family-friendly atmosphere. The County may have had problems with children being exposed to sexually graphic material in stores or on the streets. The County may be concerned that an excess of such material may deter new residents, cause businesses to leave, harm young children, and even hurt Columbia's tourist industry. All of these concerns are valid state interests, and probably rise to the level of compelling. Assuming Columbia can prove that it has a compelling interest, it will next have to show that the ordinance is necessary to achieving those interests.

### Necessary to Achieve That Interest

This requirement is more than just narrow tailoring. It actually requires that the law be the least restrictive means available for achieving the state's interests. If less restrictive alternatives are available, the state must pursue those alternatives first.

Columbia County will not be able to show that its ordinance is the least restrictive means for protecting children, cleaning up the town's image, and preserving its business and tourist industries. These interests could be accomplished by the use of content-neutral time [,] place and manner restrictions, such as requiring people to keep the material they are selling off of the streets, indoors, during normal business hours. Then children walking on the sidewalk would not necessarily run into sexually graphic material. The County could also require stores that sell such material to post warnings at the front door or window, to announce to customers that such material is sold inside. This would be a less restrictive

ban, although still content [-] based, because it would allow stores to sell such material without pre-approval from a Panel. It would also accomplish the County's goals by enabling residents to avoid that material if they want.

The County could also use zoning laws to regulate where adult-themed book and movie stores can operate. The Supreme Court has upheld the use of zoning in this way to control the secondary effects of such businesses. Zoning would be less restrictive than Columbia's current ordinance because it would not ban all sales or require pre-approval by a Panel. It would still allow Columbia to "clean-up" by regulating where such businesses can operate, and keeping other areas of the County free of them.

Because less restrictive alternatives are available, the ordinance will fail strict scrutiny, and Videorama will win its suit against Columbia.

### Question 3

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means \$480 because of your \$20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for \$500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of \$500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

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On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

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At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was \$100, but RC billed Maria for \$500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

### Answer A to Question 3

3)

#### Applicable Law

The common law applies to all sales of service contracts and the UCC applies to sale of goods. Here, the contract is for cleaning services (a service) so that it clearly falls within the ambit of the common law. As such, none of the rules under the UCC will be applicable.

#### Valid Contract Formed

Before addressing whether Maria breached her contract with Resi-Clean ("RC"), it must first be determined whether she had a valid contract to begin with. A valid contract requires: (1) an offer; (2) an acceptance of the aforementioned offer; (3) consideration from each party; and (4) no defenses to formation. Each will be discussed below.

#### Offer

For an offer to be valid there must be an intent to be bound, communicated to the offeree, with sufficient and definite material terms. Here, there are several points at which the parties may argue an offer was made. Whether or not a valid offer is made (i.e. whether above factors are met) is determined by looking at whether a reasonable person receiving the communication would feel that their acceptance of the offer would create a binding obligation.

First, it may be argued that the handbills placed on the doorknobs of the houses created an offer from RC to all of the houses. However, this argument is likely to fail. An advertisement that merely states the cost of services, a phone number, and possible coupons would not be construed by a reasonable person to evidence the intent of advertising to be bound to a contract upon acceptance.

Thus, this would not likely be construed as a valid offer. However, a court may accept an argument by Maria that the coupon attached that specified that the party would get \$20 off if they called within 24 hours and ordered a top-to-bottom cleaning was a valid offer because it was specific with the terms of how it could be accepted, when it had to be accepted by, and a reasonable person would feel that the party giving the coupon would be bound by the offer. The effect of the binding effect of the coupon will be discussed further with respect to the damages that Maria receives below.

A second possibility for the offer could be the phone call that Maria made to RC to order to the top-to-bottom cleaning service. She requested that they come and clean her house, as described on the handbill, and specified the \$480 price (\$500 less the \$20 coupon). This would be construed by a reasonable person in RC's shoes to be [an] offer than [sic]

they could accept to form a binding contract so that it likely would be deemed to be an offer. Moreover, even if this offer was deemed rejected by RC's manager indicating that "they would be there Friday" because this was an additional term, that statement would be an [sic] counteroffer to Maria on the same terms but including the Friday cleaning provision.

If, for some reason, the court determines that the above was not an offer, then the confirmation order may also be deemed to be an offer to Maria. Thus, Maria would be free to accept that order at any point after receiving it. This is very unlikely to be the case, however, as Maria's phone call would almost certainly be construed to be the offer in this case.

### Acceptance

A valid acceptance requires that a party who is able to accept the contract unequivocally accepts the offer and communicates that acceptance to the offeror. Of course, if and when a valid acceptance occurred would depend on when the offer occurred. Because the advertisement described above was not an offer (except to the extent of the coupon which was incorporated into Maria's offer) it will not be discussed here with respect to acceptance.

Assuming that Maria's phone call is deemed to be the offer then RC likely accepted the offer when its manager stated "[t]hat's right. We can be at your house on Friday." While Maria may argue that the statement "we can be at your house on Friday" was an additional term that did not create a valid contract but, rather, was a rejection and counteroffer, this argument would have little effect given that Maria promptly said "Great[,] " thereby accepting the counteroffer with the additional Friday term. Maria may also argue that by telling them to call her before they come [sic] so that someone is there to let them in she did not unequivocally accept their offer. However, this statement was not intended to modify the terms of the contract but, rather, just told [sic] them that they should call in advance to ensure someone would be home. Whether or not this amounted to a condition precedent will be discussed below. Thus, Maria's offer was accepted by RC (or Maria accepted RC's counteroffer on the same terms with the Friday provision) upon their phone call and a binding contract was completed at the time.

If the phone call was not deemed to be a valid offer so that the offer was the confirmatory memo, then Maria did not accept it and there would be no valid contract. Maria only received the memo on Friday morning and from that point on tried to send RC away. Thus, there would be no acceptance. However, this argument would be unlikely given that they almost certainly formed a valid contract during the phone call as described above.

### Consideration

Here, Maria agreed to pay RC \$480 and they agreed to clean her house from top-to-

bottom. This exchange of promises provides the required bargained[-]for exchange and legal detriment to each party for there to be valid consideration.

Thus, this element is met.

## Defenses

### Statute of Frauds

The Statute of Frauds does not apply to services contracts that will be completed in less than one year. Here, the contract was to be completed in its entirety by Friday so that the statute of frauds was inapplicable.

As no other defenses are applicable, a valid contract was likely formed at the time of the phone conversation between Maria and the manager of RC.

### Terms of the Contract Formed

Once it is determined that a valid contract was formed between the parties, the next step is determin[ing] the terms of that contract. In this case, Maria called RC and stated that she wanted a “top-to-bottom” house cleaning “as described in the handbill.” Moreover, she indicated (and the manager of RC agreed) that the price would be \$480 once the coupon from the handbill was taken into consideration. The contract likely also contains the provision that RC will complete the work on Friday as that was agreed upon by the parties during the course of the phone conversation. Thus, the contract will certainly be for a top-to-bottom house cleaning at Maria’s house on Friday for \$480.

A question exists as to whether Maria’s statement that they had to call her before their crew comes in order to be sure that someone was there to let them in. It is unlikely that this would become part of the contract given that the parties had already agreed on the contract before Maria made that statement. Moreover, the statement does not affect the performance of the obligation but was merely intended to ensure that the contract would move forward with no hassles. Thus, this is not likely to be considered part of the contract.

The provision in the “Confirmation of Order” memo sent by RC also does not likely become part of the contract. The contract was completed over the telephone and RC may not unilaterally make modifications to that contract (i.e. the 48 hour notice provision) without additional consideration provided by the other party. Here, RC gave no additional consideration to Maria for requiring the 48 hour notice provision). This does not mean, however, that Maria was free to cancel the contract at will[;] because the contract became enforceable over the phone, she is bound by the contract unless she has some excuse or defense to its enforcement or unless she is for some reason relieved of her duties under the contract.

Finally, for the same reasons as the 48-hour provision above, Maria's subsequent e-mail regarding the "exceptionally good job" would not become part of the contract. There was no additional consideration for the this [sic] provision and to require RC to do an "exceptionally good job" would deprive them of the benefit of the bargain their [sic] received when they negotiated for the \$480 price. Thus, this would not become part of the bargain and RC would be required to do a reasonable job in good faith.

Thus, the contract was for a full house cleaning on Friday for \$480 and it did not include the 48-hour notification provision or the "exception[al] job" provision.

### Did Maria Breach or Does She Have Any Excuses/Defenses For Her Breach?

Because a valid and enforceable contract existed, Maria is liable to RC if she breached the contracted [sic] as [she] is not excused from performance.

### Maria's Breach

Under the terms of the contract, Maria was required to pay RC \$480 and allow them into her house in order to complete the cleaning to which she agreed. Here, rather than allowing RC to come and clean her house, she sent them an e-mail at 10 a.m. on the morning of performance indicating that she was repudiating the contract and, when they showed up to perform, she turned their workers away. Thus, Maria anticipatorily repudiated the contract which would allow RC to: (1) treat it as an offer to rescind the contract and rescind; (2) treat the contract as materially breached and sue for damages immediately; (3) suspend their performance and sue once the contract becomes due; or (4) do nothing and encourage performance.

Here, Maria breached the contract the morning of performance so that suspending their performance or encouraging Maria's performance would be infeasible. Moreover, RC would not want to rescind the contract because that is exactly what Maria wanted to do and it would cost them \$100 in lost profits. Thus, RC would treat the contract as materially breached and Maria would be liable for damages unless she had a valid excuse for her breach.

### Possible Defense/Excuses of Performance

#### Condition Precedent Not Met

Maria may argue that she had a valid excuse for not performing because in the course of their telephone call she indicated that the crew should call her before they come so that someone may be there. However, this argument would fail for a few reasons. First, as I indicated above, the provision that they call on Friday before they come was not likely part of the contract because they had already agreed on the terms of the agreement at that point and Maria's statement was only intended to make sure she could make arrangement

to let them into her house. Second, the purpose of the covenant was not breached because they showed up to clean her house when she was there (because she turned them away). Third, she repudiated the contract before they could make the phone call by sending them her repudiating e-mail that morning so that they could treat the contract as breached immediately without adhering to the condition precedent. Thus, this argument would fail to excuse Maria's material breach.

House sold (Impossibility, Impracticability, Frustration of Purpose)

Maria may also argue that the fact that she no longer owned the house at the time the contract came due excused her performance by way of: (1) impossibility; (2) impracticability; or (3) frustration of purpose. As will be shown below, all of these arguments would fail.

Impossibility - For performance to be excused by way of impossibility an unforeseeable and supervening event must render performance impossible for any person to perform. Here, Maria's sale of her house was not unforeseeable because she knew that [she] was trying to sell her house and it was not a supervening outside factor because it was entirely within Maria's control. Moreover, it was still possible for RC to complete performance – it just would not be as valuable to Maria now that she no longer owned the home that she contracted with them to clean. Thus, this argument would fail.

Impracticability - For performance to be excused by way of impracticability an unforeseeable and supervening event must render performance by one party inordinately difficult so as to create an injustice if the contract was enforced. Here, as noted immediately above, Maria controlled the event and it was foreseeable so this did not excuse her performance. Moreover, paying \$480 to have a house that you have just sold cleaned does not seem unduly difficult on Maria. Thus, this defense would fail as well.

Frustration of Purpose - For performance to be excused by way of frustration of purpose an unforeseeable and supervening event must intervene to render the entire purpose of the contract – known by both parties to the contract at the time the contract was formed – a nullity. Like the two arguments above, this would fail because the supervening event was in Maria's control and was entirely foreseeable so that Maria assumed the risk that her house would be sold by Friday. Moreover, at the time the contract was formed RC had no idea that she was selling her house so that the purpose was to fix the house up for its sale. Thus, the fact that this purpose was frustrated would not excuse Maria's performance because RC had no idea of that purpose at the time the the [sic] contract was formed.

Potential Damages that Maria Owes RC For Her Breach

In a contracts case where one party materially breaches the other party is entitled to damages to compensate them for their expectancy under the contract. They may also receive consequential and incidental damages as appropriate. However punitive damages

are typically unavailable in contract actions.

### Expectancy Damages

For expectancy damages to be provided to a party they must be causal, foreseeable, certain, and unavoidable. In this case, providing RC with the full \$500 for Maria's breach as is claimed in their bill to Maria would unjustly enrich them given that they only lost \$100 in profit as a result of her breach. Their expectancy under the contract was to make \$100 in profit so they should be entitled to the \$100 from Maria. Note, however, that the "loss of profit" provided in the facts does not indicate whether this includes the \$20 coupon or not[;] it it[sic] does not then [sic] they should only get \$80 because their expectancy was only \$80 profit but if it does then they should get the full \$100. This \$100 is causal because they lost the money as a result of her breach, certain because they clean places like this all the time and can likely show what they typically make, and foreseeable because Maria knew that by breaching they would not be able to find another customer right away. So long as RC made reasonable efforts to find another house to clean to make up for the lost profits so as to mitigate their damages the damages would also be unavoidable. Thus, RC would be able to recover their \$100 (or \$80) of expectancy damages.

### Consequential Damages

Consequential damages are those damages that are causal, foreseeable, certain, and unavoidable but that do not stem directly from the breach. There is no evidence of such damages in this question.

### Incidental Damages

In the course of finding a new customer to mitigate their damages if RC was forced to expend resources, they would be entitled to those reasonable costs as incidental damages. There is no evidence of such damages here.

### Specific Performance

Here, because the \$100 (or \$80) lost profit damages are adequate to compensate RC for its losses, specific performance (i.e. by forcing Maria to allow them to complete the contract) would be unavailable.

Thus, RC would be entitled to \$100 (or \$80 if the \$100 lost profit does not take the coupon into account because the coupon was enforceable as described above) for their lost profits as a result of the contract so long as they took adequate reasonable steps to mitigate their

losses.

## Answer B to Question 3

### Maria v. Resi Clean

1. Applicable Law: The transaction between Maria and RC involved the purchase and sale of services. Accordingly, even though RC may have used tangible items (detergent, etc.) while performing services, the predominant aspect of the transaction involved services. Thus the common law (not the U.C.C.) controls.

2. The handbill constitutes an Offer: Many advertisements are merely invitations to negotiate. Here, under the objective theory of contract formation, the handbill would induce a reasonable person to conclude that RC had manifested an intention to perform the services at the stated price if Maria called “within 24 hours.” By giving Maria the power to accept the offer with[in] 24 hours by calling, the handbill was not merely an invitation to negotiate – at least not with respect to a “top-to-bottom housecleaning.” If someone had called with respect to some other service or bundle of services, the handbill might not be deemed an offer. Here, RC gave Maria the power of acceptance.

3. Maria’s acceptance was a mirror image of the offer. First, Maria noted that she wanted a top-to-bottom cleaning as offered in the coupon. Accordingly, the subject matter of the offer and the acceptance was the same. Second, Maria did not attempt to negotiate or make a counterproposal that would have served as a rejection. Her request for clarification did not reject the offer. Having received clarification, her utterance “Great!” was an objective manifestation of her willingness to be bound to the terms of the offer, including the time for performance.

#### 4. The Offer and Acceptance Created a Contract:

##### 4.A. Consideration

Upon Maria’s acceptance, both Maria and RC suffered a legal detriment. Both had exchanged promises to do something they were not otherwise legally obligated to do.

##### 4.B. Essential Terms

Maria and RC agreed to all essential terms. RC agreed to perform a top-to-bottom cleaning consistent with the standards in its handbill. Maria agreed to pay \$480 upon completion of the service. Although performance of the services within a reasonable time would have been a concurrent condition, RC agreed to perform the services on Friday and Maria agreed. RC’s obligation to perform the services prior to payment would be a concurrent condition, filling in any gap concerning order of performance. All essential terms were established even though the term “top-to-bottom housecleaning” was not defined with specificity.

4.C. No writing required: A contract to perform \$480 of services on Friday is not covered by any aspect of the statute of frauds. The oral agreement is enforceable without a writing.

5. There were no valid modifications to the Contract[.]

5.A. RC's confirmatory memorandum stated one inconsistent term and one additional term. Neither would be incorporated into the contract; both would be a unilateral attempt to modify the contract. Maria did not agree to the higher price, and she did not agree to the cancellation terms. Because the UCC does not apply, the consistent additional term between a merchant and consumer does not become part of the contract. Likewise, the inconsistent term regarding price is merely an offer for a modification that Maria did not accept. Maria had no duty to make a reasonable objection to the letter. She may have, but was not required to, request assurances of performances.

5.B. Maria's e[-]mail did not modify the contract. Maria's statement of the importance to her of RC's crew doing a good job does not alter, or purport to alter, RC's obligation to perform or her obligation to pay. Had RC performed, Maria would not have been justified in refusing to pay unless she was satisfied that RC did an exceptionally good job. Nor did it create an agreement about a basic assumption of the K.

6. Maria's cancellation was not excused: Maria will argue that the sale of her house on Thursday gave rise to a frustration of purpose. That "purpose", however, was not known to RC when the contract was formed. (Nor was it expressed as a condition: "I will pay you to clean my house if services are rendered before I sell it".) Maria's undisclosed purpose was not a basic assumption of the contract known to both parties. Further, a clean house between sale and closing is still valuable. Although under the UETA, Maria's e[-]mail is a proper mode of communication, it occurred after formation and does not relate back to formation.

7. Maria cancelled the contract after RC commenced performance. Although, as stated above, Maria did not accept RC's cancellation clause, Maria would still have the power, although not the right, to cancel before RC tendered performance. By dispatching the crew in accordance with the contract (i.e., before noon), RC commenced performance. [That would be a form of acceptance, were that needed.] Accordingly, Maria sent the crew away after RC partially performed.

8. Maria's cancellation excused RC's performance. Maria cannot defend her refusal to pay on the grounds that RC never performed. RC's performance was discharged by her breach.

9. Maria is liable to RC for damages caused by her breach: Given the late cancellation RC had no opportunity to mitigate and thus sustained \$100 in lost profits due to the breach.

RC would not be able to recover \$480, the contract price[.], because it did not perform (although excused). It could only recover \$100 plus incidental damages (cost of fuel, wages paid to the crew, supplies, etc.).

RC could not recover \$500 because (a) Maria never agreed to the cancellation clause and

(b) \$500 would be either an improper penalty or unjustified liquidated damages (in that the damages for lost profit would not be difficult to determine and \$500 is not a reasonable amount).

Maria owes \$100 plus incidental damages[.]

THURSDAY MORNING  
JULY 27, 2006

# 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

Beth, Charles, and David are the directors of Web, Inc. (Web), a corporation that is in the business of creating websites.

Adco, Inc. (Adco), a corporation that markets computer advertising, had an urgent need for a complex website that would cost thousands of dollars to create. Adco approached Web about creating the website. Adco explained that it did not have the cash to pay for the work but claimed that it was a well-established corporation and asked Web to extend credit for the work.

Beth, Charles, and David unanimously agreed to take on the work, conditioned upon a prior review of Adco's financial statements and a determination of Adco's credit-worthiness. After learning this, Adco contacted David and told him that the sooner Web could start on the website, the sooner Adco would be able to pay Web.

David was anxious to obtain Adco's business. He falsely told Beth and Charles that he had obtained and reviewed Adco's financial statements and that, based on his review, "we should proceed with the work." Beth and Charles, without further inquiry, agreed, and Web created the costly website. Adco is unable to pay Web.

Beth, Charles, and David have now learned that Adco's shareholders have regularly taken its funds for their personal use.

In an unrelated transaction, Charles received a call from his friend Sam who wanted Web to create a new game website. Charles told Sam that the new game website was such a small job that he could do it at home for less money than Web.

Charles told Sam to send the payment for the game website to Charles at his home. Sam was pleased with the work and sent the check to Charles as requested. Shortly afterwards, Beth and David learned of this transaction.

1. What duties to Web, if any, have been breached by Beth, Charles, and David regarding the money lost on the Adco job? Discuss.
2. What rights, if any, does Web have against Adco's shareholders for Adco's failure to pay for the website? Discuss.
3. What rights, if any, does Web have against Charles regarding the contract with Sam? Discuss.

## Answer A to Question 4

4)

### 1. Directors' Breach Regarding the Adco Job

#### Duty of Care:

Since corporate directors have a fiduciary duty to the corporation, directors of a corporation owe the corporation a duty of care. The duty of care requires that the directors act with good faith and the degree of care which a prudent person would proceed with in regard to his own business,

Here Adco asked that Web perform complex work that would cost thousands of dollars to create on credit. Adco claimed to be a well-established corporation, but the directors had a duty to investigate Adco's financial situation to determine whether it was safe and in the Web's best interest to extend credit for the work. Beth, Charles and David all agreed to take the work conditioned upon a prior review of Adco's financial statements. Their decision to review was correct, but they did not adequately follow through with it.

David, anxious to obtain Adco's business, decided to proceed with the work. This decision violated David's duty of care. David should have conducted a reasonable inspection of the financial records and then reasonably determined whether it was in the corporation's best interests to extend the credit. Instead, David made an uninformed decision. Further, David acted in bad faith by misrepresenting to the other directors that he reviewed the financial statements and made his determination to proceed based on information he obtained from them. Therefore, David clearly breached his duty of care to Web.

Charles and Beth relied on David's decision without inquiring further as to what was found in the financial reports. They will likely claim that they reasonably relied on David's statements in making their decision and should, therefore, not be liable. However, Charles and Beth cannot completely delegate their responsibility to the corporation and should have at least inquired further about what David based his decision on. Because Beth and Charles blindly followed David's conclusory statement, they too violated their duty of care to the corporation.

#### Business Judgment Rule:

Directors may be protected under the business judgment rule. Courts will not second guess a business judgment if, at the time it was made, it was informed, reasonable (based on sound business judgment), and made in good faith. Directors will still be liable for decisions which are grossly negligent or reckless.

This will certainly not serve as a defense for David, who was not informed when making

his decision and acted in bad faith by lying to the other directors about having obtained and reviewed Adco's financial statements. Beth and Charles have a better chance to succeed with this defense since they did not act in bad faith and will claim that their reliance on Charles' decision was reasonable. However, it is likely that their decision to proceed in such a risky, costly and extensive project without any independent investigation or at least further inquiry was probably not sufficiently reasonable or informed under the circumstances. Therefore, they should not be able to be protected from liability from their breach by the business judgment rule.

## 2. Web's Rights Against Adco's Shareholders

### General Rule Regarding Shareholder Liability

Generally, shareholders are not liable for the debts and liabilities of the corporation. One of the main benefits of the corporate form is that it provides limited liability; protecting shareholders from personal liability caused by corporate loss. This benefits the economy, because more risks are likely to be taken.

### Piercing the Corporate Veil

Despite the general rule, courts may decide to pierce the corporate (PCV) veil and hold shareholders personally liable if there appears to be fraud or bad faith. Courts will often PCV if (1) the corporation is actually just an alter ego of the shareholders, or (2) the corporation was inadequately capitalized at its inception.

A corporation will be found to be the alter ego of its shareholders when there is serious lack of corporate formalities. If, for example, shareholder commingle corporate funds with personal funds, use corporate funds for any personal benefit, that would be grounds to PCV. Also, if meetings are not held or decisions are consistently made without meeting or voting, that may constitute grounds to PCV. Courts are generally more willing to PCV for the benefit of tort creditors than contract creditors, since contract creditors presumably had the opportunity to investigate and make an informed decision about whether to enter into the contract.

Here, it was determined that Adco's shareholders have regularly taken its funds for their personal use. This would constitute violating the corporate form and creates grounds to PCV. Web can successfully argue that Adco's shareholders are using the corporate form in bad faith to commit fraud use[,] then use the corporation as a shield from personally [sic] liability. It can argue that since Adco is operating as an alter ego and [sic] therefore, its shareholders should be held personally liable for Adco's liabilities. However, since Web voluntarily decided to enter into the contract and could have investigated before making their decision to assume the risk of doing business with Adco, they will have a higher burden. If Web can convince the court to PCV, it will be able to sue the shareholders of Adco personally to the debt owed.

### 3. Charles' Contract with Sam

#### Duty of Loyalty

Director has a fiduciary relationship with the corporation and has a duty of loyalty towards the corporation. The director must act in the corporation's best interests and not engage in any self dealing or receive personal gain at the corporation's expense. If a director comes across a situation which would breach his duty of loyalty, the director may cure the problem by disclosing it and getting approval by a majority of disinterested directors or disinterested shares.

Here, Charles did work that the corporation was entitled to and received personal profit from it. He therefore violated his duty of loyalty by acting in his own interest rather than [sic] the corporation's. If he really wanted to proceed with the work, he could tell the other disinterested directors about Sam's interest and see if a majority of disinterested directors or shares would decide that he could proceed to do the work on his own. In this case, he convinced Sam to allow him to do the work, received profit that the corporation could have had, and did so without proper disclosure and approval. Therefore, Charles breached his duty of loyalty to Web.

#### Usurping a Corporate Opportunity

A director should not usurp a corporate opportunity. A corporate opportunity is one which the corporation has a business interest or reasonable expectancy in. Something that is in the corporation's line of work/field will usually be deemed a corporate opportunity. If a director learns of a corporate opportunity in his capacity as director and wants benefit from it personally, he may be able to do so if he takes certain steps: (1) he must inform the corporation of the opportunity [and] (2) wait for the corporation to decline to take the opportunity.

Here, Web clearly had an interest in the job Sam was asking about. Sam wanted Web to create a new game website, which is exactly the kind of work Web does. As a business that creates websites, Web clearly has an expectancy interest in the work and would benefit (profit) from it. Charles usurped Web's legitimate right to the opportunity by convincing Sam that the job was small and that he could do it at home for less money than Web. Charles should have first disclosed the opportunity and waited to see if Web would have taken it. In this case, since the job is exactly in the line of work Web ordinarily conduct[s], Web would have likely taken the job. As a remedy, Web can recover any profit that Charles earns from performing the work for Sam.

#### Charles's Defenses:

Charles may argue that he learned of the corporate opportunity in his personal capacity,

from his friend, and not because of his position as director of Web. However, Sam called Charles asking for Web to create a new game website, not asking for Charles to do it personally. Therefore, Charles was being contacted in his professional capacity as director of the corporation, and will not succeed with this argument.

## Answer B to Question 4

4)

### (1) Beth, Charles and David breach with regard to Web

As directors of Web, Inc., Beth[,] Charles[,] and David owe a Duty of Care to the corporation. In their dealings for Web they must behave as a reasonably prudent person would with regard to his personal finances. All three directors have breached this duty.

#### David

David has breached the duty of care by failing to properly investigate Adco's finances and by falsely reporting to the other directors that he had investigated Adco's finances and falsely indicating that Adco's creditworthiness was sufficient to allow Web to extend Adco credit for Web's work.

All three directors initially made a responsible decision to investigate the financial condition and creditworthiness of Adco before extending credit for the work Adco wanted Web to do. However, David did not act as a reasonably prudent person would when he subsequently failed to make this investigation and instead misrepresented to the other directors that he had made an investigation and that Web should proceed with the work. A reasonably prudent person would not have extended credit without making any investigation into the finances and creditworthiness of the person or company to whom they were extending credit. Furthermore, David's failure to make any investigation cause[d] damage to Web because Web created a costly website for Adco and will not be paid for this work. Therefore, David has breached his duty of care and will be liable to the corporation for the damage that he caused.

Finally, David's conduct cannot be saved by the business judgment rule because he did not act in good faith after a reasonable investigation of the facts. He made no investigation and had none of the relevant facts. Furthermore, he did not act in good faith when he lied about having made an investigation.

David also probably [sic]

#### Beth and Charles

Beth and Charles have also breached their duty of care owed to Web because they too agreed to extend credit to Adco without making any investigation of Adco's creditworthiness. Again, after initially making a reasonable and prudent decision to investigate they did not carry through and instead agreed to extend credit without making any investigation. A reasonably prudent person would not behave in this manner. Furthermore, it was not reasonable them to rely on David's assertion that he had

investigated and come to the conclusion that Web should proceed. Although directors are allowed to rely on the reports of officers of committees of directors assigned to perform a certain role (as well as the reports of officers of the corporation, accountants[,] etc[.]) directors may not delegate all their duties to a committee and serve simply as a “rubber stamp” for the committee’s decisions. A director may not delegate his duty to make independent decisions. Therefore, Beth and Charles should have insisted on seeing at least some further information about the financial health of Adco so that they could evaluate for themselves whether the decision to extend credit was a good decision. This is, at minimum, what a reasonably prudent person would do with regard to their own finances. Web suffered damage as a result of Beth and Charles['] breach, and therefore these directors are personally liable to Web for the loss they caused.

Finally, Beth and Charles cannot take shelter in the business judgment rule because they did not act in good faith after a reasonabl[e] investigation. They made no investigation and knew none of the relevant facts. Therefore, their decision was not within the business discretion protected by the business judgment rule.

## (2) Web’s rights against Adco’s shareholders

A company must maintain corporate form and structure if the shareholder’s personal assets are going to be protected by the corporate form. The shareholders may not use the corporate form fraudulently - as simply a cloak for their personal business activities. Therefore, the shareholders may not intermingle corporate and personal assets or take the corporation[']s assets for their personal use. When shareholders behave in this way, a court may disregard or pierce the corporate veil to hold the shareholders personally liable if justice requires it.

Here, Adco’s shareholders have been regularly taking its funds for their personal use. Usually, a court will not pierce the corporate veil simply because a corporation is unable to pay its debts. Undercapitalization when a company is formed is usually required for veil piercing. However, if the shareholders have made an extensive practice of draining the corporate assets for their personal benefit, then it will appear that they have been abusing the corporate form to shield their personal business transactions from creditors. This pattern of behavior will introduce the required element of fraud.

The shar[e]holders who took the corporate assets probably cannot claim that they were just receiving dividends. A company cannot pay out dividends if paying the dividends will cause it to become insolvent (unable to pay its bills when they come due). Therefore, the shareholders (who seem to control Adco) will not be allowed to make themselves dividend payments and then not pay Web.

Web can make a strong case that a court should pierce Adco’s veil to reach the shareholder’s assets to satisfy Adco’s debt to Web. The court will be able to reach the assets of those shareholders who engaged in the improper behavior (although the

shareholders who did not take part in the misbehavior will not be liable).

Even if a corporation's shareholders have abused the corporate form, a court will not pierce the corporate veil unless justice requires it. Furthermore, a court is generally more willing to pierce the corporate veil in tort situations than in contract situations since tort victims usually do not choose to interact with the corporation. Because Web has been harmed by Adco's failure to pay its debts, Web can argue that the interest of justice require[s] holding the shareholders personally liable. However, because Web did not make an adequate investigation of Adco before doing work for them, it may be more difficult for Web to prevail. On the other hand, Web can try to argue that Adco intentionally and fraudulently misrepresented its financial health to Web (both by saying it was a "well-established corporation" and that "the sooner Web could start on the website, the sooner Adco would be able to pay"), and that this weighs in favor of piercing the veil even though Web did not take all possible precautions to protect itself.

Finally, if Adco is a close corporation and the shareholders who were siphoning money from Adco were the same people who participated in negotiations with Web and David, then Web may be able to make a claim against them personally for fraud. To do this Web would have to show intentional misrepresentation (of fact) with the intent to induce reliance by Web, which did induce reliance and reasonable reliance by Web. It is unlikely they can show reasonable reliance on misrepresentations of fact.

### (3) Web's rights against Charles

Corporate directors owe a duty of loyalty to the corporation. They must reasonably believe that their actions are in the best interest of the corporation. A director violates the duty of loyalty when he usurps a corporate opportunity and takes it for himself. A corporate opportunity is one in which the corporation has a reasonable expectation or one that is in the business of the corporation. A director cannot excuse taking a corporate opportunity by showing that the corporation would not have been able to take the opportunity. Before a director may take advantage of any corporate opportunity he must disclose it to the corporation and wait for the corporation to turn it down.

Here Charles took for himself a corporate opportunity (work) that should reasonably have gone to the corporation. He did not fully disclose the existence of opportunity to the other directors nor did he wait for the other (disinterested directors) to refuse the opportunity. Instead he did the work himself and was paid for it. Here it seems likely that Web would have been fully capable of doing the work (taking the corporate opportunity) but even if it wasn't this would not excuse Charles's behavior.

Charles is therefore liable to the corporation for the money he made by doing the work and must disgorge it to Web.

## Question 5

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her \$1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered \$15,000 to settle the case without conceding liability. By this time, Lawyer had advanced \$5,000 in litigation and living expenses, and Client had incurred \$5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

## Answer A to Question 5

### Question 5

The issue is whether lawyer has committed any ethical violations in his representation of Client, either under the ABA Code ("Code"), the ABA Model Rules, or the California rules of professional responsibility. Based on the facts provided, Lawyer has committed a number of ethical violations, each of which will be discussed in turn.

#### Contingency Fee Agreement

In general, a lawyer is prohibited from taking a proprietary interest in the case he is working on. However, all 3 bodies of law discussed above recognize contingency fee agreements, or agreements in which the lawyer and client agree that the lawyer's fee will be paid out of any recovery the client receives. Lawyer and Client had such an agreement in this case.

Under the ABA Model Rules, a contingency fee agreement must be in writing, must state the percentage of the recovery the lawyer will take, must state what expenses will be paid out of the recovery and must state whether such expenses will be paid before or after the lawyer's percentage is calculated.

In addition, California law requires that the agreement state that the lawyer's percentage is negotiable, i.e. that it is not fixed by law, and that it state how other, non-covered expenses will be paid.

In this case, Lawyer and Client entered into a valid, written contingency fee agreement under which it was agreed that Lawyer would receive 1/3 of Client's recovery. Assuming that all of the above elements were also included in the agreement, it will be enforceable as a valid contingency fee agreement.

#### Expense Advances and Loans

Next, there is the issue of whether Lawyer violated any ethical duties by advancing Client's litigation costs and lending her \$1000 in living expenses.

Under both the ABA Code and Rules and California law, a lawyer may advance an indigent client's litigation expenses, provided that the lawyer may later recover them as part of his contingency fee. In this case, therefore, Lawyer did not violate any ethical duties simply by advancing client's litigation expenses.

However, as stated above, the contingency fee agreement must include how all expenses will be paid, and whether they will be paid, and whether they will be paid before or after the lawyer's percent is taken. Here, Lawyer and Client orally agreed on the advance, and it is not clear when it was to be repaid - before or after Lawyer's fee was deducted. Failure

to reduce this agreement to writing with precise terms therefore constitutes a violation of Lawyer's ethical duties.

The ABA Code and Rules prevent lawyers from making loans to their clients in excess of litigation expenses. However, California permits lawyers to make such loans, so long as the payment is actually a loan that must be repaid and not an outright gift. Additionally, the lawyer and client must enter into a written loan agreement, signed by both parties.

Here, Lawyer's loan of \$1000 for living expenses would be banned under the ABA Code and Model Rules. Although California law is more permissive with respect to loans, Lawyer's actions would also constitute a violation of California's rules of professional responsibility, as he did not ensure that the loan agreement was reduced to writing and signed by Client. Furthermore, as with the litigation expenses, it is not clear whether Lawyer's loan will be repaid before or after his 1/3 of the recovery is calculated.

#### Lawyer's Assurance to Physician - Duty of Communication

Lawyers owe a duty of communication to their clients, according to which they must relate information about a case's progression and status to the client on a periodic basis so the client can make informed decisions regarding the case.

Here, Lawyer made a side agreement with Physician by sending Physician a letter stating that he would receive full payment from the recovery in the case. Lawyer did so without Client's knowledge or consent. Because this is an important matter that ultimately affects the amount Client will receive to compensate her for her injuries, she should have been informed of this agreement. Therefore, Lawyer violated his duty of communication by failing to disclose the contents of the letter to client first.

And again, because the agreement with Physician addressed the payment of expenses out of client's recovery, it should have been included in the terms of the contingency fee agreement.

#### Duty of Due Care/Competence

An attorney also owes a duty of competence, which means he must act with the care, skill, preparation and diligence of a reasonable practitioner under the circumstances.

Here, the facts state that the case would not settle for the amount Lawyer initially forecast due to Defen[d]ant Driver's strong case. If Lawyer was negligent, or failed to adequately investigate the case before arriving at his initial estimate, and if that error harmed his initial negotiating position, he may be found to have violated the duty of competence as well.

#### Duty of Loyalty

A lawyer owes a client a duty of loyalty, according to which the lawyer must act solely to further the client's best interests. He may not sacrifice the client's interests to his own or to those of a 3<sup>rd</sup> party.

In this case, the facts suggest that Lawyer pressured Client into accepting the settlement offer, even though she was reluctant to do so at first. Indeed, Client had already incurred \$10,000 worth of expenses, and the offer was only for \$15,000. Lawyer appears to have convinced her to accept by taking her out to dinner, engaging in sexual relations with her, and renegotiating their oral contingency fee agreement.

The facts also suggest that Lawyer's interests in so doing were not solely to ensure Client received the largest possible award, but also to ensure that he too would recover his expenses.

Under these facts, therefore, it appears Lawyer has violated his duty of loyalty to client by using undue influence to ensure that he is able to recover his contingency fee, regardless of how much is left over for Client.

### Consensual Sexual Relations

The ABA Code and Model Rules expressly forbid lawyers from engaging in consensual sex with their clients. California, by contrast, allows such relations where the Lawyer and Client are involved in a preexisting sexual relationship and where the nature of their personal relationship will not affect the Lawyer's care, judgment, skill, etc.

Here, Client and Lawyer engaged in consensual sex after drinking two bottles of wine with dinner. This would be grounds for an ethical violation under the ABA Model Rules and Code.

Under California law, the answer is slightly less clear. There is no indication that Client and Lawyer had a previous relationship. Furthermore, as discussed above, the circumstances indicate that Lawyer was using sex as a means to exert undue influence over client's decision to accept the settlement offer. The presence of wine certainly doesn't help Lawyer's case.

Therefore, Lawyer will likely be found to have violated California's rules as well by engaging in consensual sex with client.

### Substantive Decisions

Clients have a right to make substantive decisions about their cases, while lawyers typically choose the legal strategy to be employed.

Here, Client had a right to decide whether or not to accept the settlement offer, as this was

a decision affecting her substantive rights. Lawyer's exertion of undue influence over this decision therefore violated her right[.]

### General Duty of Good Faith

Finally, Lawyer will likely be found to have violated his general duty of good faith by failing to pay Physician after expressly agreeing to do so earlier, albeit without Client's knowledge or consent.

## Answer B to Question 5

The question asks what ethical violations the lawyer in this fact pattern may have committed. There are five events which might have given rise to ethical violations by the Lawyer (L): 1) The agreement to advance legal and living expenses; 2) The letter to the Physician (P); 3) Sexual relations between L and Client (C); 4) The settlement offer agreement decision by C; and 5) Failure to pay P.

### 1. Agreement to advance expenses

The issue is whether the lawyer committed any ethical violations regarding the advances from L to C. Under ABA rules, a lawyer may advance litigation expenses to clients unable to afford such expenses, but he may not advance living expenses for fear that a lawyer is buying a client. Under CA rules a lawyer may advance both legal and living expenses, but the lawyer must get any loans to a client in written form with the client's knowing consent that such funds are loans that must be paid back. Further, the advancement of legal expenses in both CA and ABA must be contained in the writing of any contingent fee agreement.

Here, the lawyer advanced living expenses[,] which is strictly forbidden under the ABA, so he could be subject to discipline. Also, the expense arrangement was oral[,] not in writing, so in CA, the lawyer has also violated the ethical code re: loans to clients.

In addition, in any contingency fee agreement, it must be explained in the writing whether the lawyer's percentage is pre- or post- expenses. On these facts, it is unclear whether L put such arrangement in the writing. L should be subject to discipline[.]

### 2. Letter to Physician (P)

The next issue is whether L committed any ethical violations re: his letter to P that P's fee would be paid out of the accident recovery. L potentially violated his duty of loyalty to C, his duty to communicate to C, overstepped the proper scope of his representation of C, and his duty of confidentiality to C.

#### Duty of Loyalty

A lawyer owes his client a high duty of loyalty - the lawyer must act in accordance with the client's best interest. Here, L assured P that P would be paid out of the recovery of [the] case without informing C of such agreement. This action possibly created a conflicting duty on L because L had sent a letter to P which P may have relied upon and considered a contract or surety created by L. Since L's duty of loyalty to P extends beyond the representation, L created a potential conflict in that he may have been personally liable if C did not pay P and hence he would have an incentive to ensure payment even if C had a good faith reason not to pay P. This potential conflict could have been overcome if

contin[gen]cing in the representation would have been reasonable (likely on these facts since there is no indication that C was not going to pay when the letter was sent) AND if L had gotten C's informed consent under ABA and written informed consent under CA.

### Duty to Communicate

A lawyer also has a duty to keep a client informed about his representation, particularly of important points regarding the representation.

Here, the agreement with P was of great interest to C since the amount that P would receive was possibly a very substantial amount of any recovery that C could have expected. C was entitled to know from L that L had ensured the P that he would be fully compensated for treatment out of C's potential award.

### Overstepping Scope of Representation

In general, clients are permitted to make any decisions regarding the ends of the litigation, while lawyers make decisions regarding the means of the litigation, such as legal strategy. Here, a decision regarding the use of any recovery funds are not clearly about legal strategy or means of representation, so the action of commit[t]ing C to payment of P is not clearly within the scope of L's duties. Although a lawyer is assumed the power to make an action on client's behalf necessary to the representation, this may be outside the proper bounds. At the very least, L should have gotten C's informed consent to enter into this agreement on C's behalf.

### Duty of Confidentiality

A lawyer also has a duty to keep confidential any information related to the representation without client consent. The lawyer has the imputed authority to disclose any information reasonably necessary to the representation. Hence, although it is not clear whether he gave any confidential info related to representation to P, if he did give such information it would have been a breach of confidentiality to the extent it was not reasonably necessary to the representation of C.

### 3. Sexual Relations between L and C

The issue here is whether the consensual sexual relations between L and C violated any duties. Under the ABA standard lawyers are not permitted to engage in sexual relations with clients, consensual or otherwise, as presumptively creating a conflict between the lawyer and the client. In CA, consensual relations between lawyers and clients are discouraged, but permitted as long as no duress or illegality is involved. Here, sexual relations are stated to be "consensual", and so permitted under CA law, but still impermissible and a violation under the ABA.

#### 4. Settlement Offer Agreement

The issue here is whether the L committed any violations in convincing C to enter into a settlement agreement with driver. The issues here are whether L acted improperly in convincing client and in counseling C not to pay P.

A client has the ultimate decision in whether or not to accept any settlement agreement as part of the ends of representation discussed above. However, it is appropriate for a L to persuade a client to accept a settlement as in her best interests as long as L is acting according to his duty of loyalty. The duty requires that L act in good faith with the client and make sure that the client's decision is informed and reasonable by apprising the client of her rights and what a settlement means regarding those rights.

Here, it is not clear whether the L is acting in the best interest of the client because of the guarantee that he made to P and because of his own interest in recovering expenses and his fee. However, if the L made a good faith evaluation about the merits and worth of the lawsuit, L may have satisfied his good faith determination.

There is a possibility, however, that the L did not obtain intelligent, knowing consent from C because L and C had been drinking. Any settlement decision should have been made when C was not impaired in judgment.

#### Counseling C to not pay P

In counseling C to not pay P, lawyer may have violated his duty of loyalty to client and his duty of loyalty to client and his duty of fair dealings and honesty to the public and to P.

Under duty of loyalty, a lawyer should not counsel acts that may subject a client [to] liability without a good faith belief that such decision is in client's best interest. Here, it seems as if L is more interested in getting expenses and fees than protecting C. L is liable for breaching his duty of loyalty to C.

In addition a lawyer has a duty of fair dealings and honesty to the public and specifically to P. A lawyer may not counsel criminal or fraudulent acts by their clients. Here, L has counseled C to break a contract with P, violating his duty to the public.

Finally, L has violated a duty of fair dealing to P since he has both counseled fraud and disbursed funds to C over which he knew P had a legitimate claim to and that C was preparing to violate. In addition L may be a surety for C's actions. L may be held liable for breaching his duty of fair dealing and fiduciary responsibility over settlement funds to P.



## Question 6

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. Tom suffered from severe tremors and had difficulty signing his name. In the presence of one other attendant, Tom directed Lilly to sign his name and to date "my will." She did so and dated the document. At Tom's request, Lilly and the other attendant, in the presence of each other, then signed their names as witnesses.

The 2003 document stated "I give \$100,000 to my niece, Nan. And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. He then asked Lilly to send two attendants into his room to act as witnesses. After the first of the attendants arrived and was present, Tom explained the purpose of the document and then signed his name at the end of the document. The first attendant then signed her name as a witness and left the room. Immediately thereafter the second attendant came into Tom's room and quickly signed the document as a witness. Lilly was not present when Tom or the attendants signed their names. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2005, Tom died, leaving an estate worth one million dollars.

At the time of Tom's death there were only two convalescent hospitals in the county where Tom lived, Happy Home and Sunnyside. A few days after Tom's death, Happy Home went out of business. Sunnyside, also a charitable convalescent hospital, provides care for disabled persons of all ages.

Sunnyside has petitioned the court to substitute Sunnyside as the beneficiary of Tom's estate.

1. What rights, if any, does Nan have in Tom's estate? Discuss. Answer according to California law.
2. How should the court rule on Sunnyside's request to substitute Sunnyside for Happy Home as the beneficiary of Tom's will? Discuss.

## Answer A to Question 6

6)

### Question 6

#### 1) What right does Nan ("N") have in Tom's ("Ts") estate?

The first issue is whether N has any rights in T's estate. N was named as a beneficiary under T's first putative will but was not named as a beneficiary under T's second putative will. The issue is thus whether the first will was valid in the first instance, and, if so, whether the second will validly revoked the first will.

#### Will #1

##### Formalities of a Formal, Attested Will

Will 1 was a typewritten will. Thus, Will 1 would have to conform to the requirements necessary for a formal, attested will.

Under California law, a formal attested will: 1) must be signed by the testator, by someone at his direction and in his presence, or by his conservator; 2) must be signed in the presence of two disinterested witnesses who are both present at the same time; 3) must be dated; and 4) must be signed by the two witnesses. Although the witnesses need not know the contents of the will, they must know that they are witnessing the execution of the testator's will.

##### Signature

Here, T, as a consequence of his disability, asked Lilly ("L") to help him execute his will. Because T had severe tremors and had difficulty signing his name, he asked L to sign for him. Given that L signed the will in T's presence and at his direction, this would satisfy the first condition stated above (i.e., that the testator sign the will or have another person sign the will at his direction).

##### Attestation

The next issue is whether the will was validly attested to by two disinterested witnesses. Here, one other attendant, in addition to L, was present when the will was signed. The issue is whether L, who signed the will at T's direction, could be considered a disinterested witness. On one hand, it might be argued that L was simply taking T's place, as she signed the will for T at his direction. In that sense, L would not seem to be a disinterested witness who could properly attest to the signing of the will. On the other hand, however[,] because L was simply signing the will for T, it might be argued that she could serve in two

capacities: as a witness and as T's attendant. Under this view, which is the one adopted here, L was a proper witness. Thus, because the will was validly witnessed by two disinterested witnesses who were both present when the will was signed, the second requirement stated above would also be met. Additionally, because both L and the other attendant signed the will before T's death, this would meet the fourth requirement stated above. Consequently, on these facts, it seems that Will 1 was a validly executed, formal will.

### Disinterested Witness

Assuming, as stated above, that L was a proper witness, the next issue is whether she would truly be considered disinterested, as she was named as the trustee under the terms of Will 1.

The general rule is that a beneficiary cannot be considered as a disinterested witness for purpose of attesting to a will. However, if a witness is deemed to be interested, this does not affect the validity of the will. Rather, this simply means that the interested witness only takes that share of the estate that he would be entitled to in the absence of the will (i.e., his intestate share).

Here, L was named as the trustee of the trust to Happy Home ("HH"). Thus, it might be argued that L was an interested witness. Therefore, under this reasoning it might be argued that the will was not validly attested to. However, under the California law, a trustee of a trust is not considered a beneficiary under a will. Rather, the trustee is a fiduciary who does not take a gift under the will in her personal capacity. Thus, L would not be considered an interested witness, and she could thus properly witness the execution of T's first will.

### Effect of Will 2 on Will 1

Before considering whether N would have any interest in T's estate, we must first consider the effect of T's second putative will ("Will 2") on Will 1, which, as discussed above, was likely a valid will.

### Revocation by Subsequent Instrument

A testator may revoke his will by executing a subsequent will or codicil, which is a testamentary document that amends, revokes, or revises a prior will. To revoke a prior will, the testator must show an intent to do so. Moreover, for a valid revocation to occur, the second testamentary document must also comport with the formalities stated above under the California Probate Code.

Here, Will 2 was also a typewritten will. Although T did not type the will himself, he directed L to do so. However, the first issue is whether this would be valid, given that L, rather than

T, typed the will. Because the facts state that L typed the will, including in it the terms T dictated, it is reasonable to assume that L typed the will in T's presence. This would be proper.

### Attestation

The next issue is whether Will 2 was validly attested to by two disinterested witnesses. Here, L sent two attendants to T's room to act as witnesses. After the first attendant arrived, T explained that he was executing his will, and he signed the will in the presence of the first attendant only. The first witness signed her name before the second witness entered the room. This would be proper under California law, as the witnesses need not sign in each other's presence. However, because the second attendant was not present when T signed his will, the will would be invalid under California law, which requires both witnesses to be present when the testator signs his will. Additionally, when the second attendant signed T's will, she did so quickly and the facts suggest that she likely did not know what she was signing. Although, as stated above, a witness need not be aware of the terms of the testator's will, she must know that she is in fact witnessing the execution of a will. Because T did not explain this to the second attendant, it seems that this requirement would also be lacking.

In sum, Will 2 was not validly executed because: 1) the two witnesses were not both present when T signed the will; and 2) the second witness likely did not even know that what she was witnessing was actually T's will.

### Effect

Because Will 2 was not validly executed, it did not legally revoke Will 1, which was validly executed. Thus, although T explicitly stated in Will 2 that he revoked all prior wills, this statement would not be given effect despite T's apparently contrary intent. Consequently, Will 1 would continue to exist and would be probated in accordance with its terms at T's death in 2005.

### N's Gift Under Will 1

Under Will 1, T left N \$100,000. This would be considered a general gift as it is simply a sum of money, which is fungible. This, this gift could be satisfied from any of the funds remaining in T's estate at his death. Given that T had one million dollars in his estate at his death, N would be entitled to the \$100,000 devised to her in Will 1.

### 2) How should the court rule on Sunnyside's ("S") request to substitute S for HH as the beneficiary of T's will?

Under Will 1, T gave the residue of his estate in trust (all of his one million dollar estate less the \$100,000 to N) to HH for the continued care of the disabled elderly. L was to act

as trustee of the trust.

### Trust Principles

A trust is a fiduciary relationship with respect to property wherein one person (the trustee) holds the property (trust res) for the benefit of a person or group of persons (beneficiaries), arising out of a manifestation to create it for a legal purpose. A trust thus requires: 1) an intent by the person creating the trust (settlor) to create it for a valid purpose; 2) property (trust res); 3) beneficiaries; 4) a trustee; and 5) valid delivery of the trust res to the trustee. A settlor may create a trust inter vivos by making a declaration of trust or by effecting a transfer in trust. A settlor may also create a trust through the provisions of his will (a testamentary trust).

Here, T created the trust through the provisions of his will. Thus, T created a testamentary trust which was to take effect on his death. The trust had a res, the residue of T's estate. The trust also had beneficiaries, HH and the disabled elderly. The trust had a trustee, L. The Trust was created for a valid, legal purpose- to care for and help the elderly. And, T expressed the intent to create the trust and the trust res was validly delivered through the will upon T's death.

### Charitable Trust

The next issue concerns the nature of the trust created in T's will.

A charitable trust is a trust that is created in order to benefit the public health and welfare. Because the trust benefits society, it does not have any readily ascertainable beneficiaries. In other words, unlike a private express trust, the settlor does not name specific individuals who are to benefit from the creation of the trust. Rather, all those persons who fall within the class described in the trust are to receive its benefits.

Here, in Will 1, T devised the residue of his estate to HH for the continued care of the disabled elderly. Because no specific beneficiaries are named, it might be argued that the beneficiaries are all of those disabled elderly persons who qualify for convalescent care. Thus, it seems that the trust to HH might be considered a charitable trust, especially since it serves the greater public good by providing for the aged.

### Cy Pres

The next issue is the effect of HH's going out of business on the validity of the trust. Under the doctrine of cy pres (meaning, as near as possible), a court has the power to give effect to a charitable trust where it would otherwise fail as long as the court only has to change the mechanism of the trust as opposed to the beneficiaries of the trust. A court only has cy pres powers to give effect to charitable trust where the settlor has manifested a general

charitable intent as opposed to a specific charitable intent.

Here, S might argue that T had a general charitable intent, as his ultimate goal was to provide for the care of the disabled elderly. Thus, S would argue that the court could use its cy pres powers to carry out T's intent by simply substituting S for HH. On the other hand, however, it might be argued that T had the specific charitable intent of giving the benefits of the trust only to those elderly persons who were residents of HH. On this view, the court would not be able to amend the trust to give it effect because T's intent would only be to benefit those elderly persons residing in HH as opposed to all elderly persons residing in convalescent homes in the county where T lived. Because T likely knew that S was in existence when he executed his will, there were only two convalescent homes in the county, a court would likely find that T only intended to benefit those persons who resided in HH. Consequently, the court would not use its cy pres powers to deviate from T's intent. Therefore, a court would likely find that the charitable trust to HH failed, as HH was no longer in existence at the time T's will was probated. Consequently, the court would declare a resulting trust under which the trust res (consisting of the residue of T's estate) would be reconveyed to T's estate and would be distributed to her heirs. Thus, it seems likely that N, T's niece, would also receive her intestate share of the residue of T's estate in addition to the \$100,000 general devise she already received under Will 1.

## Answer B to Question 6

6)

### Question 6

As discussed below, Nan will likely take \$100,000 from Tom's estate.

### Validity of 2003 Will

Tom's 2003 will was a typewritten, formal. As such, in order to be valid, it must be [sic] satisfy the requirements for an attested (or printed) will.

### Capacity to Make a Will

Under California law, in order to make a will, the would-be testator must be (1) at least 18 years old; (2) be able to understand the scope of his or her estate; (3) be able to understand who it is the estate will be devised and (4) have intent to make a will. Here, Tom is in a convalescent elderly home, so he is clearly over 18 years of age. In addition, the fact that he was able to specify the gifts and devisees indicated he meets (2) and (3). Finally, Tom also apparently had the intent to make a will. Hence, Tom had the capacity to make a will in 2003.

### Requirements for an Attested Will

An attested will must be (1) in writing, (2) signed by the testator or by someone in testator's presence at his/her direction; (3) signed or signature acknowledged in the presence of at least two witnesses; and (4) the witnesses must understand that they are witnessing the execution or acknowledgment of a will.

In writing. Here, the will was typewritten, so this requirement for an attested will was met.

Signed by the testator or at testator's direction. Here, while Tom had difficulty signing his name, he asked Lilly, his personal attendant, to help him execute the will. Because Tom directed Lilly to sign and date the document at his direction and in his presence, the will was validly signed.

Signed or Signature Acknowledged in the Simultaneous Presence of At Least Two Witnesses. In order to be valid, an attested will must either be signed, or the signature must be acknowledged by the testator, in the presence of at least two uninterested witnesses. Here, this requirement is met because both Lilly and the other attendant, in the presence of each other, served as witness to the signature at Tom's direction.

Understanding of Witnesses of Execution of Will. Finally, the witnesses must understand

that Tom was executing a will. Here, Lilly and the other attendant both heard Lilly to [sic] sign Tom's name and to date "my will." Accordingly, this requirement is also met.

#### Possibility of Lilly as Interested Witness

In order to be validly executed, an attested will must have the signatures of at least 2 uninterested witnesses, meaning witnesses who will not take under the will or otherwise have a stake in its outcome. Here, the 2003 document gives the residue of Tom's estate in trust to Happy Home with Lilly as trustee. A witness is not an interested witness if he or she receives legal title only in a role of fiduciary duty. Here, Lilly is tasked with serving as trustee for the trust, and accordingly is named only in her capacity as a fiduciary. However, arguably, to the extent Lilly is an employee of Happy Home, she may have an interest in the trust that goes beyond her fiduciary duty. Nevertheless, with the facts presented, there is nothing to raise such suspicion that Lilly could not serve as a fiduciary and remain an uninterested witness. Hence, Tom's 2003 will was validly executed with 2 uninterested witnesses.

#### Validity of 2004 Will

In 2004, Tom attempted to execute another attested will that would have revoked the 2003 will and, instead of giving \$100,000 to Nan, would have given the entirety of Tom's estate to the Happy Home trust. Because it was an attested will, it needed to conform with the same requirements discussed above for the 2003 will.

#### Failure to Comply with Requirements of an Attested Will

There is no indication that Tom lost the legal capacity to make a will. In addition, the 2004 will [was] typed by Lilly at Tom's direction and was signed by Tom himself.

#### NOT signed in Simultaneous Presence of At Least Two Witnesses

However, the 2004 will was not validly executed because it was not signed before two witnesses who were simultaneously in each other's presence. Here, the first attendant signed as a witness after witnessing Tom's signature and left the room before the second witness came in to sign. In addition, the second attendant did not witness Tom's signature or an acknowledgment by Tom of his signature. Nor was Lilly was [sic] present during Tom's or the attendants' signatures. Hence, execution of the will did not meet the requirement that it be signed in the simultaneous presence of two witnesses. As a result, the 2004 will is invalid.

#### Lack of Awareness By 2<sup>nd</sup> Witness of Will

In addition, the second witness did not appear to understand that Tom was executing a will. While Tom asked Lilly to send two attendants into his room to act as witnesses, it is unclear whether Lilly explained to the witnesses that they were witnesses to the execution of a will. Here, while the first attendant understood that Tom was executing a will – since

Tom explained the purpose of the document – the second attendant did not receive that information and instead “quickly” signed the document and left. Accordingly, execution of the will also fails for this reason, and the 2004 will is invalid on this ground as well.

#### Effect of Failure to Execute 2004 Will

Because Tom failed to validly execute the 2004 will, the 2003 will stands because the revocation contained in the 2004 will was not valid. Accordingly, Tom’s 2003 will would enter into probate, under which Nan would inherit \$100,000.

#### Charitable Trust

Trust. A trust is a fiduciary relationship whereby the trustee holds legal title of the res (or trust property) for the benefit of others, who are the beneficiaries of the trust, for a valid and legal purpose. Here, Tom’s will created a trust at his death (as opposed to an inter vivos trust, or trust created while Tom was still alive) to Happy Home for continued care of the disabled elderly.

A private express trust requires (1) a trustee, (2) a beneficiary, (3) the res (trust property), (4) intent by the settlor to create a trust ad (5) a legal purpose. By contrast, a charitable trust differs from a private express trust in that a charitable trust does not benefit anyone in particular personally but rather society at large. Here, Tom’s trust complied with the above by bequeathing the residue in trust with Lilly as trustee for a legal purpose of assisting the disabled elderly.

Here, Tom’s trust is given to Happy Home “for the continued care of the disabled elderly.” Society generally benefits when the most disadvantaged of its members—including the disabled elderly – are cared for. Accordingly, even though the trust names Happy Home (and the elderly it cares for) as specific beneficiaries, the intent was to create a charitable trust that in fact benefits society at large.

#### Cy Pres

Cy pres is an equitable remedy which a court may invoke in order to effectuate the settlor’s general charitable intent with a charitable trust. Under cy pres, which means “as close as possible,” a court may modify the direct beneficiary or goal of the charitable trust, to substitute another as close to as possible in keeping with the original goal or beneficiary, if the settlor’s original wishes are no longer possible. Here, Happy Home went out of business a few days after Tom’s death, and Sunnyside is another charitable convalescent hospital, although Sunnyside benefits people of all ages. Accordingly, Tom’s trust would otherwise fail since Happy Home is no longer in existence without the intervention of the court in granting cy pres in order to keep the trust alive.

## General or Specific Charitable Intent

In order to apply cy pres, the court must determine— using both the intrinsic (i.e. the trust instrument) and extrinsic evidence—whether Tom had a general charitable intent in setting up the trust, or whether he had specific intent. If Tom had specific charitable intent only to benefit Happy Home or only to benefit the elderly disabled, then the court will not be allowed to substitute Sunnyside as the beneficiary and a resulting trust will be applied. On the other hand, if Tom had general charitable intent to benefit the disabled generally, then cy pres may be invoked to prevent the failure of the trust by substituting Sunnyside.

Here, Tom set up the trust “to Happy Home for the continued care of the disabled elderly.” Taken alone, this arguably suggests a general charitable intent to benefit the continued care of the disabled elderly, since Tom did not specify that the trust was meant to benefit only Happy Home’s disabled elderly residents. On the other hand, Tom did specify that the trust was to benefit the elderly while Sunnyside assists disabled persons of all ages. Nonetheless, Sunnyside is the only other convalescent hospital in the county where Tom lived, so it may very well be the closest thing to effectuate a general charitable intent, even if it was for the disabled elderly.

The foregoing is of course subject to other extrinsic evidence, such as remarks Tom may have made to others. But assuming Tom had a general charitable intent and Sunnyside is the next-best alternative to effectuate Tom’s intent, the court will invoke cy pres to substitute Sunnyside for Happy Home.