

California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

July 2008

**ESSAY QUESTIONS AND SELECTED ANSWERS  
JULY 2008  
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

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

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**TUESDAY MORNING  
JULY 29, 2008**

**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

Alex is a recently-licensed attorney with a solo law practice. Alex was contacted by Booker, a friend during college, who is now a successful publisher of educational books and software. Booker asked Alex to perform the legal work to form a partnership between Booker and Clare, a creative writer of books for children. In a brief meeting with Booker and Clare, Alex agreed to represent both of them and set up the partnership for a fee of \$5,000.

Because Alex had no experience with forming partnerships, he hired Dale, a recently-disbarred attorney, as a “paralegal” at a wage of \$250 an hour. Although Dale had no paralegal training or certification, he had decades of experience in law practice, including the formation of partnerships. Alex notified the State Bar about hiring Dale and disclosed Dale’s involvement and disbarred status to both Booker and Clare.

Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex paid Dale \$1,000 for his work. Alex spent a total of two hours on the partnership matter, including the initial meeting with Booker and Clare, reading the partnership documents in order to learn about partnerships, and a final meeting to have Booker and Clare sign the documents.

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

Answer according to California and ABA authorities.

## Answer A to Question 1

In interactions with clients, an attorney owes a client four overarching duties: the duty of confidentiality, the duty of loyalty, the duty of maintaining financial integrity, and the duty of competence. In the practice of law, a lawyer also owes a duty of decorum to the profession. Attorney Alex's (A) actions in this matter raise issues under the duties of confidentiality, loyalty, financial integrity, and competence, as well as some question as to the duty of decorum to the profession. With these general principles in mind, each action will be analyzed individually.

### Duty of Loyalty: Representation of Multiple Clients

An attorney owes a duty of loyalty to his or her client, to exercise his or her time and professional judgment and efforts solely for the benefit of that client, without any interference from outside loyalties or interests. This duty does not equate to an absolute prohibition or the representation of multiple clients, particularly in such matters as a business transaction; however, a lawyer generally must not accept the representation of more than one client if he believes their interests to be materially adverse or that any loyalties or interest might prevent the fair and competent representation of either or both clients. The ABA rules require that a reasonable attorney in [a] like situation would also believe in his ability to represent both clients without material adverse effect. California does not have this reasonable attorney standard.

Initially there do not appear to be direct conflicts in a matter regarding the construction of a partnership, so A's initial agreement to undertake the representation of both clients might be reasonable. However, one of the clients is a friend of A's from college, [a] potential source of loyalty that would potentially hinder the representation of Clare, should the interests ever diverge. Moreover, Booker, as a friend, sought out A as a new attorney for this representation, which might engender feelings of indebtedness to A that might hinder his representation of Clare. If Alex feels that he can competently represent both clients and there are no present conflicts, there is no violation under California law. However, under the ABA standard a reasonable attorney might not accept representation of multiple clients with the potential that he would feel more loyal to one than the other due to pre-existing friendship. Thus, there may be a violation under the ABA reasonable attorney standard.

In addition to only taking on the representation if the attorney deems he can properly represent both clients, the attorney has a duty to disclose the potential conflicts, including the potential that he will have to withdraw from the representation if a conflict arises. After this, the attorney must obtain the client's informed consent to the joint representation. California requires this consent to be in writing.

Here, it is unclear as to whether A discussed the potential of conflicts under this duty. The facts state only that the meeting was "brief" and that A agreed to represent both clients for a fee of \$5,000. There is no mention of informing the clients or obtaining their consent. There is, further, no mention of a written consent. Thus, A has likely breached

both ABA and California rules regarding the representation of both clients by not informing them of potential conflicts and obtaining their consent. A should have made the potential conflict much more clear and obtained clear consent from both, in writing, to satisfy both standards.

#### Duty of Confidentiality: Representation of Multiple Clients

The ABA requires a lawyer not divulge any information obtained from the client in the course of the representation intended to be kept confidential. California has no on-point rule for confidentiality, aside from the lawyer's oath to 'maintain inviolate client confidences'.

Though not apparent from these facts, the representation of multiple clients may raise issues regarding the duty of confidentiality to each, because a conflict may only arise when one client discloses something to the lawyer. When the lawyer cannot make a due disclosure to the other client regarding the conflict without violating the duty of confidentiality, the lawyer must withdraw.

#### Duty of Competence

A lawyer owes a duty of competence to a client to exercise the amount of research and inquiry as well as to possess sufficient knowledge and skill regarding the matter to render competent services. If an attorney is not familiar with the subject matter of representation, he may still represent the client if he can do sufficient research to familiarize himself with the subject area and such research will not result in undue expense to the client or delay in the matter. An attorney may also elect to associate or solicit advice from an attorney with experience in the area.

Within this duty of competence is a duty of diligence to zealously pursue the matter to completion.

The facts state that A is a recently-licensed attorney and has no experience with forming partnerships—the subject matter of the representation. The facts also state that A spent only a total of two hours on the partnership matter, which included reading other partnership documents and his initial and final meetings with Booker and Clare. Given his status as a new attorney and his lack of experience with this subject area, it would appear A neither possessed the requisite knowledge and skill necessary to competently represent the clients in this matter, nor did he do sufficient research or training to make himself competent in the area.

A would likely argue that he remedied this shortcoming by hiring Dale as a "paralegal", who had decades of experience in the practice of law, including partnership formation. Had Dale been a duly licensed attorney, this may have been proper. However, because (as will be discussed below) only an attorney may engage in activities that call for the judgment, training, and skill of an attorney, hiring a paralegal with a good deal of knowledge may ameliorate this shortcoming to some degree, but it is unlikely that it totally accounted for it. This is primarily because the only way Dale could provide

sufficient help to remedy the violation of the duty of competence would be by violating the rule against the unauthorized practice of law.

Thus, it is likely that A also breached his duty of competence in the matter by accepting representation in an area he was not familiar with, not doing sufficient research, and not associating with a more experienced attorney who could function as an attorney. A should have either declined the representation, or undertaken steps to make himself competent in the matter, if possible, without undue delay or expense.

#### Financial Integrity: \$5,000 fee

Under ABA rules, an attorney's fee for work must be reasonable in light of the skill, experience, time, degree of specialty, and difficulty required for the task. California merely requires that fees not be "unconscionable".

A \$5,000 fee for setting up a partnership does not appear reasonable in light of the time, degree of specialty, skill, and difficulty of the task. The facts state that A himself spent only 2 hours on the partnership matter, including the initial meeting and a final meeting in which documents were signed. After paying Dale \$1,000 for his work, this leaves a charging effectively a fee of \$2,000 per hour. Given A's status as a new attorney and that lack of difficulty or specialty required in setting up a simple partnership agreement between a publisher and writer, the fee arrangement would appear to violate both the ABA standard of reasonableness and the California standard of unconscionability.

Additionally, California requires fee agreements to be in writing unless the situation constitutes an emergency, the client is a regular client, the client is a corporate client, or the fee is under \$1,000. Here, there does not appear to be any emergency or exigency warranting an exception to the writing requirement. Though Booker and A were friends prior, A is a new attorney and there is no prior attorney-client relationship between the two. Thus, Booker would not qualify as a "regular" client. Booker is obviously not a corporate client and the fees are for \$5,000.

Thus, A has violated the California rule regarding client agreements being in writing.

#### Financial Integrity: Fee Splitting

Whether or not A has also violated his duty of financial integrity to his clients depends in some part on whether or not Dale qualifies as an attorney or not, which will be discussed below.

#### Fee Splitting With Attorneys

If Dale qualifies as an attorney, under the ABA standard, A may split fees so long as the fee-splitting is proportional to the work done on the matter and the client consents. Here, A did notify both Booker and Clare about 'hiring' Dale, though it is not clear he notified them as to the \$250 per hour salary. If he did notify them, there may not be a violation under ABA rules. However, if he did not, he may have violated the ABA rule, given he ultimately paid Dale \$1,000 for his services. Dale may have also violated the proportionality rule, given that in this case, Dale should have received the bulk of the

fee, rather than simply \$1,000 worth, given A's minimal work on the matter and Dale's four hours meeting with the clients and preparing the documents.

Under California law, an attorney may split fees with another if the split is reasonable. Here, there is likely nothing unreasonable about the arrangement, except that A took too much of the fee.

#### Fee Splitting With Non-Attorneys

The facts state that Dale is currently disbarred. This would make him a non-attorney and lawyers are prohibited from sharing fees with non-attorneys. However, attorneys may share fees with such personnel as paralegals and legal secretaries so long as the lawyer is ultimately responsible for the work done by the personnel. This latter issue raises the primary issue with the hiring and use of Dale's services: the duty not to assist in the unauthorized practice of law.

#### Duty Not to Assist in the Unauthorized Practice of Law

A lawyer has a duty not to assist in the unauthorized practice of law. The practice of law is defined as anything that would call for the judgment, reasoning, or skill of an attorney. Here A has hired Dale, a disbarred attorney, as a "paralegal". An attorney may hire a currently-disbarred attorney to do work [as] a paralegal or legal secretary, but, like with the work of a paralegal or legal secretary, the individual must not engage in activities that call for the special skills of an attorney and the licensed attorney, A, must be ultimately responsible for the work.

The fact state that A hired Dale, who spent four hours preparing the partnership documents and meeting with Booker and Clare about them. A paralegal may meet with clients to obtain information, but must not engage in explanations that require the judgment of a lawyer in so doing, such as explaining legal options or ramifications. A non-lawyer may similarly prepare documents to some degree, but generally not much more than in the capacity of a scrivener. Here it would appear that Dale functioned as an attorney for Booker and Clare in both meeting with them and preparing the partnership documents.

A's reasons for hiring Dale as a paralegal—for his experience in years of practice—would also be more germane to functioning as an attorney. Also, the fee of \$250 an hour seems more akin to that of an attorney's fee than the fee charged for a paralegal in a simple matter by a new solo practitioner.

Moreover, A must ultimately be responsible for the work done by the non-attorney and, in this case, the facts do not make any mention of his review of the final version of Dale's preparation of the documents, only that he was present at the final meeting in which the documents were signed.

Thus, A breached his duty to the profession and the client not to assist in the unauthorized practice of law.

## **Answer B to Question 1**

### What Ethical Violations Has Alex Committed?

#### Duty of Loyalty

A lawyer owes his client the duty of loyalty. This duty requires a lawyer to work in the best interests of the client, and not for the lawyer's personal interest or for the interest of any third party.

#### Potential Conflict of Interest

When a lawyer is presented with a potential conflict of interest, the ABA Model Rules and California's ethical provisions differ slightly in terms of what a lawyer must do in order to undertake the representation. Under the Model Rules, a lawyer may undertake the representation of a client if the lawyer has a reasonable belief that there is no significant risk that a conflict of interest will materially limit the representation, and the client gives informed consent. CA rules do not have a "reasonable lawyer" standard, but rather state that a lawyer can undertake the representation if the client gives written consent.

In this case, Alex was contacted by Booker, who was a friend during college, to form a partnership between Booker and Clare. There are potential conflicts of interest present in this representation, because Alex agreed to represent Booker and Clare jointly. Because Alex may be tempted by his friendship with Booker to work to the disadvantage of Clare, he should have informed Clare of his prior relationship with Booker. Moreover, he should also have made clear whether he represents only Booker and Clare, or if he is also representing the partnership itself.

There are no facts, other than his prior friendship with Booker, to indicate that he would work to the disadvantage of Clare. Under the ABA rules, a reasonable lawyer under the circumstances would likely believe that he could undertake the joint representation of Booker and Clare without a material limitation. Thus, if Alex informed Clare of his prior relationship with Booker, she could likely still consent to the representation. Similarly, in California the decision to undertake representation was proper if Clare consented to the representation.

#### Duty of Competence

A lawyer owes his client a duty of competence, which means that the lawyer must exercise the ordinary skill, diligence, and zeal in representing his client that an ordinary lawyer would under the circumstances.

As part of the duty of competence, a lawyer must be knowledgeable regarding the subject matter of the representation. However, in both CA and under the ABA rules, a lawyer need not be an expert in all matters to undertake the representation. A lawyer without prior experience in a field of practice may still take a case so long as the lawyer

either 1) does the work to become educated and competent without any extra expense to the client or 2) associate with competent counsel, who can help assist the lawyer.

Here, Alex had no experience forming partnerships. Thus, Alex either had to do the work necessary to educate himself regarding the law of partnerships, or he could also associate with another counsel who had such knowledge. In this case, Alex did not educate himself, but rather hired Dales as a “paralegal”. Dale had decades of experience in law practice, including the formation of partnerships. Thus, Dale was a person with the requisite knowledge and skill to form the partnership between Booker and Clare.

However, Dale was a recently-disbarred attorney. Thus, Dale was not a licensed counsel and Alex could not associate with him without violating another ethical duty – the duty not to engage in the unauthorized practice of law, discussed below. A reasonable lawyer under the circumstances would not have associated with a disbarred attorney in order to satisfy his duty of competence.

Alex may argue that he eventually became informed by reading the partnership documents in order to learn about partnerships. However, Alex spent a total of two hours on the case, including the initial meeting with Booker and Clare and a final meeting to have Booker and Clare sign the documents. While there are no facts to indicate the precise number of minutes Alex spent learning about partnerships, it is clear for someone with no prior experience handling the formation of partnerships, Alex’s cursory review of the documents prepared by Dale could not have satisfied his duty of competence. Thus, Alex violated his ethical duty by failing to become informed regarding the subject matter of the representation.

#### Fee Agreement

Under the Model Rules, all fees must be “reasonable”. Except in the cases of a contingency fee, an oral fee arrangement will not violate a lawyer’s ethical duty per se. The courts look to several factors in order to determine if a fee arrangement is reasonable, including the lawyer’s reputation, knowledge, skill, the fee customarily charged for such work, whether the work involved particularly novel claims, and, in the case of a contingent fee, the amount of recovery by the plaintiff.

In this case, a \$5,000 flat fee is likely unreasonable under these circumstances. Alex had no prior experience handling partnership agreements, and thus his per-hour fee should not be too high. Moreover, Alex spent only two hours total in working on this case. A fee of \$5,000 – or even \$4,000 if Dale was paid out of this fee – for two hours of work. Thus, Alex essentially charged Booker and Clare a fee of \$2,500 or \$2,000 per hour to form the partnership. Formation of a partnership is a relatively simple legal process and does not involve any complex or novel legal argument. Alex also has no prior experience and thus had no reputation for being a particularly efficient partnership lawyer. Thus, on balance, Alex’s fee arrangement violated his ethical duties to Booker and Clare.

In California, a fee must not be “unconscionable,” which is to say that it must not “shock the conscience.” A fee agreement must also be in writing, unless the fee is less than \$1,000, the lawyer is representing a corporate client, or there is a long history between the attorney and client. On these facts, none of those exceptions apply. While Alex had a prior friendship with Booker, that is insufficient to constitute a long history of representation such that any fee arrangement would be understood by the client. The facts also state that Alex represents Booker and Clare jointly, rather than the partnership. Thus, the \$5,000 fee had to be in writing, and Alex violated his ethical duty with respect to this fee arrangement in California.

Moreover, for the same reasons that make the fee unreasonable under the ABA rules, this fee would also likely be unconscionable in California. To charge a client over \$2,000 per hour – especially by a recently-licensed attorney – would very likely “shock the conscience” of the court.

#### Fee Sharing

Similarly, under both California and the Model Rules, a lawyer cannot share any part of his fee with a non-lawyer. This is considered a duty to both uphold the dignity of the profession, and a duty to protect the public. The facts are unclear whether Alex paid Dale out of pocket, or whether Dale’s \$1,000 payment came out of the fee paid to Alex. If in fact, Alex planned to pay Dale his fee by deducting it out of the \$5,000 paid to Alex, then Alex breached his ethical duty. Even if, however, Alex paid Dale out of pocket, this still violated his ethical duty because he did not inform his clients as to how costs would be handled in this matter. Rather, Alex simply charged a flat fee without any further disclosures.

Under the Model Rules, a lawyer may also not pay a “referral” fee to any other lawyer. That is to say that a lawyer may not only be paid a portion of a fee when the lawyer has actually done some portion of work on the case. It should be noted that in California, unlike the Model Rules, a referral fee is not a per se violation of ethical rules, so long as the arrangement is disclosed to the client and no extra amount is charged to the client.

Thus, Alex may attempt to argue that Dale’s payment was a valid referral fee under California law. However, as noted above, Dale was a recently-disbarred attorney. Thus, he is considered a non-lawyer and, as such, cannot share in any part of the fee arrangement.

#### Unauthorized Practice of Law

Part of the lawyer’s duty to uphold the dignity of the profession, and also his ethical duty to protect the public, prohibit a lawyer from assisting in the unauthorized practice of law. Such practice is defined as a non-lawyer doing something which requires exercising the judgment ordinarily required by a lawyer.

In this case, Dale – a non-lawyer by virtue of his being disbarred – prepared partnership documents at the request of Alex. There are no facts to indicate what Dale actually did in the four hours he worked on the case. However, while the filing of a partnership

document with the state would not likely require the judgment of a lawyer, the actual drafting of the documents would very likely constitute the practice of law. Dale would have had to make arrangements between Clare and Booker regarding the sharing of profits and losses, how they would be compensated in the event of a dissolution and winding up, whether either of them would enjoy limited liability, and various other important considerations. Such work would require the skill and exercise of judgment required by a lawyer. Thus, Dale was engaging in the unauthorized practice of law.

Alex, therefore, will have violated his ethical duty if he failed to supervise Dale in his work. A lawyer may delegate certain tasks to an employee, such as a law clerk or paralegal, but must always supervise such work. Here, Dale spent four hours on his own. Alex did not supervise Dale's work at all. Rather, Alex simply delegated the work to someone whom he knew was a disbarred attorney. Moreover, Dale had no paralegal training or certification. Thus, Alex could hardly argue that he delegated this work to a paralegal.

As such, Alex violated several ethical duties. First, he violated his duty of competence, because he failed to represent Booker and Clare with the ordinary skill a reasonable lawyer would have under such circumstances. Second, he violated his duty to uphold the dignity of the profession, because he permitted a non-lawyer to engage in the unauthorized practice of law and share in the fee. Third, he violated his duty of loyalty, because he delegated work [to] a recently-disbarred attorney, and thus put his clients' partnership in the hands of someone who had already been deemed by that state bar to be unfit to practice law. Finally, he violated his duty to the public, because he permitted someone automatically deemed incompetent (even though Dale clearly had the requisite skill) by virtue of the disbarment to continue in the unauthorized practice of law.

#### Duty of Confidentiality

A lawyer owes his clients a strict duty of confidentiality. Model Rule 1.6 prohibits the disclosure of any information "relating to the representation." California does not have any direct rule on point, but the Cal Business Code states that a lawyer must "protect inviolate" the confidences of his client.

Here, Alex disclosed to the State Bar that he had hired Dale to work on the partnership. This information would be confidential – and thus could not be disclosed – under both the Model Rules and in California. However, there are certain exceptions to the ethical duty of confidentiality. One such exception permits disclosure of certain information in order to obtain an advisory opinion from the state Ethics Board. Thus, if Alex was revealing this information to the Bar for the purposes of obtaining advice regarding his ethical duties, then such revelation was proper.

Therefore, on these facts, Alex likely did not violate his duty of confidentiality because he was probably attempting to obtain some sort of advice regarding how he should proceed regarding hiring Dale.

It should be noted that the related issue of Attorney-Client privilege is inapplicable here. The Attorney-Client privilege protects compelled disclosure of confidential communications between attorney and client made for the purpose of obtaining legal advice. If Alex had been called to testify regarding what he told Booker and Clare regarding the formation of the partnership, such information could not be revealed without waiver of the privilege by Booker and Clare.

## Question 2

To protect the nation against terrorism, the President proposed the enactment of legislation that would authorize the Secretary of Homeland Security (“the Secretary”) to issue “National Security Requests,” which would require businesses to produce the personal and financial records of their customers to the Federal Bureau of Investigation (“the FBI”) without a warrant. Congress rejected the proposal.

Thereafter, in response, the President issued Executive Order 999 (“the Order”). The Order authorizes the Secretary to issue “National Security Requests,” which require businesses to produce the personal and financial records of their customers to the FBI without a warrant. The Order further authorizes the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records.

Concerned about acts of terrorism that had recently occurred in State X, the State X Legislature passed the “Terrorism Prevention Act” (“the Act”), requiring businesses in State X served with National Security Requests pursuant to the Order to produce a copy of the records to the State X Department of Justice.

1. Is the Order within the President’s authority under the United States Constitution? Discuss.
2. Assuming the Order is within the President’s authority, does the Order preempt the Act? Discuss.
3. Assuming the Order is within the President’s authority and does not preempt the Act, do the Order and the Act violate the Fourth Amendment to the United States Constitution on their face? Discuss.

## **Answer A to Question 2**

### **1. Is the order within the President's authority under the United States Constitution?**

#### **Order 999**

Order 999 was issued by the President after an identical piece of legislation proposed by him was rejected by Congress. The Order requires business[es] to produce the personal and financial records of their customers to the FBI without a warrant upon issuance of a "National Security Request" by the Secretary of Homeland Security. It is unclear what the use of such information so produced would be, other than the President's stated goal of protecting the nation from terrorism.

As an initial matter, assuming that the Order is valid (see below), it would not be a violation of the nondelegation doctrine. The President may delegate executive power as he sees fit to other members of the executive [branch].

#### **Congressional Authorization**

The President's power is at its apex when he acts pursuant to power given him by Congress. The U.S. Supreme Court has said that when he acts in the face of Congressional disapproval, he may only do so if the power he exercises is vested in him alone by the Constitution and denied to Congress. Where he acts in the face of Congressional silence on a matter, he acts in a "gray area". The case law is split as to whether Congressional rejection of a proposed power (but not the enactment of some act disallowing the President's use of that power) is silenced or disapproval, but the cases tend toward disapproval.

In this case, the President has issued Order 999 in the face of Congressional rejection of an apparently identical piece of legislation. The courts would likely treat such an action as occurring in the face of Congressional disapproval. Therefore, the court will only allow the Order if it is within the powers that only the President may exercise. If the court treats Congress' disapproval of the proposed legislation as silence, then the court will treat the Order as in the "gray area" of executive power and probably approve it if it is within the President's power. In this gray area, the court will likely look to the legislative history surrounding the defeat of the President's proposed legislation to divine some intent from the defeat.

Congress, on the other hand, could have authorized the act (assuming it is not unconstitutional under the 4<sup>th</sup> Amendment, see below). Congress has the power under the Commerce Clause to regulate the people, channels and instrumentalities of interstate commerce, as well as those things having a substantial effect on interstate commerce. The personal and financial information of individuals in America are most likely instrumentalities of commerce, and almost certainly have an effect on interstate commerce. So Congress does not have the ability to regulate in the field.

Congress is not bound by the Contracts Clause, so it does not pose a problem.

Given the fact that the power to make an Order such as this is not exclusively vested in the President, and the fact that he acted in the face of Congressional denial of his proposal to do so, the court will likely treat his act as outside his authority.

#### The President's Domestic Affairs Powers

The President has some domestic affairs powers reserved to himself. These include the appointment and removal powers, the pardon power, the commander in chief power, and the duty to execute the law. The President may make an argument that the latter two powers support the Order.

As an exercise of the commander in chief power, the President has the exclusive power to control the deployment of troops and their day-to-day control. There is a very weak argument that turning over financial records supports this role.

There is a better argument that the duty to execute the law supports the Order. In order to keep the nation safe, the President will argue, he must allow the FBI access to personal and financial records of all Americans. This is still a weak argument and there is no law to support it.

#### The President's Foreign Affairs Powers

The President shares foreign affairs powers with Congress, but has some reserved to himself, including the power to conduct foreign negotiations, to deploy troops overseas, and to make executive agreements.

The Order is not even arguably within his foreign affairs powers, as it concerns Americans' financial records at home, and gives them to the FBI, the government's domestic law enforcement agency.

#### Commandeering

Finally the Order poses a problem with commandeering; that is, the federal government's forcing the states to act. The Constitution as interpreted by the Supreme Court prohibits the federal government from requiring the states to enforce its laws. The Order forces law enforcement officials to "assist" the FBI. While the Congress could, for instance, condition spending to the states on such help, the President cannot force the states to do so. The Order violates the Constitution to that extent as well.

#### 2. Does the Order Preempt the Act?

State X has passed an Act requiring business[es] in the state to provide the information they provide to the FBI under the Order to the state's DOJ as well. This section assumes that the Order is valid and treats it as federal law.

### Preemption

Federal law can preempt state law in two ways, express and implied. In either case, where there is preemption, the state law is invalid under the Supremacy Clause of the Constitution. Express preemption occurs when the federal law by words states that it is the only regulation allowed and state regulation is prohibited. The Order does not contain an express preemption.

Implied preemption can occur in one of three ways, by direct conflict with state law, by so-called field preemption, and where the state law interferes substantially with the federal objective. Here, there is no direct conflict between the Order and the Act. The Act does not call for state business[es] to do anything they are prohibited from doing under the Order and vice versa. The Act merely requires businesses to provide a separate copy of their response to the Request to the state DOJ. This is not direct conflict.

Field preemption occurs when it appears from the legislative history of a federal law or from the law itself that it intends to be the only regulation in the area (for instance, environmental regulations typically provide that they are intended to fully occupy their fields). There is no legislative history for this Order other than the President's statement that it is to protect the nation from terrorism, and there is no language that a court might read as field preemption.

When a state law substantially interferes with the objectives of federal law, the state law will give way. Here, it does not seem like the Act interferes at all with the objectives of the Order. The Order provides that financial records go to the FBI (federal law enforcement) and the Act provides that a copy will go to state law enforcement. The Act is therefore not preempted.

### Congressional vs. Executive Action

The above analysis assumes that an Executive Order can preempt a state law. The case law is unclear as to this point but it might be instructive to look to the President's authority to preempt state law under his power to make executive agreements with foreign governments. Because an executive agreement preempts state law, it is reasonable to assume that a court would declare an executive order to do so as well.

### Contracts Clause

The Contracts Clause prohibits the states from substantially interfering with the obligation of existing contracts unless they have a substantial and legitimate reason for doing so and the means are reasonable and narrowly tailored to do so. Here, in the absence of the Order, the Act might have interfered with private contracts requiring businesses [to] keep their customers' records confidential. However, because the Order already breaks those contracts, and the Act goes no further, if the Order is valid, so is the Act.

### 3. Does The Order and Act Violate the 4<sup>th</sup> Amendment On Their Face?

The 4<sup>th</sup> Amendment applies to the federal government directly and to the states via incorporation by the 14<sup>th</sup> Amendment. The Order and Act call for the same information to be passed to equivalent agencies upon the same request. Therefore, the Order and the Act are essentially the same for the purposes of the 4<sup>th</sup> Amendment and will be analyzed together in this section.

#### The 4<sup>th</sup> Amendment

##### Purpose

The 4<sup>th</sup> Amendment prohibits unreasonable searches and seizures. The purposes [is] to prevent police and law enforcement misconduct. The Order and Act involve law enforcement collection of data without a warrant and therefore are generally within the scope of the 4<sup>th</sup> Amendment.

##### Use

The 4<sup>th</sup> Amendment generally provides that all evidence unreasonably seized be excluded (subject to some exceptions, for instance, for impeachment) from criminal prosecutions. The 4<sup>th</sup> Amendment is satisfied where a warrant has been issued and does not apply where there is an exception to the warrant requirement. The exceptions to the warrant requirement include searches incident to a lawful arrest, automobile searches, plain view, consent, stop and frisks, hot pursuit and evanesce. None of those exceptions apply here. There are also reduced requirements for so-called administrative warrants issued in highly regulated industries. However, that likewise does not apply here, as there is no warrant issued in a Request setting.

##### Government Action

The 4<sup>th</sup> Amendment only applies to government action. Here, the Order and Act require that private businesses turn over their records to law enforcement. In and of itself, this might not be considered government action, but the fact that the Order and Act [are] triggered by the Secretary's issuance of a Request (clearly government action) brings them within the scope of the 4<sup>th</sup> Amendment.

##### Reasonable Expectation of Privacy – Standing

The 4<sup>th</sup> Amendment prohibits unreasonable searches and seizures. The court has interpreted this to mean that it prohibits intrusions in areas where a person has a reasonable expectation of privacy. The facts do not state exactly what information is subject to the Requests. The case law is mixed on what sort of information is subject to a reasonable expectation of privacy. Pen registers (which record phone numbers dialed but not conversations) and bank account balances are not subject to the reasonable expectation of privacy, but it appears that the Requests go beyond those and will most likely be struck down if such information is used against an individual in a criminal prosecution.

### Use of Information Discovered

In and of themselves, the Order and Act do not violate the 4<sup>th</sup> Amendment. However, any use of information in a criminal prosecution found thereby would violate the 4<sup>th</sup> Amendment, so, while the Order and Act are constitutional, they are essentially useless for criminal prosecution. For other purposes where the 4<sup>th</sup> Amendment does not apply (for instance, grand jury proceedings, parole revocation proceedings, immigration proceedings), the use of information discovered pursuant to the Order and Act is likely constitutional.

## **Answer B to Question 2**

### **1) Is the Order Within the President's Authority Under the United States Constitution?**

There are several potential sources of authority for the order in question. Unlike Article I, which vests specifically enumerated legislative powers to Congress, Article II, Section 1 vests "all" executive authority with the President. The President could claim that orders of this nature are inherently part of the "executive" power imbued in his office by the so-called "vesting" clause. This does not amount to an executive "police power," but it does allow the executive to take actions traditionally taken by heads of state. There is little case law on this clause, so it is uncertain whether it would provide sufficient justification for the President's actions.

The President could also seek to justify the order under his foreign affairs power. The President's powers in this area are plenary and expansive. The President would argue that the Order is designed to prevent and deter acts of international terrorism. Given the plenary and complete nature of the President's authority in this arena, this is a potentially solid grounding for the President's ability to enact the order.

Relatedly, the President could seek grounds for his order in his war powers. This claim would be based on the assertion that the United States is engaged in a "war" on terror. The Order would be seen as part of the President's efforts to defend the country from potential terrorist attacks. This grounding, however, probably goes too far. While the President's war powers are expansive, even in the case of a non-declared war, they are unlikely to justify an order of this nature. In dealing with the deployment and movement of troops, the President's powers are plenary. However, when dealing with civilian matters unrelated to the armed forces, his authority is greatly diminished.

Finally, the President could attempt to find a basis for his actions here in the "Take Care" Clause. The President is charged to ensure to "take care" that the laws be faithfully executed. Here, he would argue that terrorism, by its very nature, precludes and disrupts the execution of the laws of the land. His Order would be seen as a necessary step to ensuring that the laws are indeed faithfully executed.

The President's actions here would be unaffected by the test for executive authority set forth in the Steel Seizure case. Under that tripartite formula, the President's powers are at their highest when acting pursuant to congressional legislation; they are lessened if there is no congressional legislation on the matter, and they are at their lowest when he is acting in the face of congressional legislation. In this case, the President's proposal was indeed rejected by Congress. However, if that rejection did not come in the form of legislation barring the President from taking such action, it is unlikely that the rejection would have much impact on his authority to enact the Order. The mere refusal to enact a bill does not put the President's actions in the third Steel Seizure category. Thus, it appears that the President's actions fall in the middle ground-with no congressional legislation on the matter.

Thus, in this case, the President appears to be operating in an area where he is not bound or backed by congressional authority. In such an arena, the President's actions are bolstered by past acts of the executive. Here, the "National Security Requests" operate in much the same way that national security letters operate in the current system – FBI or DOJ can issue such letters and demand documents in return, without a warrant. It is likely therefore that the bulk of the Order would appear authorized under some combination of the vesting clause, the foreign affairs power, or the Take Care Clause.

A contrary argument would be that executive Orders are only binding on officials within the executive branch. As such, since this order attempts to control the actions of those outside the executive branch (the businesses), it is unconstitutional.

In either scenario, the portion of the Order that allows the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records is probably unconstitutional. The Supreme Court has held that the 10<sup>th</sup> Amendment prohibits Congress from "commandeering" either state legislatures or state executive officials (Printz). In other words, Congress cannot compel state governments to take action. It may incentivize [sic] action, and it may make grants of funds contingent, but it cannot demand. While the cases themselves referred to congressional action, it is likely that executive action would fall under the same rubric. In this case, the Order authorizes the Secretary to "require" state and local law enforcement to assist in the collection of records. That requirement effectively commandeers state officials and is therefore unconstitutional (there is an exception for requiring state governments to produce records already in their possession, but that is inapplicable here, as the records are not in state government possession).

## **2) Assuming the Order is within the President's Authority, does the Order Preempt the Act?**

By action of the Supremacy Clause, federal law may "preempt" state law. Federal law is the supreme law of the land and renders any contrary state legislation void. This preemption can take several forms. Preemption can be express – in other words, the legislation may specifically indicate that it is preempting state law (express preemption does not rule out implied preemption). In this case, however, there is no indication that the Order by its express terms preempts state law.

Preemption can also be implied. In other words, federal law can preempt state law if it is clear that the federal legislation was meant to occupy the entire field of regulation, if the state law poses an obstacle to carrying out the federal law, or if the legislation conflicts with the relevant state law. These principles are generally applied to congressional action. If they only applied to congressional action, then, by definition, an executive order like the one in this case could never preempt state law. Assuming, however, that executive orders can indeed preempt state law, there is no implied preemption in this case. There is no indication that the order was intended to occupy the entire field of regulation in this area. It is plausible that states would be allowed to

assist (indeed, the Order attempted to mandate that they would assist) and in any case, there are alternative means of obtaining business records, etc. (warrants). The law does not pose an obstacle to the enforcement of the federal act, nor does it conflict with it. Again, the Act appears to be an attempt to aid the federal government in carrying out its order.

Thus, under either theory, the Act is not preempted by the Order.

### **3) Assuming the Order is within the President's authority and does not Preempt the Act, do the Order and the Act violate the Fourth Amendment?**

#### Order

The Fourth Amendment applies directly to the federal government and prohibits unreasonable searches and seizures. Unreasonable searches and seizures have been deemed to be those involving state action which intrude upon an individual's reasonable expectation of privacy.

In this case, the state action element is clear. The federal government is ordering businesses to produce the records of their clients.

The next question is whether there was a reasonable expectation of privacy in the customer records. Individuals have a reasonable expectation of privacy, for example, in their homes. However, there are other things in which an individual has no reasonable expectation of privacy. Generally, items passed on to third party businesses cannot reasonably be expected to be considered private. For example, there is no reasonable expectation of privacy in bank records. By analogy, therefore, it is unlikely that there is a reasonable expectation of privacy in business records. Generally speaking, an individual has no standing to sue for the seizure of his property that is in the possession of another. On occasion, the owner of property does have standing to sue, but given the fact there is no expectation of privacy in bank records, it is unlikely applicable here.

Assuming, however, that there was indeed a reasonable expectation of privacy, the search is only permissible if there was a warrant or if the search fell into one of the exceptions to the warrant requirement. Here, it is clear that there was no warrant. A warrant must issue on the basis of probable cause, specifically describe the place to be searched or the person or things to be seized and be issued by an unbiased magistrate. In this case, while there is arguably a description of the things to be seized, there is no indication of probable cause, and the issuing authority (the Secretary) is not an unbiased magistrate (in many senses, he is akin to a prosecutor who has an interest in the outcome of the investigation).

A search may still be reasonable, however, if it falls into one of the exceptions to the warrant requirement. However, none of the main exceptions appear to be applicable. This is not a search incident to a lawful arrest, it is not a Terry stop, it is not under the automobile exception, there is no consent, there is no hot pursuit, the items are not in

plain view, and this is not an inventory search. The government could attempt to argue that this falls under the “special needs” exception to the warrant requirement, but that does not appear to be applicable. The special needs exception is justified only in extreme situations where law enforcement could not carry out its duties in any other fashion (i.e., drunk driving checkpoints, airport security searches). In this case, while the threat of terrorism may pose an extreme danger, it is unlikely that this is the only way of protecting the public.

#### Act

The Fourth Amendment has been incorporated against the states through the due process clause of the 14th Amendment. Thus it applies against the states in the same manner as it does against the federal government, so the analysis is the same as above.

### Question 3

On May 1, Owner asked Builder to give her an estimate for the cost of building a wooden fence around her back yard. Builder gave Owner signed written estimates of \$4,000, consisting of \$2,500 for labor and \$1,500 for materials for a cedar fence, and of \$7,000, consisting of \$2,500 for labor and \$4,500 for materials for a redwood fence. He said, however, that he would have to verify that the redwood was available.

Owner said she liked the idea of a redwood fence but wanted to think about it before making a decision. In any case, she said she wanted the fence completed by June 1 because she was planning an important event in her back yard for a local charity. Builder said he would check with redwood suppliers and get back to her within two days.

On May 2, Builder telephoned Owner. Owner's phone was answered by her voice-message machine, which informed callers that she had been called away until about May 25 but would be checking her messages daily and would return calls as soon as she could. Builder left a message stating, "I've found the redwood, and I can build the redwood fence for \$7,000, as we agreed. Please give me a call, as I will otherwise buy the redwood, which is in short supply, and start the work within a few days." Owner heard the message, but because the charity event she had planned had been cancelled and there was no longer any urgency about getting the fence erected, she decided to wait until she returned to speak to Builder.

By May 14, Builder had still not heard from Owner. He was concerned that the supply of redwood might not hold and that if he did not start work immediately he would not be able to finish by June 1. Thus, he bought the redwood and completed construction of the fence on May 24.

When Owner returned on May 25, she saw the completed fence and sent Builder a letter stating, "You did a great job, but I never agreed to go ahead with the fence, and I certainly hadn't decided on redwood. Besides, the charity event that I had planned got cancelled. You should have waited until I got back. But, to avoid a dispute with you, I'll offer to split the difference – I'll pay you \$5,500."

Builder received the letter on May 26. He telephoned Owner and said, "When I first read your letter, I was going to get a lawyer and sue you, but I decided to let it go and I do accept your offer of \$5,500." Owner replied, "Well, you're too late. I've changed my mind. I don't think I owe you anything."

May Builder recover all or any part of \$7,000 from Owner on a contractual or other basis? Discuss.

### **Answer A to Question 3**

#### Applicable Law

This contract will be governed by general common law contract principles. Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. All other contracts are governed by general common law contract principles. The contract at issue, assuming there is one, involves personal services: building a fence. Although Builder may also supply materials such as the wood, that does not convert it into a contract for the sale of goods because the materials are collateral to the primary purpose of the agreement, which is to provide the service of fence building.

#### Formation

There was no enforceable contract between the parties, because they never had a meeting of the minds. For a contract to come into formation, there must be an offer, followed by a manifestation of assent to the offer. The parties must objectively agree to a bargained-for exchange.

#### Offer - May 1 Estimates

Builder (B) may argue that the estimates he provided on May 1, were offers. An offer is a communication of definite terms of the agreement which creates a power of acceptance in the offeree. The estimate for the redwood fence was not an offer, however, because B did not objectively manifest an intent to be bound if Owner (O) accepted right there. B said that he would have to verify that redwood was available. This suggests that he did not intend to be bound to the terms of these estimates until he verified the supply of the redwood. The estimate for the cedar fence was not similarly conditioned, and so it may be construed as an offer. Since he withheld the power to accept with regard to the redwood fence, that estimate was a mere invitation to make an offer.

#### Offer – May 2 Message

The May 2 voicemail message from B does qualify as an offer for the redwood fence. In the message he referred to their earlier discussion, and said that he would be willing to build the redwood fence for \$7,000. Furthermore, he expressly granted O the power to accept by calling him back or that he would start the work in a few days if he did not hear from her. Since he created power of acceptance, this message was an offer to build the redwood fence for \$7,000.

Offers have no effect, however, unless actually communicated. B reasonably expected that his message would be heard by O since her message said that she would be checking her messages daily. Owner did in fact hear the message. Once she heard the message, the offer was effective.

#### Acceptance by Silence

The general rule is that the offeree must objectively manifest assent to the offer to be bound. As a corollary, silence on the part of the offeree is not generally an objective

manifestation of assent. There are exceptions to this general rule where the parties have a prior history of dealing on such a basis. There is no indication that B and O have any such history. Although B attempted to create a power of acceptance by O's silence, she will not be bound by silence unless it is objectively assent.

B would argue that under the circumstances, O's silence should be construed as assent. O had already told him that she needed the fence to be completed by June 1. She had not informed him that the charity event scheduled for June 1 had been cancelled. B was under the impression that O need[ed] the fence done on time. Furthermore, her message said that she would be checking her messages daily, but would return calls as soon as she could. Given this, B was reasonable in believing that she heard the message but was too busy to respond. Since he told her he would start in a few days unless he heard back from her, it may have been objectively reasonable to believe that her silence meant that she wanted him to start but was too busy to respond.

On the other hand, O would argue that it would be unfair to hold her to an agreement that she had not assented to. After all, at the time, there were two outstanding offers: one for the cedar fence, and another for the redwood fence. Moreover, on their last communication, O had told B that she liked the idea of a redwood fence, but wanted to think about it before making a decision. Given that she could have decided on either, it was not objectively reasonable to interpret her silence as assent to the building of the redwood fence. O has the better argument here, particularly because courts are loathe to enforce an agreement where one party has not affirmatively manifested assent. Thus, O is not bound to the contract by her silence.

### Consideration

There are no issues of consideration here. For a contract to be binding, there must be a bargained-for exchange whereby each party incurs some legal detriment. In this case, B would be obligated to build a fence, and O would be obligated to pay.

### **Remedies**

#### Compensatory Damages

If there is no enforceable contract then B may not recover the \$7,000 from Owner. If there is a contract, however, then B would be entitled to recover the entire \$7,000. In California, the measure of compensatory damages is the expectancy interest. In other words, the law seeks to place the parties in the monetary position they would have been in had the contract been fully performed by both parties. Here, B fully performed by obtaining the materials and building the fence. When O refused to pay, she was in breach of her obligation to pay. Had the contract been fully performed, B would have expected to be paid the contract price of \$7,000. Thus, if there is an enforceable contract, B would be entitled to \$7,000.

#### Quasi-Contract

If there was no enforceable contract, B may still be able to obtain some of the money under the theory of quasi-contract. A quasi-contract is an equitable doctrine used to

prevent the unjust enrichment of one party. A quasi-contract arises where one party confers a benefit upon the other with the reasonable expectation that they will receive payment for the benefit. Unlike contract damages, however, the measure of damages under quasi-contract are restitution, or the prevention of unjust enrichment. In other words, the law will require O to pay B for the reasonable value of the services to prevent her unjust enrichment.

In this case, a quasi-contract likely arose. B certainly conferred a benefit on O. She has a brand new redwood fence. The issue is whether it was reasonable for B to expect that he would be compensated for his services. As discussed above, it is a close call as to whether B was reasonable in interpreting O's silence as consent. While it was probably not sufficient to bind O to the contract terms, it may have been sufficient under the circumstances to create a reasonable expectation in B that he would be compensated for his services.

If B prevails on a quasi-contract theory, he would at a minimum be entitled to recover the value of the materials, or \$4,500. If the new fence has increased the value of O's property, he may also be entitled to recover that increased value because to allow O to benefit from the increased value to her property would also unjustly enrich her. If this measure is applied, however, it would be limited to a maximum of \$7,000 representing the effective contract price. Furthermore, O may oppose this measure of damages as being too speculative.

#### Accord and Satisfaction

O will be required to pay B \$5,500 on the accord and satisfaction contract. When O returned and discovered the fence, she sent B a letter. In this letter, she agreed that B did a "great job" but asserted that she had never agreed to the contract. O then offered that in order to "avoid a dispute" she would "split the difference" and pay B \$5,500. This may be interpreted as an offer of accord. The offer was effective on May 26, when B received it.

There is sufficient consideration to bind the parties to this agreement because O has agreed to pay \$5,500 in exchange for B agreeing not to waive any claim to the original contract. As discussed, although her claim that she never agreed is stronger, B still had a viable contract claim against her. B reinforced his reasonable belief that he had a non-frivolous claim when he called her and told her that his first instinct was to get a lawyer and sue her. By forgoing his right to sue her on the contract theory, B has incurred a legal detriment sufficient for consideration.

O became bound to the offer when B called her and accepted it. In general, an offer may be revoked at any time by the offeror, but a revocation is not effective until communicated. Here, B called O and immediately accepted her offer of accord. Although O may have decided to revoke the offer before B called (which she suggests by saying "You're too late. I've changed my mind"), her subjective intent does not legally revoke the offer until she communicates the revocation to B. Here, since B

accepted before she could revoke, and there is sufficient consideration, O will be bound to the accord and satisfaction contract. B may recover \$5,500 from her on that theory.

### **Answer B to Question 3**

#### Builder v. Owner

Builder may wish to proceed on three theories: 1) that Owner is in breach of contract formed on May 2, and thus, he should recover the full contract price; 2) that Owner is in breach of contract formed on May 25; and 3) that Builder should be entitled to restitutionary remedies under an unjust enrichment or quasi-contract theory.

#### Controlling Law

The first issue is whether the agreement between Builder and Owner is controlled by the UCC or the common law of contracts. The agreement was for the construction of a fence. In general, constructions are contracts for the personal services of the builder, with the cost of materials being incidental to the contract. However, the contract also involves the sale of goods, since the fence was being built out of wood. The UCC controls contracts for the sale of goods, which are defined as movable, tangible personal property. Thus, whether the UCC or the common law controls the contract depends on which part of the contract was the most important part.

If the agreement were for a cedar fence, the labor was valued at \$2,500 and material valued at \$1,500. Thus, such a contract would be governed by the common law of contracts. If the agreement were for a redwood fence, the labor was again valued at \$2,500 but instead the materials were valued at \$4,500. This contract could be governed by the UCC, since the primary part of the contract was the sale of the redwood, with the labor constructing the fence being incidental to the sale of the expensive wood.

Here, Builder is asserting a contract for the construction of a redwood fence. This is a close issue, because while there is a disparity between the value of the labor and the goods, the entire purpose of the contract was not to buy and sell wood, but rather to construct a fence. A pile of redwood would not be of use to Owner. Rather, Owner contacted Builder for the purpose of the construction of a fence. Thus, the court could also hold that the contract should be controlled not by the UCC, but rather by the common law.

#### 1. Contract Formation on May 2

##### K Formation

In order to form a valid contract, there must be 1) offer, 2) acceptance, and 3) consideration.

##### Offer

An offer is the manifestation of a present intent to contract, definitely communicated to the offeree, inviting acceptance. Whether a statement constitutes an offer will be judged by a reasonable person standard. If a reasonable person in the offeree's shoes would understand the commitment to be a contract, then the statement is an offer.

Builder may argue that he made an offer to build the redwood fence on May 1. However, this argument will likely fail because Builder stated on May 1 that he would have to verify that the redwood was available. Thus, Builder's equivocation regarding the availability of redwood made his statement too indefinite to be considered an offer. Builder may also argue that he made an offer to build a cedar fence, but his argument would also likely [fail] because he was simply responding to an inquiry by Owner for an estimate regarding the cost of completion.

Builder will also argue that his May 2 telephone message constituted an offer. Owner stated in her phone message that she would be checking her messages daily. His message stated a price term, was definitely communicated to Owner, and manifested a present intent to contract. Thus, Builder's May 2 message would very likely be considered an offer because, judged by a reasonable person standard, it was clear that he was inviting acceptance of his promise to build a fence for \$7,000, and it was clearly directed at her based on their prior conversation.

### Acceptance

Acceptance is words or conduct manifesting an assent to the terms of the offer. At common law, acceptance had to be a "mirror image" of the offer. Any deviation from the terms of the offer constituted a rejection of the offer, and instead formed a counteroffer. Under the UCC, acceptance may be made on different terms, and whether such terms become part of the contract depends on whether the parties are merchants.

Builder may argue that Owner accepted his offer on May 1. This argument will fail because, as noted above, Builder did not make an offer on that date. Thus, there could be no acceptance. Builder's better argument is that Owner accepted his May 2 offer by her silence.

Silence ordinarily does not manifest an assent to the terms of the offer. Silence can only indicate acceptance when the circumstances would clearly indicate to the offeror that his offer had been accepted. In this case, Builder will argue that he knew Owner was checking her phone messages daily. Thus, he would understand that Owner would receive his message if not on May 2, then certainly soon thereafter.

However, this argument should also fail because Builder himself requested that Owner "give him a call" soon, since redwood was in short supply and he wanted to get to work right away. Twelve days elapsed between May 2 and May 14, when Builder – who still had not heard from Owner – commenced building the fence. Based on their past conversations, Builder was aware that Owner wanted to think about building the fence before coming to a decision. Thus, it was unreasonable for Builder to assume that Owner's silence manifested an assent to his offer.

Moreover, Builder may argue that Owner had made time of the essence of the contract, since she stated in their May 1 conversation that she wanted the fence completed by June 1 in any event. Builder was concerned on May 14 that he would not be able to complete the fence by June 1 and therefore he commenced building in order to comply

with this condition set by Owner. This argument would also likely fail, because while a time of the essence clause makes late performance a material breach of contract, no contract had yet been formed between Owner and Builder. Thus, Builder cannot state that Owner's silence was acceptance even if time was of the essence.

### Consideration

Consideration is the bargained-for exchange between the parties. Consideration is present any time promises or performances are exchanged. Any legal detriment or forbearance, as well as actual benefits and performance, can constitute consideration.

If there was a valid offer and acceptance on May 2, consideration would be present because Owner would have promised to pay \$7,000 in exchange for Builder's promise to construct the fence. This would be a bargained-for exchange of promises, and thus consideration would be satisfied.

However, as noted above, Owner did not accept Builder's offer on May 2 through any action or through silence. Therefore, no valid contract could have been formed on May 2.

### Unilateral v. Bilateral

A unilateral contract is one whose acceptance is expressly conditioned on performance. That is to say, the offer can only be accepted by the demanded performance. All other contracts are bilateral. Builder may attempt to argue that, on May 1, Owner made an offer to pay \$7,000 if the fence were completed by June 1, and that a unilateral contract was formed by his full performance of building the fence. However, for the same reasons noted above, Owner did not make any offer on that date, and thus a unilateral contract argument will be rejected.

### Statute of Frauds

Even assuming a contract was formed between Owner and Builder, Owner may attempt to assert a statute of frauds defense if the contract is governed by the UCC. Under the UCC, contracts for the sale of goods in excess of \$500 must be in writing. If the court finds that the UCC governs this contract, it would be in violation of the Statute of Frauds because all communications made between the parties were oral. In order to satisfy the Statute of Frauds, there must be a writing evidencing the contract, signed by the party to be charged (unless the parties are merchants).

Builders may argue that the signed written estimates he sent to Owner should satisfy the statute of frauds. Under the UCC, a Merchant's Firm Offer will take a contract out of the statute of frauds, even if the party to be charged does not sign a writing evidencing the contract. The merchant's firm offer rule will apply if 1) the sender is a merchant, 2) the recipient has reason to know its contents, and 3) does not respond to the writing. Here, Builder is likely a merchant under the UCC's broad definition of a merchant, since he probably frequently deals in construction contracts. Owner received the estimates and knew their contents, since she expressed that she liked the idea of the redwood fence. However, Owner did respond to the estimate, indicating that she wanted time to

think about it. Thus, the merchant's firm offers rule here cannot apply. Any subsequent agreement must still be evidenced by a signed writing, which here is absent under these facts.

It should also be noted that if the contract is governed by the common law, there would be no Statute of Frauds issue because the contract did not fall within the types of contract normally governed by the Statute.

### Frustration of Purpose

Additionally, assuming a contract was formed, Owner may attempt to assert a defense based on frustration of purpose since the whole purpose for which she wanted to build the fence – the charity event in her backyard – was cancelled. However, this argument would fail because the purpose of the contract was not to perform a charity event, but rather to build a fence, which was still possible even after the event had been cancelled.

### Conclusion

Thus, on May 2, no contract was formed between Owner and Builder. As such, Owner is not in breach of contract for refusing to pay \$7,000 and Builder has no contract remedy to recover any part of that money.

### 2. Formation of Contract on May 25

Builder may alternatively argue that a new contract was formed on May 25, when Owner returned home. Builder will assert that Owner's letter to him was an offer to pay \$5,500 in exchange for the fence, which Builder accepted by his phone call on May 26. Again, every contract must contain both offer, acceptance, and consideration. Offer and acceptance are likely satisfied, but Owner will assert that no consideration was present.

Owner will argue that the consideration for her promise to pay \$5,500 was Builder's completion of the fence. That would be past consideration, which cannot constitute a bargained-for exchange, since there was no promise to support Builder's performance at the time he rendered it. In other words, Owner will argue that she did not bargain for the fence, and thus there was no return promise or performance in exchange for her offer to pay Builder \$5,500. Owner will very likely prevail on this point, and therefore since no consideration was present, a new contract to build the fence could not have been formed on May 25.

### Good Faith Settlement of a Dispute

Alternatively, Builder may argue that Owner's promise to pay \$5,500 constituted a good faith settlement of a dispute, which Builder then accepted. Here, the exchange was not money for the construction of the fence, but rather money in exchange for Builder's release of any legal claim he might assert against Owner.

In this case, Owner stated that she never agreed to the fence, and that Builder should have waited until she returned – but that to avoid a dispute, she will offer Builder \$5,500. Builder stated that he was going to get a lawyer and sue Owner, but agreed to accept the money instead. Thus, there is a good faith dispute between these parties as

to the existence of the debt and as to the amount owed. Owner made an offer via her letter on May 25, and Builder accepted it on May 26. Consideration is present because there was a bargained-for exchange: in this case, Owner promised to pay money in exchange for Builder's legal forbearance (doing something he had a right to do, in this case, sue Owner).

### Accord and Satisfaction

An accord is an agreement which rests on top of an underlying contract. An accord occurs when one party agrees to accept a different performance in lieu of the performance promised in the underlying agreement. An accord suspends performance of the underlying agreement. Satisfaction is the performance of the accord agreement. When a satisfaction occurs, the accord merges with the underlying agreement, which is extinguished.

Here, Builder will argue that the settlement of their dispute constituted an accord but not a satisfaction. As analyzed above, the good faith dispute contained an offer, acceptance and consideration. Thus, there is an overlying agreement resting on top of an underlying agreement. However, the accord was never performed. Owner did not pay the \$5,500 in lieu of her original performance. Thus, Builder could seek damages for breach of the accord agreement – but not damages for breach of the underlying contract since, as noted above, no actual contract was formed to build the fence. Builder's damages would be measured by the loss he incurred as a result of the breach of the accord agreement, which here would be \$5,500.

### Revocation of Offer

Owner will argue that she revoked the offer on May 26 when she told Builder that she had changed her mind. In a bilateral contract, an offer may be revoked at any time before acceptance is made. Once acceptance is given, the contract is formed and an offer cannot be revoked. Here, Owner's argument will fail because Builder accepted the offer by calling her immediately. Thus, Owner could not revoke her offer.

Therefore, if Builder proceeds on this theory, he could likely recover the \$5,500.

### 3. Quasi-K Remedies

If Builder decides that he cannot succeed on a contract theory, he may proceed on a quasi-contract theory, which will avoid unjust enrichment on the part of the defendant. In this case, Owner has a new redwood fence in her backyard. Builder will argue that if she were permitted to keep it without paying any sort of damages to Builder, she would be unjustly enriched.

Builder could likely prevail on this argument. Owner would argue that she should not have to pay any amount of damages because she did not actually request that Builder construct the fence. However, Owner heard Builder's message on May 2 and decided not to reply, because the event had been cancelled. Owner knew that she would not be returning until May 25, and that she had told Builder she wanted the fence built by June 1. Additionally, Builder had asked her to call him back as soon as possible, because

the redwood was in short supply. Thus, based on Builder's message on May 2, Owner should have at least communicated to Builder that she was no longer interested in having the fence constructed.

Fairness would therefore require that Owner make restitution for the benefit conferred upon her by Builder. Builder will be able to recover the fair market value of the work he did in order to build the fence. It should be noted that restitutionary remedies can sometimes even exceed the contract price, if that is the fair market value of services rendered. Thus, Owner can recover all, part, or more of the \$7,000 depending on the fair market value of the benefit conferred upon Owner.



# **THURSDAY MORNING JULY 31, 2008**

## **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

Barry is the publisher of *Auto Designer's Digest*, a magazine that appeals to classic car enthusiasts. For years, Barry has been trying to win a first place award in the annual Columbia Concours d'Elegance ("Concours"), one of the most prestigious auto shows in the country. He was sure that winning such an award would vastly increase the circulation of his magazine and attract lucrative advertising revenues. This year's Concours was scheduled to begin on June 1, with applications for entry to be submitted by May 1.

Sally owned a 1932 Phaeton, one of only two surviving cars of that make and model. The car was in such pristine condition that it stood a very good chance of winning the first place prize.

On April 1, Barry and Sally entered into a valid written contract by which Barry agreed to buy, and Sally agreed to sell, the Phaeton for \$200,000 for delivery on May 25. In anticipation of acquiring the Phaeton, Barry completed the application and paid the nonrefundable \$5,000 entry fee for the Concours.

On May 10, Sally told Barry that she had just accepted \$300,000 in cash for the Phaeton from a wealthy Italian car collector, stating "That's what it's really worth," and added that she would deliver the car to a shipping company for transport to Italy within a week.

1. Can Barry sue Sally before May 25? Discuss.
2. What provisional remedies might Barry seek to prevent Sally from delivering the Phaeton to the shipping company pending resolution of his dispute with Sally, and would the court be likely to grant them? Discuss.
3. Can Barry obtain the Phaeton by specific performance or replevin? Discuss.
4. If Barry decides instead to seek damages for breach of contract, can he recover damages for: (a) the nondelivery of the Phaeton; (b) the loss of the expected increase in circulation and advertising revenues; and (c) the loss of the \$5,000 nonrefundable entry fee? Discuss.

## Answer A to Question 4

1) Can Barry Sue Sally Before May 25?

### Contract

A contract is a promise or set of promises, for the breach of which the law provides a remedy. A valid contract requires an offer, acceptance, and consideration. Here, the facts provide that Sally (S) and Barry (B) entered into a valid written contract on April 1. Thus, it is stipulated that there was a valid offer and acceptance. The consideration requirement is also met, because B promised to pay money and S promised to convey the Phaeton to B. However, the fact that B promised only to pay \$200,000 when S thinks the car's "real value" is \$300,000 will not invalidate the consideration element; the court will not inquire as to the adequacy of consideration. What has really happened here is that S learned that another buyer was willing to pay more and, as a result, she has willfully breached her contract with B. Finally, the statute of frauds is triggered because the car is a movable good valued at greater than \$500. However, it will be satisfied because the contract is in a writing (assuming it is signed by the party to be charged, or Seller).

Thus, a valid contract existed between the parties as of April 1.

### Anticipatory Repudiation

An anticipatory repudiation is a definite and certain expression of intent not to perform a contract before the time for performance is due. Under the parties' contract, S was to deliver the car on May 25. However, on May 10, S told B that she had accepted \$300,000 cash for the vehicle from an Italian collector. The fact that she sold the car to another party and then told B about it is a definite and certain expression of intent not to perform the contract; she already sold the car to someone else and there are only two 1932 Phaetons that exist.

### Wrongful Prevention

A party may also prevent a contract by conduct that wrongfully prevents the occurrence of a condition. A condition is a requirement that must be met or excused before the duty to perform becomes absolute. All contracts contain at least one condition; that is, that the other party will perform. Here, S was obligated to convey the Phaeton ("the car") to B as a result of their contract. By selling the car to someone else, S has wrongfully prevented the occurrence of the condition that she actually transfer title of the car to B.

### Effect of Anticipatory Repudiation / Wrongful Prevention

When a party anticipatorily repudiates or prevents the occurrence of a condition, the aggrieved party may 1) encourage performance, 2) treat the repudiation as final and sue for breach, or 3) await performance and sue for breach. The repudiating party may also retract her repudiation unless the aggrieved party has indicated that he considers the repudiation final or detrimentally relied thereon.

Here, S has already accepted \$300,000 from a wealthy Italian collector for the car that she promised to sell to B. Moreover, she added that she will deliver the car to a shipping company for transport to Italy within a week. B has not communicated intent to treat the repudiation as final. He may, however, do so, and then sue for breach prior to May 25 because S's conduct indicates that she has certainly repudiated the contract.

#### Conclusion:

B may sue S before May 25 because she has repudiated and/or wrongfully prevented performance of the contract.

## 2) Provisional Remedies / Likelihood Court Would Grant

### Injunction

An injunction is a device that a party may use to stop another party from acting or, in some circumstances, force another party to act in a certain manner. An injunction requires the following elements:

#### Inadequate Legal Remedy

Because an injunction is an equitable remedy, the court must first determine that the legal remedies available to the plaintiff are inadequate. Here, the parties bargained for the transfer of a rare vehicle that B intended to use to attempt to win a first place award in the Concours. B specifically wanted a rare vehicle such as this because he thought that winning the Concours would help him increase his subscriptions and advertising revenues. It is true that B could procure another rare car that may have a similar chance of winning the car show, however. Nevertheless, B contracted for a rare good and the fact remains that the breaching party will be delivering the car to the shipping company for transport to Italy within a week.

No amount of damages will prevent the car from being shipped to Italy. Thus, the legal remedy is inadequate.

#### Property Right

Historically, the court would only award injunctions with respect to property rights: namely, real property rights. Modernly, however, the court will award injunctions to enforce personal rights. While a car is personal property, the contract is better viewed as giving B the personal right to purchase the car. Thus, though the contract involves personal rights, the court will still enforce it.

#### Feasibility of Enforcement

The court must be able to issue an enforceable decree. An injunction is either mandatory, in that it requires a party to act, or prohibitory/negative, in that it prevents a party from doing certain acts. Prohibitory injunctions are easier for the court to enforce since the defendant will be required only to stop acting in a certain manner as opposed to doing something in an affirmative manner. Finally, the court will use its powers of contempt to enforce the injunction (either civil or criminal). Civil contempt coerces a defendant to act while criminal contempt punishes a defendant from failing to act. The

court here could use its powers of civil contempt to coerce S to stop transfer of the vehicle to Italy by issuing a negative decree.

Therefore, the feasibility requirement will be met.

### Balancing of the Hardships

The type of balancing that the court will do depends on the type of injunction that [it] will issue.

### Temporary Restraining Order

A temporary restraining order (TRO) is a temporary decree issued to preserve the status quo for the period leading up to the Hearing on the preliminary injunction. The court typically will not balance the hardships under a TRO. The plaintiff must be faced with imminent, irreparable harm and the issuance of a TRO must be necessary to preserve the status quo, typically lasting no longer than 10 days. It is obtained by going in Ex Parte and making a showing of proof of the aforementioned requirements. In most jurisdictions, the plaintiff must also post a bond proportionate to the possible amount of damages the defendant could suffer from a wrongful issuance of the TRO.

Here, B would request that the court issue a TRO preventing her from transporting the car to Italy within the week. Once the vehicle is in Italy, the court will no longer have jurisdiction over it. Depending on how long it may take for the court to hold a hearing on his preliminary injunction, the court may issue a TRO to enjoin S from shipping the car.

### Preliminary Injunction

A Preliminary Injunction is an injunction that lasts during the pendency of the action, up and until trial on the permanent injunction is complete. In determining whether to issue the injunction the court will factor 1) the likelihood of Plaintiff's success, 2) Balance the Harms – the harm to plaintiff if the injunction is wrongfully denied versus the harm to the defendant if wrongfully granted, 3) The plaintiff must post a bond if he has not done so under a TRO, and 4) issuance is necessary to preserve the status quo.

### Likelihood of Success

S has willfully breached the contract, which was stipulated as valid. In the face of such a breach, B enjoys a strong likelihood of success on the merits in a claim for either damages or specific performance since the parties were bargaining for a unique good (there are only two cars in existence). Thus, B has a strong likelihood of success on the merits.

### Balancing the Harms

If the injunction is wrongfully denied, B will be deprived of perhaps his only opportunity to own a Phaeton. His motivations for purchasing the car are irrelevant. Most collectors of high end vehicles view the purchases of such as not only a hobby, but also as an investment. Thus, the fact that B wished to use the car to win the Concours, one of the most prestigious auto shows in the country, for profit motives, will not lessen the harm he suffers as a result of the breach. If anything, it means that he will suffer pecuniary

harm, as opposed to mere emotional harm from not purchasing a car he wanted to have, as a result of S's breach.

On the other hand, if the injunction is wrongfully issued, S will likely lose the opportunity to sell the vehicle to an Italian purchaser willing to pay \$300,000. However, as S now claims, if the true value is \$300,000 and she is selling it to someone for the same amount, she will not be damaged by not being able to sell it to this particular purchaser. Therefore, S's harms are comparatively slight.

Thus, the harms balance in favor of Barry.

#### Post a Bond

If B has not obtained a TRO and posted a bond, he will be required to do so upon the issuance of a preliminary injunction.

#### Necessary to Preserve the Status Quo

There are only two cars like this in existence. Keeping the car within the court's jurisdiction is necessary to maintain the status quo because otherwise B may not be able to obtain what he is entitled to under his contractual rights.

Therefore, the court will likely issue a preliminary injunction.

#### Permanent Injunction

A permanent injunction is not a provisional remedy; it is awarded after a full trial on the merits. The court will not typically balance the hardships unless the injunction pertains to a nuisance. Therefore, B's best recourse prior to trial on the merits is through one of the above-given preliminary methods considering he will likely pursue a claim for specific performance (thus making the issuance of a permanent injunction improper).

#### Conclusion:

The court may issue a TRO to prevent B's imminent harm if it is not possible to obtain a hearing on the preliminary injunction prior to S's shipment of the car to Italy.

### 3) Specific Performance/Replevin

#### Specific Performance

Specific performance is an equitable remedy that the court may utilize to enforce the terms of a valid contract. As discussed above, the contract between B and S is valid notwithstanding the fact that B may have got a "good bargain" by contracting for the car for \$200,000. To issue a decree of specific performance, the plaintiff must demonstrate.

#### Inadequate Legal Remedy

The legal remedy is inadequate when the parties are contracting for unique or specially manufactured goods. Here, the car is one of only two in existence. Thus, there is a small possibility that B could purchase another Phaeton. Moreover, B wished to have the car because it appeals to classic car enthusiasts; that is not to say, however, that it

is the only car that would win the award. Nevertheless, S's car was in "pristine condition." The condition, nor location, of the other vehicle is unknown. Thus, the legal remedy of damages will be inadequate if B is unable to recover the replevin, which, discussed below, is a legal remedy. However, even under replevin, if the defendant posts a bond then the legal remedy may be rendered inadequate because the court will not order the sheriff to seize the goods.

#### Definite and Certain Terms

The terms of the contract must be such that the court knows what type of order to issue. Here, the parties contract in which B agreed to buy and S agreed to sell "the Phaeton" for a price of \$200,000. The contract identified the subject matter of the contract, the parties, and stated a price and time for performance. The court could simply enforce the contract by requiring S to perform by delivering the car on May 25.

#### Mutuality

Historically, for a specific performance decree to be issued, the remedy had to be available for both parties. This requirement has since been relaxed under the security of performance test. Thus, as long as the court can secure performance of both parties to its satisfaction, the decree may be issued. Here, the court could force B to pay the contracted for price of \$200,000 while forcing S to deliver the car to B.

#### Feasibility of Enforcement

The court must be able to enforce the specific performance decree; personal service contracts will not be subject to specific performance. The facts do not provide where S or B live, but it is likely that both live in Columbia. Nevertheless, they entered into a contract in Columbia. S sought to place her goods into the Columbia stream of commerce. Therefore, the court very likely has jurisdiction over the parties and may enforce the decree using its powers of contempt, as discussed above.

#### Conclusion:

The court will issue a decree of specific performance if the legal remedy is inadequate.

#### Replevin

In the contract sense, replevin is the recovery of contracted-for goods by the plaintiff. Replevin is a legal remedy, in that the sheriff will seize the property; the defendant is not ordered to do anything. To obtain an order of replevin, the plaintiff must show 1) the goods are specifically identified in the contract, and 2) the plaintiff is unable to cover despite reasonable attempts to do so.

#### Specifically Identified

As discussed, the car was specifically identified in the contract because the contract specified S was to convey "the Phaeton," of which only two exist, to B. Therefore, the goods are specifically identified.

#### Plaintiff Unable to Cover

The facts do not provide that B has exerted efforts to cover. However, there are only two Phaetons in existence. It is not clear where the other one is located and what

condition it is in. Therefore, assuming B made reasonable efforts to do so, it is not likely he could cover.

Conclusion:

The court will issue an order of replevin as long as the defendant does not post a bond to stop collection of vehicle by the sheriff.

4) Damages for Breach of Contract

All damages must be causal, foreseeable, definite and certain, and unavoidable; that is, the plaintiff has a duty to take reasonable steps to mitigate his losses.

a) Damages for Nondelivery

This contract is for the sale of goods (the car); thus, the UCC applies. When the seller breaches under the UCC, the buyer is entitled to cover or market damages. Here, B would be entitled to damages in the difference between the \$200,000 contract price and the price of the other Phaeton in existence, if he was able to actually cover. Alternatively, B may seek damages of \$100,000 if the market price of the car is really \$300,000 as S has indicated.

b) Loss of increased circulation and advertising revenues

The buyer may also be entitled to consequential damages when their possibility is known at the time of contract or specifically communicated to the defendant. If S knew of the Concours, which she may have since it was one of the most prestigious shows in the country and she owned a vehicle that stood a good chance of winning it, then the fact that B would enter the car in the show is foreseeable. It is not clear that B indicated his intent to enter it in the show, or that C knew that he was motivated to increase circulation and advertising revenues thereby.

However, Barry has been operating Auto Designer's Digest for years, trying to win a first place award. Nevertheless, future increases in circulation and ad revenue as a result of winning a car show are speculative, and uncertain. Therefore, B will not obtain damages here.

c) Loss of \$5,000 entry fee

In some contexts, the plaintiff may recover reliance damages. Here, B paid the \$5,000 entry fee after contracting with S to purchase the car. He had no reason to suspect that S would breach the contract with him. Therefore, his reliance was foreseeable and B would be entitled to \$5,000 in reliance damages.

Conclusion:

B has a number of strong claims against S for her willful breach and will likely obtain a preliminary injunction and prevail under a suit for specific performance.

## Answer B to Question 4

### Applicable Law

1) This contract involves the sale of goods. As a result, the applicable law will be UCC Article 2. Because the goods being sold are over \$500, the UCC Article 2 Statute of Frauds provision requires the contract to be in writing, and contain all material terms and be signed by the party against whom enforcement is sought. The facts state that the requirements have been met.

### Anticipatory Repudiation

Generally, a party cannot sue on a contract for breach until the time for performance has come due. Anticipatory repudiation is an exception to that general rule. Anticipatory repudiation applies when one of the parties to a contract makes a statement or an act that unequivocally and clearly shows that party will not perform on the contract. That is the case here. There is a valid contract between Barry (B) and Sally (S) supported by adequate consideration (B's promise to pay \$200,000 and S's promise to deliver the car) which is in writing.

There appears to be no defenses to the formation and enforceability of the contract. S may claim that the contract is unenforceable because the price provision is unconscionable. This would require her to show procedural and substantive unconscionability. There are no facts to support procedural unconscionability and the price (though \$100,000 less than what S claims the car to be worth) does not seem substantively unconscionable. The value of rare and antique items is very speculative and S, knowing her car to be rare and valuable, should look into its value before selling. Also, mistake as to the value of an item is generally not a defense to a contract, even if the other party knew or should have known the item was worth more. As a result, the court will likely find the contract enforceable.

S anticipatorily repudiated the contract when she said she had sold the car to an Italian buyer and was not going to sell it to B. Because of this repudiation, B is free to halt or suspend his performance on the contract and immediately sue for breach, assuming he has not yet paid the \$200,000 in full to S. If he has, he will have to wait until May 25, to sue. However, the facts do not state that he has fully performed at this point so he will be able to sue as of the date of the repudiation – May 10.

2) By the time B is able to fully have his case heard and decided, S may have already sold the car and he will have suffered substantial losses and will likely be unable to ever find another Phaeton for purchase. Thus, B should seek a Temporary Restraining Order and then a preliminary injunction immediately pending the outcome of his case. These will enjoin S from selling the car pending the outcome of the case, thereby preserving the "status quo".

A TRO can be obtained ex-parte in emergency situations. The TRO, if granted, will last for 10-15 days, depending on the applicable procedural rules. A hearing on a motion for

preliminary injunction, with both parties, must then be held, whereupon the court will determine whether to keep the injunctive relief in place.

To obtain a TRO/preliminary injunction, B must show a threat of immediate and irreparable harm, inadequacy of the remedy at law, a likelihood of success on the merits, and a balance of equities in his favor and a lack of defenses to his claim. Mutuality is not required.

B will argue that he is threatened with immediate and irreparable harm because S intends to ship the vehicle to the other buyer within a week. This harm will be irreparable because the Phaeton is an extremely rare car, he will not be able to find another one and it is unlikely that he will be able to find a comparable car in time for the Concours.

B will also argue that remedies at law – money damages, will be inadequate because the uniqueness of the car and the fact that, once the car is sold, he will not be able to find a comparable car for the Concours and he will have lost his purpose for buying the car. Due to the extreme rarity of the vehicle, the court is likely to find that B's remedies at law are inadequate.

Balancing the hardships of an injunction on B and S, a court will likely find that there will be substantially greater hardship to B if the contract is not performed than to S, since S can always sell the car later if she prevails in the case.

B has a likelihood of success on the merits, if he can show he is able to pay the \$200,000, perhaps by putting the sum into escrow and because the facts state he has a valid contract in writing.

S's defenses – unclear hands, laches, unconscionability, will fail as previously discussed.

B will receive a preliminary injunction and will be required to post bond to cover damages to S if it is found she was wrongfully enjoined.

### 3) Specific Performance

Specific performance is a remedy by which courts force parties to a contract to perform as promised in the contract. It is an equitable remedy, and all equitable defenses are available. In contracts for the sale of goods, Specific Performance is generally only granted in cases where the subject goods are extremely unique, custom, or rare. In this case, the car, being extremely old and rare and in apparently good enough condition to compete in a prestigious show will likely satisfy the requirement for uniqueness.

#### Valid Contract

B must show that he has a valid contract in order to get Specific Performance. Here, the facts state the written agreement is valid.

### Feasibility

B must show that the contract terms are definite enough so that the court can feasibly enforce them. Here, the price, subject matter and the delivery date are definite, and the contract is fairly simple so a court will feasibly be enabled to order Specific Performance.

### Mutuality

Mutuality of remedies is no longer required for Specific Performance.

### Full Performance

B must show that he has fully performed on the contract or will definitely fully perform. Though he has not yet paid, he can put the \$200,000 in escrow to show this.

### Damages Inadequate

B will have to show that damages - his at-law remedy will be inadequate. As previously discussed, he will be able to show this.

### Defenses

S's defenses of unconscionability/unilateral mistake will fail as previously discussed. The facts do not support the defenses of unclean hands or laches being available to her. Specific Performance will be granted.

### Replevin

Replevin is a remedy by which a rightful owner of personal property seeks to have that property returned to him by order of the court.

If the car is sold to the Italian buyer, B will have to seek its return by replevin. The facts do not indicate whether the Italian buyer knew of the existing obligation for S to sell the car to B. If he did, he would not be able to claim that [he] is a bona fide purchaser, who purchased in good faith and for value. If the Italian is not a bona fide purchaser B will be able to seek replevin. If the Italian had no knowledge of B's contract with S, he would be a bona fide purchaser for value and B would not be able to seek replevin of the car from him.

#### 4) Non-delivery of the Phaeton

Generally, damages are designed to protect the parties' expectations – to put them in as good of a position as they would have been had the contract been fully performed. Damages must not be too speculative. Here, B expected to own a Phaeton for \$200,000 and S expected to receive that amount.

In a contract for the sale of goods where the seller breaches and keeps the goods, the buyer can recover the difference between the contract price and the market value of the goods at the time of breach, or the buyer can cover, by buying the same goods and receive the difference between the cost of cover and the contract price.

Here, the apparent market value of the Phaeton is \$300,000 at the time of breach. The K price was \$200,000. B can recover, as his expectation damages [are] \$100,000 or if he is able to buy another '32 Phaeton (unlikely) he could seek the differences between what he pays for the other Phaeton and the K price.

B can also recover all incidental damages incurred in dealing with S's breach.

#### Loss of Circulation /Revenues

Consequential damages are only recoverable to the extent they are reasonably foreseeable by the breaching party and not so speculative.

The facts do not indicate that S knew of B's purpose for purchasing the car or that he owned a car enthusiast magazine. Thus, the loss of circulation and revenue to B is likely not foreseeable to a reasonable person in S's position.

Even if S was aware of B's purpose, these damages are probably too speculative. First B would have to prove he would have won and that winning would have increased his circulation and revenue in some definite amount. This is likely not possible.

#### \$5,000 Entry Fee

B can recover the \$5,000 entry fee as reliance damages – money he spent on reliance on the K if this reliance was foreseeable to S.

If he told S he was going to enter it in the Concours or S should have known he was buying it to show, he will recover.

## Question 5

Ann, Betty, and Celia purchased a 3-bedroom condominium unit in which they resided. Each paid one-third of the purchase price. They took title as “joint tenants, with right of survivorship.”

After a dispute, Betty moved out. Ann and Celia then each executed a separate deed by which each conveyed her respective interest in the condominium unit to Ed. Each deed recited that the conveyance was “in fee, reserving a life estate to the grantor.” Ann recorded her deed and delivered the original deed to Ed. Celia also recorded her deed and left the original deed with Ann in a sealed envelope with written instructions: “This envelope contains papers that are to be delivered to me on demand or in the event of my death then to be delivered to Ed.” Celia recorded the deed solely to protect her life estate interest. Ann, without Celia’s knowledge or authorization, mailed a copy of Celia’s deed to Ed.

Subsequently, Ann and Celia were killed in a car accident. Betty then moved back into the condominium unit. She rented out one bedroom to a tenant and used the other bedroom to run a computer business. Betty paid all costs of necessary repairs to maintain the unit.

Ed commenced an action against Betty, demanding a share of the rent she has collected. He also demanded that she pay rent for her use of the premises.

Betty cross-complained against Ed, demanding that he contribute for his share of the costs of necessary repairs to maintain the unit.

1. What are the property interests of Betty and Ed, if any, in the condominium unit? Discuss.
2. What relief, if any, may Ed obtain on his claims against Betty for past due rent for her use of the condominium unit and for a share of the rent paid by the tenant? Discuss.
3. What relief, if any, may Betty obtain on her claim against Ed for contribution for the costs of maintaining the condominium unit? Discuss.

## Answer A to Question 5

### Betty and Ed's Interests

Ann, Betty, and Celia originally took title to the condo as "joint tenants with right of survivorship." A joint tenancy is characterized by the four unities of time, title, possession, and interest, and expressly stating the right of survivorship. The title that they all took when purchasing the unit together satisfies the four unities (they all took by the same instrument, as joint tenants, paid 1/3 of the purchase price, and have the right to possess) and expressly states that a joint tenancy with a right to survivorship is created. Hence, A, B, and C all owned an undivided interest in the property, were entitled to possess it, and if any of them died, the survivors were entitled to succeed to the decedent's interest, unless they severed the joint tenancy.

### B's Interest

Joint tenants all have an equal right to possess the whole property, but they may choose not to exercise that right. B moved out after a dispute. Hence, although B is out of possession, that does not alter her interest or sever the joint tenancy as to her.

### E's Interest Taken from A

A conveyed her interest to E by a deed that conveyed to A a life estate followed by a remainder to E in fee simple. A recorded this deed and delivered to E. An inter vivos conveyance will sever a joint tenancy because it destroys the unities of time and title, resulting in the grantee holding as a tenant in common with the others. Hence, if A's conveyance was valid, A severed her 1/3 interest and gave it to E as a tenant in common. A deed is valid if it describes the interest conveyed and is validly delivered and accepted. Delivery is a matter of the grantor's intent. Recordation gives rise to presumption of intent to presently transfer an interest, and acceptance is generally presumed absent some action by the grantee to reject delivery. Here, by conveying her interest in the condominium unit to E in a deed that she recorded, A had the intent to transfer, and E received the deed and did not reject it. Hence, there was a valid delivery and acceptance and A's transfer of the remainder after her life estate to E was valid. When A died, Ed's remainder vested and he now has possession of his 1/3 interest as a tenant in common.

### E's or B's Interest Taken from C

C executed a deed like A did to give herself a life estate and the remainder to E. If this effectuated a valid inter vivos conveyance, then C's interest is also severed from the joint tenancy and C's 1/3 is held by C for life, remainder to E as a tenant in common with A's life estate, remainder to E, and B. If the inter vivos conveyance was invalid, however, then C's interest was not severed and C remained holding in joint tenancy with B up until C's death. In that case, B takes the entire 2/3 held by B and C in joint tenancy. The issue, then, is whether there was an inter vivos conveyance by C. If there was no effective conveyance, B takes as the survivorship of B and C, but if there was an effective inter vivos conveyance that severed the joint tenancy, E takes C's 1/3 upon C's death because C's death extinguishes C's life estate and the remainder vests.

A conveyance is valid if the deed accurately describes the property, is delivered and accepted.

The deed describes that E is to take the remainder in the condo (the condo is known and provides a good lead), presumably, so the deed itself describes enough to be effective if validly delivered. Delivery is a matter of grantor's intent. Here, it is unclear what C intended. When a party records a deed, intent to deliver is presumed, but here, C recorded solely to protect her life estate interest rather than to convey. However, C would have no need to protect her life estate interest if she did not intend to transfer the remainder to E, so a court might well infer that she intended the delivery to be immediately effective without conditions. Acceptance is presumed absent some action indicating rejection. When C received the deed from A, he did not reject it, so C would be deemed to have accepted, making the conveyance effective and severing the joint tenancy as between C and B. Hence, C will argue there was intent to deliver and so delivery and acceptance, making the inter vivos conveyance good. On the other hand, B will argue there was no intent because C merely recorded to keep her life estate and that A's act of sending the papers without C's consent could not create present intent to transfer, making the conveyance only meant to be a testamentary transfer which would fail because C has no interest to pass by will (joint tenancy interests are not devisable or descendible).

Further, C gave the deed to Ann with instructions that the papers were to be delivered to Ed on the event of her death, or returned to her on demand. This action evidences a different intent than a present transfer. A transfer of a deed to a third party for a donative transfer without instruction is generally deemed to be an effective delivery and present intent to transfer. But when the grantor gives to a third party rather than the grantee, written instructions not on the face of the deed itself are valid to create a conditional delivery. Further, if the grantor expressly reserves for herself the right to revoke, such a reservation of interest indicates lack of intent to presently transfer. Additionally, if there are instructions only to deliver upon death, that does not evidence present intent to transfer and instead evidences a will substitute. Here, C reserved a right to revoke. B will argue this evidences a lack of present intent to deliver. Further, C gave the deed to a third party (A) with instructions not to deliver until C's death. On these facts, B will argue that there was no present intent to deliver and only an intent to make a testamentary transfer because of the condition of delivery upon death (which is valid because, although not in the face of the deed, it was contained in instructions to a third party who was to deliver the deed upon happening of the condition). On the other hand, C will argue that once a donative transfer is made and delivered to a third party to deliver upon death, many jurisdictions consider this irrevocable (even if grantor tries to revoke) and therefore, effectuates a present transfer.

Ultimately, several actions indicate C's lack of intent to presently transfer an interest, such as her instructing A not to give the deed to E until her death. However, C did record the deed to preserve her life estate, indicating a present intent to at least have the remainder transferred to E, and E did receive the deed and accept it without instructions or conditions. Although it is close, a court will probably find that C intended

to make a present, inter vivos transfer; the recordation of the deed was sufficient evidence of intent, and that therefore E succeeds to C's 1/3 as the remainderman.

Hence, E owns A and C's 1/3, giving his 2/3 held as a tenant in common with B (if the court doesn't find intent to make an inter vivos transfer, however, then B will take as the survivor and will have 2/3 with C's 1/3 as tenants in common).

#### Ed's relief against Betty

Cotenants have a right to possession of the premises, and are not responsible to each other for rent. However, when a cotenant rents out the property to a third person, she must account for the rents to the other cotenants. Additionally, when a cotenant allows the property to earn profits from a third person, the cotenant must account.

Here, B was using one room for her own computer business, and rented out the other room to a tenant. B, as a 1/3 (or 2/3) owner of the condo as a tenant in common with E is entitled to use the property to run her own business, and is not responsible to E for rents. E might argue that use of the business creates profits, and a tenant is responsible to her cotenants for accounting for profits earned from third parties, but here, because any profits come to B as a result of her running her own business rather than allowing another third party to run a business out of the unit, she is not responsible to E for rents or profits for use of the room as an office.

On the other hand, B rented out one room to a tenant. Because that constitutes renting to a third party, B is liable to E to account for his share of the rents paid (either 1/3 or 2/3, depending on whether C's deed was delivered).

#### Betty's relief against Ed

An in possession cotenant has an obligation to keep the premises in good repair. The cotenant may not commit voluntary, permissive, or ameliorative waste. The cotenant is only entitled to contribution for repairs that are necessary if she notifies the other cotenants of the need for the repairs, and she is entitled to contribution for improvements only upon sale (and if the improvements decreased rather than increased the value of the property, she bears 100% of the loss).

Here, Betty is responsible for ensuring that necessary repairs were made so she was not liable for permissive waste, and she is entitled to contribution from E if the repairs were necessary and she notified him of the need for repairs in advance. Here, the repairs Betty made apparently were necessary, but it is unclear whether she notified E of the need to make them in advance. If she did, then E must contribute his share (either 1/3, or 2/3, as described above).

## **Answer B to Question 5**

### **1. Property Interests of Betty and Ed**

Betty has 2/3 interest in the condominium as a tenant in common, and Ed has a 1/3 interest.

#### Joint Tenancy

Ann ("A"), Betty ("B"), and Celia ("C") originally purchased the condominium as "joint tenants" because they took title at the same time and by the same instrument as "joint tenants with rights of survivorship." The "four unities" appear to be present. A joint tenancy gives each tenant an undivided interest in the property with a right of survivorship, which means that if one of the other joint tenants dies, that tenant's interest automatically becomes part of the surviving tenants' interests.

The joint tenancy, however, may be severed when one of the tenants conveys her interest to another party. That other party then takes an interest in the property as a tenant in common.

#### Tenants in Common

While A and C were originally joint tenants, A and C severed the joint tenancy by conveying their interests in the condominium to Ed ("E"). Generally, when a joint tenant conveys her interest in a joint tenancy to another party, that other party takes the property as a tenant in common. In this case, however, E took the property as a remainderman.

#### Life Estates and Remainders

Both A and C reserved for themselves life estates in the condominium. They did this by deeding the property interest to E "in fee, reserving a life estate for the grantor." E now has a vested remainder in fee simple, and A and C have life estates. Therefore, while E has a property interest in the condominium, his interest does not become possessory until the death of A or C -- i.e., at the termination of their life estates.

#### Effect of Deaths of A and C

As noted above, when a joint tenant dies, the surviving joint tenants automatically take her interest. A joint tenancy interest may not be devised by will. E will argue that when A and C died, their life estates were terminated, and that E as the remainderman now has an undivided 2/3 interest in the condominium, while B has the other 1/3 interest.

However, because the attempted [conveyance] from C to E was ineffective (as discussed below), C did not sever the joint tenancy vis-à-vis B. As a result, when C died, her 1/3 interest automatically passed to B, the surviving joint. Thus, B has a 2/3 interest, and E only has a 1/3 interest.

#### Deed Formalities and Delivery

To be valid, a deed must be both (1) executed, and (2) delivered. If either requirement is not met, the property interest is not conveyed from the grantor to the grantee.

Delivery is generally regarded as solely a question of the grantor's intent. Courts have held that the delivery of a deed in which the grantor reserves a life estate is effective, even though the grantee's interest does not immediately become possessory.

In this case, A executed the deed, and both recorded and delivered the deed to E. Thus, the deed and conveyance from A to E is valid. C executed and recorded the deed. However, C did not physically deliver the deed to E. Instead, she left the original deed in an envelope with A.

Recording a deed creates a presumption of delivery. Thus, E may argue that by recording the deed, the delivery requirement is met. However, B will argue that the presumption in this case may be rebutted. While it is true C recorded the deed, she did this to protect her life estate interest, not to satisfy the delivery requirement. Furthermore, the deed was in a sealed envelope with written instructions, providing that the papers in the envelope be delivered to A on her request. These instructions suggest that C did not intend to deliver the deed to E. Instead, she wanted to have the power to take the deed back at any point during her life.

E will argue that the instructions also provided that in the event of C's death, the deed was to be delivered to E. The problem with this argument is that delivery is only effective if there is a present intent to deliver. An intent to deliver a deed in the future is not effective. Alternatively, E may argue that the written instructions are a last will and testament, devising C's property interest to E. However, there is no indication that the Statute of Wills has been complied with. Therefore, there was no delivery to E, and C retained her interest in the condominium at her death.

## **2. Relief Ed May Obtain for Past Rent Due and Rent by Tenant**

As a general rule, one cotenant does not have to share profits earned from the property with other cotenants, unless there is an agreement to the contrary. However, cotenants are obligated to share profits that they receive by renting the property to third parties.

In this case, B rented one bedroom to a third party, and used another bedroom to run a computer business. Because B rented the bedroom to a third party, E has a right to demand an accounting for his share of the profits earned from the third-party rent.

On the other hand, while B is using one of the bedrooms to run a computer business. E has no right to demand a share of the rent for the use of the bedroom as a business office. This is true even though B is clearly saving money by not having to lease commercial space from someone else. B is also not obligated to pay rent to E for her personal use of the condominium.

## **3. Relief Betty May Obtain for Contribution of Maintenance Costs**

Cotenants are required to make contributions for necessary repairs, taxes, and mortgage payments (if the cotenant signed the note). Cotenants are not required to make contributions for non-necessary repair or improvements, although there may be a right of reimbursement upon partition. In this case, B made necessary repairs to

maintain the unit. As a result, B is entitled to contribution from E for his share of the cost of repair.

## Question 6

In 2000, Hal and Wilma, husband and wife, lived in New York, a non-community property state. While living there, Wilma inherited a condominium in New York City and also invested part of her wages in XYZ stock. Wilma held the condominium and the stock in her name alone.

In 2001, Hal and Wilma retired and moved to California.

In 2002, Wilma executed a valid will leaving the XYZ stock to her cousin, Carl, the condominium to her sister, Sis, and the residue of her estate to Museum.

In 2003, Wilma transferred the XYZ stock as a valid gift to herself and to her cousin, Carl, as joint tenants with the right of survivorship. Wilma sold the condominium and placed the proceeds in a bank account in her name alone.

In 2004, Wilma, entirely in her own handwriting, wrote, dated, and signed a document entitled, "Change to My will," which stated, "I give my XYZ stock to Museum." The document was not signed by any witness.

In 2007, Wilma died, survived by Hal, Carl, and Sis.

What rights, if any, do Hal, Carl, Sis, and Museum have to the XYZ stock and proceeds from the sale of the condominium? Discuss.

Answer according to California law.

## **Answer A to Question 6**

This question concerns the rights of Wilma's survivors in the stock and proceeds from the sale of her condominium. Two areas of law will have effect on the ultimate disposition of the property, CA community property law and CA law governing will and descent. First, it is noted that Wilma may only devise her separate property and/or her share of the community estate. Therefore, it is necessary to look at the effect of community property laws to determine the ownership interest, if any, of Hal in the property which Wilma sought to devise, and then look at the impact of her testamentary actions to determine the ultimate ownership of the property.

### The Basic Community Property Presumption

To begin, all property acquired during marriage while domiciled in CA is presumed to be community property (CP). Excluded from this presumption is all property acquired by gift, devise or descent. Finally, actions of the married couple may alter the character of the property during marriage and certain statutory presumptions may arise affecting the character. Finally, both husband and wife since 1975 are granted equal management and control over all community property, subject to certain limitations.

### Quasi-Community Property

Quasi-community property (QCP) is all property acquired during marriage while domiciled outside of CA that would have been CP if acquired while domiciled in CA. In this case, because the couple lived in New York, a non-CP state, and the stock and condo were both acquired while there, they are QCP. QCP is treated as CP at death except that a decedent is not entitled to devise his QCP share of the surviving spouse's property. Because all the QCP devised here is the decedent Wilma's property, this does not apply and the QCP will be treated as CP.

### The Condominium / Proceeds

#### Community Property Analysis

The condominium was acquired during marriage and would have been CP if acquired while domiciled in CA so it would be presumed QCP; however, the facts state that it was acquired by devise and is thus Wilma's SP. Therefore, the fact that it is titled in her name has no effect, and any proceeds, absent other facts, of the sale will also [be] her SP.

Therefore, as her SP she was free to devise it in its entirety, and Hal has no ownership interest in the condo or the proceeds therefrom.

### Effect of the Devise

#### Valid Will

The question that next arises then is the validity of the gift to Sis. First, it is noted that the facts state that the 2002 will in which the gift was contained was valid. Therefore,

the initial gift of the condo to Sis is valid and she would take the condo. However, the facts also state that the condo was sold in 2003 and thus not a part of Wilma's estate when she died.

#### Ademption by Extinction

Therefore, the museum, as the residuary beneficiary, would want to argue that by selling the condo the gift to Sis was terminated, or adeemed. A gift is considered to be adeemed by extinction when the testator makes a specific devise of property, and then that property is either destroyed or sold prior to the testator's death. First, the museum will argue that the gift was specific, as it was for the Condo itself, and contained no language indicating that Sis be given a general "cash" gift out of the estate. Thus, because Wilma sold the condo, this specific gift was extinguished by sale, and the museum should therefore take the proceeds as the residuary beneficiary.

However, in CA, a gift will only adeem by extinction if it is shown that is what the testator so intended. In this case, the museum will point to the sale itself, the codicil naming the museum as the beneficiary of the stock as a demonstration of intent that the museum take all the property. Sis will argue that there is nothing to specifically indicate that Wilma intended to extinguish the gift. Further, because Wilma published her codicil in 2004, she could have also made a gift of the funds to the museum at that point but did not. Thus, this shows an intent to keep the gift to Sis in effect.

Without more information as to her intent, Sis will take the funds in the account.

### **The XYZ Stock**

#### Effect of CP Rules

##### Source

Here, the XYZ stock was acquired with Wilma's earnings during marriage. Earnings during marriage, like property acquired during marriage, are CP. Even though these funds were acquired in New York, they would have been CP if acquired while domiciled in CA, and are therefore QCP, treated as CP upon death. Thus, because the stock was acquired with QCP, it will also be presumed to be QCP. Because it is presumed QCP, it is presumed Hal has ½ community interest in the stocks.

##### Effect of Title

In this case the facts state that Wilma held the stock in her name alone; thus the museum and Carl will want to argue that by placing the stock in her name alone, the community made a gift to her SP. However, since 1985 a transmutation of CP into SP requires a writing. In this case, there is no evidence that the community intended to make a gift to Wife of the funds to purchase the stock. Further, there is no writing that would support a transmutation of the funds into SP. Therefore, absent other evidence, the stocks remain CP, and as such, Hal owns a ½ community interest in the stock.

### Gift of Community Property

Further, because spouses maintain equal control and management of community property, one spouse may not make a gift of community assets to another without the other spouse's consent. Here, Wilma has gifted the stock to herself and her cousin Carl in 2003. There is no evidence to indicate that this gift was approved of by Hal. When one spouse gifts community property to another without consent that spouse may void the gift during the donor's lifetime, or after the death of the donor void  $\frac{1}{2}$  of the gift. It is noted that the facts state the gift was "valid". It is not clear if this means valid under CP law, or a validly executed gift. Thus, if valid means that Hal consented to the gift, his  $\frac{1}{2}$  interest would be extinguished.

Therefore, because the stock was acquired with CP, Hal has a presumed  $\frac{1}{2}$  interest in it. Further, assuming valid does not mean he consented to the gift, because neither keeping title in her name alone nor giving the stock to herself and Carl is effective to eliminate this interest, Hal maintains a  $\frac{1}{2}$  interest in the stock.

### The Devise of the Stock

Ignoring for now Hal's community interest, as stated above, Wilma validly gifted the stock [to] Carl in her 2003 will. The facts then state that the stock was gifted to both herself and Carl "as joint tenants with rights of survivorship". Therefore, prior to her death, the stocks were in joint tenancy with her, and Carl. The language used explicitly created the right to survivorship, and Carl, upon Wilma's death would automatically take all the stock.

### The 2004 Codicil

The issue then arises as to the effect of the codicil made by Wilma in 2004. In CA a holographic codicil is valid as long as all material terms are in the handwriting of the testator, and the writing is signed by the testator. The other formalities of attested wills are not required. Therefore, as the document was entirely in her handwriting and was signed, it acts as a valid codicil to her 2002 will. Thus, the museum will argue that it takes the stock. However, because the stock was held as joint tenants with Carl, all of Wilma's interest in the stock will pass immediately to Carl. Furthermore, the attempted conveyance in the will is not effective to sever the joint tenancy, as it is not a present conveyance of her interest in the stock. Therefore, when she executed the codicil, she had no testamentary power over any interest she had in the stock. As such, the codicil would be ineffective to convey any interest in the stock upon her death to the museum.

Therefore, Carl retains his interest in the stock, and Museum will not take the stock under the codicil. Further, Carl's interest in the stock, because he received it by a gift of community property without Hal's consent, will be subject to Hal's  $\frac{1}{2}$  CP interest in the stock.

Therefore, Sis will likely take the funds in the account from the condo sale, Carl will take his interest as a joint tenant to the stock subject to Hal's  $\frac{1}{2}$  community interest, and the museum will take whatever is left over as the residuary beneficiary under the 2002 will.

## **Answer B to Question 6**

### The Rights of Hal, Carl, Sis, and Museum

The contribution of the assets and who is allowed to take is determined both by community property law and the law of wills. Because the important assets of the estate were acquired during marriage and Wilma died domiciled in California, all property that was acquired during marriage is presumptively community property, and if that property was acquired while married but outside of California then at the time of death it is treated as quasi-community property for purposes of distribution by the acquiring spouse, and is treated just like community property (i.e., the non-acquiring surviving spouse is entitled to a ½ interest in property). Furthermore, under California law, even when property is acquired during marriage, if it is acquired by gift, devise, or inheritance, it is treated as the spouse's separate property.

In order to determine the character of the item (as either CP, QCP, or SP), it is important to focus on the source of the funds, any actions taken by the parties to change the character of the property, and any presumptions that effect the property.

### **The Proceeds from the Condominium**

#### The Character of the Proceeds

Wilma inherited the condominium in NYC while living in NYC. The condominium therefore is considered Wilma's SP even though it was acquired by Wilma during marriage. The proceeds from the condominium sale were then placed into a bank account in her name alone, and as such were not mingled with community property and completely retained their separate property character. Therefore, the proceeds, in the bank account in Wilma's name alone, are her SP and Hal has no ½ QCP interest in the property.

Furthermore, Hal cannot claim a pretermitted spouse status and then claim his intestate share of the SP because Hal and Wilma were married before all of Wilma's testamentary documents were executed.

#### Who Takes the Proceeds

Under the will executed in 2002, Wilma's sister, Sis, was specifically granted the condominium. However, because the condominium was sold the condominium is no longer in Wilma's estate and therefore there is the possibility of ademption by extinction.

#### Ademption by Extinction

Museum will argue that the gift to Sis was a specific gift and that because the gift was in fact sold that the gift is no longer in the estate that it has adeemed. Under the common law, the courts used an identity theory for redemption by extinction where, if a gift was a specific gift that could not be located in the estate of the decedent at the time of death, then the gift had adeemed and the specific devisee took nothing. If this were the case then the proceeds would pass to the residue of Wilma's will and therefore go [to]

museum. However, under California law, the court looks to the intent of the testator instead of using the identity theory both to determine if the gift was a specific [one] so as to determine if ademption by extinction even applies and then uses it to also determine if there was an intent to actually have the gift adeem.

Here, Sis may first argue that the gift was not specific but was instead general. While the actual phrasing of the will is not provided, the will likely used the words “my condominium” or “my NYC condominium” or something to that effect, which indicates a specific gift. Further, a gift of real property such as a condominium is virtually always a specific gift and therefore the court will reject her argument that the gift is general.

Second, Sis will argue that there was no intent to adeem. Under California law, besides generally looking at the intent of the testator, there is an automatic allowance to the specific devisee of anything [or] part of the property that remains and proceeds not yet paid for a condemnation sale, insurance proceeds, or installment contract, or where the gift is sold by a conservator (the specific devisee gets the FMV of the gift). However, it does not appear that any of these apply. On the other hand, Sis can argue that because the proceeds from the sale were placed into a separate account in Wilma’s name alone and therefore the proceeds from the sale of the gift are easily traceable to one place and had not been used or commingled, that Wilma did not intend for the gift to adeem (essentially arguing tracing of the sale of the gift to the account), and therefore she should be entitled to the money from the sale of the condominium. It will be difficult for the court to accept this argument, but because it is a subjective determination, and Sis is Wilma’s sister, the court may accept the argument and allow tracing. No other defense to ademption, such as change in form not substance, will work in this case.

Therefore, if the court accepts Sis’s argument against ademption then she will be entitled to the proceeds of the condominium sale. However, if the court rejects the argument then she is not entitled to anything and as the residuary taker the museum takes the entire proceeds.

## **The XYZ Stock**

### Character of the Stocks

Wilma purchased the stocks by investing part of her wages into the XYZ stock. Presuming these wages were earned while married to Hal, the wages, and subsequently the stock purchased with them, would be considered community property had it been purchased while domiciled in California, and therefore it will be considered quasi-cp at the time of the acquiring spouse’s death. However, Wilma took several actions that may have changed the character of the property.

First, Wilma placed the stock in her name alone. However, where the acquiring spouse uses community funds for the purchase of property and places the title in their name alone, the asset is presumptively untitled in that unless Wilma can prove that Hal intended a gift of his share of the property that the asset is actually community property

and each holds a ½ interest in the property (at least at Wilma's death). Because there are not facts indicating that Hal had intended to make a gift of his interest in the stock, the stocks, at this point, will still be considered QCP at death and treated like CP for distribution purposes.

Second, Wilma transferred by valid gift (presumably through a straw to create the four unities) to herself and to Carl the XYZ stock as joint tenants with the right of survivorship. If this transfer had been valid, this would have destroyed the QCP aspect of the property. However, this was not a valid gift of Hal's interest in the property. Under California Law, a surviving spouse may set aside to the extent of one half any transfer or gift of quasi-community property at death when the decedent spouse died domiciled in California, that the decedent spouse did not receive substantial consideration for the gift, and the decedent spouse had retained an ownership or use interest in the property. Here, Wilma may have made the transfer, and at her death the joint tenancy may have passed her interest automatically over to Carl, but Hal will be able to set aside to the extent of ½ of the interest because it was a gift and she had retained an ownership interest in the property at the time of her death.

#### The Effect of the Will

Under the original will, Carl was able to be the taker of the XYZ stock. However, in 2004, Wilma executed a holographic codicil to the will that stated that Museum was not to take the XYZ stock instead. However, Museum will not take any interest in the XYZ stock.

First, Carl may argue that the codicil was invalid because it was not formally attested. However, under California law, so long as the material provisions of the will are in the testator's handwriting and the testator signs the will, this will be an effective holographic will, or in this case, a holographic codicil. Here, Wilma signed, dated, and in her own handwriting wrote that it was a change to the prior will and that Museum was not to take the XYZ stock. Therefore, the material provisions (who takes and what they take) are in Wilma's handwriting and she signed the codicil, which is all that is required under California law. As such, this was a valid codicil and did change her 2002 executed will (which was presumably attested).

Second, Carl will argue that the will was ineffective to evoke the joint tenancy and therefore he was entitled to the full XYZ stock (minus Hal's forced interest). The Museum will argue that the codicil did effectively sever the joint tenancy because it was drafted after the joint tenancy was entered and conveyed away Wilma's interest. However, in all likelihood, the court will reject this argument because while a will is interpreted (or a codicil for that matter) at the time of its execution, it is not actually given effect until when the will is probated (i.e., after the testator's death). Therefore, the actual gift, and therefore, the severance by conveyance, would not have occurred until after the death of Wilma. Unfortunately for Museum, there was nothing to convey at this point because the entire interest in the property had passed, as a matter of law, to Carl as having right to survivorship rights. Therefore, while Hal can set aside ½ of the

transfer for his forced share, Museum has no similar rights and will not take the stock because there was nothing left of it to devise.

Conclusion:

In the end, the court will likely grant the entire condominium proceeds to Sis, and then Hal will be allowed to force a  $\frac{1}{2}$  share in the XYZ stock under the California Probate Code, Carl will get the entire XYZ stock (subject to the forced share by Hal) by operation of law, and the Museum will take neither of the assets.