



California
Bar
Examination

Essay Questions
And
Selected Answers

July 2010



THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

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**ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2010
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2010 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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JULY 2010
ESSAY QUESTIONS 1, 2, AND 3

California Bar Examination

Answer all three questions.
Time allotted: three hours

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

Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that "all firearms must be stored in a secure container that is fully enclosed and locked." Burglar broke into Homeowner's house while Homeowner was out and stole the handgun.

Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron had just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused. Burglar drew the handgun, pointed it at Patron, and stated, "You made me mad, so now I'm going to shoot you."

Patron fainted out of shock and suffered a concussion. Burglar took her purse and fled, but was later apprehended by the police. Cinema had been aware of several previous attacks on its customers in the parking lot at night during the past several years, but provided no lighting or security guard.

Under what theory or theories, if any, might Patron bring an action for damages against Homeowner, Burglar, or Cinema? Discuss.

Answer A to Question 1

Patron (P) v. Homeowner (H)

The issue is under what theories P might bring an action against H.

Negligence

Negligence is an action where a plaintiff asserts that a defendant breached a duty and caused damages. In order to prevail on a claim of negligence, the plaintiff must prove (1) Duty; (2) Breach; (3) Actual Causation; (4) Proximate Causation; and (5) Damages.

(1) Duty

Duty determines the level of care a defendant must exercise. Everyone owes a general duty to avoid harming others. In certain circumstances, an individual owes a higher duty of care. Under the Cardozo majority test, the duty is owed to those in the “zone of danger,” meaning, those in the vicinity who may be harmed by the action. Under the Andrews minority test, the duty is owed to all foreseeable plaintiffs.

Applying the Cardozo test, H will claim that he did not have a duty to P, because she was not in his home when the event occurred. Under the Andrews test, P will claim that H did owe a duty because it was foreseeable someone could use the firearm to go out and shoot someone, or injure someone, or put someone into fear, as B did in this case. Depending on where H lives, and whether it is a community where burglaries often occur, P may succeed in showing it was foreseeable that a burglar could come in and take the handgun.

The court will likely agree with P, because it was foreseeable the gun could be used on a person, so H owed a duty to P.

Standard of Care

The next issue is what the standard of care is, meaning how H must exercise his duty.

The court determines the appropriate standard of care. While the standard of care might be adjusted based on such things as physical conditions or professional

occupations, the court does not consider mental or emotional individual characteristics in setting the standard of care.

In this case, P will claim that H owed a duty of a reasonable person in his circumstances, meaning the reasonable care of a handgun owner. H may claim that he owes less of a duty because for some reason he is particularly afraid of people breaking into his home. However, this argument will fail, because the court does not consider mental or emotional individual characteristics in setting the duty of care. It does not appear that there are any particular physical characteristics of H that alter this standard of care, or that he was a professional or a child, in which case the standard of care would be higher or lower.

Therefore, the standard of care is a reasonable handgun owner.

It should be noted that though H is a landowner, the issues of landowner liability do not apply to H in this case, because the injury was not to a person on his land (B), but rather to another person (P).

Negligence per Se

P may further attempt to invoke the doctrine of negligence per se. Negligence per se is a doctrine that allows the court to substitute the standard of care with the words of a statute. Where the defendant has violated the statute, that is sufficient to prove breach of duty. The plaintiff must still prove the three other elements of negligence, actual causation, proximate causation, and damages. In order for negligence per se to apply, the plaintiff must prove that (1) her harm was the type of harm the statute was designed to protect and (2) she was in the class of persons the statute was designed to protect.

In this case, P will try to apply the statute that provides that “all firearms must be stored in a secure container that is fully enclosed and locked.” She will claim that this is the standard of care.

As for the first requirement, P will argue that her harm is the type the statute was designed to protect, because it was designed to protect people from being injured by handguns. She was injured by a handgun. The court will likely agree.

However, as for the second requirement, H will argue that P was not in the class of persons, because the requirement that the guns be stored in a secure container seems to protect children in the home. It does not seem to protect people who will be harmed by guns that are stolen, because if that were the case, the requirement might be that guns be kept in a “hidden” location, or that they must be kept in rooms with locked doors, but not necessarily in “secure containers.” P will argue that the statute is broader, and legislative intent may show that it was designed to protect all people who might be injured by guns. The court will likely agree with P and that she was in the class. Therefore, the standard of care will be the statute and H will have breached. P must still prove the other elements of negligence.

However, if the court finds that the statute does not protect P, P will need to prove Breach.

(2) Breach

Breach determines whether the defendant met the standard of care, as established above. The standard of care in this case is the care of a reasonable handgun owner.

P will claim that H breached this duty because he kept a handgun on his dresser by his bed, and a reasonable handgun owner would be aware of the risks of doing that and put it somewhere more secure. He would also comply with the statute. H may claim that it was reasonable to keep it there because it was for self-defense, but P will claim he could have kept it under the bed or at least with some sort of a safety lock on it so that someone who came in and stole it would not be able to use it. Additionally, she will claim he should have put it away while he was “out,” so that it could not be stolen. This may depend on whether B had a home alarm system.

The court will likely agree there was a breach.

(3) Actual Causation

Causation is satisfied if the defendant's act was the "but-for" cause of the plaintiff's harm. Where more than one thing contributes, the causation is satisfied if the defendant's act was a "substantial factor."

In this case, P will argue that H's act was the but-for cause because if he had not kept the gun out, B would not have gotten it and would not have brought on her damages. H will claim that a burglar is likely to find a gun in someone's house, so even if he had not had it in his, B would have found a gun somewhere else and the harm would have occurred anyway.

The court is likely to find H's argument tenuous, and find that H's breach was the but-for cause.

(4) Proximate Causation

The next issue is whether H's breach was the proximate cause. This is likely to be H's strongest argument. Proximate cause determines whether it was foreseeable that the harm would occur and whether it would be fair to hold H liable.

In this case, H will argue that it was not foreseeable that someone would break in, steal the gun, and use it to commit a tort against someone else. Typically, the court finds that criminal acts of third parties are "superseding intervening causes," meaning that they break the chain of causation. Therefore, H will argue B's burglary and criminal assault should break the chain. P will argue that it was foreseeable this harm would occur, as discussed above, because people often steal guns when they break into homes. Where a homeowner had notice that he was in a dangerous neighborhood, it is more likely proximate cause will be found. Additionally, it would be relevant whether H's home had ever been broken into before.

H will also claim the chain of causation was broken because P was leaving a midnight movie in a dangerous neighborhood, so that made it more likely she would be attacked. This argument will likely fail, because people often see late movies without getting assaulted at gunpoint. H will also claim that P was not injured because of his leaving

the gun out, but rather because she “made [B] mad,” and he was going to shoot her for that reason. If she had handed over the purse, he would not have taken out the gun.

Therefore, the court will likely agree with H and find no proximate cause.

(5) Damages

However, if P were to succeed in showing proximate cause, she would also need to show damages. In this case, she will claim that the damages were the shock she suffered, the concussion, and perhaps any emotional damages.

Damages must be foreseeable, certain, unavoidable, and caused directly by the defendant’s action. The foreseeability of P’s harm is discussed above, and H may argue it was not foreseeable she would faint but rather that she would be shot. The damages from the concussion and medical bills are certain, but future damages like time away from work and emotional distress may be less certain. P could have mitigated the damages by not seeing a movie at that hour. Causation is discussed above.

Conclusion

Therefore, the court will likely find that there was no negligence on the part of H because there was no proximate causation.

Defenses

If negligence is found, H may assert defenses.

Contributory Negligence

Contributory Negligence is mostly abolished. However, if the jurisdiction retains it, the defendant argues that the plaintiff should receive no recovery because his [sic] negligence contributed to the harm. H would argue that P owed a duty to exercise care for her own safety, and failed to do so because she saw a movie late at night, was approached by a burglar who demanded her purse, and failed to give it to him. This was the but-for cause of her harm and also a foreseeable result of her failing to give over the purse. However, a court would likely find that a reasonable person would not necessarily give over their purse, because she might think that a security guard could

come help her or that the burglar was not armed. This would depend on whether P knew it was an area where attacks had happened before and if she saw the gun in B's pocket before he drew it.

On these facts, P was likely not negligent, so there was no contributory negligence.

Comparative Negligence

Comparative negligence reduces the plaintiff's recovery by the percentage of her negligence. Modified comparative negligence only allows the plaintiff to collect if her negligence was less than the defendant's.

For the reasons above, P was not negligent.

Assumption of Risk

This defense requires the assumption of a known risk. This would depend on whether P knew it was a dangerous area. It will also depend on whether she knew that B might be armed. It is unclear whether she knew these facts.

P v. Burglar (B)

P may bring various actions against B. It is important first to note that B may be guilty of several criminal acts, but they are not causes upon which P may bring an action for damages.

Assault

Assault is the (1) intentional (2) placing a plaintiff in fear of an imminent battery plus (3) causation and (4) damages.

Intent

Intent is desire or substantial certainty to cause a result. In this case, P will argue that B intended to place P in fear, because he said "I'm going to shoot you." He might have done it intending to frighten her into giving over the purse, but at least should have known it would cause fear.

Fear of an imminent battery

Battery is a harmful unconsented touching. P will argue that B's action put her in fear of this, because she saw the gun and through she was going to get shot. She was "shocked." Assault requires that the plaintiff be aware of the danger, and in this case P was. Therefore, this element is met.

Causation

P will argue that B's action caused the fear, and the court will agree.

Damages

As discussed above, P will claim that her damages are her concussion, her emotional distress, any medical bills, and perhaps time off work. As discussed above, these must be foreseeable, unavoidable, certain, and caused. There was nothing P could do to mitigate because she could not control fainting, and the harm was caused by B's act, so the requirements of unavoidability and causation are met.

In terms of certainty, it will be more difficult for P to prove her future time off work. Additionally, B may claim that it was not foreseeable she would faint and get a concussion. However, the defendant must take the plaintiff as he finds her, and, therefore, he is responsible for any damages that might occur, regardless of a plaintiff's extreme sensitivity. Therefore, P will succeed in proving damages, and may recover these damages from B provided that the court finds they are certain enough.

Conclusion

P will succeed in proving assault.

Battery

Battery is an unconsented harmful or offensive touching, harmful or offensive to a reasonable person. In this case, there was no touching, so this does not apply. P's hitting the ground does not count as a touching, because though B caused it, it was not direct enough.

Intentional Infliction of Emotional Distress

Intentional Infliction of emotional distress requires (1) extreme or outrageous conduct (2) intentionally or recklessly caused (3) that in fact causes extreme emotional distress.

Extreme Conduct

P will argue that B's saying "You made me mad so now I'm going to shoot you" is extreme and outrageous. It would be outrageous to an average person, because they might think they were going to die. They might think about their children or live lives, and be very disturbed. Therefore, this is met.

Intent

B need not have intended to cause extreme emotional distress, he just need have recklessly done so. Recklessness is extreme indifference and beyond gross negligence. A person would clearly know this action would cause extreme emotional distress.

Emotional Distress

P will claim this is met because she fainted, and the court will likely agree. It may be bolstered by psychiatrist testimony.

Conclusion

Therefore, P will succeed in proving this tort.

Negligent Infliction of Emotional Distress

This occurs where a defendant negligently inflicts emotional distress, and it causes physical damages. Because B's act was likely intentional, this will not apply. However, if it were found to be negligent instead, this would apply because P suffered physical manifestations – fainting.

Conversion/Trespass to Chattel

Conversion is an intentional and extreme interference with a plaintiff's property.

B intended to take the purse.

P will argue this applies because B stole her purse and took it away, which had many valuable in it. B will argue this was not extreme because she was able to get the purse back when he was apprehended by the police, so it was instead Trespass to Chattel, which is a minor interference with a plaintiff's property right. This may depend on whether all of P's belongs were in the purse at the time she got it back. She may argue that a purse is particularly important to a woman, so even taking it for a brief period is conversion. The court will likely determine this based on whether P got it back intact, or if it was permanently damaged. If the police did not return it, the suit will be conversion.

False Imprisonment

False imprisonment is intentionally holding a plaintiff captive, or preventing her from escaping. This occurs where there is no reasonable means of escape. P will argue that for the brief time she was held at gunpoint, she was falsely imprisoned. A plaintiff need be held for only a second. He need not physically tie her up; merely holding at gunpoint is sufficient.

B may argue that P provoked him and "made him mad," but this is no defense to this intentional tort.

Therefore, P will likely succeed on this charge.

Negligence

Negligence does not apply because, as discussed above, B's act was intentional.

Defenses

It is unlikely that any defenses will apply. D may try to claim self-defense, but there is absolutely no evidence that P attacked him in any way.

P v. Cinema (C)

P may have a suit against Cinema for negligence. There are 5 elements to negligence, as discussed above.

(1) Duty

Duty is defined above. As discussed above, some people owe higher duties, and one such category is landowners. Landowners owe a duty to protect people on their premises. While the modern trend is a duty of reasonable care under the circumstances, under traditional rules, duty depends on what kind of an individual is on the land.

No duty is owed to an undiscovered trespasser. A slightly higher duty is owed to a known trespasser, and a higher duty to a person on the land for social purposes. The highest duty is owed to someone known as an "invitee," who is on the land for profit. In this case, the court will find that P was an invitee, because she was there to see a movie, and therefore for a business purpose. The parking lot belonged to Cinema, so C was the landowner and owed a duty to P as an invitee.

A landowner owes a duty to an invitee to inspect for dangerous circumstances and make them safe or warn the invitees.

Additionally, applying either [the] Cardozo or Andrews test, P was in the zone of danger (the parking lot) and she was a foreseeable plaintiff.

(2) Breach

Breach is defined above.

In this case, P will argue that C's failure to protect its customers was a breach. P will argue that C should have installed lighting, security guards, or some sort of a fence to protect the premises. It could have also warned patrons, so that if P had known, she could have been more on her guard walking through the lot. She might not have refused to give over her purse.

Therefore, there was a breach.

(3) Actual Causation

C will claim its action was not the but-for cause, because the burglary and P's fainting might have occurred even if C had put in a security system. However, the court will likely find that if C had taken some sort of security measure, it would have indeed prevented this event.

(4) Proximate Causation

This is defined above.

C will claim the chain of causation is broken by the criminal act of a third party. However, this does not protect a landowner from liability where the risk was known to the landowner. In this case, C was "aware" of "several" previous attacks in the parking lot in past years. C may claim that they were spread out over many years. C may also introduce evidence that the neighborhood has become more safe recently, or that there is a greater crackdown by the police so it had less reason to worry. But absent this sort of evidence, P will argue that if there were "several" attacks, C should have done something more to protect. It was foreseeable there could be another attack, particularly because C shows movies at midnight, when crime is more likely to occur.

B's stealing the gun will not affect this, because it happened before the attack. It is foreseeable that a burglar would have a gun, regardless of how he obtained it. It is also foreseeable that a victim could faint and get a concussion, because people are frequently afraid of guns.

The court will likely agree with P, and find proximate causation because it was foreseeable. The court will also find it fair to hold C responsible, because it was in the best position to avoid the danger and prevent this from happening. Customers rely on their businesses to protect them. P could analogize to common carriers and claim that businesses should also owe a duty of care, because customers put themselves in their hands for protection.

(5) Damages

The damages analysis is the same as above, and it will be determined by the court on the same bases.

Defenses

The defenses of contributory and comparative negligence and assumption of risk do not apply, as discussed above.

Answer B to Question 1

Patron v. Homeowner

Negligence: Keeping the Handgun on Bedside Table

Patron will contend that Homeowner was negligent in failing to keep his handgun in a secure locked container as directed by the statute. In order to prevail in an action for negligence, Patron must prove that Homeowner owed him a duty, that he breached the duty, that his breach caused Patron's injury, and that he suffered damages.

Duty

Under the Cardozo view, a duty is owed only to foreseeable plaintiffs. Under the Andrews view, a duty is owed to the whole world. In this case, Patron will argue that it was foreseeable that a thief could steal an unsecured handgun and use it to perpetuate crime such as a robbery.

Negligence per se: Violation of Statute

When a statute proscribes certain behavior, the violation of that statute establishes a breach in the standard of care when the harm is of the kind that the statute is designed to prevent, and the plaintiff is among the class of people the statute is designed to protect. Here, Homeowner will argue that the statute is intended to prevent small children from gaining access to dangerous guns and hurting themselves or others. However, Patron can persuasively counter that it was also designed to prevent thieves or criminals from obtaining weapons that they would then use to perpetuate crime. The legislative history of the statute might shed some light on the purposes of the law. If its purpose includes preventing criminals from stealing unsecured weapons, then Patron, a crime victim, would be within the class the statute was designed to protect, and Homeowner's breach would establish per se negligence.

A reasonable Person would have Secured the Gun

Alternatively, Patron can argue that even without the statute, Homeowner was negligent in leaving the gun in a place where it was easily accessible to any burglars. He would argue that a reasonable person would foresee that the gun would be noticeable and would be stolen by a burglar. He will also argue that the mere

presence of the gun, which Homeowner kept to ward off intruders, indicates that Homeowner did in fact foresee the possibility of violent criminals entering his home.

Breach

Homeowner kept the gun on his bedside table. There is no indication that the gun was kept in a locked drawer, but rather out on his table. Therefore he violated the statute.

Causation

But-for Cause: Homeowner's act of leaving the gun on the table was the but-for cause of Burglar's assault on Patron. If he kept the gun in a locked container, Burglar would not have had access to it.

Proximate Cause: Homeowner will argue that Burglar's intervening criminal acts of breaking into his house, and then robbing Patron, were superseding causes of Patron's injury. However, an intervening act by a criminal will not interrupt the causal chain if it is foreseeable. As discussed above, it was foreseeable that a criminal could break into the house and use the gun on another unsuspecting victim. Therefore, Homeowner's argument will fail.

Damages

Patron suffered shock and a concussion as a result of Burglar's robbing him [sic]. Therefore, if Burglar's act is a foreseeable result of Homeowner's negligence in failing to secure his handgun, Homeowner can be liable for Patron's injury.

Patron v. Burglar

Burglar confronted Patron in the parking lot and demanded her purse. When Patron refused, Burglar pointed the gun at Patron and threatened her. Patron fainted, suffering a concussion, and Burglar took her purse and fled.

Assault

The prima facie case for assault is met when the defendant (1) performs an act that places the plaintiff in reasonable apprehension of imminent harmful or offensive

contact with his person, (2) the defendant had the intent to place the plaintiff in apprehension, and (3) causation. There must be some physical conduct, not mere words, to constitute assault.

Here, Burglar drew his handgun and stated “You made me mad, so now I’m going to shoot you.” His words, combined with pointing the gun at Patron, created in Patron an apprehension that Burglar was going to immediately shoot her. Further, Burglar had the intent to make Patron believe he was going to shoot her. This act caused Patron to faint and suffer a concussion. Therefore, Burglar can be liable for assault.

Battery

Battery consists of (1) harmful or offensive contact with the plaintiff’s person, (2) intent by the defendant to cause the touching, (3) causation.

Here, Burglar intentionally took the purse from Patron’s person after she fainted. Taking an object from someone’s person satisfies the offensive touching element. Further, the fact that Patron may have been unconscious when Burglar seized her purse does not negate the offensiveness of the touching he caused. Therefore, he can be liable for burglary.

Trespass to Chattels

Trespass to chattels occurs when the defendant (1) interferes with the plaintiff’s possession of her chattel, (2) had the intent of performing the act that interferes with possession, (3) causes the interference, and (4) plaintiff suffers damages.

Here, Burglar grabbed Patron’s purse and ran away with it, interfering with her right to possess it. He did so intentionally. The police later apprehended Burglar. If he still had the purse and it was returned to Patron, she may recover for any damages that resulted from her temporary loss of possession.

Conversion

Conversion occurs when the defendant (1) interferes with the plaintiff’s possession of her chattel, and the interference is so extensive as to warrant payment for the full

value of the chattel, (2) has the intent of performing the act that interferes with possession, (3) causes the interference. When defendant's act amounts to an exercise of dominion and control over the chattel, conversion is more likely to be found.

Here, Burglar seized the purse with the intent to completely and permanently deprive Patron of possession. If Burglar's later apprehension by the police restored the purse to Patron's possession, she may not be able to obtain the full value. If, however, Burglar disposed of the purse before he was apprehended, Patron can recover the full Value of the purse and its contents at the time Burglar seized it.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress occurs when the defendant (1) engages in extreme and outrageous conduct (2) with the intent to cause severe emotional distress, or is reckless as to the likelihood of causing severe distress, (3) causation, and (4) damages: severe emotional distress.

Burglar's conduct in pointing a gun at Patron, demanding her purse, and stating that he was going to shoot her is conduct "beyond all bounds of decency in a civilized society." Theft and threats to inflict serious bodily injury are extreme and intolerable. Burglar clearly intended to cause Patron emotional distress, as he likely hoped his threat and menacing her with the gun would convince her to hand over the purse. Patron fainted out of shock and suffered a concussion. She is likely to suffer emotional distress including fear of being out at night by herself following this robbery. Therefore, she can prevail under this theory.

Negligent Infliction of Emotional Distress

Patron could also prevail under a negligence theory because she suffered physical harm (shock and concussion) as a result of her emotional stress from her encounter with Burglar. However, because Burglar's conduct was at least reckless with respect to her emotional distress, she will not need to rely on a negligence theory.

In sum, Patron can recover for her physical injuries, emotional distress, and the deprivation of her purse.

Patron v. Cinema

Duty to make Safe for Invitees

Patron was robbed in a parking lot belonging to Cinema, just as she was exiting the Cinema around midnight after viewing a late movie. She will argue that Cinema breached the duty of care owed to her as an invitee by failing to provide lighting or a security guard in the parking lot.

A person who comes onto the land for the economic benefit of the landowner, or as part of the general public is invited onto the premises, is an invitee. Patron was an invitee because she entered Cinema's property, which was open to the public, and paid to see a movie. Cinema's duty to invitees is to make safe or warn of any latent dangers, manmade or natural, that are known or discoverable with reasonable inspection.

Cinema knew that there had been several previous attacks on customers in the parking lot in previous years, yet failed to provide any lighting or a security guard. Because the threat was known to Cinema, there was a duty to make a reasonable effort to enhance security.

Negligence

Cinema can also be liable under a negligence theory (see above). A duty of care is owed to all foreseeable plaintiffs, and Patron was a foreseeable victim of crime because she was exiting the cinema after midnight in an area where there was a known risk of assault. A reasonable theater owner would have provided either a security guard or bright lighting to discourage crime. Providing lights is [a] fairly low cost and would significantly improve safety. Therefore, Cinema's failure to do so was a breach of duty.

The lack of lights or a guard was a but-for cause of the attack because Burglar would not have been emboldened to attack Patron if there was a security guard present or if bright lighting would increase his risk of apprehension.

Proximate Cause: Cinema will argue that Burglar's intentional tortious and criminal act was a supervening cause of Patron's injury. However, as discussed above, a defendant can be liable where his negligence increases the risk of subsequent criminal acts. Here, the failure to provide lighting or a guard, despite the known attacks on other patrons, was a substantial cause of the burglary.

Joint and Several Liability

In a jurisdiction permitting joint and several liability, a plaintiff can recover the full amount of any damages proximately caused by the combined tortious acts of two or more defendants, whether acting independently or in concert, that result in a single indivisible harm. If this jurisdiction follows joint and several liability, Patron can recover from any of the defendants, and they can seek contribution from one another.

Question 2

There was recently a major release of hazardous substances from a waste disposal site in County. Owen is the current owner of the site. Fred is a former owner of the site. Hap is the producer of the hazardous substances disposed of at the site.

As a result of the hazardous substance release, County has identified the site as a priority cleanup target, and has notified Owen, Fred, and Hap that they are the responsible parties who must either clean up or pay to clean up the site. County advised each responsible party of his degree of culpability. In the event each responsible party does not pay his share of the cleanup costs, County is entitled to impose joint and several liability on each of them.

In an effort to facilitate the resolution of County's demand, Owen, the wealthiest responsible party, arranged for Fred, Hap, and himself to meet with Anne, his tax lawyer. At the meeting, Owen offered to pay the attorney fees of all three of them in exchange for their agreement to be represented by Anne. Fred and Hap accepted Owen's offer and Anne distributed identical retainer agreements to each of them, which they signed.

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

Answer A to Question 2

Anne's Ethical Violations

Duty of Loyalty

An attorney must not represent a client when there is a concurrent conflict of interest. A concurrent conflict occurs when the interests of one client are directly adverse to those of another or the representation of one client will be materially limited because of the interests of the attorney, a third party, another client or a former client. An attorney can nevertheless take on representation if she reasonably believes that she can competently and diligently represent the interests of all effected clients, discloses the conflict and gets informed written consent from the clients. The CA rules do not apply the "reasonably believes standard" and require written disclosure in situations where the conflict involves a former client.

Potential Conflict

Here, Anne is the longtime tax attorney of Owner (O). She agrees to represent O, Fred (F) and Hap (H) is a case where they are each being required by the County to clean up a hazardous substance spill. Anne has agreed to represent them as her joint clients against County. The County has made it clear that if each party does not pay his share, County will impose joint and several liability one each of them. This means that County can recover the full amount of the costs from either of them. Here, O is wealthier than F and H. We are not aware how wealthy F and H are. Due to County's decision to pursue joint and several liability in case each person does not pay, there is a potential conflict of interest. If either of the parties turns out to be insolvent or does not pay his share, the others are exposed to liability for the full amount, which likely will be a lot. Also, each party has been notified of his culpability. It might be that the parties each have an argument for why they are not at fault and for why another party is more at fault. For example, F is the former owner of the site and may want to argue that he does not have any responsibility for the spill. H produces the hazardous material that is dumped on the site. Thus, H might argue that he is not responsible for the release because O as the owner of the site has responsibility to prevent a release.

Thus, Anne must have realized that there was a potential conflict of interest between the parties and [it] must [be] determined whether she reasonably believed she could effectively represent O, F and H as her joint clients. Here, Anne might reasonably believe that she can do so because their interests are all aligned against County. However, because of each party's different involvement and responsibility for the spill, as well as the County's decision to pursue its claims under the theory of joint and several liability in case one party does not pay, Anne should have realized that she could not make arguments on behalf of each client without taking a position adverse to the others. However, if she reasonably believed that the conflict was consentable, she should have disclosed the conflict [to] the parties, preferably in writing, and received their informed written consent to proceed. Anne must have been careful not to disclose any confidential information about O and his finances since Anne had such information as O's tax attorney. If she could fully disclose the conflict without revealing O's confidential information, and the clients each gave their informed, written consent, then Anne could have proceeded to represent all three of them. However, the conflict would be unconsentable if Anne did not believe she could effectively represent them all. For the reasons discussed above, Anne might have believed that this conflict was not consentable and thus could not have advised the clients to consent.

Also, there is a potential conflict stemming from the fact that O is Anne's former client. [Anne] must not take on representation of a client in a matter that is the same as or substantially related to a matter in which she represented a former client if the former client's confidential information might be relevant. Furthermore, Anne cannot use any confidential information against O in this matter without O's consent. Since O has arranged for Anne to represent O, H and F, O has consented to the representation. However, Anne must be careful not to reveal any confidential information about O without O's consent during the course of her representation.

The fact that O is Anne's current client creates a conflict. Anne may feel a greater sense of loyalty to O to protect his interests because O is already her client and she likely wants to keep O as her client in her tax practice. Thus, Anne might not be able to effectively and fairly represent the interests of F and H. She must also disclose this conflict to F and H and only proceed if it is reasonable to do so and F and H provide

their informed consent. Given that this lawsuit is not related to Anne's tax practice, Anne might reasonably believe that she can fairly represent the clients' interests as joint clients, especially because they are all defending against County. However, given her loyalty to O, perhaps this conflict is also not consentable. It would be useful to know just how long O has been Anne's client. In any case, if the additional facts make it such that a reasonable attorney would not advise F and H to consent to Anne representing all three clients, the consent of F and H will not be effective.

Actual Conflict

An actual conflict can develop in the course of representation. If it does, Anne must revisit the process discussed above, disclose the conflict and only proceed if she has written, informed consent from the parties to proceed. If Anne proceeded with the representation despite the conflicts discussed above, she must be aware of any actual conflicts that might arise. For example, if any of the three parties decides to argue in his own defense that culpability lies with another one of the parties, Anne must realize that continuing with representation is no longer reasonable. At that point, she must disclose the conflict (subject to any limitations due to her duty of confidentiality) and advise the clients to seek independent counsel. Depending on how much confidential information she has at that point, she may be able to continue representing one of them. In this case, that party would likely be O because she already has confidential information about O due [to] previously representing O for tax purposes. However, if she learns confidential information from the parties and an actual conflict arises, she may have to withdraw completely and advise each of them to seek independent counsel in this matter.

Duty of Competence

A lawyer has a duty to competently represent her clients. She must use the skill, knowledge, thoroughness and preparation reasonably necessary for effective representation. Here, we are told that Anne is a longtime tax attorney. The case she is hired to work on involves a major release of hazardous substances from a waste disposal site and cleanup required by County. As a longtime tax attorney, she likely does not have much experience in this particular area of the law. The case relates to matters outside of the scope of a tax attorney's area of practice. However, Anne may

take on representation if she can become competent in the areas of the case by researching and preparing herself in the pertinent field. If she can do so without causing any harm to the clients or causing an undue delay, she may represent them in the matter. Also, she can associate with another attorney who has more experience in the specific area. If Anne takes these measures to prepare herself or associate with another competent attorney, she will not have violated this duty. However, if she proceeds to represent the clients in this matter without becoming competent in this particular area, she will have breached her duty of competence.

Duty of Confidentiality

Under the ABA, an attorney has a duty not to disclose confidential information related to the representation of that client. It does not matter from whom or how the information was acquired. In CA, this duty of confidentiality is recognized in the attorney's oath. There are exceptions for disclosing confidential information: 1) express consent, 2) implied consent, 3) disclosure ordered by court, 4) disclosure to prevent a crime or fraud likely to result in substantial financial loss when the attorney's services have been used to commit the crime or fraud, and 5) disclosure if the attorney reasonably believes it's necessary to prevent certain death or substantial bodily injury. CA does not recognize the exception for crimes and fraud and limits the disclosure to prevent death or bodily injury to situations where the act to be prevented is a crime.

During the course of representation, Anne must take care not to disclose the confidential information from one client to another without their consent, unless one of the other exceptions discussed above applies. Also, if Anne discovers an actual conflict of interest during the course of representation, she must take care to protect such confidences when making any disclosures related to resolving the conflict of interests. If Anne does not properly protect the confidential information from her clients, she will have breached this duty.

Attorney-client privilege

This privilege is an exclusionary rule of evidence. The plaintiff can refuse to testify and prevent his attorney from testifying as to confidential communications between them and their agents during the course of representation. The communications must have

been intended by the client to have been confidential and must have been made for the purpose of legal services. Under the ABA, this privilege lasts even after the client dies. Under the CA rules, the privilege ends when the client's estate is finalized after his death. There are exceptions to this privilege; the attorney may testify 1) to prevent a future crime or fraud when the client has used the attorney's services to commit the crime or fraud, 2) when there is litigation related to a breach of duties between the client and attorney and 3) when joint clients are later involved in civil litigation. CA also allows disclosure to prevent a crime that is likely to result in death or substantial bodily injury. The client holds this privilege and may waive it.

Under this privilege, Anne may not testify as to confidential communications between herself and the three clients unless the clients waive it. If the crime/fraud exception applies or the CA exception for death or bodily injury applies, then Anne can testify as to the confidential communications. Also, if the joint clients are later involved in civil litigation against one another, the clients will not be able to assert this privilege. Anne should make it clear to O, H and F that she may have to testify against them if they are later involved as adversaries in a civil case.

Fiduciary Duties of Attorney

Under the ABA, fees must be reasonable under the CA rules, fees must not be unconscionable. Thus, Anne must make sure that her fees meet these standards based on the amount of time and skill she will use and the level of difficulty in the case. Also, under CA rules, a fee arrangement must be in writing if it is for over \$1000 unless the client waives the right to get a writing, there is an emergency, the attorney is performing routine services for an existing client, or the client is a corporation. Thus, the fee arrangement must be in writing to meet the CA requirements if it is for more than \$1000 and the clients do not waive their right to a writing.

Receiving Payment from One Person for Representing Another

An attorney may receive payment from one person to represent another so long as 1) the client being represented is aware of this arrangement and provides written, informed consent, 2) the attorney's judgment and the effectiveness of representation will not be affected because of the interests of the person paying for the services, and 3) the

client's confidential information is protected. Here, O is the wealthiest of O, H and F. O offers to pay the attorney's fees for all three of them. Thus, F and H must be made aware of the arrangement. Also, Anne must ensure that her representation of H and F is not affected by the fact that O is paying for her fees. Because O is also a client in the case, the fact that he is paying the fees might interfere with Anne's judgment. Anne might feel a greater sense of loyalty and duty to O not only because O is her current client but also because O is paying for her fees. Thus, she might choose to pursue O's interests at the expense of the others. Thus, Anne may violate her duties of loyalty to F and H if she lets the fact that O is paying her fees influence her judgment. Also, as discussed above, Anne must protect the confidential information of all three clients. If she fails to, she will have violated this ethical duty.

Anne should have disclosed this conflict when she disclosed potential conflicts to all three clients and obtained their informed, written consent. F and H must have been made aware of this situation before agreeing to be represented by Anne and accepting O's offer for O to pay the attorney's fees. If Anne failed to inform the clients when they agreed to the joint representation, Anne has violated her duty to loyalty.

Duty to Communicate – Settlement

Anne also has a duty to communicate to her clients all material developments in the case and to keep them informed. Thus, Anne must communicate material information to all three clients and not rely on one of them to communicate it to the others. If she does [not] she will be found to have violated this duty.

The client has the power to decide whether to settle. Here, if there is a settlement offer by the County or any resolution that affects all three clients, Anne must communicate it to each of them individually, make sure that they understand it and only proceed with their consent. Anne cannot rely on the consent of only one client to proceed. Furthermore, she must clearly explain the terms of any settlement to each client and how it affects each of them.

Answer B to Question 2

Duty of Competence

A lawyer has a duty to the clients to provide competent representation. Competence is defined as the skill, thoroughness, and preparation reasonably needed to provide adequate representation in a case. Whether an attorney is competent is dependent on the complexity of the case, the availability of other lawyers in the region to take the case, the circumstances the case was brought to the attorney, the ability of the attorney to research and become acquainted with the case without undue expense to the clients, and the ability of the attorney to consult with local counsel. Here, Anne may have violated this duty. The nature of this case is a complex environmental case arising under state and federal law, CERCLA liability. However, the facts state that Anne's area of expertise is tax. Environmental law requires significant technical training and experience and knowledge of the federal statutes and state statutes. There is no evidence Anne has practiced in this area in the past. Further, there is no evidence that other attorneys in the region are not competent to practice in this area of law. Further, there is no evidence to establish that Anne has attempted to consult with a local expert on environmental law in order to provide competent representation to the clients. Finally, no evidence establishes that Anne has done any research to become familiar with this area of the law. Therefore, under the circumstances she has probably violated her duty of competence by taking a case in an area of the law in which she is extremely unfamiliar.

Conflicts of Interest

Both the ABA and California Model Rules limit an attorney's representation of clients with conflicting interests. Under the ABA rules, an attorney may not represent a client if representation would be directly adverse to a client or there is a significant risk his representation of one client would be materially impaired by his duty to himself or another client, unless the attorney reasonably believes he can provide competent and diligent representation, does not involve a claim by one client against another in the same case, and is not prohibited by law. Under the ABA rules, an attorney only needs to get informed consent in a situation where an actual conflict exists. Anne may argue

that under the ABA rules no informed consent was necessary here because all the parties had the interest in avoiding liability from the county and therefore all of the interests were aligned at the time. Further, she will argue that this offense is a strict liability offense so none of the parties can absolve liability by placing the blame on another party.

However, it may be argued that the parties did have conflicting positions. As parties who were to be jointly and severally liable and had the right of contribution under the act, all parties wanted to shift the blame to the other party and recover from the prior landowners. Generally, environmental statutes allow the nonactive party to seek contribution from the active party; here Hap is the active party. Therefore because each side is trying to place the blame on the other party, it is likely that there is a current conflict of interest. If there is a current conflict of interest, the attorney must reasonably believe she can provide diligent and competent representation to all clients and must give full informed consent, confirmed in writing. The ABA suggests that an attorney notify the clients on the risks of the duty of loyalty, confidentiality, and the lack of privilege if a suit were to arise between the clients. There are two problems here. First it would be tough to argue that Anne reasonably believed she can provide competent and diligent representation to all clients. Given that all the clients are attempting to push liability on each other and will want to recover contribution from each other in the case, it is likely that a reasonable attorney would not believe that they would be able to provide competent and diligent representation. This is not simply a case where the parties are trying to avoid liability, but it also involves relative contribution if the county is to recover from one client. Further, given her continuing business with Owen, it would be tough for her to argue she could provide equal representation to F and H.

Under the ABA, it will also be unconscionable to receive this consent if Anne's duty of confidentiality to Owen prevents her from making a full disclosure of the potential conflicts of interest to the parties. There is no evidence that her duty to Owen will prevent her from fully disclosing the risks and circumstances of joint rep to the other clients because she represented Owen on a totally unrelated matter and the details of that matter are not necessary for full informed consent of the clients.

Further, Anne failed to get the informed consent of any of the clients confirmed in writing. She only distributed retainer agreements but did not get the informed consent of any of the clients in a case of actual conflict between the clients. Therefore she has violated her duty for concurrent conflicts of interest under the ABA rules.

She also violated this duty under the California rules. California has similar requirements but extends the conflicts to potential conflicts as well as actual conflicts, requires disclosure of the risks of the conflicts, and the attorney only needs to believe in good faith that she can provide competent representation, not the reasonable attorney standard adopted under the ABA rules. Anne may be able to argue that she honestly believed that she could provide competent and diligent representation to all the clients and may be able to prevail here, which she would not under the ABA rules, which require an attorney's reasonable belief. However, under the CA rules, Anne failed to give full disclosure to the clients of the risks provided by joint representation and failed to get their written consent to these conflicts. Therefore Anne violated the ethical rules relating to joint representation under CA law also.

Therefore, Anne should withdraw from representing all three because she has received confidential information from H and F.

Fee Payor Interests

Anne violated her duties under both the California and ABA authorities by having Owen pay the fees for all three defendants. Under the ABA rules, an attorney may not have a party pay all of the fees for a group of clients unless the attorney reasonably believes it will not interfere with her professional judgment, confidential communications will not be shared with the party, and the nonpaying clients give informed consent. California has similar requirements but also requires that the informed consent be in writing. Here, Anne may run into a few problems. First, it may be argued that by having one of the joint clients paying the interest of all three clients in a joint liability context may interfere with her professional judgment. However, in offering to pay the fees Owen did not require that Anne exercise her judgment in a certain way or proceed in a certain way under the case. Therefore, the payment probably did not interfere with her professional judgment. Next, the payment probably did not interfere with the duty of confidentiality

to the other clients because the fee payor, Owen, did not request that confidential information be given to the other clients. Under the ABA rules, H and F need to give informed consent. There is no evidence of this. Although they both knew that Owen was paying, Anne never disclosed to them the risks of the fee payor interest. For that reason, informed consent was never given. In addition, under California law, informed consent must be given by F and H in writing. Since informed consent, even orally, was never given, Anne violated her duties under the ABA and California authorities.

Duty of Confidentiality

As a past attorney for Owen, Anne has a duty to Owen not to reveal information learned in the course of her past representations of Owen without the consent of Owen, where consent is implicitly given, or where another exception exists. Here, there is no evidence that Anne has revealed any information learned in the course of her past representations of Owen on tax matters. Further, it is unlikely she even came across this information. Therefore a violation of her duty of confidentiality has [not] been violated in this instance, unless she revealed this information. There is no evidence here that she had revealed any of this information but she needs to be sure she does not reveal any of this without the informed consent of Owen.

Further, Anne has a duty of confidentiality to all current clients, Owen, F, and H. In representation she may not reveal information learned in the representation of the other clients unless the clients give informed consent confirmed in writing or an exception exists. Before revealing any information and before jointly representing the clients, Anne should have the clients waive their right for the information to be kept confidential. If this is not done either before rep or during rep, she will probably be forced to withdraw because her duty of loyalty to the other clients requires her to do so.

Duty to Keep Reasonably Informed

Anne [as an] attorney has a duty to keep all clients reasonably informed as to the status of their litigation. Here, this may conflict with Anne's duty of confidentiality to the other clients. If Anne learns of a matter central to her representation of the group, her duty of loyalty to a certain client may conflict with the duty to keep the other clients reasonably informed. As stated above, Anne should inform the clients ahead of time of this duty

and require them to waive their duty of confidentiality so she can fulfill her duty to keep all clients reasonably informed. If a client refuses to waive the duty of confidentiality, she should withdraw from representing all clients.

Duty Not to Use Information of past Clients to Disadvantage

Similar to the duty of confidentiality, an attorney may not use any information to the disadvantage of past clients unless the information is public or the client has given informed consent confirmed in writing. Here, Anne should be sure not to use any information learned in the representation of Owen to the disadvantage of Owen, even if the information is not itself revealed. This is particularly tough situation for Anne if she does come across a situation where some information used in the past representations may be used to the disadvantage of Owen; she will need to be sure not to reveal this information or get Owen's informed consent.

Fee Agreement

The ABA rules do not require a noncontingent fee arrangement to be in writing, although they highly suggest doing so. Further, the ABA rules require the attorney to notify the client within a reasonable time of representation of the fee arrangement.

The California rules that all fee arrangements, including noncontingent fee arrangements, be in writing, unless the services are for less than \$1,000, it is a corporate client, the client has received the services in the past, or it is otherwise impracticable to do so. Here, none of the exceptions are met, unless Anne plans on charging less than 1k. Further, the payor, Owen, is an individual, not a corporation. She should give a written disclosure of this arrangement.

Duty of Loyalty

Anne has a duty of loyalty to all clients, which includes the duty to put the interests of your client before all others. In a joint rep situation this is tough to do, but it is required that all clients get treated fairly. Here, Owen is a past client of Anne and Anne hopes for future representation of Owen on his tax matters. Therefore, it will be tough for her to treat all clients equally. She should withdraw from rep for this reason.

Question 3

David and Vic were farmers with adjoining property. They had been fighting for several years about water rights.

In May, Vic and his wife, Wanda, were sitting in the kitchen when Vic received a telephone call. During the call, Vic became quite angry. As soon as he hung up, he said the following to Wanda: "That rat, David, just called and told me that he was going to make me sorry! He used some sort of machine to disguise his voice, but I know it was him!"

In June, Wanda and Vic passed a truck driven by David, who made an obscene gesture as they drove by. Vic immediately stopped and yelled that if David wanted a fight, then that was what he was going to get. Both men jumped out of their trucks. After an exchange of blows, David began strangling Vic. Vic collapsed and died from a massive heart attack. David was charged with manslaughter in California Superior Court.

At David's trial, the prosecution called Wanda, who testified about Vic's description of the May telephone call.

During cross-examination of Wanda, the defense introduced into evidence a certified copy of a felony perjury conviction Vic had suffered in 2007.

The prosecution then introduced into evidence a certified copy of a misdemeanor simple assault conviction David had suffered in 2006.

During the defense's case, David claimed that he acted in self-defense. He testified that he knew about two other fights involving Vic. In the first, which took place four years before his death, Vic broke a man's arm with a tire iron. In the other, which occurred two years before his death, Vic threatened a woman with a gun. David testified that he had heard about the first incident before June, but that he had not heard about the second incident until after his trial had commenced.

Assuming that all appropriate objections were timely made, should the California Superior Court have admitted:

1. Wanda's testimony about Vic's statement regarding the May phone call? Discuss.
2. The certified copy of Vic's 2007 felony perjury conviction? Discuss.
3. The certified copy of David's 2006 misdemeanor simple assault conviction? Discuss.
4. David's testimony about the first fight involving Vic breaking another man's arm with a tire iron? Discuss.
5. David's testimony about the second fight involving Vic threatening a woman with a gun? Discuss.

Answer according to California law.

Answer A to Question 3

1. Wanda's testimony about Vic's statement concerning the May Phone call:

Logical and Legal Relevance

For evidence to be admissible it must be relevant which, under California law, is any evidence that has any tendency to make any fact of consequence, that is at issue, more or less probable than it would be without such evidence. In this case, Wanda's testimony concerning the phone call is relevant, in that it goes to show that David's intent to hurt Vic in some way prior to the June fight, a fact that is at issue, since David is claiming he acted in self-defense when he killed Vic.

Under Proposition 8 of the California Constitution (hereafter Prop. 8), any evidence that is relevant may be admitted in a criminal case. However, Prop. 8 makes an exception for balancing under California Evidence Code (hereafter CEC) 352, which gives a court discretion in excluding relevant evidence if its probative value is substantially outweighed by a risk of unfair prejudice, confusion of issues, or misleading the jury. In this case, the evidence has significant probative value, as it tends to show that David had a preexisting intent to hurt Vic and thus makes it more likely than not that he, not Vic, was the initial aggressor in the June fight that led to Vic's death. There is no indication that such evidence poses a risk of unfair prejudice, confusion of issues, or misleading the jury, and as a result, the evidence would not be barred by CEC 352.

Personal Knowledge

A witness may only testify as to those matters to which she has personal knowledge, in that she must have perceived the matter in some manner, such as by hearing or observing it. In this case, Wanda personally heard Vic's statement concerning the phone call, and as a result, she has sufficient personal knowledge to testify.

Authentication

All evidence must be authenticated, in that it must be proven to be what it purports to be. In this case, the authenticity of the phone call – namely, whether David was the person who actually made the call – comes into question, given that Vic stated David

was using some machine to disguise his voice. To authenticate a phone call, the person hearing it must be shown to have some familiarity with the speaker's voice, which can be gained either from prior interactions before the trial or subsequent to the trial. In this case, David and Vic had been fighting for several years about water rights, and thus it would be likely that Vic was familiar with the sound of David's voice. As a result, he would be qualified to make an identification of David's voice over the phone. As a result, Vic's statement concerning the phone call would be properly authenticated for purposes of trial.

Hearsay

A statement is hearsay if it is made out-of-court and being offered to prove the truth of the matter asserted. In this case, Wanda's statement contains two pieces of hearsay: 1) Vic's statement made to her, and 2) David's statements to Vic over the phone. Both are being offered to prove the truth of the matter asserted, in that Vic's statement is being offered to show that David called him and Vic knew it was him despite the voice distortion, and David's statement is being offered to show that David was planning to make Vic sorry.

In general, hearsay is inadmissible. However, the CEC does contain numerous exceptions to this general rule of hearsay inadmissibility that may allow these statements in. In a situation where a statement contains two levels of hearsay, such as here, both levels of hearsay must fall within an exception in order to be admissible.

Prop. 8 would not be sufficient to admit the evidence, as Prop. 8 contains an exception which requires hearsay rules to be satisfied before admitting relevant evidence.

David's Statement to Vic:

Admission of a Party-opponent:

If the statement is made by one party to the case and is offered into evidence against him by the opposing party, it is an exception to the hearsay rule and is admissible. In this case, the person who made the statement is David, the party-opponent, and it is being offered against him by the prosecution. Thus, it would be admissible under the exception for statements of a party-opponent.

Statement Against Interest:

A statement may also be admitted if it is made by one party against their penal or pecuniary interest, and such party is unavailable. Here, David is available to testify, and there is no indication that he made the statement knowing that it was against his penal interest to do so; thus, the statement would not qualify under this exception.

Then-existing State of Mind:

A statement may be admissible to show the party's then-existing state of mind at the time the statement was made. In this case, Wanda can argue that the statement shows David's existing state of mind at the time, namely, that he was going to make Vic sorry and intended to act on his statement. If the court finds this to be accurate, the statement would be admissible.

Vic's Statement to David:

Contemporaneous Statement:

A hearsay statement is admissible if it is made describing or explaining certain conduct of the declarant while the declarant is engaged in such conduct. In this case, while the statement does describe Vic's conduct, namely, that he was just on the phone with David, Vic made the statement about the phone call only after he had hung up, not while he was actively listening to David. Thus, the statement was not contemporaneous with Vic's action and would not be admissible under this exception.

Excited Utterance:

A hearsay statement is also admissible if it describes an exciting or startling event or condition and is made while the person is still under the stress of excitement from an event or condition. In this case, the facts indicate that Vic became quite angry during the call, thus indicating the call itself was a startling event or condition. In addition, given David's particular statements to Vic during the call, namely, that he meant to make Vic sorry, a court most likely would find this to be a startling event or condition. Vic's statements about the call were made to Wanda as soon as he hung up, thus indicating that he was still under the stress of the phone call – furthermore, the statements are followed by exclamation points, implying that he was still agitated from it.

Therefore, the statement would qualify as an excited utterance, and would be admissible.

Thus, in conclusion, the court did not err in admitting Wanda's statement.

2. Certified Copy of Vic's 2007 Felony Perjury Conviction:

Logical and Legal Relevance

The evidence of Vic's conviction is logically relevant to the case, as it goes to show Vic's character for truthfulness, and thus would be used to impeach his statements to Wanda above concerning the telephone call, indicating that David did not make the call or have the intent to hurt Vic. Further, David's preexisting intent to hurt Vic is in dispute, since David is claiming he acted in self-defense and was not the initial aggressor. Thus, the evidence is logically relevant.

The prosecution could argue that the evidence is inadmissible under CEC 352, on the grounds that it would mislead the jury by making them think that Vic's character for truthfulness is relevant to whether he started the fight or not. However, it is unlikely a court would find that a reasonable jury would make this inference, given that the conviction was for perjury, not for a crime of violence, and it is being offered during the cross-examination of Wanda, thus indicating that it is meant to attack Wanda's testimony, not Vic's character for violence as a whole. Furthermore, the evidence has substantial probative value, as it tends to show that Vic is not truthful, and was therefore lying about the phone call from David – thus making David's self-defense argument more probable. Therefore, the evidence would not be barred by CEC 352.

Character Evidence

Character Evidence is any evidence offered to show that a person acted in conformity with character on a particular occasion, and is generally inadmissible. Here, the evidence of Vic's prior conviction is being offered to show Vic's action in conformity with character – namely, his character for lying – and thus would ordinarily be inadmissible. However, evidence of a witness's or declarant's character for truthfulness can be

offered for the purposes of impeachment to attack the witness's or declarant's credibility on the stand. Therefore, the evidence would not be inadmissible character evidence.

Impeachment

Any party is permitted to impeach a witness in order to diminish his or her credibility for speaking the truth. In addition, a declarant, or out-of-court speaker, may be impeached in the same manner that a testifying witness may be impeached. Here, as the evidence goes to show Vic's – the declarant in Wanda's testimony – character for truthfulness, it would be permitted into evidence.

Under California law, the court has the discretion to allow in evidence of prior felony convictions for the purposes of impeaching if such convictions are for crimes of moral turpitude. In this case, the conviction is for perjury, or lying on the stand, which is a crime of moral turpitude, and thus the court would have the discretion to admit it for purposes of impeachment. In addition, prior convictions can be admitted in the evidence either through cross-examination or extrinsic evidence. Here, the conviction was introduced during cross-examination, but by means of extrinsic evidence – namely, the certified copy of the conviction, and therefore is a permissible means of impeachment.

Hearsay

The conviction is hearsay, in that it is an out-of-court statement offered to prove the truth of the matter asserted, namely, that Vic was convicted for felony perjury in 2007. However, a judgment of a prior felony conviction is an exception to the general hearsay rule, and would thus be admissible.

In conclusion, the court did not err in admitting the conviction.

3. Certified Copy of David's 2008 Assault Conviction:

Logical and Legal Relevance

The evidence is logically relevant for two purposes – first, it goes to show that David had a character for violence, and thus acted in conformity with such character during

the June fight, thus negating his claim of self-defense. In addition, the evidence can be used to impeach David's credibility on the grounds that his prior conviction speaks to his ability for truthfulness.

However, the evidence would be subject to CEC 352, particularly, the possibility of unfair prejudice. In this case, the evidence is being used to show action in conformity with character, which is an impermissible character inference and would unfairly prejudice David. In addition, as will be demonstrated, the use for impeachment is impermissible. As there is no other probative value attached to the statement, it would be inadmissible under CEC 352 for being unduly prejudicial.

Character Evidence

As stated, character evidence is any evidence offered to show that a person acted in conformity with his character on a particular occasion. In a criminal case, such evidence cannot be offered by the prosecution unless the defendant "opens the door;" in other words, the defendant must put his character at issue, and the prosecution can only then rebut with character evidence. In this case, David had not yet opened the door to his character – while he did plead self-defense, it was only after the prosecution offered his assault conviction into evidence, not before. Therefore, the prosecution could not admit such evidence prior to David's opening the door, and the evidence should have been ruled inadmissible.

Proposition 8 would not be applicable, as it contains an exception for the rules concerning character evidence.

Impeachment

Under California law, a witness can only be impeached with a misdemeanor conviction if it is one of moral turpitude – otherwise, it is inadmissible. In this case, the conviction was for simple assault, which is not a crime of moral turpitude. As a result, it would be admissible.

Thus, the court erred in admitting the prior felony conviction.

4. David's Testimony about the First Fight:

Logical and Legal Relevance

The evidence is logically relevant, in that it goes towards David's self-defense claim by showing Vic's character for violence and thus indicating that Vic acted in conformity with character on this particular occasion – which is a fact at issue, since the prosecution claims that David was the initial aggressor, while David claims that Vic started the fight.

The evidence is also substantially probative, as it tends to show that Vic started the fight and thus makes David's self-defense claim more likely than it would be without the evidence. However, it does carry a risk of unfair prejudice, in that it involves a character inference concerning Vic's character for violence. However, as described below, the character evidence is permissible under the circumstances, and thus the evidence would not be inadmissible under CEC 352.

Character Evidence

David's introduction of Vic's breaking a man's arm with a tire iron is character evidence, as it is being used to show that Vic had a character for violence and acted in conformity with such character during the June fight. However, under the CEC, a criminal defendant can bring in evidence of the victim's character for violence if he claims self-defense and wishes to show that the victim was the initial aggressor. As this is David's purpose in bringing this evidence, since he is claiming self-defense and is bringing in the evidence to show Vic's initiation of the fight, the evidence would be admissible.

Character evidence can take the form of either reputation evidence, opinion evidence, or specific acts. Under the CEC, a defendant is permitted to use any of these methods in bringing in evidence of the victim's bad character for violence during the direct examination. Here, David's testimony would constitute specific acts, as he is testifying to specific acts that Vic had done in the past. Therefore, the method of character evidence used is permissible.

Personal Knowledge

In this case, David does not have personal knowledge as to the fight. While he heard about it from someone before June, he did not personally witness it, nor is there any indication as to who he heard it from, for example, whether the person who told him was the other man involved in the fight whose arm was broken, or was from someone else. Thus, there is no indication that he has personal knowledge as to the fight, and as a result, the testimony would not be admissible.

Thus, the court erred in permitting David's testimony into evidence.

5. David's Testimony about the Second Fight:

Logical and Legal Relevance

The evidence is logically relevant, in that it, like the testimony about the first fight, goes towards David's self-defense claim by showing Vic's character for violence and his action in conformity with such character on this particular occasion – a fact at issue in this case. The evidence is also substantially probative, as it tends to show that Vic, not David, started the fight and makes David's self-defense claim more likely. In addition, as will be demonstrated below, the use of such evidence is a permissible use of character evidence, and as a result, the testimony would not be barred by CEC 352.

Character Evidence

As with the first fight, David's introduction of Vic's prior threatening a woman with a gun is character evidence, as it is being used to show that Vic had a character for violence and acted in conformity with such character during the June fight. Yet, as indicated above, a criminal defendant can bring in evidence of the victim's character for violence if he claims self-defense and wishes to show that the victim was the initial aggressor – which is the case here, as David is claiming self-defense and wishes to show that Vic was the initial aggressor.

As with the testimony above, this testimony takes the form of specific acts, as David is testifying as to specific violent acts that Vic took in the past, and thus is a permissible use of character evidence.

Personal Knowledge

Here, David again does not have substantial personal knowledge to testify as to the fight. He only heard about it from someone else, and there is no indication as to whom; he did not actually perceive it himself nor hear about it directly from the victim or someone who saw it occur. Furthermore, he did not hear about the second incident until after his trial had commenced, thus running the possible risk of such evidence not being particularly reliable or truthful and being created solely for the purposes of trial. As a result, David lacked sufficient personal knowledge to testify as to the second incident, and the court erred in permitting the evidence to be admitted.

Answer B to Question 3

CA Constitution Truth-in-Evidence Provision

In California, evidentiary rules in criminal cases are sometimes changed by the Truth-in-Evidence Provision of the California Constitution. The Truth-in-Evidence provision generally provides that all relevant evidence is admissible in California criminal trials. As state constitutional law, the Truth-in-Evidence provision overrides any contrary California Evidence Code provisions. However, the Truth-in-Evidence provision itself explicitly preserves numerous rules of the California Evidence Code, including the rule against hearsay and the CEC 352 Balancing Rule. With this general framework in mind, we can discuss the individual evidentiary items.

Wanda's Testimony About Vic's Statement Regarding the May Phone Call

Logical/Legal Relevance

Irrelevant evidence is never admissible. In California, evidence is logically relevant if it has a tendency to make a disputed fact of consequence more or less probable. However, even if evidence is logically relevant, it may still be excluded at the discretion of the court if the court finds that the probative value of the evidence is substantially outweighed by concerns of prejudice, confusion or delay. Neither the basic rule governing relevance nor the balancing rule are changed in criminal trials by Proposition 8.

Here, Vic's statement that David planned to "make [him] sorry" is relevant because it tends to prove that David and Vic were in a feud and that David intended to hurt Vic. Thus, it tends to make more probable that David committed the later violence and strangulation to Vic. However, the fact David attacked Vic does not appear to be in dispute, because David is claiming he acted in self-defense. Thus, it is likely that Vic's statement about the phone call is not relevant under California standards.

If it is logically relevant, it will not be excluded. The evidence is probative of David having committed intentional violence against Vic, and there is no substantial risk of unfair prejudice.

Personal Knowledge

Wanda can only testify as to matters for which she has personal knowledge. Here, Vic told Wanda about the phone call directly; thus she personally perceived the statement by Vic and can testify about it.

Hearsay

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. Hearsay is not admissible unless an exception to the hearsay prohibition applies. Moreover, where a statement contains multiple levels of hearsay, a hearsay exception must apply to each level for the statement to be admissible.

Vic's Statement

In this case, Vic's statement that David called and said he would make Vic sorry is hearsay. Vic is making this statement to prove the truth of the matter asserted, i.e., that David did call and threaten Vic.

Vic's hearsay statement, however, is likely admissible as a spontaneous statement. Under the CEC, a hearsay statement made describing a startling event while still under the stress of excitement is an exception to the hearsay prohibition. In this case, Vic described the phone call to Wanda immediately after receiving it. Moreover, the evidence indicates that Vic was still in a state of anger and excitement after receiving the phone call. Thus, Vic's statement is a spontaneous statement.

The prosecution may also claim that Vic's statement was a contemporaneous statement. The contemporaneous statement exception applies to hearsay statements made by a declarant to describe his conduct contemporaneously to or immediately following his actually doing it. However, in this case, Vic's statement describes David's conduct, not his own, and thus would not fit within the contemporaneous statement exception.

David's Statement

David's statement that he would make Vic sorry is also an out-of-court statement. Moreover, it is also offered to prove the truth of the matter asserted in that it is intended to prove that David did intend to make Vic sorry.

David's statement is admissible under the present state of mind exception. The present state of mind exception applies to statements by a declarant that describe the declarant's state of mind at that time. The exception can be used to admit statements of the declarant's intent in order to prove that the declarant carried out that intent. In this case, David's statement that he "was going to make [Vic] sorry" was a statement of David's present intent and thus fits within the present state of mind exception. It is thus admissible to prove that David later carried out actions to make Vic sorry.

David's statement may also be a spontaneous statement. However, there is no indication that David was in a state of excitement, especially considering he initiated the call. Thus, this exception likely does not apply.

Accordingly, Vic's statement is admissible hearsay because both his statement and David's fit within hearsay exceptions.

Authentication of David's Statement

David's alleged statement, however, can only be admissible if properly authenticated. To be authenticated, there must be sufficient evidence for a jury to find that David's statement is what it was purported to be. In this case, Vic's statement indicates that the caller used a voice-changing device, calling into possible doubt whether David actually called. However, given Vic's belief that it was David that had called, and evidence of the feud between them, there is probably sufficient evidence for a jury to find David made the call. Thus David's statement is authenticated.

Spousal Privileges

David may claim that the evidence is not admissible because of spousal privileges. However, the spousal testimonial immunity only allows a current spouse to choose to refuse to testify against her husband. Moreover, although confidential marital

communications made during marriage are protected by privilege, this privilege is only held by either spouse, not an outside party. Thus, even though Vic's statement to Wanda was a confidential marital communication, only Vic or Wanda could assert the benefit of the privilege.

Confrontation Clause Issues

The confrontation Clause of the federal Constitution forbids the use of otherwise admissible testimonial hearsay evidence against a defendant if the defendant did not have an opportunity to cross-examine the hearsay declarant. "Testimonial" statements are those concerning a past event that are made to incriminate the defendant.

In this case, Vic's statement about David is likely not "testimonial" because it was not made to police or concerning a past event. Thus, it was not a statement that was made for the purposes of incriminating David and the Confrontation Clause will not apply.

Conclusion

Vic's statement should not have been admitted because it was irrelevant, but otherwise it would be admissible hearsay.

Certified Copy of Vic's 2007 Felony Perjury Conviction

Relevance

Vic's felony perjury conviction tends to prove that Vic's statement may have been a lie, negating [a] possible motive by David to attack Vic and strengthening his claim of self-defense. However, it is unclear whether there is any dispute about the veracity of Vic's statement, and thus it may not be relevant under California law. Assuming, however, that the fact of the phone call is in dispute, then Vic's prior conviction is relevant.

Authentication

The copy of the conviction must be authenticated. However, under the CEC, certified copies of public records are self-authenticating, meaning that the document itself provides sufficient evidence for a finding that it is genuine, and no additional foundational evidence is necessary.

Hearsay – Public Records Exception

The copy of Vic's conviction is hearsay because such a document is an out-of-court statement offered to prove the truth of its contents, i.e., that Vic was convicted of perjury. However, factual records made by public officials in the regular course of their duties are excepted from the hearsay prohibition. Records of convictions are made in the regular course of public officials' duties and thus are admissible hearsay as public records.

Character Evidence/Impeachment

Evidence of a victim's character to prove the victim acted in conformity with that character is generally inadmissible in a criminal trial. However, such evidence is permissible if first introduced by the defense or for the purpose of impeaching the victim. Moreover, Proposition 8 allows for the admissibility of the victim's character in a criminal trial wherever relevant, subject to balancing. Moreover, a hearsay declarant can be impeached by any applicable method.

In this case, the evidence was both introduced by David and to impeach Vic, so it is admissible either because David "opened the door" or because it is impeachment evidence.

Use of Conviction

However, a conviction can only be used for impeachment purposes under the CEC if the conviction is for a felony involving a crime of moral turpitude. Proposition 8 broadens this rule for criminal trials by allowing in any relevant convictions, which include misdemeanors involving a crime of moral turpitude.

In this case, Vic's conviction was for a felony involving a crime of moral turpitude, perjury, and thus was admissible to impeach Vic's statement.

Conclusion

The conviction was properly admitted as allowable impeachment evidence.

Certified Copy of David's 2006 Misdemeanor Simple Assault Conviction

Relevance

Evidence of David's misdemeanor assault conviction is relevant because it tends to prove that David was an aggressive individual and may have been the aggressor in the fight against Vic. This does concern a fact of consequence that is in dispute because it undermines David's claim of self-defense.

However, this evidence may be excluded because of its prejudicial effect. By introducing evidence of David's conviction for a violent crime, there is a risk that the jury will decide to punish David because of this past crime or "criminal character" rather than the conduct at issue in this case. Thus, the court should have excluded this evidence because of the risk of unfair prejudice.

Authentication

As with Vic's conviction copy, David's conviction copy is a self-authenticating document.

Hearsay

The certified copy of David's conviction is admissible under the public records exception for the reasons discussed above.

Character Evidence

Generally, evidence of a defendant's character cannot be introduced to prove the defendant acted in conformity unless first introduced by the defendant. However, where the defendant has introduced evidence that the victim has a character for violence, California law permits the prosecution to introduce evidence of the defendant's same character trait for violence.

In this case, the prosecution may be introducing David's prior conviction as evidence that David had a character for violence and acted in conformity on the particular occasion when he attacked Vic in June. This would be an inadmissible use of the conviction because at this point in the trial, David had introduced no evidence regarding his own character or evidence that Vic had a character for violence. However, because

the defendant later testified about Vic's prior fights, the error of admitting evidence of David having a trait for violence was harmless.

The Truth-in-Evidence Provision does not change the rules regarding character evidence about a criminal defendant.

Impeachment by Conviction

As discussed above, misdemeanor convictions cannot be used to impeach a witness or party. However, because of the Truth-in-Evidence provision, misdemeanors involving crimes of moral turpitude are relevant impeachment evidence.

In this case, the defendant has not yet testified, so it was improper for the prosecution to introduce the conviction in order to impeach him. Moreover, a conviction for simple assault is not a crime of moral turpitude because it does not involve lying or similar immoral conduct. Thus, the conviction is not admissible for impeachment purposes.

Other Purposes

The conviction may be used for non-character and non-impeachment purposes, however. Conviction evidence can be used if it is relevant to establishing the defendant's motive, intent, and absence of mistake, or other relevant non-character issues.

In this case, David's prior assault conviction does not appear to be relevant for any purpose besides proving that David was a violent individual. Thus, there are no other purposes for which it may be admissible.

Conclusion

David's conviction should not have been admitted because of its prejudicial effect.

David's Testimony About First Fight

Relevance

David's testimony about Vic's first fight involving the tire iron is relevant because it tends to prove that David reasonably believed Vic was violent and thus David's actions were reasonable self-defense. The fact of David's self-defense is in dispute.

Personal Knowledge

David cannot testify on matters to which he does not have personal knowledge. Here, David is claiming that he knew about the fight, however, and thus may have had personal knowledge about Vic's prior fight.

Character Evidence

As discussed above, the defendant can open the door to prove the victim's character. Thus, David could properly introduce evidence of Vic's character to prove that Vic acted in conformity with that character by attacking David on the occasion at issue.

Other Purposes

Furthermore, the evidence is also relevant to showing David's reasonable belief that he was in danger.

Conclusion

David's testimony about Vic's first fight was properly admitted.

David's Testimony About Second Fight

Relevance

David's testimony about Vic's second fight also tends to prove Vic was an aggressor. However, its probative value is likely substantially outweighed by unfair prejudice because it tends to show that Vic is a violent individual and thus may have deserved David's strangulation even if it wasn't in self-defense. The probative value is limited because David did not know about this fight before his fight with Vic, and thus it cannot be probative of David's belief regarding Vic's nature.

Personal Knowledge

David likely did not have personal knowledge of this incident, and thus it should not have been admitted on these grounds too.

Character Evidence

David could open the door on character evidence regarding Vic.

Conclusion

This evidence should not have been admitted because of its unfairly prejudicial impact.



JULY 2010
ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions.
Time allotted: three hours

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

Alfred, Beth, and Charles orally agreed to start ABC Computers (“ABC”), a business to manufacture and sell computers. Alfred contributed \$100,000 to ABC, stating to Beth and Charles that he wanted to limit his liability to that amount. Beth, who had technical expertise, contributed \$50,000 to ABC. Charles contributed no money to ABC but agreed to act as salesperson. Alfred, Beth, and Charles agreed that Beth would be responsible for designing the computers, and that Charles alone would handle all computer sales.

ABC opened and quickly became successful, primarily due to Charles’ effective sales techniques.

Subsequently, without the knowledge or consent of Alfred or Charles, Beth entered into a written sales contract in ABC’s name with Deco, Inc. (“Deco”) to sell computers manufactured by ABC at a price that was extremely favorable to Deco. Beth’s sister owned Deco. When Alfred and Charles became aware of the contract, they contacted Deco and informed it that Beth had no authority to enter into sales contracts, and that ABC could not profitably sell computers at the price agreed to by Beth. ABC refused to deliver the computers, and Deco sued ABC for breach of contract.

Thereafter, Alfred became concerned about how Beth and Charles were managing ABC. He contacted Zeta, Inc. (“Zeta”), ABC’s components supplier. He told Zeta’s president, “Don’t allow Charles to order components; he’s not our technical person. That’s Beth’s job.”

Charles later placed an order for several expensive components with Zeta. ABC refused to pay for the components, and Zeta sued ABC for breach of contract.

Not long afterwards, ABC went out of business, owing its creditors over \$500,000.

1. How should ABC’s debt be allocated? Discuss.
2. Is Deco likely to succeed in its lawsuit against ABC? Discuss.
3. Is Zeta likely to succeed in its lawsuit against ABC? Discuss.

Answer A to Question 4

1. How should ABC's Debt be Allocated?

To begin, one must determine the nature of the organization that was created. In this instance, there were no formalities or written arrangements to begin a business with Alfred (A), Beth (B), and Charles (C). Corporations require formal articles of organization to be filed with the state. In this instance, it is much more likely that a partnership existed. No formalities are required to form a partnership. Partnerships exist when two or more people agree to carry on a business for profit. In this case, ABC was formed to sell computer items for profit. Generally, partnerships are also presumed if there is an agreement to share profits equally. In this instance, there is no indication as to what profit sharing arrangement existed, if any at all. As such, the default rule is that this would be a partnership with equal sharing of profits. Furthermore, without an express agreement as to how losses will be shared, the default is that they will be shared just as the profits are shared. Therefore, losses will also be shared equally. The amount of capital contribution by each partner is irrelevant to this equation.

A will argue that he expressed a desire to limit this liability. However, absent a formal agreement and filing of the proper limited liability forms with the state (articles of organization and an operating agreement) for a Limited Liability Company, A is going to be considered a general partner. This is further indicated by his general managerial position, apparent equal voting rights, and active management in the company. A was the one to call Zeta (Z) and tell them not to accept orders from C. This indicates his active management. Limited partners, those with limited liability, generally have no managerial functions. Given there is no formal limited liability structure or arrangement, and given the various management positions by each person, they are all general partners who will share equally in the profits and losses of the business.

On top of profit and loss sharing, each general partner is liable for the debts of the entire partnership. Each partner is considered an agent of the partnership. Under agency law, any contract or tort entered into in the scope of the partnership is deemed to be partnership debt, and all partners are jointly and severally liable. As such, any of the following contracts that were properly entered into and authorized by a partner having

authority are partnership debts that A, B and C will be jointly and severally liable for as individuals.

In the event that the company is forced to liquidate and pay, the order of payment is as follows. First, the company must pay all debt creditors first. Second, the company must pay back all capital contributions from each partner, which would be \$100,000 to A and \$50,000 to B. While C may argue that his contribution was in sales, partners generally have no right to salary or compensation for services unless they are winding up. As such, C is not entitled to this amount as a capital contribution absent any other agreement. Finally, any remaining loss or profit would be distributed as applicable, which is equally in this case.

2. Is Deco likely to Succeed in its Lawsuit against ABC?

Validity of the Agreement

In order to prevail Deco (D) must show that B was authorized to enter the contract. In general, all partners are authorized as agents. However, the nature of their authority may vary. Express authority exists when the arrangement expressly states what an agent may do. Here, there is no indication that B was told to enter into a sales contract. In fact, sales were expressly reserved to C. Implied authority exists when the function is 1) necessary to carry out other responsibilities, 2) one that has been done in the past dealings without objection, or 3) normal custom for someone with the position of the agent. Here, sales are not necessary to B's technical design responsibilities, and she has never sold before. However, D could argue that a general partner in a business customarily has authority to enter contracts. Still, the express reservation of the right to likely kills this argument. Finally, D may argue apparent authority. This exists when the company cloaks the agent with authority to do certain things and later withdraws or limits that authority without notifying a customer who is still relying on that authority. In this case, there is no indication that ABC held B out to be a sales representative in the first instance. There was likely no good basis that D had to rely on any authority from ABC. However, given that B herself is a managing partner, D likely could argue that B's actions were sufficient to show that the corporation had given her authority to act. As such, they will argue that it was reasonable to rely on this without any other notice. This would bind ABC. Failing to perform on the contract is a breach of duty and the

partnership, as well as the individual partners, will be obligated to pay as described above.

Breach of Duty of Good Faith and Loyalty

Partners have fiduciary duties to each other that are described as the utmost duty of good faith and loyalty. Under the duty of loyalty, a partner must not engage in self-dealing, usurping business opportunities, or competing against the company. In this instance, B engaged in a transaction with her sister who owned D. The terms were apparently very favorable to D. This could be viewed as self-dealing because it promoted B's familial interest with her sister and was not in the best interest of the company. The duty of good faith requires that partners act in a way that solely benefits and is advantageous to the partnership. Again, B's deal with D didn't garner the profits that it should have. Furthermore, this duty requires disclosure of conflicts of interest to the other non-interested partners so that they can either cleanse the transaction through ratification or disapprove it. There is no indication that B informed her partners. The other partners have a very strong argument to bring a claim against B for these breaches in duty. This would place the entire liability for the breached contract on B, which would deviate from the normal liability scheme described above.

3. Is Zeta likely to Succeed in its Lawsuit against ABC?

Validity of the Agreement

Zeta's (Z) claim on this contract again hinges on the authority of C to enter into it. In this instance, C has the express authority to enter into sales contracts. However, this contract was for components being purchased by C, which is outside his express authority. Z may argue that components are necessary to production and later sales, which gives C implied authority to enter into contracts. Plus, it is reasonable to assume that a partner who can sell can also buy. This also lends credence to a claim of apparent authority. Z will argue that ABC has held C out as a person whose sole responsibility is to contract, and it reasonably relied on that representation. Z's main issue is that A called and gave actual notice that C could not enter into this contract. This would destroy any reasonable reliance that Z had. A told Z that B was the technical person, not C. As such, Z should have seen that his was outside the scope of C's authority.

Notwithstanding the arguments above, C is still a general partner in the company. If Z is at all knowledgeable about agency law and partnerships, Z could rightly assume that one partner doesn't have the sole authority to terminate the management authority of another partner. Management functions are only transferable and alterable upon a unanimous vote of the partnership. In this case, A alone tried to limit what C could do. Z may argue that it knew this wasn't a proper action by A and more reasonably relied on C. In the end, I think it is likely that the court would find that Z at least should have investigated further once given notice that C may not have authority, and failure to follow through made there [sic] reliance on his apparent authority unreasonable. As such, this contract is invalid and will not bind ABC. Should the court disagree, any resulting contract liability would be distributed among the partnership and A, B and C as described above.

Effect of A's Notice on C's Duties

A might also claim that C's activities outside his scope of duty were not in good faith. There is no indication that loyalty of fair dealings are implicated. So far as we know, the contract with Z could have been completely advantageous and proper. However, the argument is that acting in an area in which C knows nothing about shows a lack of obedience to his agency limits and lack of good faith in honoring partnership agreements on authority. However, nothing in C's behavior indicates an improper motive. This is a young startup with new partners. It is unlikely that C thought he was doing anything wrong. Rather, it is reasonable to assume he thought he was helping out in another area. Also, A didn't act with the consent of B. As such, there is no indication that the majority of management is at odds with C's decision to enter the contract. This appears to be solely the reservation of A with B and C. In the end, there was likely no breach of duty and any potential liability from this contract would flow to all, not just C.

Answer B to Question 4

1.) How should ABC's Debt be Allocated?

The preliminary issue to determine is what type of business was formed when Alfred (A), Beth (B), and Charles (C) agreed to start ABC computers.

Formation of a General Partnership

A general partnership is formed when two or more people agree to run a business for profit, contribute funds or services in exchange for a share of the profits. Unlike a limited liability corporation or limited partnership, a general partnership requires no formal paperwork to be filed with the secretary of state. If the above definition of a general partnership is met, then the business will be presumed to operate like a general partnership. Here, A, B, and C agreed orally to start ABC computers and did not file any corporate or partnership paperwork with the state. A contributed \$100,000, B contributed \$50,000 and her technical expertise and C contributed his services as a salesperson. They distributed the work amongst themselves. Although the facts do not state that they shared in the profits, it can be assumed that they shared in the profits because ABC becomes successful. Thus, because no formal paperwork was filed, all three members contributed money or services and share in the profits, there is a presumption that ABC operated as a general partnership.

Characteristics of a General Partnership

General Liability

In a general partnership, all partnerships share equally in liability and are personally liable for the debts of the other partners and the partnership. Although A stated that he wanted to limit his liability, there are no facts to support that this was actually accomplished through an agreement, contract or that the partnership filed for a limited liability partnership. The only way that A could limit his liability would be to become a limited partnership, but that can only be done if the proper paperwork is filed with the state; there is at least one limited partner and at least one general partner. Because there is an absence of the necessary components of a limited liability partnership, A's liability will not be limited.

Each Partner is a Fiduciary and Agent to the General Partners and Partnership

Each partner is a fiduciary and agent to the general partnership and general partners. Thus, the laws of agency apply to the partners when acting in furtherance of and conducting business for the partnership.

Default Rules for General Partnership

In absence of an agreement governing the partnership, the default rules of partnership will be applied by the court. Here, A, B, C only had an oral agreement about how to run the business and not formal structure or governing documents for the partnership. Thus, the default rules will be applied.

Several of the key default rules that are applicable in the present situation include: Each partner has equal power to manage the partnership; when there are profits they are shared equally and losses are shared like profits.

Dissolution of General Partnership

Upon dissolution of a general partnership, there is a specific order in which assets must be distributed. First, creditors must be paid and general partners who loaned money to the partnership. Second in line to [be] paid are general partners who made capital contributions. Lastly, any surplus or profits will go to the general partners or the general partners may be personally liable for existing debt of a dissolved corporation. Partners who contributed capital contributions and made loans to the company should receive their money back if it is possible upon dissolution.

Here, ABC went [out] of business and owed its creditors over \$500,000. It is unclear how much profit was made or the assets of the partnership at the time it went out of business. Assuming the partnership went out of business due to lack of profits or funds, then the creditors are to [be] paid all that was left of the partnership's assets and each general partner will be personally liable for the remaining that is owed to the creditors. As discussed above, although A wanted to limit his liability, that is not done properly, so each partner will be equally liable for the debt after all partnership assets have been used to pay the creditors and there remains a debt still owed to the creditors.

2.) Is Deco likely to Succeed in Lawsuit against ABC?

Here, B as a general partner of ABC entered into a written sales contract with Deco, Inc. The contract was extremely favorable to Deco and not ABC. Deco was owned by B's sister. When A and C learned of the agreement with Deco they informed Deco that B had no authority to enter into sales contracts and that ABC could not profit if it sold computers at that price. ABC refused to deliver the computers and Deco sued. The issues are whether B can bind the partnership and whether A and C can cancel the contract that B made.

B's Authority to Enter Into Agreements that Bind the General Partnership

Absent an agreement, the default rules of partnership state that each general partner has an equal right to manage the partnership and act as agents for the partnership in the usual course of business. This means that the general partners have authority to enter into contracts that bind the corporation as long as the contracts are in the regular course of business of the partnership. The other partners do not need to assent to know about the agreement, but will become liable on any agreement that is validly entered into by one of the other partners in the course of business. Here, A, B, and C agreed that B would be responsible for designing computers and C alone would handle computer sales. Although they delegated responsibility for tasks, there is no agreement that limited authority of any of the partners; thus the default rules apply (although one could argue that their delegations of tasks was akin to agreement to limit authority, but the mere oral agreement is not sufficient to rise to a degree of limited partnership rights). Therefore, B can enter into contracts in the regular course of business the bind the general partnership without the knowledge or consent of either A or C. Thus, it was proper for B to use her authority as a general partner to enter into an agreement with Deco to sell computers to Deco.

B's Fiduciary Duties of General Partners and Partnership

However, every general partner owes a duty to the partnership and general partners. Each partner must act as a fiduciary, owing a duty of care and loyalty to the general partnership. Each partner has a duty of lolyalty to the corporation to do [sic] not compete with the partnership, usurp the partnership's opportunities or engage in any

self-dealing where the partner receives a benefit to the detriment of the corporation. Here, B entered into a contract with Deco, which was owned by her sister. Inherently, there is nothing outrightly wrong with entering into an agreement with a family member. However, the contract that B entered into with her sister was extremely favorable to her sister and would actually cause ABC not to profit. Thus, the agreement was extremely beneficial to Deco, and B's sister, to the detriment of the partnership. Therefore, B's actions can be characterized as self-dealing because her sister received a benefit to the detriment of the partnership. Thus, B breached her duty of loyalty to the partnership.

When a partner breaches a duty of loyalty, the profits can be disgorged and the contract can be revoked or rescinded. Here, because B breached her duty of loyalty to the partnership in forming the contract with her sister, the contract can be revoked. Further, a court would likely allow the contract to be revoked. Because B's sister was a wrongdoer because [she] was well aware of B's position and responsibility/duty to the general partnership, B's sister cannot claim that she was innocent and did not know that her sister owed a fiduciary duty to the corporation.

Thus, although B had authority to enter into the contract with Deco, because B breached her duty of loyalty to ABC, ABC can refuse to deliver the computers under the contract and hold B personally liable for damages.

3.) Is Zeta likely to Succeed in Lawsuit against ABC?

Here, A contacted Zeta, Inc., a supplier of components for ABC, and told the President to not allow C to order components because that was B's job. Then C placed an order with Zeta and ABC refused to pay for components. Zeta, Inc. then sued ABC. The issues are whether A can limit C's power and whether after informing Zeta that C should not be allowed to place orders, whether ABC can refuse to pay for the components ordered by C.

A's Authority to Revoke C's Authority

As discussed above, in absence of an agreement the default partnership rules apply. In the present case, ABC has no formal agreement and thus each partner will share equally in the management duties. Additionally, each manager has the authority to bind

the partnership. Here, A and C have equal management power and power to bind the corporation. The issue is whether A has the authority to revoke C's power and authority absent any agreement.

A does not have authority to revoke C's power and authority to enter into contracts simply because he is concerned about how B and C were managing the corporation. There was no agreement as to what A was responsible for. In light of the fact that no partner was given a power similar to that of a CEO or oversight or management of the entire partnership and other partners' action, A had no authority to revoke C's authority.

Further if A was under the impression that he was [a] limited partner, he would not be allowed to engage in managing the partnership under the traditional limited liability partnership model. Under the traditional limited liability partnership model, limited partners have limited liability and cannot engage in management of the partnership. If limited partners engage in management of the partnership, then they forfeit their limited liability status. However, under the newly revised Uniform Partnership Code, if it applies in this jx, limited partners may retain their liability and manage the partnership.

Although A had no power to revoke C's authority, the president of Zeta was put on notice that A did not want C to have the ability to bind the partnership due to how management powers/oversight was delegated. Thus, the president of Zeta should have thought twice before entering into an agreement with C, because at the very minimum with such information Zeta's president should have known that there was some conflict over management powers or personal issues between C and A. It was irresponsible of Zeta's president to enter into the contract with C after receiving such information from A.

C had authority to enter into the agreement with Zeta because C's authority was not limited in any way. Thus, although Zeta was aware that he could potentially have problems with the contract, the contract was validly entered into by C (assuming all contract formalities were met). Thus, the partnership and all the partners will be personally liable for breach of contract to Zeta.

Question 5

Harriet was on her porch when Don walked up, pointed a gun at her, and said, "You're coming with me." Believing it was a toy gun, Harriet said, "Go on home," and Don left.

While walking home, Don had to pass through a police checkpoint for contraband. Officer Otis patted down Don's clothing, found the gun, confiscated it, and released Don. Later, Officer Otis checked the serial number and located the registered owner, who said the gun had been stolen from him.

A month later, Officer Otis arrested Don for possession of stolen property, i.e., the gun. During a booking search, another officer found cocaine in Don's pocket.

Don was charged with possession of stolen property and possession of cocaine. He moved to suppress the gun and the cocaine, but the court denied the motion.

While in jail, Don drank some homemade wine. As a result, when he appeared in court with counsel, he was slurring his words. The court advised Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way. Don agreed and pleaded guilty. Subsequently, he made a motion to withdraw his guilty plea, but the court denied the motion.

1. Did the court properly deny Don's motion to suppress:
 - a. the gun? Discuss.
 - b. the cocaine? Discuss.
2. Did the court properly deny Don's motion to withdraw his guilty plea? Discuss.
3. If Don were charged with attempted kidnapping against Harriet, could he properly be convicted? Discuss.

Answer A to Question 5

1) Whether the Court Properly Denied Don's Motion to Suppress

A) The Gun

Officer Otis (O) discovered a gun on Don (D) while D was walking home and subsequently encountered a police checkpoint for contraband. Thus, whether the gun is admissible evidence depends on whether the checkpoint was constitutional. D will likely argue that the checkpoint violated his Fourth Amendment rights, which prohibits unreasonable searches and seizures.

The Checkpoint

All Fourth Amendment violations must come from the hands of the government. This is easily satisfied because the checkpoint at which the gun was discovered was a police checkpoint. However, the general rule is that for a checkpoint to be outside the scope of Fourth Amendment protection, the checkpoint must be conducted in a nondiscriminatory manner, and must be for purposes other than the police investigation of criminal activity. In this case, the checkpoint was likely conducted in a nondiscriminatory manner. A nondiscriminatory checkpoint generally checks every person who passes through or some other equal rule, such as every third person that passes through.

However, D will likely argue that the checkpoint is invalid because it directly relates to the investigation of criminal activity. The United States Supreme Court has held that a constitutional checkpoint only occurs when the underlying purpose is not criminal investigation. Such examples include DUI checkpoints being motivated by the state interest of safety on public roads, and informational checkpoints, to investigate the occurrence of an accident that happened in the area recently. In this case, the police checkpoint is specifically looking for contraband, i.e., illegal materials. While O may argue that the checkpoint's purpose of checking for contraband directly advances public safety, this argument will likely be rejected given the fact that it directly relates to criminal investigation. Thus, the checkpoint is unconstitutional.

Since D's gun was discovered through an unconstitutional police checkpoint, the court improperly denied D's motion to suppress the gun.

Terry Stop and Frisk

O may attempt to argue that the gun is a valid seizure because it was performed pursuant to a Terry stop and frisk. A stop and frisk allows an officer to pat down a suspect when the officer has a reasonable suspicion that the suspect may be armed and dangerous. In this case, O will argue that he had a reasonable suspicion that D could be armed, thus giving O the ability to pat down D's clothing, thus leading to a constitutional avenue towards discovery of the gun. However, this argument will likely fail because the Supreme Court has held that "reasonable suspicion" requires more than a "hunch," but instead a set of articulated facts that give rise to the notion that criminal activity is afoot. In this case, O had no suspicion because he was merely checking people at the police contraband checkpoint. In other words, O had less than a hunch, and thus no reasonable suspicion that would give rise to a constitutional stop and frisk.

Thus, as discussed above, the court improperly denied D's motion to suppress the gun.

B) The Cocaine

At the checkpoint, O seized the gun from D. O subsequently checked the serial number and located the registered owner of the gun, who said that the gun had been stolen from him. One month later, O arrested D for possession of stolen property. During a booking search at the police station, another officer found cocaine in D's pocket. Thus, the admissibility of the cocaine depends on whether the booking search was constitutional.

Booking Search

As discussed above, the Fourth Amendment protects against unreasonable searches and seizures. The Supreme Court, however, has held that administrative searches, such as routine booking searches performed for safety and to ensure that suspects' personal items are not lost, are not subject to the Fourth Amendment. Thus, the prosecution will likely argue that the cocaine was properly found and confiscated.

However, D will argue that the cocaine should be suppressed because the booking search was based on an arrest founded on probable cause from an illegal search, i.e., the checkpoint discussed above.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine precludes the admission of evidence that was lawfully seized based on prior unconstitutional acts. As discussed above, D will argue that the gun which led to his arrest and subsequent booking search was unconstitutional, and therefore the cocaine is a fruit of the poisonous tree. In response, the prosecution will likely argue that the cocaine is admissible under the independent source and inevitable discovery doctrines.

The independent source doctrine makes evidence admissible because the police had an alternative, constitutional, avenue towards its discovery. This argument is likely to fail. The only avenue the police have to D's cocaine is from a booking search based on an arrest founded on probable cause from an illegal search. There is no other source. While O may argue that his independent source is his research of the serial number and discussion with the registered owner, such an argument is likely to fail because O would not have performed those actions without the illegally confiscated gun. Thus the independent source doctrine does not apply.

The inevitable discovery doctrine makes evidence admissible because the police authorities would have eventually discovered the evidence through their investigation anyway. The argument is also likely to fail for the same reason that the independent source doctrine, discussed above, will fail: the only route towards the cocaine that O had was from a gun that was from the fruit of an illegal search.

Thus, the cocaine is the fruit of a poisonous tree, and should be suppressed unless the prosecution can show that the taint associated with the illegal search is attenuated.

Attenuation of Taint

The attenuation of taint doctrine will admit improperly seized evidence if the police can show factors that have led to the attenuation of the taint. In this case, O will argue that, despite the fact that the gun was discovered at a police checkpoint, the probable cause for the arrest was for stolen property. Specifically, it was O's investigation into the serial number of the gun and discussion with the true registered owner of the gun which led to the probable cause to arrest D for stolen property. Prior to this attenuation, the gun was merely the product of an illegal search, but now the gun is evidence in a claim of stolen property by the registered owner. Furthermore, O will argue that an entire month passed by, thus indicating that the illegal search was not the main motivating factor in D's ultimate arrest for stolen property. A court would likely agree.

Thus, the court properly admitted the cocaine discovered in the booking search because, although the arrest was based on a gun discovered in an illegal search, there was a sufficient attenuation of the taint of that illegal search to support probable cause to [sic] for D's arrest for stolen property.

2) Whether the Court Properly Denied Don's Motion to Withdraw His Guilty Plea

Whether the court denied D's motion to withdraw his guilty plea depends on: (1) whether D's initial guilty plea was knowing and voluntary, and (2) whether proper formalities were followed when D entered his guilty plea.

D's Guilty Plea and Voluntary Intoxication

The general rule is that a defendant's plea of guilty must be knowing and voluntary. In this case, D drank homemade wine and as a result, he was slurring his words. This indicates that, even if counsel and the court advised him of the nature of his rights, it is likely that D lacked capacity to understand the material details associated with a guilty plea and subsequently D could not have made a knowing and voluntary guilty plea.

Formalities to Enter a Guilty Plea

For a guilty plea to hold up under appellate review, at the time the defendant enters a guilty plea, the judge must inform the defendant: (1) the maximum possible sentence; (2) the mandatory minimum sentence; (3) that he has a right to a jury trial, and; (4) that

he has a right to plead not guilty. All of this information and dialogue must be on the record.

In this case, none of these formalities were followed. Instead, the court merely advised D that if he waived his right to a trial, the court would take his guilty plea and let him go on his way. Thus, although the court somewhat advised D regarding his right to a jury trial, it is clear that the court failed to inform D of the maximum possible sentence, the mandatory minimum, and that he has the right to plead not guilty.

Thus, the court improperly denied D's motion to withdraw his guilty plea because: (1) it is highly unlikely that D lacked capacity through voluntary intoxication to making a knowing and voluntary guilty plea, and (2) the court failed to follow constitutionally required formalities for accepting and entering a guilty plea.

3) Whether Don May Properly Be Convicted of the Attempted Kidnapping of Harriet

Whether D may be convicted of attempting to kidnap Harriet depends on whether D committed the criminal act ("actus reus") simultaneously with the requisite mental intent ("mens rea").

Mens Rea

Since the jurisdiction is not identified, this analysis presumes that the common law is applied. Under the common law, a crime may either be a general intent crime or a specific intent crime. While there is no clear-cut rule delineating the two, suffice to say that a general intent crime requires a lower mental threshold, while a specific intent crime requires a higher threshold of mental acknowledgment, such as purposefully engaging in the crime or knowing the likely outcome of the defendant's acts.

In this case, kidnapping is a general intent crime. However, if D were charged with attempted kidnapping, it would be a specific intent crime. The inchoate crime of attempt requires that the defendant have the specific intent to commit the crime. Thus, to be properly convicted a jury must find that D specifically intended to kidnap Harriet (H). It is likely that D intended to kidnap Harriet, as he pointed a real gun at her and said, "You're coming with me." While one act (pointing the gun) or the other (saying "You're

coming with me”) alone may be insufficient to establish that D had the mens rea to effectuate a kidnapping, both acts together make it highly likely that D intended to kidnap H. However, D will point out that after H told him to go home, D obliged and left. Thus, it is unclear whether D had the requisite mental state to commit an attempted kidnapping.

Thus, because it is unclear whether D had the requisite mental state to commit an attempted kidnapping, required under the inchoate crime of attempt, D may not have the requisite mens rea to [be] convicted of attempted kidnapping. However, specific intent may be indicated by the actions that D took to effectuate the kidnapping, discussed below.

Actus Reus

While the normal crime of kidnapping requires that D falsely imprison Harriet (H) and either move her location or conceal her presence from others for an extended period of time, since D is hypothetically being charged with attempted kidnapping, D need not go that far. Under the common law, to be convicted of an attempted crime the defendant must be in “dangerous proximity” of committing the crime, while in other jurisdictions the defendant need only take a “substantial step” towards the commission of the crime.

In this case, it is likely that D’s actions satisfy both the “dangerous proximity” and “substantial step” doctrines. Walking up to someone, pointing a gun at them, and saying “You’re coming with me” is within the dangerous proximity of committing the crime, as the defendant is face-to-face with the intended kidnapping victim coupled with the fact of oral communication threatening or coercing the intended victim. Likewise, the same actions are obviously a substantial step towards the commission of a kidnapping, as D has taken the time to approach H at her house, pull a gun on her, and coerce her to come with D, which would have the result of completing the kidnapping crime, i.e., by moving the victim.

Furthermore, these acts are extremely probative as to D’s mental state, as it is highly unlikely that someone who not only took a substantial step towards attempting a

kidnapping, but is also in the dangerous proximity of doing so, would have the requisite mental state to be convicted of attempt.

Thus, if D were charged with attempted kidnapping against H, D could properly be convicted for the reasons discussed above.

Answer B to Question 5

1a. Don's Motion to Suppress the Gun

Don's motion to suppress will be based on the argument that the confiscation of his gun was an impermissible search-and-seizure in violation of his Fourth Amendment rights.

Governmental Conduct

For Fourth Amendment rights to attach, the search-and-seizure must have been done by government actors. In this case, Otis stopped Don at a checkpoint, and was presumably on duty. Note that even if Otis had stopped and searched Don while he was off duty that would still be sufficient for governmental conduct.

Reasonable Expectation of Privacy

In addition, the Fourth Amendment also requires that the individual have a reasonable expectation of privacy in the items or place searched. Here, the gun was located in Don's clothing and on his person. The fact that the police had to pat down Don to find it alone evidences that he had a reasonable expectation of privacy. The fact the gun was stolen and that Don was not the proper owner is not sufficient to demonstrate that he lacked a reasonable expectation of privacy.

Warrant

Generally, 4th Amendment search requires a valid warrant, where there must be particularity and probable cause. Here, there was no warrant. Therefore, Otis cannot have been in good faith relying on the warrant even if it was defective, so an exception to the warrant requirement must apply.

Checkpoint

Don will first argue that the confiscation of the gun was invalid because the checkpoint was not authorized by law. A valid checkpoint requires a neutral reason for stopping or selecting people for the checkpoint. For example, if the officers stop every third person that passes through the checkpoint, that would be a sufficiently neutral basis for the checkpoint. In this case, there is no specific evidence of an improper police purpose in stopping Don and the officer's actions are thus presumptively going to be valid.

A valid checkpoint also must address some legitimate government concern or interest. Again as an example, a checkpoint to stop drivers and watch for those that are driving under the influence is permissible because there is a valid interest in keeping dangerous drunk drivers off the road. Here, the checkpoint was to stop pedestrians carrying contraband. Don will argue that pedestrians, even if they are intoxicated, do not present inherently dangerous risks similar to that posed by drunk drivers.

In addition, Don will argue that while it may be permissible to stop pedestrians for specific reasons, there must be some sort of articulable purpose. Here, the officers are simply looking for contraband, which could be evidence of any offense. Officers are not allowed to stop every passerby without having any reason for the stop. Therefore, the checkpoint here is probably not valid absent some more articulable purpose.

Terry Stop and Frisk

A secondary justification to stop Don would be on the basis of a Terry stop. A Terry stop requires reasonable suspicion that the individual stopped either be dangerous or have some improper purpose. If the officer has reasonable suspicion necessary for the stop, if the officer also has reasonable suspicion that the suspect is dangerous, then the officer may pat down or frisk the individual to look for weapons. If during the patdown the officer by "plain feel" thinks an item is either a weapon or drugs, then the officer is allowed to seize the item.

In this case, there is no evidence that Officer Otis had reasonable suspicion to stop Don. Don was simply "walking home" and while [he] had a weapon, the weapon was in his clothing and there is no indication Otis saw the gun, saw a bulge in Don's clothing that could indicate he was armed, or some other reason that Don was acting suspiciously. Otis may point to the totality of the evidence here, that Don was leaving Harriet's after what might have been an attempted kidnapping, but even given this fact there is no indication from the way that Don was walking home that he had just tried to kidnap someone.

Therefore, the seizure of Don's gun was probably not valid under either the justification of a checkpoint or a Terry Stop and Frisk.

1b. Don's Motion to Suppress the Cocaine

Fourth Amendment Attachment

The search of Don that found the cocaine was done by a government official after Don had been arrested and Don had a reasonable expectation of privacy of items contained in his pocket. Therefore, 4th Amendment protections attach.

Booking Search

Don will first argue that the booking search was impermissible. A booking search is valid as long as it is conducted as a result of and in accordance with the regular practice of the police office. If so, the search does not require probable cause, nor does it require reasonable suspicion. In this case, the cocaine was found during a booking search of Don, in Don's pocket. Because there is no evidence of anything other than the fact that this was a routine booking search, the search-and-seizure was proper.

Fruit of the Poisonous Tree

Even though the booking search itself was valid, Don will argue that it is impermissible because the booking search only arose as the result of the impermissible search-and-seizure that led to the gun. The booking search was conducted after Officer Otis arrested Don for possession of stolen property in the gun found at the checkpoint search.

Evidence that is discovered through impermissibly tainted evidence is also invalid. In this case, because the gun was improperly seized, the prosecution will have to show some alternative means of acquiring the evidence. If the prosecution can show that they had an independent source for the evidence, would have inevitably discovered it anyway, or that the secondary evidence arose from intervening acts of free will by the defendant, then the evidence is valid anyway.

Independent Source

If the police can derive the evidence from an independent source, that will be sufficient to cleanse the taint of the impermissible evidence. In this case, the officers found the cocaine as a result of the booking search, which only arose directly from the seizure of

Don's gun. After the officers seized the gun, they checked the serial numbers and located the registered owner, who informed the officers that the gun had been stolen. The officers then followed up on the owner's statements and arrested Don for possession. There was thus only one source for the evidence that led to the cocaine, and that source was impermissibly tainted.

Inevitable Discovery

If the police can show that they would have inevitably discovered the cocaine that would also be sufficient to cleanse the taint of the seizure of the gun. Again, there is no evidence here that the officers would have discovered the cocaine without the information obtained from the gun. Without the gun, the officers probably never would have discovered the cocaine, and thus the inevitable discovery exception is inapplicable.

Intervening Acts of Free Will by Defendant

Finally, if the officers show that there had been some intervening act of free will by Don that led to the discovery of the cocaine that could lead to its admissibility as well. The prosecution will point out the fact that the police did not arrest Don for one month after the initial search, and they will thus argue that time was sufficient to clear the taint. This is probably the prosecution's best argument; however, it still fails to show any direct relationship to the evidence from anything other than the illegal search. Therefore, the cocaine will probably have to be excluded as well.

2. Don's Motion to Withdraw His Guilty Plea

Before a judge can accept the defendant's guilty plea, the judge must inform the defendant that the defendant has a right to plead not guilty and demand a trial. The judge must also inform the defendant of any mandatory minimums that will result from the guilty plea as well as the possible maximum penalty. The judge should also inform the defendant of his ability to secure an attorney or alternatively proceed per se. Finally, the judge must inform the defendant that all of this information and the defendant's plea itself must be on the record.

In this case, the judge did not do any of this. The court advised “Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way.” Don then pled guilty. The judge did not inform Don of the possible results of pleading guilty, nor did the judge tell him that his plea would be recorded. Arguably, the judge satisfactorily met the requirement of informing Don of his right to trial by telling him about his ability to waive it, but the judge still should have expressly stated his right, instead of simply discussing his ability to waive trial.

Furthermore, Don will point to the fact that the judge should have been aware of Don’s lack of capacity when making the decision. As a result of drinking wine in jail, Don “was slurring his words” when he went into court. The judge at this point should have been even more careful than normal to comply with the various requirements in taking a defendant’s guilty plea. However, the judge failed to meet these requirements. Therefore, the court improperly denied Don’s motion to withdraw his guilty plea.

3. Attempted Kidnapping

Kidnapping requires refraining a person’s ability to move or leave along with either concealment or movement of the person. Here, there was no actual kidnapping because even if Harriet’s ability to leave was briefly restrained by Don pointing the gun at her, because Harriet didn’t believe the gun was real and Don left, there was no concealment or movement.

Attempted kidnapping requires the specific intent to kidnap as well as a substantial step towards completion of the act. In this case, while there is no direct evidence of Don’s state of mind, his actions demonstrate that he probably had the requisite specific intent to kidnap. First, as evidenced by his later arrest, Don had brought a real gun with him, pointed it at Harriet and made a demand of her. This is all relevant to show Don’s state of mind, that he did intend the outcome he stated that she come with him. Furthermore, had Harriet believed that it was a real gun she probably would have gone with him, sufficient for kidnapping. Therefore, while more evidence would be helpful, there is a sufficient amount of evidence to conclude that Don had the requisite intent.

In addition to the specific intent to kidnap, Don must also have completed a substantial step towards completion of the kidnapping. This test is not the most restrictive. If Don had simply brought the gun to Harriet's home and at the point was arrested, the fact that he brought a gun with him that far would probably be a substantial step. Here, however, Don not only brought the gun, he pointed it at Harriet and made a demand. There was not much more left for Don to do. Don may point to the fact that the act itself was not completed, or the fact that Harriet was not scared, but neither of these outcomes is required for an attempt. Therefore, Don would be convicted of attempted kidnapping.

The minority rule would require not that Don completed a substantial step towards kidnapping but rather that Don was dangerously close to succeeding in kidnapping. Here, the acts of drawing the gun and demanding that Harriet come with him were probably sufficient to be dangerously close to success. Don will again raise the fact that Harriet did not come with him, and will have a better argument by pointing to the fact that Harriet was not in fact even scared of him, but again this argument goes to the result of the actual crime of kidnapping. Don had done everything required to complete the act besides Harriet acquiescing to his demand. Therefore, because Don had done everything he could besides trying to further convince Harriet the gun was real, he would probably be convicted even under the minority rule.

Question 6

In 2000, Harry and Wanda, California residents, married. Harry was from a wealthy family and was the beneficiary of a large trust. After their marriage, Harry received income from the trust on a monthly basis, and deposited it into a checking account in his name alone. Harry remained unemployed throughout the marriage. Wanda began working as a travel agent. She deposited her earnings into a savings account in her name alone.

In 2003, Harry and Wanda purchased a vacation condo in Hawaii. They took title in both their names, specifying that they were “joint tenants with the right of survivorship.” Harry paid the entire purchase price from his checking account, which contained only funds from the trust. Harry and Wanda orally agreed that the condo belonged to Harry.

In 2004, Harry purchased a cabin in the California Mountains to use when he went skiing. He paid the entire purchase price of the cabin from his checking account, and took title to the cabin in his name alone.

In 2005, Wanda commenced a secret romance with Oscar. During a rendezvous with Oscar, Wanda negligently operated Oscar’s car, causing serious personal injuries to Paul, another driver.

In 2006, Wanda received an e-mail advertisement inviting her to invest in stock in a bioengineering company. She discussed the investment with Harry, who thought it was too risky. Wanda nevertheless bought 200 shares of stock, using \$20,000 from her savings account to make the purchase. She put the stock in her name alone.

In 2007, Harry and Wanda separated. Shortly thereafter, as a result of the car accident, Paul obtained a money judgment against Wanda.

Harry and Wanda are now considering dissolving their marriage. The condo and cabin have increased in value. The stock has lost almost all of its value.

1. In the event of a dissolution, how should the court rule on Harry’s and Wanda’s respective rights and liabilities with regard to:

- a. The condo in Hawaii? Discuss.
- b. The cabin in the California Mountains? Discuss.
- c. The stock in the bioengineering company? Discuss.

2. What property can Paul reach to satisfy his judgment against Wanda? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. There is a presumption that all property acquired during marriage is community property (CP). In general, community property is defined by what it is not – it is not separate property. Separate property (SP) is all property acquired by either spouse before marriage so after dissolution or acquired by inheritance. The rents and income from SP are also considered SP.

In the event of a divorce, CA requires all CP to be distributed equally between both spouses. This applies to all CP property as well as CP liabilities. Each item of CP should be distributed 50/50, unless economic circumstances warrant a different distribution. At divorce, the court has no jurisdiction to award SP. Each spouse keeps his or her own SP.

In determining whether an asset is classified as CP or SP, one must look to the source of the asset. One must also determine if either spouse has taken any action to recharacterize the property or if any presumption applies to the property.

1. Rights and Liabilities of Harry (H) and Wanda (W)

In determining the rights of H and W in all of the property at dissolution, each asset must be classified as either CP or SP.

(a) The Condo in Hawaii

Funds used to Purchase the Condo

The condo in Hawaii was purchased in 2003, while H and W were married. Since this was acquired during marriage, the general CP presumption is raised. H will attempt to rebut this CP presumption by tracing the purchase price of the condo. The condo purchased with money from H's checking account. This checking account contained only income from H's trust. These funds came from his inheritance only and (as mentioned above), money received during marriage from inheritance is characterized as SP and income from SP is characterized as SP. This checking account was never commingled with any CP funds and thus, all of the money in the account (the income

and any principal) would be SP. Further, H evidenced his intent to keep his money as his SP since he took title to the account in his name alone. Thus, the condo was purchased with SP funds.

Titled as “Joint Tenants with the Right of Survivorship”

Purchasing an item of property with SP funds does not alone classify the item as SP. One must also look to the title taken on the property. In this case, H and W took title as “joint tenants with the right of survivorship.” In Lucas, the CA court held that any taking of property in joint and equal form evidences an intent to take the property as CP. The CA legislature passed a statute known as the anti-Lucas statute, which has been in effect since 1984. Under this law, joint title is still considered CP (as in Lucas) but the court dictated how SP purchase money must be treated. Absent any written agreement between the spouses, the SP proponent will not have [been] apportioned into the joint tenancy property. If no written agreement is established, the SP proponent will only be able to assert a right to reimbursement for the amount paid towards the purchase price.

Therefore, in this case, although SP was used to purchase the condo, the condo would be characterized as CP. H and W orally agreed that the condo was H’s SP, but this agreement was not in writing and is thus unenforceable under the anti-Lucas statute. In the event of dissolution, H and W will each own a 1/2 interest in the condo and, thus, they will each be entitled to 1/2 of its appreciation amount. H will be reimbursed from the community for his SP contribution to the purchase price. Thus, he will be reimbursed the entire price of the cabin when it was purchased since his SP paid the entire amount.

(b) The Cabin in CA

The cabin was purchased in 2004 while H and W were married and, thus, the general CP presumption is raised. Again, H would attempt to rebut the CP presumption by tracing the purchase funds back to his SP checking account (discussed above). H paid for the entire purchase price of the cabin with SP funds.

He would also show his intent to keep his SP interest by showing that he took title to the property in his name alone. Taking title in one’s name alone is not enough to rebut the

CP presumption but when this is coupled with a purely SP purchase price, the SP proponent will be able to rebut the presumption and prove the property is SP.

Therefore, at dissolution, the cabin will be characterized as H's SP and it, along with its increase in value, will be awarded entirely to H. Since H did not use his cabin for any business purpose during the marriage, the community does not receive any ownership interest as a result of its increase in value during the marriage.

(c) The Stock

Funds used to Purchase the Stock

In 2006, W purchased stock in a bioengineering company. This stock was purchased during marriage and is presumed to be CP. The source of the funds used to purchase the stock came from W's savings account. The money in this savings account came entirely from W's earnings as a travel agent. The earnings of each spouse during marriage are considered CP. Thus, the money in the savings account was all CP.

W would attempt to show the money was actually her SP since the account was titled in her name alone. But, as mentioned, title in one spouse's name alone is not enough to evidence a SP interest. The SP proponent must also be able to trace the funds to SP monies or must be able to show that the other spouse gave a gift of his or her CP share. In this case, there is no evidence that H intended to gift away his CP interest in W's earnings. Further since 1985, any transmutation, which is any agreement to change the character of property during the marriage, must be in writing. There is no writing to evidence the intent to transmute these earnings from CP to W's SP. Therefore, the stock is considered all CP.

Management and Control of CP

Under CA CP laws, each spouse is given equal rights to manage and control the CP, unless a specific exception applies. Exceptions are realized for the sale of real property, for any gift of CP, or for any sale of the necessities within the home (such as furniture). If any of these exceptions do not apply, either spouse is permitted to unilaterally make decisions regarding the CP.

In this case, H might argue that he told W the investment was too risky and thus, the liability for the loss in the stock value should be hers alone. But this would not be a winning argument since W was permitted to unilaterally spend CP monies. None of the exceptions above apply to this situation. Stock is not real property. This was not a gift since W paid \$20,000 for the stock and the stock is not a necessity of the home.

Therefore, at dissolution, the liability for the loss in the stock value should be distributed equally between H and W.

Breach of Fiduciary Duty

H might also claim that W breached her fiduciary duty when she purchased this stock. In all marriages in CA, both spouses are considered fiduciaries of each other. They owe each other a duty of care and loyalty regarding CP funds. One spouse is permitted to make decisions regarding purchases and sales, but the spouse will breach his or her duty if he or she is grossly negligent or reckless in some CP transaction.

H will argue that W was at least grossly negligent when she refused to listen to his complaints regarding the purchase of the stock. He told her it was too risky and she was grossly negligent when she ignored this fact.

W would counter-argue that this was just a typical investment and there was no gross negligence. First, she had no knowledge that this stock was actually risky. All she had was H's opinion that the stock was too risky but this is not enough to show she was grossly negligent when she decided to purchase it. Second, even if she had some knowledge that the stock was risky, this is typical in most stock purchases. No stocks are guaranteed to make money and in almost all stock purchases, the buyer takes some sort of risk. This inherent risk does not equal gross negligence at all times. Since this was not a grossly negligent or reckless use of CP funds, H cannot prove that W breached a fiduciary duty and H cannot collect any losses in the value of the stock from W.

2. Property to satisfy Paul's Judgment

In general, a creditor of either spouse can reach the CP of the couple and the creditor spouse's SP to collect on the debt. This general rule applies to debts incurred during marriage as well as debts incurred prior to the marriage.

For certain kinds of judgments, there are rules that dictate how the creditor can collect from the spouse. For tort judgments, the rules depend on whether or not the tortfeasor spouse committed the tort while she was benefiting the community. If the tort was committed while the spouse was engaging in activity that benefits the community, the creditor must collect from the couple's CP first and then, if necessary, collect from the tortfeasor's SP. If the tort was committed while the spouse was not engaged in activity that benefited the community, the tort creditor must first collect from the tortfeasor's SP and then collect from the couple's CP if necessary to satisfy the entire judgment.

In this case, W committed a tort against P while she was married. This tort was committed while W was having a secret rendezvous with her lover Oscar. Thus, W was not engaging in an activity that benefited the community at this time. H had no knowledge of this activity and this activity certainly cannot be said to have benefited H. Therefore, P must first collect from W's SP to satisfy his judgment and then, if necessary, he can collect from the couple's CP. At no point is he permitted to collect from H's SP.

H may argue that this debt should be considered entirely W's SP debt because P obtained the judgment against W after H and W separated. Thus, he would argue that the debt was incurred after separation, when the community is no longer liable. H's argument would not be a winning argument. In determining liability for a tort, the liability will attach at the time the tort is committed, not at the time the judgment is actually obtained. Thus, a court will determine that W incurred this liability in 2005 when she injured P, not in 2007 when P finally obtained the judgment.

Thus, since this debt was incurred during marriage, the rules discussed regarding the order of satisfaction apply. P must first collect from W's SP but, at dissolution, W has no SP. Then, P must collect from the couple's CP. Here, the only property

characterized as CP is the stock and the Condo in Hawaii. P can reach the stock (even though it has almost no value) and then he can reach the increased value of the condo. In reaching the condo, he cannot collect from the share that H is entitled to for reimbursement of the purchase price.

Answer B to Question 6

Introduction

Because Harry and Wanda are residents of California, California law is applicable. California is a community property state. All property acquired during marriage by either spouse is presumptively community property. All property acquired by either spouse before marriage or after permanent separation, or by gift, will, or inheritance, is presumptively separate property. In determining the characterization of an asset, a court will look to the source of funds used to purchase that asset. A court will also consider any actions taken by the parties that may have affected its characterization, as well as any presumptions of law that affect the asset's character. Finally, the mere fact that an asset has changed form will not change its character. With the above principles in mind, we will now look at each asset in turn.

The Condo in Hawaii

Source

The source of funds used to purchase the vacation condo in Hawaii was from Harry's checking account. Harry's checking account is entirely composed of money that he received from a family trust. The money received from this family trust is considered a gift or inheritance. Thus, the money is his separate property. In addition, he did not commingle his separate property with the funds of the community, which might have given rise to a presumption that family expenses paid from those assets are community property. The title to the condo was taken in both spouses' names, and was taken as a joint tenancy with a right of survivorship. Thus, it was taken in joint and equal form.

Presumption: Joint and Equal Form

Where joint and equal title is taken to property which was acquired through a spouse's separate property funds, the Lucas and Anti-Lucas principles apply. The property itself is presumptively community property. Upon death, Lucas applies to hold that absent an express agreement to the contrary, the separate property which was used to acquire title in the property in question will be deemed to have been made as a gift to the community. Thus, the donor spouse has no claim of ownership or reimbursement. Upon divorce, the principles of Anti-Lucas apply. These provide that absent some

express agreement to the contrary or express wording in the deed, upon dissolution of marriage, the spouse who gave separate property toward the purchase of an asset that was acquired in joint and equal form is entitled to reimbursement for the down payment, improvements, and principal, but not an ownership interest.

Actions: Oral Agreement that the Condo Belonged to Harry

Spouses may make agreements or gifts that transfer property from one form to another, whether from separate to community or community to separate. This is called a transmutation. Since January 1, 1985, all transmutions must be in writing, signed by the party to be adversely affected, and must clearly indicate that a change in characterization is intended. In this case, the agreement between Harry and Wanda that Harry would own the condo was made orally. Thus, it is not a valid transmutation and this agreement did not change the characterization of the condo.

Disposition: Community Property with Right of Reimbursement

In this case, the parties are considering dissolution of marriage. Anti-Lucas will apply. This means that upon divorce, the condo is community property and Harry can claim a right to reimbursement for the purchase price of the vacation condo, since he paid this purchase price with his separate property funds. However, he is not entitled to an ownership interest in the condo. Therefore, any increase in the value of the condo belongs to the community and will be split evenly between Harry and Wanda.

The Cabin in the California Mountains

Harry purchased the cabin in the California mountains with money from his checking account. The money in his checking account was derived solely from the trust that he inherited. Because these funds are derived from inheritance, they were his separate property. He took title to the cabin in his name alone. Separate property includes all assets purchased entirely from separate property, unless some presumption such as that of joint and equal form applies. Because Harry did not take title in any joint and equal form, a presumption of a gift to the community does not arise under Lucas or Anti-Lucas. Thus, the cabin is Harry's separate property. Upon dissolution of marriage, Harry alone will take the entire cabin, including any increase in its value.

The Stock in the Bioengineering Company

Source

Wanda purchased stock in a bioengineering company using \$20,000 from her savings account. The money from her savings account was derived from her work as a travel agent. Salary that either spouse earns during the time of marriage is community property. Although Wanda kept her earnings in a separate account in her name alone, this does not change the fact that the funds are community property. Form of title is generally inconclusive. This fact might have been relevant if Harry had sought to use those funds to pay his own premarital debt. However, since that is not the case, then funds are community property. Thus, the stock was purchased with community property funds and will be presumptively community property.

Action: Title Taken in Wanda's Name Alone

Wanda took title to the stock in her name alone. Generally, the fact that a spouse takes title to an asset in his or her name alone does not change the presumption of community property, if the funds used to purchase that asset were community funds. In this case, the fact that Wanda took title to the stock in her name alone does not make the stock her separate property, unless it can be shown that some gift was intended. Wanda will likely argue that Harry intended to make a gift of the stock to her as her separate property, since he did not think the investment was a good idea and therefore did not want the investment for the community. However, it is unlikely that Harry's disapproval meant that he intended to make a gift of community assets to purchase the stock. Instead, Harry did not want Wanda to purchase the stock at all. Thus, he did not make a gift to her of the stock, and it will therefore remain as community property.

Action: Purchase without Harry's Permission

Under the equal management powers doctrine, either spouse alone may encumber, sell, or otherwise dispose of community assets. Thus, the fact that Wanda purchased the stock without Harry's permission will not change its characterization. In addition, Harry is not necessarily entitled to reimbursement for the community property that Wanda used to purchase the stock, since she had the power to use that money to purchase stock.

Duty of Loyalty

Each spouse owes a duty of the highest good faith, loyalty, and fair dealing to the other spouse. Neither may gain a financial advantage at the expense of the other. Also, neither may make a grossly negligent or reckless investment of the community's funds. In this case, Harry thought that the stock was too risky. If the stock was in fact so risky that investing in it was grossly negligent and reckless, Wanda will be said to have breached a duty of loyalty to her husband. If that is the case, she may have to reimburse him for his share of the community funds that were used to purchase the stock. However, the mere fact that Harry thought the investment was risky does not alone make it a reckless investment. Thus, it is unlikely that Wanda breached the duty of loyalty to her husband.

Disposition: Community Property

Because the stock was purchased with community funds and form of title did not change this, the stock is community property. It and its loss in value will be equally divided upon dissolution of marriage.

What Property can Paul reach to Satisfy his Judgment against Wanda?

Tort Liability

Where a spouse commits a tort during the marriage, the injured party can reach community assets and the separate property assets of the tortfeasor spouse. The order in which these items will be used to satisfy the obligation will depend on whether the tortfeasor spouse committed the tort to "benefit" the community. In this case, Wanda committed the negligent act while meeting Oscar, with whom she was having a secret romance. Having a secret romance with another man was not an action taken to benefit the community. Thus, the tort was not committed for the benefit of the community. This means that Paul may first reach Wanda's separate property, and then Paul may reach community property. Paul may not reach any of Harry's separate property, because Harry is not personally liable, and this is not a contract for necessities.

The Condo

The condo is community property upon divorce. However, where title is taken in the form of a joint tenancy with the right of survivorship, during marriage each spouse will own a 1/2 separate property interest in this property. This means that creditors of one spouse can only reach the 1/2 separate property interest of that debtor spouse. In this case, Paul may reach only Wanda's 1/2 separate property interest in the condo. This will be the first item that will be used to satisfy Paul's judgment, since it appears to be the only asset that is Wanda's separate property. Paul may not reach Harry's 1/2 separate property interest in the condo.

The Cabin

The cabin is Harry's separate property because it was purchased with his separate property funds and title was not taken in joint and equal form. Thus, Paul may not reach the cabin, since Harry is not personally liable and this is not a contract for necessities.

Harry's Checking Account and Trust Fund

Harry's checking account and his trust fund are his separate property. They may not be used to pay Paul.

The Stock

The stock is community property. Thus, once Paul has exhausted Wanda's separate property, if he has not satisfied his judgment he may proceed to use the stock as well.

Wanda's Savings Account

The savings account in Wanda's name is community property. Thus, it may be reached to satisfy Paul's judgment.