California
Bar
Examination

Essay Questions
And
Selected Answers

February 2010

THE STATE BAR OF CALIFORNIA
OFICE OF ADMISSIONS
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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 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.

FEBRUARY 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

On April 1, Pat, a computer software consultant, entered into a written services contract with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. The contract provided that Danco would pay Pat $25,000 on completion of the work and that the programs were to be delivered to Danco no later than May 1. The contract stated, “This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties.”

Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future, and he consequently turned away opportunities to take on more lucrative work.

On April 15, Pat called Chelsea, the President of Danco, who had executed the contract on behalf of Danco, and told her, “I’m having some problems with program number 3, and I won’t have it ready to deliver to you until at least May 8 – maybe closer to May 15. Also, I have some doubt about whether I can even write program number 4 at all because your computer hardware is nearly obsolete. But I’ll get programs numbers 1 and 2 to you by May 1.”

Chelsea said in response, “I’m sorry to hear that. We really need all four programs. If you can’t deliver until May 15, I guess I’ll have to live with that.”

On April 28, Pat called Chelsea and said, “I’ve worked out the problems with programs numbers 3 and 4. I’ll deliver them to you on May 12.”

Chelsea responded, “I’ve been meaning to call you. I’m going to start looking around for another consultant to do the work because I consider what you said in our April 15 telephone discussion to be a repudiation of our contract. My lawyer tells me that, because of the language in the contract, nothing I said to you in that conversation matters. You repudiated the contract, so we don’t owe you anything.”

Can Pat prevail in a suit against Danco for breach of contract, and, if so, what is the measure of his damages? Discuss.

Answer A to Question 1

The issue is whether Pat has a valid contract with Danco and whether Danco has breached such contract, and what damages Pat is entitled to as a result.

Service Contract

Contracts for services are governed by the common law. Although a computer program could be considered a good, the UCC only applies to tangible, movable goods. Therefore, the UCC does not apply and the contract, if any, is governed by the common law.

Elements of a Contract

In order to have a valid contract, there must be mutual consent and consideration. There was mutual consent here, because Pat offered to write four computer programs for use by Danco, and Danco accepted the terms of Pat's offer in a written agreement between the two. The consideration requirement is satisfied because there was a bargained-for exchange: four computer programs in exchange for $25,000. Thus, there was an offer, acceptance and valid consideration; a valid contract exists between Pat and Danco.

Statute of Frauds does not apply

The Statute of Frauds requires that any contract for goods greater than $500, or services which may take longer than one year to be performed, must be in writing, and signed by the party to be charged. Here, the contract is for services, and was to only take one month to perform. Thus, the Statute of Frauds does not apply. Although the agreement is in writing this was not necessary.

Time of the essence

The contract stated that the work was to be completed and delivered to Danco "no later than May 1." Thus, if this is considered to mean that time is of the essence, then performance after such time could be considered a material breach of the contract. However, contracts are generally given a reasonable time for performance under the common law, and if time was not of the essence then Pat has a reasonable time to finish his work. In any case, this condition was waived as discussed below.

April 15th call form Pat

Danco claims that Pat anticipatorily repudiated the contract when he called on the 15th of April saying, "I won't have it ready to deliver to you until at least May 8th—maybe closer to May 15." A contract is anticipatorily repudiated when a party unequivocally manifests an intention to not perform the agreement by words or conduct. Here, although the contract specified performance by the 1st of May, Pat indicated that he would perform at least half of the services by that time, and indicated he would complete the other two within a couple weeks. Thus, he did not unequivocally manifest an intention to not perform the contract, but merely requested an extension of time, or modification of the contract. Thus, Danco could not treat the contract as breached but could ask for assurances that the contract would be performed.

Attempted Modification of the Contract

Chelsea, who has authority to bind Danco because of her implied apparent authority as President, manifested assent to the modification when she said "I guess I'll have to live with that." A modification under the common law, however, requires additional consideration to be valid. Here, there was no change in the form of consideration, or any additional consideration by Pat to be given extra time; therefore, the modification attempt was invalid. The oral nature of the modification was not a problem, because this is a services contract and the modification did not bring the services to beyond one year, as required for the Statute of Frauds to apply.

Waiver of condition to perform on May 1st

Danco may claim that its duty to pay Pat was expressly conditioned on performance by May 1st; therefore no payment is due. As a condition precedent, no duty to pay would arise until it is met. However, Pat will counter that Chelsea, as President, waived the condition by saying "I guess I'll have to live with that." Even if a condition is not met, it may be waived by the party benefited by the condition. Thus, Danco must pay Pat as promised under the agreement because the condition was orally waived by the president of the company. Since the Statute of Frauds does not apply, this oral waiver was valid.

April 24th call: Anticipatory Repudiation

On April 24th, when Pat made assurances that the contract would be performed by the 12th of May, Chelsea responded by saying that she was "going to start looking around for another consultant" and that the company did not owe Pat anything. Pat may treat this as an anticipatory repudiation of the contract, because it manifests an unequivocal intention not to perform. He may thus, at this point, stop performance and sue for breach of contract. In the alternative, he may wait to sue for breach of contract on the date when performance is due, or ignore the repudiation and encourage Danco to pay for the programs.

Integration Clause and Parol Evidence Rule

Danco claims that no evidence of oral agreements will be allowed because the writing was intended to be a final expression of the agreement, and therefore fully integrated. The parol evidence rule, however, only bars oral evidence prior to or during negotiations leading to the writing. Any subsequent oral modifications or agreements are admissible; thus, Pat may validly admit evidence of waiver of condition and anticipatory repudiation in the conversations on May 1st and April 24th.

Expectation damages

Because Pat had a valid contract, which Danco breached by anticipatory repudiation, he is entitled to compensatory damages to put him in the position had this wrong and resulting damage not occurred. Such damages must be caused by the breach, [be] foreseeable, and certain. Pat must also have mitigated any unnecessary damages. Here, the damages are certain ($25K) and foreseeable as a result of Danco's breach, because this is what the parties expressly agreed to as payment.

Consequential damages

Pat will also claim right to consequential damages, because he turned away opportunities to take on more lucrative work in anticipation that the job would lead to future work. These damages lack certainty, however, and were not foreseeable at the time of contract formation. Danco was not aware of Pat's other opportunities to take on more lucrative work. Therefore, they will not be awarded.

Restitutionary Damages

In the alternative, Pat may seek return of any unjust enrichment of Danco should the court find fault with the contract, or that Pat breached. He would be entitled to the amount that Danco unfairly benefited: if Danco was given the two programs in the case at hand, Pat may seek recovery for the value of the benefit to Danco.

Answer B to Question 1

Can Pat Prevail Against Danco for Breach of K?

<u>Applicable Law</u>

Pat has entered into a services contract ("K") to perform work for Danco between April 1 and May 1 or, alternatively, May 15. Thus, this K will be governed by common law rules.

<u>Formation</u>

For Pat to win on a breach of K claim, he must first show there was a valid contract. A valid contract requires an offer, acceptance and consideration. In this case, the first line of the facts state that Pat entered into a written services K with Danco, to write software programs in exchange for $25,000. The facts imply a valid offer was made and properly accepted. Both parties have provided consideration, a bargained-for legal detriment, when Pat agreed to perform services he was not legally required to do and Danco agreed to pay Pat without having a legal obligation to do so. Thus, a contract was likely made.

<u>Terms</u>

A contract at common law must also state material terms with definiteness. In an employment services contract, the primary term needed is duration. Here, the K calls for services to be provided for one month and then the K will end. Thus, duration has been provided and the contract will not fail for lack of material terms.

<u>Statute of Frauds</u>

This is a services K which will end, by its terms, [and/or] can be finished within one year of its inception. Thus, the Statute of Frauds will not apply. The Statute of Frauds, if applicable, requires a K to be in writing and its subsequent modifications to be in writing as well, pursuant of the Equal Dignitaries doctrine.

Modification Clause (generally not valid in CL outside SOF)

The facts state that the written K has a clause in it, however, stating that the initial written services contract signed by Pat and executed by Danco's President, Chelsea, "is the complete and entire contract between the parties and no modification of this contract shall be valid unless written and signed by both parties." Generally, at common law, clauses which seek to invalidate modifications that are not in writing are themselves not valid. Thus, though the contract states as much, a court will still allow evidence of oral modifications, particularly in light of the Parol Evidence Rule. This is important because the facts state that the contract was later sought to be modified orally by Pat, which I will discuss two sections below.

Parol Evidence

Parol Evidence Rule ("PER") states that generally, where a written contract is intended to be a complete and final integration of a K, that no evidence may be admitted outside of the four corners of the contract to establish whether a breach has occurred. However, an exception exists for subsequent modifications. In this case, as noted above, the K states that it is intended to be the "complete and entire contract," language sufficiently similar to that required under the PER. However, to the extent that the contract was later modified, the court will allow at common law for evidence, whether oral or written, to be admitted to establish any subsequent modification agreed to by the parties.

Modification without Consideration

Pat, after signing the K, called Danco and told them that he wasn't sure he could complete the K on time and would need 8 to 15 extra days to finish the project, as well has voicing concerns of his ability to finish it at all. Chelsea replied, "if you can't deliver until May 15, I guess I'll have to live with that."

Danco will want to argue that Pat's failure to provide for the four programs he agreed to write by the stated date of May 1 will constitute a material breach, thus entitling them to avoid their obligation to perform on the contract. However, Pat will want to introduce this evidence as showing a modification to the original agreement. While the PER will not bar this evidence, the modification Pat seeks to establish occurred without any subsequent consideration. Generally, at common law, consideration is required for a subsequent modification to be considered valid. However, courts have generally been willing to find that consideration when both parties limit their right to assert their rights and sue on the original contract. Here, Danco's President, likely authorized to negotiate and make contractual agreements on behalf of Danco, appears to have agreed to the modification by stating, "I guess I'll have to live with that." Thus, Pat will argue Danco agreed to limit its rights to sue based on the original May 1 deadline, constituting consideration. However, Chelsea did not explicitly agree. Danco would likely argue that she was simply stating that, at that time, she could not legally compel Pat to finish and was thus simply stating her acknowledgment that she would have to wait until May 8 or 15 for the programs, but not that she would be willing to ignore Pat's failure to abide by the K. Further, Pat does not appear to have limited his own consideration in this modification. He still appears to have the full right to demand $25,000. Thus, Danco will likely succeed in asserting that this modification, even if admissible, is not valid.

<u>Waiver to Time is of the Essence Clause</u>

Generally, a "time is of the essence" clause is a clause in a K that asserts a necessity for the contract to be finished, or one party to perform fully, by an established date. Here, Pat is faced with a deadline of May 1, though the contract does not explicitly state that time is of the essence, but merely provides for the deadline. If Danco wishes to assert that Pat's failure to finish by May 1 constitutes a material breach pursuant to the terms of the contract, Pat should then argue that Danco waived its right to that deadline and the time is of the essence clause when Chelsea said she would have to live with Pat's tardiness. Again, Danco will argue this does not constitute an explicit waiver. This is a close situation because of the vagueness of the statement, but a court will likely side with Pat that the deadline was waived by Chelsea, who as President of Danco is authorized to alter the K with Pat.

However, waiver usually occurs once a time is of the essence clause has passed. Thus, a court may deem the waiver argument is not as sufficient as an estoppel argument.

Estoppel

Even if Pat cannot assert a waiver claim, which usually occurs after a term has not been agreed to, Pat can assert an estoppel argument. Estoppel occurs when one party makes assurances that the other party can be reasonably, objectively expected to rely on, and the other party does so to their detriment. In this case, Chelsea's claims are vague and imply her acceptance of Pat's tardiness. A reasonable person, when told that the other person expecting earlier delivery, will "live with" later delivery would assume that statement to imply acceptance. Pat indeed relied on that assertion and continued to perform his services, which is to his detriment. If he were in material breach and were told so and that he would be sued in such a manner, he would not be required to continue to perform fully. Pat continued to work for 13 days after his April 15 discussion of his problems with Chelsea and announced he would finish the services he was expected to perform on May 12. Thus, Pat's estoppel claim should succeed, and the modification will thus be included in the K.

Anticipatory Repudiation

Danco will alternatively argue that Pat gave Danco an anticipatory repudiation when he announced he could not perform his services by May 1. When a party asserts it will not perform its contractual obligations prior to deadlines stated in a K, giving the other party his reasonable grounds to believe the K will not be performed, the party notified will have the right to cease its own performance and sue for breach of K unless it has already performed fully. Alternatively, the party has the right to seek assurances from the party concerned about its potential failure to perform before continuing on the contract. In this case, Danco has not yet paid Pat so it has not fully performed. Danco will assert that Pat's statements constitute an anticipatory repudiation because he not only told Danco he was worried about the deadline, but also that their hardware was so obsolete that he may not even be able to finish 50% of the contract at all. Pat will assert that Danco made assertions in response that it would live with Pat's tardiness. However, Danco will argue that it only discussed the tardiness and not the potential failure to provide two of the software programs at all. Danco has a strong argument. However, Pat was told Danco would live with his tardiness and Danco never requested any further assurances of Pat's work. In addition, Danco never discussed concerns about Pat's inability to finish the 3^{rd} and 4^{th} software programs. Finally, Pat told Danco it would deliver programs 1 and 2 by May 1. Danco told Pat prior to that date, on April 28, that it would not accept his work and was going to look for an alternative software consultant because of Pat's April 15 phone call. Thus, they did not even wait until May 1 to determine if Pat could deliver. While Danco will argue that it was not required to wait because of Pat's anticipatory repudiation, without any discussion to Pat implying that they would not allow him to miss the May 1 deadline, a court will not accept Danco's argument of anticipatory repudiation.

In fact, because Danco announced it would not pay him for his services prior to even the May 1 deadline, Pat himself will use the anticipatory repudiation claim to be able to assert his right to sue on the contract prior to the modified deadline date of May 15 (or May 12, which he claimed would now be his end date). He will be able to sue prior to that date as he has not fully finished performance and they have anticipatorily repudiated.

Thus, Pat's claim of estoppel will hold on the modification during his April 15 phone call. Based on this modification, Pat will have a valid claim for breach of K because he appeared to be able to finish the contract by the modified deadline and, prior to doing so, Danco repudiated its agreement. Thus, Danco breached its K obligations and Pat is entitled to damages.

If so, what are Pat's Remedies?

Pat's likely remedies are legal remedies, or money damages.

<u>Compensatory Damages</u>

Pat should be entitled to compensatory damages, which are designed to place the plaintiff in the position they expected to be in had the contract been properly performed by the defendant. To obtain them, he must show that Danco caused the damages, that they were foreseeable, that the damages are certain and that they were unavoidable. Causation, particularly but-for causation, requires that, but for Danco's actions, Pat would not have been injured. If it is clear Danco breached the K, then but-for causation follows that but for the breach, Pat would not be injured, as he would have been fully paid. Further, it is foreseeable that Pat would be injured by Danco failing to pay him for his services. Pat will be suing for the contract price of $25,000 likely, and these are certain given the terms of his contract. Finally, Pat must show the damages were unavoidable, meaning he must seek to mitigate these damages if at all possible. Usually, in an employment K case, this requires the employee to seek other employment. However, based on the unique services he provided Danco and the relatively short time left on his contract, he will be able to show his damages were unavoidable. The court may, however wish to determine that Pat did not destroy his work for Danco or stop working prior to Danco's breach. Also, to the extent that Pat's failure to meet his original deadline injured Danco, his damages will be reduced. The facts give no mention of any specific injury caused by Pat's tardiness.

Consequential Damages

In addition to the contract price, Pat may wish to claim additional consequential damages, which are damages that do not arise specifically from the breach but are foreseeable by the defendant at the time the contract was made that the plaintiff would likely suffer if it were to breach. In this case, Pat will argue that he turned down other opportunities to finish this contract in the relatively short amount of time he was given. It would be reasonably foreseeable that, were Pat to not be paid on the contract, Pat will argue, he would not only lose that contract price but also the value of the work he turned down to perform that work. Danco will likely argue that these are merely opportunity costs which Pat gave up and were reflected in the contract price which he accepted. While Pat did likely lose out on additional work, Danco will probably win this argument unless Pat can show with specificity and certainty that he had contracts offered to him in excess of his contract price that were only turned down as a result of his agreement to work for Danco, and that he could not have taken those contracts once his work with Danco was finished.

Punitive Damages

Punitive damages are designed to punish the defendant and are based on the notion that the defendant maliciously violated its agreement. In this case, Chelsea consulted with her attorney, who told her that Danco was not liable to execute the contract. The facts thus do not imply that Chelsea or Danco acted in any way other than negligently in breaching its contractual duties, and thus punitive will not be available.

Restitutionary Damages

If Pat for some reason could not succeed in his breach of K, he could likely obtain restitutionary damages so long as he delivers his completed software to Danco. Restitution, or “quasi-K,” allows for a plaintiff to recover if a K (or modification in this case) is not deemed valid, by showing that he conferred a benefit upon the defendant, that a reasonable person would expect to be paid, and that it would be unjust to allow the defendant to be enriched freely for the plaintiff’s efforts. In this case, so long as Pat delivers the software to Danco, he will be able to show he conferred the benefit of the software, and a reasonable person would expect to be paid for writing computer software for a company. It would be unjust to allow a company to obtain these services freely when it told the writer they would be paid, and thus Pat will be able to assert his quasi-K claim if he for some reason could not assert his breach claim. The damages will be the value of the work he provided them, not the contract price.

Specific Performance (not available)

Specific Performance is not applicable here because Pat’s claim is primarily for money damages and, even if it were not, there is an adequate legal remedy (money) which will suffice.

Question 2

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name "ABC Legal Services LLP" ("ABC LLP"). They agreed to share profits and losses equally. Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. Inadvertently and unbeknownst to Able, Baker, and Charlie, Able's assistant never filed the appropriate documents.

Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of $1100 or 10% of his billings. David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space.

Able, Baker, and Charlie hired Jack as head of computer services. Jack had just graduated from college with a degree in computer science. Jack, in an effort to save ABC LLP the cost of Internet access budgeted at $500 a month, accessed and used the wireless network of an adjacent law firm for free. Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able's clients, which caused the client economic loss.

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able's client caused by the disclosure of confidential client information? Discuss.

2. May Able, Baker, and Charlie each be held personally liable for David's malpractice? Discuss.

3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

Answer A to Question 2

Limited Liability Partnerships:

The main benefit of an LLP is that the partners have limited liability – meaning that they are not personally liable for the debts and obligations of the partnership. To be properly formed, the LLP papers must be filed with the Secretary of State. Here, the ABC paperwork was not filed and the LLP was never registered. Without the proper paperwork, this venture is likely to be treated as a general partnership.

General Partnerships:

General Partnerships ("GP") are formed by two or more persons carrying on a business for profit. There are no filing requirements for forming a GP. GPs can be made up of general partners and limited partners. General partners have a duty to manage the business and can be held personally liable for partnership debts and/or obligations. Limited partners, however, are not liable for partnership debts and may lose their limited status if they engage in management. Absent any agreement each partner has an equal vote, profits are shared equally, and losses are shared as profits are.

A, B, and C are likely to be seen as general partners in a GP; thus they are entitled to an equal say in the management of the business and may be held personally liable for partnership debts.

Ethical Duties of Attorneys:

Attorneys owe a wide array of duties – to clients, the court, opposing counsel, and the public generally. The duties are established by ABA rules as well as state-specific rules. California's rules on ethical conduct of attorneys largely follows the ABA rules, but there are variances which will be noted if applicable below.

Duties to clients:

Attorneys owe clients the duties of confidentiality, loyalty, financial responsibility, and competence. Duties owed to the court and opposing counsel include the duties of candor, fairness, and decorum. Attorneys must also ensure that all members of their firm, including staff, act in accordance with the ethical standards imposed. To the extent that one attorney has a conflict, such conflicts are imputed to the firm and are shared by all other attorneys unless the conflict arises from prior governmental work or a personal relationship with the opposing party's counsel, for example.

1. The disclosure of client information:

One of the most important duties owed to clients is the duty of confidentiality. This duty requires the attorney to act so as to not reveal any confidential information of the client – without consent, either express or implied. The facts do not indicate that any consent was given to the disclosure of this information in this case.

Here, the client information was revealed due to the use of an un secured wireless network which the firm used. Although the facts indicate that the attorneys were not aware of the use of the adjacent building's wireless network, we do know that they were surprised by the cost savings. If the attorneys were aware of unexpected savings, they should have spoken with Jack to determine why internet access was so much cheaper than expected. Because they did not so inquire, and consequently were unaware of the issue, Jack acted unethically by using another network for free. A, B, and C all had a duty to ensure that Jack's actions were proper and ethical.

Because ABC is likely to be deemed a GP, all general partners may be held liable for the debts of the firm. These debts can include the economic losses incurred from the disclosure of information and/or debts incurred if the client sues the firm for malpractice.

2. David's liability for malpractice:

Here the issue will be whether David is a partner of the firm or merely a lessee of an office. A, B, and C will argue that D was merely renting space from the firm, making him not a partner, and therefore not subjecting the firm to any liability for his actions. We do not have facts to indicate whether David ran his business under a separate name, kept his files in a separate room, used the same office staff, or contributed any money to the partnership. The first three factors would indicate a separate firm, while the final factor – buying into the partnership – would indicate that D had become a partner of ABC.

What we know is that David paid monthly rent. Absent other facts, paying rent indicates the D was likely a separate practitioner. If D was acting as a separate practitioner, the ABC firm partners would not be liable for this malpractice.

However, if there were facts to indicate the D was a partner of the firm, or that the malpractice occurred with regard to a firm client, the firm general partners may be liable for D's malpractice. In a LLP, as intended, partners are all liable only for their own malpractice, but in a GP, the general partners can be held liable for all partnership obligations. In a GP incoming partners are not liable for existing partnership debts, through the money they contribute can be used to pay off such debts. Outgoing partners of a partnership are liable for debts of the partnership until creditors have been given notice of their departure or 90 days have passed since their departure.

D's malpractice occurred shortly after he took up office space with ABC. If he were deemed to be a partner, and the malpractice occurred after joining the partnership, ABC general partners would be liable for partnership debts arising out of his malpractice.

3. Professional conduct:

The attorneys of ABC have violated a number of rules of professional conduct.

a. Management of Staff:

The attorneys have a duty to properly manage staff and ensure that all members of the firm are in compliance with the rules of conduct. Here, A gave partnership documents to an assistant for filing. While staff members of a firm frequently are in charge of filing court documents or making deliveries, it was likely imprudent to allow such an important document to be handled by an assistant. Because of the assistant's negligence the firm likely lost its privileges as an LLP. Attorneys cannot allow the unauthorized practice of law by non-attorneys. Here the documents likely did not need to be filed by an attorney, but the task was nonetheless important enough that it should have been done by a partner so as to ensure accuracy.

The attorneys were prudent in hiring Jack as a computer services manager as he was properly qualified with a degree in computer science. The use of non-attorneys does not violate any ethical rules so long as fee sharing does not occur (payment of non-attorney salaries is not considered fee sharing.) The attorneys likely violated their ethical duties in their management of Jack, however. By not managing Jack properly and being unaware of Jack's use of an unsecured wireless network, A, B, and C breached not only their duties as managers, but also their duty of confidentiality to their client.

b. Duties to clients:

Attorneys owe their clients the duty of confidentiality – the duty to not reveal any confidential information without consent. Information may be revealed where necessary to defend oneself against a claim of malpractice or potentially if the attorney knows of conduct which will result in death or serious bodily harm which can be prevented through disclosure. The CA rules indicate that the conduct must be criminal; however the ABA makes no such distinction. Here, the requisite facts for proper revelation of client information do not appear. ABC breached its duty of confidentiality to its client by allowing the transmission of client information to a third party.

Attorneys also owe clients the duty of loyalty, which prevents attorneys from taking on representation or taking actions which are in conflict with current clients. Attorneys must always act in the best interests of their clients and with their interests at heart. It is unclear to whom the confidential information was revealed, but the ABC firm may have breached their duties of loyalty as well if the use of the network resulted in revelation of information to an adverse party.

Financial responsibility imposes on an attorney the duty to properly manage client funds and avoid commingling personal money. There are no facts indicting a breach of this duty by ABC.

The duty of competence requires that attorneys provide clients with professional, skilled, competent services. Here, by use of an unknown wireless server which allowed for the disclosure of confidential information, the attorneys of ABC have acted competently. A competent attorney would have ensured that information was not revealed, and would have properly managed all staff members.

Answer B to Question 2

<u>Liability for Loss Due to disclosure of confidential information</u>:

A partnership is an association of persons to carry on a business as coowners for profit. The partners are jointly and severally liable for the debts of the partnership, both in contract and in tort. A limited liability partnership is a partnership that registers as an LLP with the Secretary of State. As an LLP, the partners are liable for their own torts incurred in furtherance of the partnership but not for the torts of the other partners or the partnership.

Filing the documents to register the partnership as an LLP is a prerequisite to attaining limited liability status. By not doing so the partnership retains the status of a general partnership and, therefore the partners would be personally liable for all liabilities of the partnership to the extent the debt was not satisfied by the partnership.

They could argue they intended to be an LLP and treated themselves as such, so they should be deemed to be a "de facto LLP." However, this argument is likely to fail because filing is such a simple act and the "de facto" argument has been applied in the corporation, not the partnership contract. Also, an LLP by estoppel argument would fail because there are no facts to indicate Abel's client thought he was dealing with an LLP, and, even if he did believe that, this defense would not apply to a loss caused by a tort – i.e., negligence.

As partners A, B, and C are liable for failing to properly supervise Jack. Jack was their employee. His tapping into a wireless network directly caused the disclosure of client information. As his employee A, B, and C Legal Services is vicariously liable for the torts of their employee. Here Jack committed the intentional tort of conversion, the intentional taking of the personal property of another. He did this while working for the ABC LLP and with the intent of furthering their business. Therefore, even though the tort was intentional, ABC LLP is liable. Further they could be found liable for negligently hiring an inexperienced computer person and then failing to adequately supervise him. See the discussion of their failure to supervise and prevent breach of confidentiality rules infra. Violating the rules does not show a personal liability but is evidence they breached their standard of care. Since ABC LLP is liable, the partners are jointly and severally liable for reasons discussed above.

David's Malpractice

A partnership is defined above. In order to prove the existence of a partnership, the primary element is whether the parties intend to share profits. Other indications are whether they share in losses and share in the management of the enterprise.

In this case David leased an office for a monthly rent that included 10% of his billings. While that relates to David's profits, it does not represent a sharing of profits because the amount is received as rent under a landlord-tenant relationship. Moreover, there is no indication of any sharing of losses or management responsibilities. There is no partnership between David and A, B, or C. Likewise, there is no indication that David otherwise held himself out as a partner of A, B, and C. One can be deemed to be a partner if he is deemed to have apparent authority by being held out as a partner. Since that is not the case here, ABC LLP is not liable for David's malpractice, and therefore ABC or its partners are not liable.

Breach of Rules of Professional Conduct

Lawyers have a duty to preserve the confidentiality of confidential client information. It may only be disclosed if expressly or impliedly authorized by client or permitted by the rules of professional conduct. None of the exceptions are relevant here, such as to present a crime involving death or serious bodily harm, serious economic loss (ABA rules only) or in response to a court order or order of the ethics committee.

Partners in a law firm have an obligation to put in place procedures to assure compliance with the rules of professional conduct.

They also have a responsibility to take any action to prevent or mitigate violation of the rules if they are able to do so.

Here ABC did not adequately supervise Jack or have any procedures in place to prevent violations of the confidentiality rule, resulting in a breach of the confidentiality rules. They breached the rules and may be disciplined accordingly.

Question 3

Hank and Wendy married, had two children, Aaron and Beth, and subsequently had their marriage dissolved.

One year after dissolution of the marriage, Hank placed all his assets in a valid revocable trust and appointed Trustee. Under the trust, Trustee was to pay all income from the trust to Hank during Hank's life. Upon Hank's death, the trust was to terminate and Trustee was to distribute the remaining assets as follows: one-half to Hank's mother, Mom, if she was then living, and the remainder to Aaron and Beth, in equal shares.

Trustee invested all assets of the trust in commercial real estate, which yielded very high income, but suffered rapidly decreasing market value.

Hank, who had never remarried, died three years after establishing the trust. At the time of his death, the trust was valued at $300,000. Subsequently, it was proved by DNA testing that Hank had another child, Carl, who had been conceived during Hank's marriage to Wendy, but was born following dissolution of the marriage. Wendy, Carl's mother, had never told Hank about Carl.

Wendy, Mom, Aaron, Beth, and Carl all claim that he or she is entitled to a portion of the trust assets.

1. At Hank's death, what claims, if any, do the trust beneficiaries have against Trustee? Discuss.

2. How should the trust assets be distributed? Discuss. Answer this question according to California law.

Answer A to Question 3

At H's Death, What Claims do the beneficiaries have against the trustee?

Duty of Care – Prudent Investing

A trustee has a duty to manage income as a reasonably prudent investor. Under old common law, this meant that each individual investment had to be relatively safe. Under the more modern standard, risky investments are permissible, as long as the portfolio as a whole has a relatively low level of risk. The trustee will not necessarily be liable for investment losses, as long as the investments had an acceptably low level risk. Here, investing all of the trust in real estates, a fairly risky investment, violated the duty of prudent investing. The portfolio as a whole would have a very high level of risk.

Duty of Care – Investment Diversification

Related to the prudent investor duty is the duty to diversify investments. T invested 100% of the trust assets in one form of investment – commercial real estate – a clear violation of the duty to diversify investments. T should have invested in a mix of stocks and bonds, and perhaps a small percentage could be in real estate.

Duty of Loyalty to Residuary Beneficiaries

When a trust is divided between an income beneficiary and a remainder beneficiary, the trustee owes a duty of loyalty to fairly protect the interests of both beneficiaries. This includes not making investment decisions solely for the benefit of the income beneficiary, and at the detriment of the remainder beneficiary. Here, T invested all the trust assets in real estate, which produces a lot of income (which would go to H, the income beneficiary) but will have very little principal left over due to rapidly decreasing market value. This violated T's duty of loyalty to the remainder beneficiaries M, A & B.

Duty of Communication

A trustee has a duty to keep the beneficiaries updated (at least yearly) as to the general status of the trust, and investment allocations. It's not clear on the facts here if T did this – T most likely did not, as the remainder beneficiaries would undoubtedly have complained earlier If they found out the trust was 100% invested in commercial real estate, solely for the income benefit of H. So T most likely breached his duty to communicate the status of the trust.

Remedies

The beneficiaries may sue Trustee personally for the loss in market value of the real estate (they may also sue for the increase in value that would have happened if T made a reasonably safe and diversified investment).

How should the trust assets be distributed?

Pretermitted Spouse

If a will (or trust) is formed before a marriage, and the spouse is omitted from the trust, it will be presumed that the omission was accidental and the spouse will be entitled to his or her intestate share. However, if divorce has occurred in the interim, it will be presumed the spouse was intentionally omitted and the spouse gets nothing. Here, H's trust was formed after marriage to W, but they had already been divorced for 1 year by the time the trust was formed, so W cannot claim to be a pretermitted spouse.

Community Property Law

Because California law applies here, W should have already received 1/2 of all community property (property acquired during marriage by the skill or labor of either spouse). So I'll assume H's trust was made only with his separate property, and the 1/2 share of CP he got upon dissolution. This means W has no rights to it unless H makes a gift to her.

Pretermitted Heir

If a will (or will substitute such as a trust) is formed before a child was born, and the child was omitted from the will, it will raise a presumption that the child was accidentally omitted, and the child will be entitled to his or her intestate share. When a child was born before the will or trust was executed, the testator did not know of the child's existence, the child will be treated as a pretermitted heir and will get the intestate share.

Here, it appears C was born before the trust was made (C was born right after dissolution and the trust wasn't made until 1 year after the dissolution). So normally C would not be a pretermitted heir; however, H had no idea C existed when H made the trust, as W never told H about C. And it's understandable H wouldn't have noticed, as the couple divorced soon after conception, so H may not have seen W much during the following year. And the child is H's child, suggested by the fact that C was conceived during marriage, and proved by DNA testing. I don't believe it matters that C was born following the dissolution of the marriage. Thus, C will be considered a pretermitted heir and will be entitled to an intestate share.

C's Intestate Share

Property is distributed intestate to the deceased person's spouse and issue, per capita, with right of representation. Per Capita means the property is distributed in equal shares at the first level of a living heir. Normally, a spouse gets 1/3 of the estate intestate if there are also living children. However, the spouse gets nothing intestate if divorce has already occurred when the settlor or testator dies. Here, divorce has already happened when H died, so W would get nothing intestate. H has three living children, so they each would be entitled to 1/3 of the $300,000. Since there are living children, Mom would not get anything. This is in California, and divorce has already occurred by the time H died, so I'll assume W's share was already taken care of by community property law. This means C's intestate share would be $100,000.

Abatement & Distribution

Abatement is the process by which money is cleared up for a new gift by reducing previously existing gifts. I believe that, unlike abatement when the estate is insolvent, abatement for a pretermitted heir is taken pro rata from both the residuary and general gifts (gifts or money or stock). Here, there is $300K in the trust. M has a general gift of 1/2, and A & B get the remainder. Thus, before C's gift, M would get $150K, and A & B would split $75K each. C's gift of $100K will take $50 K (1/3) from M, and $25K (1/3) from both A & B.

After abatement, C will end up with $100K. M will get $100 K. And A & B will get $50K.

Answer B to Question 3

What claims do the Trust beneficiaries have against Trustee?

A trustee holds title to assets for the benefit of others, beneficiaries, and as such owes them certain duties. A trustee's violation of these duties can render him personally liable to the trustees.

Breaches of the Duty to Invest

A trustee has a duty to invest the assets of a trust and to do so with ordinary care a prudent person would use in investing their own money. Many states provide lists of acceptable investments. Likewise a trustee may consult professional investors to determine what is reasonable. In any event, two specific obligations must be met: 1) the trustee must diversify, and 2) the trustee must not speculate.

In this case, the trustee did not diversify and so has violated the duty to invest because all the trust assets were invested in real estate. Similarly, a court could find that the trustee was speculating in making these investments, which is also a violation.

Breach of the duty of loyalty

Trustees owe the beneficiaries a duty of loyalty and they owe this duty to each beneficiary equally. Favoring one beneficiary over others is a violation of this duty. In this case the trustee appears to have favored H (who was a beneficiary since income went to him during his life) over the other beneficiaries by making investments which maximized income, benefiting only H, and actually resulted in harm through diminished corpus value to the other beneficiaries. Trustee is personally liable for this breach to the beneficiaries.

Breach of the duty of care

Trustees owe beneficiaries a duty of care to act as a reasonably prudent person and the failure to properly manage the trust funds as described above is also a violation of this duty.

Other

It's also possible trustee breached his duty of accounting if he was not providing the beneficiaries with regular statements of the account balance. We need additional facts but the decrease in value indicates this could be the case.

How should the trust assets be distributed?

H created an inter vivos trust which terminated at his death and provided for 2 of his children (A & B) and his mother (if she was living). This trust was created while H was single and he never remarried. Hank died intestate but his inter vivos trust will be subject to the same probate rules as a will would have been.

Does W have any right to trust assets?

W is claiming an interest in trust assets but the trust was made after dissolution to her marriage to H. Absent some evidence that community property which should have gone to W under the court's continuing jurisdiction was used to establish the trust, W has no claim to the trust.

Carl's claim

Carl is H's child and he was conceived during but born after dissolution of the marriage. He was also apparently born before the creation of the trust since the trust was created a year after dissolution of the marriage. A child who is born after all testamentary instruments have been executed (including inter vivos trusts) or not provided for in them is pretermitted and will have a claim on decedent's estate. Here, that is not the case since Carl was born before the trust was created and would therefore normally not have a claim. However, there is an exception when it appears that the only reason the child born before the execution of testamentary instruments was not provided for is that the parent did not know of his existence. That is the case here and so Carl will be considered a pretermitted child (his having been born after the marriage was dissolved is irrelevant).

<u>What share does a pretermitted child take?</u>

An omitted (pretermitted child) is entitled to take an intestacy share of the decedent's estate. The rules of intestacy would first provide for the decedent's spouse and children. Here, however, H leaves no spouse (as discussed above W has no interest in the trust) and so the intestacy rules would look to H's children. Under intestacy, children would take equally so Aaron, Beth, and Carl's share would be 1/3 each of the $300,000 corpus. Thus, Carl's share as a pretermitted child is $100,000.

<u>What do the others take from the trust?</u>

The trust provides that Mom gets 1/2 the corpus (assuming she's still living as appears to be the case) and the A & B split the remaining 1/2. Absent Carl's claim, Mom would've gotten $150,000 and A & B would've each received $75,000. Here, however, those amounts must be abated in order to pay for Carl's share.

In abating shares to pay for the claim of a pretermitted child the other beneficiaries will have their benefit reduced in proportion to the value they receive. Here Mom got 1/2 so she will have her share reduced by 1/2 of the amount due to Carl (i.e., $50,000). A & B each got 1/4 so their amounts are each reduced by 1/4 the amount owed to Carl ($25,000 each). Thus, the final distribution will be: Mom gets $100,000, Carl gets $100,000, Aaron and Beth each get $50,000 and W takes nothing.

FEBRUARY 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

In 2001, Lou was the managing partner of Law Firm in State X and Chris was his paralegal. Realizing that Chris intended to go to law school, Lou invited Chris and his father to dinner to discuss Chris's legal career. Aware of Chris's naive understanding of such matters, Lou, with the authority of Law Firm, made the following written offer, which Chris accepted orally:

> 1) After graduation from law school and admission to the Bar, Law Firm will reimburse Chris for his law school expenses;
>
> 2) Chris will work exclusively for Law Firm for four years at his paralegal rate of pay, commencing immediately upon his graduation and admission to the Bar;
>
> 3) Chris will be offered a junior partnership at the end of his fourth year if his performance reviews are superior.

In 2005, Chris graduated from law school and was admitted to the Bar, at which time Law Firm reimbursed him $120,000 for his law school expenses. Chris and his father invited Lou to dinner to thank him and Law Firm for their support. During dinner, however, Chris advised Lou that it was his decision to accept employment with a nonprofit victims' rights advocacy center. Lou responded that, although Law Firm would miss his contributions, he and Law Firm would nonetheless support his choice of employment, stating that such a choice reflected well on his integrity and social consciousness. Nothing was said about Law Firm's payment of $120,000 for Chris's law school expenses.

In 2008, Chris's father died. Chris then completed his third year of employment at the advocacy center. Not long thereafter, Law Firm filed a breach-of-contract action against Chris seeking specific performance of the agreement or, alternatively, recovery of the $120,000. In State X, the statute of limitations for breach-of-contract actions is five years from breach of the contract in question.

What legal and equitable defenses can Chris reasonably present to defeat the relief sought by Law Firm, and are they likely to prevail? Discuss.

Answer A to Question 4

I. Controlling Law

The Uniform Commercial Code governs the sale of goods.

Here, the contract is one for services, mainly an employment contract. No goods are involved.

Therefore, the contract is governed by the common law of contracts.

II. Valid Contract?

Chris may defend by claiming that there was no valid contract. For there to be a valid contract, there must be an offer, acceptance, and consideration.

<u>Offer</u>

An offer invites the offeree to enter into a contract and creates the power of acceptance in the offeree.

Here, Lou made a written offer to Chris on behalf of Law Firm, which is probably an LLP or general partnership. As stated, Lou as managing partner has the authority to bind the firm.

Therefore, a valid offer has been made by the Law Firm.

<u>Acceptance</u>

An acceptance is the manifestation of assent to be bound by the terms of the contract.

Here, Chris accepted the offer because he "accepted orally."

Therefore, there was an acceptance, subject to Statute of Frauds considerations discussed below.

Consideration

A contract will fail for lack of consideration if there is no bargained-for exchange of legal detriment. Each party must be bound to do something he is not otherwise obligated to do, or to refrain from doing something he otherwise has a legal right to do.

Here, Law Firm is to reimburse Chris for his law school expenses if Chris graduates from law school and is admitted to the Bar. Law Firm is also to hire Chris thereafter for four years and pay Chris his paralegal rate of pay, while Chris is to work for Law Firm at such rate immediately upon admission to the Bar.

Further, Chris is to be offered a junior partnership at the end of his fourth year if his performance reviews are superior. This may be an illusory promise. Analysis follows.

Illusory Promise?

A promise is illusory even if there appears to be legal detriment if one party is not bound to do anything at all. An illusory promise included in a contract containing other legal detriment will not void the contract, and can become part of the contract.

Here, Law Firm can control Chris's performance reviews, and appears to give Law Firm complete discretion. However, performance at law firms can be objectively evaluated with client reviews, revenues raised, cases handled, successful litigation, and other factors. The court is likely to read in a reasonableness requirement on the part of Law Firm in making the review.

Therefore, item 3 on the contract is not illusory, and, in either case, the contract appears to be valid on its face.

III. Statute of Frauds

Under the Statute of Frauds, certain contracts must be in writing, contain a description of the parties thereto and subject matter thereof, and be signed by both parties. A contract must satisfy the Statute of Frauds if it is one in contemplation of marriage, one which cannot be completed in one year, a contract relating to land or executors, or for the sale of goods of $500 or more.

Here, the contract calls for at least 4 years of work at the paralegal rate of pay. There is no way this contract can be completed in one year; it would not be deemed "completed" if Chris dies or Law Firm goes under. Therefore, the Statute of Frauds applies.

Law Firm's offer was in writing, but Chris accepted orally. There is no indication that the agreement was memorialized or signed by Chris. Therefore, Chris may assert that the contract fails due to the Statute of Frauds.

<u>Part Performance</u>

Law Firm will counter, saying it has partly performed on the contract. The Statute of Frauds can also be satisfied by part performance.

Here, Law Firm already reimbursed Christ $120,000 for his law school expenses. Therefore, Chris cannot void the contract for failure to meet the Statute of Frauds.

IV. Minor?

Contracts entered into by minors are voidable upon reaching majority. I will assume that Chris is not a minor as of 2001, as he graduated from law school in 2005. I assume he graduated from college in 2002 at the latest, and that he is not a prodigy who graduated from college while still a minor.

V. Undue Influence?

Chris may attempt to void and contract for undue influence. Although not rising [to] the level of duress, undue influence arises when someone with a confidential relationship exerts pressure and steers one into the influencer's desired course of action.

Here, Lou was already Chris's boss at the time of the offer. There was a vast difference in knowledge concerning employment practices between the two. Lou was also aware of "Chris's naïve understanding of such matters" when he made the offer. However, Lou did invite Chris's father to dinner with Chris, and the partner-paralegal relationship probably does not rise to a level which can be considered a confidential relationship for purposes of undue influence.

Therefore, Chris is not likely to succeed on this theory.

VI. Unconscionable?

Chris may also raise unconscionability as a defense to the contract. A contract may be unconscionable when a party with superior bargaining power imposes a contract of adhesion or otherwise imposes terms which cannot reasonably be seen as fair.

Here, hiring a lawyer at the price of a paralegal appears unconscionable. However, Lou can logically argue that Law Firm has "prepaid" some of Chris's compensation by paying for law school. Further, the terms do not appear boilerplate or as adhesive.

Therefore, Chris is not likely to succeed on the theory of unconscionability. Thus the contract is valid.

VII. Defenses to Specific Performance

Specific performance is an equitable remedy which may be granted by the court where 1) legal remedies are inadequate, 2) the terms are definite and certain, 3) there is mutuality of remedies, 4) the remedy is feasible for the court to monitor, and 5) there are no defenses.

Here, Law Firm will argue that legal remedies are inadequate because they are seeking to employ the one and only Chris. Christ knows the firm from his paralegal work and Law Firm trusts him. The terms of the contract are certain, as the term and salary are stated on Lou's offer. Mutuality of remedies, recently not very important and leans more towards mutuality of performance, is also met because Law Firm is ready, willing, and able to meet their side of the bargain. The remaining issues to consider are feasibility and defenses.

Feasibility

It is very difficult for the court to monitor a service contract, especially an employment contract. Further, forcing someone to work violates the 13th Amendment of the Constitution banning involuntary servitude. Here, we are concerned with an employment contract, and the court will find it infeasible to enforce.

Laches

Chris can also assert the defense of laches. One can defend on the theory of laches regardless of the statute of limitations because they are completely different theories. Laches operates when a party has 1) unreasonably delayed assertion of their rights so that 2) there is prejudice to the other party.

Here, Law Firm said they would nonetheless support his choice of employment, and commended Chris on his integrity and social consciousness. Chris reasonably took this to mean that he was not bound by the contract to work for Law Firm, and that the law school expenses would be paid for regardless of his decision. Further, Law Firm waited 3 years to file a breach of contract action. Chris had worked for the advocacy center for 3 years at this time, and for Chris to go back to a law firm at paralegal wages would constitute severe prejudice.
Thus, Chris can successfully assert the defense of laches.

Unclean hands

Equity does not help those who do not come to the court with clean hands. If there was foul play on the part of Law Firm, equity will not help it pursue its goals.

Here, Law Firm made the offer knowing of Chris's naïveté. Further, Law Firm took Chris's father's death as an opportunity to file their claim. The father had been there at the two dinners with Lou and could offer support as well as testimony.

Therefore, Chris will most likely succeed on this defense as well.

Note, however, that the court has discretion in granting equitable defenses.

VIII. Defenses to recovery of law school expenses

Gift

Chris will argue that Law Firm made an irrevocable gift of the law school expenses. An oral gift is revocable, but a gift is finalized and cannot be revoked when there is delivery with the intent to give and the gift is accepted.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Lou also commended Chris on his decision. Therefore, Chris will assert that Law Firm made a gift. Here, there was delivery of the $120,000 and the money was accepted. The problem is the question of intent. Law Firm will assert that is [an] obvious, common practice to repay someone on a prepayment when a contract is not fulfilled. This is a question of fact but, on balance, Chris will probably not succeed on this theory.

Waiver

Chris will argue that Law Firm waived its rights to take back the reimbursement.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Therefore, Chris will assert that he interpreted this to be a waiver. However, a waiver must be knowingly made, not assumed from silence. Further, a waiver of a significant debt must generally be in writing, and there was no such writing.

Therefore, Chris will not succeed on this defense.

Promissory Estoppel

Chris will next assert that he relied to his detriment on the gift or waiver, so that Law Firm is estopped from claiming the $120,000 back. Promissory estoppel arises when reliance is induced and the other party in fact justifiably relies.

Here, Law Firm will argue that it induced no such reliance. Chris will argue that waiting 3 years is enough for reliance. While this is another question of fact, the court will most likely hold for Law Firm.

Therefore, Chris will most likely have no defense concerning the recovery of the $120,000.

Answer B to Question 4

Law Firm (LF) v. Chris (C)

Contract Formation

A contract is formed if there is mutual assent and consideration. Mutual assent is found if there's an offer and an acceptance of the offer. An offer is the manifestation of willingness to enter into a bargain so as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Acceptance is the manifestation to accept the terms of the offer. Consideration is the bargained-for exchange of legal detriment – which is the doing of something one has no legal obligation to do or forbearing on doing something one has a right to do.

Here, we have Lou of LF making a written offer to C for C to work for LF. The offer has certain terms and it was communicated to C properly. C accepted orally. Thus, mutual assent is found.

Consideration is likewise found here because LF was offering to reimburse C for law school expenses and C in return promised to work exclusively for LF for four years. Each party does not need to do what it promised to do absent a contract; thus, each has legal detriment involved in the bargain.

Thus, there is a contract formed here.

Defenses to Formation

Statute of Frauds

The law of contracts requires that certain contracts have to be in writing in order to be enforceable. The writing must identify the parties, must contain the critical terms of the agreement, and must be signed by the party to be charged. One of these types of contracts falling under the statute is contract which performance takes over a year.

Here, we have a four-year contract so if falls under the statute. Although there's an offer in writing, the acceptance of C wan not in writing – i.e., he did not sign the offer so there is no writing evidencing a contract was formed between the parties. Thus, there is no writing that meets the requirements of the statute. This being so, LF cannot enforce C's promise.

However, a promise may be taken out of the Statute if the parties have already performed. Here, LF can argue that even if there's no qualifying writing, LF performed by reimbursing C the money – a clear evidence of the presence of a contract. On this issue, LF has the better of the argument.

<u>Unconscionability/Public Policy</u>

The law frowns upon and does not sanction unconscionable contracts where one party, because of its superior bargaining position, takes advantage of the other party either procedurally (i.e., during the negotiation phase where a party) or substantively (i.e., where the terms of the contract are unreasonably favorable to the party who drafted it and who has the superior position).

Procedurally, here, LF was the one in the superior bargaining position because it is the employer of C. C can argue that through its agent, LF took advantage of C's "naive understanding" of matters relevant to the contract. Additionally, LF, aware of C's naiveté, did not advise C to seek independent advice about the contract.

LF can argue that C has other choices, however, and was not coerced into accepting the contract. Besides, LF can argue that C had his father with him when the contract was being negotiated. Further, LF may argue that C has several reasonable alternatives, including not accepting the contract itself. LF has the better argument here.
Substantively, C has a stronger argument because the contract states that he would work for LF for four years at his paralegal rate of pay. The law will see this as an unreasonable term given the duration and low rate of pay even where C is already a lawyer. Further, Ca can argue that the promised junior partnership at the end of the 4

years is illusory because the firm retains the unrestricted right to say C's performance reviews are "not superior," unless LF can point to specific and objective standards by which C's performance can be measured.

Misrepresentation

Misrepresentation is the intentional making of false statements of material fact. It can [be] affirmative or it can be through silence. Silent misrepresentation is typically found where one party, who enjoys a fiduciary or special relationship with the other, stays mum about pertinent facts that the other party should know about in order to make a knowing and intelligent decision.

C may claim LF, through Lou, misrepresented by keeping silent about the pertinent aspects of the contract when he had the responsibility to apprise C of his rights and obligations. C can argue that Lou has a special relationship with him as he is his employer and also the managing partner of a law firm.

The court, however, will likely side with LF on this issue unless C can point to specific acts by which LF affirmatively or negatively, through silence, "misrepresented" facts because each party is allowed to drive as hard a bargain as possible in an arms-length transaction.

Specific Performance (SP)

SP is an action where a party goes to a court of equity seeking relief and asking the court to ask the breaching party in a contract to perform as promised. SP is granted where the following elements are met: there is inadequate remedy at law; the contract has definite and certain terms and all conditional terms precedent to formation have been met; performance is feasible for the parties; the court does not need to actively monitor performance; and there are no equitable defenses that the breaching party can raise.

Here, LF will argue that there are definite and certain terms because the offer specifies the relevant provisions of what the contract entails. It will also point out that all the conditional terms precedent to contract formation – i.e., C's graduation from law school and admittance of the Bar – have been met.

However, C will be able to argue that there are adequate remedies available for LF to pursue at law. For instance, it can ask for damages, measured by the cost of hiring another lawyer.

C will also argue that performance is not feasible because to require him to serve as LF's new lawyer against his will is unconstitutional – it is violative of the law against involuntary servitude. This is a huge argument in favor of C because it is well-established that courts are loathe to enjoin parties to perform personal services contracts against the wishes of the performing party. Additionally, the court does not want to actively monitor individual performances of this nature because of the impossibility of having measurable standards by which the party can be judged.

Moreover, C can raise two equitable defenses: (1) the doctrine of Unclean Hands and (2) Laches.

"Unclean Hands" provides that one must do equity in order to seek equity; in other words, a party cannot seek relief form a court of equity when the court's "hands" will be sullied because of the unethical, unlawful or otherwise improper conduct of the party seeking relief. Here, C will point out that Lou's conduct in taking advantage of his "naiveté" and of inserting those unconscionable provisions render LF unworthy of relief from the court of equity because these actions were unethical and improper, if not unlawful.

Laches is another equitable defense by which the defending party can raise the issue that the plaintiff slept on its rights, thus prejudicing his defense. Here, C will be able to point out that LF should have immediately sought relief and not waited three years. C will argue that the long waited prejudiced him because the only witness to the contract negotiations was his father, who died in 2008. While LF can point to the statute of limitations of 5 years, this argument will be unavailing for the firm because a court of equity looks at the statute of limitations as just one factor in determining whether the doctrine of laches should apply. Because SP is an equitable remedy, the court will look at the totality of the circumstances and render a decision in favor of C here, whose ability to defend himself has been compromised by the unexpected death of his father.

<u>Restitution of $120K</u>

Restitutionary remedies are proper where there is a promise which the defending/promising party made which the party made which the party should have reasonably expected will induce reliance on the other; the other actually relied on it and conferred a benefit on the breaching party; and unjust enrichment will result if the promising party is allowed to retain the benefit without reimbursing the other.

Here, LF will argue that C made a promise which C should have reasonably expected would induce LF to rely, and LF did rely, on his promise; that C benefited by receiving the $120K reimbursement of his law school expenses; and that allowing C to retain the money will result in C's unjust enrichment.

This is a strong argument on the part of LF, and C really does not have much in the form of argument to rebut it, except possibly to say that C's receipt of the money was a reward for working as a paralegal for the firm and that the reward is part of employment benefits and not conditioned on his working for the firm even after passing the bar. It's a weak argument and C will be asked to return the money absent a stronger defense.

One possibility for C is the doctrine of waiver. Waiver is the voluntary relinquishment of a known right. C can argue that Lou knew about his decision and said that "although LF would miss his contributions, he and LF would nonetheless support his choice of employment," which is a noble one – i.e., working for an advocacy center. C can argue that by LF's conduct, it waived its right to restitution of the money, or otherwise indicated that indeed, the money was an employment benefit to reward [him] for his loyal and worthy employment as paralegal in the prior years.

Additionally, C can raise again the equitable doctrine of laches, as discussed supra, because LF “slept on its rights” when it waited 3 years to seek restitution. C will be able to again argue that the sole witness as to the real characteristics of that money is dead, thus prejudicing his ability to defend himself.

Question 5

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.

2. A partial taking? Discuss.

Answer A to Question 5

1. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a total taking?

The Fifth Amendment of the Constitution prohibits the government from taking private property for public use without just compensation.

<u>Taking</u>

There are two types of takings: permanent physical occupation and regulatory takings. The former is not at issue because Paula's complaint contends the County is liable for a regulatory taking.

A regulatory taking is considered a "per se" taking if it deprives the owner of 100% of all economic viable use of the owner's property. Here, Paula owned 100 acres and 10 of those acres bordered a small lake in which she [was] seeking to develop to construct 30 homes thereon. However, the County denied Paula's application to develop the 10 acres on the basis that the 10 acres constituted protected wetlands. Thus, Paula owned 100 acres but only 10 of it was denied development. Because the County did not deny development of the entire 100 acres owned by Paula (rather, the County only denied development of 10 acres), Paula was not deprived 100% of all economically viable use of her property.

<u>Denominator Problem</u>

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paul lacks a vested right to develop.

Vested Rights

A private property owner has a vested right to develop when a government body has specifically approved, by individualized action, the development of a particular piece of property.

Here, although Paula has expended a substantial amount of expenditures in determining the feasibility for developing the 10 acres, she nonetheless has no “vested” right to develop because she lacks the requisite government approval. There are no facts indicating the government issued Paula any type of building permit or other individualized action specific to her property that would vest her rights to develop. Thus, because she has no vested right to develop the 10 acres, the value of the 10 acres is tantamount to its value as undeveloped wetlands, i.e., $200,000.

Conclusion

Although Paula’s property is private property and the state law is pursuant to public use, the trial court’s decision that a total taking has not occurred is correct because Paula was not deprived of 100% of all economic viable use of the owner’s property.

2. Did the trial court correctly rule that County’s denial of Paula’s development application did not constitute a partial taking?

Taking

A regulatory taking does not have to be a “per se” taking to implicate the 5^{th} Amendment. A regulatory taking is also considered a “taking” under the 5^{th} Amendment if it does not pass the Penn Central Balancing Test. In the Penn Central case, the U.S. Supreme Court analyzed three factors in determining whether a “taking” has occurred: (1) the nature of the government action, (2) the private property owner’s reasonable investment-backed expectations, and (3) the level of diminution in the owner’s private property value.

1. Nature of Government Action

Here, a state law was enacted to protect wetlands to protect certain endangered species. It was not enacted to punish Paula. And it's probably safe to presume the state law is also applicable [to] other properties alongside the lake and that it was not similar in form to that of "spot zoning" – where the government singles out a piece of property and changes its use in a way that's distinct from other adjacent properties. Because the nature of the state law was to protect endangered species and not to single out Paula's property, this factor weighs in favor of the trial court's decision that a partial taking has not occurred.

2. Private Property Owner's Reasonable Investment-backed Expectations

Last year, Paula expended a "substantial amount" of money in determining the economic feasibility of developing 10 acres of the parcel. Thus, she invested a considerable amount in her expectation to develop eth property. The County may argue, however, that Paula's level of investment was not reasonable under the circumstances because she had no "vested right" (see heading Vested Rights under question 1 above) to develop her 10 acres. The County would argue she should not have spent a substantial amount at a point in time when the probability of her being able to develop her property was so speculative.

However, the facts state Paula did the economic feasibility study "in compliance" with County regulations. Thus, Paula has a strong argument that her investment was reasonable because the County required her to do an economic feasibility study. On balance, Paula's expenditure of a "substantial amount" was probably reasonable under the circumstances.

3. Level of Diminution in Value

Here, the parties stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not. Thus, Paula would likely argue that the level of diminution in the value of her property is great because of the difference in what her property would be worth if the state did not prohibit her from developing her property. However, the $4,000,000 figure is a “would be” value and not an “as is” value. The court may weigh this factor differently if it was the case that Paula owned property worth $4,000,000 and, due to a state law, it is now worth $200,000. However, that is not the case. Here, Paula’s property is worth $200,000 as it sits right now, undeveloped. Because Paula’s property has not diminished in value, this factor weighs heavily in favor of the trial court’s decision that a partial taking has not occurred.

Denominator Problem

A court’s review of the trial court’s decision that a partial taking has not occurred would have to grapple with the same denominator issue (as analyzed above and repeated below) as they would regarding the trial court’s decision that a total taking has occurred.

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned “for many years”) 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula’s property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paula lacks a vested right to develop.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a partial taking has not occurred is correct because the factors under the Penn Central balancing test weigh in favor of the trial court's decision.

Answer B to Question 5

1. <u>DID THE TRIAL COURT CORRECTLY RULE THAT COUNTY'S DENIAL OF PAULA'S DEVELOPMENT APPLICATION DID NOT CONSTITUTE:</u>

A. <u>A TOTAL TAKING?</u>

<u>TAKINGS CLAUSE</u>

The 5^{th} Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. Through the Doctrine of Selective Incorporation, this is made applicable to the states via the Due Process Clause of the 14^{th} Amendment. In this case since the County is a state municipality Paula will challenge under the 14^{th} Amendment clause.

A taking can either be physical, where the government physically occupies the land, or a taking can be regulatory, where a government regulation renders the land economically unviable. In either case, if there is indeed a "taking" and the taking is for public use the government will be required to pay just compensation.

<u>PHYSICAL TAKING</u>

As mentioned above, a physical taking occurs when the government physically occupies the land either in part or in total. If there is actually any "physical" occupation in any way, it will constitute an official taking. If the taking is for public use the government will be required to pay just compensation.

In this case the only governmental action is a regulatory statute preventing Paula from developing the 10 acres. There is no actual physical occupation, but rather a regulation affecting Paula's use.

Therefore, there is no physical taking.

REGULATORY TAKING-TOTAL

A regulatory taking occurs when a government regulation renders property economically unviable. For there to be a taking under the takings clause through, and unlike a physical taking, the regulatory taking must leave no economically viable use of the property.

Here the court concluded that there was no total regulatory taking of Paula's property when they rejected her application. Let's explore this further to see if indeed there was a total taking.

Paula owns 100 acres of land and had done so for many years. Paula has farmed the land, but the facts don't state how much of the land she actually farms. Presumably Paul also lives on the farm as well.

In this particular case, Paula is seeking to build 30 homes on 10 acres of her land sitting next to a small lake. The government is claiming that due to a state law the 10 acres is protected land and Paula is not able to build. It should be immediately noted that only 10 of Paula's 100 acres is being negatively affected by the government's regulation. Paula is still free to use the remaining 90 acres as she sees fit. She can continue to farm it, or even build the 30 homes on any of those remaining 90 acres. It's presumed that Paula's intentions in building the homes is for business purposes. Moreover, since the 10 acres abuts a small lake, Paula will likely be able to make a bigger profit on selling the homes as she'll be able to advertise that they are "waterfront property". The facts don't specifically state what type of condition the remaining 90 acres is. 90 acres is a lot of land and perhaps there is another equally viable place for her to build the 30 homes.

However, the government regulation is not a total taking here since there appears to be a lot of economically viable use of the land remaining. First, Paula has possession and can make use of 90 of the 100 acres presumably as she sees fit. The government regulation only affects 10% of Paula's land. Paula still has a lot of remaining of which [it] has tremendous economical use. Paula can continue farming the 90 acres of land,

and even perhaps the 10 acres in question. Additionally, she may even be able to move her development plans to those 90 acres as well. In this case the government regulation may not even affect her that much at all.

Since the regulation only affects 10% of the land, and there is still considerable economical use of the remaining 90 acres of land, the government regulation is not a total taking.

B. A PARTIAL TAKING

PARTIAL REGULATORY TAKING

A partial regulatory taking occurs where the government regulation affects some economic use of the land, but there still remains a sufficient amount of economic use.

Here, Paula will argue that by preventing her from building the 30 homes on the 10 acres the government regulation is rendering those 10 acres economically unviable. She will further argue that while in relation to the total 100 acres 10 acres is only 10%, but in relation to the 10 acres in question, the government regulation is preventing her from making any economic use of the land. By not allowing Paula to build the 30 homes on the 10 acres the government is preventing her from making a profit from her use of the land. The state law in question requires the 10 acres to be undeveloped, meaning Paula cannot build any structures on the land, or make any profitable use of it.

INVESTMENT BACKED OPPORTUNITIES

Paula will argue that the government regulation destroys her investment backed opportunity since she's invested a substantial amount of money in determining the economic feasibility of developing the 10 acres. While the facts don't say, Paula has perhaps entered into contracts with prospective buyers of the homes and/or even contractors to build the land. Further, Paula will argue that she complied with County regulations the entire step of the way in her pursuit of this endeavor.

The government will argue that she should not have invested that much money before researching if her prospective use was legal. In doing so she created her own detriment and will suffer the burdens of it.

BALANCE OF INTEREST

Finally, the court will likely balance the interest of both parties to determine if there is a substantial partial regulatory taking of which compensation should be paid.

Here, Paula's interests are obvious. She wants to be able to build 30 homes on the 10 acres of land so she can make a profit on them. Also Paula can argue that by building the homes she's providing adequate housing for the public. Alternatively, the government wants to protect endangered species from becoming extinct. Weighing the two factors, given the fact the Paula's interests are purely pecuniary, the government will likely prevail in this battle. Their interest protects more of the public at large while Paula's merely protects a few, if any.

In conclusion there appears to be [not] any total or partial taking. However, in the event the court finds that there was, the taking must be for public use.

<u>PUBLIC USE</u>

The government may only take land if is for public use. Here, the government regulation is to preserve endangered species. This is a benefit for the public at large since it preserves the wildlife for all to enjoy.

<u>JUST COMPENSATION</u>

Finally, in the event that there is a taking for public use, the government must pay just compensation. This is the market value of the land to the owner at the time of the taking.

In this case, if there is a taking the government will have to pay Paula $4,000,000 since the taking prevents her from developing her land as she wants to.

STATE LAW INVALID

Paula may try to argue that the state law guiding the government's decision is invalid.

10th AMENDMENT & PREEMPTION

Under the 10th Amendment, powers not reserved to the federal government are reserved to the states.

Here the state law protects certain wetland and endangered species. Paula will argue that the state law is preempted by federal law since under the federal property power, the federal government is in control of preserving the land.

In conclusion, the court did not err in ruling that the County's denial of Paula's development application did not constitute a total or partial taking.

Question 6

Herb and Wendy, residents of California, married in 2001. Herb worked as an accountant. Wendy was an avid coin collector who hoped someday to turn her hobby into a profitable business. Prior to marriage, they had entered into a prenuptial agreement providing that each spouse's wages would be his or her separate property.

On Wendy's birthday in 2002, Herb gave Wendy a drawing by a famous artist. Herb paid for the drawing with $15,000 that his parents had given him. Wendy hung the drawing in their bedroom.

In 2003, Wendy opened CoinCo, a shop specializing in rare coins. She capitalized the business with a $10,000 inheritance that she had received when her grandfather died. Wendy worked at the shop alone every day. Customers appreciated her enthusiasm about coin collecting and her ability to obtain special coins at reasonable prices. Over time, Wendy learned that she had acquired a number of highly valuable coins. There was also a renewed interest in coin collecting due to the discovery of several boxes of old coins found buried in the area.

Although Wendy's services at the shop were worth $40,000 per year, she took an annual salary of $25,000. She also paid $5,000 in household expenses from the business earnings each year.

In 2008, Herb and Wendy separated, and Wendy filed for dissolution of marriage. At that time, CoinCo was worth $150,000, and the drawing was worth $30,000.

In 2009, before trial of the dissolution proceeding, Wendy was disabled by a serious illness and had to be hospitalized. She closed CoinCo while she was in the hospital, and the value of the business fell to $100,000 by the time of trial. Her hospital bill was not covered by health insurance.

In the dissolution proceeding, Wendy claims that the prenuptial agreement is valid and Herb claims that it is not.

What are Herb's and Wendy's respective rights and liabilities in:

1. The drawing? Discuss.

2. CoinCo? Discuss.

3. The hospital bill? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. All property acquired during marriage is community property (CP). Property acquired prior to marriage or after permanent separation, and any property received during the marriage by gift, bequest , or devise, is separate property (SP). In order to determine the character of property, we must trace back to the funds used to acquire the property, then apply any special exceptions or conditions under the law. Both spouses are entitled to a one-half share of CP. At divorce, the CP is divided equally unless there are special considerations that apply.

1. The drawing

To determine the character of a piece of property we trace back to the funds used to acquire it. Here, we are told that H paid for the drawing with $15,000 that his parents gave him as a gift. Property acquired during marriage as a gift to one spouse is SP; therefore the $15,000 was SP, and by tracing we determine that the drawing was SP at the time it was purchased.

Transmutation

Prior to 1985, the character of property could be more easily changed or transmuted from SP to CP or vice versa. After 1985, however, any transmutation of property had to be in writing to be valid. An exception to this is where a spouse gives the other spouse a gift of relatively insubstantial value, in which case the gift between spouses can be transmuted from CP to SP or from SP to CP or even from one spouse's SP to the other spouse's SP.

Here, we are told that the drawing was by a famous artist, and that H purchased it in 2002 in honor of W's birthday for the substantial sum of $15,000. We are also told that Wendy hung the drawing in the couple's bedroom. Under these facts, the drawing was of substantial value and would not ordinarily come within the transmutation exception for gifts of insubstantial value. But we are also told that it was bought on Wendy's birthday, H gave it to her, and W hung it in their bedroom. Those facts appear to show an intent that the painting was either given to the community from H's SP, or possibly even given to W as her SP, but hanging the painting in their bedroom looks more like a potential transmutation from H's SP to CP. However, because the drawing was clearly valuable and there was no writing, no transmutation occurred. The painting remained H's SP at the time of permanent separation.

End of economic community upon permanent separation.

A marriage ends upon dissolution/divorce, but the economic community of a marriage ends upon permanent separation, where the couple separates with the intent to not reconcile and to stay permanently separated and dissolve the marriage. Here, we are told that H and W separated in 2008, and W filed for dissolution of marriage at that time. Therefore, the economic community ended in 2008. We are also told that in 2008 the painting was worth $30,000. Because there was no transmutation, the painting was still H's SP, and now worth $30,000.

2. CoinCo

Separate property business enhanced by community labor. Where a SP business is enhanced by community labor during marriage, for the purposes of dissolution the courts will use one of two formulas in order to determine the CP's interest and share in the SP business.

Pereira: Where the SP business growth is due predominately to the spouse's labor and abilities, the Pereira method is used. Under Pereira accounting, the SP business spouse is entitled to the original principal value of the business, plus an annual rate of return calculated at 10%, both of which are SP. The remaining value of the business is CP.

Van Camp: Where the value of the SP business derives mostly from the character and nature of the business itself, the Van Camp method of accounting is used. Under Van Camp, the community is entitled to the reasonable salary value of the spouse's labor, minus any mount received by the community, and minus any community expenses paid. All else is SP.

Pereira analysis:

Here, we are told that we can trace the beginning of CoinCo in 2003 to W using a $10,000 inheritance. This inheritance is SP; therefore CoinCo is a SP business belonging to W. We are also told that W had prior to marriage been an avid coin collector, therefore she had skill and expertise used to increase the value of the business. We are also told customers appreciated her enthusiasm about coin collecting and her ability to obtain special coins at good prices and had in fact obtained highly valuable coins. We are also told that after permanent separation with W became ill, the value of CoinCo fell from $150,000 in 2008 to $100,000 in 2009, because W was not available to lend her skills to the business. All of these factors point to W's skill and expertise as being the reason for CoinCo's success, and point to a Pereira analysis. Under Pereira, the initial value of CoinCo of $10,000 is SP, and 10% per year from 2003 when it started to 2008 upon permanent separation is $1,000 per year or $5,000. Therefore $15,000 would be W's SP, and the remainder would be CP. At permanent separation CoinCo was worth $150,000, so $135,000 was CP, and H would be entitled to half of that. We are told that in 2009, CoinCo's value fell to $100,000. If that figure is used, then we deduct the $15,000 SP and the $85,000 remaining is CP.

Van Camp analysis:

On the other hand, we are also told that there was a renewed interest in coin collecting due to the discovery of old coins found buried in the area. This would point to CoinCo being inherently valuable because of the type of business it was, and not entirely due to W's expertise skill and labor. If a court decided that was the predominant factor, then under Van Camp analysis we are told the W's services at CoinCo were worth $40,000 per year. Over five years that is $200,000. We are told that W took an actual salary of $25,000 per year, and W also paid $5,000 per year of household community expenses. So the community already received $125,000 of salary over five years from 2003 to 2008 and $25,000 in expenses totaling $150,000. Under Van Camp, the community is still entitled to $50,000, the difference between the $200,000 value and the $150,000 actually received. The initial $10,000 investment is W's SP. We are told that by the time of 2009 divorce trial the value of CoinCo fell to $100,000. Thus $50,000 of that is CP and the rest is SP.

Prenuptial agreement:

A prenuptial agreement is valid so long as it is in writing. Here we are told that prior to marriage W and H entered into a prenuptial agreement providing that each spouse's wages would be his or her SP. The agreement is valid; therefore W's wages from CoinCo are her SP and the community is not entitled to them. Therefore, the above Van Camp analysis is altered by the prenuptial agreement. The $125,000 in salary will not be credited to the community, but the expenses (which are not mentioned in the prenup) will still be credited. Thus under Van Camp and under the prenup wages of W are not credited to the community.

This does not affect the Pereira analysis which is not based on wages. Overall, the facts show that the increase of value of CoinCo was due primarily to W's skill so because Pereira does not take wages into the analysis there is no change under Pereira. H will want Pereira used, and W will want Van Camp used, because it is based on her wages, which are SP under prenup. But a court is likely to apply Pereira.

3. The hospital bill

Debts after permanent separation

After permanent separation the economic community ends. Any debts that are incurred by either spouse post-separation are SP debts, and creditors will have to go after the SP of the spouse who incurred the debt. An exception exists, however, for debts related to the necessities of life, such as food, clothing, shelter, and, arguably, health care expenses. In that event, a creditor may go after the debtor spouse's SP, the CP, and also the SP of the other spouse.

Here, we are told that in 2009, after the permanent separation but before the divorce trial, W was disabled by a serious illness and in hospital, and that her hospital bill was not covered by insurance. Because the hospital bill is for a necessity of life and they are not divorced yet, the hospital can go after W's SP, the CP, and H's SP for this necessity of life debt.

Answer B to Question 6

California is a community property state. In California, property acquired during marriage is presumed to be community property (CP). Property acquired before marriage and after legal separation is deemed separate property (SP). Additionally, property acquired by gift, bequest and devise is also SP.

The name of the title is not determinative of the property's characteristics. Courts may trace the funds used to acquire the property to determine the characteristics of the property. With these things in mend, we can understand how a court will assess the distribution of the following assets.

<u>Prenuptial agreement</u>

The determination of the distribution of assets at the divorce of Wendy and Herb all depend on the validity of the prenuptial agreement. A prenuptial agreement is an agreement that allows [a] party to contract out of California community property law. To be valid, there must be a writing signed by both parties, each of whom are represented by independent counsel, there must be a valid waiver in writing, a full disclosure of all assets, and a minimum of 7 days before the parties sign the agreement. Additionally, the parties must have the capacity to enter such [an] agreement, including no undue influence from either party. Also, it must be voluntary. Here the only facts we are given was that in 2001, Herb and Wendy married in California. Prior to their marriage a prenuptial agreement was entered into. The agreement stated that wages of each spouse would be his or her separate property. However, at the divorce proceedings, Wendy claims that the agreement is valid while Henry argues it is not. Without facts demonstrating the validity of the agreement, the following distribution analysis will show the results of the distribution with or without a valid prenuptial agreement.

<u>1. The drawing</u>

Items acquired during marriage are presumed to be CP unless tracing the assets or actions of the parties shows otherwise. Here, on Wendy's birthday in 2002, she acquired a drawing from a famous artist. Wendy acquired this painting from her husband Herb. Herb paid $15,000 dollars for the painting using money his parents gave him. As stated above, property and money received as a gift is the SP of the party receiving the gift. When Herb acquired the painting, tracing shows that it was his SP. However, in 2002, as a birthday present, Herb gave the painting to Wendy. Wendy will argue that since she received the property as a gift, it is presumed that gifts become the SP of the receiver.

However, in 2008 the painting was worth $30,000 dollars. Herb will argue that the property should still be his property because it was an invalid transmutation of his SP to Wendy's SP.

Transmutation

Transmutation is the doctrine of transferring one person's SP into another person's SP. After 1985, stricter requirements were necessary for property to be validly transmuted. After 1985, in order to successfully transmute the property a party needed to show there was 1) a writing, 2) signed by the party who is giving up the SP and 3) expressively states the transmutation of the property. Under these facts we do not see a valid transmutation under the 1985 documents.

Here, in 2002, Herb gave the drawing as a birth gift. We are not given any other facts. If Wendy can show that she was given the drawing and was given a birthday card, that said possibly "I know you love this drawing, now it's yours! Love, Herb" we may have a valid transmutation. The card in itself is a writing, as would be his statement explaining the gift. Additionally, people usually sign birthday cards. Since we do not get the facts stating this or anything like this happened, the painting was invalidly transmuted and Herb will be able to trace the drawing back to the Parents' $15K gift. Also, the actions of the parties, Wendy hanging the drawing in the bedroom does not show the property was SP. Wendy will have to return the painting.

Pre-nup?

Since this drawing was not purchased using either party's earnings, the pre-nup has no effect on the distribution of the drawing.

2. CoinCo

The next issue is the distribution of the CoinCo business. Since, under California law, earnings acquired through the effort, intelligence, and skill of either part is deemed CP, the validity of the pre-nup is vital to the distribution of Coinco.

Invalid pre-nup

The following analysis presumes that a court will believe Hank and find that the 2001 pre-nup is invalid.

The courts use two tests to determine the property interests of a self-employed company owned and worked out by a spouse during marriage. A court may use either the Pereira analysis while Wendy would desire the Van Camp if it is shown that the pre-nup is invalid.

Pereira Analysis

Under Pereira, courts conclude that the company's value is based upon the effort, hard work, and skill of the working spouse. Since we are working with the assumption of an invalid pre-nup, the earnings by a spouse during marriage are presumed CP. Under Pereira, the working party keeps their SP and receives a reasonable rate of interest on the investment (10%) multiplied by the years worked. Here, the company was capitalized by a $10K inheritance of Wendy that she received when her grandfather died. As described above, in heritance is SP.

Herb will argue that her business thrived because of her work, enthusiasm and her ability to collect special coins as reasonable prices. If the court believes this to be true, under Pereira, Wendy would be entitled to her initial $10K + 10% of $10K multiplied by her years worked, which look to be 5 (2003 – 2008). This number would go to Wendy's SP and the rest would go to the CP estate.

Van Camp

Under Van Camp, courts conclude that it was not the work of the spouse, but certain circumstances outside their control resulted in the increase of the business value. Here, Wendy will argue that because of a discovery of boxes of old coins, a renewed interest in coin collecting caused her business to boom. She will argue that she was lucky since she always wanted to start a coin business but fortunately came in at the right time. If a court believes this to be the reason why the business flourished, a court uses a different formula than the one used above. Under Van Camp, the community receives a reasonable salary minus whatever was already received minus household expenses multiplied by the number of years worked. The rest would go to the SP of the working spouse.

Under these facts, a reasonable salary would be about $40K per year. Wendy only took out $25K per year and also spent $5K in household expenses per year. So $10K would be multiplied by the 5 years she worked, resulting in $50K going to CP. Since at the time of dissolution the company was worth $100K, Wendy would receive $50K as SP and her half of CP resulting in her receiving $75K.

Court Discretion

Although Wendy will argue for a Van Camp analysis and Herb will argue for a Pereira analysis, a court has the discretion to choose whichever one they like. Courts will look to whichever method is intrinsically fair to both parties in making their determination.

Valid pre-nup

If the court finds that the pre-nup is valid, as Wendy claims, the property will be distributed differently. Since the pre-nup rebuts the presumption that the earnings during marriage are CP, Herb may not recover anything under either test.

Presumably, income derived from one's SP is deemed to also be SP.

Under Pereira, courts conclude that the company increases based upon the skill and effort of the other party. Here, since the skill and effort are considered earnings, Herb would not receive anything under Pereira. Both the initial down payment as well as the earnings acquired during Wendy's years working would be her SP and would result in her obtaining the full $100K. Since Wendy would be able to argue that income from the company is both her earnings and investment, Herb would acquire nothing.

Also, under Van Camp, Herb would get nothing. Just like the analysis above, since the company was financed by SP and her earnings under the Pre-nup are SP, the entire $100K would be characterized as SP.

Goodwill

Herb's last ditch effort is to argue that goodwill is a community asset. Goodwill is a community property interest that increases customer retention in a business. Here Herb will argue through her enthusiasm Wendy created goodwill for the community. However, goodwill is created by the skill and effort of the working party. As stated above this is deemed part of one's earnings. Under the pre-nup, earnings are one's SP. Herb has no valid claim on receiving CP money for goodwill.

If the pre-nup is valid, Herb has no claims of CoinCo.

3. The Hospital Bill

Traditionally, a party has no financial obligations after legal separation and/or divorce. Legal separation is defined as the mutual intent to no longer continue marital relations with a physical separation. Here, the facts stated that in 2008, Herb and Wendy did separate. Without other facts, it is presumed that their separation had the required intent.

An exception to the statement above states that a spouse's SP and CP is liable for necessities acquired by the other spouse. Here, in 2009, Wendy became disabled and had to be hospitalized. The facts also state that this occurred before the dissolution proceeding. Because Herb and Wendy are not divorced, Herb retains some liabilities as it pertains to Wendy's hospital bills.

Since Wendy's bill was not covered by insurance, 3 types of property may be used for fulfill the hospital obligations. First, Wendy's SP may be used. Additionally, since medical bills are deemed a necessity by California law, both the CP and Herb's SP may be used to fulfill this obligation. If in this instance Wendy is not able to use her SP to pay the bill Herb is liable to use his own property.