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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2001 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2001 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 and may not be reprinted.

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts 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 the 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

In 1980, Herb married Wanda, and the couple took up residence in a California home, which Herb had purchased in 1979.

Herb had bought the home for $50,000 by making a $5,000 down payment and signing a promissory note for the balance. At the time of the marriage, the outstanding balance on this note was $44,000. During the next 20 years, the couple paid off the note by making payments from their combined salaries. The home now has a fair market value of $200,000.

In 1985, Wanda sold for $10,000 a watercolor she had painted that year. She and Herb orally agreed that the $10,000 would be her sole and separate property. Wanda invested the $10,000 in a mutual fund in her name alone. The current value of the mutual fund is $45,000.

In 1995, Herb and Wanda bought a vacation cabin on the California coast for $75,000. They made a down payment of $25,000 with community property funds, and both signed a note secured by a deed of trust on the cabin for the balance. Title to the cabin was taken in the names of both Herb and Wanda "as joint tenants."

Shortly afterward, Herb inherited a large sum of money from his mother and used $50,000 of his inheritance to pay off the note on the cabin. In 2000, Herb and Wanda added a room to the cabin at a cost of $20,000, which Herb paid out of the funds he had inherited. The current fair market value of the cabin is $150,000.

In 2001, Wanda instituted a dissolution proceeding. What are Herb's and Wanda's respective rights to:

1. The home? Discuss.
2. The mutual fund? Discuss.
3. The cabin? Discuss.

Answer according to California law.

ANSWER A TO ESSAY QUESTION 1

California is a community property state. This means that all property earned during marriage by a spouses's efforts, labor or skill is deemed community property. All property earned before marriage or after separation, or property that is acquired by devise or inheritance during marriage is separate property. A transformation in form of the property does not change its characterization. In order to determine whether property is community property or separate property, a court will trace back to the original form of the property. At divorce, courts will divide the community assets 50-50 and in kind, if possible, unless special rules provide otherwise.

1. The Home

If a home is purchased with both separate and community funds, and there is no joint title presumption, then, at dissolution, both the separate and community property estates will receive the pro rate share of the home's value at divorce. (Marriage of Moore) When Herb purchased the home in 1979, he contributed $5000 as the down payment. He additionally paid $1000 of the loan amount prior to marriage. Therefore, his separate property contribution was $6000 at the time of the marriage. The purchase price of the home was $50,000. Therefore Herb should receive 6/50 (or 3/25) of the appreciation value of the home (i.e., 3/25 of $150,000) in addition to his separate property contribution of $6000, at divorce.

As stated above, community property is that property which has been earned as a result of a spouse's efforts, skill or labor during marriage. Here, the facts indicate that during the next 20 years, from 1979-1999, the community paid off the rest of the loan which had a balance of $44,000 at the time of the marriage. Therefore, the portion that the community contributed

to the purchase of the home was 44/50 or 22/25. The community property pro rata share, at divorce, is then 22/25 of the appreciation of $150,000 plus $44,000.

2. The Mutual fund

The original source of the monies that purchased the mutual fund was the $10,000 that Wanda earned for the sale of her painting. Given that this painting was the result of her skill, effort and labor during marriage, it is community property.

Wanda and Herb orally agreed that the $10,000 would be her sole and separate property. Had this agreement taken place prior to 1985, it would have been a valid agreement and this community property would have been transmuted to separate property simply by this oral agreement. However, after 1985, all agreements between spouses to transmute any property (i.e., to change it from community property to separate property, from separate property to community property or even from the separate property of one spouse to the separate property of another spouse) must be in writing. Further, this writing must have a clear and express statement of what is being transmuted. Therefore, when Herb and Wanda made the agreement to have the proceeds from Wanda's painting sale be separate property, it had no enforceable effect. Therefore, notwithstanding their oral agreement, the $10,000 from the sale of the painting remained community property.

Under California community property law, if a spouse deposits community monies in her name alone, takes title to property in her name alone or, as is the case here, invests in a mutual fund in her name alone, it is irrelevant as to the characterization of the property. Here, when Wanda invested the $10,000 in a mutual fund in her name alone it did not have any effect on

the community property character of the money. The mutual fund therefore is community property.

The current value of the mutual fund is $45,000. As community property it should therefore be divided 50-50, with $22,500 going to each spouse. If the court should determine that this is not in the interests of justice, or that this division would greatly devalue this appreciating asset, it may determine that Wanda gets all of the $45,000 mutual fund and offset Herb with a community asset of equal value.

3. The cabin

Herb and Wanda bought their cabin during their marriage. Therefore, the funds used, and the asset acquired (the cabin) are presumptively community property. In addition to making a down payment of $25,000, they also took out a note secured by a deed of trust for $50,000. It is important to note here that given that they both signed the note and that they took title as joint tenants, the lender most likely intended that it was making a loan to the community. Therefore the loan was a community liability (not separate liability of one of the spouses).

Herb and Wanda took title as joint tenants. Since 1989, courts have held that when a married couple takes title as joint tenants it is presumptively community property. At divorce, any separate property contributions will not go toward a pro rata share at dissolution. At divorce, the separate property contributor is only entitled to reimbursement for payments made toward principal and improvements. A spouse will not be reimbursed for separate property that has been used for payments of taxes and insurance.

When Herb used the $50,000 of his inheritance to pay off the note, he was using separate property because property acquired by inheritance, regardless of whether one is married, is separate property. In addition, he also used $20,000 of his separate property for an improvement. At divorce, he can be reimbursed for this $20,000 he used for the improvement and for any of the $50,000 that went toward principal payments on the loan. The remaining $80,000 is community property. Herb and Wanda will each take their ½ community property share, for a total of $40,000 each.

ANSWER B TO ESSAY QUESTION 1

Wanda v. Herb

California is a community property ("CP") state. All property acquired during marriage is presumptively community property. All property acquired before marriage or after permanent legal separation is presumptively separate property ("SP"). Additionally, all property acquired through gift, devise, or bequest is also considered SP.

The Home

The issue is how a home should be divided upon dissolution of a marriage when that home was acquired by one spouse before marriage, but the balance of the promissory note was paid off during marriage with community funds. As a general rule, the fair market value of the house is divided into SP and CP based on the proportionate shares of the purchase price that were expended. Here, Herb ("H") made a $5000 down payment before marriage (thus, from SP), and by the time of marriage he had paid an additional $1000 of the note, leaving a balance of $44,000. This balance was paid by H and Wanda ("W") during the course of the marriage using CP. Thus, H contributed 12% of the purchase price from SP and the community contributed 88% of the purchase price ($44,000 out of $50,000 purchase price). Upon dissolution, H will be entitled to 12% of the fair market value of the house (12% of $200,000), and the remainder of the fair market value is community property. This result is reached to enable each spouse to obtain a proportionate amount of equity in the house.

The Mutual Fund

The issue is whether there has been a valid transmutation of property. As a general rule, property acquired through the labor of one spouse during marriage is presumed to be CP. Here, W received $10,000 as a result of the labor she used to paint the watercolor. Thus, this $10,000 is presumptively CP. However, as a modification to this presumption, the parties can agree to change the form of property from CP to SP (or from SP to CP), if that agreement is made in a valid, legally enforceable way. Here, H and W orally agreed that the $10,000 would be W's SP. As a general rule, oral transmutations made on or after January 1, 1985 are

invalid and not legally enforceable. To be enforceable, the oral agreement must be in writing and signed by the party whose rights are affected. Here, the agreement was made in 1985 and was oral; thus, it does not work to transmute the $10,000 from CP to SP.

The next issue is determining, through the method of tracing, what happened to the $10,000. As a rule, property can be traced to later locations and then divided into SP or CP. Here, W invested the $10,000 in a mutual fund in her name alone. Since there is no issue of federal preemption (as there would be if W used the money for a U.S. savings bond, for example), the money can be property traced to the mutual funds and the entire current value of the funds ($45,000) will be treated as CP to preserve H's interest in W's labor during marriage.

The Cabin

The issue is how title to property should be divided when SP is expended on the improvement of CP. As a general rule, under the Marriage of Lucas, title to property taken in community property form is presumptively CP, and one spouse may not be reimbursed for money expended out of SP on contributions to CP upon death of one of the spouses. Instead of receiving a reimbursement, a presumption arises that the SP contribution was a gift to the CP estate. However, upon divorce, the rule is different. Upon divorce, title taken in CP form is still presumptively CP, but a spouse contributing SP for down payments, improvements, or principal payments on a mortgage is entitled to reimbursement without interest for these contributions under the Anti-Lucas Statutes (as long as the contribution was made post-1984). Here, H and W hold title in one of the community property forms - namely, a joint tenancy (a joint tenancy is treated as a community property form of title for purposes of divorce, but is treated differently for death). Thus, in CP form, the property is presumptively CP, entitling each spouse to a ½ CP interest. This conclusion is buttressed by the facts that CP funds were used to make the down payment, the cabin was purchased during marriage, and they both signed the note as joint tenants.

The only issue remaining is whether H can receive reimbursement for the money he spent on improving the cabin. As a general rule, property received through inheritance is presumptively SP. Here, H received $50,000 from his mother as an inheritance (SP). Under the Anti-Lucas statutes, as explained above, SP contributed to CP for an improvement or principal payment can be reimbursed without interest. Here, H's SP ($20,000) was used to add a room (an improvement) to the cabin. Furthermore, H spent $50,000 to pay off the principal owed on the mortgage. Thus, H can be reimbursed without interest for $70,000, and the remainder of the fair market value of the cabin will be treated as CP.

QUESTION 2

Adam owns 100% of the stock of Sellco, a corporation that sells houses. Sellco's board of directors consists of Adam and his wife Betty.

Sellco owns 90% of the stock of Buildco, another corporation. Pat owns the remaining 10% of Buildco's stock. Buildco's business is home construction. Buildco's board of directors consists of Adam, Betty and Evan. Betty is the president of Buildco and, as such, is a salaried employee. Neither Adam nor Evan is an officer or employee of Buildco.

Adam urged Buildco's other directors (Betty and Evan) to approve an arrangement whereby Buildco would build houses and sell them to Sellco at cost. Sellco, in turn, would sell the homes for a profit. Based solely upon Adam's representation that the arrangement "made sense," Buildco's board unanimously approved this arrangement. Buildco thereafter commenced constructing homes exclusively for the purpose of selling them to Sellco. Buildco sold the houses at cost to Sellco, and Sellco sold the houses for a considerable profit.

Pat objects to this arrangement because it deprives Buildco of the only source of money with which to pay dividends.

What personal and/or derivative claims can Pat reasonably assert against Sellco, Adam, Betty and/or Evan, and is he likely to succeed on each claim? Discuss.

ANSWER A TO ESSAY QUESTION 2

Shareholder Derivative Suits

To bring a shareholder's derivative suit, the plaintiff must be a shareholder at the time the claim arose and throughout the course of the litigation. The shareholder must be asserting a claim for which the corporation could sue. He must make a demand on the Board of Directors to rectify the situation unless he can show that it would be futile, and may be required to make a demand on the shareholders to rectify unless the majority of the shareholders are also wrongdoers. He must then file a verified complaint with the corporation as a nominal defendant and post a bond.

Here, Pat, is seeking to rescind this agreement as it deprives Buildco any ability to pay shareholders' dividends. The company is not making a profit so not only is Pat as a shareholder injured but so is Buildco. Since Buildco's Board of Directors already approved the Buildco-Sellco arrangement it would be futile to demand of them to rescind it. Also, Sellco is the majority shareholder, which in turn is owned by Adam, who is on the Board of Directors of Buildco; thus, to ask Sellco to rescind this profitable agreement would also be futile.

Pat v. Sellco

Pat can sue Sellco in his individual capacity as a shareholder or under a shareholder's derivative suit if Sellco's actions as a majority shareholder injure the corporation. Traditionally a majority shareholder had no duty to minority shareholder; however, there is a trend to impose such a duty, particularly in close corporations. Close corporations are those that have a few number of shareholders and are not traded on national exchange. Here, Sellco and Pat are the

only shareholders of Buildco. Nothing in the facts indicate whether Buildco is traded on national exchange.

Duty of Sellco

The trend is to impose a duty on the majority shareholder, not to act to the detriment of a minority shareholder. The court will look to the Entire Fairness Test, i.e., 1) fair price and 2) fair dealing.

Sellco as the majority shareholder of Buildco

Sellco as a company is reaping great profits at the expense of Buildco making no profits. Buildco cannot issue dividends to its shareholders, who are Sellco and Pat. Since Sellco is already making money, it is only Pat who suffers. Thus, Sellco by making this agreement has breached its duty of fairness to Pat and its duty of fairness to the corporation.

Pat should be able to disgorge the profit made by Sellco, but he will want the recovery personally rather than to Buildco; otherwise, Sellco would benefit as the majority shareholder.

Pat v. Adam

Adam, as a member of the Board of Directors of Buildco, owes the fiduciary duties of care and loyalty to the corporation.

Duty of Care

The duty of care is the standard a reasonably prudent person would use in the course of his own business affairs. The plaintiff bears the burden of proof to show this fiduciary duty

has been breached. Adam urged the other directors to vote for the agreement with Sellco saying that it "made sense." He made no further statements.

Adam may argue the Business Judgment Rule as a defense. The Business Judgment Rule excludes a director from liability where 1) he acted in good faith, 2) the decision was reasonable, and 3) it was supported by a rational basis. To be reasonable, a decision must be made after the directors investigate, analyze and deliberate over a corporate action.

Other than the statement that the agreement "made sense," there is no indication that Adam, Betty or Evan further discussed or questioned the agreement. Thus none of them abided by their duties of care. Thus, Adam may be liable for lost profits to Buildco as a result of the Buildco-Sellco Agreement.

Duty of Loyalty

The duty of loyalty is such that a director must act in good faith belief that his actions or decisions are in the best interest of the company. The duty of loyalty prohibits directors from self dealing, i.e, profiting at the expense of the company.

Company

The Interested Director's Rule forbids a director from any transactions with his company unless he fully discloses the arrangement in which he has an interest and the deal is approved by a majority of the disinterested directors or shareholders. Some jurisdictions count the involved directors for purposes of a quorum; others do not.

The problem here is that Buildco's board consists of Adam and his wife Betty, both o whom are interested in the transactions. Evan, the only disinterested director, was not made aware of Betty and Pat's involvement with Sellco. Thus there was no disclosure of the appropriate involvement of Adam and Betty with Sellco, and 2 of 3 board members were interested persons. Adam, as owner of Sellco, and therefore 90% owner of Buildco, could've submitted the agreement to Pat, but Pat's dissent would not have mattered.

Since Adam violated his duty of loyalty to Buildco, any loss suffered by Buildco he will be held liable for. However, if the corporation receives the profits, Adam will benefit as a company shareholder, so Pat may want to sue personally to recover.

Pat v. Betty

Betty, as a director and officer of Buildco, owes the fiduciary duties of care and loyalty to Buildco discussed above. She is in violation of both duties for the same reason as her husband, Adam, and will be held liable to Buildco and Pat for damages.

Pat v. Evan

Evan also owes the fiduciary duties of care and loyalty to Buildco as discussed above. However, as he had no personal interest in the Sellco-Buildco arrangement he will not be liable for breach of the duty of loyalty. However, Pat will be able to show that Evan breached the duty of care.

A reasonably prudent person would have further inquired of Adam and Betty about the proposed transaction, particularly where he knows Sellco is the majority shareholder in Buildco. Evan also knew Buildco would not be making any profit. Evan failed to act with the care a

reasonably prudent person would in his own business affairs and, thus, is liable for any damages to Buildco.

ANSWER B TO ESSAY QUESTION 2

Pat v. Sellco

Pat will bring both a derivative shareholder action and a personal action against Sellco on behalf of Buildco.

In a personal action against Sellco, Pat will claim that Sellco, as a majority and controlling shareholder of Buildco, breached its fiduciary duty to him, a minority shareholder. A controlling shareholder has a general duty to deal fairly with the other shareholders and to not take any action that will affect their interest. Here, Sellco entered into a deal with Buildco that was unfair to Buildco and deprived Buildco of the only source of money with which to pay dividends. Thus, this will not only cause Pat as a minority shareholder to receive no dividends, but it will greatly decrease the value of his stock.

Action to Declare a Dividend

Pat may also attempt to bring an action against the company demanding that it pay a dividend. The facts tell us that the company has not been able to pay dividends because of the arrangement between Sellco and Buildco.

A shareholder is generally not entitled to a dividend until it is declared. Furthermore, a dividend can only properly be paid out of net earnings or, in some states, excess capital. Here, there were no net earnings because the company was not making any money. Thus, payment of a dividend was not warranted.

Nonetheless, some courts may entertain an action demanding a dividend where a shareholder can show Board misconduct. For the reasons discussed below, Pat can show that the Board acted improperly. Thus, the Court may require the corporation to declare a dividend. More likely, however, the court will order a buyout of Pat's shares at a reasonable price.

Pat (on behalf of Buildco) v. Sellco - Shareholder Derivative Suit

Pat will also bring a shareholder's derivative action against Sellco on behalf of Buildco. A shareholder can bring a derivative action on behalf of the corporation if he was an owner of stock both at the time of the action complained of (here, the entering in the contract with Buildco) and throughout the course of the lawsuit. Before bringing such a suit, a shareholder must generally either make a demand on the Board of Directors to bring the suit themselves or, in some states, make a demand to the shareholders to bring a suit. A shareholder is excused from this requirement where the making of such a demand would be futile. Here, the making of the demand would be futile since a majority of the Board (both Adam and Betty) have an interest in the deal. Adam is the 100% owner of Sellco and thus would not likely approve an action to sue the company. Betty is Adam's wife and is thus indirectly interested in Sellco. Pat will have to file a complaint alleging that the demand was futile with specificity and then he will have to likely post a bond. If Pat is successful in his suit, he will be entitled to an award of attorney's fees and the company will receive any damages.

Pat's suit will allege that Sellco, as a majority shareholder, breached its duty of loyalty and care to Buildco. A majority shareholder such as Sellco stands in a fiduciary relationship with Buildco, since it in essence has control of the Board. Here, Sellco breached its duty of loyalty to Buildco by entering into a deal that was entirely unfair to Buildco and which will cause Buildco to lose a lot of money.

Unjust Enrichment

Pat will also sue Sellco derivatively alleging that the contract between Sellco and Buildco is unenforceable because it was unconscionable when made. He will bring an action against Sellco in equity to rescind the contract and for restitution in the amount that Sellco was unjustly enriched at Buildco's expenses. This would include any and all profit which Sellco made on the sale of Buildco homes, which, according to the facts, was a considerable profit. Pat may also seek a constructive trust on the profits made off of Sellco's sale of Buildco-built homes. Because the deal was unfair to Buildco, Pat is likely to succeed on these claims.

Pat (on behalf of Buildco) v. Adam

Pat will bring a shareholder derivative action against Adam on behalf of Buildco. Again, he will be able to show that a demand on the Board is futile because Adam is a Board Member.

Adam is a member of the Board of Directors of Buildco, and as such owes certain fiduciary duties to the corporation. A board member owes the corporation a duty of care, which requires that he act with respect to the corporation as a reasonable person would with respect to their own business affairs. He also owes a duty of loyalty which requires that he act in good faith, and with the reasonable belief that he is acting in the best interest of the company.

Breach of the Duty of Loyalty

Adam engaged in self-dealing when he urged the other Buildco directors to approve an arrangement whereby Buildco would build houses and sell them to Sellco at cost. The facts

indicate that Adam made a representation that the arrangement "made sense" and thus the Board unanimously approved the arrangement. Adam clearly had much to gain from the transaction as he was the 100% shareholder of Sellco. A transaction benefiting a Board member is a breach of the duty of loyalty unless: (1) it is fair to the corporation; or (2) the interested Board member makes a full disclosure of his interest to the Board and a majority of uninterested Board members or shareholders approve the deal. Here, it is not clear that Adam disclosed his interest in Sellco to Evan (presumably Betty knew of his interest since she was his wife). Furthermore, this deal was not fair to Sellco as it took away all of its profits.

Breach of the Duty of Care

Adam also breached his duty of care to Buildco because, as discussed above, the deal was not fair to the corporation. As a result of his breaches of care and loyalty, Pat is likely to succeed on his claims and Adam will be liable to Buildco for the losses it sustained as a result of the bad deal with Sellco.

Pat v. Adam (directly) - Piercing the Corporate Veil

Adam is also a 100% owner of Sellco. Pat will sue Adam directly, arguing that the corporate veil should be pierced and that Adam should be directly liable for the same causes of action Buildco has against Sellco discussed above. A court will hold a shareholder directly liable where there is evidence that the corporation was a mere shell for the shareholder. The court will consider factors such as the amount of control of the shareholder and the amount of capital the company maintains. Here, Sellco's Board of Directors consists of Adam and his wife, Betty. Thus, it is clear that Adam controls Sellco. It also appears that Sellco is merely a holding company, as the facts do not indicate that Sellco has any purpose other than holding

Buildco stock and reselling Buildco homes. Thus, the interests of justice would allow Pat to pierce the corporation veil and bring a direct cause of action against Adam.

Pat (on Behalf of Buildco) v. Betty

Pat will also bring a shareholder derivative suit on behalf of Buildco against Betty. Again, because Betty and her husband are on the Board, Pat will be able to show that a demand on the Board would be futile.

Betty is both a President and Board Member of Buildco. In both roles, she also owes duties of care and loyalty to the corporation. Betty, as Adam's wife, also engaged in self-dealing, because she stands to benefit from any profit made by Adam. Thus, for the reasons discussed above with respect to Adam's breach of the duty of loyalty, Betty also breached this duty.

Betty breached a duty of good faith [to] the company also. The facts indicate that the Board approved the action "based solely on Adam's representation that the agreement made sense."

Business Judgment Rule

Under the Business Judgment Rule, a Board member will not be held to breach the duty of good faith if the facts show that the judgment was made in good faith, reasonably informed, and rationally based. Here, the decision was not reasonably informed or rationally based. Furthermore, Betty cannot claim that she relied in good faith upon the representations of another Board member, because this was not reasonable under the circumstances, particularly since Betty knew that Adam (and she) had an interest in the deal.

Pat may also be able to bring an action against Betty based upon the theory of piercing the corporate veil if she has an ownership interest in the stock (e.g., based on her community property interest).

Pat (on behalf of Buildco) v. Evan

Finally, Pat will bring a shareholder derivative suit against Evan. Pat will again argue that a demand on the board would be futile since Evan is on the Board and the deal he complains of involves both Adam and Betty.

Evan was a Board member and thus owed Buildco duties of care and loyalty. For the same reasons discussed above with respect to Betty, Evan acted in an uninformed and unreasonable manner in approving the deal with Sellco. Thus, he is liable to Buildco for any losses it incurred.

Conclusion

As a result of the above actions, Pat will successfully bring shareholder derivative suits on behalf of the company and will be able to seek damages against all of the defendants jointly. A court will rescind the Sellco-Buildco contract. In addition, the company will be entitled to unjust enrichment against Sellco and damages from the Board Members, which represents the damage caused to the company as a result of the contract.

QUESTION 3

Duce and Cody were arrested for an armed robbery. Duce was taken to the police station, where she was interrogated without Miranda warnings. After three hours of questioning, a police officer asked Duce if she would consent to a search of her automobile. Duce consented, and a search of her car revealed a handgun and items stolen in the robbery, which were seized by the officers. When told what the officers found, Duce confessed to driving the getaway car in the robbery.

Cody, who did not know that Duce had confessed, then confessed and named Duce as the driver of the getaway car.

At their joint trial on a charge of robbery, Duce moved to exclude her confession from evidence based solely on the failure of the police to give her Miranda warnings. Based only on that violation, the court granted the motion to exclude her confession.

Duce also moved to exclude from evidence the handgun and the stolen items seized from her automobile, claiming that she was not aware that she had a right to refuse consent to search. The prosecutor conceded that the police had no authority to search the car absent consent, but asserted that Duce's consent was obtained without coercion. The court denied the motion, finding that the consent was voluntary.

The handgun and the stolen items seized from Duce's car were admitted into evidence at the joint trial of Duce and Cody over objections by each defendant. Cody's confession, redacted to eliminate any reference to Duce, was admitted into evidence against Cody.

At trial Duce testified, denying that she drove the getaway car and that she knew the handgun or the stolen items were in her car. She testified that she had loaned her car to Cody on the day of the robbery. In rebuttal the prosecutor called a police officer who testified, over objection by Duce, to the contents of Duce's confession and to the contents of Cody's complete unredacted confession implicating Duce as the driver of the getaway car.

Assume that in each instance all appropriate constitutional and evidentiary objections were made.

1. Did the court err in admitting the handgun and the stolen items seized from Duce's car against Duce and Cody? Discuss.
2. Did the court err in admitting the police officer's testimony about Duce's confession? Discuss.
3. Did the court err in admitting the police officer's testimony about Cody's complete unredacted confession? Discuss.

ANSWER A TO QUESTION 3

1. Handgun and Stolen Items Against Duce and Cody

Duce

The Fourth, Fifth, and Sixth Amendments apply to states by the Fourteenth Amendment. Under the Fourth Amendment, persons are to be free from unreasonable searches and seizures.

Government Action

The Fourth Amendment as incorporated into the Fourteenth Amendment only applies to unreasonable searches and seizures conducted by government actors. Here the police were government actors and therefore the Fourth Amendment applies to Duce.

Standing

In order for a defendant to challenge the constitutionality of a search and seizure he must have a reasonable expectation of privacy regarding the area searched or the items seized. Generally, one's body, premises where they live, property they own or if they are an overnight guest are examples of where there is a reasonable expectation of privacy. Here Duce had a reasonable expectation of privacy regarding the search of his automobile because it is his property.

Search Warrant

To obtain a search warrant, the police must have probable cause, specify to location and items to be searched and seized and be signed by a neutral magistrate.

Because the police did not obtain a warrant to search Duce's car, the warrantless search must fall under one of the exceptions.

Consent

A warrantless search is valid if consent to a search is given voluntarily and intelligently by someone with apparent authority to give consent. Here Duce had authority to give consent because the car was hers. Duce may argue that her consent was not voluntary because she was not told she had a right to refuse consent.

The voluntary and intelligent requirement does not require that the party giving consent be informed of her right to refuse consent. Therefore because Duce was not told she could refuse does not automatically render her consent involuntary or unintelligent.

Next Duce may argue that her consent was involuntary because it was obtained during the course of an interrogation that was not preceded by Miranda warnings. Duce may argue that not being informed of her right to counsel or to remain silent led to her giving consent to a query that would elicit an incriminating response from her. This argument is not likely to succeed because the request to search a car is not likely to elicit an incriminating statement from the defendant, only incriminating non-testimonial evidence that is not protected by the Fifth Amendment.

Automobile Exception

In the event that the consent is deemed invalid, the police may argue that the fruits of the search are admissible under the automobile exception. A warrant is not

required to search an automobile where there is probable cause that there are seizable items or contraband in the car. The police may search anywhere in the car that could reasonably contain the contraband.

Here the police may argue that they had probable cause to arrest Duce for the armed robbery. If the police can show, for example, that Duce's car was the getaway car, then probable cause to search for the gun and other contraband or instrumentalities of the crime may be established to search the car without a warrant. Thus, the items would be admissible under this exception.

Search Incident to Arrest

A search incident to arrest is probably not a strong basis for searching the car without a warrant. Where the defendant is arrested based on probable cause, the police may search the wingspan area of the defendant. Here the search took place at least three hours after Duce was arrested, and therefore the search is not "incident" to the arrest of Duce.

The evidence is probably admissible under consent exception and possibly the automobile exception. The court did not err in admitting the evidence against Cody.

Cody

The evidence would probably be admissible against Cody because Cody did not have a reasonable expectation of privacy with regards to the search of Duce's car.

A defendant may have standing to challenge a search if it is their property that is being searched and/or seized or if they were lawfully present at the time of the search. Here the car does not belong to Cody and he was not present at the time the police searched the car. Therefore Cody does not have standing to challenge the search based on Fourth Amendment grounds and the evidence is admissible against him.

2. Officer's Testimony about Duce's Confession

Under the Fifth Amendment, the defendant has the privilege against self-incrimination. Therefore, prior to any custodial interrogation the defendant must be given the Miranda warnings. An interrogation is defined as a statement or conduct made that is reasonably likely to elicit an incriminating response from the answerer. Custody is defined as a seizure of the body where a reasonable person would not feel free to leave. Evidence obtained in violation of constitutional rights must be excluded under the exclusionary rule at the trial of the defendant.

Here Duce was in custody because he was arrested. Therefore, a reasonable person who is arrested would not feel free to leave. A waiver of Miranda rights must be knowing, voluntary and intelligent. Here Duce was never given her Miranda warnings, so no waiver could have taken place. The officer's statement to Duce that the handgun and other stolen items were found in Duce's car was reasonably likely to elicit an incriminating statement from Duce. On balance, because of the officer's failure to give Miranda warnings the statements made by Duce during the three hours of interrogation and her confession must be excluded under the exclusionary rule as a violation of Duce's Fifth Amendment rights.

However, an otherwise voluntary confession given in violation of the Miranda warnings is admissible to impeach the defendant. Here Duce's statement about driving the getaway car was used to rebut Duce's testimony that she did not drive the getaway car. Because the statement is being used to impeach Duce's testimony and not in the prosecution's case in chief, the confession is admissible. The court did not err in admitting the confession for impeachment purposes.

3. Cody's Unredacted Confession

Under the Sixth Amendment, the defendant has a constitutional right to confront witnesses. A co-defendant's confession is admissible only if the statements inculpating the other party are redacted or if the co-defendant is subject to cross-examination. Here, Cody's statement was used to impeach Duce's testimony that she was not the driver of the getaway car. It is also being introduced as hearsay evidence, as an out-of-court statement to prove the truth of the matter asserted. Because Duce has a right to confront her witnesses, she must be permitted to cross-examine Cody, or Cody's statement must be redacted.

The statements of a third party may not be used to impeach the testimony of the defendant-witness, unless the third party is subject to cross-examination.

As a co-defendant, Cody is not required to testify and may invoke his Fifth Amendment right against self-incrimination. Therefore if Cody does not take the stand, Cody cannot be subject to cross-examination.

The hearsay exception of statements against penal interest does not apply here because Cody's statement that Duce drove the getaway car does not burden his penal interest. Even if it did, where such statements inculpate another party, there must be corroborating evidence.

ANSWER B TO QUESTION 3

This question raises issues of the validity of searches and seizures under the Fourth Amendment and the rights against self-incrimination under the Fifth Amendment. Evidence issues also arise. The Fourth and Fifth Amendments to the Constitution are applicable to the states by virtue of the Fourteenth Amendment.

Admission of Handguns and Stolen Items from Duce's Car

The issue is whether the police search of Duce's car and seizure of evidence from it was permitted under the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment.

For the Fourth Amendment to be applicable, there must be state action and a reasonable expectation of privacy. Here, the state action requirement is met because the police conducted the search. Further, the expectation element is met because people have a reasonable expectation of privacy of the contents of their car.

Once it is established that the Fourth Amendment applies, the police must conduct the search pursuant to a warrant, or satisfy a warrantless search exception. Here, no warrant was obtained. However, the police may conduct warrantless searches based on a number of exceptions, including consent, incident to arrest, the automobile exception, plain view, stop and frisk, and hot pursuit/evanescent evidence.

Of these exceptions, only the consent exception is a possibility. The automobile exception only applies where police have probable cause to believe a car contains the fruits

or instrumentalities of a crime. Here, the prosecutor conceded that this exception did not apply.

The consent exception applies where the police obtain a voluntary consent to search from a person with apparent authority over the property to be searched.

Here, the facts indicate that Duce was in custody for three hours under interrogation. However, there is nothing to indicate that the consent to the car search was coerced. Duce asserts that her consent was not voluntary because she was never told that she had the right to refuse to consent. However, the consent exception to the Fourth Amendment warrant requirement does not require that the person giving the consent be warned of their right to withhold consent. Accordingly, the seized items of evidence may be admitted at trial against Duce.

The evidence may also be admitted against Cody. As discussed above, for a Fourth Amendment right to attach to an individual, he or she must have an expectation of privacy that is reasonable. Because the car was owned by Duce, and not Cody, Cody has no reasonable expectation of privacy as to its contents and therefore has no standing to exclude the evidence.

Accordingly, the court did not err in admitting the handgun and stolen items against Cody or Duce.

Testimony about Duce's Confession

The Fifth Amendment provides the right of an individual to not be forced to incriminate themselves. This right is applicable to the states by virtue of the Fourteenth Amendment.

This right attaches upon custodial interrogation by the police. In this context, the police are required to deliver a Miranda warning. The suspect then may remain silent or may ask for an attorney. Absent the delivery of the Miranda warning, the results of a custodial interrogation are not admissible.

Here, there is no question that Duce's Fifth Amendment rights were attacked. She was under arrest, and therefore will be considered to be in custody. Further, the facts state that she was interrogated and that no Miranda warning was given.

The police will argue that the break in the questioning halted the initial interrogation, and that Duce's confession to driving the getaway car was voluntary, and not the result of interrogation. The facts indicate that Duce made her confession after being told what the police found in her car. Accordingly, while Duce was still in custody, there is a significant question as to whether her confession was the result of interrogation.

This is a close position. However, in light of the break in the initial interrogation and the spontaneous nature of her confession, the court probably did not err in allowing it.

It is important to note that even if the court finds the confession was obtained in violation of Duce's Fifth Amendment rights, the confession could still be admitted to impeach Duce's denial as a prior inconsistent statement.

Hearsay Issue

Hearsay evidence is generally inadmissible. Hearsay is a statement by someone not on the stand offered for the truth of the matter asserted. Here, the police officer is testifying as to what Duce said, and the statement is being offered for its truth. Accordingly, under the traditional rule, this statement would not be allowed.

However, under the FRE, admissions by a party opponent are non-hearsay. Accordingly, the confession would be admissible.

Testimony about Cody's Unredacted Statement

In a criminal trial, a defendant has the right to confront adverse witnesses, under the Sixth Amendment. Accordingly, in joint-trials, a co-defendant's confession is generally not admissible unless one of three conditions are met. The confession must either be redacted to remove any reference to the other defendant, the confessing defendant must take the stand and be subject to cross-examination, or the confession may be admitted to rebut a claim of involuntary confession by the other defendant.

Because the confession of Cody was not redacted, Cody did not take the stand, and the purpose of the confession was to rebut Duce's claim that she was not driving the getaway car, the unredacted confession should not have been admitted into evidence. Accordingly, the court erred.

If the confession is otherwise admissible, it would be permitted under the FRE as a vicarious admission of a co-conspirator.

QUESTION 4

In 1998, Diane built an office building on her land adjacent to land owned by Peter. Neither she nor Peter realized that the building encroached about ten inches on Peter's adjacent property. Because of the narrowness of Diane's lot, Diane did not have much latitude in the design of her office building. In December 2000, a town survey made for other purposes revealed the mistake. In constructing her office building, Diane inadvertently destroyed two dozen ornamental trees that had been on Peter's land for years.

Peter, who was a restaurateur, maintained a garden where he grew specialty vegetables for his restaurant. The vegetables have been unable to flourish without the filtered sunlight provided by the trees that Diane destroyed. As a result, Peter's costs have risen as he has been forced to buy more produce from suppliers. In addition, his reputation as a restaurateur has suffered because his customers had come to look forward to his fresh garden vegetables. Many of his customers have begun to frequent other restaurants, and the long-term effect on his business is incalculable.

Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction.

Diane's tenants have been parking on a lot in back of Diane's building. Diane paid for the paving of the lot under the mistaken belief that the lot was on her land. In reality, the lot is almost entirely on Peter's land. Diane has been charging her tenants $50 a month to lease parking space in the lot. Peter has never voiced any objection to this practice because, until the town survey, he did not realize that the lot was on his land.

What remedies are available to Peter against Diane, and on what theories of liability are they based? Discuss.

ANSWER A TO ESSAY QUESTION 4

The issue is what remedies Peter has against Diane for the damages to his restaurant business and the trespass on his property, and on what theories of liability he may base his claims. Peter has three causes of action for Diane's (1) encroachment on his property, (2) destruction of his trees and interference with his vegetable garden and the consequential damage to his restaurant business, and (3) use of Peter's land as a parking lot.

1. **Peter v. Diane for encroachment of Diane's building on Peter's property**

Theories of liability

Peter may bring a claim against Diane for trespass of land, which is the defendant's intentional entering of plaintiff's real property. Whether the defendant knew that he or she was trespassing on another's property is irrelevant for purposes of determining intent. As long as the defendant intended to enter the land, an action for trespass of land lies. Here, Diane built an office building on her land, but which encroached about ten inches on Peter's adjacent property. While Diane did not know at the time she had encroached onto Peter's property, and did so only because her lot was so narrow and did not have much latitude in the design of her building, she had, in fact, intentionally built her structure so that, in effect, it did encroach on Peter's property.

Therefore, Diane has trespassed onto Peter's property and she is liable for trespass of land.

Legal remedies: Damages

Usually, for non-possessory trespass, the only remedy available is nominal damages, which are damages merely to vindicate the plaintiff's legal right. These are damages awarded in the absence of a showing of actual damages. While Peter's legal rights as to his property were violated, here, however, there is a continuing or permanent trespass, for which Peter may pursue a number of remedies.

Peter may pursue compensatory damages for Diane's encroachment on his land. Compensatory damages are a measure of the harm done to the plaintiff. There must be actual causation, proximate causation, certainty of the value of damages, and unavoidability. Here, Diane's ten inch encroachment on Peter's land is the actual and proximate cause of her trespass on his land. The certainty of the damages can be measured by the value of the land. Finally, there is little Peter could have done to avoid or mitigate Diane's damages because he did not know that Diane was encroaching on his land at the time.

Punitive damages are not likely to apply since Diane's conduct was not malicious or willful.

Therefore, Peter may pursue compensatory damages in the form of rental value for the land, or a measure of diminution of value of his land.

Legal restitutionary remedies: Ejectment

Ejectment is a legal action that the plaintiff may take to reclaim real property to which he or she has a legal right of possession, and which the defendant is wrongfully and actually possessing. Here, Peter has a legal right of ownership of the ten inches of land on which Diane has encroached and is wrongfully and actually possessing the presence of her building.

Therefore, Peter may seek and ejectment action to force Diane to remove the ten inch encroachment on his land.

Equitable remedy: Injunction

Peter may also seek to enjoin Diane from using his land. Peter must show that there is an inadequate legal remedy alternative, that he has a property right or protectable interest, that enforcement is feasible, that the balancing of hardships weighs in his favor, and that there are no defenses that can be asserted against him.

First, Peter will have to show that money damages do not adequately address his injury. Here, Diane has encroached about ten inches onto his property. Because the facts do not indicate that the ten inch encroachment caused any other damages besides the trespass on his land (the fact that the building itself caused other consequential damages will be discussed below), money damages will probably be adequate.

Second, Peter clearly has a property right on the ten inch encroachment. Therefore, Peter will win on this point.

Third, enforcement is not likely to be feasible because the sheriff, in an ejectment or injunctive action, is not likely to order Diane to tear down her building in order to stop encroaching on Peter's land. Therefore, Peter will most likely lose on this point.

Fourth, the balancing of hardships is likely to weigh in Diane's favor. Here, Diane has encroached only about ten inches on Peter's land. On the other hand, Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction. Therefore, Diane would not only suffer damages to her building, but would suffer long-term fallout from tenants leaving and justifiably breaking their leases. Because the harm to Diane is great and the harm to Peter is relatively small, Peter is likely to lose on this point.

Finally, Diane may assert laches in that Peter should have surveyed the land during construction of her building. She will likely lose on this point because neither she nor Peter realized the building had encroached about ten inches.

In conclusion, the balancing of hardships will most likely prevent Peter from seeking an injunction. Therefore, money damages, as discussed above, will most likely suffice for Peter.

2. Peter v. Diane for destruction of Peter's ornamental trees and blocking of filtered sunlight and harm to restaurant business

Cause of action

Peter may assert an action for conversion for the destruction of the ornamental trees that had been on his land for years. Conversion is where the defendant interferes with and damages plaintiff's chattel to such a point that it warrants forcing defendant to pay the fair market value of the chattel at the time of conversion. Here, Diane, although inadvertently, destroyed two dozen ornamental trees that had been on Peter's land for years. Because she destroyed the trees, she is liable for conversion.

Legal remedies: compensatory damages

Peter may seek compensatory damages for the loss of his trees. Diane's actions were the actual and proximate cause, and are certain and unavoidable. Therefore, Peter may seek the fair market value of the trees at the time at which Diane destroyed them.

In addition, Peter may seek damages to his garden. Because the trees were destroyed, the vegetables have been unable to flourish without the filtered sunlight provided by the trees. The damages are readily calculable and certain based on the past production from the garden. However, Diane may successfully argue that Peter had a duty to mitigate the damages by obtaining new trees or trying to find some other means of providing filtered sunlight to his vegetables. Therefore, Peter's recovery for the garden may be reduced.

As for the harm to the restaurant, Diane will argue that those damages cannot be ascertained with certainty. Peter may be able to calculate the rise in costs as he has been forced to buy more produce from suppliers. Determining the certainty of damages requires looking at past historical performance date or calculating future damages with an all-or-nothing "more likely than not" rule. Calculating the damage to Peter's reputation and other long-term effects to his business is "incalculable." Therefore, lacking any degree of certainty, Peter is not likely to recover for the damage to his reputation and long-term reputation to his business.

Punitive damages are not likely to apply since Diane's conduct was not necessarily willful or malicious.

4. **Peter v. Diane for Diane's use of Peter's land as a parking lot**

Cause of action

Peter may assert an action for trespass of land for the use by Diane's tenants of a lot behind Diane's building for a parking lot, which was in fact Peter's land. Here, even though Diane paved the lot under the mistaken belief that the lot was on her land, she is still liable for intentionally entering the land and paving the lot on it, because she intentionally entered Peter's land.

Legal remedies: damages

Peter may seek compensatory damages. These damages must arise from Diane's proximate and actual actions that caused the damage, and must be certain and unavoidable. Here, Diane paved over part of Peter's land, causing damage. She has also used Peter's land, incurring rental value of the land. Therefore, Peter may seek compensatory damages for both the damage done to his land and for the rental value of her using his land.

Punitive damages are not likely to apply since Diane's conduct was not malicious or willful.

Restitutionary remedies: restitution

Peter may recover more, however, if he files for restitutionary damages. Restitutionary damages are a measure of the benefit that the defendant has gained from the injury committed on the plaintiff, while compensatory damages are a measure of the damage to the plaintiff. Here, Diane has been charging her tenants $50 a month to lease parking space on the lot. Therefore, Peter may be able to recover that proportion of the parking lot leasing fees as was on his land, so as to avoid unjustly enriching Diane.

ANSWER B TO ESSAY QUESTION 4

I. Encroachment of Diane's office Building

Liability

The first issue is whether Diane (D) is liable to Peter (P) for her encroachment. Neighboring landowners can be liable for encroachment whenever the improvements on their land physically intrude onto the property of another. Here D's building clearly counts as such an intrusion and the slightness of the intrusion (10 inches) does not prevent the encroachment from being actionable. Neither is D's liability affected by her inadvertence [n]or the fact that she had little latitude in the construction of her building (although her inadvertence ensures she may not be sued for a trespass to land). Therefore, P may sue D for encroachment.

P's remedies for the building

Compensatory Damages

The next question is how much damage P is entitled to collect. The damages typically awarded for an encroachment depend on the duration of the encroachment. Where an encroachment is permanent, P will be awarded the market value of the encroached-upon land. Where the encroachment is only temporary, P will be given the fair rental value of the encroached land for the duration of the encroachment. Further, to collect damages, one must show that D's acts were the factual and legal cause of the damage, that the damage can be calculated with reasonable certainty, and that they have taken all appropriate steps in mitigation.

On these facts, D's encroachment is likely permanent (but see injunction below) and D can seek the market value of the taken land. Cause will be established by D's conduct, and P has no realistic means to mitigate. As to certainty, D would like[ly] take the fair market value of his entire tract, as determined by some reasonable means, perhaps by consulting a professional estimator, and divide it by the percentage of land D encroaches.

Punitive Damages

Punitive damages are intended to punish D for the wrongful conduct. Punitive damages can only be awarded, however, when D has acted willfully in the damaging of P's property. Here, D's acts appear to be inadvertent in every regard, so punitive damages will not be awarded.

Restitutionary Damages

P may also be entitled to collect the benefit D has enjoyed from the wrongful intrusion upon his land. Restitutionary damages are awarded to P where D has been unjustly enriched by some wrongful conduct, in the amount of that enrichment. Again, P could take the rental value of the tenements on the encroaching portion of the building and try to calculate the amount their rent would have to be reduced were it not for the extra space of the encroachment. This calculation presents serious certainty problems for P.

It should also be noted that P must elect whether to collect actual or restitutionary damages, and cannot collect both. P should select whichever method offers the

greatest result, or, if either method cannot be proved to sufficient certainty, should select the one that can be.

Equitable lien

If P does get a restitutionary award and D refuses to pay, or is somehow unable to, P may also seek to place an equitable lien on D's bank accounts, in the amount of the award. An equitable lien entitles a plaintiff to collect money from the other party without their consent, by giving the plaintiff a secured interest in the other's money.

Injunction

The next important issue is whether P will be able to compel D to remove the encroaching portion of her building. A court in equity can order an injunction of this kind where the plaintiff's remedies at law are inadequate, plaintiff has a legitimate property interest, the court has jurisdiction of the subject matter, making the award "feasible," the balance of the hardships tips in the plaintiff's favor, and the defendant has no equitable defenses.

Inadequate remedies

D will argue that an award of money damages or restitutionary damages to P is adequate to compensate him for his loss. P will argue that because his loss is in real property, and all real property is unique, damages are rarely if ever adequate in such cases. The court will likely rule with P that damages cannot adequately compensate one for a loss of real property.

Feasibility

From these facts, it appears that the two properties and both parties all reside in the same state. In such a case, there are no barriers to a court enforcing its orders. If, however, either party were from a different state or the properties were somehow straddling state lines, there could be a problem with [the] court ordering an injunction.

Balancing of the hardships

Balancing allows the court to weigh the respective damage that each party will incur if the injunction is granted or if it is denied. Balancing is considered especially appropriate in cases of encroachment and nuisance.

Here, the encroachment is rather small and P is suffering little harm from his inability to use this 10 inches of his land. If P had some plans for his land that the encroachment were somehow preventing, that would weigh in his favor, but on these facts, his hardship is not great.

D by contrast will likely incur great costs to abate the encroachment. It is certainly possible that her building will have to be torn down entirely. At a minimum, her tenants on that side of the building will have to leave their tenancies for a substantial period and tenants in the rest of the building will have to tolerate the noise and commotion of ongoing construction. D will likely suffer great economic harm if such an order is given.

Equitable defenses

There are no obvious equitable defenses (e.g., unclean hands, laches) presented by these facts. It seems that both parties acted in good faith and were simply unaware of the boundary lines.

II. Conversion of the trees

P can also sue D for the destruction of the trees on his property. A case of conversion will be made out where one intentionally destroys or otherwise substantially damages the property of another. Here, D's conduct was "inadvertent" so an action for conversion will not lie.

Negligence as to the trees

P may also sue if D was negligent in the destruction of the trees. Negligence requires a duty between the parties that is breached, causing damage. Here, neighboring landowners owe each other a duty to perform construction competently, but the facts do not indicate whether D was negligent in the destruction of P's trees. However, under the doctrine known as res ipsa loquitor P can still collect on a negligence theory where 1) the instrumentality of harm was under D's exclusive control, 2) the type of harm is one that would not normally occur without negligence and 3) P was not at fault. Since D was responsible for the construction, negligence will likely be presumed under res ipsa loquitor.

P's remedies

Compensatory damages

P may collect for the value of the trees under the same rules announced above.

Damage to garden

Whether P may also collect for the rising costs of tending his garden turns on issue of causation, certainty and mitigation. Again, P will have to show that the absence of the trees caused his gardening problems, he will have to establish a reasonable means of calculating his costs, and will have to prove that there were no steps he might have taken to lessen his damage (e.g., erecting an alternate source of light filtration). In the end, the court would likely permit P to collect for his gardening costs.

Damage to P's business

P's right to collect for his lost business also presents serious certainty and causation problems. P's position will be substantially enhanced if his business has been in existence for a long time. The damages to the reputation of a newer business are frequently regarded as too speculative to be awarded by the courts. P must also show clear causation. D will likely look to the surrounding community and any general decline in restaurant revenues to explain P's losses. In the end, the court should rule that the damages are too speculative.

Restitutionary damages

P may not collect restitution as D was not enriched by the destruction of the trees.

III. Encroachment by the parking lot

Damages

P may collect for damages on the same theories explained above for encroachment. That is, P will get the fair market value of the land encroached, unless there is an

injunction to remove the parking lot, in which case he will get the fair rental value of the land while it was covered.

Restitutionary damages

P may also elect to collect from D the amount by which the parking lot has enriched her. This would be a relatively simple calculation, given that D has been charging her tenants for use of the parking space. That is, P's case that these amounts are certain is a strong one.

Ejectment

P could also seek to simply have D and her tenants forbidden from returning onto the land, which is almost entirely his. If he were successful, he could theoretically use the lot for his own purposes. However, D would likely be able to recover in quantum meruit for the amount she has enriched D's land with her construction of the parking lot. P will argue that because she's a trespasser, she is entitled to no recovery. On these facts, the court would likely allow D to recover for the amount she benefitted P.

Equitable lien

Under the principles explained above, P might get an equitable lien on D's accounts to ensure prompt payment of the restitutionary damages he may be entitled to.

Injunction to remove the lot

On the same factors explained above, P could seek to have the lot completely removed.

Inadequate remedy

Again, an interest in land is considered "unique" and any payment of a large swath of the land like this would be considered inadequate.

Balancing of the hardships

This calculation weighs far more strongly in P's favor than did the building. Here, D has taken a large portion of P's land, impairing his rights substantially. By contrast, D's only hardship will be the removal of the offending improvement and the loss of income it provides. D may also note that she may lose tenants if she has to give up the lot, but these hardships are all ones D brought on herself, and she cannot avoid them at P's expense.

Conclusion

Therefore, the court would give P an injunction, ordering D to remove the lot from his land.

QUESTION 5

Jones & Smith is a law firm concentrating on plaintiffs' personal injury litigation. The firm has decided to take several steps to increase its business volume.

First, the firm plans to run television advertisements stating that the firm offers to handle cases for discount contingency fees. The advertisements will state that, while most firms normally charge a 33% contingency fee for handling a personal injury case, Jones & Smith will undertake representation for a fee of 25%. In addition, the advertisements will state that the firm offers interest-free advances against prospective judgments in cases of clear liability of up to 50% of the firm's estimated value of the case.

Second, the firm plans to acquire from the police department lists of individuals who have been involved in automobile accidents, and to mail letters to those persons informing them that the firm is available for consultation about their legal rights arising out of the accident. Individuals who have been hospitalized as a result of an accident will receive a flower arrangement, delivered "compliments of Jones & Smith, Attorneys at Law."

Finally, the firm plans to make use of nonlawyers in order to reduce costs. The firm will employ several paralegals and investigators who will be responsible for working up personal injury cases. Their activities will include fact investigation, witness interviews, negotiation with insurance adjusters, meetings with clients to discuss proposed settlements, and settlement conferences with clients to explain releases and to execute other documents necessary to conclude a case.

Do the proposed actions violate any rules of professional conduct? Discuss.

ANSWER A TO QUESTION 5

The ABA Model Rules generally provide the majority ethical rule standards governing the conduct of attorneys. California has some rules which are more strict, less strict or different than the ABA rules on various issues. As to advertising, in particular, California has detailed requirements requiring that ads be labelled and that any staged recreations or simulations be labelled, and also designating a number of practices as presumptively deceptive or misleading. That includes any guarantees or warranties of results, as one example.

1. The Television Ads

Lawyer advertising is commercial speech, which is subject to regulation that balances the First Amendment free expression rights with limitations such as that there is no constitutional right to make false statements.

Thus, while lawyer advertising is permitted, it must be truthful and not misleading.

A law firm is entitled to advertise its rates. The Jones & Smith (J & S) ad's statement that while most firms normally charge a 33% contingency fee, they will charge 25% is potentially misleading in that it may not be true that most firms charge a 33% contingent fee. If that statement can be supported (and may well be true), the next problem is that the ad does not disclose that costs for advanced items will be recovered as well.

California requires contingent fee contracts to be in writing and to specify not only the contingency percentage but also whether costs are recovered before or after the contingency percentage is applied. The absence of that information (i.e., whether costs are recovered before or after the 25% contingency is calculated) may render the ad misleading.

The Interest-Free Advances

The offer of interest-free advances against prospective judgments in cases of clear liability of up to 50% of the firm's estimated value is clearly an ethical violation, in several respects.

First, a lawyer is not permitted to acquire a personal financial interest in a case, apart from the permitted contingent fee. Lawyers may not pay to get a case. Lawyers also are generally not permitted to loan clients money. They may advance litigation expenses or sometimes necessary medical expenses necessary for litigation. California does permit loans, but only after the representation is established and only if the client signs an IOU in writing.

The ad contemplates advances on loans even before the potential client has become an actual client.

Additionally, the parts of the ad that deal with "cares of clear liability" and "50% of the firm's estimated value of the case," are suggestive of guarantees or assurances of case outcome which, as noted above, are presumptively misleading and impermissible in California.

2. The Mailings to Accident Victims

The Supreme Court has upheld targeted mail solicitations such as letters to accident victims. However, the ABA Model Rules and California impose various restrictions and requirements on such letters. Both the letters themselves and the outside envelope must note that it is a commercial solicitation. The information about the firm and its availability also must be truthful and not misleading. So the plan to mail letters is not ipso facto any ethical violation assuming that the accident information is obtained lawfully. Informing that the firm is available for consultation is permissible.

The plan to send flower arrangements to hospitalized victims that say, "compliments of Jones & Smith," is not ethically permissible.

As noted above, any advertising has to be labelled as such. This would be considered advertising and would have to be labelled.

Second, there is a problem of direct solicitation. The law firm is not sending out a general mailing advising of its availability, but instead soliciting business from an individual.

Just as it is not ethically proper for a lawyer to fling his business card to an accident victim as he goes by (without any direct discussion) it would likewise be impermissible to solicit business by a card on a floral display.

Additionally, a lawyer may not offer payments or gifts to obtain business. A floral display sent to a friend or colleague with the compliments card would be permissible. A floral arrangement sent to a potential client to encourage him/her to hire the firm is not ethically permissible. It violates duties of fairness to other lawyers and of decorum to the public.

Use of Non-lawyers

Non-lawyers may be used by lawyers to assist with legal tasks, subject to several restrictions. Lawyers may not share legal fees with a non-lawyer. The non-lawyers must be supervised by the lawyer(s) and the lawyers are responsible for any ethical breaches committed by their supervisee. Additionally, it is ethically impermissible for lawyers to assist non-lawyers in the unauthorized practice of law.

Some of the activities contemplated here are proper for non-lawyers, such as fact investigating and witness interviews, as long as the paralegals and investigators observe client confidentiality and other strictures.

Some of the activities contemplated involve the practice of law, and the law firm is in ethical violation if it assists in that.

Meetings with clients to discuss settlements and settlement conferences to discuss releases and to execute other documents involve legal functions - judgments about the legal strength of claims and the evaluation of legal documents and their consequences. The paralegals and investigators should not be performing those functions.

Likewise, negotiations with insurance adjusters is not an investigatory function or a paralegal one. It involves legal evaluations and a number of legal judgments and legal strategies. That should be done by a lawyer. Paralegal or investigator involvement would involve the unauthorized practice of law. The law firm would be in ethical violation by assisting or allowing that to occur.

Supervising lawyers are liable for any ethical violations which they direct or know about and fail to correct.

ANSWER B TO QUESTION 5

Jones & Smith (J & S) as a law firm has proposed several actions that raise potential conflicts with, and violations of, both the ABA Rules of Professional Conduct and those specific to California. Where appropriate, the split between the ABA and California Rules is mentioned below.

I. TELEVISION ADS

There is nothing inherently wrong with a firm running ads seeking to inform the public that it wishes to offer its legal services. While some may find ads seeking representation on T.V. to encroach upon the duty of dignity and decorum to the profession and public, commercial speech under the First Amendment is protected speech so long as it is not deceptive, false or misleading.

J & S must make clear in their T.V. ads that the spots are ads seeking to gain clients and must not make any unverified claims or comparisons. If actors are used in the spots, the ads should clearly state the ad is a "dramatization" and contain an attorney name and contact number for the ad.

California's statutory code provides a series of presumptions concerning improper lawyer advertising. Among these is that a firm should not make any unsubstantiated guarantees, warranties or representations.

Here, J & S plan to state that most firms handle contingency fees for a personal injury case for 33% of the eventual recovery. J & S will need to verify this claim before giving such an ad and also make clear how the costs are calculated. Since it is inherently difficult to offer an industry-wide practice, particularly where the geographic scope is not mentioned, regarding costs, J & S may be engaged in deceptive or misleading advertising.

J & S then plans to compare its 25% fee to that of "most" firms at 33%. The ad is deceptive, or potentially misleading, in that "most" is very imprecise (51% or 99%?) and does not state what is involved. Then J & S attempts to state that it will "undertake" representation for a 25% fee. What does undertake mean? Does it mean that all personal injury cases are for a 25% fee, or does it mean that this is a floor for negotiation or for most cases?

More importantly, a contingency fee arrangement is a contractual relationship between the client(s) and firm in which all relevant factors must be made clear to the parties. The fee arrangement should detail, inter alia, (i) what costs are included or excluded, (ii) whether the percentage includes or excludes such costs, and (iii) what costs are involved in the event counsel is dismissed or withdraws before settlement.

The ABA provides that contingency fees must not be unreasonable while California requires that fees not be unconscionable. Additionally, personal injury cases often involve medical malpractice claims and such claims in California can be capped at a set percentage.

Loans

The ads also plan to mention that J & S will offer interest-free advances against prospective judgments in "cases of clear liability" of up to 50% of the firm's "estimated value" of the case. Both standards appear to be very subjective and offer the consumer no true idea how or whether a loan will be granted.

More importantly, loans are improper under both the ABA and California Rules. The ABA provides that loans may only be advanced to indigent clients for necessary litigation expenses, while California provides that loans are per se improper unless accompanied by a signed promissory note.

Additionally, the loans serve to provide J & S with an improper interest in the subject of litigation. However, this is not fatal since contingency fee arrangements inherently involve interest in the client's litigation.

II. IN-MAIL SOLICITATION

It is proper for J & S to acquire the names of potential clients from the police because this is public information made available to the public.

While it would be improper for lawyers to use such lists for in-person solicitation of clients, sending letters is different. Lawyers are prohibited by the rules of professional conduct from in-person solicitation of prospective clients for personal pecuniary gain in the absence of a pre-existing legal or familial relationship. The rationale is that potential clients may feel coerced to assent to representation under the duress of face-to-face confrontation.

This concern is lessened with solicitation for profit through the mail. There is less pressure and the client is better able to weigh his options. The rules pertaining to such letters are similar to those for T. V. acts above - there should be a prominent disclaimer that this is an ad for legal services and provide an attorney contact and number. Attorneys are required in California to keep a copy of all such ads for 2 years and make them available for inspection to the state bar.

The letters should not make any unverified claims, comparisons, or contacts or influence with local agencies and officials. Additionally, while the firm may state that it concentrates in the area of personal injury, it should not claim any specialization unless certified by the state bar or an approved independent organization.

Flowers

Attorneys are forbidden to either personally, or through the use of runners and agents, solicit representation in person at the scene of an accident or in the hospital. Such scenarios increase the likelihood of pressure and duress in gaining solicitation, and is a breach of the public's trust in the profession.

The flowers may or may not be improper. However, no matter the variety, something smells bad when a law firm sends flowers or gifts to prospective clients. As such, the flowers may constitute solicitation and would be improper. Even if they do not, J & S should refrain from sending flowers.

III. USE OF NON-LAWYERS

Non-lawyers may not direct nor supervise the work of lawyers. Additionally, lawyers may not share fees with non-lawyers for conducting legal work (with exceptions for death benefits and pensions).

Here, J & S seeks to have non-lawyers conduct the following activities:

i) Fact investigation

This is proper, and many firms employ paralegals and even private investigators to do such work.

ii) Witness interviews

This may be appropriate, but attorneys owe their clients a duty of competence to fully prepare and handle their cases. Witness interviews should only be conducted with sufficient firm oversight so that important factual matters giving rise to legal claims do not go unnoticed.

iii) Negotiations

This is prohibited. Non-lawyers may not engage in the providing of legal services. Since insurance adjusters often determine the size of the claim, attorneys should oversee such negotiations.

iv) Proposed Settlement Meetings

This is also prohibited. Lawyers have a duty to communicate with their clients and relay all proposed settlement offers. A client is owed a duty of loyalty and

confidentiality, and this entails that all such communications are to be between the client(s) and attorney(s).

Additionally, clients oversee substantive decisions (whether to settle) while attorneys oversee procedural/tactical decisions. Thus, non-lawyers should not conduct settlement conferences since it violates the above rules and duties.

v) Execute other documents

Lastly, non-lawyers are not to execute any documents with legal significance that require legal analysis and professional judgment. To allow otherwise breaches duties to the client, profession, public and the courts.

QUESTION 6

Owens, a homeowner, approached Carter, a licensed contractor, to discuss construction of a new garage attached to Owens' home. After several meetings, Owens and Carter signed the following contract.

> Carter will build a two-car garage, with overall dimensions of 30' (width) by 25' (depth). Included within the overall dimensions will be a storage area at the rear. Storage area to be 30' by 4', and divided from the remainder of the garage by a wall containing a door. Wooden siding, paint, and roof will be matched to Owens' home. Carter will commence work on March 15 and will complete job no later than April 30. Owens agrees to pay $8,500 upon completion. The time for performance of these obligations shall be of the essence.

The contract was signed on January 15, and Carter arrived on the job site on March 15 to begin work. Several weeks later, Carter learned that roofing shingles of the exact type and color used on Owens' home were difficult to obtain. Therefore, he used shingles made of other material which were of even higher quality than those originally planned but which, although very close, did not precisely match those on the roof of Owens' home.

Carter completed the garage on May 10 and presented Owens with a bill in the amount of $8,500. Later on the same evening, Owens placed his car in the garage only to learn that the length of his car did not permit the garage door to close. Upon closer inspection he discovered that the storeroom at the back of the garage was 30' by 6', two feet deeper than planned. As a result, the garage parking area was only 19' in depth. While this would be sufficient for most automobiles, it was several inches too short to accommodate Owens' large car.

The cost of removing and relocating the dividing wall would be $800. The cost of removing and replacing the shingles with others matching Owens' home would be $2,200. Owens has refused to pay any part of Carter's bill, citing as reasons Carter's failure to (1) complete the job by April 30; (2) use matching shingles; and (3) build a garage and storeroom of the dimensions called for by the contract.

What are Carter's rights and liabilities? Discuss.

ANSWER A TO ESSAY QUESTION 6

I. Carter's liabilities and rights under the Contract

Carter's contract with Owens complied with all the formation requirements because it has mutual assent, consideration, and it was in writing, satisfying the Statute of Frauds. So the issue here involves the performance of such a contract by Carter. If Carter's contract with Owens had conditions, then Carter's compliance with those conditions will be at issue. Whether Carter's performance is excused is also determinative of his rights and liabilities. Finally, if Carter's performance duty is not excused, then whether his performance was a breach [sic].

A) Time of Essence Clause on Contract

The Contract specifically had a time of the essence clause at the end. Courts will construe these clauses strictly if they are intended by the contracting parties. Since it was expressly stated, the courts will not second-guess the intents of the parties and strictly construe this clause.

Since the clause will be strictly construed by the courts, then this clause will be viewed as a condition precedent to payment. If the party can't fully perform by the prescribed dates, then the condition precedent to payment hasn't been satisfied. As such, Owens need not pay Carter the $8,500 because the express condition of completing the construction by April 30 wasn't complied with. So Owens has a right to withhold payment because the condition wasn't satisfied as stated on the contract.

But to render the whole contract breached just because the time of the essence clause wasn't fully complied with will be too harsh on the breacher. Carter did tender substantial, if not full, performance by building the garage and the storage room. (The issues with the shingles and storeroom will be discussed separately in the next sections.) So the court may not strictly construe the time of the essence clause as an express condition. Instead, if the

court construes the condition as a covenant instead, then Carter's failure to finish by April 30 will not be fatal.

Covenants are promises by the parties that they'll abide by them, and failure to do so will result in damages to the aggrieved party. If the time of the essence clause is not an express condition precedent to payment, then Owens' obligations to payment is not excused. He will only be able to claim dollar damages because Carter didn't comply with the covenant of the time of the essence clause.

B) Matching Shingles

The express terms of the contract have to be complied with by the parties because that reflects the parties' intent and their duties under the contract, since the contract expressly stated that the "shingles will be matched to Owens' home." Failure to do so will be a breach. The issue is whether the breach is a material one or a minor one.

In a minor breach, the aggrieved party is not excused from full performance of her duties. So Owen[s] should still pay the contract price to Carter minus the costs of the minor breach if the matching shingles is indeed considered minor. But if the failure to put matching shingles onto Owens' garage is a material breach, then the aggrieved party is excused from payment.

The matching of the shingles to the house is probably a minor breach. Whether singles match or not does not affect the construction of a garage and a storeroom. This only goes to an aesthetic issue. It is also subjective whether Owens thinks the shingles match with the house or not. So the failure to match is not a material breach since the substantial part of the contract was not to put shingles on but rather to build a garage and a room.

Carter may even argue the singles matched and so there wasn't even a minor breach. But Owens will counter by saying the contract expressly asked that they match his home and

since they don't "precisely" match, there's a breach. Albeit the discrepancy may be minor, but courts, again, will construe the contract as the intent of the contracting parties.

Another way to get around the problem of not getting precisely matching shingles and so having breached in a minor way would be the concept of excuse. Carter may assert he's excused by impracticability because the perfect shingles weren't obtainable with ease. But for impracticability to be a viable excuse, the burden must be so severe for compliance to render the compliance impracticable. Here, the burden to look harder for those matching shingles can't be severe. Although Carter did use better quality shingles, Owen[s] contracted for "matching," not "high quality" shingles. So Carter's assertion of impracticability to excuse his duty to get matching shingles can't prevail.

But Carter can assert that he's mitigated by using almost matching shingles. (Remedies section will discuss mitigation.)

C) Building of a Garage and Storeroom as Specified

Once again, the contract expressly stated duties and term for Carter to perform and abide by . So Carter's failure to comply will be a breach.

These breaches have a stronger argument to be material ones because the contract's essence is to build a garage and storeroom in a specified dimension. Since the contract expressly required Carter to build them in a certain size, the intent of Owen[s] was clear. So Carter's failure to perform as instructed will be a material breach because the dimensions of the garage and storeroom didn't follow the contract as stated.

As such, Owen[s] can be excused from performing because it's a material breach. However, if it's a minor breach, then the court will still require Owen[s] to pay Carter.

The failure to comply with the exact dimensions could be viewed as a minor breach because the garage and storeroom were completely built as directed with the design,

materials, and overall dimensions roughly. The deviation from the dimensions are 2 inches only. So the breach could be minor. Since normal cars would fit, the purpose of the contract is not frustrated because Carter still built a garage usable by cars. It's just that Owen[s] has peculiarly long cars that don't fit without the extra 2 inches. However, Owens didn't communicate this to Carter, so Carter's failure to take heed in ensuring the dimensions are at least 30' by 4' and 30' by 25' couldn't be Carter's fault. Therefore, Carter's failure to follow precise directions could possibly be viewed as a minor breach. Then he'll still be entitled to the contract price minus the cost of fixing the breach.

II. Breacher's Remedies

A) Material Breach

If the court construes all the aforementioned breaches as material breaches, then Owen[s] is permitted to withhold payment. Owen[s] can also get the cost of completing the garage and storeroom and the replacement of the shingles from Carter. Those are his expected damages and Carter will be liable for them

However, under restitution, it'll be unfair for Owen[s] to get the entire garage and storeroom without paying Carter anything. So restitution allows Carter to get back the benefit conferred onto Owen[s] so that an unjust enrichment of Owen[s] wouldn't result. Owen[s] should disgorge the costs of the garage and storeroom minus any costs he'll incur for fixing the material breaches. Since the contract price was for $8,500 and Owens' cost of remedying the wall and shingles cost $3000, Carter can get $5,500 back on his restitution costs.

B) Minor Breach

If those breaches are minor, then Owen[s] should pay the $8500 to Carter since he did substantially perform and his breaches weren't willful. A breacher can still collect the contract price because he substantially performed. However, Carter must pay Owen[s] the costs for remedying the shingles and the wall removal so the car will fit. But Carter will argue that he need not pay $2,200 to Owen[s] because he substantially complied by providing better quality

and closely matching shingles. Carter mitigated by using closely matching shingles. So Owen[s] needs to mitigate the damages from these non-matching shingles by not replacing them entirely. Carter should not be liable for the $2,200 for replacing all the shingles.

C) Specific Performance

Generally, courts are reluctant to grant specific performances because personal services contract[s] are hard to administer and will be imposing involuntary solitude. So if Owen[s] asked for specific performance by Carter to redo the garage and the replacement of the shingles, such a remedy will not be granted. Most important reason is that there is an adequate legal remedy in making Owen[s] whole. So specific performance will not be something Carter needs to do for his breaches.

ANSWER B TO ESSAY QUESTION 6

Owens (O) and Carter (C) entered into a valid construction contract, to which the common law of contracts applies. The determination of C's rights and liabilities depends upon an analysis of his performance of the terms of the contract and any breach thereof.

At common law, the duty to perform may be discharged by exact performance of the terms of the contract. A performance which does not conform to the terms of the contract does not discharge the duty and is a breach of the contract. A breach may either be minor or material. A material breach is one that so substantially affects the value of the contract (or the benefit of the bargain) that the duty to pay the contract price is discharged, while a minor breach occurs when substantial performance has been rendered. In the event of a material breach, the breaching party may not recover under the contract but may recover any benefit bestowed under quasi-contract (or quantum meruit) principles. For minor breaches, the breaching party may receive the contract price, less the amount by which the defective performance reduced the bargained-for benefit.

1. Breach of the "time is of the essence" clause

A "time is of the essence" clause serves to notify the parties that a failure to render performance by the specified date is a breach of a contractual term and may entitle the promisee to damages.

Here, C breached the time is of the essence clause, because he finished performance ten days late. There is no showing that this caused O any actual damages and so O's remedy would be limited to nominal damages. Carter's liability for this (minor) breach is negligible.

2. Failure to use matching shingles

C has an argument that he did not breach the relevant term at all. It is unclear from the contract whether the term "matched" means: a) the siding, paint and roof on the garage shall be constructed from precisely the same materials as the corresponding pieces on the house; or b) the siding, paint and roof shall be of reasonably similar materials so that, as a totality, the house and garage match (to a reasonable person or even to O's satisfaction). If customarily in construction contracts it means the latter, C will prevail, in the absence of contrary evidence of the parties' intentions. O could have (but did not) specifically bargain for exactly matching shingles. (It might have been wise to ask or notify O about the non-match earlier, though.)

Assuming that C loses the above argument on interpretation, he has failed to perform exactly and thus has breached. This breach does not go to the value of the bargained-for consideration - the roof is otherwise a perfectly good roof (and may be superior to the one bargained for!). O will not be able to obtain the cost of removal and replacement, but will only recover the difference in value, if any. Again, C may be liable only for nominal damages.

3. Failure to build the dividing wall

C's failure to put the wall in the right place is a more serious issue, because that failure does go to the suitability of the garage for O's intended use (i.e., to the value of the bargained-for benefit). However, the cost of correcting this problem is less than 10% of the total contract price. This is likely to be considered a minor breach as well, with damages of $800.

C may file suit against O for $7,800; i.e., the contract price of $8,500 less the $800 to relocate the dividing wall. Unfortunately, the time of essence clause has the effect of cutting off the time of performance allotted to C, so C cannot correct his mistake and sue for the entire contract price.