



California Bar Examination

Essay Questions and Selected Answers

July 2024



ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2024

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2024 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered “model” or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Business Associations
2.	Real Property
3.	Professional Responsibility
4.	Civil Procedure
5.	Remedies

ESSAY QUESTION 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 situation 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 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 to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no 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 that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

PickWinners Inc. (Pick) is a corporation that markets to wealthy investors who want to trade stocks online. The shareholders of Pick elected Alex, Baker and Cate as the sole members of the Board of Directors.

Cate believed that Alex and Baker caused a decline in Pick's market share and stock price by focusing exclusively on wealthy investors, thereby ignoring average consumers and losing the low-priced end of the trading market to other companies.

At a Board meeting, Cate told Alex and Baker that she planned to start a competing company called E-Save, Inc. (E-Save) unless Alex and Baker agree that Pick will form a subsidiary to focus on the low-priced end of the trading market. Cate stated, "Pick can capture the low-priced end of the market with a subsidiary that advertises on social media platforms. Otherwise, Pick risks continually losing market share and value." Alex and Baker disagreed with the proposal and responded, "Pick's decline just mirrors the overall recent decline of the stock market." They also reminded Cate that, "We hired an analyst two months ago who looked at the low-priced end of the market and concluded that there was no money in it." Cate replied, "If Pick won't do it, I will form such a company myself."

Cate subsequently formed E-Save on her own. E-Save soon began generating large profits. Meanwhile, Pick's market share and stock price continued to decline.

Several of Pick's shareholders learned of the Board's actions and Cate's operation of E-Save. Their written demand that the Board take remedial action was denied and the shareholders now plan to file suit on behalf of Pick.

1. Upon what theory or theories may the Pick shareholders bring claims against Alex and Baker and what is the likely result? Discuss.
2. Upon what theory or theories may the Pick shareholders bring claims against Cate and what is the likely result? Discuss.

QUESTION 1: SELECTED ANSWER A

1. Shareholder Claims Against Alex and Baker

Shareholder Direct Suit

Via a shareholder direct suit, a shareholder brings a claim against the corporation on their own behalf. The plaintiff is entitled to any recovery obtained as a result of such a suit. Typically, such suits are brought because actions of the corporation impinge on the shareholder's right as a shareholder — i.e., through issuance of stock. Ordinarily, direct suits are not the vehicle by which shareholders challenge bad business decisions by a corporate board of directors.

Here, the shareholders of PickWinners Inc. have plausible claims that Alex and Baker breached their fiduciary duties by making bad business decisions. However, their theory would likely rely on them arguing that the price of their shares have decreased, not that their ownership interest in their shares has been in any way disrupted. A direct suit seems like an inappropriate vehicle for a shareholder claim in this instance.

Shareholder Derivative Suit

A shareholder is entitled to bring a derivative suit on behalf the corporation for breaches of fiduciary duty. The plaintiff stands in the shoes of the corporation, and the corporation is entitled to any recovery obtained as a result of the suit.

Here, the shareholders are more likely bringing a derivative suit. As will be discussed below, they can allege that Alex and Baker breached their fiduciary duties to the corporation and that the corporation is entitled to recover. They will stand in the shoes of the corporation and will not receive any recovery that a court grants as a result of the harms that Alex and Baker caused to Pick.

Demand Futility Requirement

Derivative suits are subject to a demand futility requirement, which requires that the plaintiff bring a demand to the board of directors asking them to bring suit. Only when the demand is denied is suit appropriate. Here, the facts provide that the shareholders file a written demand to the board, which was denied. The demand futility requirement has been satisfied here.

Duty of Care

Directors of a corporation act as fiduciaries for the shareholders of the corporation. As a

result, they owe the shareholders a duty of care. This requires that they act with the prudence and business acumen befitting of the director of a business corporation. If a director fails to act with the appropriate level of prudence, they have violated their duty of care and can be held liable for their misconduct.

Here, Cate apprised Alex and Baker of the fact that it was her opinion that Pick should enter into the low-priced end of the trading market. Pick's traditional line of business is marketing to wealthy investors who want to trade stocks online. However, Cate believed that Alex and Baker caused a decline in Pick's market share and stock price by focusing on these wealthy investors and thereby ignoring average consumers and losing the low-priced end of the market to other companies. Cate supported her conclusion by noting that Pick's market share and stock price was in decline. Despite Cate's suggestion, Alex and Baker declined to adopt Cate's proposed solution to the problem which was forming a subsidiary that captures the low-end of the market and advertises on social media.

Shareholders can allege several violations of the duty of care that arise from Alex and Baker's actions (or lack thereof):

First, they can argue that their unwillingness to change the nature of Pick's business or adopt remedial measures in the face of declining market share and stock price was imprudent. A prudent corporate director likely would not have stood by idly given dwindling performance. Instead, they likely would have engaged in research into the problem and adopted measures aimed at increasing performance. The facts don't indicate the extent to which Alex and Baker took action against dwindling performance. They hired an analyst to research whether expanding into the low-priced end of the market made sound business sense, but it's arguable that such a limited measure is not all that a prudent business director would have done. This is especially true given the fact that the analyst is a new hire, who likely lacks a complete knowledge of Pick's business. Yet, Alex and Baker have indicated that they thought that Pick's decline simply paralleled that of the stock market. If the problem was with the economy generally rather than Pick's line of business, Alex and Baker's lack of action aimed at remedying Pick's declining performance is far more reasonable. Overall, it appears likely that Alex and Baker met their duty of care here.

Second, they can argue that rejecting Cate's proposal after she suggested it to the board was imprudent. They will argue that a prudent business director would have more seriously entertained a proposal made by a co-director, especially given that Pick's performance in the market was declining. Alex and Baker will counter that they did consider Cate's proposal, however, relying on the opinion of their newly hired analyst, they concluded that entering into a new domain was imprudent. They can also argue that Cate's proposal was accompanied by an improper threat, which justified their rejection of the proposal. The shareholders have a persuasive argument that rejecting Cate's proposal based on an opinion by an analyst that has only been at Pick for two months is not what a prudent business director would do. But it's likely that Alex and Baker did exercise judgment appropriate of corporate directors — i.e., they believed that Pick's recent decline paralleled that of the stock market, and as a result, the problem was not with Pick's line of business, but the stock market generally. This would give

Alex and Baker a reasonable basis for declining Cate's proposal, as they could logically expect Pick's performance to rebound as soon as the stock market did. However, the fact that after Cate formed E-Save, Pick's market share and stock price declined while E-Save's profits skyrocketed suggests that Alex and Baker's speculation regarding the state of the market and their reliance on the analyst's opinion was imprudent. It appears more likely that Alex and Baker violated their duty of care here, but given the protectiveness of the business judgment rule, it still seems like an uphill battle.

Business Judgment Rule

The business judgment rule is a rebuttable decision that a corporate director made a business decision in good faith and with the best interests of the corporation in mind. It has the effect of shielding directors from liability for bad business decisions. However, the business judgment rule can be rebutted by showing that the corporate directors did not act in good faith or that they were not as reasonably informed as they should be. It is a general rule that corporate directors are entitled to rely on the opinions of their employees when making business decisions.

Here, Alex and Baker can claim that they are protected from liability because of the business judgment rule. First, there's no indication that either of them acted in bad faith. Instead, they had a good faith belief that Pick's declining performance was a result of a declining economy, not Pick's business model being imprudent. Second, they reasonably relied on the opinion of an employee — the analyst who looked at the low-priced end of the market and concluded there was no money in it — in making their business decision. Shareholders might counter that Alex and Baker should have acquired more information, but given that directors can permissibly rely on the opinions of their employees, even newly hired ones, they have likely satisfied the requirement that they be reasonably informed. The business judgment rule appears likely to afford protection to Alex and Baker.

2. Shareholder Claims Against Cate

Shareholder Direct Suit

See rule above. Here, the shareholders appear to be suing on behalf of the corporation rather than in their own right. This is because their interests as shareholders have not been disrupted. A direct suit appears inappropriate in this instance.

Shareholder Derivative Suit

See rule above. Here, the shareholders are suing on behalf of the corporation as a result of misconduct committed by Cate. Their theory is that Cate's actions have caused harm to the corporation. Further, as indicated above, they have satisfied the demand futility requirement. They therefore permissibly bring a derivative suit.

Duty of Loyalty

A corporate director owes the corporation a duty of good faith and fair dealing. The duty of loyalty provides that a corporate director must act in the best interests of the corporation and for the sole interests of the shareholders. A director violates this duty of loyalty when they prioritize other interests above those of the shareholders.

Self-dealing, where a corporate director enriches themselves or acts for their own benefit to the detriment of the corporation, is a clear violation of the duty of loyalty.

Here, Cate told Alex and Baker at the Pick board meeting that she planned to start a competing company called E-Save, unless they agreed that Pick would form a subsidiary to focus on the low-priced end of the trading market. When Alex and Baker declined her proposal, she subsequently formed E-Save on her own. After E-Save's formation, Pick's market share and stock price continued to decline whereas E-Save's profits skyrocketed. The shareholders can bring several theories for why Cate has violated the duty of loyalty.

Self Dealing -- Usurping Business Opportunity

When a corporate director usurps a business opportunity from the corporation, they engage in self-dealing and violate the duty of loyalty. In determining whether a business opportunity is usurped from a corporation, courts consider (1) whether the corporation had an expectancy in the business opportunity and (2) whether the business opportunity is within the same line of business as the corporation.

Here, Cate's creation of E-Save arguably usurps a business opportunity from Pick, namely, the opportunity to enter the low-priced end of the market. Cate might argue that she did not steal an opportunity such as a merger or a sale. But it still appears likely that because E-Save replaced Pick as the potential newest entrant into the low-priced market, Cate engaged in a business opportunity. The question is whether the corporation had an expectancy in the opportunity or if it was in the same line of business.

Expectancy

Here, there's no indication that Pick had any expectation of the business opportunity. Indeed, Cate presented the opportunity to the board and the board rejected it. Therefore, shareholders cannot claim that there was an expectation in being able to enter the low-priced end of the market.

Same Line of Business

Here, there's no indication that Pick and E-Save are in the same line of business. While Pick is aimed at wealthy investors, E-Save is aimed at average consumers and the low-priced end of the market. The shareholders might argue that the two companies are in the same field generally — stock trading. But this argument is likely to fail because the businesses operate in different subcomponents of the same field. They might also argue that the presentation of the proposal to the board suggests that E-Save and Pick were in the same line of business. However, the whole point of Cate's proposal was to

expand Pick's business into a new field. Finally, the shareholders might argue that Pick's declining performance combined with E-Save's soaring performance suggests competition. But this could simply be due to the fact that two discrete parts of the economy are in boom and recession respectively.

It appears unlikely that a court would find Cate usurped a business opportunity. Even if a court did, a director can usurp a business opportunity from the corporation if they first present it to the corporation, and the corporation rejects the opportunity. Here, it appears as though Cate has done exactly that, presenting her proposal to Alex and Baker at the board meeting and eventually being declined. The shareholders can argue that because it was accompanied with the threat that Cate would start such a business venture anyway, the presentation was appropriate. But it appears likely that because there is at least some presentation that was accompanied by Cate's facts and opinions supporting her proposal, she likely satisfied her duties to the corporation here.

Self-Dealing -- Competing Against Pick

A corporate director violates the duty of loyalty when they engage in a business venture that competes with the corporation. Here, the shareholders can argue that Cate engaged in self-dealing by forming a venture that competed against Pick. They can point to the fact that as Pick's performance declined, E-Save's ascended. As a result of engaging in the competitive venture, Cate benefitted financial. Arguably, this violates the duty of loyalty. However, as indicated above, it's possible that a court finds that Pick and E-Save are not competitors because they have different lines of business. If this argument is persuasive, merely operating a business that is similar to Pick, but not competitive with it, does not violate the duty of loyalty.

Safe Harbor Rule

Per the safe harbor rule, a director can be insulated from liability if they get approval from a majority of the disinterested directors and shareholders after full disclosure, or if the transaction is entirely fair. Here, it appears likely that Cate is entitled to protection via the safe harbor rule. First, she disclosed the transaction to Alex and Baker, who are both disinterested directors. She did so fully, explaining her reasoning for why she believed that such a venture would be beneficial to Pick and why she would proceed with the venture if Pick declined. And Alex and Baker rejected the proposal. Moreover, it's at least arguable that the transaction is entirely fair, assuming that Cate can prove that Pick's decline in business is not attributable to E-Save, and that Cate's threat to the board does not preclude the transaction from being deemed fair at the time.

Duty of Care -- Formation of Company

See rule above. It is arguable that a prudent director would not form a distinct business

venture that undercut their corporation. However, for the reasons provided above, it's not clear that Pick's decline in performance is in any way attributable to the formation of E-Save. It's a close call, but it seems likely that Cate satisfied her duty of care here, as a prudent business director can engage in other ventures that do not undermine the corporation that the director serves.

Duty of Care -- Board's Decision to Not Enter Low-Priced Market

See rule above. A dissenting board member can avoid liability for the business decisions of other directors if they clearly and unequivocally indicate their dissent. Cate, as a board member, could also be held liable for Alex and Baker's decision not to enter the low-priced market. However, while the facts do not indicate whether there is a formal vote, it appears likely that if there was, Cate would have registered her dissent clearly, given her indication that she believed that Pick's declining performance was attributable to a failure to enter the low-end market. Therefore, she can avoid liability for Alex and Baker's decision.

Business Judgment Rule

See rule above. Here, Cate appeared to have all the information required. Even if Cate threatened the board that she would proceed with the formation of E-Save if Pick declined, this likely doesn't rise to the level of bad faith, since the threat did not appear to influence Alex and Baker's business judgment in any way. Cate is likely protected by the business judgment rule.

QUESTION 1: SELECTED ANSWER B

1. SHAREHOLDERS V. ALEX AND BAKER

Derivative Action

Shareholders can bring a derivative action against the board of directors if the shareholder has standing. To have standing, the shareholder must have held shares at the time of the injury, continue to hold shares during the litigation, and adequately represent the corporation's interests. The shareholder also must make a demand on the board to act, and if they board fails to do so, then in 90 days the shareholders can bring a derivative action.

Here, the shareholders issued a written demand that the Board take remedial action. This demand was denied. The shareholders plan to file suit on behalf of Pick. Assuming that the shareholders held stock at the time of the injury and continue to do so during the litigation, they have standing to bring this suit.

Duty of Care

Directors have a duty to act as a reasonably prudent director would in similar circumstances. If the directors have special skills, expertise, or training, the directors must utilize this knowledge when making business decisions on behalf of the corporation. Directors are also able to rely on the advice and opinion of officers, experts, and other people with technical training that benefits the directors in making an informed decision.

Here, the shareholders can assert that Alex (A) and Baker (B) breached the duty of care in two situations: (1) by focusing on wealthy investors only and (2) by refusing to form a subsidiary that advertises on social media platforms.

Focusing on Wealthy Investors

The shareholders will assert that A and B failed to act as reasonable directors when they allowed Pick's market share and stock price decline by focusing exclusively on wealthy investors and ignoring average consumers. By doing so, they lost the low-priced end of the trading market to other companies. The shareholders will argue that reasonable directors would not have limited Pick's market so exclusively and cost Pick business from ordinary consumers because doing so could reasonably result in the decline of Pick's stock prices, as Cate (C) subsequently argued that it did. However, A and B can attempt to rely on the business judgment rule (BJR), analyzed below, to rebut the breach of duty claim.

Business Judgment Rule

The business judgment rule is a rebuttable presumption that the directors believed they were reasonably acting in the best interest of the corporation. This presumption can be rebutted by a showing of bad faith, that the directors were not reasonably informed of

material information prior to making a decision, that the directors engaged in self dealing or had a conflict of issue, or any other showing that the decision was not made in a good faith belief.

Here, A and B can assert the BJR to protect their actions regarding focusing exclusively on wealthy investors because A and B reasonably believed that Pick's decline mirrored the overall recent decline of the stock market. Nothing in the fact pattern indicates that A and B acted in bad faith by ignoring average consumers. Further, A and B will assert that they relied on business analysts who were hired specifically to advise them on these matters. The analysts concluded that the low-priced end of the market had no money in it. A and B were allowed to rely on the advice of these analysts, as they are experts in the field, to argue that A and B were reasonably informed of the material information prior to taking action. A and B had a good faith belief that the low-priced end of the market was not going to be profitable, and diverting energy towards including the average consumers would ultimately not benefit the corporation.

Because there are no facts indicating that A and B acted in bad faith, the BJR would likely protect A and B for the act of focusing on wealthy investors to the exclusion of the average consumers.

Refusing to Form Subsidiary

The shareholders will also assert that A and B breached the duty of care when they rejected C's proposal to form a subsidiary to focus on the low-priced end of the trading market because a reasonable director would have given the proposal more thought and investigated the opportunity further before making a decision. A and B might try to argue that a reasonable director would not have formed the subsidiary with the information they had available at the time, which indicated that there would be no money in it. Additionally, A and B will assert that C intended to pressure the board into a decision by issuing an ultimatum to them, which a reasonable director would have denied. The BJR will also apply to this action to protect A and B from liability (see analysis below).

Business Judgment Rule

See rules above. Here, A and B can assert that they, in good faith, reasonably believed that forming a subsidiary to focus on the low-priced end of the trading market would not be a good business decision because experts told them that "there was no money in it." The shareholders will argue that the information may have been stale, as the analysts were hired "two months ago" and that the stock market is an ever changing, fluid market. Thus, the opinion that A and B relied on could have been outdated, making A and B not fully informed upon making the decision. However, two months is a relatively short period of time. Additionally, it does not seem from the facts that Cate brought any additional information, statistics, or evidence of her claim that Pick could "capture the low-priced end of the market with a subsidiary that advertises on social media platforms." If there had been market research done that supported this conclusion, A and B likely would have been at fault for disregarding this evidence. However, given the information available to A and B at the time from market analysts, and the lack of evidence indicating that the analysts were wrong, it is likely that A and B acted

reasonably and in good faith. Thus, the BJR would protect them from liability for the declining stock and market prices.

Fundamental Corporate Change

Shareholders must be given an opportunity to vote on a fundamental corporate change once the board has voted on a resolution. Here, this would not be applicable because the Board denied C's proposal; thus, the shareholders were not entitled to a vote because there was no resolution to vote on.

Conclusion

Thus, the shareholders could bring claims against A and B for breach of the duty of care; however, the BJR will likely protect A and B, and the shareholders will be unlikely to succeed.

2. SHAREHOLDERS V. CATE

Derivative Action

See rules and analysis above. For the same reasons stated above, the shareholders likely have standing to bring this suit against C.

Duty of Care

See rules above. Here, the shareholders will argue that C breached the duty of care by forming E-Save, because a reasonable director would have realized that forming E-Save would harm Pick. Additionally, a reasonable director would not engage in a directly competing business, because doing so runs the risk of leading to a breach of the duty of loyalty (see below). Further, it does not seem that C was acting in good faith when engaging in this proposal with the Board, as she framed it as an ultimatum, effectively stating that she would be forming this corporation unless the Board took action. A reasonably prudent director would have provided the other directors with market research or evidence of some kind to support her claim for the value of the new business and how it would stop Pick from "continuously losing market share and value." Because it does not seem that C acted reasonably, she likely violated the duty of care. The BJR likely would not apply here, because as explained, C seemed to act in bad faith and, as explained below, likely violated the duty of loyalty by directly competing with the business in a conflict of interest.

Duty of Loyalty

Directors have a duty to act in the best interest of the corporation. This includes refraining from conflicts of interest, engaging in transaction with the corporation in which the director or their family member benefits, and usurping business opportunities.

Competing with Pick

A director should avoid competing with the corporation in a way that will lead to a conflict of interest. Here, the shareholders will argue that C breached her duty of loyalty to the corporation by forming E-Save. E-Save was a competing company that began generating large profits. As a director of Pick, C owed a duty to act in the best interest of Pick. Forming a competing company and taking sales away from Pick likely violates this duty. C will try to argue that she presented the option to the board, and that she only formed E-Save on her own as a result of the board's denial of her proposal. However, even though that is true, it does not give C the right to take business away from Pick, as she owes Pick a duty to act in its best interest. Furthermore, the shareholders will assert that operating E-Save is a direct conflict of interest because C cannot be expected to act in both the best interest of Pick and if E-Save if they are "competing compan[ies]" as C stated in her own words. Therefore, C likely breached the duty of loyalty by directly competing with Pick.

Usurping Business Opportunity

A director usurps a business opportunity by taking for himself or herself an opportunity from the corporation.

Here, the shareholders may assert that C usurped a business opportunity when she formed E-Save because Pick should have been given this opportunity first, since it is directly in Pick's line of business. C will argue that (1) E-Save was not a business opportunity and (2) that if it was, she was able to engage in it because she first fully disclosed the opportunity to the board, who rejected it.

There are two tests a court will use in determining whether a corporate opportunity existed: the line of business test and the interest expectancy test.

Line of Business

The line of business test asks if the opportunity was in the same current area of business or a closely related area that the corporation was going to branch into. Here, the shareholders will argue that E-Save is in the same line of business as Pick, because Pick is a corporation that markets to investors who want to trade stocks online, and E-Save is a company that also allows investors to trade stocks online. C will argue that it is not the same line of business because Pick markets to wealthy investors, and E-Save markets to the average consumer on the low-priced end of the market. However, it is not a stretch to assume that one day Pick may venture into the market of the ordinary consumer and attempt to expand Pick in that way. C may argue that A and B have reaffirmed that Pick will not be venturing into advertising to the average consumer. However, while at this time A and B were not interested in expanding into that market, it is likely that one day Pick may expand since it is already set up to allow users to trade stocks online. Thus, it would likely be considered a business opportunity under this test.

Interest Expectancy Test

The interest expectancy tests inquires into whether there was an existing interest that the corporation held that was expected to receive, such as a contract that included the

expansion into an area of business or a deal for future business to do to the corporation. Here, C will likely be able to prove that Pick did not have an expectancy in the formation of E-Save because Pick did not hold any interest in a subsidiary of the formation of a subsidiary for these purposes. Thus, under this test, the formation of E-Save would likely not constitute a business opportunity.

Defense: Presentation to the Board

A director can nonetheless engage in a corporate opportunity if the opportunity was first presented to the board, who after full disclosure declined the opportunity. Here, C will argue that she presented the opportunity first to A and B, and made them aware that she would be engaging in this action if they did not want to form the subsidiary. A and B disagreed with the proposal and ultimately declined it. She will likely be able to prevail on this defense for the claim of usurping a business opportunity. However, she would likely still be liable for a breach of loyalty for directly competing with Pick.

Remedies

If a director breaches a duty, the director can be ordered to disgorge the profits. The director could also be removed from the board by the shareholders, with or without cause.

Here, because C likely breached the duty of loyalty by forming E-Save and competing with Pick, the shareholders could sue C to disgorge the large profits she obtained from E-Save. Additionally, the shareholders could vote to remove C.

Conclusion

C is likely liable for breach of the duty of loyalty and care. The shareholders could sue C to disgorge her profits.

QUESTION 2

Olivia owned Greenacre in fee simple. Greenacre consisted of two unimproved adjoining lots, Lot A and Lot B. A dirt road led from Lot A across Lot B to a public highway.

Sixty years ago, Olivia conveyed Lot B to Barry as a gift, subject to the following clause:

“If at any time, Barry, his heirs, successors or assigns shall use the premises for any purpose other than as a personal residence, said Lot B shall immediately vest in fee simple in Zach or his surviving descendants.”

Shortly after receiving title, Barry began living in a cottage he built on Lot B.

At the time of the conveyance of Lot B, Zach had not yet had any children. Zach has since died, and his granddaughter, Darla, is now his only surviving descendant.

Thirty years ago, Olivia died. Her son, Simon, inherited Lot A. He built a house on Lot A one year later. Through the years, Simon regularly used the dirt road across Barry’s adjacent Lot B to get to and from his house and the public highway because there was no other access.

Four months ago, Barry sold Lot B to Developer for \$1,000,000. Developer demolished the cottage, began constructing an office building on the lot, and began closing off access to the dirt road from Simon’s house.

All conveyances were properly recorded immediately after execution and delivery.

1. What property interest, if any, does Darla have in Lot B? Discuss.
2. What claim(s) may Simon make to maintain a right of way over Lot B to the public highway? Discuss.

QUESTION 2: SELECTED ANSWER A

I. DARLA'S PROPERTY INTEREST

Conveyance to Barry

Fee Simple Subject to Executory Interest

A fee simple subject to an executory interest (FSSEI) is a defeasible fee, subject to an interest that cuts short the prior interest upon the occurrence of a condition, after which time the property interest vests in a third party (not the grantor).

Here, Olivia created an FSSEI when she conveyed Lot B to Barry as a gift. Her conveyance stated that if Barry or any heirs used the premises "for any purpose other than as a personal residence, said Lot B shall immediately vest... in Zach or his surviving descendants." Thus, Barry has a fee simple in Lot B, but this interest may be cut short if he or his heirs use the premises for a purpose other than their own residence, at which time the executory interest will vest in Zach or his descendants.

Rule Against Perpetuities

The Rule Against Perpetuities (RAP) invalidates any interest in a conveyance of real property that will not vest within 21 years of a life in being at the time the interest was created. However, many jurisdictions have adopted the Uniform Statutory Rule Against Perpetuities, which takes a "wait and see" approach: if the interest actually vests within 90 years of its creation, it will be valid. If a conveyance is found to violate RAP, the offending interest will be stricken from the conveyance but the rest of the transfer will remain intact.

Barry will argue that the executory interest created in this conveyance - providing that "Zach or his surviving descendants" will take the property if Barry makes non-residential use of it - is a violation of the Rule Against Perpetuities, because it was undetermined at the time of conveyance whether Zach would have any surviving descendants. Moreover, even if Zach did have surviving descendants at the time of his death, it's unclear whether the interest would vest in those descendants at that time, because it's unknown when or if Barry would violate the condition that would lead to termination of his estate.

If the jurisdiction employs the traditional version of RAP, then the conveyance to Zach may vest or fail upon Zach's death -- if Zach has no descendants at that time, the interest will fail, but if he has descendants their executory interest will remain contingent upon Barry using the property for a reason other than a personal residence, and this may or may not occur. But if the jurisdiction does employ the traditional RAP, then the RAP-violative language -- "Zach or his surviving descendants" -- would likely be stricken from the conveyance, and Darla would have no remaining interest in the conveyance. This would likely result in the creation of a fee simple subject to a condition subsequent, in which Olivia would retain a right of re-entry if Barry ever used Lot B for purposes

other than a personal residence.

If the jurisdiction employs the "wait and see" approach, Darla's interest will vest. Olivia made the conveyance 60 years ago, which is within the time period for vesting allowed by the Uniform Statutory Rule Against Perpetuities. And four months ago, Barry sold Lot B to a Developer for \$1,000,000, who immediately demolished the cottage and began constructing an office building on the lot. Since the triggering condition occurred within 90 years of the interest's creation, Darla would own Lot B in fee simple (per below).

Restraint on Alienation

A restraint on alienation is permissible in a conveyance if it is reasonable. An absolute restraint on alienation is per se unreasonable and void. However, restraints for a limited period of time and for a reasonable purpose, or restraints on the use of land in a particular manner, are typically valid.

Barry will argue that the restraint here - the provision requiring that he use his land only for personal residence - is an invalid restraint on alienation. This provision would divest him of his interest upon his sale to a commercial developer. However, because restraints on use of a particular property are typically deemed reasonable, it is likely that this restraint is valid. Thus, the condition can be enforced if it does not violate the Rule Against Perpetuities.

Zach's Death

Shifting Executory Interest to Darla

A shifting executory interest is one in which the executory interest divests a prior grantee. In the unlikely event that the conveyance to Zach did not violate the RAP, Zach's interest passed to Darla upon his death. Upon the occurrence of the condition -- Barry selling Lot B to a developer -- Darla's interest vested and she would own Lot B in fee simple.

Conclusion

If the jurisdiction employs the "wait and see" approach, Darla owns Lot B in fee simple. But if Zach's interest was eliminated from the conveyance by the RAP, then Barry likely holds the property in fee simple and Olivia's estate holds a right to re-enter the property.

II. SIMON'S CLAIMS

Simon may claim that he has an easement - a vested right to use the land of another person ("the servient estate") in a particular manner.

Easement Appurtenant

An easement appurtenant is a right to use the servient estate that is attached to the land itself. An easement appurtenant may generally be transferred, inherited, and

devised. By contrast, an easement in gross is a right to use the servient estate in a particular manner that is given to a particular person. An easement in gross is only inheritable if that is consistent with the intent of the servient estate holder.

The easement here -- the right to use the dirt road crossing Road B in order to access the public highway -- is an easement appurtenant because it is attached to the land. Simon may claim that he inherited the easement from Olivia when she died and he inherited Lot A. However, it is not clear that Olivia herself made any use of this road, or that an easement existed at the time that Simon inherited the land. Therefore, Simon is more likely to be successful by arguing that an easement was created after he inherited it (either an express easement, an easement by necessity, an easement by implication, easement by prescription, or an easement by estoppel), discussed below.

Express Easement

An express easement is an explicit agreement between the servient estate holder to grant an easement to the dominant estate holder to use their land in a particular manner. Express easements must be codified in a signed writing to satisfy the Statute of Frauds.

Simon inherited Lot B from Olivia 30 years ago, and in the intervening time "regularly" used the dirt road across Lot B to access the public highway. But there is no evidence in the facts to suggest that Barry and Simon entered into a written agreement permitting this use of the dirt road. Absent a writing to this effect, there is no express easement. However, Simon may argue that an implied easement was created instead (by necessity, implication, prescription, or estoppel).

Easement by Necessity

An easement by necessity exists when three conditions are satisfied: (1) the servient and dominant estates were once under common ownership, (2) the dominant estate is virtually useless without the easement (easement is necessary), and (3) the necessity arose at the time of the unified estate's severance.

Common Ownership

The servient estate (Lot B) and the dominant estate (Lot A) were once under common ownership -- Olivia owned Greenacre in fee simple before she conveyed one half to Barry. This element is satisfied.

Dominant Estate Useless

The facts state that a dirt road leads from Lot A, and across Lot B to a public highway, and that there is "no other access" to this public highway. This suggests that Lot A is landlocked (i.e., has no access to public roads) without the easement. If there were other means of accessing a road that would eventually lead to the public highway, Lot A would not be truly landlocked and there would be no necessity. Olivia continued to own Lot A for 30 years after the conveyance and before her death, and if she lived on the property and did not use the road, this would cut strongly in favor of finding there was

no true necessity. But since the facts indicate that the public highway is the only accessible road, and it can only be reached by use of the dirt road across Lot B, a necessity exists and Lot A would be virtually useless without use of the easement.

Necessity at Severance

The necessity arose when Greenacre was severed into Lot A and Lot B. Prior to that point, the owner of Greenacre could freely make use of the dirt road to access the public highway. The final element of easement by necessity is therefore satisfied.

In sum, Simon likely has an easement by necessity to use the dirt road.

Easement by Implication

An easement by implication exists when four elements are met: (1) the servient and dominant estates were once under common ownership, (2) the landowner of the unified estate made use of the easement ("quasi-easement"), (3) the use of the easement continues openly after the unified estate was severed, and (4) the easement is reasonably necessary to the dominant estate's use of their property.

Common Ownership

Per above analysis, Greenacre was once under common ownership and this element is satisfied.

Quasi-Easement

Prior to the severance of the unified property, the former owner must have made use of the property in a particular way -- this is called a "quasi-easement." There are no facts to support the proposition that Olivia did or did not use the dirt road to access the public highway when she owned Greenacre in fee simple. However, if she lived on the property and the dirt road leads to the public highway, it is highly likely that Olivia made use of it pre-severance. This element is therefore likely satisfied.

Continued Use

The facts are silent as to whether Olivia continued to live on Lot A after the severance of Greenacre and conveyance of Lot B to Barry. However, assuming she lived on Lot A for the 30 years after severance and before her death, it is likely that she used the road to access the public highway, and that Simon continued this use when he inherited the property upon her death.

Reasonably Necessary

If Lot A is landlocked, per the foregoing analysis, use of the easement is more than reasonably necessary -- it is strictly necessary. This element is also satisfied, and Simon can likely claim an easement by implication.

Easement by Prescription

A party may obtain an easement by prescription, which is akin to adverse possession in

the context of land use. Specifically, an easement may be created when one party makes use of the property of another (1) continuously for the statutory period, (2) in a manner hostile to the other party's claim of right, and (3) actually, openly, and notoriously.

Continuous

Simon inherited the property 30 years ago upon Olivia's death, and he "regularly" used it to get back and forth from his house and the public highway. The facts are silent as to the applicable statutory period for obtaining an easement through prescription, but typical statutes may require 10, 20, or 30 years of continuous use. Therefore, even if the jurisdiction has adopted a statute requiring 30 years of continuous use, this element is satisfied.

Hostile

To be hostile, a use must be adverse to another party's claim of right. The majority approach does not require that the person seeking the easement possess any particular state of mind, while a minority of jurisdictions require either (a) good-faith trespass or (b) hostile trespass.

Simon's use of the road is adverse to Barry's claim of right to use the road exclusively. It's not clear whether Simon had a good-faith belief that he had a right to use the road or did so intentionally in the absence of Barry's permission. But if the jurisdiction adopts the majority approach to hostility, Simon's state of mind is likely irrelevant and this element is satisfied.

Actual, Open, Notorious

Simon made actual use of the road. Moreover, his use would be "open and notorious" to Barry, who built a cottage on Lot B and lived on it. Barry would likely have been able to observe Simon coming and going across his property as he lived there the entire time Simon made use of it.

Because all the elements for prescription are satisfied, Simon has an easement by prescription.

Easement by Estoppel

An easement by estoppel exists where one landowner gives a third party a promise that they have permission to use the property for a particular purpose, the third party relies on this promise, and the landowner then revokes the promise and the third party suffers harm as a result.

As an initial matter, there is no evidence that Barry promised Simon that he could use the road or otherwise granted him permission to use it. Moreover, Simon did not rely on any such promise to his detriment -- for example by improving or paving the road at his own expense. Although he would be harmed by the revocation of permission, if it existed, because the second element is not satisfied, Simon will be unable to claim

easement by estoppel.

Termination of Easement

An easement may be terminated under certain circumstances, for example if the dominant estate holder releases the servient estate from the easement, the severed properties merge into a single estate, necessity of the easement ends, or the easement holder abandons it. Moreover, an easement will be unenforceable if the servient estate is sold to a bona fide purchaser.

There are no facts to suggest that Simon voluntarily released or abandoned the easement, or that there was a merger of Lot A and Lot B that would eliminate the easement. But the developer may claim that the easement was terminated when he purchased the property since he was a bona fide purchaser.

Sale to Bona Fide Purchaser

A bona fide purchaser is someone who buys property for value and without notice of another party's interest in the land (e.g., an easement). Notice may be actual, inquiry, or record.

The developer paid value - \$1,000,000 - for the property. However, the developer will not be able to successfully argue that he lacked notice of Simon's use. The developer may have lacked actual, personal knowledge of Simon's use, and he may have lacked record notice, since Simon's easement was likely not express and no facts suggest Simon attempted to record it. However, the developer likely had inquiry notice of Simon's use. Simon regularly made use of the road to access the public highway, and if the developer had inspected the land properly prior to purchase, he likely would have been put on notice of Simon's use.

Conclusion

In conclusion, Simon has an easement to use the land by necessity, implication, or prescription. Barry's sale to Developer did not terminate the easement or make it unenforceable because Developer had inquiry notice of Simon's use.

QUESTION 2: SELECTED ANSWER B

Darla's Property Interest in Lot B

Olivia's Conveyance to Barry

Fee Simple

Olivia owned Greenacre in fee simple when she made her conveyance of Lot B. Fee simple is absolute ownership of potentially infinite duration. A person with fee simple absolute can pass on their entire interest, or pass it on subject to future interests.

Fee Simple Subject to Executory Interest

A fee simple subject to executory interest is absolute ownership of potentially infinite that is subject to divestment by a third party upon the occurrence of a stated event. The third party's interest is an executory interest, and it vests automatically upon occurrence of the event.

Here, Olivia conveyed Lot B to Barry in fee simple, but it was subject to the condition that if he used the premises for any purpose other than as a personal residence, it would vest in fee simple in Zach or his surviving heirs. She therefore attempted to create a fee simple in Barry subject to an executory interest, which was held by Zach.

However, the rule against perpetuities may apply.

Rule Against Perpetuities

The rule against perpetuities applies to contingent remainders, executory interests, and vested remainders subject to open. Zach's interest in Lot B was an executory interest, so RAP applies.

RAP holds that interests must fail or vest within 21 years of the end of a life in being at the time of conveyance. If an interest will not obviously vest or fail in that time, it is invalid under RAP. A court will generally strike the offending interest and the remaining interest is what will be considered valid.

Here, Olivia conveyed Lot B to Barry subject to the condition that if he or *any of his heirs, successors or assigns* used the premises for any other purpose, then Lot B would immediately vest in Zach or *any of his surviving descendants*.

This interest does not necessarily vest within 21 years of a life in being. It could take place generations from now, well beyond 21 years later than the cessation of any or all of the lives in being at time of this conveyance--Zach, Olivia, Barry, and perhaps Zach's granddaughter Darla.

This executory interest is therefore invalid, and must be stricken.

If RAP is applied in this jurisdiction, the conveyance therefore gave Barry fee simple

absolute in Lot B, and Zach and his descendants have no interest.

Different Approaches to RAP

Some jurisdictions take other approaches to RAP. Some take a wait-and-see approach to determine whether it vests within the 21 year period of a life in being; others determine whether it vests in 90 years from conveyance; others have eliminated RAP altogether.

In a jurisdiction that takes an alternate approach, Zach's interest would survive. Barry was a life in being at the time of conveyance, and he was still alive when the premises began to be used for another purpose by Developer. The executory interest therefore would have vested in Zach within 21 years of a life in being at the time of conveyance. In such a jurisdiction, Developer's action would automatically vest fee simple in Darla, Zach's only surviving descendant when he died.

Interests

Assuming the traditional approach to RAP applies in this jurisdiction, Darla has no interest in Lot B, and Developer owns fee simple absolute.

Simon's Claims

Easement

An easement is non-possessory interest in land which permits the holder of the easement (the dominant estate) to use the servient estate for their benefit. Easements can be created expressly (in writing and with intent) or by prescription, implication, necessity, or estoppel.

Here, Simon can argue that he holds an easement to use Lot B to get to the public highway. Although Olivia did not create an express easement at the time of splitting Greenacre (the prompt indicates no writing or explicit intent to do so), Simon can argue there is an easement by prescription, implication, or necessity.

Prescription

An easement by prescription requires similar elements to adverse possession: actual use that is i) continuous; ii) hostile; iii) open; and iv) satisfying the statutory period for adverse possession.

Continuous

Continuous use means that the easement owner used the easement with regularity. This does not have to be without any break, but can be in accord with regular use of the land (such as using a summer home in summer).

Here, Simon built a house on Lot A thirty years ago, and "regularly" used the dirt road across Lot B to get to and from his house and the public highway. This regularity likely satisfies this element.

Hostile

Hostile does not require actual hostility toward the servient estate owner, merely that the interests are in conflict with one another and there was no permission.

Here, Simon does not seem to have gotten Barry's express permission to use the dirt road. He was using it despite that fact, so this element is met.

Open

Open simply means that the person was not hiding their activity, but was conducting it in an obvious and detectable way. It does not matter whether the other party actually knew.

Here, the fact that Simon was using the road regularly indicates his use was open. There are no facts to indicate he tried to hide his usage or only used the road at night. Therefore, this element is met.

Statutory Period

Different jurisdictions have different statutory periods for adverse possession. Most are less than thirty years. Simon has been using the public highway for that entire time, so assuming the statutory period in this jurisdiction is less than thirty years then he has acquired an easement by prescription.

Implication

An easement by implication requires that two pieces of land were once under common ownership. If, at the time of common ownership, a *quasi-easement* existed whereby the owner used one lot for the benefit of another, that easement will survive as long as the parties intended it to survive.

Here, the two pieces of land were under common ownership when Olivia owned all of Greenacre. There was an existing dirt road leading from Lot A to Lot B. Although the facts do not state so directly, it is likely Olivia was using this road when she conveyed Lot B to Barry, because there was "no other access" to Lot A other than the road. However, it is also possible Olivia was not using the road, as both lots were unimproved at the time she conveyed them, and she may never have used the road at all. The existence of the road, however, supports a finding of a quasi-easement at the time she conveyed.

An easement by implication also requires intent, however. There is no explicit indication that Olivia intended there to be an easement. She never herself built a house on Lot A and may have intended it to remain undeveloped.

Lacking more clear evidence of Olivia's intent for the quasi-easement to pass, there is likely not an easement by implication.

Necessity

An easement by necessity requires that the two pieces of land were once under common ownership, and that at the time of splitting the land one parcel became landlocked, thus creating an absolute necessity to use the other piece for access.

Here, Greenacre consisted of Lot A and Lot B when Olivia conveyed Lot B to Barry. This conveyance created a landlocked parcel in Lot A, which could only be accessed via the dirt road. There was therefore an absolute necessity created at the time of conveyance of Lot B, and an easement by necessity existed for the use of the dirt road to access Lot A. It did not matter that there was no house on Lot A until Simon inherited the land; Lot A (the dominant estate) was landlocked and could only be accessed (for whatever purpose) through the road on the servient estate, Lot B.

Termination of Easements

Easements terminate in a number of ways: by estoppel, by prescription, by their express terms, by severance, and by merger, among other mechanisms.

Here, Simon still holds Lot A and has not attempted to convey it to anyone. There are no express terms for termination of this easement and he has not stopped using it. It therefore has not terminated.

Easement's Validity Against Developer

An easement runs with the land, and is valid against a subsequent purchaser for value of the servient estate as long as the purchaser had notice. There are three types of notice.

Actual Notice

Actual notice is actual, obtained notice (such as through the seller of the estate informing the purchaser).

Here, there is no indication that the Developer had actual notice of the land. They may have seen Simon using the dirt road, which could have given actual notice, but that is not in the facts. It is unclear whether Barry informed Developer of the easement. Assuming he did not, Developer may not have had actual notice.

Inquiry Notice

Inquiry notice exists if a party could have found out about an easement through reasonable inquiry.

Here, if Developer had asked Barry or had visited the land they could likely have found out about the easement. They should have seen the dirt road that goes across Lot B and realized that it connected to another lot. If they had investigated they would have realized that Simon held an easement and regularly used the dirt road to access his house and the public highway.

Inquiry notice therefore likely existed.

Record Notice

Record notice exists if a party has recorded the easement and a diligent search for the record would have revealed its existence.

Here, there is unlikely to be record of the easement as it was not expressly granted and thus was not recorded upon conveyance of the land or upon Simon's inheritance. However, if Simon did acquire an easement by prescription and *recorded* that easement, there could be a record. However, absent more information it is unlikely the easement was recorded so record notice did not exist.

Easement Holder's Right of Enforcement

The holder of a valid easement may bring a claim to bar the dominant estate from destroying the valid easement. Alternatively, he may be able to obtain damages for the loss of use of the valid easement.

Here, as discussed above, Simon likely holds a valid easement by prescription or a valid easement by necessity. He can therefore attempt to enjoin Developer from closing off access to the dirt road connecting his house to the road.

Injunction to Stop Destruction of the Dirt Road

There are three types of injunctions: a temporary restraining order, a preliminary injunction, and a permanent injunction. The first two are temporary measures aimed at preventing a party from engaging in certain behavior while a lawsuit progresses; the latter is a permanent restriction. A party seeking a TRO or a Preliminary Injunction must prove i) that they will suffer irreparable harm for which money damages are inadequate; ii) that they will suffer more harm than the defendant and any third parties; iii) that the injunction is enforceable; and iv) a likelihood of success on the merits. A party seeking a permanent injunction only needs to satisfy the first three elements.

Here, Simon is likely to suffer irreparable harm if the road is destroyed as it blocks the only access to the home in which he lives. He will suffer more than the Developer, who can still use the lot to construct its office building. The order is enforceable, as it merely requires the Developer to refrain from doing something and courts enforce such orders with some frequency. As discussed above, Simon is likely to succeed in establishing the existence of a valid easement.

Simon can therefore likely get an injunction to prevent destruction of the road.

QUESTION 3

August is an attorney who represents Paul in a lawsuit against Paul's former real estate broker, Dani. August and Paul have a valid, written contingency fee agreement. Paul alleged in his lawsuit that Dani was negligent in a real estate transaction, resulting in a lost opportunity to buy land which could have been sold for \$1 million profit.

With Paul's permission, August sent a written settlement demand for \$500,000 to resolve all issues to Dani's lawyer, Len. Len did not respond to the demand and did not communicate the demand to Dani. One evening, Paul saw Dani and asked her about the settlement demand. Dani told Paul that she had no knowledge of the settlement demand. Paul told August about his conversation with Dani. August did nothing with the information.

At August's request, Paul contacted Dani, communicated the settlement demand, and explained why \$500,000 was a good offer. Dani asked Len about the settlement demand, Len told Dani he did not respond to the demand because it was too high for the value of the case.

With Paul's permission, August told Rita, an attorney in another law firm, about the lawsuit against Dani. Rita said she knew Dani and could work with her. August asked Rita to assume joint responsibility for Paul's lawsuit in return for 50% of August's contingent fee. Rita agreed and August wrote to Paul explaining the new arrangement. Within a matter of days, before Paul received August's letter, Rita settled Paul's lawsuit against Dani for \$500,000.

1. What ethical violations, if any, did August commit? Discuss.
2. What ethical violations, if any, exist in August and Rita's arrangement? Discuss.
3. What ethical violations, if any, did Len commit? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

1) What Ethical Violations did August Commit?

Duty to Report Another Lawyer's Misconduct

August potentially is in violation of her duty to report another lawyer's misconduct. Under the ABA, a lawyer must report to the state bar or other appropriate authority any violation of law or ethical rules by another attorney known to the lawyer that raise a substantial question as to that lawyer's trustworthiness, honor, credibility, or fitness to practice law. This duty is not mandatory if the lawyer merely suspects such a violation by another lawyer. Under the CA rule, a lawyer must report the actions of another attorney that involve fraud, deceit, material misrepresentation, or criminal conduct that raises a substantial question as to that lawyer's trustworthiness or fitness to practice law.

Here, August was told by Paul about his conversation with Dani, whom Paul was suing, which indicated that Dani was not informed by Len of the settlement agreement proposed by August. As discussed below, this would be a violation of Len's duty to communicate to Dani. Here, there is no reason to doubt the trustworthiness of Paul's statement, and if August knew that Len had violated the rules, she would herself be in violation of her duty under the ABA rules to report Len's violation; but if she was unsure, she would not be in violation. Under the CA rules, August's failure to do anything with the information would not raise any issues because the CA rules only require disclosure if there is a crime or act of dishonesty, material misrepresentation, etc. and here Len's failure to communicate, though a violation of the rules, does not meet any of those categories requiring August to disclose. The results are similar with August's knowledge of Rita's failure to obtain consent of Paul or notify Paul under the CA rules. Therefore, August will likely be subject to discipline under the ABA rules, but not the CA rules.

Communication with One Known to be Represented by Counsel

August will likely be in violation of her duty not to communicate with one appointed by counsel. Lawyers owe a duty of fairness to opposing parties and counsel. A lawyer has a duty under the ABA and CA rules not to communicate with one they know to be represented by counsel about matters regarding the case at hand without their lawyer present. A lawyer may do so if they either receive the lawyer's consent, or if they have a court order to do so. A lawyer will be subject to discipline if they direct another to act as their agent in violating this rule. However, the clients of attorneys are free to meet and discuss the case.

Here, August instructed Paul to contact Dani, who August knew was represented by Len, to communicate a settlement demand, and explain why the offer of \$500,000 was good. There is no indication she received Len's consent or a court order to communicate with Dani, and Paul was acting at her request in communicating the settlement offer. August will argue that there was no violation because Paul and Dani

are allowed to meet and discuss the case and are not covered by this rule. However, the facts indicate Paul only did this at August's request, not of his own volition, and in doing so was acting as August's agent in communicating the settlement offer. This is further apparent because August told Paul to explain to Dani why \$500,000 was a good deal. Therefore, while not clear cut, August likely violated her duty not to communicate with Dani without Len's consent or a court order.

Duty of Competence and Diligence

Under the ABA, a lawyer must act with reasonable competence and diligence in representing their client. Competence requires the lawyer to have the requisite knowledge, skill, and preparation for the representation. Under the CA rules, a lawyer must not intentionally, recklessly, repeatedly, or with gross negligence fail to act with competence and diligence in representing a client. CA also requires the physical and mental ability to pursue the representation. The duty of diligence requires a lawyer to pursue the interests of their clients thoroughly throughout the representation to the end of all trial, appeals, or to a settlement.

Here, August may have failed to act with competence because she committed a violation of the ethical rules in using her client to communicate directly with one known to be represented by counsel. However, it is unclear whether this rises to unreasonable levels of incompetence, and is certainly not repeated. Therefore, August may be subject to discipline for violation of her duty of competence under the ABA or CA rules, but only under the ABA if her actions are found to be unreasonable and only in CA if she was at least grossly negligent.

2) What Ethical Violations Occurred from August and Rita's Arrangement?

Conflicts of Interest

Lawyers owe a duty not to take on a case if there is a conflict of interest. A lawyer should not take on a client if: 1) representation of the client would be adverse to representation of a current client in the same or a different matter, or 2) the representation is substantially likely to be materially limited by the lawyer's interests or the lawyers (or another lawyer in the firm's) duty to another prospective or current client or third party. A lawyer may represent a client if: 1) they reasonably believe there will not be a material limitation; 2) the representation is not illegal; 3) the representation is not two adverse parties in the same litigation; and 4) the client obtains consent (ABA: informed consent, confirmed in writing; CA: informed written consent). Under CA, a lawyer has a duty to disclose any relationship, even absent a material limitation, the lawyer has to another party or witness; or if opposing counsel is a close relative of the lawyer, lives with the lawyer, or is in an intimate personal relationship with the lawyer.

Here, Rita is taking on representation of Paul, but she knows Dani. Given that she merely knows Dani, it is unlikely that informed written consent will be required because there is no indication that Rita represents Dani as a client or that the relationship will materially limit the representation. However, Rita will be in violation of her CA duty to give written notice to Paul because of a personal relationship with another party in the

matter. Therefore, Rita will likely be subject to discipline under the CA rules for failure to notify Paul, but will not likely be subject to discipline under either rules for taking on the case.

Splitting Fees with Other Lawyers

August's splitting of fees with Rita may subject her to discipline. Under the ABA, lawyers generally cannot split fees with outside lawyers unless: 1) the fee is split with another lawyer outside the firm for work on a case, 2) the client is given written notice of the split and the material terms; 3) the client consents to the fee split; and 4) the fee split is in proportion to work performed or the lawyers take joint responsibility. The CA rules allow such fee splitting where: 1) the client is given written notice of the arrangement; 2) consents in writing to the fee split; and 3) the fee to the client is not increased solely as a result of the agreement.

Here, August contacts Rita, a lawyer outside the firm, to help her on the case for Paul against Dani, and the first two prongs appear to be met. The agreement stipulates that Rita will be entitled to 50% of August's contingent fee, which indicates that the fee will not be increased solely as a result of the arrangement. Here, the agreement to split fees is with a lawyer outside the firm and the two are jointly responsible for the case, so that portion of the ABA rule is satisfied. There was also written notice sent to Paul, however Paul never consented to the fee because Rita settled the case before he even received it, so there was neither notice nor consent. Therefore, the fee splitting will likely violate both the ABA and CA rules and subject both August and Rita to discipline.

3) What Ethical Violations did Len commit?

Settlement Offer

Duty to Communicate

Lawyers owe their clients a duty of communication. This requires the lawyer to promptly communicate with their client sufficiently for the client to make reasonably informed decisions. A lawyer must promptly inform the client of all major events in a case, of all circumstances requiring the client to make a decision, and all settlement offers (unless the client already gave the lawyer authority to reject such an offer).

Here, Len was given a settlement offer of \$500,000 from August to end the lawsuit between Paul and Dani. As Dani's lawyer, he had a duty to communicate this offer to Dani, especially given he had no instructions from Dani regarding settlements. However, he failed to do so, and the fact that he thought it was too high for the value of the case does nothing to excuse his duty. Therefore, Len will be liable under both the ABA and CA rules for failing to communicate the settlement offer to Dani.

Scope of Lawyer Client Relationship

Len will not be liable for exceeding the scope of the L/C relationship. Clients have the sole power in the L/C relationship to make important decisions such as whether to settle, whether to make a plea in a criminal case, or whether to testify in a criminal case.

The lawyer has power to make strategic decisions to achieve those goals, but should inform the client as to the strategies.

Here, Len did not accept the settlement offer originally, and likely did not accept the settlement offer later. However, his failure to make an express refusal of the settlement offer that would have exceeded the scope of the L/C relationship may not subject him to discipline. Even though Dani, as his client, had sole power to accept or deny the offer, Len may not have breached his duty because he did not affirmatively accept or deny, just failed to do anything. Therefore, Len will likely not be subject to discipline under both the ABA and CA rules for doing nothing with the settlement offer.

Duty of Competence and Diligence

Len will likely be in violation of his duty of competence under the rules set out above.

Here, Len failed to communicate a settlement offer, and also decided unilaterally to do nothing with it. A reasonably prudent lawyer would not have made such a decision, even if that lawyer also believed the settlement was too high for the value of the case, because a reasonably prudent lawyer would know of their duty to communicate, making Len's failure to communicate a failure to act with reasonable competence. Further, Len failed to act with diligence because he simply did nothing. He did not investigate the offer, try to bargain and pursue a higher offer, and did nothing to notify Dani. In doing nothing, Len was likely unreasonable in failing to diligently pursue Dani's interests. It is unclear whether these actions were at least grossly negligent, and they are not repetitive. Therefore, Len will likely be subject to discipline under the ABA rules, but not the CA rules, for violating his duty of competence and diligence.

QUESTION 3: SELECTED ANSWER B

I. August

Contingency Fee Agreement - Fees

Under the ABA and CA, contingency fee agreements must be in writing and signed by the client. They must describe how the fee is to be calculated, what expenses are deducted from the fee, whether it is on the gross or the net, and what expenses the client will still be required to pay. Further, they are not permitted in domestic cases or criminal cases where the fee is contingent on securing divorce or acquittal. As a general matter, ABA requires that fees be reasonable, while CA prohibits unconscionable fees. Considerable factors in determining the reasonableness of fees includes the difficulty of the matter, the prevailing fees in the locale, the attorney's reputation, etc.

Here, the facts indicate that the contingency fee agreement was valid, meaning we can presume that it was in writing, signed by Paul, and explained the necessary details. Further, the matter is a negligence issue, not a domestic or criminal matter, so a contingency fee is proper. Finally, as it is valid, it is fair to assume the fee is reasonable and not unconscionable.

Therefore, there is no violation as to the fee agreement.

Settlement Offer - Scope of Representation & Fairness to Opponent

Under both the ABA and CA, the decision to make or accept a settlement offer falls squarely with the client. Under the ABA, a lawyer may not use heavy-handed tactics or those which have no significant purpose other than to burden or harass. While CA does not have an exact rule on point, CA requires lawyers to act in fairness and honesty when dealing with opposing counsel and clients.

Here, August offered a settlement demand of \$500k to Len, Dani's lawyer. If this action was done on August's own accord, this would violate the scope of his representation as Paul's lawyer. However, the facts indicate that Paul instructed August to send the demand, which places the settlement offer within the scope of August's representation of Paul, and therefore proper. There are no facts to suggest that the settlement offer was used as a heavy-handed tactic or to burden/harass Len or Dani, but was instead a good faith, honest, and fair approximation of a reasonable settlement demand in light of the underlying action's alleged total of \$1 mill in lost profits.

Therefore, the settlement offer was proper.

Doing nothing regarding Len's Failure to Tell Dani - Duty to Report

Under the ABA, a lawyer has a duty to report another lawyer where they receive credible information that the lawyer has committed an act or crime that substantially and materially reflects on their honesty or fitness to practice law. However, in CA, a lawyer is

not required to report another lawyer unless there is some criminal, intentional misrepresentation, fraudulent, or reckless conduct that substantially bears on their ability and fitness to practice law. Instead, CA engages in a self-reporting system where, under particular circumstances not present here, the lawyer must report themselves to the ABA.

Here, August received credible evidence from his client that Len, opposing counsel, had failed to communicate a reasonable settlement offer (see below for further analysis). Len's failure to do so is a violation of the ABA and CA authorities, and may bear on his honesty and fitness to practice law because it calls into question his loyalty, communication and professional judgment in his representation of Dani. Therefore, if August knew or should have known that Len's actions substantially and materially bore on his fitness to practice law, he would be in violation of the ABA authorities for failing to report Len. However, CA has no such rule, and Len's actions do not rise to fraud, crime, or intentional misrepresentation as contemplated by the CA reporting law. Ultimately, it is unlikely that a one-off failure to communicate a settlement offer does not substantially and materially impair Len's fitness to practice law, so August likely has not violated either CA or ABA.

If the ABA determines that Len's actions are such that they would require reporting, then August has violated the ABA authorities to this extent, but in the more likely event that they do not, then August has not.

Asking Paul to Reach out to Dani - Contacting Represented Persons

Under both the ABA and CA, a lawyer is not permitted to engage in communication with a party whom they know to be represented by counsel. Further, a lawyer may not engage another person on their behalf to violate a rule of professional conduct.

Here, August asked Paul to contact Dani, whom August knew was represented by Len. August instructed Paul to contact Dani despite her being represented, when ordinarily her contacts should be going to her lawyer, Len. However, the ABA and CA authorities are more relaxed when the two parties themselves are communicating, such that Paul's contact with Dani may actually be permissible to the extent it is not fraudulent or coercive. In communicating that he believed that the settlement was a good offer, this would not give rise to a coercive communication, because it is simply August & Paul's opinion as to the value of the case, which they are making in good faith as it is half their proposed value of the negligence action. However, a court may find that August circumventing the rule against communicating with represented parties by taking advantage of the court's leniency in the parties themselves communicating may still give rise to a violation of this rule, since Paul's contacts with Dani were incited by August's requests.

Therefore, ABA and CA may permit this action because it is communication between the two parties to the matter. However, to the extent August intentionally circumvented the rule on contacting represented person, he likely violated the ABA or CA authorities.

Disclosure to Rita - Duty of Confidentiality

A lawyer owes a duty of confidence to his or her client which extends to all information related to the representation of the client obtained from consultation to beyond the death of the client, no matter the source of the information. Under the ABA, the duty of confidence may be overcome by a client's express or implied consent, to prevent substantially certain death or bodily harm, to prevent or rectify a financial harm, per court order, or to remedy false testimony. Under CA, disclosure is permitted with the client's consent and to prevent a criminal act which is substantially certain to result in death or great bodily harm.

Here, August disclosed to Rita, a lawyer at another firm, details of the lawsuit regarding Dani and Paul. Ordinarily, absent seeking legal ethics advice or absent the use of general terms for an opinion on strategy, this may result in a disclosure of confidential information in violation of both ABA and CA authorities. However, both the ABA and CA permit the disclosure of confidential information where the client gives their consent, and Paul permitted August to disclose this information to Rita.

Therefore, August has not breached his duty of confidentiality.

II. August & Rita's Arrangement

The Arrangement - Fee-Splitting

Under both the ABA and CA, fee-splitting with a non-lawyer is strictly prohibited. Under the ABA, fee-splitting with a lawyer is permitted where the client gives informed written consent, the overall fee does not increase, and the lawyers either assume joint & several liability for the work or the fee is proportional to work each lawyer does. In CA, the proportionality/joint and several rule does not apply, instead the two lawyers must have a written agreement identifying the fee-splitting terms.

Here, Rita is a lawyer, so there is no fee-splitting with a non-lawyer which would automatically make this arrangement improper. August asked Rita to assume joint responsibility for the lawsuit and to split the contingency fee 50-50, which Rita agreed to. Therefore, there is joint & several liability, notwithstanding whether or not the 50% fee will ultimately reflect the proportion of work that Rita does on the case. Further, the overall fee for Paul did not increase, because Rita is simply receiving 50% of the already contracted for contingency fee. However, on these facts, it does not seem like Paul provided informed consent in writing to the arrangement. While Paul gave August permission to discuss the matter with Rita, this fact alone is not sufficient to establish his consent to the fee-splitting agreement. Instead, it seems that August attempted to obtain Paul's consent, presumably because he did not already have it, and instead did not obtain it before Rita performed work on the lawsuit and settled the matter.

Therefore, Paul's consent to the fee arrangement was not obtained prior to its execution. For this same reason, the CA requirements are unmet, because although the fee did not increase, there was no client consent beforehand and no facts to suggest Rita and Paul's agreement was reduced to writing.

Therefore, the fee arrangement between August and Rita is improper under both ABA and CA authorities.

Rita knowing Dani - Conflict of Interest & CA Mandatory Disclosures

Under both the ABA and CA, a lawyer has a duty of utmost loyalty to the client, which requires avoidance of actual and potential conflicts of interest. A conflict of interest exists where the interests of two clients are directly adverse or where there is a significant risk that the representation will be materially limited by the interests of the lawyer, another client, or a third party. However, a lawyer may continue to represent a client notwithstanding a conflict where they reasonably believe they can competently and diligently represent the client, it is not prohibited by law, there is no client vs. client litigation, and the client gives informed consent, confirmed in writing, or in CA, in writing. Finally, in CA, even where a conflict of interest does not exist or would not materially impact the client's representation, a lawyer must disclose in writing when they or a lawyer in their firm has a relationship with another party or witness in the matter or where the lawyer or another in their firm has a relationship with opposing counsel.

Here, Rita told August that she knew Dani, the defendant in Paul's claim. The facts do not indicate how Rita knew Dani, but if the relationship is close or sexual, then this may very well give rise to a significant risk that the representation of Paul could be materially limited by any loyalty that Rita had to Dani, or that August had to Rita. This risk should have been disclosed to Paul so he could make the informed decision on whether he was comfortable moving forward with a conflict. Under both authorities, if the conflict gave rise to a significant risk that the representation will be materially limited by the interests of the lawyer, another client, or a third party, then Rita and August were required to satisfy the elements of continuing representation. Even if August and Rita reasonably believed that they could competently and diligently represent Paul notwithstanding the conflict, and absent any illegality or client vs. client conflict, neither party obtained Paul's consent confirmed in writing per the ABA or in writing per CA, so continuing representation was improper. Finally, even if the relationship between Rita and Dani did not give rise to a substantial conflict of interest requiring disclosure under the ABA, CA requires that Rita, and by association August, disclose Rita's relationship with Dani, be it professional, personal, sexual, familial, in writing. There are no facts to suggest that any disclosure of this type was made to August, but instead he learned of the arrangement and subsequent conflict after the matter had settled.

There, August and Rita have violated their duties of loyalty to Paul under both ABA and CA authorities.

Acceptance of Settlement - Communication & Scope of Representation

Under both the ABA and CA, a lawyer has a duty to communicate with their client to the extent necessary to permit them to make informed decisions and to respond to reasonable requests for information. Further, a lawyer has a duty to communicate all reasonable settlement agreements to the client and communicate with the client before accepting settlement offers, unless the client has already indicated a settlement amount that they would accept.

Here, the facts indicate that Rita settled Paul's lawsuit against Dani for \$500,000. There are no facts to suggest that, at the time of Rita's involvement, communication was made

to Paul indicating that the settlement was being obtained. However, since Paul had given permission to August to send a settlement demand for \$500,000 to resolve the issues with Dani earlier, it is likely that Paul had communicated a consent to settlement for \$500,000. Without any facts to suggest that the facts underlying Paul's satisfaction with a \$500k settlement would have changed in the time passed, Rita and August were probably proper in settling the matter with Dani for that amount without further communicating with Paul.

Therefore, acceptance of the settlement offer on its own does not violate Rita & August's duty of communication to Paul.

III. Len

Not Communicating Settlement Offer to Dani - Communication

Under both the ABA and CA, a lawyer has a duty to communicate with their client to the extent necessary to permit them to make informed decisions and to respond to reasonable requests for information. Further, a lawyer has a duty to communicate all reasonable settlement agreements to the client and communicate with the client before accepting settlement offers, unless the client has already indicated a settlement amount that they would accept.

Here, Len did not communicate the settlement offer of \$500k to Dani, his client. Len told Dani that he did not tell her about the offer because it was too high for the value of the case. However, Len's duty of communication requires him to communicate the offer to Dani if it is reasonable, not if he thinks it is proper. Since the proposed lost profit underlying the negligence action was \$1mill., a reasonable attorney, and more importantly a reasonable client, could determine that \$500k settlement offer is reasonable under the circumstances. Here, the authority to accept the settlement offer laid purely with Dani, and she ended up accepting the offer of \$500k settlement when Rita offered it to her. Len's failure to communicate the settlement offer under these circumstances was a violation of his duty of communication to his client, Dani.

Therefore, Len has violated both the ABA and CA authorities by failing to properly communicate with Dani.

Not Communicating Settlement Offer to Dani - Diligence

Under both the ABA and CA, a lawyer has a duty to pursue a matter to completion with diligence and promptness.

Here, Len failed to communicate with August in response to the settlement demand, and failed to communicate the settlement demand to Dani, his client. It is likely that this unwarranted delay and failure to timely communicate may slow down the completion of the matter, because it leaves parties in limbo and waiting instead of diligently responding and denying or otherwise communicating with August or Dani.

Therefore, Len may have breached his duty of diligence under ABA and CA.

Unilateral Decision that Offer was too Low - Competence

A lawyer owes a duty of competence to their client under both the ABA and CA rules. The ABA requires that a lawyer use the requisite knowledge, skill, preparation and thoroughness to undertake effective representation. CA further requires that the lawyer have the requisite mental, physical and emotional capacity to undertake the representation.

Here, Len unilaterally decided that the demand of \$500k was too high for the value of the case. However, ultimately, Dani accepted the \$500k demand, which suggests that she thought it was a reasonable valuation of the case. To the extent that Len did not have the requisite knowledge or skill to make such a determination, his duty of competence to Dani may be implicated.

Len may have violated his duty of competence under both the ABA and CA authorities.

QUESTION 4

A car manufactured by Motor was in an accident. Palma was in the front passenger seat during the accident when her seat collapsed, resulting in serious injuries. Palma properly filed and served a complaint in California Superior Court against the manufacturer, Motor, asserting defective seat design.

During jury selection, Juror #5 revealed that she had worked as a Motor engineer before retiring five years ago. Juror #5 also disclosed that she still owned 50 shares of Motor stock, which amounts to 2% of her total financial assets. Palma challenged the seating of Juror #5 for cause. The court denied Palma's challenge because Juror #5 said she could be fair and impartial.

During trial, Motor presented evidence that the seat was not defective and that any injuries Palma suffered were due to reclining the seat to an unsafe angle. Palma submitted evidence that at the time of the accident, a bookshelf was in the backseat, which prevented excessive reclining. At the close of evidence, Palma moved for directed verdict, arguing that misusing a product is not a defense to defective design when that misuse is foreseeable. The court denied Palma's motion and a jury verdict was issued in favor of Motor.

Two weeks after the jury verdict and judgment, Palma received anonymous reports ("Reports") of Motor safety tests conducted three years earlier. The Reports showed that severe injuries were likely regardless of the angle of the seats. One week after receiving the Reports, Palma filed a motion for a new trial, arguing that the verdict was flawed, and provided evidence that Motor had intentionally hidden the Reports.

1. Did the court err in seating Juror #5? Discuss.
2. Did the court correctly deny Palma's motion for directed verdict? Discuss.
3. How should the court rule on Palma's motion for a new trial? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Juror #5

Peremptory Strikes

A peremptory strike allows a lawyer to strike any potential juror from serving on the jury for any reason, except reasons based solely on the potential juror's race, sex, or gender (or any other trait protected by the equal protection clause).

Here, Palma did not seek to exclude Juror #5 using a peremptory strike because the facts say that Palma wanted to strike the juror "for cause." This means that Palma must justify her decision to have Juror #5 removed from the jury by showing that Juror #5 may be biased or cannot act impartially.

Therefore, the court did not improperly prevent Palma from using her peremptory strikes because Palma did not use a peremptory strike on Juror #5.

For Cause

Any juror can be disqualified from serving on a jury for cause. A lawyer can seek to have an unlimited number of jurors removed for cause if cause is shown. A juror can be removed for cause if they cannot act impartially or would be biased in favor (or against) a party based on the potential juror's personal beliefs, economic situation, or other objective factors.

Here, there are 2 potential grounds where Juror #5 may be excluded for cause: (1) Juror #5's previous work as an engineer at Motor before retiring and (2) Juror #5's investment in Motor. Each is discussed below:

Former Engineer

Here, Palma will argue that Juror #5 cannot act impartially because Juror #5 was an engineer at Motor who could have participated in designing the seat that allegedly malfunctioned from a design defect in her accident. Palma would argue that Juror #5 would not be able to act impartially because Juror #5 would think that her work on designing the seat was proper and resulted in a safe seat design. In other words, Juror #5 would not want to be critical of her own engineering work and would thus find in favor of Motor. This would mean that Juror #5 would not be assessing the evidence as presented by both parties at trial and impartially applying the facts to the law, but would instead be judging the case based on Juror #5's personal and subjective assessment of their own work as an engineer designing the seat. And, as just mentioned, Juror #5 would not likely negatively judge her OWN work as an engineer.

On the other hand, the facts are not clear that Juror #5 even worked on the seat in question. Juror #5 retired 5 years ago and thus may not have been employed at the time the seat was designed. This makes it less likely that Juror #5 would tend to view

her own design work as infallible. If Juror #5 worked on a separate part of the car or worked on a different product entirely then she may be able to impartially judge the work of other engineers at Motor.

This argument would have strength if Juror #5 was either not employed at Motor at the time the seat was designed OR was not involved in the design of the allegedly defective seat at all (even if employed at the time). For example, the seat could have been designed AFTER Palma retired, which would make her more like any impartial potential juror who never worked at Motor as an engineer. However, overall, the argument is still weak. Even if Juror #5 did not work on designing the allegedly defective seat, Juror #5 may still not be able to judge the design work of her colleagues impartially for the same reason she would not be able to judge her own design work. Juror #5 may feel a sense of loyalty to her colleagues and would tend to view her colleagues work on designing the seat as effective and infallible.

Thus, it is most likely that the court erred in seating Juror #5 because Juror #5 would not be able to act impartially if she was involved in designing the seat or knew of colleagues that designed the seat. However, this conclusion could change if the seat was designed after Palma retired.

Based, on the facts though, it is most likely that the court erred in seating Juror #5.

Economic Investment

Here, Palma will argue that Juror #5 will not be able to act impartially because Juror #5 would be too concerned about the financial well-being of her Motor stock. Palma will argue that Juror #5 will not objectively assess the evidence in the case and neutrally apply facts to law because Juror #5 will be basing her decision in the case based on what Juror #5 thinks will be best for 50 shares of Motor stock. Palma will argue that Juror #5 will be ex hesitant to find that Motor defectively designed the seat because finding Motor liable could make Motor's stock price decrease. If there is a design defect in the seat, this defect would likely affect many of Motor's cars on the road and Motor might have to issue mass recalls. This would be bad PR for Motor and would hurt the company's reputation for safety. Motor would also be opened up to more costly litigation for defectively designed seats. This could all cause Motor's stock price to decrease and would thereby harm Juror #5's economic investment in the company (i.e., Juror #5's own net worth). Palma will argue that Juror #5 will vote in favor of Motor to avoid these negative consequences.

However, this argument is weak given the EXTENT of Juror #5's investment in motor. Juror #5 only has 50 shares of Motor stock which is a mere 2% of "her total financial assets." This is a de minimis investment in the company. Even if Motor's stock price were to decrease because of a negative trial outcome, Juror #5's overall investment portfolio would not significantly change. Palma's argument would be much stronger if Juror #5 had a much more significant investment in Motor such that her wealth was concentrated in Motor stock. Because Juror #5's investment in de minimis, it is unlikely that Juror #5 will base her decision in the case based on her own financial interests. Juror #5 is much more likely to be able to judge the facts and the law impartially as any

other person not at all invested in Motor.

Therefore, the court did not err in seating Juror #5 on this basis.

Overall, the court erred in seating Juror #5 because Juror #5 may have been involved in designing the defective seat or knew of those who were involved in designing it.

2. Directed Verdict

Timing of Motion

A motion for directed verdict can be made at the close of evidence (i.e., after both parties have rested), after the plaintiff rests their case, or after the defendant rests their case. The motion must be made before the case is sent to the jury. Under the federal rules, the appellate court will not hear an appeal from a denial of a motion for directed verdict (JMOL) if the party did not move for a directed verdict (JMOL) before the case was submitted to the jury.

Here, Palma's motion was timely because Palma moved for directed verdict "at the close of evidence." At this point in the case, both parties had presented all their evidence and the case was ready to submit to the jury (but has not yet been submitted). At this time, Palma would be able to argue that no reasonable jury would be able to find in Motor's favor because Motor presented insufficient evidence. Because the motion was timely, the appellate court would be able to hear any potential appeal from Palma.

Therefore, Palma's motion was timely.

Standard for Motion

A motion for directed verdict should be granted if, viewing all the evidence in the nonmoving party's favor, the court finds that the non-moving party has provided insufficient evidence to support its case such that no reasonable jury would be able to find in favor of the nonmoving party. The court cannot weigh the credibility of witnesses, because credibility issues are for the jury and the existence of such issues shows that a reasonable jury might find in favor of the nonmoving party.

Here, as a legal matter, Palma is correct in her assertion that misuse of a product is not a defense to defective design (strict liability) if the misuse is foreseeable. However, based on the evidence presented by both parties at trial, the court would not be able to conclude that no reasonable jury could find in favor of Motor (the nonmoving party). First, the foreseeability of a particular use is likely to be a question of fact for the jury to decide. Foreseeability is rarely an issue of law that the court decides because whether something is foreseeable turns on the particular facts of the case as presented by the parties. Few things tend to be foreseeable or unforeseeable as a matter of law.

Second, Palma and Motor each "presented evidence" that the seat was not (from Palma) and was (from Motor) reclined too much. Thus, even if "excessively reclining" a

seat was an unforeseeable misuse as a matter of law, the facts as presented by the party are not clear on how far (or even if) the seat was excessively reclined. In other words, there is evidence to support BOTH parties' positions on the extent of how far the seat was reclined. This is because Palma "presented evidence" that there was a "bookshelf" in the car that physically prevented the seat from reclining too far. BUT, Motor also "presented evidence" that the seat was reclined too far such that it was at an "unsafe angle." Based on these competing accounts, Motor has presented sufficient evidence to support a finding that there was an unforeseeable misuse (i.e., that the seat was reclined too far). The court cannot weigh credibility of witnesses in ruling on Palma's motion because that is the role of the jury. The jury will have to decide if they believe Palma's evidence that a bookshelf prevented excessive reclining or if they believe Motor's evidence that the seat was too far reclined. Palma's motion turns on credibility issues, which the court cannot weigh in deciding a motion for directed verdict. As it turned out, the jury believed Motor's evidence regarding how far the seat was reclined because it returned a verdict in favor of Motor.

Therefore, the court did not err in denying Palma's motion for directed verdict.

3. Motion for New Trial

Timing of Motion

Under the federal rules, a motion for new trial must be brought within 28 days of the entry of judgment.

Here, Palma's motion is timely because she made her motion "two weeks" (14 days) "after the jury verdict and judgment." 14 days is less than 28 days, so the motion is timely.

Therefore, Palma's motion is timely.

Standard for Motion

In general, a motion for a new trial will be granted if the jury verdict is against the clear weight of the evidence. However, a new trial can also be granted if there is newly discovered evidence that existed at the time of trial but could not have been discovered with reasonable diligence. Fraud by a party may also be a grounds for a new trial.

Here, Palma's motion is based on Motor's fraud in hiding the "Reports" that the seats were unsafe and thus likely to cause "severe injuries . . . regardless of the angle of the seat." Palma has also "provided evidence that Motor had intentionally hidden the Reports," which makes Palma's motion credible and not based on a mere hunch or last-ditch effort to overturn the verdict. If these reports are true, Palma's motion for a directed verdict should have been granted because no reasonable jury would be able to find in Motor's favor. If the seats are unsafe at any angle, then it does not matter if or how far Palma reclined her seat. The seats are always unsafe. Thus, the jury, in deciding the case, wrongfully believed that Motor's seats were safe at some angles (but

not others).

This wrongful belief is attributable to Motor's fraud, because Motor intuitively hid the reports. Motor's fraud unduly prejudiced Palma because the Reports defeat Motor's case. Had Palma had access to the reports, she would have presented them at trial and prevailed on her motion for directed verdict. Thus, Palma is correct to say that the jury's verdict is "flawed."

These Reports existed at the time of trial because Motor had "intentionally hidden" them and they could not have been discovered through reasonable diligence because they had been "intentionally hidden" by Motor. Motor's actions are fraudulent because Motor intentionally concealed damaging evidence from Palma and the court. As a result, the trial was not conducted fairly to Palma.

Therefore, the court should grant Palma's motion for a new trial.

Fraud on the Court

A fraud on the court is a grounds for a new trial. But the fraud must consist of bribery of court personnel such as judges or jurors.

Here, a new trial cannot be ordered for fraud on the court (even though Motor intentionally hid the Reports) because there is no evidence that Motor bribed the judge or other jurors. The type of misconduct by Motor is not a grounds for a new trial for fraud on the court.

Therefore, there was no fraud on the court.

QUESTION 4: SELECTED ANSWER B

1. Juror #5

Dismissal of a Juror

The 7th Amendment guarantees, in civil suits, the right to an impartial jury. One way in which a jury's impartiality may be called into question is via a juror's bias of personal interest in the subject matter of the litigation. In California, a juror may be dismissed if their impartiality may reasonably be questioned due to the juror's personal interests. In assessing whether a juror may be seated notwithstanding a personal interest in the subject matter of the litigation, the court will consider whether the juror has extensive familiarity with the subject matter of the litigation, whether the juror has a pecuniary or other interest in the subject matter of the litigation, whether the juror has a relationship with any party in the litigation, and whether the juror both subjectively and objectively reasonably believes that they can render a fair and impartial verdict.

Extensive Familiarity

The first factor a court will consider in whether or not to seat a juror is whether the juror has extensive familiarity of the subject matter such that their judgment may be materially prejudiced by prior knowledge not presented in the case. Here, Juror 5 (#5) worked as a Motor engineer until just 5 years ago. This suggests that #5 had extensive knowledge about the way in which cars were manufactured at Motor. #5 likely has inside information about Motor's manufacturing process, including information about the design of their seats. There is a high likelihood that #5 was bringing in extraneous knowledge regarding the exact seat at issue which allegedly led to P's injuries. This runs the risk of #5 rendering a verdict in Motor's favor based on an erroneous belief that their seats are manufactured well, because she has a direct interest in preserving the reputation of M for manufacturing safe and effective vehicles. As such, this factor weighs heavily against the seating of #5 because the extraneous knowledge that #5 was able to bring into the jury room is highly likely to prejudice P's right to a fair trial by an impartial jury.

Pecuniary Interest

The court will also consider the juror's pecuniary interest in the subject matter of the litigation. This is because if a juror has a stake in the outcome of the litigation, it is likely that the juror will render a verdict in favor of the party whose interests are aligned with theirs. Here, #5 disclosed that she still owns 50 shares of M stock, which amounts to 2% of her total financial assets. On its face, 50 shares appears to be a substantial amount of ownership. However, as the facts indicate, this amounts to just 2% of #5's financial assets. This raises a legitimately challenging question for the court to decide. On one hand, having a financial stake of any kind in the litigation appears to prejudice an individual's judgment. However, an amount of ownership of just 2% appears sufficiently slight as to not raise an eyebrow of facial bias. The facts do not indicate the

relative wealth of #5, but owing to #5's prior career as an engineer at a major car manufacturer, there is a possibility that #5 has substantial financial assets such that 2% of their assets may still amount to a substantial sum. On its face, there may be an ever-so-slight weight in favor of this factor *not* weighing against #5's seating, as it is commonplace for people to own shares of publicly traded corporations without owing an allegiance to them. However, in light of the fact that M was likely gifted these shares in the course of her employment, a thumb on the scale may be placed in favor of considering this to be a measurable indicia of bias. Ultimately, this question may be null, as it is difficult to assess whether a pecuniary stake of such slight magnitude qualifies as an indicia of bias.

Relationship with Party-Opponent

Here, #5 has an extensive relationship with M. This is evidenced by the fact that she worked as an engineer at M until 5 years ago, when she retired. This is facially a significant relationship, as #5 likely has friendships and professional relationships with employees of M. Furthermore, it appears that #5 retired as an M employee, which suggests that she may still retain an allegiance to the company, casting light on potential bias. However, the relationship did end 5 years ago, which may be a sufficient amount of time as to dissipate the taint of any bias towards M. Ultimately, due to the extensive relationship between #5 and M, and the likelihood of bias in its favor, this factor weighs heavily against #5's seating.

Belief of Fairness & Impartiality

Here, #5 has indicated that she believed she could be fair and impartial. In assessing whether this statement weighs in favor or against #5's seating, a court will assess the subjective and objective reasonableness of this assertion.

Subjective

Here, #5 indicated a subjective belief that she could be fair and impartial. The facts are silent as to whether there are any other indicia of reliability tending to show that #5's statement should be believed. On one hand, jurors take an oath to tell the truth, as they are operating under the obligations of a tribunal. For the sake of the smooth operation of the justice system, honesty under oath is presumed. However, as mentioned above, there are serious questions as to whether #5 is biased in favor of M. Not only is #5 a former employee, but also #5 is still a shareholder of M. #5 likely has a reputational interest in favoring a verdict for M as well as a pecuniary interest in the same. Nonetheless, under oath, #5 did say she could be fair and impartial, and this presumption of honesty should not be disturbed absent clear evidence of bias. So, as noted above, if the court finds that #5 is sufficiently biased as to render her a non-impartial juror, then the court may also find that #5 was dishonest regarding her ability to render a fair verdict.

Objective

Under the objective standard of reasonableness of #5's belief that she could render a fair and impartial verdict, the court will assess whether a reasonable person in #5's

situation would have been able to render a fair verdict. Considering many of the factors set forth above, prior employment with a party, current ownership interest in a party, and serious familiarity with the subject matter of the case tend to suggest that #5's belief that she could be fair and impartial was unreasonable. A reasonable person in the same situation would likely have declined to sit on the jury because of the extent of the bias at issue.

Ultimately, because a majority of the factors in considering juror bias weigh against seating #5, the court did err in seating #5 in P v. M.

2. P's Motion for a Directed Verdict

Standard

In California, a directed verdict is the same as what is called a "Judgment as a Matter of Law" (JMOL) in federal court. A directed verdict / JMOL is proper if, upon viewing all evidence in the light most favorable to the non-moving party, no reasonable jury could find for the non-moving party and the movant is entitled to judgment as a matter of law. Here, the question is whether there is sufficient evidence to raise a question of fact regarding whether Motor was liable for defective seat design.

The facts indicate that M has presented evidence demonstrating that the seat was not defective and that P may have been contributorily negligent in reclining her seat to an unsafe angle. While the facts underlying both parties' assertions are unclear, M did present evidence sufficient to raise a question of fact for the jury. On one hand, P did submit evidence that showed that she had a bookshelf in the back seat which prevented her from reclining her seat back to an unsafe angle. However, M appears to have also proffered evidence that the seat was not defective and that P did in fact recline the seat back to an unsafe angle. The jury is free to weigh both parties' respective witnesses and assess the credibility of the evidence each party submitted. For this reason, there does appear to be a legitimate question of fact regarding whether or not M was liable for P's injuries. A directed verdict is rendered only upon a showing of virtually no evidence by the non-moving party. These should be reserved only in situations where a party has failed to raise any question of fact, such that the credibility of evidence is not at issue. This does not appear to be the case here. It appears that both parties have put forth evidence sufficient to sustain a verdict in their favor. In fact, the jury did come out this way. This suggests that M's evidence was sufficient - if not compelling - enough to support a verdict in its favor, and the court properly dismissed P's motion for a directed verdict as a result.

Defective Design Claim

Although the facts are substantially unclear on the defective design claim, a defective design claim may be brought under either a strict products liability or a negligence claim. It appears that P's claim is rooted in defective design, which is an element of strict products liability. Under a defective design claim, a court uses either a "risk-utility" test or a "consumer expectation test." The risk utility test asks whether another feasible alternative was available, and the consumer expectation test asks whether the design

was consistent with a consumer's reasonable expectations. There does appear to be an issue as to whether the seats were defectively designed here, considering M presented evidence that the seat was not defective. Although P's assertion that foreseeable misuse is not a defense to defective design is technically correct, the facts are insufficient regarding M's proffered evidence in support of its claim against P. Therefore, as mentioned above, a directed verdict is not proper because there is an arguable question of material fact and, viewing the evidence in the light most favorable to M, a reasonable jury could find in its favor.

3. P's Motion for a New Trial

Standard for Granting a New Trial

Whether or not to grant a new trial is squarely within the decision of the court. In assessing whether a new trial should be granted, courts will consider the severity of the alleged error in the trial and whether or not it unjustly affected a party to the litigation. New evidence made available following trial that could have reasonably been obtained prior to the conclusion of the trial is *not* a basis for granting a new trial. However, evidence that was unlawfully obstructed by an opposing party or structural errors that resulted in prejudice to the moving party may be proper grounds for granting a new trial.

New Evidence

Here, the issue is whether M's safety test reports, which were made available to P anonymously following the jury's verdict, could have been discovered before conclusion of the trial. On one hand, P has raised a facially valid question of fact regarding whether M intentionally hid the reports. If this assertion were true, this would amount to gross procedural misconduct on M's part and may be a basis for granting P a new trial. However, if P is unable to muster sufficient evidence supporting this assertion, P will not be entitled to a new trial. In P's filing, her attorney was required to certify the truth of the statement and that it was made in good faith. So, given that there appears to be sufficient credibility to the claim that M intentionally hid the reports, the question for the judge will be whether M's conduct was sufficiently prejudicial as to have rendered the jury's verdict invalid. If M did engage in this willful misconduct, the court is likely to grant a new trial.

Structural Error - Juror #5

A party may also be entitled to a new trial upon a showing of a procedural error that materially prejudiced the moving party. In civil trials, unanimous juries are required. However, in California, unanimity is not required. The facts are unclear as to whether the verdict in M's favor was unanimous. If the verdict was unanimous, and the parties stipulated that the verdict did have to be unanimous, then Juror #5 could have materially prejudiced P's rights, as P was unsuccessful due to an arguably improperly sat juror. Of course, whether or not #5's seating amounted to a fundamental structural error hinges on whether it is shown that #5 had bias likely to render her judgment impartial and unfair. However, because of the above analysis, which set forth grounds for concluding that juror #5 was in fact sufficiently biased as to render her unfit for serving on a fair and

impartial jury, then this may amount to a substantial procedural and structural error which may entitle P to a new trial.

Timeliness

A party may make a motion for a new trial within 30 days of the jury rendering its verdict. Here, P received anonymous reports two weeks after the jury verdict. Then, one week later, P filed her motion for a new trial. It appears that P timely filed her motion for a new trial, as it was filed within the 30 days window. Furthermore, even if California courts did alter the window for filing a motion for a new trial, it appears that P filed the motion as soon as reasonably practicable, and thus the motion will be found to have been timely filed.

QUESTION 5

Years ago, Perry purchased two baseballs that he understood were autographed by members of championship teams. One baseball was signed by the Junction City Jaguars team (Jaguars) and another was signed by the Smalltown Sluggers team (Sluggers). Because Perry knew nothing about the value of these baseballs, he entered into separate contracts with his niece, Denise, a sports memorabilia expert, to sell each of them.

Aware of Perry's ignorance of the value of his baseballs, Denise told Perry that the Jaguars baseball was a counterfeit worth only \$20. As a result, Perry sold the Jaguars ball to Denise for \$20. In fact, the Jaguars ball was worth \$5,000 on the open market.

Denise told Perry that the Sluggers baseball had a fluctuating value and that it could sell for at least \$1,000 and likely more. Denise sold the Sluggers baseball to Bob for \$10,000 but told Perry that it had only sold for the \$2,000 she gave him. With the remaining \$8,000 that Denise received from Bob, she purchased a used Voy car. Ironically, since Denise purchased the Voy, interest by collectors in Voy cars has vastly increased and her Voy is now worth \$20,000.

Denise still has the Jaguars baseball and the Voy car. After learning of Denise's deception concerning the baseballs, Perry filed suit against her for fraud. The court has ruled in Perry's favor.

1. What damages can Perry recover? Discuss.
2. What equitable remedy or remedies can Perry obtain? Discuss.

QUESTION 5: SELECTED ANSWER A

Preliminary Matters

Selection of Remedies

Some remedies, such as compensatory damages and rescission, are incompatible with each other. The plaintiff must elect which damages to receive for each cause of action.

Severability

Here, Perry's case against Denise was for two separate events: the fraud relating to the Jaguars ball, and the fraud relating to the Sluggers ball. Since these frauds are separate, Perry may independently select the remedies for each case. For example, he could pursue compensatory damages for one ball but rescission (an incompatible remedy) for the other. Since the remedies are for different wrongs, such an election would not be inconsistent.

1) Money Damages

Fraud is an intentional tort. As such, torts damages are available.

Compensatory Damages

Compensatory damages are designed to put the party in the same position they would have been absent the wrong. In a fraud case, the compensatory damages may be either "out of pocket" losses (price paid minus actual value) or "benefit of the bargain" losses (promised benefit minus actual benefit received).

Out of Pocket Damages

The Jaguars Ball

Here, Perry (P) sold the Jaguars ball to Denise (D) for \$20. However, the actual value of the ball was \$5,000. As such, P's out-of-pocket losses are $\$5000 - \$20 = \$4980$.

The Sluggers Ball

Here, P received only \$2,000 for the Sluggers ball, but it was actually worth \$10,000. P's out of pocket damages are therefore $\$10,000 - \$2,000 = \$8,000$.

In total, then, P's out-of-pocket losses are \$12,980.

Benefit of the Bargain Damages

Benefit of the Bargain damages differ from out of pocket losses only when the defendant lied about the value of the consideration they paid to the plaintiff. Here, D

paid cash in both cases, which has a set value. As such, P's damages under the benefit or the bargain analysis would be identical to his damages under the out of pocket calculation

As such, P's compensatory damages are \$12,980.

Incidental/Consequential Damages

In addition to out of pocket/benefit of the bargain damages, fraud plaintiffs are entitled to incidental/consequential damages that flow naturally from the fraud. If, for example, the fraud caused the plaintiff to lose business or wages (such as lost work for a personal injury claim), those losses would also be recoverable.

Here, there is no indication that any incidental or consequential damages flowed from D's fraud. Since P simply had the baseballs sitting in his possession, not, say, money in a bank, there is not even a loss of interest payments from a savings account. As such, P likely cannot recover any incidental or consequential damages.

Punitive Damages

Availability

Punitive damages are available in tort when the defendant's misconduct was willful, wanton, or malicious. Punitive damages are not generally available in contract cases. However, since fraud is an intentional tort, punitive damages are available when the defendant had the requisite mental state.

Here, D knew that P was ignorant of the balls' true values and that he put his trust in her to fairly determine them, both as an expert and as a family member. D intentionally gave P values grossly below the actual market prices. This constitutes willful or malicious misconduct. As such, punitive damages are available.

Amount

Punitive damages should be of an amount calculated to dissuade similarly situated parties from engaging in the same misconduct as the defendant. As such, factors include the gravity of the misconduct, the defendant's net worth, and whether there is a pattern of behavior at play. In general, punitive damages seldom exceed compensatory damages. Further, the Supreme Court has held that punitive damages in excess of a single-digit multiplier of the compensatory damages are unconstitutional in all but the most extraordinary circumstances. Punitive damages are in addition to any compensatory damages.

Here, the amount of punitive damages should consider D's net worth, whether she has similarly deceived other clients, and the gravity of the misconduct (likely heightened by taking advantage of a family member's trust). If awarded punitive damages, P will likely not receive more than an additional \$12,980 (equal to the compensatory damages) and in any event cannot receive more than an additional \$116,820 (9x the compensatory damages).

2) Equitable Remedies

A number of equitable remedies are available for fraud. These include rescission and restitution/replevin, the creation of a constructive trust, and imposition of equitable lien on the defendant's property.

Rescission and Replevin

Rather than recovering compensatory damages, a plaintiff may seek to rescind the fraudulent transaction, followed by an action for replevin. Before bringing an action for rescission and replevin, a plaintiff must return any benefit obtained from the transaction to the defendant and request that they do the same.

Jaguars Ball

Rescission

Here, P may seek rescission of the sale contract for the Jaguars ball to D for \$20. To bring this action, P must return the \$20 to D. If he has done so, he may properly seek this equitable remedy.

Replevin

An action for replevin requests the return of personal property that was transferred as part of the rescinded contract. It is enforceable against the fraudster, but not against a third party who is a bona fide purchaser for value without notice of the fraud.

Here, D still has the Jaguars ball, which is personal property. As such, an action for replevin could properly force D to return the ball to P.

Sluggers Ball

Rescission

See rules above. For the same reasons as above, to bring this action, P must return the \$2,000 purchase price to D. If he does so, he may properly seek rescission of the sale.

Replevin

See rules above. In this case, D does not have the Sluggers ball; she sold it to Bob for \$10,000, its fair market value. There is no indication that Bob had notice that D had obtained the Sluggers ball through fraud. As such, P could not use an action for replevin to force the return of the Sluggers ball. Instead, he must seek damages or an alternative equitable remedy for that contract.

Constructive Trust

Unlike an express trust, a constructive trust is an equitable remedy created by operation of law. If a defendant would be unjustly enriched by their misconduct, the court may

impose an equitable trust on the fruits of that misconduct, which transfers possession of the money or property to the plaintiff.

Unjust Enrichment

A person is unjustly enriched when they gain an economic benefit by their misconduct in addition to any direct damages they inflict on the plaintiff. Classic examples of unjust enrichment are selling stolen or fraudulently obtained personal property or investing ill-gotten funds in a lucrative asset that increases in value. To be considered unjust enrichment, the resulting benefit must be unfair.

Here, P can argue that, by using the funds fraudulently obtained in the sale of the Sluggers ball to purchase the Voy car, an asset which has substantially appreciated in value, D was unjustly enriched. D's purchase of the car is directly traceable to the proceeds from her fraud with the Sluggers ball. Since it would be unfair to allow D to retain a profit of \$12,000 from her fraud even if she returned the \$8,000 owed as compensatory damages to P, a court is likely to find that the car's appreciation in value represents unjust enrichment.

Constructive Trust

Since D would be unjustly enriched by retaining the Voy car, the court may impose a constructive trust on the car in favor of P. This would result in the transfer of the car (or, if sold, any proceeds from the sale) from D to P.

Equitable Lien

When a defendant has been unjustly enriched (see above), the court may impose an equitable lien on any property related to that unjust enrichment as security for the defendant's obligations to the plaintiff.

Here, D was unjustly enriched by using the proceeds of her fraudulent sale of the Sluggers ball to purchase the Voy car (see analysis above). Since the car is related to that unjust enrichment, if P does not obtain the car (via a constructive trust), he may obtain an equitable lien on the car as security for D's obligations (any damages from the judgement).

QUESTION 5: SELECTED ANSWER B

Applicable Law

The UCC governs contracts for the sale of goods which are defined as tangible and movable items. All other contracts are governed by common law rules. Since the contract between Perry and Denise was regarding the sale of autographed baseballs, they would be considered tangible and movable goods. Therefore, the UCC rules would govern.

Fraudulent Misrepresentation

(1) defendant made a false statement of a material fact (2) defendant knew the statement was false (3) the defendant made the statement intending to induce the plaintiff (4) the plaintiff actually and reasonably relied on the false statement and (5) suffered damages. Denise made a false statement of material fact when she told Perry the counterfeit was worth only \$20 when it was really worth \$5,000. She intended that he would rely on her statement and he actually and reasonably did. Further, he suffered damages as he lost in potential value. Additionally, Denise told Perry that she sold the baseball for \$2,000 when she actually sold it for \$10,000 and she intended that he rely on her statement which he did when he accepted the \$2,000. The court found Denise guilty of fraud therefore all these elements were met.

1. Perry's Recoverable Damages

Fraud Damages

When a defendant is guilty of fraud, a plaintiff may recover either actual damages or the benefit of the bargain.

Actual Damages - Jaguar Baseball

Actual damages are calculated by taking the difference in value between what the value of what the plaintiff gave the defendant and what the plaintiff received on the date of the transaction. Perry gave Denise the baseball for \$20 due to her fraudulent misrepresentation when it was really worth \$5,000 on the open market. Therefore, Perry may seek to recover the difference in value which would amount to \$4,980.

Actual Damages - Slugger Baseball

See rule above. Perry may argue that he should be entitled to the difference between the \$2,000 he received for the ball and the \$10,000 it was actually sold for. Denise

would likely argue that the baseball had a fluctuating value and that the value of the baseball on the date of contracting was difficult to determine.

Benefit of the Bargain - Slugger Baseball

The benefit of the bargain is calculated by taking the difference between what the plaintiff received and what the plaintiff was reasonably led to believe. Perry would not likely attempt to receive damages under this theory as he was led to believe that the baseball was worth at least \$1,000 and actually received \$2,000. Under this theory, Perry would not recover anything.

Compensatory Damages

Compensatory damages include expectation damages, consequential damages and incidental damages less costs saved and mitigation. It is a legal remedy sought to put the injured party in the position they would have been in but for the breach.

Expectation Damages

Expectation damages are sought to put the injured party in the position they would have been in had the contract been fully performed. The plaintiff must prove that the defendant was the actual cause of his damages, the proximate cause of his damages, that the damages are certain and unavoidable. Perry entered into two contracts with Denise, one in which she sold the Jaguar baseball for \$20 and another in which Denise stated that she could sell the Sluggers baseball for at least \$1,000 and likely more. Denise was the actual cause of harm to Perry as but for her fraudulent misrepresentation, he would not have given away the two baseballs at a price far lower than what they were both worth. Further, Denise was the proximate cause of Perry's harm as it is reasonably foreseeable that by fraudulently inducing Perry into giving her the baseballs at a low price he would lose out on a substantial amount of money he would have been entitled to. Perry would likely not be able to recover anything for the Jaguar baseball as he received the \$20 he contracted for. Further, Perry would likely not be able to recover more than \$1,000 for the Sluggers baseball since it was not certain how much she would sell it for at the time of contracting. The fact that she ended up selling it for \$10,000 is irrelevant as Perry would not have been certain of that sales amount.

Consequential Damages

Consequential damages may be sought when a party to a contract loses out on profits he would have earned as a result of the defendant's actual harm and foreseeable harm. As explained above, the harm Perry suffered was actually and proximately caused by Denise. Perry may argue that he is entitled to the profits he would have earned from

selling the baseballs on his own, however, the profits he would have earned were not taken into consideration at the time of contracting. This is because Perry did not believe he would have profited from the sale of the Jaguar baseball at the time he contracted with Denise. Further, while he did expect to earn at least \$1,000 for the Sluggers baseball, the amount of lost profits was not certain since the value was fluctuating. Perry would not be able to recover speculative damages.

Incidental Damages

Incidental damages are costs incurred as a result of the breach. The facts do not state any costs incurred as a result of the breach in contract. Therefore, Perry would not likely recover incidental damages.

Restitution

Restitution is a legal remedy that may be sought instead of expectation damages. It seeks to compensate a party for the value of the benefit they conferred on the other party and is often sought when a contract has not been fully formed or when one party renders performance under the assumption that the other party would as well. Restitution seeks to avoid unjust enrichment. Perry may argue that he should be entitled to \$4,980 for the Jaguar baseball as he conferred a benefit onto Denise by giving her the baseball and reasonably believed he would receive the value of what it is worth. Perry may further argue that he should be entitled to the rest of the \$10,000 sale price as he gave Denise the ball under the assumption that she would sell it for him and confer the value to him. Under this theory the court would likely find that Perry is entitled to both the \$4,980 for the Jaguar baseball and the \$8,000 for the Sluggers baseball as Perry conferred a benefit onto Denise under the assumption that he would receive the fair value of the two baseballs.

Punitive Damages

Punitive damages are awarded to punish a defendant. It usually may not be sought in a contracts case, however, when the case includes fraud, punitive damages may be sought. In order to obtain punitive damages, the plaintiff must recover actual damages and the defendant must have acted willfully, maliciously, or egregiously. Further, courts generally find that punitive damages must be proportional to the actual damages recovered and many courts have found that a single digit ratio between the two is appropriate. As explained above, Perry will likely recover actual damages as a result of the fraudulent misrepresentation Denise made. Further, the court will find that Denise acted willfully, maliciously, or egregiously as she was found to have made the misrepresentation intentionally to induce Perry's reliance and actually did induce his reliance. Therefore, the court will likely find that Perry can recover punitive damages in an amount proportional to what he received as his actual damages.

Conclusion

The court will likely find that Perry would be entitled to receive \$4,980 for the Jaguar baseball under a theory of actual fraud damages or restitution. Further, Perry would be entitled to receive \$8,000 for the Sluggers baseball under a theory of fraud damages or restitution. Lastly, Perry would be able to recover punitive damages.

2. Perry's Equitable Remedies

Constructive Trust - Jaguar Baseball

A constructive trust is an equitable remedy that may be sought when a defendant wrongfully attains title to personal property such as through fraud or undue influence and the plaintiff has the right to possess the property. The court would find that the defendant would need to hold the property as trustee for the plaintiff so that it may be returned to the plaintiff. A plaintiff may trace the funds acquired from the sale of the property and is entitled to any increase in value obtained from the sale of the property. A bona fide purchaser, however, is not subject to a constructive trust. If the property was sold for less than the value of the property on the date of the wrongful taking, the plaintiff would not be entitled to a deficiency judgment and would only be able to collect the value it was sold for.

Perry may seek to have Denise hold the jaguar baseball for him as trustee so that it may be returned to him. Since the Jaguar baseball has not been sold, he would likely just receive the baseball back under this theory.

Constructive Trust - Sluggers Baseball

See rule above. Perry may seek a constructive trust to recover the Sluggers baseball. The baseball, however, has been sold to Bob. The facts do not indicate whether Bob was a bona fide purchaser who believed Denise honestly sold the baseball to him, however, assuming he is, Perry would not be able to recover the Sluggers baseball as a bona fide purchaser is not subject to a constructive trust. Perry may, however, trace the funds Denise received as a result of the sale. Denise purchased a used Voy car for \$8,000. He may seek to have the car placed into the constructive trust. Under this theory, Perry would be entitled to the increase in value of the car as well. The car is now worth \$20,000; therefore Perry would be entitled to the whole \$20,000 car under this theory.

Equitable Lien - Jaguar Baseball

An equitable lien is an equitable remedy similar to a constructive trust that may be

sought when a defendant wrongfully attains title to personal property such as through fraud or undue influence and the plaintiff has the right to possess the property. It is also similar in that it is not enforceable against a bona fide purchaser. The plaintiff may trace the funds from the sale of the property. However, unlike a constructive trust, the plaintiff could not recover any increase in value of the property. The plaintiff is only entitled to the value of the property on the date it was wrongfully attained, if the property was sold at a value below what it was worth on the date of the wrongful taking, the plaintiff may seek a deficiency judgment in order to collect the full value of the property.

Under this theory, Perry would likely still only recover the Jaguar baseball as it has not been sold and its value has not changed.

Equitable Lien - Sluggers Baseball

See rule above. Under this theory, Perry would likely still not be able to recover the baseball as Bob was likely a bona fide purchaser. However, Perry would be able to trace the funds from the sale to the Voy car, but Perry would only be entitled to \$8,000 as that was the difference in the amount it was sold for and he is not entitled to any increase in value under this theory. Therefore, it would likely be in Perry's best interest to seek a constructive trust rather than an equitable lien as he could recover more under that theory.

Replevin - Jaguar Baseball

Replevin is an equitable remedy that may be sought when a defendant is in wrongful possession of the personal property of another in which the plaintiff has a right to possess. Under this remedy, the defendant would be required to return the property to the plaintiff. Perry may seek replevin for the return of the Jaguar baseball as Denise obtained it through fraudulent means and Perry has the right to possess his personal property. Perry would not be able to seek replevin for the Sluggers baseball as it was sold to a bona fide purchaser.

Rescission of Contract - Jaguar Baseball

A party may seek rescission of a contract that was not properly formed if a defense to contract formation exists, such as fraudulent misrepresentation. Rescission is generally sought when a party seeks restitution and would unwind the contract. Under this theory, Perry may seek to unwind the contract with Denise regarding the Jaguar baseball so that it would be as if the contract never existed.

Defenses

Statute of Frauds

Denise may argue that she should not be required to pay damages as there may be a valid defense to the contract formation. A valid contract requires mutual assent, consideration, and no defenses to enforcement. Denise may argue that she should not be required to pay damages since a valid contract was not formed with respect to the Sluggers contract. Under the UCC a contract for the sale of goods over \$500 must be in writing and signed by the party against whom enforcement is sought. The facts do not state whether either contract was in writing, however, the contract for the sale of the Sluggers baseball would have needed to have been in writing to be enforceable as it was for the sale of a good for at least \$1,000. However, there are several exceptions in which a contract may still be formed despite it not being in writing, including complete performance. Perry gave Denise the Sluggers baseball, and Denise sold it on behalf of Perry to Bob. Therefore, performance was complete, and Denise could not claim that there was no enforceable contract even if the contract was not in writing that conformed with the statute of frauds.

Laches

Laches is a defense that may be raised if the plaintiff delayed in bringing the action and the undue delay prejudiced the defendant. There are no facts to suggest that Perry delayed in bringing the suit or that Denise was prejudiced by it.

Unclean Hands

Unclean hands is another defense that may be raised if the plaintiff engaged in misconduct or unethical behavior with respect to the subject matter of the contract. There are no facts to suggest that Perry engaged in misconduct or unethical behavior therefore this defense will likely not apply.

Conclusion

It would likely be in the best interest of Perry to seek a constructive trust with respect to the Sluggers baseball as it would allow him to recover the Voy car and its full value of \$20,000. Perry may seek replevin for the return of the Jaguars baseball so that he may sell the baseball for its full value of \$5,000.