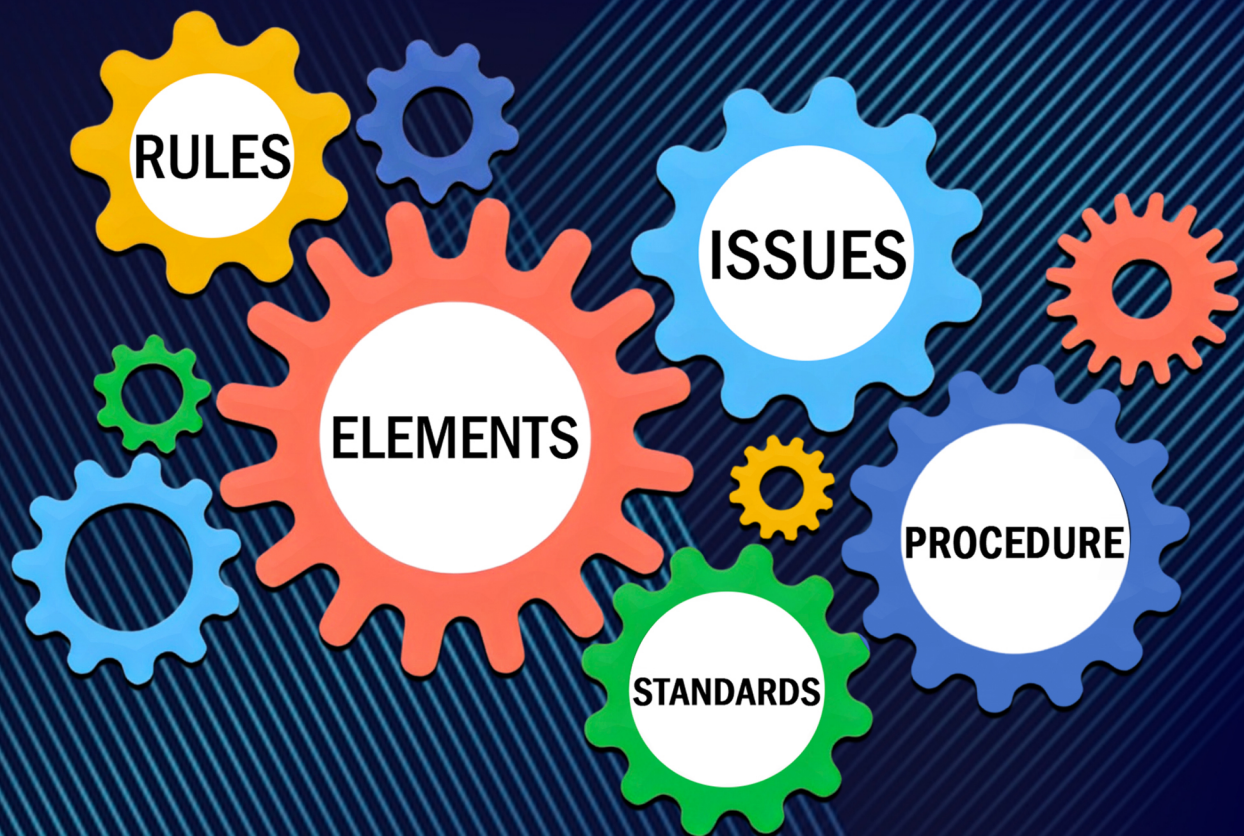


Includes All Tested Subjects

BAR EXAM ESSAY PRACTICE MANUAL

Frequently Tested Issues & Explanations



FOR THE CALIFORNIA BAR EXAM

Edward P. Reyes, Esq.

Jurax Bar Preparation

Bar Exam Essay Practice Manual
Jurax Bar Preparation

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Things I learned from Edward “Eddie” Reyes

I took the time to study these common issues and their setups. My confidence was high because I knew most of these issues as the exam approached. I passed on the first try.

- Robert D.

I wanted to share that I passed the CA bar exam and I believe part of the reason was because I used your essay templates while studying. Thank you for the work you've done and continue to do to help people pass this exam! It truly all comes together when you understand how the bar is testing you. Thank you for your generosity in sharing your materials. I will definitely recommend future bar takers to look into working with you!

- Erica E.

I used the Frequently Tested Rules and Cheat Sheets from Jurax Bar Preparation throughout my law school career. The hallmark feature of these Cheat Sheets is how they are derived from actual California Bar Exam essays and are carefully distilled to only the most essential legal doctrines that you must absolutely know for passing each subject. Something that I cannot overemphasize is how much your confidence is bolstered from performing a rapid review of these essential doctrines plus the recommended ways to approach each essay subject. It matters a lot – knowing that no matter what you may encounter on an exam, you have the core doctrines to work with. In contrast, some popular commercial law outlines overwhelm you with so much exhaustive material that your confidence plummets before the Final Exam. I am currently studying for the Bar Exam with the latest updates from Jurax Bar Preparation and I am once again feeling a surge of confidence. Thank you Jurax Bar Prep!

-Akagi K.

There is no way I could memorize volumes of outlines. As a repeat taker, I was focused on studying outlines. But it was too much to learn. This took time away from writing practice essays. When I first took the exam, I could count on one hand the times I wrote a practice essay. This is because most of my time went into trying to memorize volumes of rules. Eventually, the Jurax Cheat Sheets helped me focus on key rules. I then had more time to write essays and this helped me pass. Thank you Eddie and Jurax.

-Maria R.

Why is most bar prep material written with overwhelming and distracting text? Thank you Eddie for writing in a way that is straight to the point.

-Phil D.

Table of Contents

Business Associations	1
Civil Procedure	15
Community Property	39
Constitutional Law	63
Contracts	77
Criminal Law / Criminal Procedure	100
Evidence	119
Professional Responsibility	137
Real Property	154
Remedies	170
Torts	188
Wills and Trusts	212

Business Associations

Table of Contents

Agency.

- Actual Authority
- Implied Authority
- Ratification

Promoters and Preincorporation

Derivative Suits

Duties Owed (Fiduciary Duties)

- Duty of Care
- Business Judgment Rule
- Duty of Loyalty

Interested Director

Usurping Corporate Opportunities

Types of Business Entities

- Limited Liability Partnership (LLP) Versus General Partnership
- Corporation Versus Limited Liability Company (LLC)

Status of the Corporation

- De Jure Corporation
- De Facto Corporation
- Corporation by Estoppel

Piercing the Corporate Veil

Ultra Vires

Securities (Federal Securities Law)

- 10b-5
 - 10b-5 and Untruthful Information
 - 10b-5 and Truthful Information

16b

Shareholder Agreement

- Call and Put Options
- Drag and Tag Rights
- Perpetual Proxies
- Preemptive Rights
- Proxies
 - Irrevocable Proxies
 - Perpetual Proxies
- Rights of Shareholders to Elect

Winding Up

AGENCY

Approach to Agency.

Agency is a commonly tested issue. Know the skeleton layout as it will help with organization.

Agency.

1. Actual Authority
2. Apparent Authority

Broken down further, the terms resemble this layout:

Agency.

1. Actual Authority.

- a. Express
- b. Implied.

2. Apparent Authority.

Then, discuss **Ratification**.

1. Actual Authority Black Letter Law.

Actual authority is the authority that the agent reasonably believes that they have based upon the manifestations of the principal. Actual authority can be express or implied.

Express Actual Authority.

Express actual authority is the authority given from the four corners of the agency agreement.

Implied Actual Authority.

Implied actual authority is the authority that the agent reasonably believes that they have based upon necessity in order to carry out their express authority, customs of the position held by the agent, and by prior dealings with the principal.

2. Apparent Authority Black Letter Law.

In the event that the court finds that there was no actual authority, they could find apparent authority to bind the principal. Apparent authority is the authority that a third party reasonably believes that the agent possesses based upon the manifestations of the principal. One form of manifestation by the principal would be if the principal

placed the agent in a position that is usually associated with the grant of authority.

Ratification.

Another form of authority is ratification. Ratification occurs where the agent entered into a contract and then the principal gained knowledge of it and accepted its benefits.

PROMOTERS AND PREINCORPORATION

Introduction to Promoters and Preincorporation.

Consider these facts: Before a corporation is legally formed, two individuals (future officers of the corporation) enter into a lease for real property. Unexpectedly, an event occurs that causes the creation of the next-big-thing corporation to collapse. The issue becomes whether the individuals are personally liable for the lease (as opposed to holding the corporation liable for the lease). The language below comes from Question 2, Answer A, of the February 2007 California Bar Exam.

1. Can the Landlord recover unpaid rent from Rita and Fred individually?

Liability of Promoters on Pre-Incorporation Contracts.

Until such time as a corporation complies with all formalities of incorporation and files its articles of incorporation, it does not have a separate legal existence, and cannot enter into contractual obligations such as a lease. Prior to incorporation, it is typical for the corporation's promoters and/or founders to enter into contracts on its behalf.

Here, Rita and Fred entered into the lease with the Landlord on behalf of Rita's Kitchen, Inc. ("RKI"), which had not yet been formed.

Under the law, a promoter remains personally liable on a pre-incorporation contract unless there has been a subsequent novation (i.e., all parties agree to substitute the corporation for the promoters as the party liable on the contract whereby the promoters are thereafter relieved of further personal liability) or unless the contract is explicit in providing that the promoter has no personal liability on the contract.

Here, there has not been a novation to relief [sic] Fred and Rita of liability. However, they would argue that they entered into the contract on behalf of RKI, a corporation in formation, and signed as officers, and therefore made it clear that it was only the corporation and not them personally who would be liable on the lease. Their arguments would not likely succeed because the lease was not explicit in stating that they would not be personally liable thereunder. In the absence of such explicit language, the most likely result is that the court would hold that Rita and Fred as promoters are and remain personally liable on the lease.

Therefore, the landlord should be able to recover the unpaid rent from either or both of them.

Indemnification from Corporation

Note also that it is not clear where RKI has ever ratified the lease. **If no corporate action was taken to ratify the lease, then the corporation would not be liable thereunder, unless it silently took the benefits of the lease.**

Here, if RKI did not ratify the lease, it could still be held liable because it took the benefit of the lease without objection.

Note that although Fred and Rita would be held liable for the unpaid rent on the lease, they would have a claim for indemnification against RKI for any amounts that they had to pay personally to the landlord. They will not be able to recover, however, if the corporation does not have sufficient funds to pay. See selected Answer A, Question 2 of the February 2007 California Bar Exam.

DERIVATIVE SUIT

Derivative Suit Black Letter Law.

A derivative suit is proper to enforce a right of the corporation. The following two requirements must be met. (1) A shareholder must, before filing a derivative suit, make a demand on the board of directors unless the board refuses or it is futile to do so.

(2) The person must have standing. Standing is met by a showing that the shareholder was a shareholder at the time of the injury.

Commentary.

An example where an act would be futile is where the majority of the directors would be defendants in an action. Don't be intimidated by the fancy term *derivative suit*. Discuss the elements and the facts and you should do well in this area.

Further Reading.

See Question 5 of the July 2015 California Bar Exam. See also Question 1 of the July 2024 California Bar Exam.

FIDUCIARY DUTIES OWED

Duty of Care.

Directors have a duty of care to (1) use judgment as any reasonably prudent person would; (2) to act in good faith; and (3) act in the best interest of the corporation

Duty of Loyalty.

A director owes the corporation a duty of loyalty as a fiduciary to act in the best interests of the corporation and to avoid self-dealing to his or her own benefit and/or to the detriment of the corporation. If a director comes across a situation which would breach his duty of loyalty, the director or officer may cure the problem by disclosing the information and getting approval by a majority of disinterested directors or disinterested shareholders.

Business Judgment Rule.

In exercising his or her duty of care, a director can rely on the business judgment rule if he or she acted in (1) a reasonable; (2) informed manner with due care; and (3) in good faith.

Note: This is more of a defense for directors.

Commentary.

Traditionally speaking, directors and officers owe fiduciary duties to the corporation. However, for bar exam purposes, most hypotheticals deal with directors. Therefore, and in keeping the black law consistent with textbook examples and statutory language, only the term *directors* will be used here. In the next section, we'll continue with the topic of the duty of loyalty.

Further Reading.

See Question 2 of the February 2007 California Bar Exam. See also Question 1 of the July 2004 California Bar Exam.

DUTY OF LOYALTY CONTINUED INTERESTED DIRECTORS

Approach to Duty of Loyalty.

There are two common sub-issues under the duty of loyalty. These are (1) the Interested Director Transaction and (2) Usurpation of Corporate Opportunities. We'll begin with the interested director transactions.

(1) Interested Directors Transaction and the Black Letter Law.

An interested director transaction occurs when a director has a personal interest in a transaction in which the corporation is also a party. In other words, directors are not permitted to "sit on both sides of the transaction."

Cure for Interested Director Transaction.

Interested director transactions will be upheld if: (1) a majority of disinterested directors approve the transaction; (2) a majority of disinterested shareholders with voting power approve the transaction; and (3) the transaction was reasonably fair to the corporation. Usurping Corporate Opportunities Black Letter Law.

(2) Usurping Corporate Opportunities and the Black Letter Law.

Directors' fiduciary duties dictate that they must first offer a business opportunity to the corporation before entering into it themselves. The corporation must have an expectancy or interest in the business opportunity. The closer the opportunity to the corporation's line of business, the more likely it will be a "business opportunity."

Further Reading.

As this is a commonly tested area, it is suggested that you review, perhaps write out the following past exam: *See* Question 4 of the July 2006 California Bar Exam. *See also* Question 1 of the July 2024 California Bar Exam.

TYPES OF BUSINESS ENTITY

The following entities are commonly tested:

General Partnership, Limited Liability Partnership (LLP), Corporation, Limited Liability Company (LLC).

General Partnership Black Letter Law.

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

See Answer A, Question 2 of the February 2010 California Bar Exam.

Limited Liability Partnership (LLP) Black Letter Law.

The main benefit of an LLP is that the partners have limited liability – meaning that they are not personally liable for the debts and obligations of the partnership. To be properly formed, the LLP papers must be filed with the Secretary of State.

Further Reading.

See selected Answer A, Question 2 of the February 2010 California Bar Exam. *See also* Question 6, February 2013, California Bar Exam and Question 5, February 2015, California Bar Exam, discussing General Partnerships.

Corporation Black Letter Law.

A corporation is formed when articles of association are filed with the Secretary of State. The articles need to have the name of the corporation, the names and addresses of the incorporators and registered agent, the authorized stock of the company and associated rights, and the purpose of the corporation which can be any lawful purpose.

See Selected Answer A, Question 5 of the February 2020 California Bar Exam.

LLC Black Letter Law.

An LLC is a hybrid organization. Its owners (members) have limited liability like a corporation. However, LLCs get the pass-through tax treatment that partnerships get. On the other hand, corporations are subject to double-taxation (taxed once at the corporation level and then again when distributions are made to shareholders). To form a limited liability company, a certificate of formation must be filed with the [Secretary of S]tate.

Other Types of Entities for Lawyers.

The following is a brief summary of other types of business entities that lawyers can form:

- **Sole Proprietorship.** Requirement: Filing with the Secretary of State is not required. However, the name of the attorney must reflect the business name of the law office. Otherwise, a DBA (doing business as) filing may be required.
- **Professional Corporation.** Many law firms have PC or APC in their title (A professional corp.). E.g., Paul McCartney Law, P.C. Or, John Lennon Law, A.P.C.
- **Limited Liability Companies.** California LLCs cannot practice law. LLCs can practice law in other states.

STATUS OF THE CORPORATION

**De Jure Corporation
De Facto Corporation
Corporation by Estoppel**

Status of the Corporation and the Black Letter Law.

De Jure Corporation.

If the corporation is a de jure corporation, it has been validly created by observing the formalities of incorporation and receiving its articles of incorporation from the state.

De Facto Corporation.

A corporation is a de facto corporation where the formalities have been entered into, and the corporation had a good faith belief that it is a corporation, but the paperwork has not been processed and the state has not actually issued corporate status. A corporation can rely on its de facto status in such a situation to enforce a contract that it might not otherwise be able to enforce.

Corporation By Estoppel.

Corporation by estoppel results when a corporation holds itself out to the public as a corporation, acts as such, and enters into contracts under that banner, but is not actually a corporation at the time. Such an entity is estopped from claiming that it was not in fact a corporation when it entered into those contracts, as it benefited from claiming that it was.

See Selected Answer A, Question 6 of the February 2008 California Bar Exam.

Exam Tip.

Sometimes a party that wins a judgment may want to seek the personal assets of one of the directors. In other words, the prevailing party may want to argue that a corporation never existed. As such, the directors are personally liable.

Consider the following scenario from an actual past exam. *See Question 6 of the February 2013 California Bar Exam.*

Facts.

In January 2012, Molly and Lenny hired an attorney to incorporate their business under the name “Software Inc.” The attorney properly prepared all necessary documents to incorporate the business but carelessly failed to file them with the Secretary of State.

....

In May 2012, Lenny had an automobile accident, caused solely by his own negligence, on the way to visit a prospective buyer. The accident injured a pedestrian. As a result of the accident, Lenny stopped working and sales collapsed.

In July 2012, Software Inc. went out of business, leaving negligible assets and the unpaid loan to National Bank.

B. Lenny and Molly's Liability for the Loan

1. De Facto Corporation

This issue is whether Lenny and Molly can escape personal liability through de facto corporation.

This rule is discussed above

Because Lenny and Molly made a good faith attempt to incorporate, and acted in good faith as if they were incorporated, they potentially could receive de facto corporation status, and thereby its included limited liability.

Therefore, Lenny and Molly could escape liability through de facto status.

2. Corporation by Estoppel

This issue is whether Lenny and Molly can escape personal liability through corporation by estoppel.

Even if a corporation fails to properly file its articles of incorporation with the Secretary of State, and even if a corporation fails to receive de facto corporation, a creditor may nevertheless be stopped from denying the existence of a corporation. If a creditor treated a corporation as such, and looked to corporate assets in making a loan, a corporation can be protected through corporation by estoppel.

Here, Software Inc. projected income of about \$300,000/year for the next five years from its service contracts [*This is the analysis.*]

Therefore, Molly and Lenny could escape personal liability through corporation by estoppel.

End Abstract.

See Selected Answer A, Question 6 of the February 2013 California Bar Exam.

PIERCING THE CORPORATE VEIL

Piercing the Corporate Veil Black Letter Law.

Piercing of the corporate veil is an extraordinary remedy that is only awarded when the directors, officers, and shareholders do not provide for sufficient capital [*undercapitalization*] or insurance for the corporation's debts and where the corporation is but an alter ego of the shareholders. The latter can be established in part by the officers and managers not observing sufficient corporate formalities.

See Selected Answer B, Question 4 of the February 2012 California Bar Exam.

Commentary.

Look for a fact pattern where a party desires to hold individual members of the corporation liable for alleged wrongdoing. Also, look for a fact pattern that mentions something about financial struggles that the corporation is going through.

Piercing the Veil Versus Ultra Vires.

Piercing the veil sounds very similar to *ultra vires*. Maybe because they both have v's in there. However, these are two distinct terms. Let's look at the doctrine of ultra vires now.

ULTRA VIRES

Ultra Vires Black Letter Law.

If a corporation's purpose is narrowly defined in its articles of incorporation, it may not enter into business activities unrelated to that purpose. In doing so, it is said to be acting *ultra vires*. Moreover, the corporation may be *estopped* from using the defense of *ultra vires*. As such, the *ultra vires* act may be enforceable. However, the corporation may sue an officer or director for damages arising from the act. Third parties have no duty to inquire as to the limitations in the articles.

End of discussion.

**SECURITIES LAW
RULE 10b-5
RULE 16(b)**

Approach to 10b-5 and 16(b).

This section deals with securities (federal law). We'll discuss Rule 10b-5 and then move on to Rule 16(b). For Rule 10b-5, we'll break this section into two sections:

- (1) Untruthful Information and Rule 10b-5**
- (2) Truthful Information and Rule 10b-5**

Let's go now to the untruthful section as it relates to 10b-5.

RULE 10b-5 AND UNTRUTHFUL INFORMATION

Rule 10b-5: Insider Trading

Rule 10b-5 is a federal law that makes it illegal for a person to use any means or instrumentality of interstate commerce to engage in a scheme to defraud in connection with the purchase or sale of a security. The elements of a violation of Rule 10b-5 therefore include an (1) instrumentality of interstate commerce; (2) scienter; (3) a misstatement; (4) the purchase or sale of a security and (5) reliance.

Comments.

Note that scienter is required. Contrast this with Rule 16(b) (scienter is not required there). Moreover, reliance is presumed in cases of misrepresentation and insider trading. The *fraud on the market* presumption may be available in situations where the security is traded on a well organized and presumably efficient market.

With this said, look again at the black letter law for Rule 10b-5. Notice how it resembles that of common law fraud (or misrepresentation). Think of a scenario where a director uses deceit in the sale of stock through the use of misstatements.

Exam Tip.

When approaching a federal securities law hypothetical, first determine if the material confidential information is truthful or not. If it is not truthful, then it is misinformation and your analysis should focus on the black letter law in this section. If it is truthful information, then you may have a *tipper/tippee* relationship as discussed in the next section. Let's look at the other version of Rule 10b-5 where there is truthful information.

RULE 10b-5 AND TRUTHFUL INFORMATION

Approach to Tipper, Tippee and 10b-5.

For bar exam purposes, the area where truthful information is being conveyed is more commonly tested (as opposed to where deceitful information is being conveyed as in the last section). Here is an over-simplified way in which this area is tested: "*Was confidential inside information provided so that another person could benefit from this confidential information?*"

When insider trading is being committed based on truthful information, focus on these terms: *tipper* and *tippee*. Let's go there now.

Tipper Black Letter Law.

The tipper is a person with a fiduciary duty that reveals inside information.

Tippee Black Letter Law.

The tippee is the person who knowingly uses the information to make a trade. A tippee is usually aware that there is a breach of fiduciary duties involved with the use of such information.

Exam Tip.

The insider or the person receiving the information does not necessarily have to be a director or officer under a misappropriation theory. Since confidential information is being transmitted, a lawyer, accountant, or another person exchanging this information can be held liable.

Further Reading.

See Question 3 of the February 2002 California Bar Exam. See also Question 1 of the July 2003 California Bar Exam.

RULE 16(b)

Rules 16(b) Black Letter Law.

If an (1) officer, a director or a shareholder (of 10% or more) of a publicly traded corporation or with assets of over \$10,000,000 and 500 shareholders, (2) realizes a profit from buying and selling stock (3) within a six-month period, the trader may be held liable under the strict liability rule for such so-called "short swing" profit.

Comments.

Note that *scienter* is *not* required (in contrast with Rule 10b-5). As such, the trader can be held strictly liable if he buys or sells stock within the six-month period. This means that the trader is liable even if there was no misappropriation of confidential information. You may be required to make calculations. See the next heading.

Calculation of Profits:

[Party] is entitled to recover the maximum difference between an[y] sale and purchase during this 6 month period. See Selected Answer A, Question 1 of the July 2003 California Bar Exam.

Example.

This is from an actual past bar exam. Assume that the director is liable under Rule 16b. How would you calculate the damages?

Abstract.

The following sequence of events occurred in 2003:

January 2: Corp publicly announced that it expected a 25% revenue increase this year.

March 1: A Corp director (“Director”) sold 1,000 Corp shares for \$25 each.

July 1: Director bought 1,000 Corp shares for \$5 per share.

Model Answer:

On these facts, Director sold 1,000 corp shares for \$25 each on March 1. Less than 6 months later on July 1, Director purchased corp shares for \$5 per share. Corp is entitled to recover \$25 - \$5 = \$20 multiplied by 1,000 shares or \$20,000 dollars from this violation of Rule 16(b).

End Abstract and Explanation.

\$25 is the highest price for the sale of shares within the 6 month period. Since there was only one sale, we’ll use that amount. If there were other sales, select the amount for the highest sale.

\$5 is the lowest amount for the sale of shares within the same 6 month period. Again, since there was only one sale, use that amount. In the event that anything below \$5 is present, use that.

The difference is \$20.

\$20 is the number that can be “matched.” That is to say, match the number of highest per-share price with the lowest per-share price.

Here, there were 1,000 shares that were sold by the director. As such, use the number 1,000.

Take the number of shares that can be matched, or \$20, and multiple that by 1,000: $\$20 \times 1,000$ is \$20,000.

In our example, the director is liable for \$20,000.00.

SHAREHOLDER AGREEMENT

Shareholder Agreement Black Letter Law.

A shareholders' agreement amongst a company's shareholders describes how the company should operate. The rights and obligations of the shareholders are also stated within this document.

The following topics have been covered in past exams: (1) Proxies and Irrevocable Proxies and (2) Rights to elect and remove directors.

Perpetual Proxies and the 11th-Months-Rule.

A proxy is usually valid for 11 months unless otherwise agreed upon.

Exam Tip.

Proceed cautiously where the fact pattern states that any given proxy in the shareholder agreement is offered as *perpetual*. It may be that such a clause is not valid. First, determine whether there is language stating that the proxy is valid for 11 months. Then consider the language that extends the length of the proxy. However, language that states that the proxy is flat out perpetual in duration will usually not be enforceable.

Rights of Shareholders to Elect and Remove Directors.

Shareholders have the right to elect and fire directors, both with and without cause. An agreement that prohibits shareholders from being able to exercise these powers would be contrary to public policy and likely unenforceable. At the very best, shareholders must have the authority to fire directors for cause (ie, breach of duty of care, duty of loyalty, etc.). See Answer A, Question 2 of the February 2007 California Bar Exam.

Miscellaneous Information.

This document may also be referred to as a *stockholders' agreement*. Moreover, on past bar exams, shareholder agreements have been tested where there is a closed corporation (this usually means that the stock of the company is not publicly traded). However, shareholders' agreements can also apply to publicly traded companies.

WINDING UP

Approach to Winding Up.

For bar exam purposes, this question will mostly deal with paying off creditors and outstanding debts. It will also deal with the order of payment. We'll first discuss the winding up of corporations. Thereafter, a description of winding down general partnerships will follow.

Below are the steps for the termination of the corporation. First, the shareholders vote for the dissolution. Thereafter, notice is given to the Secretary of State. This document may be via a certification of election to dissolve (a certificate of dissolution). The winding up process then commences.

During the winding up process. The sole purpose of the corporation deals only with the winding up process. The process includes giving notice to creditors, paying debts, and distributing assets.

The corporation's first order is to pay liabilities to creditors (including unpaid taxes). After the creditors have been paid, the remaining assets are distributed to the shareholders. Then the corporation is then dissolved.

Distribution of General Partnership and the Black Letter Law.

Upon dissolution of a general partnership, there is a specific order in which assets must be distributed. First, creditors must be paid and general partners who loaned money to the partnership. Second in line to [be] paid are general partners who made capital contributions. Lastly, any surplus or profits will go to the general partners or the general partners may be personally liable for existing debt of a dissolved corporation. Partners who contributed capital contributions and made loans to the company should receive their money back if it is possible upon dissolution. See Selected Answer B, Question 4 of the July 2010 California Bar Exam.

CIVIL PROCEDURE

Table of Contents

- Introduction
- Serving a Summons
- Personal Jurisdiction
- Subject Matter Jurisdiction
 - Federal Question
 - Diversity
- Supplemental Jurisdiction
- Venue
- Transfer of Venue
- Joinder
 - Joinder of Parties
 - Compulsory Joinder
 - Permissive Joinder
 - Joinder of Claims
- Counterclaim
- Claim Preclusion (Res Judicata)
- Issue Preclusion (Collateral Estoppel)
- Motion to Dismiss Under 12(b)(6)
- Summary Judgment
- Demurrer
- Judgment as a Matter of Law
- Renewed Motion for Summary Judgment
- Statute of Limitations Expiration and Relation Back Doctrine
- Removal and Remand
- Erie Doctrine
- Jury Trial (Versus Bench Trial)
- Appeal
 - Interlocutory Appeal
- Discovery
 - Physical and Mental Examinations
- Work Product

SERVING A SUMMONS

Proper Summons Black Letter Law.

The Federal Rules of Civil Procedure allow for a party member to be served with process in a number of ways. One accepted method of service is personally serving the summons and complaint on the Defendant. A person may be served personally by any non-party who is 18 years or older. To effect proper service the Defendant should be given a summons and two copies of the complaint.

Under California civil procedure, a person may similarly be personally served by a non-party 18 years or older by the same rules. This case has been filed in the superior court so it is under California rules. The CA rules prefer personal service.

Commentary.

Notice that the writer here distinguishes between the Federal Rules of Civil Procedure ("FRCP") and the California Code of Civil Procedure. We'll simply refer to the California codes as the California Rules ("California Rules"). This is an excerpt from Question 1 of the July 2016 exam. See Answer B.

PERSONAL JURISDICTION

Approach to Personal Jurisdiction and Subject Matter Jurisdiction.

Let's first deal with personal jurisdiction. Thereafter, we'll move to subject matter jurisdiction.

Personal Jurisdiction Black Letter Law.

Under personal jurisdiction, there are two concepts under which the court can satisfy this requirement. Personal Jurisdiction can be met through (1) General Jurisdiction or (2) Specific Jurisdiction.

Commentary.

Remember the basic objective here: for the court to satisfy the requirements for personal jurisdiction, the court must meet the elements for either General Jurisdiction *or* Specific Jurisdiction.

It is customary to perform a General Jurisdiction first. If the court has Personal Jurisdiction based on a General Jurisdiction analysis, then you are set! You usually do not need to perform a Personal Jurisdiction analysis. Whether to do such an analysis depends on time. If you are short on time, and if you meet the elements for General Jurisdiction, do *not* perform a Specific Jurisdiction analysis.

GENERAL JURISDICTION

General Jurisdiction Black Letter Law.

General jurisdiction is met where the party's actions are **Systematic and Continuous**. Systematic and continuous is present when any of the following elements are met: (1) consent through an agent in the forum state; (2) person is served within the jurisdiction; or (3) the defendant is domiciled in the forum state.

Commentary.

Take note of the fancy term "Systematic and Continuous." Use this term in your discussion. Also, "General Jurisdiction is sometimes referred to as the "Traditional Method.")

Further Reading.

See Question 1 of the July 2012 California Bar Exam.

SPECIFIC JURISDICTION

Approach to Specific Jurisdiction.

Specific jurisdiction is also known by other terms. Some of these other terms are listed here: (i) Long Arm Statute, (ii) Minimum Contacts, (iii) Constitutional Limitations, or (iv) a combination of these terms. The black letter law now follows.

Specific Jurisdiction Black Letter Law.

Specific jurisdiction is present where the state has: (1) a long arm statute: and (2) where due process is met. We now discuss both and the long arm statute will be discussed first.

1) Long Arm Statute.

The long arm statute can be statutory.

Commentary and Black Letter Law.

The facts may or may not tell you if the state has adopted a long arm statute. In such a case, assume there is one. State this in your analysis: **The facts do not state there is a long arm statute. However, the absence of such a statute is not an issue. This is because the facts do not state that the long arm statute is at issue. Thus, this element is met.**

2) Due Process.

Due process is met where the party has minimum contacts in the state. Minimum contacts are achieved where: (1) the party purposely avails himself of the state; (2) where it is foreseeable that the party will be hauled into court; or (3) due process is met where the statute does not offend traditional notions of fair play and substantial justice.

Commentary.

Notice that traditional notions of fair play and substantial justice has its own elements. Don't discuss *traditional notions* if you don't have to. If you can get them with *purposeful availment* or *foreseeability*, don't discuss this third element. Keep in mind that you don't want to run out of time.

Traditional Notions of Fair Play and Substantial Justice Factors.

Factors to consider: (1) Interest of the forum state in protecting its citizens from foreign tortfeasors; (2) the plaintiff's interest in being able to seek the protection of the law of his domicile; (3) the fairness given to Defendant in forcing him to litigate outside of his state; and (4) administrative details in litigating the plaintiff's state.

SUBJECT MATTER JURISDICTION

Subject Matter Jurisdiction (SMJ) Black Letter Law.

For the Court to have SMJ, either of two elements must be met: (1) a federal question arising out of the US Constitution exists; or (2) Diversity of citizenship is found. Federal Question will be discussed first.

1. Federal Question.

In order for federal question jurisdiction to exist, the cause of action must arise under federal law.

2. Diversity of Citizenship.

For diversity of citizenship to apply, the amount in controversy must exceed \$75,000 (exclusive of court costs) and opposing parties must be domiciled in different states. Also, a corporation's domicile can be their principle place of business ("PPB") or their place of incorporation.

Comments.

There are sub-issues which are regularly tested that are part of subject matter jurisdiction. One of these terms is Supplemental Jurisdiction. Let's go there now.

SUPPLEMENTAL JURISDICTION

Supplemental jurisdiction is usually discussed as a sub-issue under subject matter jurisdiction (as in the example that follows). Here, the black letter law will be stated first. Thereafter, an example will be provided.

Supplemental Jurisdiction Black Letter Law.

When the court has original jurisdiction over a matter, the court may also assert supplemental jurisdiction over other claims that are so related that they form the same case or controversy as the original claim. The test here is whether the other claims arose from the same nucleus of operative facts.

Commentary.

Notice that the “same case or controversy” has a test. That test is the “the same nucleus of operative facts” rule. Understanding this concept will make things clear.

Example.

Below is an excerpt from Question 1 of the July 2012 California Bar Exam. The hypothetical will be presented and followed by an interpretation and a model answer.

Hypothetical.

Pam and Patrick are residents of State A. While visiting State B, they were hit by a truck owned and operated by Corporation, a freight business.

Corporation is incorporated under the laws of Canada and has its headquarters there, where its President and Secretary are located. State B is the only state in which Corporation conducts its business. Corporation’s drivers and other employees work out of its warehouse in State B.

Pam and Patrick jointly filed a lawsuit against Corporation in federal district court in State A. In their complaint, Pam demanded damages for personal injury in the amount of \$70,000 and for property damage in the amount of \$10,000; Patrick demanded damages in the amount of \$6,000.

Comments.

Here is one way in which supplemental jurisdiction is used. There are two plaintiffs. One plaintiff (Pam) meets the minimum amount under the amount in controversy (must exceed \$75,000). However, the other plaintiff (Patrick) will not meet the elements. But this does not end the discussion. Under supplemental jurisdiction, the court will have supplemental jurisdiction over the amount that does not exceed \$75,000. The reason is because, in this situation, the claims arose from a common nucleus of operative facts. Here is a model response. *See* Selected Answer A. A bold format and shorter paragraphs are applied. The content is the same.

Excerpt of Answer.

SUPPLEMENTAL JD

Where the court has jurisdiction over one claim in a matter, it may exercise supplemental jurisdiction over other claims that arise from a Common Nucleus of Operative Fact. The common nucleus test is generally considered broader than the same transaction or occurrence test, and therefore any party that would meet the Same Tran. and Occ. test will meet the Common Nucleus of Operative Fact test.

Here, Pam and Patrick are both suing for injuries and damages arising from the same car accident. While visiting State B, they were hit by a truck owned by Corp, the same truck, in the same accident. The witnesses to both will be the same, as will the evidence. *(The analysis using the Common Nucleus of Operative Facts element.)*

Therefore, Patrick's claim arises from a Common nucleus of operative fact with Pam's claim, and the federal district court could exercise supplemental jdx over Patrick's claim. *(The conclusion is stated.)* [End of discussion.]

VENUE

Venue Black Letter Law.

Venue is proper where only of the following applies: (1) District where any defendant resides; (2) District where a substantial part of the cause of action occurred; (3) If neither is possible, any district where any defendant is subject to personal jurisdiction.

Venue Under California Rules.

Different rules apply based on whether the action is a local action or a transitory action. If it is not a local action (land action where the venue is where the land is) then venue is where any defendant resides. Further for a personal injury case venue is proper where the injury took place. See Selected Answer B, Question 1 of the July 2016 California Bar Exam.

Alternative Rule.

Venue is proper in a local action, one involving real property, in the county in which the real property lies. For a transitory action, venue is generally proper in a California Superior Court in any county where any defendant resides. For contract actions, venue is additionally proper in the county where the contract was entered into and the county where the contract was expected to be performed. For tort actions, venue is proper in the county where the act or omission giving rise to the tort occurred. If no venue is proper following the application of these rules, then venue is proper in any county in which a court has personal jurisdiction over the defendants. See Answer A, Question 1 of the July 2016 California Bar Exam.

Further Reading.

See Question 1 of the July 2001 California Bar Exam.

Exam Tip.

Many times, for an issue relating to venue, you are also being tested on personal jurisdiction. Read the third prong again that is stated above as it includes personal jurisdiction as an element. However, this is not always the case. Sometimes, the plaintiff will file his case in the district where the defendant lives. This would then be a straightforward question and it does happen, albeit rarely. *See* Question 1 of the July 2021 California Bar Exam.

TRANSFER OF VENUE

Transfer of Venue Black Letter Law.

Although the plaintiff may have established a proper venue, a federal court may transfer the action to any other district in which it might have been brought, for the convenience of parties and witnesses, in the interest of justice.

Commentary.

Notice the fancy language above: "in the interest of justice." What does that mean? When you have a vague term like this, take the time to consider if there is a standard present. In this matter, there is such a standard.

Interest of Justice Black Letter Law.

The burden is on the party making the motion to show that (1) the convenience of the parties and witnesses, the ease of access to proof, calendar congestion, and other factors favor transfer; and (2) The action could have been brought in the transferee court; that is, the transferee court has personal and subject matter jurisdiction.

Further Reading.

A venue question also appeared on Question 1 of the July 2016 exam.

JOINDER

Approach to Joinder.

There are two main types of joinder. These are (1) **Joinder of Parties** and (2) **Joinder of Claims**. Also, keep in mind that joinder may fall under *jurisdiction*. This is because a joinder discussion can prevent the court from establishing jurisdiction over a party. Let's begin with joinder of parties.

JOINDER OF PARTIES

Joinder of Parties.

There are two classifications under **joinder of parties**. They are (1) **compulsory joinder** and (2) **permissive joinder**. The joinder discussion may appear to be confusing. However, do not be

intimidated by this concept. We'll go through some of these examples and show you how they have been tested in the past. We'll begin with compulsory joinder.

Exam Tip.

To get a passing score on an essay on this topic, it is easier to say that no compulsory joinder is present. Why is this? Because in most hypotheticals, the party being sued is the company that has money to pay off judgments. It's as simple as that. The plaintiff is not looking to sue an employee of the company. And the plaintiff is not looking to sue a person that performed maintenance work on a product (both examples have been tested in past exams). It can be problematic for the plaintiff (and for the examinee), as you will see, if a necessary party must join the case because that party can destroy diversity in favor of the defendant.

In essence, this is a defense from a defendant even before litigation commences. The goal of the defendant may be to destroy diversity and then have the case dismissed. Sounds like a lawyer-trick yeah? The defendant will say: Hey Plaintiff! You must haul into court a person (or entity) that is not named as a defendant. Add the other defendant or else! Or else I will ask the court to dismiss your case for not joining all defendants that should be named! That is the idea of the compulsory joinder.

Compulsory Joinder.

A joinder may destroy complete diversity. To determine if the party is a compulsory joinder, the court will first look to see if a party is a necessary party. A party is necessary (1) where the court cannot afford complete relief without the party; (2) there is danger that the absentee will be harmed as there may be an inconsistent judgment; or (3) there may be a possibility of double liability.

Exam Tip and Diversity.

Again, a plaintiff may have to haul into court a person (or entity) that is not named as a defendant. Otherwise, the case will be dismissed for not joining that other person.

Look for situations where diversity is necessary. This is because a joinder may destroy complete diversity. If this sounds confusing, don't be discouraged. It makes perfect sense once you read a hypothetical. Also, this issue has been tested on essays at least twice since 2001. As such, take time to understand the operation of the law.

We are now going to look at an example. Source: Question 6 of the February 2004 California Bar Exam.

Example.

To summarize the facts: a plaintiff sues a company. However, the plaintiff does not name the employee of the company. The company then files a motion to dismiss since the employee was not joined.

Excerpt of Fact Pattern.

Paul and Tom, both State X residents, were involved in an auto accident in State X. At the time of the accident, Tom, who was working as a delivery truck driver for Danco, was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Danco does no business in State X.

Paul filed a complaint against Danco in federal district court in State X on the basis of diversity jurisdiction, alleging \$70,000 in property and personal injury damages. Danco was properly served with the complaint at its principal place of business.

Appearing specially in the State X federal district court, Danco filed a motion to dismiss the complaint on the grounds that the district court lacked both subject matter and personal jurisdiction and that Paul's action could not proceed without joining Tom. The district court denied Danco's motion.

Danco then filed a counterclaim against Paul to recover \$20,000 in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss Danco's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim. The district court granted Paul's motion.

State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States."

1. Did the district court rule correctly on Danco's motion to dismiss Paul's complaint? Discuss.

End Fact Pattern.

Below is an excerpt of a State Bar model answer. Note that the joinder discussion comes right *after* the diversity analysis. This is important because *joinder can destroy complete diversity*. Therefore, the organization of the discussion is proper. The excerpt now follows.

Excerpt of Model Answer.

Joinder:

P claims that the matter cannot proceed without joining Tom. **Under compulsory joinder of parties, the court will first look to see if the party is a necessary party. A party is necessary where the court cannot afford complete relief without the party or there is a danger that the absentee will be harmed, there may be an inconsistent judgment or there may be a possibility of double liability.**

Here, it is arguable whether Tom is a necessary party because although he may be liable to Danco for the accident, P may get a judgment solely against D for the accident because Tom was

an agent of D when the accident occurred and because the accident was within the scope of Tom's employment, D will be liable for Tom's negligence.

However, *(This is a transition to introduce the next issue. That of an indispensable party.)* if Tom is a necessary party, the court will next determine whether he is an indispensable party. **An indispensable party is one whose joinder will destroy diversity.** *(Next term is used: Indispensable party)*

Here, Tom's joinder will destroy diversity because Tom is also a State X resident and this would destroy complete diversity because P is also from State X.

Where the party is indispensable, the court may dismiss the case or proceed without the party.

The factors *(These are the elements to determine if the court should dismiss the case or proceed without the party.)* **the court will use to determine that are the following: (1) alternative forum; (2) likelihood of prejudice; (3) chance of inconsistent judgment.**

Here, State X appears to be the best forum for the case because the claim arose here and it would be highly inconvenient to require P to travel to State Y or Z. Also, there is not a high chance of prejudice because State X will likely fairly administer its laws. There is also not a chance of inconsistent judgment because as discussed, P can sue D alone for her damages.

Therefore, *(This is the conclusion to the issue of indispensable parties.)* the court may continue the case without joining Tom.

Conclusion: *(This is the overall conclusion to the question.)* The court was correct in denying D's motion for failure to join. Had the court had SMJ, it could proceed with the case without joining Tom.

Further Reading.

See Question 1 of the February 2023 California Bar Exam.

JOINDER OF CLAIMS

Joinder of Claims.

Generally, a plaintiff may bring any number of claims against the same defendant, even if they are unrelated or do not have a common nucleus of operative fact, in the same action. If the claims are brought in federal court, at least one of the claims must satisfy the requirements of subject matter jurisdiction. See Selected Answer A, Question 4 of the July 2017 California Bar Exam.

Commentary.

Notice that the subject here are the claims (as opposed to joinder of parties). For example, for the question above, the claims were for **(1) fraud** and a claim for **(2) breach of contract**. These claims seem to be unrelated. However, they must meet the *common nucleus of operative facts* requirement.

Here is the analysis from the same quoted exam.

Here, both the fraud claim with respect to the Rothko painting and the breach-of contract claim with respect to the real property are being brought by the same plaintiff, Buyer (B), against the same defendant, Seller (S). Therefore, the two claims may be joined, and they may be brought in federal court if one of them satisfies subject matter jurisdiction. (The issue of subject matter is discussed below, in Part 3.)

Commentary.

Notice how subject matter jurisdiction must still be met when the litigation occurs in federal court. That discussion will not be addressed here. Refer to the aforementioned link.

COUNTERCLAIM

Approach to Counterclaim.

In sum, the defendant that is being sued can also sue the plaintiff in the same case. However, the defendant may only have a limited time to do so. After that, the defendant may lose his right to sue. Let's look at the black letter law.

Counterclaim Black Letter Law.

A counterclaim is when the defendant asserts a claim against the plaintiff that is suing him. Compulsory counterclaims are claims against the suing party that arise out of the same conduct, transaction, or occurrence. Counterclaims are non waivable and must be raised during the pretrial stage or the defendant will lose his right.

End Black Letter Law.

Let's now see how a counterclaim will appear on an exam. We'll again use the July 2004, California Bar Exam, Question 6 (the same question as used in the *joinder* example). See the next page please.

Example.

Please read the fact pattern again. We'll then discuss the issue of counterclaim. To summarize the facts, a plaintiff sues an employer (Danco) for the acts of the employee (Tom). The defendant employer then files a counterclaim against the plaintiff. The question is this: was the counterclaim properly filed?

Excerpt of Fact Pattern.

Danco then filed a counterclaim against Paul to recover \$20,000 in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss Danco's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim. The district court granted Paul's motion.

2. Did the district court rule correctly on Paul's motion to dismiss Danco's counterclaim? Discuss.

Excerpt of Model Answer.

Below is an excerpt of the model answer. *See* Selected Answer B of the February 2004 exam.

Counterclaims

A counterclaim is when the defendant asserts a claim against the plaintiff that is suing him. Compulsory counterclaims are claims against the suing party that arise out of the same conduct, transaction, or occurrence. Compulsory counterclaims must be plead [sic] or the claim is lost. (The defendant cannot sue on that claim later as a plaintiff.)

Here, D alleges that P damaged its truck as a consequence of the same accident P is suing for. This is the same transaction and occurrence. Thus, D's counterclaim is compulsory.

Supplemental Jurisdiction [Include Compulsory Counterclaims].

Supplemental jurisdiction also covers a state law claim by the defendant against the plaintiff if the defendant's claim arose out of the same conduct, transaction, or occurrence. In a diversity case, supplemental jurisdiction includes compulsory counterclaims. The rationale is that it would not make sense to make a defendant sue in state court on a claim that arose from the same conduct, transaction, or occurrence for which the plaintiff is suing in federal court. It would help the parties and serve judicial economy to hear both claims at one time.

Here, D's counterclaim is compulsory. Thus, the federal court has supplemental jurisdiction to hear that claim.

Further Reading.

Let's move away from the counterclaim issue. The issue of *joinder* and *counterargument* appears on a past exam and the link is referenced here for further reading. Please refer to Question 6 of the February 2004 California Bar Exam.

CLAIM PRECLUSION (RES JUDICATA) AND ISSUE PRECLUSION (COLLATERAL ESTOPPEL)

Approach to Claim Preclusion (Res Judicata) and Issue Preclusion (Collateral Estoppel)

Here is the black letter law. We'll begin first with claim preclusion as it is straight-forward and simple to comprehend.

Claim Preclusion (Res Judicata).

To assert claim preclusion, 3 elements must be satisfied: (1) same claimant vs. same defendant in both case #1 and #2; (2) case #1 ended in a valid final judgment on the merits (which means it did not end based on jurisdiction or summary judgment, etc.); and (3) the claimant is asserting the same claim as case #1 (same claim usually means it arises out of the same transaction or occurrence).

Issue Preclusion (Collateral Estoppel).

To assert collateral estoppel, 5 elements must be satisfied: (1) case #1 ended in a valid final judgment on the merits; (2) the issue was actually litigated in case #1; (3) the issue was essential to the judgment; (4) collateral estoppel is being used against one who was a party in case #1, and (5) collateral estoppel is being used by

- (i) one who was a party in case #1 (and satisfies mutuality requirement if require to do so),**
- (ii) one who was not a party in case #1 but is a defendant in case #2 if plaintiff actually litigated the issue in case #1, or**
- (iii) one who was not a party in case #1 but is a plaintiff in case #2 if fairness is met.**

Commentary.

Focus on the 5th element of issue preclusion above. It is wordy. Let's make that simple: collateral estoppel can be used as a "shield" by Mr. Old-Defendant against Mr. New-Plaintiff. This scenario quickly comes to mind and is simple to comprehend. It makes sense for the defendant to brush off a new litigant by saying: "No chance buddy. Someone previously tried that to no avail."

However, collateral estoppel can also be used as a "sword" by Mr. New-Plaintiff against Mr. Old-Defendant in a previous action involving Mr. Old-Defendant. This is discussed further below.

This Fact Pattern is Highly Tested. Memorize the Scenario.

Issue preclusion is tested more often as this fact pattern can be more complex. Here is what you can expect: Plaintiff 1 will sue Defendant 1 (e.g., Patient 1 sues Doctor 1 in a negligence case). Plaintiff 1 will prevail over Defendant 1 (e.g., Patient 1 prevails in his negligence case against Doctor 1). Then some time will pass and a new plaintiff, Plaintiff 2, will discover that Plaintiff 1 successfully sued Defendant 1. As such, Plaintiff 2 will assert issue preclusion over Defendant 1 (e.g., Patient 2 will file his case against the same Doctor 1 and Patient 2, as the new plaintiff, will move for summary judgment against Doctor 1). *See* July 2011, Cal. Bar Exam, Question 2, discussed further below in this section. In fact, let's look at that example now.

Exam Tip.

Do not expect the question to ask you if the party can assert collateral estoppel. Rather, the question *may* ask you if a party can succeed on a *motion for summary judgment*.

Example From Previous Exam.

What now follows is a hypothetical. *See* Question 2 from the July 2011 California Bar Exam.

Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton, Inc. (Bolton). Shortly after the surgery, Perry developed severe back pain at the location where the rod was inserted. Within the applicable statute of limitations for a tort action for negligence, Perry sued Doctor in federal district court, alleging that she was negligent in using Bolton's rod for the kind of back condition from which he suffered. Personal jurisdiction, subject matter jurisdiction, and venue were proper.

During a deposition, Perry's attorney asked Doctor to state whether she had performed any other spine surgeries using Bolton's rods and, if so, whether any of those surgeries had resulted in complications. Doctor's attorney objected to the questions on the ground that the information requested had nothing to do with whether Doctor was negligent as to Perry, and Doctor refused to answer. After the attorneys properly met and conferred concerning Doctor's refusal, Perry's attorney filed a motion to compel Doctor to answer the questions.

Shortly after the statute of limitations had run, Perry learned through a newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Perry immediately sought and obtained leave to amend his federal complaint to join and include a claim against Bolton, alleging that it had negligently designed the rod. Bolton immediately filed a motion to dismiss Perry's claim against it on the ground that the statute of limitations had already run.

Perry also learned that Doctor had lost a lawsuit brought by another patient with a back condition like his who had also alleged negligence by Doctor for inserting Bolton's rod into his spine. Perry filed a motion for summary judgment against Doctor on the basis of preclusion.

[Q]. How should the court rule on Perry's motion for summary judgment? Discuss.

Excerpt of Model Answer.

Perry v. Doctor: 3. Perry's Motion for Summary Judgment

Motion for summary judgment will be granted if the court determines there is no dispute of fact in the case. The court may look at evidence when making such a determination. (*We'll discuss summary judgment later.*)

....

Issue preclusion (collateral estoppel) (*This is a key issue. Again, focus on the 5th prong since it is highly tested.*)

To assert collateral estoppel, 5 elements must be satisfied: 1) case #1 ended in a valid final judgment on the merits, 2) the issue was actually litigated in case #1, 3) the issue was essential to the judgment (if the issue was decided differently, the case would have ended differently), 4) collateral estoppel is being used against one who was a party in case #1, and

[*The 5th Prong is isolated for emphasis as this prong is highly tested.*] 5) [C]ollateral estoppel is being used by one who was a party in case #1 ..., one who was not a party in case #1 but is a defendant in case #2 if plaintiff actually litigated the issue in case #1, and one who was not a party in case #1 but is a plaintiff in case #2 if it is fair. Collateral estoppel may be used by nonparties in case #1 because many jurisdictions have found that not complying the mutuality requirement does not violate due process.

Commentary.

Note that Element 5 mentions the *mutuality requirement*. Let's now understand what is meant by the *Mutuality Requirement* (trust me, it's not as complex as it sounds). Here is the definition: mutuality requirement means that the parties in the new case were the same exact parties in the second case. Also, the rule usually does not apply (unless the hypothetical states that it does).

Return to the Civ. Pro. Fact Pattern From July 2011.

Notice that there is a *fairness* element that must be met in this scenario. It is usually via discussion of the fairness element where you will score points. Let's continue with the model answer.

Used by nonparty in case #1 but plaintiff in case #2. (*This is the 5th element above.*)

For Perry to assert issue preclusion, the use of issue preclusion must be fair.

Here, (*This is the analysis.*) Perry would argue that it is fair because the previous plaintiff/patient's injuries had a back condition like Perry's and Doctor inserted the same Bolton's rod into his spine, just like Doctor did with Perry. However, this argument would likely fail. Doctor would argue that although the previous patient in case #1 had a "back condition like" Perry's, medical conditions/injuries, especially back injuries, are almost never exactly the same. Its causes may be different and its symptoms may be different, which would call for different treatment.

Thus, even if Perry and the previous patient had similar injuries, its causes, symptoms and other factors may require Doctor to use different technique or treatment. Or even if the same technique was used, each patient may react different based on the patient's physiology even without any negligence on the part of Doctor.

Therefore, it would not be fair to preclude Doctor from litigating the issue of negligence in Perry's case based on Perry's injuries/condition, causes of Perry's injuries/medical condition, and techniques used during Perry's surgery. Because it would be unfair to preclude Doctor from litigating the issue of negligence in Perry's lawsuit, this element is not satisfied.

Thus, the court should deny Perry's motion for summary judgment.

Exam Tip.

Use this rule for the *fairness* element. It is from Answer B of the July 2011 California Bar Exam:

[I]f the party is asserting it as a plaintiff (offensive collateral estoppel) the court will be more reluctant to apply CE and will look at a number of factors- (1) did the defendant have a full and fair opportunity to litigate the issue in case 1, (2) could this new plaintiff have joined case 1, (3) could the defendant have foreseen multiple lawsuits, and (4) are there any inconsistent judgments so that assertion of CE could be unfair to the defendant.

Commentary.

Also, take note that there are a total of *four main terms* (claim preclusion, res judicata, etc.) These four terms are directly below in bold. Take the time to memorize the terms as this will prevent anxiety from developing later on.

A Total of Four Main Terms:

Claim Preclusion is the same as Res Judicata.

Issue Preclusion is the same as Collateral Estoppel.

Further Reading.

See Question 1 of the July 2015 California Bar Exam. See also Question 1 of the July 2021 California Bar Exam.

MOTION TO DISMISS UNDER 12(b)(6)

Introduction.

In this area, we'll discuss *motion to dismiss under 12(b)(6)*, *summary judgment*, *demurrer*, *judgement as a matter of law* and *renewed motion for judgment as a matter of law*. Students tend to confuse these terms with one another. We'll clear everything up to avoid confusion. Let's begin with a motion to dismiss under FRCP Section 12(b)(6).

Motion to Dismiss Under 12(b)(6) Black Letter Law.

What is required for a Rule 12(b)(6) motion to be granted is that the complaint does not allege sufficient facts to state a claim upon which relief can be granted.

Difference Between a Motion to Dismiss and Summary Judgment.

In summary, a defendant can dispose of a complaint against it in many ways. Two common rules are through a motion to dismiss under FRCP 12(b)(6) and via a summary judgment.

A good way to distinguish the two is by considering the appropriate time for filing the motion. A motion to dismiss is usually filed in response to a complaint. As such, no answer is filed. On the other hand, a summary judgment is filed after the discovery phase has been completed. As such, an answer is required before filing a summary judgment. Let's now discuss summary judgment.

SUMMARY JUDGMENT

Summary Judgment Black Letter Law.

The legal standard requires the moving party to demonstrate that there are no genuine issues of material fact. When deciding whether to dismiss the case, the court must accept the allegations of the complaint as true. The court must also view the facts in the light most favorable to the nonmoving party.

Commentary.

Notice that a question for summary judgment may *not* deal specifically with resolving the elements for summary judgment. Rather, a question may ask you to resolve *another* issue. In the example above, the issues of res judicata and collateral estoppel were discussed *before* reaching the conclusion for summary judgment.

However, this is not always the case. In other situations, a summary judgment may deal specifically with the elements. For example, does the plaintiff's complaint have genuine issues of material fact?

End of discussion.

JUDGMENT AS A MATTER OF LAW

Judgment As A Matter Of Law Black Letter Law.

A motion for judgment as a matter of law may be brought after the close of party's evidence or at the close of all evidence. The motion is granted if no reasonable person could differ as to the outcome of the trial. Also, there must be no disputed issues of material fact to be tried. As a result, it asks the judge to take the case out of the jury's hands and decide it as a matter of law.

Commentary.

For a proper analysis of this issue, focus on the evidence that is presented. This is because the element explicitly states that the motion is brought *after* the close of a party's evidence. Let's move away from this and go to a Renewed Motion for a Judgment as a Matter of Law.

RENEWED MOTION FOR A JUDGMENT AS A MATTER OF LAW

California Version.

In California, it is known as a directed verdict. *See* Question 4 of the July 2024 California Bar Exam.

Renewed Motion For Judgment As A Matter Of Law.

A renewed motion for judgment as a matter of law is made after the jury has returned its verdict. The motion seeks to alter the verdict. To be proper, a motion for judgment as a matter of law must first be made at the close of all evidence.

Commentary.

For a proper analysis under a renewed motion for judgment as a matter of law, discuss whether a motion for judgment as a matter of law was *previously* made. Keep in mind that we are now discussing two motions: **1. A Motion for Judgment as a Matter Of Law and 2. A Renewed Motion For Judgment As A Matter Of Law.**

Further Reading.

For a practice exam on this issue, refer again to Question 1 of the February 2002 California Bar Exam.

STATUTE OF LIMITATIONS EXPIRATION AND RELATION BACK DOCTRINE

Statute of Limitations (SOL) Black Letter Law.

A plaintiff must file his complaint with all claims and all defendants within the applicable statute of limitations ("SOL"). There are two limited exceptions where the plaintiff may (1) add a new claim and/or (2) add a new defendant after the SOL has run. In these situations, the new claim or new defendant will "relate back" to the original complaint and the date that this original complaint was filed. This way, if the original complaint was filed within the applicable SOL, the plaintiff will be able to avoid the SOL problem.

Relation Back-Amendment of Pleadings to Add a Claim.

A plaintiff must establish (1) that his claim against this new defendant arises from the same transaction or occurrence as the original complaint; (2) that the new defendant knew about the original action within 120 days of its filing; and (3) that the defendant knew that, but for a mistake, he would have been originally named in the plaintiff's original complaint.

Further Reading.

See Question 2 of the July 2011 California Bar Exam.

REMOVAL AND REMAND

Removal and remand are heavily tested topics. Removal is common and remand is a possible outcome. Below is the black letter law.

Removal Black Letter Law.

A defendant may remove the case to the federal court in the state where the claim was filed provided if these elements are met: (1) the case could have initially been filed in federal court; (2) the claim for removal is brought by all defendants; (3) it is removed within 30 days of filing of the complaint or the pleading which triggered the right of removal; and (4) the defendant may not remove if he is a resident of the state in which the court is remanded to.

Commentary.

Typical fact patterns are straight forward. A plaintiff will sue a defendant in state court. The defendant may then remove the case to federal court. Notice that removal is only proper where the case originates at the state level. Then an action to remove the case to the federal level will take place. If removal is not proper, then the case will be remanded to the state court. Do not confuse removal with change of venue.

Further Reading.

See Question 1 of the February 2002, California Bar Exam.

ERIE DOCTRINE

Erie Doctrine Black Letter Law.

Under the Erie doctrine, a federal court sitting in diversity jurisdiction must apply the substantive laws of the state where it sits and the procedural laws of the federal system, generally the Federal Rules of Civil Procedure and in most cases the Federal Rules of Evidence. Whether or not a rule is substantive or procedural is a balancing test that depends on whether (1) the rule is outcome determinative, (2) the federal court's interest in applying their own rules, and (3) whether or not application of the federal rule will result in forum shopping. See Answer A, Question 1 of the February 2015 California Bar Exam.

End Black Letter Rule.

Commentary.

The Erie Doctrine is usually accompanied by another issue. Past examples include *motion to strike*, *jury trial* and *breach of contract*.

JURY TRIAL (VERSUS BENCH TRIAL)

Approach to Jury Trial.

Not all matters are entitled to a jury trial. For example, questions of equity may be decided via a bench trial. The following is from Selected Answer B, Question 4 of the July 2017 exam. Read this content to understand the difference between remedies at law and remedies at equity. That will aid you in your determination of whether an issue is entitled to a jury trial.

Jury Trial.

The Seventh Amendment to the Constitution guarantees a jury trial upon timely demand to litigants in questions of law. There is no right to a jury trial for questions of equity. While under the Federal Rules of Civil Procedure, actions are no longer brought exclusively in law or equity - there is instead only the "civil action" - the application of the right to a jury trial is determined by whether or not the cause of action contained in the complaint would have qualified for a jury trial in 1789.

Remedy at Law.

Damages are a remedy at law. Therefore, the [party] is entitled, upon timely demand, to a jury trial on the issue of damages

Remedy at Equity.

A litigant is not entitled to a jury trial on an issue of equity; it may instead be decided by a bench trial.

Mixed Issues of Law and Equity

When a complaint alleges both legal and equitable remedies and demands a jury trial, the court should separate the questions and hold a jury trial on the legal question first. It can then move to a bench trial on the equitable question.

End Excerpt.

The information above is thorough and further explanation is not needed. For further reading, *see* Question 4 of the July 2017 California Bar Exam.

APPEALS

Appeal Black Letter Law.

Where the court has reached a final judgment, only the final judgment may be taken to the appellate court.

Commentary.

Moreover, appeals can be tested along with interlocutory appeals. Let's discuss this now.

Interlocutory Appeal Black Letter Law.

A party may appeal before a final judgment on certain matters by right, such as a granting of an injunction, or if the lower court certifies that the issue is a close one and the appellate court agrees. *See* Answer B, Question 1 of the July 2001 California Bar Exam.

DISCOVERY

Approach to Discovery.

An essay question relating to discovery appeared on the July 2019 California Bar Exam. We'll state the black letter law here. It is a good idea to begin your discussion by stating the scope of discovery. Then proceed from there. The source of the black letter law below originates from the selected answers chosen by the State Bar.

Scope of Discovery Black Letter Law.

Under the Federal Rules of Civil Procedure, a litigant is entitled to discover all non-privileged information relevant to the subject matter of the litigation so long as the requests are not disproportional to the needs of the litigation. Relevance is defined broadly and is not limited to evidence that will be admissible at trial. To obtain relevant information, a litigant may use several discovery devices to another party. The party responding to interrogatories must provide written responses, under oath. *See* Selected Answer A, Question 1 of the July 2019 California Bar Exam.

Motion to Compel.

If a party fails to comply with a good faith and permissible discovery request, the other party may file a motion to compel. Typically, courts request that the parties meet and confer to attempt to resolve the dispute before the motion to compel stage. A motion to compel will ultimately be granted in the court's discretion. *See* Answer B, Question 1 of the July 2019 California Bar Exam.

Commentary.

The test for admission of discovery is not as stringent as that of evidence so do not confuse the two. Examples of discovery have appeared as interrogatories, admissions or requests for production.

Here, we are assuming that the entities are parties to the case. What if there is a person that is not a party? We then go to the area of third party discovery. This area is covered next.

THIRD PARTY DISCOVERY

Third Party Discovery.

The rules provide for limited discovery of third parties through use of a subpoena. Thus, a third party may be subpoenaed to appear for deposition or to produce documents. The requesting party must serve a subpoena duces tecum to obtain the documents.

If the party objects to the subpoena, he may file a motion to quash or may simply respond to the subpoena duces tecum with written objections along with a refusal to produce the records. In such a case, the burden shifts to the moving party to establish the need for the discovery.

Commentary.

It is important that you distinguish between who the parties are and who the other characters are. As stated above, the discovery for third parties is limited (as compared to that between parties to the case). We will now emphasize this point.

Example.

Read the hypothetical carefully! Here is an excerpt from Question 2 of the February 2009 exam:

Sally is a citizen of State B. Sally was using a Copyco copy machine at Blinko, a copy center within the northern federal judicial district of State B, when the machine started to jam.

End Excerpt.

In this scenario, the plaintiff was Sally and the defendant was Copyco. You probably won't capture that information from the excerpt. However, the point is that a third party may appear in a subtle way. As such, you should pay close attention to every character in the hypothetical.

PHYSICAL AND MENTAL EXAMINATIONS

Requests for Physical Examination and Mental Examination Black Letter Law.

A party may obtain a mental or physical examination of the other party if that party's physical or mental condition is in controversy, and good cause exists for ordering the examination. Good cause will be found to exist if the examination in question is not overly intrusive and it is relevant.

Steps.

Unlike in state court in California, where one physical examination is granted as a matter of right, if the physical condition of the party is in issue, in federal court, the requesting party must take a motion to the court to compel a physical examination and issue an order.

The court then allows a hearing where both sides present their case, and decides whether it should issue an order. This is a form of discovery called a request for physical or mental examination. See Answer B, Question 2 of the February 2009 California Bar Exam.

Medical Examination and Good Cause Black Letter Law.

In personal injury cases, defendants have a right to examine the injured plaintiff upon a showing of good cause. The showing of good cause depends on the extent to which the plaintiff is alleging any special emotional or mental damages.

Commentary.

Good cause can be shown when the plaintiff files her claim for personal injuries against defendant. A showing of cause good is more stringent for mental examinations.

Mental Examination and Good Cause.

Mental examination is proper when the plaintiff's mental condition is in controversy. Additionally, a mental examination is an intrusive procedure that should not be granted unless necessary to establish a claim or defense.

Further Reading.

See also Question 3 of the February 2015 exam.

WORK PRODUCT

Work Product Black Letter Law.

The work product privilege applies to all materials prepared by an attorney, or a client at the attorney's request, in anticipation of litigation.

Not all aspects of the work product privilege are absolute. Any mental impressions, opinions, theories of the case, and related information is absolutely privileged and is never discoverable. However, the remaining aspects of a document may be disclosed if the requesting party establishes: (1) there is a substantial need for the information; and (2) he or she cannot obtain the information from any other source. *See* Selected Answer A, Question 5 of the February 2013 California Bar Exam.

Commentary.

Understand that if the work product was made before the anticipation of litigation, it will not fall under the work product privilege. Moreover, understand the difference between *absolute privilege* and *qualified privilege* as it applies here. In the example above, the term *absolute privilege* appears. However, qualified privilege is not mentioned. Make a note of these two terms in your notes. Let's move now to work product under California Rules.

Work Product and California Rules.

Work Product In California, the work product privilege applies solely to materials prepared by the attorney in anticipation of litigation. This is unlike the federal rules, where the work product doctrine applies generally to materials prepared in anticipation of litigation. Materials prepared in anticipation of litigation that are comprised of the attorney's mental impressions, notes, or opinions, are absolutely protected and are not discoverable. Other materials prepared in anticipation of litigation received are qualified work product. These materials may be discoverable upon a showing of substantial need

and inability to acquire the materials elsewhere. *See* Selected Answer A, Question 2 of the July 2017 California Bar Exam.

Commentary.

Again, the distinction between absolute and qualified work product is emphasized. For the most part, an opposing party will not be entitled to work product considered absolutely protected. On the other hand, qualified work product is more likely to be attained (as discussed above).

Community Property

Table of Contents

- Community Property Standard Template.
 - Template Explanations.
 - Approach.
- Lucas and Anti-Lucas.
- Community Property with Right of Reimbursement.
- Marvin Claim (Relating to Cohabitation).
- In Re Marriage of Moore (Improvement of SP Using CP assets).
- Moore/Marsden Calculation.
- Third Party Transfer of QCP.
- Characterization of Assets.
 - Business Apportionment:
 - Pereira and Van Camp.
 - Reverse Pereira & Reverse Van Camp.
 - Child Support.
 - Education and Training.
 - Goodwill.
 - Medical Expenses.
 - Personal Injury.
 - Retirement Benefits.

COMMUNITY PROPERTY STANDARD TEMPLATE

Think of these items as a checklist.

- 1. Introduction.**
- 2. Basic Presumptions.** These are general rules for community property. These are also known as **rule dumps**. This may include community property, separate property, quasi-community property, etc.
- 3. Characterization of Asset (*What and When Acquired*).**
For example, a home purchased by the wife before she was married.
- 4. Statutory Presumption.**
May serve as “defenses” for a party (a party may want to have an asset declared community property and may need to overcome a presumption). In other words, think of these as “exceptions” to a basic presumption. Examples of these are a married couple holding real estate in joint tenancy, Married Woman’s Special Presumption, etc.
- 5. Action by Parties to Change the Character of the Asset.**
Pay close attention to the actions of the parties. These acts can change the character of an asset. Examples include transmutation, gift, separation, or divorce. *This is where many, if not most of the points will come from!*
- 6. Disposition** (or the conclusion but it is more detailed.)

TEMPLATE EXPLANATIONS

Numerical Headings.

Think of the numerical headings as a checklist. Some of the topics below the heading may apply. Other headings may not apply. However, you want to work your way through the analysis in an organized manner. There is no “one way” to properly organize your work. The key is to be organized.

Exam Tip.

The facts for one issue may be scattered throughout the essay. This may cause confusion. However, it is emphasized that you should stay organized. For this reason, feel free to reach a quasi-conclusion as you work through the analysis (this is explained below).

Here is an invaluable tip: After you discuss an issue, write your *Conclusion* and include the term “subject to” in your conclusion. Here is an example: Thus, Wifey takes the house in State X *subject to the discussion below.*” Notice how “subject to the discussion below” is added. This allows you to stay coherent and to collect more points on any given question.

Below are the headings. With the exception of the first two headings, you don’t have to discuss them in order. In fact, let’s do an example. We’ll use Question 1 from the February 2019 California Bar Exam. Below are the pertinent facts we’ll use for our example.

Facts.

In 2006, Hubby Hank and Wifey Wendy were married in State X, a non-community property state. Hubby bought a condo using money from his salary and took title in his name alone. In 2008, Hubby executed a will leaving whatever he might own at death to Wifey. Hubby and Wifey retired and moved to California in 2016. Also in 2016, Hubby conveyed the condo to himself and to Sid, his son from a prior marriage, as joint tenants with right of survivorship. In 2018 Hubby died.

Question 1: What rights, if any, do Wendy and Sid have in the California condominium? Discuss.

Approach.

Let’s run through a very basic approach using the checklist we have discussed. Remember that all we are doing is staying organized since there is no “one way” to approach these questions.

1. **Introduction.** (Think of the *Issue* in IRAC here)

State the Issue here (yes, the Issue in IRAC). Example: *Wife versus Son for the interest in the real property.* Or

Wendy V. Sid Re: The California Condo.

2. **Basic Presumptions.** (i.e., the **rule dump** of community and separate property rules)

Community Property and Separate Property.

California is a community property state. All property acquired during the marriage is presumed to be Community Property (CP), while all property acquired before marriage or after permanent separation, or by gift or inheritance is presumed to be Separate Property (SP).

Quasi-Community Property (QCP).

Property acquired in a SP state by either H or W before they became domiciled in CA is quasi-CP. Upon death or divorce, quasi-CP is treated as CP.

Note: You don't necessarily have to add something like QCP or putative spouse here. It can also go under *Statutory Presumptions* below. Use your judgment and stay organized.

3. Characterization of Assets (What and When Acquired).

Here is where you characterize the asset. An example is a home purchased by the wife before she was married. Further below, there will be a list below of commonly tested assets and how they are usually distributed. Let's take that example now from the February 2019 exam.

Example:

A condo purchased by Hubby in State X in 2006 while married to Wifey. Purchased with his salary using only his name in the title....

Analysis Approach.

State whether the property meets the definition of quasi-community property. Here is the exam tip from a couple of pages back: for your conclusion to this section, add the phrase "subject to the discussion below."

There are several reasons for adding the *subject to* phrase: (1) You still have to run through your checklist. Get those points! (2) It helps you stay organized. (3) You don't lock yourself in to one conclusion. As such, your conclusion can look like this: "Thus, the condo will be considered QCP subject to the discussion below."

Then you go on to the next item on the checklist.

4. Statutory Presumption.

Joint Tenancy, Married Woman's, etc.

Again, something like Putative Spouse can go here. Let's do an example. We'll continue using the February 2019 question.

Exam Tip.

Don't get caught up with the term *Statutory Presumption*. Don't worry too much of its placement in your outline. You don't even need to create a heading titled *Statutory Presumption*. Again, use

these categories as a checklist. If you think of an asset in the fact pattern, use the asset as a heading.

In our example, we'll use the grant that was conveyed as joint tenancy with right of survivorship. The heading will look like this:

Hubby's 2018 Joint Tenancy ROS Grant.

A joint tenancy with right out survivorship is valid when ...

5. Action by Parties to Change the Character of an Asset.

This is the part of the analysis where you can generate most points. Community Property begins with presumptions (as explained above). Here is where parties get to say something along these lines: "I took certain action and thus I overcome the presumption and I keep the property as SP."

As such, one spouse may focus on a certain action he or she took. Here are some examples of these actions: making a gift, performing a transmutation, moving out of the house and creating a separation, divorcing, when a party dies (when property is involved), etc.

Example.

Here is an example from a past exam dealing with stock. In this example, Wilma (*a spouse*) took title of the stock in her name alone even though the stock was purchased with her earnings during her marriage to Hal (*thus establishing a presumption of community property*). Hubby will want to prevent the rebuttal of the presumption (*he wants the stock to be community property so that he'll get a piece of the goodies*):

Effect of Title.

In this case the facts state that Wilma held the stock in her name alone; thus the museum and Carl will want to argue that by placing the stock in her name alone, the community **made a gift to her SP**. However, since 1985 a **transmutation** of CP into SP **requires a writing**. In this case, there is no evidence that the community intended to make a gift to Wife of the funds to purchase the stock. Further, there is no writing that would support a transmutation of the funds into SP. Therefore, absent other evidence, the stocks remain CP, and as such, **Hal owns a 1/2 community interest in the stock**. See Selected Answer A of the July 2008 California Bar Exam. Emphasis in bold added.

End Example.

Do you see how spouses argue that a gift is present? And that a writing is required? Make such an argument if the actions are found in the fact pattern or if the actions can be reasonably inferred from the facts. These add up to points.

Here is another example from the February 2019 exam. In our fact pattern, Hubby died. That can fit perfectly into our checklist. Let's do the example.

Death of Hubby.

In the death context, "Quasi-community property" means all real property situated in this state acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition. Real property situated outside of California will not be considered QCP.

Here, the real property was situated in State X, outside of California

End Example.

Notice how the heading does not include *Action By Parties To Change Character of an Asset*. It has an actual event (the death of hubby).

6. **Disposition.** The *conclusion* but it is more detailed.

This is the same as your *conclusion* that is used in IRAC discussions. However, since the analysis of the property may have been discussed in different phases, using the word *disposition* lets the bar grader know that you have reached a final conclusion.

Further Reading.

The question that was referenced above was a combination of community property, wills and trusts. It is highly recommended you do the entire question as practice. See Question 1 of the February 2019 California Bar Exam.

Now, let's look at some examples. We'll start with *Statutory Presumptions* and then move to an area under the category titled *Characterization of Asset*.

STATUTORY PRESUMPTIONS

Introduction.

As stated earlier, statutory presumptions may serve as "defenses" for a party (a party may want to have an asset declared community property and may need to overcome a presumption). In

other words, think of these as “exceptions” to a basic presumption. Examples of these are a married couple holding real estate in joint tenancy. Or the Married Woman’s Special Presumption. Other examples follow.

Lucas (And Anti-Lucas) Black Letter Law. Author’s Note: This concept can be very complex. It is recommended that you read the example from an actual bar exam that follows and then reread the black letter law. Let’s go to the black letter law now.

Lucas.

When spouses take title in joint and equal form but contribute disproportionately to the purchase price, there is a presumption of a gift to the community.

Commentary.

What does the rule mean in layman’s terms? Here is a hypothetical. Imagine if Hubby receives an inheritance while married. With the money from the inheritance, he purchases a home in California. Hubby has now “contributed disproportionately.” Title is taken in both husband and wife’s name in Joint Tenancy With Right of Survivorship. In other words, they have taken “title in joint and equal form.” What has just happened? What does this mean?

When Contributing Spouse Dies and Lucas Applies.

Even though the home was purchased with the Hubby’s Separate Property, there will be a presumption of a *gift* to the Community Property. This is what the Lucas concept entails. Otherwise, the home would be considered Hubby’s separate property. Also note that the element of “contributing disproportionately” has been met because Hubby paid for all of the purchase price. So what just happened? Hubby just gifted the home to the community so that the home is now community property. This scenario can occur when the contributing spouse dies (as opposed to a divorce occurring). Then, under the right of survivorship principles, the surviving spouse takes the home as a gift.

Otherwise, the Anti-Lucas policy may apply when there is a divorce (as opposed to the death of the contributing spouse). You should also become familiar with the Anti-Lucas statutory provision. This discussion now follows.

Anti-Lucas.

Upon divorce, anti-Lucas may apply. Separate Property used by the contributing spouse is entitled to reimbursement for the down payment, improvements, and principal. But not ownership interest. See Question 6 of the July 2010 California Bar Exam.

Commentary.

If Hubby had a really bad marriage, and he took title along with Wifey in Joint Tenancy, then this would not be a complete loss for Hubby (the spouse that contributed disproportionately). Continuing with our example, upon divorce, Hubby would be entitled to the reimbursement for the down payment (if any is present). He would also be entitled to reimbursement for any improvements and the principal.

Summary.

Lucas applies where the contributing spouse dies. Anti-Lucas applies upon dissolution of marriage.

Lucas In Action.

Below are the relevant facts. The actual sample answer from the State Bar is printed below.

Facts.

In 2000, Harry and Wanda, California residents, married. Harry was from a wealthy family and was the beneficiary of a large trust. ... In 2003, Harry and Wanda purchased a vacation condo in Hawaii. They took title in both their names, specifying that they were “joint tenants with the right of survivorship.” Harry paid the entire purchase price from his checking account, which contained only funds from the trust. Harry and Wanda orally agreed that the condo belonged to Harry.

In the event of a dissolution, how should the court rule on Harry’s and Wanda’s respective rights and liabilities with regard to [...] The condo in Hawaii? Discuss.

End Fact Pattern.

Before reading the answer, see if you can draft a response (a mental note is okay).

Answer.

The Condo in Hawaii

Source

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

Presumption: Joint and Equal Form

Where **joint and equal title is taken to property** which was acquired through a **spouse's separate property** funds, the **Lucas and Anti-Lucas principles** apply. The property itself is presumptively community property. Upon **death**, Lucas applies to hold that absent an express agreement to the contrary, the separate property which was used to acquire title in the property in question will be deemed to have been made as a **gift to the community**. Thus, the donor spouse has no claim of ownership or reimbursement. Upon **divorce**, the principles of **Anti-Lucas apply**. These provide that absent some express agreement to the contrary or express wording in the deed, upon dissolution of marriage, the spouse who gave separate property toward the purchase of an asset that was acquired in joint and equal form is entitled to reimbursement for the down payment, improvements, and principal, but not an ownership interest.

....

Disposition: Community Property with Right of Reimbursement

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

Bold format added for emphasis. *See* Selected Answer B of the July 2010 California Bar Exam.

MARVIN CLAIM (RELATING TO COHABITATION)

Marvin Claim Introduction.

Be cautious when the facts state that a couple is living together, are engaged, and may later marry. California does not recognize common law marriages. However, when the couple nonetheless cohabitates, certain rights may apply.

Black Letter Law.

Unmarried cohabitants are not included under the CP system, even if they are engaged and plan to marry. However, under Marvin, cohabitants may have some rights under contract theories where there are agreements between the parties regarding income and expenses.

Source: Selected Answer A, Question 6 of the July 2011 California Bar Exam.

IN RE MARRIAGE OF MOORE

The Moore calculation is used when there is an improvement of separate real property using community property. In summary, the community property will be entitled to certain reimbursements (e.g., for the down payment and improvements of one of the spouse's separate property).

In re Moore Black Letter Law.

Where CP is used to improve a SP asset, the community is entitled to an interest. The formula used for calculating such an interest is from In re Marriage of Moore. The community is entitled to reimbursement for the value of the contributions for down payment, improvements, and payment of principal, plus a pro rata share of the appreciation. See Answer A of the July 2013 California Bar Exam. Underline added for emphasis.

Facts From Past Exam (July 2013):

In 2008, [Hubby] inherited an unimproved lot in California worth \$75,000. [Hubby] and [Wifey] obtained a construction loan from a bank for the purpose of building a rental house on the lot.

Commentary.

In the example above, the unimproved lot is the husband's separate property. The loan is used to improve Hubby's separate property. Take note that the loan is community property. As such, community property is being intermingled with one of the spouse's separate property. The task at hand, therefore, is to determine the interest of the community in husbands' separate property.

Below is an excerpt from a model answer that pertains to the facts above (from July 2013).

Begin Excerpt.

Actions.

Improvement of Separate Real Property with CP.

Here, the bank loan (CP) was used to improve an SP asset (H's lot).

Where CP is used to improve a SP asset, the community is entitled to an interest. The formula used for calculating such an interest is from *In re Marriage of Moore*. The community is entitled to reimbursement for the value of the contributions for down payment, improvements, and payment of principal, plus a pro rata share of the appreciation.

Here, the community will receive reimbursement of the principal payments made on the bank loan, plus a pro rata share of the appreciation calculated by dividing the CP contribution by the total contribution of SP and CP. The facts do not give enough details to make such a calculation, but it will be some portion of the \$500,000 present market value. *See* Selected Answer A of the July 2013 California Bar Exam. Bold format added for emphasis.

End Excerpt.

Further Reading.

Below is a more detailed explanation. Attribution is listed below.

What is the Moore/Marsden Calculation?

The Moore/Marsden Calculation stems from two court cases in California: *In re Marriage of Moore* and *In re Marriage of Marsden*. *Moore* was a Supreme Court of California case, while *Marsden* was an appellate case that further clarified the ruling in *Moore*. These two cases held that when the community in a marriage pays down principal, the community may receive a dollar-for-dollar reimbursement as well as a *pro tanto* (as far as it can go) share of the property's appreciation from the date of marriage to the date of the trial. Thus, we have the Moore/Marsden calculation, which is as follows:

Add together the dollar-for-dollar reimbursement and the *pro tanto* share and you get the community interest in the property. Multiply this by this equation:

- Numerator = Community property payments of principal
- Denominator = Purchase price of the home

To determine the separate interest in the property, the courts use a different formula (the Separatizer formula). Here is an example of the Moore/Marsden formula at work: Party A purchased a home for \$400,000 in 2013. Party A made a down payment of \$50,000 and paid an additional \$100,000 before Party A married Party B in 2015. At this point, the price of the home is \$500,000. Once married, both parties paid another \$100,000 of principal. On the date of the trial in 2017, the home is worth \$700,000.

Using the Moore/Marsden calculation, the community would receive \$100,000 for reimbursement of the pay down of principal. In addition, the community would get \$200,000 (the appreciation of the home from marriage to trial) multiplied by the fraction $\frac{\$100,000}{\$400,000}$ (community property payment of principal) over \$400,000 (purchase price of home). The community interest would thus be \$150,000 ($\$100,000 + \$200,000 \times [\frac{\$100,000}{\$400,000}]$), not counting the Separatizer calculation.

Source: Boyd Law.

<https://www.boydlawsandiego.com/what-is-a-mooremarsden-calculation/>

End Excerpt.

THIRD PARTY TRANSFER OF QCP

Introduction.

This issue is also known as the Widow's Election doctrine.

Question: What happens if the decedent conveys the QCP real property to a third party before he dies? *See* Question 1, February 2019 California Bar Exam.

Facts:

Hubby conveyed the condominium to himself and to Sonny, his son from a prior marriage, as joint tenants with right of survivorship, doing so as a gift to Sonny. The condo is QCP situated in California. Moreover, Wifey never agreed orally or in writing to convey any of the condo to Sonny. Hubby died and was survived by Wifey and Sonny.

Issue: Under California law, is the conveyance to Hubby and Sonny valid?

Answer.

Based on the given facts, Wifey will be entitled to restore the interest in the condominium.

Rationale.

The condominium, which is QCP, will be treated under the probate code. The wife will be able to restore the QCP mostly based on the following four reasons: (1) Husband gifted the interest to his son; (2) The wife did not agree in writing to divide the QCP; (3) The transfer was done with the right of survivorship to the husband; and (4) The real property was situated in California.

Note that the outcome would have been different if the real property was not situated in California. This is because we are applying California law and thus the California Probate Code applies. Sections of the probate code are listed below and relevant parts pertaining to our hypothetical are underlined for emphasis.

CHARACTERIZATION OF ASSET

Introduction.

Before we go any further, we'll discuss the area of *Characterization of Assets* since it is important. It is here where you will inform the bar grader that you know the substantive law well. This is not an exhaustive list of assets. Rather, they are assets that commonly appear.

Here is a list of the assets that will be discussed.

- Business Apportionment: *Pereira* and *Van Camp*.
- Child Support.
- Education and Training.
- Goodwill.
- Medical Expenses.
- Personal Injury.
- Retirement Benefits.

PEREIRA AND VAN CAMP

Business Apportionment: *Pereira* and *Van Camp*.

Under this section, we'll discuss business apportionment in two ways: (1) the Basic Formulas and then (2) a more In-depth Explanation. Let's start with the basic formula. But first remember when these formulas apply.

Usually, these apportionment methods apply: (1) When there is marital labor; (2) The business has value.

The reason the discussion is divided into two sections is as follows. Sometimes the need for apportionment will not be a major issue. When this happens, your discussion should not be extensive. Thus, Basic Formulas should be applied.

To the contrary, the hypothetical may contain a substantial amount of facts relating to the apportionment of the business. When this occurs, a more in-depth explanation is warranted. We'll do such an example below. Let's go to the Basic Formulas first.

The Basic Formulas for Pereira and Van Camp.

Memorize these formulas. Examples will also be featured further below. We'll start with *Van Camp*.

Van Camp.

Van Camp accounting is used when the increase in value is primarily the result of the unique nature of the SP asset. Under the *Van Camp* formula, (1) **determine what a fair salary would be for the community labor**, and (2) **multiply that by the years of marriage**, and (3) **subtract any salary already received and any amounts paid for community expense**. The result is CP. The rest is SP.

Example From Past Exam.

Under these facts, a **reasonable salary would be about \$40K per year**. Wendy only **took out \$25K per year** and also **spent \$5K in household expenses per year**. So **\$10K would be multiplied by the 5 years** she worked, **resulting in \$50K going to CP**. Since **at the time of dissolution the company was worth \$100K**, Wendy would receive **\$50K as SP** and **her half of CP resulting in her receiving \$75K**. See Answer B, Question 6 of the California Bar Exam, February 2010. Bold format and underlines added for emphasis.

End Example.

Many times, deciding which of the two formulas to use will require an analysis. For this reason, you must understand the traits of each formula. Below is an example of a fact pattern that will probably fit under the *Van Camp* method.

Example of Van Camp Fact Pattern.

Wilma-Wifey opened a dry cleaning business 21 years ago. This was one year before the 20 year marriage. During the marriage, the business appreciated in value. The opening of a large

commercial site took place in the community around 19 years ago. This caused a larger need for a dry cleaning business. Because the appreciation is more likely due to the nature of the business than to Wifey's labor, *Van Camp* applies. The Community will receive a fair salary (minus family expenses paid from the business). The rest is SP.

Let's move now to *Pereira*.

Pereira.

***Pereira* accounting is used when the increase in value is primarily a result of a spouse's labor. Under *Pereira*, (1) determine the value of the SP at the beginning of the business. (2) Thereafter, give it the fair rate of return. (3) Multiply that by the years of marriage. The remainder is CP.**

Example From Past Exam.

Herb will argue that her business thrived because of her work, enthusiasm and her ability to collect special coins as reasonable prices. If the court believes this to be true, **under *Pereira***, Wendy would be entitled to **her initial \$10K + 10% of \$10K multiplied by her years worked**, which look to be **5** (2003 – 2008). This number would go to Wendy's SP and the rest would go to the CP estate. *See* Answer B, Question 6 of the February 2010 California Bar Exam. Bold content and underlines added for emphasis.

Commentary.

The *Pereira* formula is more likely to be used if the managing spouse's labor is the primary cause of the increase in value of the business. For example, if the spouse is an experienced potter with high demand for his or her services. Also notice that the interest is usually 10% interest. If you must do a calculation and no interest is given in the hypothetical, use the 10% figure.

Factors to Help Determine Which Formula to Use.

In deciding which formula to apply, courts are interested in fairness. Note that it may be difficult to determine whether a *Pereira* or a *Van Camp* formula should apply. As such, courts may ascertain the major factor that caused the creation of the value (or increase in value). Following are factors that courts may use (although this is not an exhaustive list).

- 1) Whether one spouse spent a considerable amount of time in the enterprise. A considerable amount of time on the part of one party could favor a *Pereira* accounting.
- 2) Whether an unusual economic event occurred. If so, this would favor the *Van Camp* formula.

3) Whether the business can operate without special skill. If so, this would favor a *Van Camp* accounting method.

In-depth Explanation

The objective here is for you to plug in the numbers using the *Pereira* and *Van Camp* formulas. We'll also use an actual past exam from the California Bar.

This question appeared as Question 6 of the February 2010 exam. You will notice that the hypothetical contains many numerical figures. When you see many figures, it can be an indication that you should probably use those figures in your analysis. We'll look at such a fact pattern now.

In the hypothetical below, **the couple was married two years before the company began to operate**. Certain numbers will be featured in bold. These numbers will be relevant in order to do the proper computations. *See* Question 6 of the February 2010 California Bar Exam.

In-depth Example Pertaining to *Pereira v. Van Camp*

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

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

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

End Abstract.

Source: Question 6 of the February 2010 California Bar Exam. Bold added for emphasis. Selected Answer B is featured below. The writer first discussed *Pereira* and then *Van Camp*. Content relating to the two formulas will also be underlined.

Pereira Analysis

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

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

Van Camp

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

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

Court Discretion

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

End Example.

It is suggested that one reread this apportionment section as the content can be complex. Let's move away from this topic now.

REVERSE PEREIRA & REVERSE VAN CAMP

Reverse Pereira Black Letter Law.

Under the reverse Pereira formula, the C[ommunity] P[roperty] is calculated as (F[air] M[arket] V[alue] of the business at separation) + [(FMV of business at separation) * (fair rate of return) * years of separation] The SP is then calculated by subtracting the CP calculated above from the FMV at time of divorce. See Selected Answer A, Question 3 of the February 2021 California Bar Exam.

Commentary.

Note that the date of separation will be particularly important for this analysis. You will understand the reason for this after reading this section. Also, the fact pattern may not include the numbers you need to make the calculation. In such a case, just state that the numbers are not available. This section will focus more on Reverse Pereira but there is also commentary regarding Reverse Van Camp which will be discussed below.

If you don't address this issue, will you lose points? The author will provide some relief in answering this question. The answer, based on prior exams, seems to be *no*. Rather, Reverse Pereira and Van Camp seem to be a matter of getting extra points. Reverse Pereira could have been applied under Question 3 of the February 2021 California Bar Exam. Selected Answer A addressed the issue while Selected Answer B was silent on the issue.

How should you approach this topic then? Read the information in this section and understand it. We're talking about potential extra points here. Let's now look at a frequent fact pattern where this issue may arise.

Common Fact Pattern.

Typical fact pattern would involve a business that starts out as separate property. For example, the wife helps operate a business and then, through her expertise, the business grows in value. The parties separate eight (8) years ago (or another number of years has passed) and the value of the business doubles in value. One of the parties files for divorce this year. And of course the husband will seek the largest amount in value during apportionment.

Another scenario may be where the husband has a business that is considered separate property. Also, there may be children involved. The parties separate six (6) years ago. One of the parties

files for divorce this year. As such, child support may be at issue and the other parent that is not involved in the separate property business will seek the largest amount in value during apportionment.

When to Apply Reverse Pereira and/or Van Camp.

Everything is clear thus far, correct? Also, up to this point, this sounds very much like the general applications to Pereira and Van Camp. So how do you know when to apply the Reverse aspect to these legal issues?

Consider these two facts: (1) Has the value of the business grown by at least double the amount? (1) Has more than one year passed between the date of separation and the time of filing for dissolution? Look for these facts in the scenarios below:

- The parties separated four (4) years ago and the business was worth \$10,000 then. The dissolution proceedings begin this year. However, the business is now worth \$100,000. How do you appraise the business and which distribution formula do you apply?
- Another fact pattern is this. The wife works in a business with her father. The wife then marries but continues to work in the business. The father dies and the wife becomes the sole owner of the business. The wife and husband separated six (6) years ago. During the marriage, the value of the businesses doubles. Assuming that the husband has interest in the business via community property, the husband will want to calculate the value of business after separation (for purposes of apportionment). This was the fact pattern found in Question 3 of the February 2021 California Bar Exam.

Summary of Three Key Points to Determine if You Should Apply the Reverse Formulas.

1. One of the spouses clearly has an interest in the business via a gift or they owned the business before the marriage. The other party may have an interest through community property or because child support and/or spousal support may be at issue.
2. The value of the business substantially increases to at least twice the value.
3. The year of separation will be years apart from the date when divorce proceedings take place.

Further Reading.

Here is how one Reddit user summarized it. I place this information here to emphasize that Reverse Pereira and Reverse Van Camp apply after the separation has taken place.

- Reverse Pereira: use when labor/skills after separation improves CP business. **Favors SP.**
- Figure out fair rate of return, that's CP.
 - Rest is SP.

Reverse Van Camp: use when CP business is appreciating not necessarily due to labor/skills of spouse after separation. **Favors CP.**

- Figure out reasonable value of spouse's labor, that's SP.

- Rest is CP.

Source: 2l_throwaway, https://www.reddit.com/r/Bar_Prep/, "1 yr. Ago."

CHILD SUPPORT

Child Support.

A child support obligation of a married person that does not arise out of the marriage shall be treated as a debt incurred before marriage. (**Author's note:** The term here "before marriage" does *not* imply that the debt falls under Separate Property. Note that the community can be liable for some debts that are acquired by a spouse *before* marriage. We'll focus solely on child support debt here so as to not lose focus.)

If property in the community estate is applied to the satisfaction of a child support obligation of a married person that does not arise out of the marriage, at a time **when separate income of the person is available** but is not applied to the satisfaction of the obligation, the community estate is entitled to reimbursement from the person in the amount of the separate income. See California Family Code Section 915. *Emphasis added.*

Commentary.

The rule above is simple to understand: if separate property from the debtor-spouse **is available** but not used, then the community will be entitled to reimbursement.

If separate property from the debtor-spouse is *not* available, then a court may consider community property to satisfy the child support obligation. This may be done for necessities such as food and shelter. Consider this example. The mother has custody after permanent separation. The father has remarried and does not have sufficient separate property for the basic necessities of the child. A court may reach into the father's community property to satisfy child support debts. *See* Question 6 of the July 2007 California Bar Exam.

EDUCATION AND TRAINING

Education and Training.

Education and training are not community property. However, the community shall be reimbursed if a party's earning potential substantially increased. However, this presumption can be rebutted in any of the three following ways:

- (1) If the community has substantially benefited. There is a **10 year presumption** that the community has substantially benefited if the parties file for divorce more than 10 years following the completion of the education;
- (2) Both spouses received community-funded education; or
- (3) Where the degree has lessened the obligations of the other spouse to pay for support that would otherwise be required.

GOODWILL

Goodwill.

“All assets acquired during marriage by the labor and efforts of a spouse are community property, and goodwill is no exception. The goodwill of a professional practice is a community asset. Goodwill is the **value of the continued patronage to the practice**. It is the value of the business that is not derived from personal skill or the value of the assets of the business. It can be **valued by expert testimony** or by capitalizing the excess earnings of the practice.” *See* Selected Answer B from Question 6 of July 2007 California Bar Exam. Emphasis in bold added.

Comments.

Use the definition above as it both explains goodwill and it explains how to value its worth. Calculating the value is not always straightforward as detailed below.

Value of Goodwill Can Be Based on Past Results.

“In establishing value of good will, trier of fact may take into consideration situation of business **premises, amount of patronage, personality of parties** engaged in business, **length of time** the business has been established, and habit of customers in continuing to patronize business.” *In re Marriage of Foster*, 117 Cal. Rptr. 49 (Cal. App. 1st Dist. 1974). Emphasis in bold added.

In simple terms, past results of the business can be used to establish its value. Consider the transcript below. An expert is brought forth to discuss the value of goodwill.

Cross Examination of Expert (One “Heller”).

On cross-examination Heller was asked what he meant by ‘goodwill.’ He replied: ‘Goodwill is value that somebody has built up. . . . it is part of the business; it is separate from the accounts receivable, and is in addition thereto.’ When asked if he was representing to the court that appellant could find a buyer who would pay \$27,000 in addition to the other assets,

Heller said ‘not necessarily.’ He explained that if appellant continued in his practice, his business had a value of \$27,000 in excess of tangible items, but that it depended on how long appellant let the practice, ‘sit,’ whether he abandoned it, or whether he passed away. He said he had no opinion as to whether appellant could obtain \$27,000 for goodwill from a buyer, but stated he would receive an amount for goodwill if he sold the practice. Heller reiterated that the \$27,000 valuation for goodwill did not mean that appellant could obtain that sum by selling the medical practice and that he had no opinion as to the amount of money that could be obtained for goodwill upon a sale.

Appellant testified that the goodwill of his medical practice had no value as of July 31, 1972, the date that the parties separated. The trial court found that as of this date the goodwill of appellant's medical practice had a value of \$27,000. In re Marriage of Foster, 117 Cal. Rptr. 49, 51 (Cal. App. 1st Dist. 1974).

End Cross Examination.

It is a good idea to recall that the valuation of goodwill can be done by an expert.

MEDICAL EXPENSES

Medical Expenses.

When a spouse expends SP on the medical expenses of the other spouse, he or she is entitled to reimbursement if (1) The community had sufficient funds available or (2) That the debtor spouse had sufficient SP available at such time.

Example From Past Exam.

As a general rule, all debts incurred during marriage are community obligations. Where one spouse expends SP to pay a community obligation, he may be entitled to reimbursement from the community if he did not intend a gift and there were sufficient CP funds available at the time, and no other special presumptions apply.

Here, H expended \$15,000 of his SP to pay W’s medical expenses. H will argue that he is entitled to reimbursement from the community because W’s expenses were a community obligation.

To the extent CP funds were available at the time to pay W’s medical expenses, H will be entitled to reimbursement from the community. *See* Selected Answer B, Question 5 of the February 2008 California Bar Exam.

PERSONAL INJURY

Personal Injury Award (As Opposed to *Judgement as a Liability*):

Award After Marriage:

If award arises after marriage, the award is SP of injured spouse. Court may order reimbursement to other spouse or community if either contributed to expenses related to injury. Family Code §781(b). *See* Question 1 of the July 2005 California Bar Exam:

Tort Judgment Against Spouses (As Opposed to Tort Judgement as a Personal Injury Award).

Judgments Against Spouses.

A tort judgment against a spouse will subject both the community property and the separate property of the tortfeasor to the judgment. *See* Selected Answer B, Question 2 of the July 2012 California Bar Exam. The rule continues below.

For the Benefit of the Community.

Although the community property is liable for the judgment by the pedestrian, the judgment must be satisfied first from the separate property of the tortfeasor spouse if the tort was *not* committed by conduct that was being performed *for the benefit of the community*. For example, if [Husband] was on his way to drop the kids off at school or to pay the mortgage on the house, this would be *for the benefit of the community*. In that case, the judgment would be satisfied *first from community property*, and if there was any deficiency, then from the separate property of the tortfeasor.” *See* Selected Answer B, Question 2 of the July 2012 California Bar Exam. Italics added for emphasis.

Summary of Tort Judgment Against Spouse.

CP debt if tort was committed in the interest of the community. SP if the tort was not committed in the interest of the community.

RETIREMENT BENEFITS

Retirement Benefits:

Retirement benefits are usually apportioned according to the Time Rule. **Retirement Benefits** are CP if earned during the course of the marriage. To determine the amount of CP, courts apply the **time rule** to determine and this rule is explained below. .

Time Rule Explained.

The time rule, the number that represents the community interest, is calculated as follows. The numerator is the length of time during marriage (before separation). The denominator is employee-spouse's length of employment. Once divided, the percentage will equal the percentage that the community will be entitled to.

Chart:

Numerator: Length of Time During Marriage

Divided by

EQUALS = Time Rules

Denominator: Length of Employment

End of Chart.

Let's do an example.

Hubby works at Disney for 30 years. Hubby and Wifey were married for 20 years. The numerator is 20 (years of marriage) and the denominator is 30 (length of employment). Then perform the division: 20/30. The result represents the Time Rule. Thus, $20/30 = 66$. The time rule percentage is 66%.

Let's assume the pension value amounts to \$100,000. 66% of 100,000 = \$66,000. The \$66,000 will be considered community property. Therefore, Hubby and Wifey will each be entitled to \$33,000.

Constitutional Law

Table of Contents

Cookie Cutters.
Commerce Clause.
Dormant Commerce Clause.
Due Process.
 (1) Procedural Due Process.
 (2) Substantive Due Process.
Equal Protection.
Presidential Powers.
Immunity to Former Presidents (*Trump v. U.S.*).
Privileges and Immunity.
Speech Under the 1st Amendment.
Speech and Constitutional Limitations.
Speech: Content Neutral vs. Content Based.
Speech: Content Neutral, Time, Place, Manner.
Speech: Content Based.
Speech: Symbolic Speech.
Speech: Obscene Speech.
Religion.
Taking.
13th Amendment (Abolishing Slavery).

COOKIE CUTTERS.

Preliminary Issues.

Consider these issues when beginning your discussion. However, you do *not* always have to discuss them. The general rule is that you look for facts that may give rise to the issues. At times, standing may be a major issue. In such a case, you have to discuss standing and maybe even **group standing**. See Question 5, February 2007, California Bar Exam.

Government Actor.

Standing.

Moot.

Ripeness.

Mnemonic.

Actors Stand Smooth and Ripe.

COMMERCE CLAUSE.

Approach to Commerce Clause.

Most likely you will not be tested *just* on the Commerce Clause. Rather, you will also probably be tested on the Dormant Commerce Clause. Here's a tip: historically, you will likely be tested on whether the state is a market-participant. As such, take it easy. Understand the template and know how to arrive at the market-participant discussion.

Commerce Clause Black Letter Law

Congress has the plenary power to regulate the channels, instrumentalities and any activity that substantially affects interstate commerce.

Then you usually perform a dormant commerce clause Discussion. This topic now follows.

DORMANT COMMERCE CLAUSE

Dormant Commerce Clause Black Letter Law.

A State cannot discriminate against interstate commerce and the law will be invalid if is discriminatory or unduly burdensome. If the law discriminates, the state can use these issues as a defense:

1. State's Non-economic interest.

2. No less discriminatory alternatives.
3. The Market-Participant Doctrine.

Exam Tip.

Begin your discussion with the black letter law listed above. If there is discrimination, you may need to address that first before exploring the defenses. Discrimination may mean that the law of the state favors products from one state over products from a different state. Discrimination can be explicit on the face of the statute. *See* Question 5, July 2018, California Bar Exam.

Alternatively, the discrimination can be implicit through the application or motive of the statute. Here, the discrimination will not be as apparent. Do a careful reading of the facts to determine if discrimination is present. For an example, *see* Question 1, February 2005, California Bar Exam.

More on Discrimination.

Discrimination can appear in subtle ways. Remember the mnemonic *FAM*: Face; Application; Motive.

Here are the three means used to determine if the state statute discriminates against out-of-state entities. The state discriminates (1) On the Face of statute; (2) In Application of statute; or (3) Motive of statute.

Let's move now to defenses that the state may use.

Dormant Commerce Clause Defenses Black Letter Law.

1. State's Non-Economic Interest.

Statute can be valid if there are factors that are unrelated to an economic interest. Apply the balancing test.

Balancing Test.

Does the state present non-economic interests outweigh the burden on interstate commerce? Consider the police powers of the state: health, safety, and welfare (economic discussions may fall under welfare). Compare these factors against the burden on interstate commerce.

2. No Less Discriminatory Alternatives.

The state must show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

3. Market-Participant Doctrine.

When a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. However, the state must act solely as a market-participant and not as a regulator.

Commentary.

Since the Market-Participant Doctrine is highly tested, we have provided some exceptions to this doctrine. Read below.

Exceptions to the Market-Participant Doctrine.

Do the economic benefits to the discriminating state go beyond the border of the discriminating state? These are the “downstream restrictions” discussion in *South Central Timber Development*.

The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

Commentary.

Many find the Dormant Commerce Clause difficult to understand. It is important to use the facts from the hypothetical. You *do not* have to discuss all of the exceptions.

Further Reading.

Aside from reading the black letter law, also do a close reading of past exams where this issue has appeared. As stated earlier, you can find examples on Question 1 of the February 2005 exam. You can also find another example on Question 5 of the July 2018 exam. See also Question 2 of the February 2024 California Bar Exam.

DUE PROCESS.

Approach to Due Process.

There are two issues that are usually discussed under Due Process: **(1) Procedural Due Process and (2) Substantive Due Process.** The discussion on procedural due process now follows.

PROCEDURAL DUE PROCESS.

Procedural Due Process Black Letter Law.

Under the 14th Amendment of the U.S. Constitution, the state shall not deprive any person of life, liberty, or property, without due process of law. Many times, notice and a meaningful hearing may be required.

You may have to perform an Eldridge discussion.

Eldridge Standards Black Letter Law.

1. Whether a fundamental life or liberty interest or property entitlement has been denied.
2. The importance of that interest.
3. Procedural safeguards adopted to reduce or eliminate erroneous decisions.
4. Balance those interests against the interests of government fiscal and administrative efficiency.

SUBSTANTIVE DUE PROCESS.

Approach to Substantive Due Process.

For this issue, determine if a fundamental right is impacted. Remember this mnemonic: **MEP**: (1) **Marriage**; (2) **Education**; (3) **Privacy**.

If such a case goes to court, it will trigger a discussion of **Strict Scrutiny**.

Commentary.

Dobbs v. Jackson Women's Health Organization (2022) held that abortion no longer a fundamental right.

Black Letter Law for Abortion.

Under *Dobbs*, abortion is not a fundamental right. Rational-basis review is the appropriate standard to apply when state abortion regulations undergo a constitutional challenge.

Exam Tip.

Religion is usually *not* discussed under Substantive Due Process. Religion is usually analyzed under the **Establishment Clause and Free Exercise Clause**. These are also known as the Religion Clauses. If further discussion is needed, the courts may resort to a **strict scrutiny analysis**. See rule below.

End Exam Tip.

Strict Scrutiny Black Letter Law.

When fundamental rights are implicated, a strict scrutiny analysis may be necessary. The government that is applying a law must show:

- i. It is narrowly tailored to
- ii. Achieve a compelling government interest.
- iii. Also, there must be no less restrictive means available to achieve its goals.

Commentary.

Should you discuss both types of Due Process? To get a 65 on an essay (which is a clearly passing response), the answer is *no*. Not usually. However, this determination is made on a case-by-case basis. Again, focus on the facts as you may be able to determine whether the facts give rise to only one type of Due Process or both.

EQUAL PROTECTION

Approach to Equal Protection.

Determine the “Classification” of the person/group first. That person/group may fall under one of the three standards of review: (1) Strict Scrutiny; (2) Intermediate Scrutiny; (3) Rational Basis. You will then base your analysis on such classification.

Equal Protection Black Letter Law.

Requires equal protection of similarly situated individuals. To determine whether an equal protection violation has occurred, the classification being used must be scrutinized.

Standards of Review:

Strict Scrutiny

Under the strict scrutiny test, the classification must be necessary to serve a compelling government interest. When the strict test is being applied, the government has the burden of proof.

Intermediate Scrutiny

Under the intermediate scrutiny test, the classification must be substantially related to an important government interest. In general, an exceedingly persuasive justification must exist in order to warrant the classification. When the intermediate scrutiny test is being applied, the government has the burden of proof.

Rational Basis

Under the rational basis test, the classification must be rationally related to a legitimate state interest. When the rational basis test is being applied, the plaintiff has the burden of proof. Almost any legitimate state interest will pass muster.

Commentary.

Strict Scrutiny: The following three categories will be evaluated by the Strict Scrutiny standard: (1) Race; (2) Alienage; (3) National Origin. Remember “RAN.”

Moreover, if Fundamental Rights are burdened, the statute will be subject to Strict Scrutiny review. Fundamental rights may include: (1) Privacy Rights; (2) 1st Amendment Rights; (3) Right to Vote; (4) Right to be a Candidate; (5) Right to Interstate Travel.

Intermediate Scrutiny: Applies when the classification is based on (1) Suspect Class; (2) Gender; or (3) Legitimacy.

If these are not present, you may be under Rational Basis.

Rational Basis: All other categories not mentioned above.

PRIVILEGES AND IMMUNITIES OF 14TH AMENDMENT

Privileges and Immunities Clause of the 14th Amendment.

Privileges and Immunities Clause prohibits the discrimination of out-of-state citizens in favor of local residents. This clause does not apply to corporations.

PRESIDENTIAL POWERS

Approach to Presidential Powers.

Things to consider: When is the president's power at its highest? When is the power at its lowest? Is there a gray area? Also consider the president's power when dealing with (1) foreign affairs and (2) domestic affairs. Read on.

Presidential Powers Black Letter Law.

Congressional Authorization.

The President's power is at its apex when he acts pursuant to power given him by Congress.

The U.S. Supreme Court has said that when he acts in the face of Congressional disapproval, he may only do so if the power he exercises is vested in him alone by the Constitution and denied to Congress.

Where he acts in the face of Congressional silence on a matter, he acts in a "gray area". The case law is split as to whether Congressional rejection of a proposed power (but not the enactment of some act disallowing the President's use of that power) is silenced or disapproval, but the cases tend toward disapproval.

See Selected Answer A, Question 2 of the July 2008 California Bar Exam.

Also consider the President's domestic affairs powers and his foreign affairs powers.

The President's Domestic Affairs Powers.

The President has some domestic affairs powers reserved to himself. These include the appointment and removal powers, the pardon power, the commander in chief power, and the duty to execute the law. The President may make an argument that the latter two powers support the Order. As an exercise of the commander in chief power, the President has the exclusive power to control the deployment of troops and their day-to-day control.

The President's Foreign Affairs Powers.

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

IMMUNITY TO FORMER PRESIDENTS *TRUMP V. U.S. (2024)*

Approach to Immunity To Former Presidents.

Focus on whether the President's actions were official. Also, whether the acts related to the President's exercise of his core constitutional powers.

Black Letter Law.

Presidential power requires that a former President have some immunity from criminal prosecution for official acts during their tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

Comments.

Such immunity does not include unofficial acts. Also, absolute immunity only applies to the President's core constitutional powers. As for the remaining official actions, the court did not decide such issue.

SPEECH UNDER THE FIRST AMENDMENT

Approach to Speech.

This area will cover various areas of speech. You will see that the elements may overlap. This may cause confusion so take the necessary time to understand the elements as they apply to the issues.

COMMERCIAL SPEECH

Commercial Speech Black Letter Law.

Commercial Speech Can Be Regulated By Government.

There are two tests to consider: (1) Initial Test and (2) Standard of Review.

Initial Test.

Commercial speech is proper if it is (1) Not false advertising and (2) Not illegal.

Commentary.

If these elements *are* met, then move on to the standard of review. Note that the official name of this is not “initial test.” However, discuss these issues prior to the standard of review. The key here is to have an organized discussion.

Standard of Review.

Commercial speech may be regulated if (1) There is an important interest; (2) It is narrowly tailored; and (3) It directly advances that interest.

See Question 5 of the February 2007 California Bar Exam. In this question, tobacco ads are being regulated. You may also need to discuss constitutional limitations. The black letter law now follows.

CONTENT NEUTRAL VERSUS CONTENT BASED

Approach to (1) Content Neutral Speech and (2) Content-Based Speech.

This area is highly tested. The first step is to determine whether the government is regulating speech that is content neutral or whether it is content-based. Content neutral is easier to regulate than content-based speech. We'll begin with content neutral speech. You may know this area of law as the regulation of time, place, manner (TMP) speech. Let's go to this discussion now.

Regulation Of Content Neutral Speech (Time, Place, Manner) Black Letter Law.

The law regulates without references to the content of the speech. Rather, the law regulates something other than speech but incidentally burdens speech. The government can regulate the time, place, and manner of speech (TPM) if these elements are met:

(1) Be narrowly drawn; (2) Serve a significant government interest; and (3) leave open alternative channels of communication.

Commentary.

The key here is to understand that the speech *must* be **content neutral** as opposed to content-based speech. In other words, if you are going to discuss public forums, run through the elements above first. Do not confuse content neutral speech with content-based speech. If the elements above are met, you may then proceed to discussing the type of forum where the speech regulation is taking place. For example, does the hypothetical involve a sidewalk or a bus station?

The type of forum must be taken into consideration because the government has more power to regulate speech when the speech is taking place on government property.

Forums.

(1) Public Forum; (2) Quasi-Public Forum; or (3) Non-Public Forum (Private Property).

Further Reading.

See Question 3 of the July 2004 California Bar Exam. *See also* Question 2 of the February 2012 California Bar Exam.

End of Discussion.

CONTENT-BASED SPEECH

Content-Based Speech Black Letter Law.

Content-based restrictions on speech arise when the government regulates either subject-matter based speech or viewpoint based speech. Government can regulate if the test for strict scrutiny is met.

Strict Scrutiny.

(1) Narrowly tailored; (2) To achieve a compelling gov't interest; and (3) No less restrictive means available to achieve its goal.

Further reading.

For further reading, refer to Question 5 of the February 2014 California Bar Exam.

CONSTITUTIONAL LIMITATIONS

Approach to Constitutional Limitations.

This cluster of issues are usually discussed after a Speech discussion. For example, discuss Commercial Speech first (assuming it's relevant), and then discuss the issues here. Here are the issues under this highly tested category: **(1) Prior Restraint; (2) Overbroad; (3) Vagueness (4) Unfettered Discretion.**

For *all* speech regulations discussions, it is highly suggested that you consider the constitutional limitations just mentioned. These issues are sometimes referred to as facial attacks. *See* Question 2 of the July 2006, Cal. Bar Exam, for an example. The Black Letter law now follows.

Constitutional Limitations / Facial Attacks Black Letter Law.

Prior Restraints.

Under the 1st Amendment, speech cannot be enjoined before it occurs.

Overbroad.

A law is overbroad under the 1st Amendment when it prohibits more speech than is constitutionally allowed.

Vagueness.

A law is vague under the 1st Amendment when one cannot tell which speech is prohibited & which is allowed.

Unfettered Discretion.

The First Amendment is also violated where an official is given complete discretion on whether to allow or prohibit speech.

SYMBOLIC SPEECH

Symbolic Speech Black Letter Law.

The gov't can regulate if the standard of review is met. (1) The regulation is unrelated to suppression of speech; (2) There exists an important gov't interest; and (3) The burden is no greater than necessary.

Commentary.

Think of a fact pattern where a **religious symbol** is being discussed. For example, a small religious group worships the sun. The government is now trying to prevent sun symbols from being displayed on government property during Christmas.

Sample Facts.

After [the government agency] was informed by counsel that courts treat **Christmas trees** as secular symbols, rather than religious symbols, the Building Authority decided to erect a Christmas tree in the lobby of the Municipal Government Building, while continuing to **prohibit the Old Ways Fellowship sun display**. See Question 5, February 2014, Q. 5. California Bar Exam.

Exam Tip.

The key here is to recognize that the "Old Ways Fellowship" (a neopagan religious organization) was using a sun display *as a symbol* to express its religious belief. Moreover, the government agency was also using a symbol to express its religious belief: a Christmas tree. There seemed to be a different treatment of symbols based on the origin of the religion. This would have given rise to a discussion of symbolic speech.

The next step would have been to discuss the issue of symbolic speech based on the three prongs listed above. It is noteworthy to say that different treatment of symbols is *not* the only instance of where symbolic speech would be discussed. Look for facts that give rise to such a discussion. It is always important to remember that the facts give rise to issues.

OBSCENE SPEECH

Obscene Speech Black Letter Law.

When the regulation involves obscene speech, consider the Miller standards.

- 1. The average person, applying contemporary community standards would find that such speech, taken as a whole, appeals to the prurient interest (i.e. a morbid or degrading interest in sexual activity, as opposed to simply a curious interest).**
- 2. The speech depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.**
- 3. The speech, taken as a whole, lacks serious literary, artistic, political, or scientific value.**

End 1st Amendment Speech section. We'll next cover religion.

RELIGION AND FIRST AMENDMENT

Approach to the Religious Clauses.

There are two central issues here: (1) Free Exercise of Religion and (2) the Establishment Clause. These are also known as the religious clauses.

Free Exercise of Religion Black Letter Law.

The free exercise clause of the Constitution prohibits the government from preventing one's free exercise of his or her religion. Laws of general applicability are permissible while laws that target a specific religion must meet strict scrutiny.

The Establishment Clause Black Letter Law. (Author's Note: Updated as of 2022.)

When a law or policy is facially neutral (e.g., it does not discriminate against a particular type of religion), then a 1st Amendment violation occurs when "historical practices and understandings" of the Establishment Clause are violated.

Factors to consider in determining a violation of "historical practices and understandings."

- (1) Neutrality. Whether the policies are not neutral because they target religious speech;**
- (2) General applicability. Whether the policies are not generally applicable because they are specifically applied to a person's religious exercise (e.g., engaging in individual prayer);**
- (3) Establishment Clause. Whether the actions of the government are not justified because they are based solely on the *Lemon Test*. Remember that the *Lemon Test* is no longer controlling.**

Commentary.

You may mention the *Lemon Test* (see next entry) but argue that it has been abandoned by *Kennedy v. Bremerton School District*. Rather, the *Lemon Test* can now be a factor under *Kennedy*. The focus under *Kennedy* is whether the law is neutral. Also, do not apply strict scrutiny, intermediate, or rational scrutiny. There is no need if the law fails the factors discussed above.

New Approach to the Lemon Test.

Discuss the *Lemon Test* very briefly. Argue that it is now a factor under *Kennedy* as discussed above.

Lemon Test Black Letter Law.

The Establishment clause prohibits the government from respecting the establishment of a religion. If a law does not have a secular purpose on its face, it must meet strict scrutiny. Laws that are not secular on their face must pass the three-part *Lemon test*. (1) First the

law must have a secular purpose; (2) Second, the law must neither advance nor inhibit religion; and (3) Third, the law must not lead to excessive government entanglement with religion.

Exam Tip.

The religious clauses are commonly analyzed with the two tests as described above. However, Equal Protection and other issues may also be tested. *See* Question 2 of the February 2018 California Bar Exam. **End of discussion.**

TAKING

Taking Black Letter Law.

The 5th Amendment takings clause, applicable to states through the 14th Amendment, prohibits the government from taking private property without just compensation.

Consider the two types: (1) Partial Taking and (2) Regulatory Taking.

1. Partial Taking – Balancing Test.

Balancing test has three factors: (1) Economic impact of the regulation on a property owner; (2) Extent to which the regulation interferes with an owner’s reasonable, investment-backed expectations regarding property use; and (3) Character of the regulation, including the degree it benefits society, how the regulation distributes the burdens and benefits amongst the property owners, and whether the regulation violates the owner’s property ownership attributes (i.e., right to exclude).

2. Regulatory Taking.

A statute which limits the productive uses of the property is considered a regulatory taking. Government action must take away all reasonable use or value of the property.

Further Reading.

See Question 5 of the February 2010 California Bar Exam.

13th AMENDMENT (ABOLISHING SLAVERY)

13th Amendment (Abolishing Slavery) Black Letter Law.

The Thirteenth Amendment abolished slavery and involuntary servitude, except as punishment for a crime.

See Question 2 of the July 2013 California Bar Exam.

CONTRACTS

Table of Contents

How to Approach Contracts for Written Exam

Main Heading 1: Applicable Law

- Common Law

- UCC

Main Heading 2: Contract Formation

- Offer

- Acceptance

 - Acceptance Under the Common Law

 - Acceptance Under the UCC

 - UCC 2-207(1)

 - UCC 2-207(2)

- Quasi-Contracts

- Consideration

 - Exceptions to Consideration

 - Consideration Not Met

 - Promissory Estoppel and its Relation to Consideration

Main Heading 3: Defenses to Formation

 - Mnemonic: *C ID FILM US*

 - Statute of Frauds & Exceptions

Main Heading 4: Terms

- Parole Evidence & Exceptions

- Modifications

Main Heading 5: Performance

- Conditions

 - Under the Common Law

 - Substantial Performance

 - Minor and Material Breach

 - Promise versus a Condition

 - Under the UCC

 - Perfect Tender Rule

 - Conforming Goods and Non-Conforming Good

- Assignments

- Third Party Beneficiaries

Main Heading 6: Excuses

Main Heading 7: Breach

- Anticipatory Repudiation

Main Heading 8: Remedies and Conclusion

APPROACHING CONTRACT WRITTEN EXAMS

How To Approach Contracts on Written Exams.

To excel at Contracts on exams, approach the questions in a systematic manner. Using this structure titled *Main Headings*. This format will allow you to establish a solid foundation to achieve this goal. Using this structure will also facilitate the organization of your response.

Keep in mind that the structure below is subject to change depending on the call of the question. However, as a general rule, you want to divide your answer into at least two divisions. These divisions are detailed below.

The First Division.

The first division will contain *Main Heading 1* that pertains to *Applicable Law*. See the diagram below. It should continue until *Main Heading 3* that relates to *Defenses to Formation*.

The Second Division.

The second division should occur after *Defenses to Formation*. Also, you should do your best to implement the facts in chronological order within any given section. As such, you may have to sort the Main Heading in a different order. For example, you may have to deal with a condition (which falls under Main Heading 5: Performance) before you discuss an issue involving the Parole Evidence Rule (which falls under Main Heading 4: Terms). For this reason, you want to practice writing many past bar exams. This way, you will get used to the mechanics of the subject matter and maximize performance.

MAIN HEADINGS.

1. Applicable Law - Common Law or UCC.
2. Contract Formation.
3. Defenses to Formation.
 4. Terms.
 5. Performance.
 6. Excuses.
 7. Breach.
 8. Remedies.

Let's look at the format a bit closer.

MAIN HEADING 1: APPLICABLE LAW

Two Choices for the Applicable Law.

There are usually two choices for this: the common law (CL) or Article 2 of the Uniform Commercial Code (UCC). Let's look at these two areas now.

Common Law.

Common law should be used when the contract involves services. Common law should also be used when discussing the sale of real property, insurance, intangible assets, and employment.

UCC.

UCC should be used when the contract involves the sale of goods. Note that the UCC applies to all sales of goods whether or not both parties are merchants.

Special Rules for Merchants.

UCC has special provisions that apply when both parties are merchants. For example, (1) Battle of the Forms under 2-207; (2) Modifications (2-209); and (3) Merchant's Confirmation (2-201). UCC's Firm Offer.

MAIN HEADING 2: CONTRACT FORMATION

Contract Formation Elements.

To form a valid contract, these three elements must be present: (1) Offer; (2) Acceptance; and (3) Consideration.

Offer.

An offer must have the three elements present: (1) Must manifest an intent to contract; (2) Communicated to the offeree; and (3) Certain and definite terms are stated.

Exception to Offer: Quasi Contract.

A quasi contract does not require an offer. This topic will be discussed later. See the heading labeled: *Quasi-Contracts* below (discussed after *Acceptance*). Let's move now to other areas under offer.

Other Offer Issues.

(1) Termination. (2) Preliminary Negotiations. (3) Advertisements. (4) Bilateral v. Unilateral.

These issues are now discussed.

(1) Termination and the Offeror's rights.

(a) Revocation may be available to terminate the offer. However, an option contract prevents the offeror's termination.

(b) Lapse of time. An offer will terminate if not accepted after a reasonable period of time (assuming that no expiration period is stated in the contract).

(c) Death. Death of the offeree will terminate the offer.

(2) Preliminary Negotiations.

Preliminary negotiations are not offers.

(3) Advertisements.

Advertisements usually create an invitation to offer and are not offers.

Alert: If the fact pattern states the words *newspaper advertisement*, or something along those lines, briefly mention these issues. This is true whether or not the issue applies to resolve the dispute. Remember to state why they do not apply if that is the case.

(4) Bilateral Contract Versus A Unilateral Contract.

(a) Bilateral Contract.

Under a Bilateral Contract, offeror wants a *promise* that the offeree will perform. This is in contrast to a unilateral contract where the offer expects some type of *performance* to fulfill the offer element.

Here is an example for a bilateral contract. A medical patient- offeror expects a promise of acceptance from the medical doctor-offeree that the doctor will take care of patient's medical needs until his death.

(b) Unilateral Contract.

Under a Unilateral Contract, the offeror expects acceptance through performance.

Let's turn to an example. The state offers a reward for the capture of a fugitive. A person can accept by capturing the fugitive. A promise to capture him will not form an acceptance.

Revocation of Unilateral Offer.

An offeror cannot revoke the contract if part of **actual performance** has been made. However, **mere preparation** of performance will not stop a revocation on the part of the offeror. Now on to **Acceptance**.

ACCEPTANCE

MAIN HEADING 2: CONTRACT FORMATION CONTINUED

Acceptance Overview.

There are two areas under acceptance. These are (1) Acceptance under the common law and (2) Acceptance under the UCC. Let's start with the common law.

ACCEPTANCE UNDER THE COMMON LAW

Approach to Acceptance.

Keep in mind that this is acceptance under the common law as opposed to acceptance under the UCC. One of the most important concepts to remember under the common law is the Mirror Image Rule. You should immediately acknowledge the Mirror Image Rule as a potential issue.

Mirror Image Rule.

The rule states that an offer must be accepted with no modifications on the part of the offeree. The offeror is the master of one's own offer. Also, this gives rise to the term *battle of the forms*. The reason for this is because the terms of the last form control the agreement. This has been referred to as the *last shot rule*.

When Acceptance Becomes Effective.

Let's discuss the point in time when an acceptance becomes effective. Here are four common areas: (1) When it is communicated to the offeror; (2) When the offeree remains

silent; (3) When performance under a unilateral contract is established: or (4) When the *Mail Box Rule* is in effect.

Further Reading.

See Question 3 of the July 2011 California Bar Exam.

ACCEPTANCE UNDER THE UNIFORM COMMERCIAL CODE MAIN HEADING 2: CONTRACT FORMATION CONTINUED

Salient Distinction Between Acceptance Under the Common Lw and UCC.

Before discussing Uniform Commercial Code Section 2-207 (“2-207”), it is vital that the reader also understand the Mirror Image Rule under the common law. As you know, under the common law, the terms of the offeror and the offeree *must match* in order to form a valid contract. In contrast, the terms *do not* necessarily have to match under the UCC.

UCC 2-207 Made Simple.

The reason UCC 2-207 is confusing is because it deviates from the standard flow of the law. Here is the format to many laws: there are rules and there are exceptions to the rules (and exceptions to the exceptions). Under 2-207, you are first given the exception to the rule, and then you are given the rule. Take a second to appreciate this and it will make your comprehension a lot more simple to grasp.

Here is one operation of 2-207 in simple terms. This is the rule: Parties can accept different terms unless those terms materially change the proposal. *See* 2-207(2). The following is the exception to the rule. However, one party is still able to materially change the proposal if that party states that the offer will not be accepted unless that material change is accepted. *See* 2-207(1). So yes, 2-207(1) is the exception to 2-207(2). Wasn’t that simple to understand? If you get confused as you read the following content on this topic, just come back to this section and reread it.

2-207 AND DECONSTRUCTING THE TEXT

2-207(1).

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to

or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

2-207(2).

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless

- (a) The offer expressly limits acceptance to the terms of the offer;**
- (b) They materially alter it; or**
- (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.**

Commentary.

Let's first discuss 2-207(1). 2-207(1) can be broken down into two parts.

2-207(1) First Part.

Under the common law, acceptance must be a mirror image of the offeror's terms. Conversely, the UCC departs from the image rule. Therefore, the offeree's terms that are *additional or different* from the offeror's terms *can* form a valid acceptance. So far so good.

2-207(1) Second Part.

Even though additional or different terms are stated in the acceptance, an offeree is still entitled to a counter-offer found in the common law. It is important to note that under a counter-offer within the common law, no contract is formed. Just as in the common law, a counter-offer is *both a rejection* of the offeror's offer and it is also the *offeree's counter-offer*.

Since a counter-offer does not create a contract, *the offeree* must use clear language to indicate that it will not accept the offeror's terms. That is part of where the "expressly conditional" language of 2-207(1) comes in. Many times, the issue will focus on whether conditional language is present in the offeree's writing. You will see an example in the *Roto-Lith* case below. We will focus on that language to appreciate the legal principle there: ". . . unless acceptance is expressly made **conditional on assent** to the addition or different terms." Emphasis in **bold** added. Here is the language from *Roto-Lith*: "If these terms are not acceptable, Buyer must so notify Seller at once."

It is emphasized here that factors are used in the analysis of 2-207(1). For example, is the language unambiguously stated? Moreover, are the terms conspicuously stated on the face of the form? More importantly, is there language that says something along the lines of the following statement? Here is the statement: “*A contract will not be formed unless you accept these additional terms.*” Notice that the burden to prove that the contract falls within 2-207(1) is not low. As such, implicit or indirect language by the offeree to meet the requirements for conditional assent will not be upheld.

Again, take note of this language where courts have held that 2-207(1) is in effect: “Seller’s acceptance is expressly conditional on Buyer’s assent to the different terms as set in this form. If the Buyer does not accept these different terms, the Buyer should immediately contact the Seller.” A court will probably consider such language to fall under 2-207(1). Thereafter, if the original offeror does not object and performs, then the terms of the offeree will control under 2-207(1). Let’s look at 2-207(2) now.

Case Law.

Case title: *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497 (1st Cir 1962).

Facts.

Plaintiff Roto-Lith, Ltd. (“Roto-Lith”), a manufacturer of cellophane bags for packaging vegetables, is the buyer/offeror. Roto-Lith sent Defendant F. P. Bartlett (“Bartlett”), the seller/offeree, a written order for adhesive emulsion which the defendant produced. Bartlett then sent the plaintiff an acknowledgment form. It included provisions excluding all warranties and it required Roto-Lith to notify Bartlett immediately if those terms were not acceptable.

Bartlett’s acknowledgment contained the following statement conspicuously on its face: “All goods sold without warranties, express or implied, and subject to the terms on reverse side.” Furthermore, on the back of the acknowledgment, there was a disclaimer of “any and all warranties, guarantees, or representations whatsoever,” as well as the following statement: “This acknowledgment contains all of the terms of this purchase and sale *If these terms are not acceptable, Buyer must so notify Seller at once.*”

Issue.

Whether 2-207(1) controls the contract to justify the seller’s term that warranties are disclaimed.

Holding.

The district court directed a verdict for the defendant (Bartlett, the seller/offeree) by concluding that 2-207(1) was in effect.

Rationale.

On appeal, plaintiff argued that under 2-207, a binding contract was formed on the terms of its order. As such, defendant's disclaimer was an additional term that materially altered the agreement. Therefore, it was not part of the contract and it was to be treated as a proposal. Moreover, the plaintiff did not assent to the addition and the proposal was not part of the contract.

The First Circuit Court (on appeal) agreed that the disclaimer of warranties materially altered the contract. However, it also concluded that defendant's agreement was expressly conditioned on the plaintiff's assent to the terms introduced in the defendant's acknowledgment form. In other words, *the seller made it expressly clear that there would be no contract unless the other party agreed*. The circuit court affirmed the lower court's ruling.

Translation.

Bartlett (the original seller/offeree) prevailed because it took some type of strong action. That action is described as factors in this manner: the terms were conspicuous, the terms were clear, and the defendant made it clear it would accept entering into a contract if Roto-Lith agreed to those terms. Using these factors, the court agreed that 2-207(1) would be the controlling statute.

The buyer/offeree attempted to argue that a disclaimer of warranty would materially alter the agreement under 2-207(2). However, 2-207(2) was not applicable because the court determined that the agreement fell under 2-207(1). In other words, the exception to the rule was applied. Let's move now to areas where 2-207(2) prevails.

DECONSTRUCTING 2-207(2)

Let's look at the 2-207(2) black letter law again.

2-207(2).

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless

- (a) The offer expressly limits acceptance to the terms of the offer;**
- (b) They materially alter it; or**

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Again, 2-207(2) allows parties to contract without abiding to the mirror image rule unless subelements (a), (b), and (c) are present. If they are present, are there any other terms that can form an exception under 2-207(1)? These steps will achieve a thorough analysis under 2-207.

Acceptance discussion under both the common law and the UCC are concluded.

QUASI-CONTRACTS

MAIN HEADING 2: CONTRACT FORMATION CONTINUED

Introduction.

Up to this point, we have covered offers and acceptance. When there is no offer or acceptance, can a contract still be formed? The answer is *yes*. One way is via a quasi-contract.

Quasi-Contract Black Letter Law.

Also known as implied-in-law obligations. A quasi-contract is an obligation imposed by law to prevent unjust enrichment. There is a requirement that one of the parties confers a benefit to another party. The party that confers the benefit must do so voluntarily and in good faith. As such, courts have an interest to prevent such unjust enrichment.

Can Serve as an Exception to Offer and Statute of Frauds.

Note that there is no mutual assent by the parties to enter in the contract. As stated in the introduction, there is no offer or acceptance. It is fine to think of a quasi-contract as an **exception to the requirement of *offer***.

Do you remember the mnemonic *Q-PPiGS*? These are the exceptions to the statute of frauds. The *Q* stands for quasi-contract. As such, quasi-contracts may serve as an exception to the SOF.

CONSIDERATION

MAIN HEADING 2 - CONTRACT FORMATION, CONTINUED

Approach to Consideration.

This is the first section on consideration after covering offer and acceptance. The area of consideration is the last segment under Main Heading 2, Contract Formation.

Consideration Black Letter Law.

Promisor bargains for exchange and the promisee suffers a legal detriment.

EXCEPTIONS TO CONSIDERATION

Approach to Exceptions to Consideration.

There are two common exceptions to consideration: (1) Promissory Estoppel and (2) UCC Merchant's Firm Offer. Let's look at promissory estoppel first.

Promissory Estoppel.

Promissory estoppel has the following three elements: (1) Promise is made by the promisor; (2) The reliance is foreseeable; and (3) Promisee suffers a detriment.

Exam Tips.

Promissory estoppel can also be applied when a general contractor submits a bid on a construction project. If the general contractor relies on the subcontractor's bid, promissory estoppel will apply if the subcontractor backs out and the general contractor incurs damages.

Relation to Statute of Frauds.

Promissory estoppel is also an exception to the statute of frauds doctrine.

UCC AND THE MERCHANT'S FIRM OFFER EXCEPTIONS TO CONSIDERATION CONTINUED

Merchant's Firm Offer Black Letter Law.

Offer by merchant is irrevocable if (1) the writing requirement is met; and (2) It gives explicit assurance that the offer will be held open. Again, this requires no consideration but keep in mind that the offeror must be a merchant. See UCC 2-205. Distinguish this from common law offers that require consideration.

DEFENSES TO FORMATION MAIN HEADING 3

Introduction.

If (1) Offer, (2) Acceptance, and (3) Consideration are met, a valid contract usually exists unless any of the following defenses apply. These defenses will be the topic of this section.

Note that there will be a heavy emphasis on the Statute of Frauds (“SOF”). Many times, a party will attempt to avoid the contract by using the statute of frauds defense. As such, its placement is appropriate here.

Mnemonic.

C ID FILM US

Terms.

1. Capacity; 2. Illegal; 3. Duress; 4. Fraud; 5. Impossible; 6. Latent Ambiguity; 7. Mistake; 8. Unconscionable; 9. Statute of Frauds.

Commentary.

If no defenses apply, a contract may be formed. If you believe one defense does apply, you must still go through the entire defense mnemonic to reach your conclusion. Keep in mind that the list above is not an exhaustive list.

Distinguish Defenses to Formation From Excuses.

Defenses as listed above are distinguished from Excuses in the following manner. Excuses arise after a valid contract is formed and the terms are met. However, the phase in which excuses arise comes later in the stage. Recall the eight main headings. Start with contract formation, then move to defenses, then terms. Excuses will come after these topics and are listed under Main Heading 6. We’ll discuss that further below. For now, we’ll continue with defenses to formation.

STATUTE OF FRAUDS MAIN HEADING 3 DEFENSES TO FORMATION CONTINUED

Approach to Statute of Frauds.

While there are other terms listed under defenses, the statute of frauds is perhaps the most common defense. As such, we’ll elaborate on this particular term.

Statute of Frauds Black Letter Law.

SOF includes (1) a writing; (2) names the parties; (3) the subject matter; (4) the terms, and (5) a signature is usually required. Under the UCC, the SOF requires a term for the quantity.

Mnemonic: MY LEGS.

SOF is usually required under the following circumstances: (1) Marriage; (2) Year; (3) Land; (4) Executor; (5) Guarantee; and (6) Sale of Goods.

Year Term Explained.

SOF requirement does not apply where performance can be completed within one year. Note that there is another way of stating this: *a contract which is impossible to be fully performed within a year falls under the SOF.*

Land, Part Performance, and SOF Exception.

SOF applies to sales for real estate. However, SOF does not apply when real estate is at issue and when part performance is present. At least two of the three elements must be met: (1) Buyer pays money; (2) Buyer possesses the land; or (3) Buyer makes improvements.

Let's now look at exceptions to SOF.

STATUTE OF FRAUDS EXCEPTIONS

Introduction.

The following area contains exceptions to SOF.

Mnemonic.

Remember this mnemonic: *Q P Pi GS*. **Q - Quasi-Contract; P - Partial Performance; P - Promissory Estoppel; I - (intentionally left blank); G - Goods delivered; S - Substantial Reliance by Seller.**

Quasi-Contracts.

Quasi contracts prevent unjust enrichment. Look for a fact pattern where a plaintiff has rendered full performance to a defendant. For more on quasi-contracts, see the section above after Acceptance.

Partial Performance.

Discussed in the previous page. Do not confuse *partial performance* with *substantial performance*. Substantial performance is discussed under *Conditions* below.

Promissory Estoppel.

Promissory estoppel also appears as an exception to consideration. See the area of *Consideration* above.

Substantial Reliance.

SOF does not apply when there is substantial reliance by the seller of specially manufactured goods.

Let's now further review the aforementioned content.

PAUSE TO RECAP

Recap.

So far we have covered the following areas:

Main Heading 1: Applicable Law.

Main Heading 2: Contract Formation.

Main Heading 3: Defenses to Formation.

The next section will be titled *Main Heading 4: Terms*.

TERMS MAIN HEADING 4

Introduction.

In this section, we'll focus on these two areas:

(1) Parole Evidence Rule and

(2) Modifications.

Commentary.

Did you notice how the word *Terms* does not appear as part of the two items mentioned above? Think of *Terms* as the terms that govern the contract *after* the section titled *Contract Formation*. Also, think of *Terms* as issues that attempt to alter the contract after it has been formed. Let's discuss the usage of this word a bit more.

Two Ways To Think of Terms.

First Way.

When you are thinking of purchasing a vehicle, applying for a home loan, or even using your credit card to buy a new computer, you consider the terms of the agreement. For example, when you agree to buy an item with your credit card, you may ask this question: "What is the interest rate on this card?" The interest rate is a term. This is a "real-world" example. For bar exam purposes, *don't* think of terms in real-world examples. Strange right? After all, it's the bar exam! Let's discuss this now.

Second Way.

Think of *terms* as phrases that attempt to disrupt the four-corners of the contract (a contract that has already been formed). As such, think of the Parol Evidence Rule ("PER") and of modifications. We'll focus on these terms under this main heading.

PAROL EVIDENCE RULE MAIN HEADING 4: TERMS

Parol Evidence Rule Black Letter Law.

PER prevents introduction of evidence of *prior or contemporaneous* agreements that contradict, modify, or vary the terms of a written contract when the written contract is intended to be a final expression of the parties' agreement.

Complete Integration.

Complete integration of a writing means a full and final expression of an agreement. Extrinsic evidence is *not* admissible here.

PAROL EVIDENCE RULE EXCEPTIONS

Mnemonic.

Remember this mnemonic: *FOAMLID*. **F - Fraud; O - Oral Condition; A – Ambiguity; M- Mistake; L - Lack of Consideration; I – Illegal; D – Duress.**

MODIFICATION MAIN HEADING 5 CONTINUED

Approach to Modification.

Modification has two outcomes depending on whether the law is based on the (1) Common Law and (2) the UCC.

Modifications Under the Common Law.

The modification should be supported by new consideration.

Modifications Under the UCC.

As between merchants, a modification need *not* be supported by new consideration. Let's move to a new Main Heading now.

MAIN HEADING 5: PERFORMANCE

Approach to Performance.

Performance is the carrying out of the terms of the contracts. Once the terms are satisfied, the parties are discharged from their duties.

This area includes the following concepts. Conditions are commonly tested: **1. Conditions. 2. Satisfaction & Accord. 3. Assignments. 4. Third Party Beneficiaries.**

CONDITIONS MAIN HEADING 5 CONTINUED

Condition Precedent.

A condition precedent is a condition or an event that must occur before a right, claim, duty, or interest arises. A condition will usually have words like *must, on condition that, or shall.*

Exam Tip.

A condition can be very difficult to understand. Here is a tip that will make this concept very easy to understand. Use this phrase in your rule statement: “A condition will usually have words like *must, on conditions that, or shall.*” As such, you will usually be able to identify a condition in a fact pattern if the clause has the word these words.

PROMISES (AS OPPOSED TO CONDITIONS)
MAIN HEADING 5 CONTINUED

Promise and the Black Letter Law.

In contrast to a condition, the non-occurrence of a promise or the failure to fully satisfy a promise contained in a contract does *not* relieve the other party of liability. If a party promises to render performance of a contract, the other party will *not* be relieved of performance unless the party who made the promise *materially* breached the contract.

A material breach occurs when the party does not render substantial performance. (*This is already defined above.*) A **minor breach** does *not* relieve the non-breaching party of their duty to perform, although they can sue for damages. In order to determine whether a breach is minor or material, a court will consider the extent of performance, the hardship to the breaching party, the adequacy of compensation, and the additional work needed to fulfill the promise. *See* Answer B of Question 4 of the July 2013 California Bar Exam. Emphasis in *italics* and in **bold** format have been added.

Hollywood film.

The topic of promise versus a condition appeared in a Hollywood film titled *The Paper Chase*.

THE PERFECT TENDER RULE
PERFORMANCE CONTINUED
STILL ON HEADING 5

Perfect Tender Rule and the Black Letter Law.

The rule states that a buyer is permitted to reject goods shipped or delivered to it from a seller if the seller's tender of the goods is in some way not perfect. In other words, under the UCC, any breach is deemed a material breach.

Commentary.

Notice that under the UCC, there is no distinction between material and minor breach. The breach under the UCC will usually fall under the Perfect Tender Rule (taking exceptions into consideration, of course).

BLACK LETTER LAW CONTINUED

Perfect Tender Rule Black Letter Law Continued.

If the good or the tender of delivery fail in any respect, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

Commentary.

The rule above covers single transactions. There is another topic for installment agreements. That will be discussed next.

INSTALLMENT AGREEMENT SECTION PERFECT TENDER RULE CONTINUED STILL ON HEADING 5

Installment Contract Under the Perfect Tender Rule.

One which requires delivery of goods from a seller in separate lots to be accepted by the buyer.

One That Substantially Impairs.

If any installment substantially impairs the value of the installment (versus the contract as a whole), then the buyer can reject the installment.

Note the difference between a *single* installment and the entire contract as a whole. Moreover, the buyer cannot discharge his performance under the contract.

Time To Cure.

If the non-conforming installment does not substantially impair the installment, the buyer must give the seller time to cure within a reasonable time.

If the seller does not cure, the buyer can reject that installment (but he cannot cancel the entire contract).

Duties of the Buyer That Arise When Rejecting Goods. *Popular MBE Topic.*

If a buyer decides to *reject* a non-conforming installment AND does *not* seasonably notify the seller of the rejection, THEN the buyer is deemed to have *accepted* the installment. However, the buyer must have a *reasonable opportunity* to **inspect** the goods.

**THIRD PARTY BENEFICIARIES
PERFORMANCE CONTINUED
MAIN HEADINGS 5**

Introduction.

In this area, we'll briefly cover third-party beneficiaries and assignments.

Third-Party Beneficiary Black Letter Law.

The person that steps into the shoes of the original party that is to receive a benefit. A third-party beneficiary is a person who is to benefit from a contract made between two other parties. If the contract is fulfilled, the third-party stands to benefit.

When The Rights Vest.

1. He gets notice of the contract and assents; 2. When justifiable reliance based on the promise occurs; or 3. When he brings forth a suit to enforce the promise.

**ASSIGNMENTS
PERFORMANCE CONTINUED
MAIN HEADINGS 5**

Assignments Black Letter Law.

An assignment occurs when one party to a contract (the *assignor*) transfers the contract's obligations and benefits to another party (the *assignee*). Ideally, the assignor wants the assignee to step into his shoes and assume all of his contractual obligations and rights.

Exam Tip.

Don't confuse an assignment with a sublease when dealing with real property. An assignment transfers all rights in the interest. A sublease only transfers part of the interest. Although this may likely occur under a Real Property question, the doctrine is grounded under contract law.

Let's now move away from this area.

MAIN HEADING 6: EXCUSES

Approach to Excuses.

There are three common concepts under this area: **(1) Impracticability; (2) Impossibility; and (3) Frustration of Purpose.** We'll cover these in a bit.

Excuses differ from Defenses to Formation in the following manner: when approaching excuses, there is no question that a contract has been formed (i.e., there are no defenses to the formation of a contract). Excuses apply to a different phase within the area of Contracts as a whole. Think of these topics in chronological order as this helps with organization.

Also keep in mind that a party may be excused without being in breach even if all requirements for a valid contract have been met. When an excuse is valid, that party may be discharged from his duty to perform and will *not* be liable for breach of contract. Now let's look at the black letter law for the individual terms.

Impracticability.

When unforeseen difficulties have made performance extremely burdensome. Both parties may be excused from performing.

Impossibility.

Objectively impossible performance and due to circumstances beyond the control of the parties. Both parties will be excused from performing.

Frustration of Purpose.

Where one party's purpose is completely frustrated by a supervening event, the performance will be discharged.

End of discussion.

MAIN HEADING 7: BREACH

Approach.

Before we discuss breach, we'll touch on the demand for adequate assurance. We'll then cover the doctrine of anticipatory repudiation and then go over minor and major breach.

Demand Adequate Assurance: Option for Non-Breaching party.

The insecure party may make a demand for adequate assurance of performance if there are reasonable grounds to believe that the party will not perform.

Common Law Versus UCC Distinction.

Under the common law, *no* writing demanding adequate assurance is needed (an oral demand is sufficient). Moreover, the response to the demand for adequate assurance is to be made within a reasonable time.

Under the UCC, the demand for assurance must be in **writing**. Furthermore, the response to the demand should be made **within 30 days**.

Anticipatory Repudiation Black Letter Law.

Prior to when performance is due, a party unequivocally states that he will not perform. Once a party has repudiated, the non-breaching party has four options:

- 1. Treat the contract as repudiated and sue immediately;**
- 2. Ignore the repudiation and urge performance;**
- 3. Suspend his own performance and wait until performance is due; or**
- 4. Treat the repudiation as an offer to discharge the contract.**

Let's now review minor and material breach.

MINOR AND MATERIAL BREACH BREACH CONTINUED MAIN HEADING 7

Minor Breach Black Letter Law.

Also known as a partial breach. Breach that is less severe than a material breach and it gives the harmed party the right to sue for damages but does not excuse him from further performance.

Material Breach Black Letter Law.

Occurs where the breach defeats the entire purpose of the contract.

Commentary.

This area has already been covered under the main heading that deals with *Performance*. If a breach is present, then the next discussion will be in the area of damages and **Remedies**.

Commentary.

While discussing conditions, we'll throw in these terms so that the terms won't catch you by surprise: (1) Substantial Performance; (2) Material Breach; (3) Minor Breach, (4) Perfect Tender Rule; (5) Installment Contracts; and (6) The Act of Accepting Some Parts and Rejecting Other Parts.

Substantial Performance Means You Get Paid!

Wait. You might rightfully ask: "What do all these terms mentioned above have to do with conditions?" Glad you asked. Here is the answer.

To put this in different words: payment of one party to the other party *may depend* on the quality of performance that the other party renders. Does this sound confusing? Put it this way: *Substantial performance from one party means he gets paid for performing*. To the contrary, if there is a *material breach*, the performing party may *not* get paid.

Conditions and Breach.

Let's reflect on conditions for a bit. On an actual exam, you may be required to identify whether a term is a *condition* or a *promise*. If it's a condition and that condition is not met, that may result in a material breach.

This topic confuses many bar candidates. Read this entire section but highlight this particular paragraph. Here is a tip: Read this past bar exam and the model answer. There are times when doing an act is easier than reading an explanation. This may be one of those times. This is not a difficult area to understand. But it is a difficult area to explain. Refer to *Answer B* of Question 4 of the July 2013 California Bar Exam. See the heading titled *Promise or Condition to Use Panels from Sun Company*. We'll put away the term Conditions for now (we'll return to it in a bit). Let's discuss the doctrine of substantial performance. See the next page.

SUBSTANTIAL PERFORMANCE

Substantial Performance Test.

Substantial Performance Test: whether the performance meets the essential purpose of the contract. However, substantial performance is not met if a material breach is present.

Note: The substantial performance doctrine is applicable only under the common law.

Material Breach Black Letter Law.

A material breach is a breach that goes to the heart of the contract's subject matter and impairs the outcome of the agreement.

Distinguish Material Breach With Minor Breach.

For minor breach, the harmed party (the non-breaching party) may *not* be excused from further performance. This is a *key distinction* from material breach.

Exam Tip: Look At The Language Of The Terms!!!

If a condition is present, look for words like *shall* or *must*. As an example, consider the following statement: *The house shall be painted blue as this is a material term of the contract.* The underline is added for emphasis. The other words are “this is a material term of the contract.” The language in this example helps to make the determination that a condition is present.

Again, if a condition is not met, this may result in a material breach. Let's look now at a promise (as opposed to a condition).

MAIN HEADING 8: REMEDIES.

Please refer to the Remedies chapter in this text.

CRIMINAL LAW & CRIMINAL PROCEDURE

Table of Contents

Murder at Common Law
First Degree Murder
Second Degree Murder
Voluntary Manslaughter
Involuntary Manslaughter
Insanity as Defense
Self-Defenses
Intoxication as a Defense
Exclusion of Evidence: Motion to Suppress
Search Warrants and Exceptions to Search Warrants
Exclusion of Statements: Motion to Suppress Continued
Exceptions to the Exclusionary Rule
Mistake of Fact
Mistake of Law
Specific Intent Crimes
General Intent Crimes
General Intent Crimes and Reasonable Mistakes
Peremptory Challenges

MURDER

Overview.

Before we get into the black letter for murder, think of the big picture. This includes thinking of the lesser-included offenses. See the pyramid below. Think of a hierarchy. Thus, first degree murder will be more severe than involuntary murder.

Begin with murder at common law at the top. Then at the bottom place involuntary manslaughter. The key is to become aware of the types of crimes listed here.

Overview:

Murder at Common Law

1st Degree Murder
2nd Degree Murder

Voluntary Manslaughter
Involuntary Manslaughter

Let's now discuss the black letter law.

MURDER AT COMMON LAW

Common Law Murder

Under the common law one is guilty if he kills with malice aforethought. Malice can be found where there is either: (1) Intent to kill; (2) Intent to cause great bodily injury; (3) Depraved-heart murder; or (4) intent to commit a felony that results in a killing (also known as felony murder). These are discussed below.

(1) Intent to Kill.

Where the death is caused by the purposeful use of a deadly weapon, intent to kill is implied. Note: Keep a close eye on the use of a gun or knife in the fact pattern.

(2) Intent to Cause Great Bodily Injury.

Look for the amount of force that is being applied. Look for an amount of force in the fact pattern: "such great force that it threw Victim to the floor."

Example:

Here, the intent was to cause great bodily injury because he struck Vic with such force that it threw Vic to the floor and fractured his skull. Therefore, D acted with malice.

(3) Depraved-Heart Murder.

Reckless indifference to an unjustifiably high risk to human life.

(4) Felony Murder.

These elements must be met for liability under felony murder: (1) the defendant must be guilty of the underlying felony; (2) the felony must be distinct from the killing; (3) death must have been a foreseeable result of the felony; and (4) the death must have occurred during the commission of the felony.

Note:

The death of a co-felon can fall under felony murder.

Moreover, the crime of Felony Murder can fall under 2nd Degree Murder. There is no “correct placement.” What is more important is that you are organized. As such, placing Felony Murder under Common Law Murder is a safe place.

Death of a Co-Felon Defenses

There are two rules here: (1) The Redline view and (2) The proximate cause rule.

(1) Redline View.

Under the Redline view (the majority rule), a defendant is guilty if a felon or his agent did the killing.

(2) Proximate Cause Rule.

Under the proximate cause rule, a defendant will be guilty for any killing caused during the commission of the felony that is foreseeable.

This concludes the discussion on murder at common law. Let’s move now to first degree murder.

FIRST DEGREE MURDER

First Degree Murder Black Letter Law.

One is guilty of murder if the killing was deliberate and premeditated. Moreover, deliberation can occur for a brief period.

Commentary.

The key words here are *deliberate* and *premeditated*. When you see these words, immediately think of first degree murder. Usually, second degree murder will not have these two words. Let's go to second degree murder now.

SECOND DEGREE MURDER

Second Degree Murder.

Second degree murder is all other killings that do not qualify as first-degree murder.

Note.

Study this well. It can be confusing at first. This issue is also highly tested on the MBE. The key is to understand two things about second degree murder: (1) You must understand that second degree murder is a creature of statute. As such, different states will word this statute differently. This is the reason why this rule changes so much on exam material. (2) Another exam tip is to understand that second degree murder can be **placed between first degree murder and voluntary manslaughter**. With this in mind, let's now go voluntary manslaughter.

VOLUNTARY MANSLAUGHTER AND INVOLUNTARY MANSLAUGHTER

Voluntary Manslaughter Black Letter Law.

The killing of a human that occurs with adequate provocation. This is also known as the offender acting in the heat of passion. Under these circumstances a reasonable person would lose self-control. Also, there must be no sufficient time between the provocation and the killing (no "cool off" period).

Commentary.

A common hypothetical here is when the husband arrives at home to find his spouse engaging in sexual relations with another man. In such a case, the actions of the husband could meet the definition of being committed in the heat of passion.

Involuntary Manslaughter Black Letter Law.

An involuntary manslaughter occurs when an offender commits a killing with criminal negligence or during the commission of an unlawful act.

Commentary.

Notice the two principal main elements. (1) One is *criminal negligence* and (2) the other is *during the commission of an unlawful act*. Let's discuss these two separately. We'll begin with

involuntary manslaughter.

(1) Criminal Negligence Black Letter Law.

When a defendant negligently commits a reckless act that results in the death of another. This type of criminal negligence can also be called “gross negligence.” This is more than tort negligence since the conduct creates a high degree of risk of death or serious bodily injury.

Commentary.

Again, the wording may vary depending on jurisdictions. The key here is to remember that the act exceeds civil negligence (a tort action). Driving while intoxicated can be placed here.

(2) Unlawful Act Manslaughter Black Letter Law.

Where the death occurs during the commission or attempted commission of an unlawful act.

Commentary.

Again, the unlawful act cannot be a felony. Otherwise, it will probably be placed under the felony murder rule.

This type of manslaughter is also referred to as *Misdemeanor Manslaughter*. Moreover, a serious traffic offense can also be included here (depending on the wording of any given statute).

Further Readings.

Since murder is a heavily tested topic (even on the MBE), it is highly advisable that you view past essay exams on the topic. Here is a list of where murder has appeared on past exams (this is not an exhaustive list).

1. **July 2004**, Question 1. 2. **February 2007**, Question 3. 3. **February 2008**, Question 3.

Let's now turn to the area of defenses. We'll begin with insanity.

INSANITY AS DEFENSE

Insanity

We will consider some key defenses. There are four main areas here: (1) M’Naghten Rule, (2) Irresistible Impulse Test, (3) Durham Test, and (4) ALI Model Penal Code Test. We’ll begin with the M’Naghten Rule.

(1) M’Naghten Rule Black Letter Law.

Offender will not be liable if he had a mental disease or defect that caused him to either (1) not understand the nature and quality of his actions; or (2) not know that his act would be wrong.

Commentary.

In essence, this is what the first prong is stating: the defendant does not know what he is doing. This is more about **cognitive capacity**. That is to say that the defendant does not have the intellectual ability to properly reason.

The second prong is an alternative definition. This one deals with **lack of moral capacity** (moral being the difference between right and wrong). To use a metaphor, the defendant lost his moral compass.

(2) Irresistible Impulse Test Black Letter Law.

A defendant will not be liable if he has a mental illness and he was unable to control his actions.

Commentary.

Think about the literal meaning of *irresistible impulse* here. It simply means that he is not able to control his actions.

(3) Durham Test Black Letter Law.

Excludes the defendant from punishment for his criminal conduct that is the product of a mental disease or defect.

Commentary.

Think of the “but for” test here. But for the mental disease, the crime would not have been committed. This test is broad.

(4) Ali Model Penal Code Test Black Letter Law.

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

Commentary.

This test is a combination of the Irresistible Impulse Test (cannot conform his conduct) and the M’Naghten Rule (can’t appreciate the wrongfulness of the act).

Let’s look at other defenses to murder crimes.

OTHER DEFENSE: SELF-DEFENSE MURDER CRIMES CONTINUED

Don’t forget about self-defense when discussing murder. This may or may not be applicable.

Self-Defense.

Self-defense is the use of reasonable force to protect oneself at a reasonable time. Deadly force may only be used to protect against the use of deadly force. *See* Answer A, Question 3 of the February 2008 California Bar Exam.

Imperfect Self-defense.

This defense is available to a person who engages in good faith but unreasonable self-defense. It is a mitigating defense to murder. It can take a murder charge down to manslaughter. Let’s look at intoxication now. This can also be a defense to murder.

INTOXICATION DEFENSE

VOLUNTARY INTOXICATION AND INVOLUNTARY INTOXICATION

Voluntary Intoxication Black Letter Law.

Defense to crimes that require specific intent.

Note: As such, voluntary intoxication will not be a defense to non-intent crimes or general criminal intent.

Involutary Intoxication Black Letter Law.

Can result from taking intoxicating substance without knowledge, under duress, or prescribed by a medical personnel. The defendant must prove the two elements: (1) The defendant was involuntarily intoxicated and (2) that because of his intoxication he was rendered legally insane during the time he committed the offense. Source: 73 A.L.R.3d 195 (Originally published in 1976).

Commentary.

Involutary intoxication has been tested before on the California Bar Exam. *See* Question 3 of the February 2003 California Bar Exam. Below is the model response “A”. It is suggested you study this particular exam. Some words have been changed to **bold** to emphasize key terms.

EXCLUSION OF EVIDENCE MOTION TO SUPPRESS

Fourth Amendment.

Here is an overview of the issues you should present. This will encompass both criminal law and criminal procedure.

- **4th Amendment Protection Against Unreasonable Search and Seizures.**
- **Warrant requirements and exceptions to the warrant requirements.**
- **The Exclusionary Rule to exclude evidence.**
- **Inevitable Discovery Rule.**

Let's run through the setup. Let's assume suppression of cocaine is at issue.

Issue: Suppression of Evidence (e.g., exclusion of cocaine).

1. Defendant's Motion to Suppress Cocaine.

Begin by providing the black letter law to the 4th Amendment.

4th Amendment Black Letter Law.

The 4th Amendment prohibits unreasonable searches and seizures. A defendant must first meet two elements to bring forth the claim: (1) Show that there was government action and (2) That there was a search and seizure.

(1) Government Action.

The 4th Amendment protects against governmental conduct.

Commentary.

Usually this element is met when a police officer makes the arrest.

(2) Search and Seizure

A search occurs when an officer searches a location where a person has a reasonable expectation of privacy. Examples include a physical search of the person's body, a search of the person's home, or eavesdropping on private conversations through wiretapping.

A seizure occurs when a person's freedom of movement is limited by an officer such that the person would not feel free to leave the officer's presence.

Commentary.

After you analyze search and seizure, you may have to discuss the Exclusionary rule.

Exclusionary Rule Black Letter Law.

The exclusionary doctrine prohibits introduction of evidence obtained in violation of the 4th, 5th, and 6th Amendments. If the exclusionary rule applies, unconstitutionally obtained evidence will be inadmissible at trial.

Commentary.

This is also known as the “fruit of the poisonous tree” doctrine. Once you have this set up, move to the search warrant requirements. More than likely you will have to discuss the *exceptions* to the search warrant. Let’s move now to this area.

SEARCH WARRANTS & EXCEPTIONS TO SEARCH WARRANTS

Warrant Requirement Black Letter Law.

A search and seizure is permissible if the government agent has a search warrant. A valid warrant requires a showing of probable cause.

Note: Elements to a search warrant are as follows: (1) a good faith requirement by the officer is needed; (2) The information must be based on reliable information showing probable cause; (3) It must be issued by a neutral and detached magistrate; and (4) The warrant must state specifically the place and items to be searched and/or seized.

Commentary.

Usually, a search warrant will not be present. Quickly discuss that it is not present (if this is the situation), and then move on to *exceptions to the warrant requirement*.

Probable Cause.

Since probable cause is part of the warrant requirement, let’s look at the black letter. Keep in mind that you will probably not be required to discuss probable cause.

Probable cause is found when there is a reasonable basis for believing that a crime may have been committed.

Commentary.

Just use the key words above to describe probable cause. The key words are *reasonable basis*. If you want to get technical with the definition, here is how the U.S. Supreme Court defines it:

Test for probable cause to search is not reducible to precise definition or quantification, and finely tuned standards such as proof beyond reasonable doubt or by preponderance of evidence have no place in probable-cause decision; all that is required is the kind of “fair probability” on which reasonable and prudent people, not legal technicians, act. U.S.C.A. Const.Amend. 4. Fla. v. Harris, 568 U.S. 237 (2013).

Search Warrant Exceptions.

This is usually where a healthy amount of the points come from. Remember the mnemonic ESCAPIS. These are just the common exceptions.

E - Exigent Circumstances.

S - Search Incident to Arrest.

C - Consent.

A - Automobile Search.

P - Plain view.

I - Inventory.

S - Stop and Frisk.

Commentary.

There are opportunities to gain essential points when discussing these exceptions as demonstrated in previous exams. For example, discuss the facts when the police ask a motorist to step out of a vehicle during a checkpoint stop. Also, discuss the facts when the police enter the home even though the occupant does not give consent. The facts can be subtle so be especially attentive here.

Exceptions to the Exclusionary Rule.

The Inevitable Discovery Rule is an exception to the Exclusionary Rule. These exceptions will be discussed after the area of excluding statements under the 5th and 6th Amendments below.

Let's now go to the discussion relating to the exclusion of statements.

EXCLUSION OF STATEMENTS MOTION OF SUPPRESSION CONTINUED

Approach to Excluded Statements From Evidence.

This is another highly tested area. The focus here will usually be on statements made by the defendant. The focus here will be on the **5th and 6th Amendments** (suppression of *physical* evidence mostly falls under the 4th Amendment).

The Essential Setup.

In essence, first discuss the **Miranda Warnings** under the **5th Amendment**. Then discuss the **right to counsel** under the **6th Amendment**.

5TH AMENDMENT

5th Amendment Black Letter Law.

The 5th Amendment provides for a privilege against self-incrimination. The Supreme Court has held that a defendant must be given Miranda warnings before any confessions by the defendant are admissible against the defendant (unless used to impeach).

Miranda Warning.

Police officers (or other government actor) must give the suspect warnings about his rights once he is subject to custodial interrogation. The warnings must inform the suspect of the right to remain silent, the right to an attorney, and that the attorney will be provided for him if he cannot afford one. Miranda is triggered where the Defendant is (i) in custody and (ii) interrogated.

Government Actor.

The element requires that a state actor, such a police officer, be involved.

Custody.

Custody is defined as a place where a reasonable person would not feel free to leave.

Interrogation.

The element requires that the police ask the defendant questions that would be reasonably likely to lead to an incriminating response.

Commentary.

Undercover Police Informant in Jail.

Courts have upheld the admissibility of statements obtained by police informants when the defendant did not know the informant was working for the government. The rationale is that the coercion factor is not so high. The reason being that the defendant is free to not speak to the informant.

Line Ups (Non-Testimonial Speech).

Non-testimonial speech include line ups and other identification procedures. The evidence must be used for identification purposes and not as testimony. Testimonial statements include statements from a preliminary hearing, a grand jury hearing, a former trial, or police

interrogation conducted to establish or prove past acts. This is not an exhaustive list.

Now let's move to the 6 Amendment. We are still under suppression of a statement.

**6TH AMENDMENT
EXCLUSION OF STATEMENTS
MOTION TO SUPPRESS CONTINUED**

6th Amendment Black Letter Law.

The 6th Amendment guarantees the right to the assistance of an attorney in all criminal proceedings. This includes all critical stages of the proceedings. The right attaches once formal adversarial judicial proceedings have commenced, such as formal charges, arraignment, or indictment.

Waiver.

A defendant can waive his right to counsel. The rule now follows.

Voluntary Statement.

Under the 14th Amendment, an incriminating statement or confession is admissible only if it was voluntary. The statement must be rational, under free will, and not the product of coercion.

Exclusionary Rule

The exclusionary rule prohibits introduction of evidence obtained in violation of a defendant's 4th, 5th, and 6th Amendment rights. If the rule applies, unconstitutionally obtained evidence will be excluded as evidence at trial.

Commentary.

This is the same exclusionary rule that was discussed earlier under suppression of physical evidence. If you discussed it before, there is no need to state the rule again. A mere "See rule above" is sufficient. Now that we are on this topic, let's discuss exceptions to the exclusionary rule.

**EXCEPTIONS TO THE EXCLUSIONARY RULE
MOTION TO SUPPRESS CONTINUED**

Approach to Exceptions to the Exclusionary Rule.

The exceptions apply to the Exclusionary Rule where the violation occurs under the 4th Amendment, 5th Amendment, and/or the 6th Amendment. Let's look at three popular rules under

this topic: (1) Independent Source Doctrine; (2) Inevitable Discovery Rule; (3) Good Faith Exception.

(1) Independent Source Doctrine.

Evidence obtained from a source independent of the unlawful search can be admissible. The rationale being that even if the police had acted unlawfully, the evidence was still discoverable from a separate source that was independent of the unconstitutionally obtained evidence.

(2) Inevitable Discovery Rule.

This is evidence that would have been inevitably discovered through lawful means.

Commentary.

This rule is closely related to the Independent Source Doctrine.

(3) Good Faith Exception.

This applies when officers had a reasonable and good faith belief that they were acting according to legal authority. An example is when the officers rely on a search warrant that is later found to have been legally defective.

Commentary.

Keep this in mind when discussing the Good Faith Exception:

“This exception is not available, however, when any of the following is true: (i) the warrant, on its face, is so lacking in probable cause that no reasonable officer would rely on it, (ii) the warrant, on its face, is so lacking in particularity that no reasonable officer would rely on it, (iii) the affiant officer misled the magistrate in issuing the warrant, or (iv) the magistrate was so biased against the object of the warrant that he could be said to have given up all neutrality.” *See* Selected Answer A, Question 6 of the February 2017 California Bar Exam.

MISTAKE OF FACT & MISTAKE OF LAW

Initial Questions.

Question 1: **Can mistake of fact be a defense?**

Question 2: **Can mistake of law be a defense?**

First we'll state the answers and then provide the reasoning below.

Answer to Question 1: **Yes, mistake of fact can be a defense.**

Answer to Question 2: **No, mistake of law is almost always never a defense.**

Commentary.

Notice that **general intent** crimes or **specific intent** crimes are *not* mentioned above. These concepts will be discussed later in relation to mistake of fact and mistake of law.

MISTAKE OF FACT

Mistake of Fact Black Letter Law.

Arises when an offender misunderstood a fact that negates an element of a crime. The mistake must be honest and reasonable.

Commentary.

Think of a person that takes a cell phone from a busy restaurant believing it was his. The phone is the same brand and the same color. In such a situation, the mistake seems honest and reasonable.

To the contrary, consider the same situation of a cell phone on a table. However, the person is repeatedly told by two people that it is not his phone because of the brand and the color. In such a situation, it would not be reasonable and the defense would not be available.

Mistake of Fact and Attempted Crime.

Mistake of fact will not aid where there is an attempted crime.

Commentary.

Be careful when discussing mistake of fact. Take note that the defense will *not* apply where there exists an attempted crime. An example is listed below.

Consider these facts from a past bar exam. *See* Question 4 of the July 2007 California Bar Exam. Relevant parts are in bold for emphasis.

Facts.

Defendant Dan believed that he intentionally burned of a copy of the **United States Constitution**. Moreover, there is a state statute that made it a misdemeanor to burn a copy of the U.S. Constitution.

As it turned out, the document that Dan burned was actually a copy of the **Declaration of Independence**, not of the U.S. Constitution, as he believed.

End Facts.

Question. Will Dan be found liable?

Selected Answer B.

Mistake of Fact

D's motion to dismiss is based on a **mistake of fact defense**. Namely, he is arguing that, because he actually burned a copy of the Declaration of Independence, not the U.S. Constitution as he thought, he should not be found guilty for attempt.

D will fail in this defense because mistake of fact is **not a good defense to attempt**. That is because, here, if the circumstances had been as D believed (to burn the Constitution), he would have been guilty of the misdemeanor. The fact remains that, had the circumstances been the way he believed them to be, he would have been guilty of the crime of receipt of stolen goods.

Here, D's mistake of fact **may be a defense to the actual misdemeanor itself**, but will **not provide a defense to attempt**.

End Model Answer.

Now let's move away from mistake of fact and direct our attention to mistake of law.

MISTAKE OF LAW

Mistake of Law and Black Letter Law.

When an offender misunderstands or is not aware that a law exist, the mistake of law doctrine will *not* serve as a defense.

Exceptions.

Limited exceptions apply in the following situations: (1) When the law is not published; (2) When there is reliance on a statute that is later overturned; (3) When there is reliance on a judicial decision that is later overturned; or (4) when there is reliance upon an interpretation by an applicable official.

Let's now see how the areas of **specific intent** crimes and **general intent** crimes would impact the analysis. It is emphasized here that we will focus on **mistake of fact** since that legal concept can serve as a defense.

SPECIFIC INTENT CRIMES AND GENERAL INTENT CRIMES, MISTAKE OF FACT CONTINUED

Review.

We have established that **mistake of fact** can serve as a defense (again, *mistake of law* will usually *not* serve as a defense). Now, let's get more specific (pun intended) in the application of this defense involving mistake of fact. In this section, we'll discuss **specific intent** crimes and **general intent** crimes. Here is an overview of what will be discussed.

Question: **Will mistake of fact serve as a defense to *specific* intent crimes?**

Answer: **Yes. Mistake of fact can serve as a defense to *specific* intent crimes.**

Question: **Will mistake of fact serve as a defense to *general* intent crimes?**

Answer. **No. As a general rule, mistake of fact will not serve as a defense to *general* intent crimes.**

However, Mistake of fact can serve as a defense to *general* intent crimes if the mistake is reasonable. We will further discuss the **reasonable mistake** concept (for general crimes) on the next page.

Let's now briefly discuss the differences between specific intent crimes and general intent crimes.

Specific Intent Crimes versus General Intent Crimes.

Most examinees can recite the crimes that go under specific and general intent. However, many do not understand how to *apply* these crimes when performing a mistake of law analysis. We have already covered the area of mistake of law so we are on the right track here. Let's talk first about general intent crimes because the list is a lot shorter there (it's much more manageable than for specific intent).

General Intent Crimes.

The offender does not have *mens rea* to commit the crime. In other words, he does not have the intent.

There is a list below of some common general intent crimes (e.g., most of you know the acronym BARK): **Battery; Assault; Rape; Kidnapping.**

Example.

United States v. Goodman, 70 M.J. 396, states that mistake of fact is a special defense. It is a defense when it negates the existence of a mental state essential to the crime charged. In other words, an accused may not be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense.

If the ignorance or mistake of fact goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.

However, if the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

In *Goodman*, an E-4 enlisted service member engaged in sexual harassment against an E-3 female junior service member. Although the enlisted man did not know he had the mental state to engage in sexual harassment, the court ruled against him because he had general knowledge of sexual harassment rules against junior service members.

Specific Intent Crimes.

The offender has the *actus reus* (the intent) to commit the crime.

Here is a list of some common specific intent crimes:

- Burglary**
- Child Molestation**
- Conspiracy**
- Embezzlement**
- False Pretenses**
- Forgery**
- Solicitation**

Commentary.

The areas of mistake of fact and general intent and specific intent can be confusing. Take time to review this section more than once if necessary. Now, let's go back and return to the area of general intent crimes and reasonable mistake.

GENERAL INTENT CRIMES AND REASONABLE MISTAKE

Approach to General Intent (and Reasonable Mistake).

In this section, the focus will be on the impact of a *reasonable* mistake on a *general* intent crime. Here is a review from earlier in this section.

General Intent Black Letter Law.

A mistake of fact will not serve as a defense to *general* intent crimes. However, mistake of fact can serve as a defense to *general* intent crimes if the mistake is reasonable.

Unreasonable Mistake and Specific Intent Crimes.

Let's not forget the discussion on *specific* intent crimes. There, we have established that a mistake will insulate a person from a specific intent crime. There, the **mistake can be either reasonable or unreasonable**. Pretty straight forward, correct? It is the general intent crimes that require a bit further discussion. Now, let's go back to general intent crimes.

Commentary on General Intent and Mistakes.

The law here is subject to statutory discretion based on jurisdiction. As such, *some* states allow a reasonable mistake to serve as a defense when a general intent crime has occurred. Now, let's move away and examine the areas of factual and legal impossibility.

FACTUAL AND LEGAL IMPOSSIBILITY

Factual and Legal Impossibility Black Letter Law.

Legal impossibility means that the defendant believes what he or she is attempting to do is illegal, when it is not. Factual impossibility means that the defendant could not complete the crime attempted because the facts are not as he or she believes them to be.

Examples.

Legal Impossibility: The thing you are attempting to do is not a crime. You certainly attempted, but you attempted something...perfectly legal, although you thought it wasn't. (Policy: You cannot punish people for thought crimes; in this situation, there is no actus reus, so punishing someone for a legally impossible attempt at crime is tantamount to punishing them for a thought crime.)

Factual Impossibility: You attempted to commit a crime, but due to some fact, the crime was never possible to have been committed from your attempt. (ex: you plan to ambush and murder X at Y location he normally frequents at Z time. You buy a gun and wait for X. Turns out X has moved to a different country, so it was never possible for your attempt to result in a crime). This is still a crime because if he had been there, you would have murdered him. You have both a guilty mind and a guilty act (mens rea and actus reus), so you are guilty of attempt. Reddit. /r/barexam. User: cm5453.

PEREMPTORY CHALLENGES

Peremptory Challenges Black Letter Law.

Each party has a limited number of special challenges. This means that a party can exclude a potential juror without explanation. However, exclusions based on race, ethnicity, or sex are not allowed.

Moreover, when the attorney and the court believe that a juror cannot be fair, the process is called a "for cause" challenge (versus peremptory challenge).

Commentary.

Voir dire is the jury selection process. It is during this phase that lawyers from each side select jurors they believe will result in favorable outcomes.

Look for a fact pattern where a party seeks to remove jurors based on the juror's personal beliefs. For example, the party may seek to exclude those that advocate the death penalty for convicted felons. This is impermissible unless the moving party shows cause. Let's move away from this topic now.

EVIDENCE

Table of Contents

- Summary of Checklist
- 1st Main Heading: Relevance
 - Logical Relevance
 - Legal Relevance
 - Proposition 8 (California)
 - Public Policy Considerations
 - Confrontation Clause
- 2nd Main Heading: Presentation
 - Testimony
 - Authentication
 - Best Evidence Rule
- 3rd Main Heading: Character Evidence
 - Defendant Opens the Door
 - MIMIC
- 4th Main Heading: Impeachment
 - Prior Inconsistent Statement
- 5th Main Heading: Privilege
 - Spousal Communication Privilege
 - Spousal Testimonial Privilege
- 6th Main Heading: Hearsay
 - Non-Hearsay
 - Hearsay Exceptions (Declarant Unavailable)
 - Hearsay Exceptions
 - Double Hearsay
- Objections to the Form of a Question

Basic Question: Is the Evidence Admissible at Trial?

This content contains basic approaches to issues that appear in Evidence essay questions. To be admissible, run through this checklist. Also, the federal rules (FRE) will apply unless otherwise indicated.

Summary of Checklist.

Run through this checklist.

1st Main Heading: Relevance.

2nd Main Heading: Presentation.

3rd Main Heading: Character.

4th Main Heading: Impeachment.

5th Main Heading: Privilege.

6th Main Heading: Hearsay.

Explanation.

1st Main Heading: Relevance.

Two Rules.

- 1. Logically Relevant.**
- 2. Legally Relevant, including Public Policy Issues** (e.g. offers for settlement).

2nd Main Heading: Presentation. (Remember the acronym "TAB.")

- 1. Testimony:** (1) Personal Knowledge or (2) Expert Witness
- 2. Authentication.**
- 3. Best Evidence Rule (BER).**

3rd Main Heading: Character Evidence.

Remember that character evidence is not proper unless

4th Main Heading: Impeachment.

Is the evidence offered to impeach?

5th Main Heading: Privilege.

Examples include relationships such as marriage and relationships between an attorney and a client.

6th Main Heading: Hearsay.

These are out of court statements.

Three Types of Hearsay.

- 1. Non-Hearsay (CA: Hearsay Exemptions).**
- 2. Hearsay Exceptions (Declarant Unavailable).**
- 3. Hearsay Exceptions.**

See below for detailed explanations.

Objections to the Form of a Question (During Trial). See end of document.

1st MAIN HEADING: RELEVANCE

Both FRE and California Rules

FRE Relevance Black Letter Law.

Logical Relevance.

To be relevant, the evidence must have any tendency to make any fact that is of consequence to the determination of the action more or less probable than without the evidence.

Legal Relevance.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues.

California Relevance Black Letter Law.

Approach to Prop 8.

Discuss Prop 8 only if it is a criminal setting. For the bar exam, if you are instructed to answer based on California law, it will most likely be a criminal setting. State this rule, then move on to the discussion of logical and legal relevance.

Prop 8. Black Letter Law.

Under Proposition 8 of the California constitution, all relevant evidence is admissible during a criminal trial, unless it is subject to an exclusion such as hearsay or privilege. See Selected Answer A, Question 4 of the California Bar Exam February 2022.

Logical Relevance.

For evidence to be admissible it must be relevant which, under California law, is any evidence that has any tendency to prove or disprove **any disputed fact** that is of consequence to the determination of the action.

Legal Relevance.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues.

Exam Tip: Relevance Shortcut.

If you are running short on time, and relevance is not a major issue, use this shortcut for both logical and legal relevance.

The X is logically relevant because it tends to prove (*what is at issue*). **It** (*describe the evidence*) **is also logically relevant because it is not unduly prejudicial in this context because** (*state the reason or just say "there are no facts to suggest it."*)

LEGAL RELEVANCE CONTINUED

Legal Relevance and Public Considerations.

Just in case you are wondering about privileges, you can categorize it here under **legal relevance**. The reason is that some rules pertaining to privilege also include **public policy considerations**. As such, a good outlining format can look like this:

Legal Relevance.

Public Policy Considerations.

Privilege: Husband-Wife Relationship.

Calling a Potential Witness With Privilege To The Stand.

Many times, the examiners will ask you whether a “prospective witness” may be called to the stand. Moreover, this witness may not be called to the stand by the opposing party due to the presence of privilege. This sounds like a simple question to answer. But many test takers get distracted by other elements in the exam. Here, we’ll present an example of how this question has appeared. We’ll also provide a model response.

Exam Tip.

You may get extra points if you discuss whether the person called to testify can claim a privilege to prevent from being put on the stand. Stop and think for a moment. The question is not just

asking if the potential witness has privilege. It goes to a level more profound. Here is the issue to identify: *can the prospective witness even be called to the stand in the first place.*

To fully appreciate this question, think of some witness that may be in a privileged relationship. Here is a partial list: (1) Physician-patient privilege; (2) Attorney-client privilege; and (3) husband-wife relationship (most common scenario).

Sample Question.

Here is how the question will look like. This is from Question 3 of the July 2012 exam.

“Assuming all appropriate objections and motions were timely made, did the court properly: 1. Allow the prosecution to call Whitney [the wife]? Discuss.” *Commentary in [brackets] added.*

Many examinees miss the discussion of calling the witness to the stand. Here is a sample answer that correctly identified the issue.

Sample Response.

1. Allow the Prosecution to call Whitney

The first issue is whether the prosecution should be allowed to call Whitney. This depends on whether Whitney ("W") can claim one of the spousal privileges: spousal communications privilege or spousal testimonial privilege. *See Selected Answer A.*

FIRST MAIN HEADING: RELEVANCE UNDER PUBLIC POLICY CONTINUED Confrontation Clause

Confrontation Clause Black Letter Law.

The confrontation clause bars admission of testimonial statements of a witness who did not appear at trial unless (1) The witness was unavailable to testify; and (2) the defendant had a prior opportunity for cross-examination.

Comments.

The rule sounds confusing. But don't be troubled. Think of it this way: if a person is being accused, a person bringing forth testimony against him must be subject to cross examination. Simple right? However, when tested, the fact pattern will *not* be as straightforward. For example, the person that is doing the accusation may even be difficult to identify in the fact pattern. Consider this scenario.

First Hypothetical.

Boyfriend calls 9-1-1 stating that Girlfriend just beat him. Boyfriend wants the police to help immediately.

Did you catch the fact that Boyfriend may have been accusing Girlfriend of a crime? This is because the 9-1-1 call may be used against Girlfriend to convict her of a crime.

What sticks out here is whether Boyfriend's 9-1-1 call was **testimonial in nature**. We'll discuss the rule for *testimonial in nature* in a bit.

Second Hypothetical.

How about these set of facts? It's a continuation from the first hypothetical. See what you make of them:

At Girlfriend's trial, Boyfriend takes the stand. However, Boyfriend refuses to identify the name of the person that beat him on the day he made the 9-1-1 call.

Did you notice that Boyfriend may now fit the definition of being unavailable? Why? Because he is being non-cooperative (he does not want to accuse Girlfriend). You have to pay close attention to the facts.

By the way, some of you recognized the fact pattern as being similar to the facts in *Davis v. Washington*. Moreover, a similar fact pattern appeared as Question 2 of the July 2018 California Bar Exam. Let's look at this bar exam question a bit closer.

Evidence Question in July 2018 and Key Facts.

Below are some key facts in the hypothetical.

1. Battery of a domestic partner.
2. 9-1-1 call.
3. Victim's reporting of the perpetrator during the 9-1-1 call.
4. Declarant Vic is unavailable to testify against Defendant Deb.
5. Vic called two minutes after beating.

The Central Issue: Whether Statement Was Testimonial in Nature.

The crux of the issue will usually be as such: was the statement testimonial in nature?

- If this statement *was testimonial* in nature, then the following should be discussed:
 - Did the defendant have an opportunity to cross-examine the witness?
- If the statement *was not testimonial*, then the Confrontation Clause is not implicated.
 - The statement can be admitted if it falls under a **hearsay exception**.

Summary:

In sum, your discussion should answer whether the statement was **testimonial in nature**.

Two Possibilities.

(1) Yes, the statement is testimonial. The confrontation clause is implicated under the 6th Amendment.

(2) No, the statement is not testimonial. The statement is not subject to the confrontation clause under the 6th Amendment.

Definition of Testimonial.

Let's now discuss the definition of *testimonial in nature*.

Two Terms.

There are two definitions here: (1) Testimonial and (2) Nontestimonial.

Let's discuss testimonial evidence first.

Testimonial Statement Black Letter Law.

The Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.

Moreover, where *no* on-going emergency is present, this may be an indication that testimonial statements are being produced. We'll look at an example where there is an emergency in the following section. Let's go there now.

Nontestimonial Statement Black Letter Law.

Statements taken by police officers in the course of an interrogation are nontestimonial, and *not* subject to the Confrontation Clause. When they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, then they will be determined to be nontestimonial.

Reach A Conclusion.

In your analysis, discuss as to whether there is a testimonial statement or not. Reach a conclusion and move on.

Conclusion: What Is The Last Step in a Confrontation Clause Analysis?

There are two possible scenarios here. Here they are:

(1) The statement was testimonial in nature. If this is the case, the defendant must have had an opportunity to cross-examine the witness. Discuss this in your analysis.

(2) If it is not testimonial in nature. If this is the outcome, then the prosecutor can introduce the evidence. However, the statement must still fall under a **hearsay exception**.

Let's do an example.

Let's go back to the earlier matter between Girlfriend and Boyfriend. We will assume that Boyfriend's 9-1-1 call was *not* testimonial. You give your reasons why (e.g., there was no ongoing emergency).

The next step then is to find a **hearsay exception**. Hearsay exceptions will be covered later. But you get the idea here. If the statement falls within a hearsay exception, then the statement will be admissible.

Further Reading.

For further reading on the Confrontation Clause, refer to *Davis v. Washington*, 547 U.S. 813 (2006).

SECOND MAIN HEADING: PRESENTATION

Introduction.

Here are the main headings under Presentation.

2nd Main Heading: Presentation. ("TAB": 3 Ways.)

1. **Testimony:** (1) Personal Knowledge or (2) Expert Witness
2. **Authentication** is proper.
3. **Best Evidence Rule** (BER).

TESTIMONY

Personal knowledge is a very common and simple issue to discuss. Briefly discuss it.

AUTHENTICATION

Voice Authentication and Black Letter Law.

All evidence must be authenticated, in that it must be proven to be what it purports to be. ... To authenticate a phone call, the person hearing it must be shown to have some familiarity with the speaker's voice, which can be gained either from prior interactions before the trial or subsequent to the trial. See Selected Answer A, Question 3 of the July 2010 California Bar Exam.

BEST EVIDENCE RULE

Best Evidence Rule and Black Letter Law.

When the content of a document is at issue, the original must be introduced as evidence.

3rd MAIN HEADING: CHARACTER EVIDENCE

Character Evidence and Black Letter Law.

Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

Commentary.

Start by stating that character evidence is not admissible. Then jump into the exceptions.

Character of the Accused.

Recall that the character of an accused (the defendant), is not admissible unless some type of exception is present. We now list the two rules under which the character of the accused is admitted: (1) He "opens the door;" and (2) under MIMIC.

The Defendant Opens The Door.

1. Reputation or Opinion testimony may be properly offered by the accused. Upon occurrence, the accused "opens the door" and on cross-examination, the prosecution may rebut the evidence.

MIMIC.

2. MIMIC. Evidence of specific acts of the defendant is admissible to show (1) Motive; (2) Intent; (3) Mistake; (4) Identity; or (5) Common Scheme.

4TH MAIN HEADING: IMPEACHMENT

Impeachment of a Witness: Six Common Ways.

Here are **six common ways** in which to impeach a witness. The most tested form of impeachment on essays is prior inconsistent statements. Nonetheless, the rest are listed. This will be followed by a discussion on prior inconsistent statements.

(1) Extrinsic Evidence and the Material Rule (Not Admissible for Collateral Matters); (2) Bias; (3) Poor Testimonial Capacities; (4) Prior Inconsistent Statement; (5) Opinion, Reputation, or Past Acts; (6) Prior Criminal Convictions - Propensity for Untruthfulness.

Approach to Prior Inconsistent Statements.

We'll focus on the federal rules and the California rules. There is no major difference except that the federal rules require the first statement to be under oath. We'll run through some examples.

FRE Prior Inconsistent Statement Black Letter Law.

The statement is made (1) under oath at a trial, hearing, or deposition; (2) it is inconsistent with the statement at trial; and (3) the declarant is subject to cross-examination.

CA Rule Prior Inconsistent Statement Black Letter Law.

The statement (1) is inconsistent with the statement at trial; and (2) the declarant is subject to cross-examination. Let's begin with the first of six ways in which to impeach a witness. This is the area of extrinsic evidence.

Commentary.

A prior inconsistent statement can be used as substantive evidence (as a hearsay exception) and to impeach.

Exam Tip.

Many times, you will see an explanation that reads something along these lines: admissible as substantive evidence and to impeach.

Substantive evidence is evidence offered to support a fact in issue. Distinguish this from the purpose to impeach. Remember that they can overlap. In the example above, a prior inconsistent statement is used for both purposes.

How This Impeachment Issue Has Appeared On Past Exams.

In the following fact pattern, Defendant Donna denies that she offered to pay Plaintiff Pete for medical expenses. Then later in the hypothetical, there is an inconsistent statement. Here is the relevant text:

On cross-examination, Donna was asked whether she had ever offered to pay for any of Pete's medical expenses, and she denied she had. . . .

Pete also testified that Donna visited him in the hospital and told him that Donna's Pizza would take care of all of his medical expenses.

Further Reading.

See Question 3 of the February 2017 California Bar Exam. *See also* Question 4 of the February 2024 California Bar Exam.

5TH MAIN HEADING: PRIVILEGES

Approach to Spousal Privileges.

- 1. Spousal Communication Privilege and**
- 2. Spousal Testimonial Privilege.**

Common Question: Who is the holder of the privilege for Spousal Communication Privilege and for Spousal Testimonial Privilege? In other words, which spouse can determine whether to testify or not?

Answers.

1. Spousal Communication Privilege:

Each spouse is the holder of the privilege under Spousal Communication Privilege. This means that one spouse can prevent the other from testifying.

2. Spousal Testimonial Privilege:

The witness-spouse is the holder of the privilege under the Spousal Testimonial Privilege. Under this rule, one spouse can testify despite an objection to testify from the other spouse.

Consider the following excerpt from Selected Answer A, Question 3 of the July 2012 California Bar Exam.

Spousal Communications Privilege Black Letter Law.

The spousal communications privilege protects all confidential communications between spouses that are made in the course of an existing marriage and in reliance on the intimacy of the marriage. This privilege belongs to both spouses and may be claimed by either to prevent the other spouse from testifying. Moreover, the privilege exists regardless of whether the marriage has ended in divorce, so long as the communication itself was made during a period when the marriage existed. For purposes of the privilege, marriage does not end until there is a valid divorce.

Spousal Testimonial Privilege Black Letter Law.

The spousal testimonial privilege allows one spouse to refuse to testify against another spouse in any action. For this privilege to apply, a valid marriage must still exist. The privilege belongs to the testifying spouse, as the privilege is designed to protect the harmony of the marriage, which is not salvageable if the testifying spouse wishes to testify. Moreover, in California, the privilege allows the testifying spouse to avoid taking the stand entirely.

Exam Tip.

When discussing privilege, also consider discussing **waiver**. Be on high alert for instances where a party may waive the privilege. For example, a spouse may waive the privilege by choosing to testify. A spouse can also waive the privilege through carelessness if an eavesdropper is nearby.

6th MAIN HEADING: HEARSAY Hearsay under the Federal Rules

We'll cover hearsay in this section using the Federal Rules of Evidence (California rules are found in the next subsection). The area of hearsay is extremely troubling to many and is highly tested. For this reason, break down the content into three categories. This will simplify things. Here is a way to easily remember these three areas: (1) Non-Hearsay; (2) Hearsay Exceptions/Declarant Is Unavailable; and (3) Hearsay Exceptions. Also, don't forget to consider double-hearsay (aka Hearsay Within Hearsay).

On the next page will be some mnemonics so that you can remember the individual rules within these three broad categories.

Non-Hearsay (aka Hearsay Exemptions).

1. Prior Identification.
2. Admission.
3. Prior Consistent Statement.
4. Prior Inconsistent Statement.
5. Verbal Acts (or Legal Operative Facts).
6. Impeachment or Rehabilitation.
7. State of Mind.
8. Effect on Listener.

Hearsay Exceptions (Declarant Is Unavailable).

1. Former Testimony.
2. Statement Against Interest.
3. Dying Declaration.
4. Statement of Personal or Family History.

5. Statement Offered Against Party Procuring Declarant's Unavailability.

Hearsay Exceptions.

1. Excited Utterance.
2. Present State of Mind.
3. Present Sense Impression.
4. Present Bodily Condition.
5. Past Physical Bodily Condition.
6. Public Records.
7. Business Records.
8. Catch-all.
9. Learned Treatises.

Hearsay Memory Tool.

Once you remember the three main categories, then break down each category into further mnemonics. We'll do an example. First, remember the three main categories. **(1) Non-Hearsay; (2) Hearsay Exception/Declarant Is Unavailable; and (3) Hearsay Exceptions.** We'll begin with the first main category (non-hearsay).

1. Non-Hearsay. Mnemonic: PAPP I VISE

P - Prior Identifications
A - Admissions
P - Prior Consistent Statements
PI - Prior Inconsistent Statements

V - Verbal Intent
I - Impeachment (or Rehabilitation)
S - State of Mind
E - Effect on Listener

2. Hearsay. Declarant Is Unavailable. Mnemonic: DIFFF

D - Dying Declaration
I - Interest, Statement Against
F - Former Testimony
F - Family History or Statement of Personal History
F - Forfeiture: Statement Offered Against Party Procuring Declarant's Unavailability

3. Hearsay Exceptions. Mnemonic: PEPPS BF PAL C

P - Public records
E - Excited utterance
P - Present Sense Impression

P - Past Physical Condition
S - State of mind or condition

B - Business records
F - Final Judgment

P - Past recollection recorded
A - Ancient, Statement in Ancient Records
L - Learned treatise

C - Catch-all (residual)

End of discussion.

DOUBLE HEARSAY

Double Hearsay Black Letter Law.

Where a piece of hearsay evidence contains other pieces of hearsay evidence, each layer must fall within an exception to be admissible.

If either statement is inadmissible, the whole piece of evidence is inadmissible.

Commentary.

When approaching an evidence question, be on high alert. It may *not* be obvious that you are dealing with double hearsay. Here is an example from Question 3 of the February 2017 California Bar Exam. See if you can identify the two sources that produce the statement.

Fact Pattern:

Pete then called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that, during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence and rested.

Did you identify the two levels of hearsay? Notice that one of the sources is not a verbal statement from a human (the intake form). Here they are: (1) Pet's statement to Nellie and (2) The hospital intake form. Again, be on high alert because identifying the issue of double hearsay may not be an obvious task.

Exam Tip.

Identify and discuss each hearsay level separately. Label the hearsay levels to clearly convey that you have identified them. In the example above, the examinee labels these as "a. Pete's Statement" and "b. Hospital Record." Another option is to label the different layers as such:

"First Level of Hearsay" and "Second Level of Hearsay." Let's now discuss California rules on this topic.

6th MAIN HEADING: HEARSAY Hearsay Under the California Rules

Two Commonly Tested Hearsay Exceptions.

The following two California hearsay exceptions have FRE equivalents and are highly tested. Memorize these two exceptions.

Not “Excited Utterance” But “Spontaneous Statement.”

Spontaneous Statement Black Letter Law.

Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Not “Present Sense Impression” But “Contemporaneous Statement.”

Contemporaneous Statement Black Letter Law.

Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and (b) Was made while the declarant was engaged in such conduct. Moreover, it can be immediately after the event occurs.

Other Noteworthy Point: Computer Printouts.

Computer printouts are *not* considered hearsay. See the rule below. However, such computer printouts must still be authenticated. Discuss the facts.

Only people can make hearsay statements; machines cannot. *People v. Leon* (2015)189 Cal.Rptr.3d 703, 61 Cal.4th 569, 352 P.3d 289.

OBJECTIONS TO THE FORM OF A QUESTION

Approach to Objections.

These are objections that can be raised during trial. It is not an exhaustive list. However, they are very common objections.

Argumentative.

Though it might be a question in format, it is not a question to get an answer. It is a question to communicate a different message to the witness.

Example: "When you arrived to work that morning, you had already decided to leave work early, didn't you?"

Asked and Answered.

The questioning attorney is covering the same ground a second time. Also, he is asking a question to which he has already received an answer.

Example: "Did you speak to the accused in the morning?" "No." "So you did not converse with him before 12pm that day?"

Assumes Facts Not In Evidence.

The question contains a statement of fact that has not yet been established.

Example: "Did you interview the witness before you threatened him?" (Asked when there is no testimony that the witness was threatened.)

Calls for an opinion.

The question calls for an opinion of a lay witness. Lay witnesses may not testify as to their opinions unless they have personal knowledge. However, the information in the opinion cannot be scientific or technical in nature.

Example: "What was the exact speed of the white vehicle before it reached the intersection?"

Compound.

The question has two or more questions.

Example: "Did you find the canceled check on the ground and did you make a copy of it?"

Hearsay.

The statement is hearsay.

Example: "What did the police officer at the scene say to medic?"

Improper Character Evidence.

A party may not bolster or support the credibility of its own witness subject to the following statements. A hearsay declarant is a witness and may be impeached as any other witness. Bolstering or impeaching may not occur unless the witness's credibility has been attacked first.

Lacks a Question.

A lawyer may not make a statement without asking a question.

Example: "You arrived at the location. You spoke to the defendant." (Without asking a question.)

Lacks Foundation.

This means that the evidence or document lacks authentication, identification, logical relevance, or legal relevance.

Example: "You signed the rental lease didn't you?" (Without first authenticating the rental lease.)

Lacks Personal Knowledge.

Lay witnesses may testify regarding their own personal knowledge. Testimony outside of that scope is not permitted.

Example: "What instructions were contained inside the sealed envelope?" (Without establishing that the witness read the content of the envelope.)

Leading.

The attorney is asking a leading question to a witness and he is not permitted to ask leading questions.

Example: "When you stopped at the intersection, the light was red, correct?"

Misstates the Evidence.

The question incorrectly quotes what has been admitted into evidence.

Example: "The witness saw everything, didn't he?" (When the witness admitted to not seeing everything.)

Narrative Account.

Lawyer must ask specific questions. He can lead the witness through testimony. However, he cannot call for a narrative by the witness.

Example: "Tell me everything."

Relevance.

The testimony must be relevant. Relevant evidence is evidence that tends to make a fact more or less likely.

Example: "What were your personal plans a year ago." (When such a topic is not relevant.)

Speculation.

The lawyer cannot ask a witness to speculate.

Example: "What was the fireman thinking when he came out of the building?"

Vague.

The question is not clear as it may be ambiguous or confusing.

Example: "Your cooking is deadly, isn't it?"

Professional Responsibility

Table of Contents

- Introduction
- Paying Expert Witness
- Candor Towards Tribunal
- Duty of Confidentiality
- Duty of Loyalty
 - Conflict of Interest
 - Actual Conflict of Interest
 - Potential Conflict of Interest
 - Cures to Conflict of Interest
 - Firms, Conflict of Interests
 - Former Government Attorneys
- Participation in a Consumer Advocacy Group
- Organization as Client
 - Report Up and Out under the ABA
 - Report Up and Withdraw un CA Rules
- Duty to Withdraw
 - Mandatory Withdraw
 - Permissive Withdraw
- Attorney Fees
- Contingency Fees
- Referral Fees (May Be Fee Splitting Between Lawyers)
- Loans to Clients
- Business Transaction With Clients
- Duty of Competence
- Reporting Professional Misconduct
- Employment of Disbarred Lawyer
- Sexual Relations With Clients
- Solicitation

Introduction.

Welcome. This text contains commonly tested issues that have appeared on the California Bar Exam. As you may know, the State Bar released updated rules that went into effect on November 1, 2018.

One major revision is that the numerical coding of the California Rules of Professional Conduct (“CA Rules”) now closely mirror those from the American Bar Association Model Rules of Professional Conduct (“ABA Rules”). However, there remain salient distinctions between the two. As such, not all rules underwent a substantial change. A full text of the California rules are found at this site: <https://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-2018.pdf>

To facilitate comprehension of the rules, this text may use enumeration that does not resemble the actual California Rules. This is done with the purpose of success on the Bar Exam as the rules contain essential elements you need to conduct a proper analysis. With this said, we wish you success.

PAYING EXPERT WITNESS FEES

Paying Expert Witness Black Letter Law.

Both the ABA and California rules permit attorneys to compensate expert witnesses for their time exerted on the case. However, the compensation cannot be hinged on favorable testimony from the witness. The compensation must also be reasonable in light of factors such as the expert's familiarity with the subject, his experience in the field and other similar factors. See Answer A, Question 5 of the February 2012 California Bar Exam.

Sending a Gift to a Witness.

Gifts to Witness Black Letter Law:

Both the ABA and the California rules prohibit sending gifts to witnesses who testify on their behalf. The attorney is only allowed to compensate the expert witness for her services in the case such as depositions, preparing for trial and testifying. Moreover, a gift to an expert witness may compromise the witness's ability to be fair and not to give favorable testimony in anticipation of a gift. If the gift was intended for the doctor as a thank you for testifying it will not be allowed.

Commentary.

For PR questions, be mindful of the activities that the attorney performs. The facts may not explicitly spell out the issue. As such, you have to make some inferences. In other words, the issues may be disguised. Take this a step further. Here is how. Make a heading out of the

attorney's actions that is questionable. Let's do an example. Let's assume that making a header to a witness is questionable. In such a situation, the heading can read as such: **Sending a Gift To a Witness.**

CANDOR TOWARDS TRIBUNAL

Calling to the Stand a Witness That Will Commit Perjury.

An attorney is allowed to call witnesses to testify on his client's behalf. However, there are some exceptions to this rule. One major exception to this rule is if the attorney knows that the witness will perjure him or herself. This is also a place where the ABA and California rules differ.

ABA Rule.

Under the ABA, an attorney shall not call a witness to testify if the attorney knows the witness will commit perjury. However, if the witness is the defendant in a criminal case he has a constitutional right to testify on behalf of himself. The ABA states that if her client insists on testifying and perjuring herself the attorney must attempt to persuade her not to. If the client still insists on testifying, then the attorney should attempt to withdraw as counsel if the court will allow it depending on how damaging it will be to the client. Finally, if the attorney is unable to withdraw he must carefully weigh the balance of his duty of confidentiality with his duty of candor to the court. If the client persists on testifying then the attorney may advise the court about the perjury. ABA Rule 3.3.

CA Rule.

Under California, the rule regarding witnesses who are not the clients are the same. An attorney is prohibited from calling a witness who he knows will perjure himself. However, the California rules differ from the ABA regarding a client who wishes to testify on behalf of himself and who wishes to perjure himself as well. In California, an attorney must make the same effort to attempt to persuade the client to not perjure himself. Furthermore, the attorney must try to withdraw as counsel if the court permits it. The big distinction is that in California an attorney is allowed to let his client testify in narrative fashion regarding the false information. He also is not required to breach his duty of confidentiality and warn the court of the perjury. CA Rule 3.3. *See also* Comment [4].

DUTY OF CONFIDENTIALITY

Rule Under the ABA and CA.

An attorney owes an ethical duty of confidentiality to his client which requires him to maintain inviolate all information he obtains that is related to his representation of that client. The ethical duty is broader than the attorney-client privilege, which is an exclusionary rule of evidence forbidding the government from compelling a lawyer to reveal any communication made by the client to the lawyer in furtherance of the provision

of legal services. Rather, the duty of confidentiality forbids the attorney from revealing anything related to his representation of a client, from whatever source that information is derived,

unless (1) the client consents to disclosure; (2) disclosure is necessary to prevent a crime (see below for further discussion); or (3) to establish a personal defense.

ABA Rule.

A lawyer may sometimes disclose confidential information if it is to prevent a crime or fraud. Under the federal rules, such information may be disclosed to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

CA Rule.

In CA, however, only a crime that would result in death or serious bodily injury may be disclosed, after the lawyer makes a good faith effort to try and prevent the harm from occurring.

Commentary.

California does not have the exception to protect financial interests.

DUTY OF LOYALTY

Duty of Loyalty Under ABA and CA.

The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.

Commentary.

There are many acceptable variations of the black letter law regarding duty of loyalty. The rule above comes straight from the California Rules of Professional Conduct. *See* Rule 1.7, Comment [1].

Exam Tip.

The discussion of duty of loyalty will usually entail conflict of interest. We will discuss conflicts of interest below. For now, just remember that duty of loyalty is discussed first. And underneath that is the sub-issue of conflict of interest. Let's go there now.

CONFLICT OF INTEREST

Conflict of Interest Black Letter Law.

Under both CA and ABA rules, if an interest of another client, the lawyer's, or a third party, materially limits or is directly adverse to the representation, there is a conflict of interest.

Representation is permitted (1) if the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

A lawyer shall obtain informed written consent when his representation (1) is directly adverse to another client in the same or a separate matter; or (2) will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

Commentary.

The *conflict of interest* issue is commonly tested. Consider running through this issue on most practice essays and on the actual bar exam. One common fact pattern is when there are multiple clients that seek representation from a single attorney.

**ACTUAL AND POTENTIAL
CONFLICT OF INTEREST**

Duty of loyalty and conflict of interests are common issues that are almost always discussed. *Sometimes* the discussion on conflict of interest can get more narrow. This is because there can be an (1) actual conflict of interest or (2) a potential conflict of interest in the fact pattern. This will not always be the situation so you have to be particularly aware. Let's do some examples. First we'll add the black letter law (on the following page).

Actual Conflict of Interest Black Letter Law.

An actual conflict of interest is a conflict that is occurring or that occurred and it affected counsel's performance.

Potential Conflict of Interest Black Letter Law.

If there is a possibility of a conflict occurring, it is a potential conflict of interest. In other words, it is a theoretical division of loyalties.

Further Reading.

Look for scenarios where the attorney has two clients. The attorney may have been a college roommate of one of the clients. *See* Question 1 of the July 2008 California Bar Exam:

Also, the attorney may be a family member of one of the clients. *See* Question 3 of July 2018 California Bar Exam. In such a situation, discuss potential conflict of interest.

CURES TO CONFLICT OF INTEREST

Cure to Actual Conflicts of Interest.

If an actual conflict of interest occurs, a lawyer may be forced to withdraw unless the conflict can be resolved effectively, the client is informed of the conflict, and the client consents to the conflict.

Cure to Potential Conflicts of Interest

In the case of a potential conflict, the lawyer may continue if he feels he can effectively represent the client despite the conflict and the client consents after being informed of the potential conflict. In CA the consent must be in writing.

Commentary.

Under the California rules that were implemented in 2018 under 1.10, a law firm can implement “screens” to cure issues that may arise. This practice was not favored before the updated rules took effect in November 2018. In fact, let’s talk about screens now as they apply to firms.

FIRMS, CONFLICT OF INTERESTS AND ETHICAL SCREENS

Ethical Screening Black Letter Law.

While lawyers are associated in a firm, none of them shall represent a client when any one of them practicing alone would be prohibited from doing so, unless (1) the prohibition arises out of the prohibited lawyer’s association with a prior firm; (2) the prohibited lawyer did not substantially participate in the same or a substantially related matter; (3) the prohibited lawyer is timely screened and is apportioned no part of the fee; and (4) written notice is promptly given to any affected former client.

Commentary.

Look for facts where a firm hires a new lawyer or the law firm is contemplating the hiring of a lawyer. The issue arises when the newly hired attorney has worked in a firm that might have attained confidential information that could be adverse to the client.

FORMER GOVERNMENT ATTORNEYS AND SPECIAL CONFLICTS OF INTERESTS

Attorneys Who Formerly Served for the Government Black Letter Law.

A lawyer who has formerly served as an attorney for the government (1) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially, (2) unless the government agency gives its informed written consent.

Ethical Screening and Firm.

When a lawyer is disqualified (CA uses the words “prohibited”), no lawyer in a firm may undertake such a matter unless (1) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) Written notice is promptly given to the appropriate government agency.

CA Rule.

A lawyer who has formerly served as an attorney for the government (1) Shall not represent a client in connection with a matter in which the lawyer participated personally and substantially; (2) unless the government agency gives its informed written consent.

Ethical Screening Firm.

When a lawyer is prohibited from representation (ABA uses the word *disqualified*), no lawyer in a firm may undertake representation unless (1) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee; and (2) written notice is promptly given to the appropriate government agency.

Commentary.

The ABA rule is substantially the same. One difference is that CA uses the word “prohibited” lawyer and the ABA uses the word “disqualified.”

PARTICIPATION IN CONSUMER ADVOCACY GROUP

Participation in a Consumer Advocacy Group Black Letter Law.

Even where there is no direct adversity, a conflict of interest requiring informed written consent exists if there is a significant risk that a lawyer’s ability will be materially limited as a result of the lawyer’s other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal.

Commentary.

The words “Consumer Advocacy Group” do not appear in the Professional Rules. However, such participation is implied under “other” relationships. As such, a lawyer is permitted to affiliate with a local consumer advocacy group as an active member of a society. However, if their involvement is adverse to the interests of their client, then potential or actual conflicts may result. Such a fact pattern has appeared before on the California Bar Exam where an attorney

joins a local consumer advocacy group . *See* Question 2 of the February 2008 California Bar Exam.

Duty to Withdrawal.

If the conflict of interest cannot be cured, an attorney may be required to withdraw.

ORGANIZATION AS CLIENT (CA Rule)

Approach to Organization as Client.

“Organization as Client” is the official title of the relevant section. However, many refer to this section as “Corporation as Client.” Either description is fine.

Keep in mind *who* the attorney represents. A lawyer may represent a corporation as a client. In such a scenario, the corporation is the client. Representatives of the corporation, such as the president or directors, are not the clients of the attorney.

1st Step: “Report Up.”

If a lawyer knows that a constituent is acting in (1) violation of law and (2) likely to result in substantial injury to the organization, the lawyer shall refer the matter to higher authority in the organization, including to the highest authority in the organization.

2nd Step: Withdrawal.

If the highest authority of the organization fails to act and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed in the best lawful interests of the organization. The lawyer’s response may include the lawyer’s duty to withdraw.

Commentary.

ABA Rules have the “reporting out” option. Reporting out means that the attorney may reveal confidential information to an outside government agency. CA Rules are distinguished on this matter in that CA does not have the “reporting out” option. Rather, the attorney is permitted to withdrawal from the representation. Let’s look at the ABA Rule on this matter.

ORGANIZATION AS CLIENT (ABA Rule)

1st Step: “Report Up.”

If a lawyer for an organization knows that a person associated with the organization is engaged in action that is a violation of a legal obligation to the organization, the lawyer

shall refer the matter to higher authority in the organization, and if warranted, to the highest authority of the organization.

2nd Step: “Report Out.”

If the highest authority of the organization refuses to act, the lawyer may reveal confidential information if the violation is reasonably certain to result in substantial injury to the organization. This disclosure must be done only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Commentary.

This rule dealing with organizations is also related to the rule on confidential information. See Rules 1.6. Under Rules 1.6, exceptions to the duty of confidentiality are found. The organization as client section also deals with the duty to preserve the duty of confidentiality. Notice that California has more strict rule as compared to the ABA. Instead of “reporting out” to an outside agency, it allows a duty to withdrawal if necessary.

The point being here is that the exceptions to the duty of confidentiality may apply under the Organization as Client section. Below is an example from a past essay question.

Further Reading.

See Question 6 of the July 2016 California Bar Exam.

DUTY TO WITHDRAWAL

Approach to Duty Withdrawal.

There are two areas here. There is mandatory withdrawal and permissive withdrawal. Let’s discuss mandatory withdrawal first.

Mandatory Withdrawal CA Rule.

A lawyer shall withdraw from the representation if: (1) the client is bringing an action without probable cause and for the purpose of harassing or maliciously injuring any person; (2) The representation will result in violation of these professional rules or other law; (3) The lawyer’s mental or physical condition renders it unreasonably difficult to carry out the representation effectively;

Note the ABA’s version of the 3rd prong: the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(4) the client discharges the lawyer.

Commentary:

Note the difference in the language under the third prong (*material impairment* under ABA and *unreasonable difficult* under CA). Aside from this, the ABA's rule is more concise. See below.

ABA's Mandatory Withdrawal Rule 1.16.

(1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged.

Let's now move to permissive withdrawal.

PERMISSIVE WITHDRAWAL

Permissive Withdrawal Under California Rules.

A lawyer may withdraw from representing a client if:

(1) the client seeks to pursue a criminal or fraudulent course of conduct (CA & ABA); (2) the client has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud (CA & ABA); (3) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively (CA & ABA);

(4) the client consents; (5) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively; or (6) other good cause for withdrawal.

Commentary.

Note that only 1 through 3 share the same language between CA and ABA rules. Moreover, this is not an exhaustive list but contains the elements that are commonly tested.

Permissive Withdrawal Under ABA Rules.

A lawyer may withdraw from representing a client if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent (CA & ABA); (2) the client has used the lawyer's services to perpetrate a crime or fraud (CA & ABA); (3) The representation has been rendered unreasonably difficult by the client (CA & ABA);

(4) withdrawal can be accomplished without material adverse effect on the interests of the client; (5) the representation will result in an unreasonable financial burden on the lawyer (6) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (7) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable

warning (author's note: this includes not paying attorney fees); or (8) other good cause for withdrawal exists.

ATTORNEY FEES

Fee Agreement In Writing.

CA – Requires fee agreements to be in writing unless situation constitutes emergency, client is a regular client, client is a corporate client, or fee is under \$1,000.

ABA - The scope of the representation and the basis or rate shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Commentary.

Notice that the ABA does not make the writing requirement mandatory under most situations (*preferably* in writing). Moreover, the discussion above merely focuses on the writing requirement. This does not end the discussion. See the following section for further requirements pertaining to the fee amounts.

Approach to Attorney Fees.

California will be discussed first and then the fee amount under the ABA. Notable differences will be highlighted.

CA Fee Requirements.

CA Rules require that a lawyer may not charge an illegal or unconscionable fee.

Commentary.

The CA rules include the following factors when determining whether a fee is unconscionable (ABA does not have unconscionable requirement. Rather, it prohibits *unreasonable* amounts):

First 7 Are Similar to the ABA.

- (1) The novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The amount involved and the results obtained;
- (4) The time limitations imposed by the client or by the circumstances;

- (5) The nature and length of the professional relationship with the client;
- (6) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (7) Whether the fee is fixed or contingent;

These Are Not Similar to the ABA.

- (8) The relative sophistication of the lawyer and the client;
- (9) Whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee;
- (10) Whether the lawyer has failed to disclose material facts;
- (11) The amount of the fee in proportion to the value of the services performed;
- (12) The time and labor required; and
- (13) Whether the client gave informed consent to the fee.

ABA Fee Requirements.

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

First 7 Are Similar to CA Rules.

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The amount involved and the results obtained;
- (4) The time limitations imposed by the client or by the circumstances;
- (5) The nature and length of the professional relationship with the client;
- (6) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (7) Whether the fee is fixed or contingent; and

Not Similar to the ABA.

- (8) the fee customarily charged in the locality for similar legal services.

CONTINGENCY FEES

Contingency Fee Agreement Under CA Rules.

A lawyer shall not make a contingent agreement for: (1) any fee in a family law matter based on (i) securing of a dissolution of a marriage; (ii) declaration of nullity of a marriage; (iii) upon the amount of spousal support; (iv) upon the amount of child support, or (v) property settlement; or

- (2) a contingent fee in a criminal case.

Contingency Fee Agreement Under the ABA.

A lawyer shall not enter into a contingent arrangement for: (1) any fee in a domestic relations based on: (i) a divorce; (ii) upon the amount of alimony or support, or (iii) property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

Commentary.

The rules are substantially the same.

REFERRAL FEES A.K.A AS FEE SPLITTING BETWEEN LAWYERS

Referral Fees and CA Rule.

Payments for referrals are prohibited unless the attorney satisfies certain criteria such as: (1) getting informed written consent from the client, (2) having in the contract how the referral is to be split up, and 3) the fee must not increase solely on the reason that the fee will be divided.

Commentary.

The ABA Rules are substantially similar to the California Rules with one exception. California permits “pure referral fees.” This means that the referring attorney can receive a percentage on the fees paid by the client, even if the referring attorney does not do any work towards the actual case.

Referral Fees and ABA Rule.

Same as above except the division is in proportion to the work done on the matter (or each lawyer assumes joint responsibility);

LOANS TO CLIENTS

Loans to Clients and the CA Rule.

CA Rules *permits* loans to clients. After the lawyer is retained by the client, the lawyer can lend money to the client based on the client’s written promise to repay the loan.

Loans to Clients and the ABA Rule.

ABA Rules do *not* permit loans to clients. However, a lawyer can lend to a client to cover court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence.

BUSINESS TRANSACTION WITH CLIENT

CA Rules.

A lawyer shall not enter into a business transaction with a client unless:

Rules 1 Through 4 Are Similar to the ABA.

(1) The terms are fair and reasonable to the client; (2) The writing is in a manner that should reasonably have been understood by the client; (3) The client either is represented in the transaction by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer; (4) The client provides informed written consent; and

(5) The lawyer's role in the transaction are fully disclosed.

Commentary.

A lawyer may own a business that is *separate* from the practice of law.

ABA Rules.

Rules 1 Through 4 Are Similar to the ABA.

(1) The terms are fair and reasonable to the client; (2) The writing is in a manner that should reasonably have been understood by the client; (3) The client either is represented in the transaction by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer (ABA also requires that a reasonable opportunity to do so exists); and (4) The client provides informed written consent.

DUTY OF COMPETENCE

CA Rules.

Competence shall mean to apply the learning, skill, mental, emotional, and physical ability reasonably necessary for the performance of service.

(c) If a lawyer does not have sufficient learning and skill, the lawyer nonetheless may provide competent representation by (i) consulting another lawyer whom the lawyer reasonably believes to be competent, (ii) acquiring sufficient learning before performing, or (iii) referring the matter to a competent lawyer.

ABA Rules.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Commentary.

CA looks to a similar standard, but will only discipline a lawyer for repeated or reckless violations of the duty of competence.

REPORTING PROFESSIONAL MISCONDUCT

Reporting Professional Misconduct Black Letter Law.

A lawyer shall, without undue delay, inform the State Bar, or a tribunal to investigate when the lawyer knows of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Commentary.

This is a fairly new rule that took effect on August 1, 2023 and it is known as *the snitch rule*. Observers have commented that this rule is in response to the scandals surrounding Tom Girardi, a disbarred personal injury attorney. Apparently, the State Bar received numerous complaints over several decades before he was disbarred.

EMPLOYMENT OF DISBARRED LAWYER

Employment of Disbarred or Suspended Lawyer.

The section is divided into two parts. The first part states the duties that the disbarred lawyer *may not* perform. The second part presents the duties that the person *may perform*.

Disbarred Lawyer *May Not* Perform the Following Duties.

A disbarred lawyer shall not perform the following on behalf of the lawyer's client: (1) Render legal consultation or advice to the client; (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer; (3) Appear as a representative of the client at a deposition or other discovery matter; (4) Negotiate or transact any matter for or on behalf of the client with third parties; (5) Receive, disburse or otherwise handle the client's funds; or (6) Engage in activities that constitute the practice

of law.

Disbarred Lawyer *May* Perform the Following Duties.

A disbarred lawyer may perform research, drafting or clerical activities, including but not limited to: (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents; (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or (3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.

Duties of the Law Firm.

The lawyer acting as the employer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing, associating with, or assisting such person to work on the client's specific matter.

Further Reading.

This issue appeared under Question 5 of the February 2019 California Bar Exam.

SEXUAL RELATIONS WITH CLIENTS

CA Rule (Updated).

A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

ABA Rule.

A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

SOLICITATION

CA Rules.

CA Rules state that a lawyer may not solicit potential client with whom the lawyer or law firm has no family or prior professional relationship. ABA prohibits direct contact for purposes of soliciting a prospective client, unless the person contacted is a lawyer or has a prior personal or professional relationship with the lawyer contacting him.

Issue:

Mailing a Professional Announcement to Physicians in the Area.

Rule Under ABA and CA:

Both the ABA and California prohibit in person, live solicitation to individuals who the attorney does not have a familial or professional relationship with. However, attorneys are allowed to send professional announcements, letters, cards, etc. to people in the area. Moreover, the document must have certain information contained in it, such as the attorney's name or if it is a firm, a name of one attorney in the firm. It must also have an address listed for the attorney and/or any other relatable contact information. However, the document must be accurate and fair, the attorney is not allowed to guarantee success rates or hold himself out as a specialist unless he is certified by the proper authorities in the state. See Answer A, Question 5 of the February 2012 California Bar Exam.

CA Additional Requirement.

Every written, recorded or electronic communication from a lawyer soliciting professional employment shall include the word "Advertisement" or words of similar import on the outside envelope.

Real Property

Table of Contents.

Contributions and Accountings
Real Covenants and Equitable Servitudes
Deeds and Transfers
Recording Statutes
Easements
 Creation of Easements
 Termination of Easements
Adverse Possession
Future Interests
Lien Theory v. Title Theory
Landlord Tenant

CONTRIBUTION AND ACCOUNTING BETWEEN TENANTS IN COMMON

Approach to Contribution and Accounting.

This area pertains to the duties between co-tenants in common. Which co-tenant pays for which expense as it relates to the real property? And when? We'll cover some commonly tested areas here.

Accounting For Rent.

A tenant in common has a duty to account to co-tenants in common for any rents or profits received from use of the land.

Contribution Between Co-Tenant.

A contribution is a payment from one co-tenant to another co-tenant to reimburse a cotenant for necessary costs spent in maintaining the property.

Co-tenants Who Do Not Occupy the Property.

Co-tenants who do not presently occupy the property (live there or otherwise do business on the premises) are required to share the costs of necessary improvements, principal payments on the mortgage, and taxes paid on the property. If one co-tenant pays these costs up front, he is entitled to contribution from his co-tenants.

Costs for Tenants in Possession.

Some bills, however, are the sole responsibility of the tenant in possession, since they are based on his use or enjoyment of the property. Such bills include utility bills. These types of bills are not subject to reimbursement from the other tenant that is not in possession.

Repairs and Contribution From No-possessory Tenants.

Tenants in possession may receive contribution from non-possessory tenants for regular repairs (distinguished from improvements). These repairs may be used to keep the property in good condition. As such, the tenant that is not in possession may have to provide reimbursement to the tenant in possession.

Accounting Re: Profits From a Third Party.

An accounting is a sharing of the profits derived from the property that two tenants co-own. Co-tenants of a property are entitled to share in the profits gained from leasing the property to a third party.

Further Reading.

See Question 5 of the February 2005 California Bar Exam.

REAL COVENANTS

Real Covenants Black Letter Law.

Real covenants may run with the land. This means that subsequent owners of land may be able to enforce the covenants. Moreover, subsequent owners may also be burdened by the covenants.

Requirements for a burden to run, there must be: (1) notice; (2) intent; (3) touch and concern; (4) vertical privity; (5) horizontal privity.

Note: We will discuss the meaning of having a “burden run with the land” further below. This is in contrast to having a “benefit run with the land.” There will also be an example. For now, let’s focus on the elements.

(1) Notice.

May be met through the following types of notice: Actual Notice, Constructive Notice, and/or Inquiry Notice.

(2) Intent.

Intent of the original contracting parties that burden or bind successors.

(3) Touch and Concern.

The performance of the covenant relates to the use and enjoyment of the land.

Note:

This element can be described in other ways. For example, will the covenant benefit the land economically? If you have a different definition that is somewhat similar, feel free to use it.

(4) Vertical Privity.

Vertical privity must exist between the succeeding parties. Vertical privity exists between the original party to the covenant and a subsequent owner.

(5) Horizontal Privity.

Horizontal privity must exist between original parties (not required for the benefit to run).

Mnemonic.

Remember the mnemonic “WITHN.”

W – Writing; I – Intent; T – Touch and Concern; H – Horizontal and Vertical Privity; N – Notice.

Note:

Horizontal privity requires that at the time the original parties entered into the agreement, they shared some interest in land. Examples of this include the following: landlord and tenant relation, mortgagee and mortgagor, dominant estate and servient estate in an easement.

Commentary.

Covenants are found on deeds when a new owner promises to perform a covenant. Moreover, a promise is made that the new owner will sell the land that contains a similar deed. As such, the promises, or the covenants, run with the land.

Why Is a Burden?

A burden may exist when a landowner is required to pay a fee. For example, there is a cost for security and each landowner must pay \$600 per month.

Examples of Burden to Run.

Developer sold the first lot to Cora and quickly sold the remaining nine. **Developer had inserted the following clause in each deed:**

Purchaser(s) hereby **covenant and agree** on their own behalf and on behalf of their heirs, successors, and assigns **to pay an annual fee of \$600 for 10 years to Ace Security, Inc.** for the maintenance of security within the subdivision.

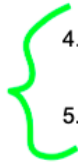
Developer promptly and properly recorded all ten deeds. *See* Question 2 of the July 2005 California Bar Exam. *See also* Question 5 of the February 2004 California Bar Exam.

Exam Tip.

Sometimes the terms will be obvious. For example, look for indented and/or enumerated content. See this example from the February 2004 exam.

Lori owns a small shopping center. In April 1999, Lori leased a store to Tony. Under the lease Tony agreed to pay Lori a monthly fixed rent of \$500, plus a percentage of the gross revenue from the store. The lease term was five years. In part the lease provides:

Landlord and Tenant agree for themselves and their successors and assigns:

- 
4. Tenant has the right to renew this lease for an additional term of five years, on the same terms, by giving Landlord written notice during the last year of the lease.
 5. Tenant will operate a gift and greeting-card store only. Landlord will not allow any other gift or greeting-card store in the center.

In July 2000, Tony transferred his interest in the lease in writing to Ann. Ann continued to operate the store and pay rent.

Let's move to an example of where a benefit runs with the land.

REAL COVENANTS CONTINUED BENEFIT TO RUN WITH THE LAND (VERSUS THE BURDEN RUN WITH THE LAND)

Requirements for the Benefit to Run (v. burden).

In order for the benefit of a covenant to run with the land, the following elements must be met: (1) intent, (2) touch and concern, and (3) vertical privity (note that notice and horizontal privity are not required).

Mnemonic.

Remember the mnemonic "WITV."

W – Writing; I – Intent; T – Touch and Concern; V – Vertical Privity

Definition:

The benefit of a covenant is the right to enforce the promise in the deed (the terms of the covenant).

Example:

In the example above describing the burden (from February 2004), the benefit is the promise to have the security company guard the land.

Remedies for Breach of Real Covenants.

Awards for breach of real covenants can include monetary damages. Distinguish this from available remedies to an equitable servitude. The proper award for an equitable servitude would be satisfied with an equitable remedy, such as an injunction. Keep this difference in mind. Let's move not to equitable remedies.

EQUITABLE SERVITUDE

Equitable Servitude.

An equitable servitude is similar to a real covenant but is limited to equitable remedies. A writing is usually required. The following elements must be met for an equitable servitude: (1) Writing; (2) Intent of the original parties to bind successors; (3) The servitude must touch and concern the land; and (4) Notice to the party to whom the covenant is being enforced.

Mnemonic.

Remember the mnemonic “WITNES.”

W – Writing; I – Intent; T - Touch and Concern; N – Notice; E – Equitable; S – Servitude.

Note: An exception to the writing requirement may involve a common scheme. Common schemes are discussed next.

COMMON SCHEMES

Common Schemes (or “Negative Equitable Servitude”).

A common scheme is where a developer intends for all parcels to be bound by a restrictive covenant. Evidence of such an intent include the following: (1) a recorded plat; (2) a general plat of restrictions; or (3) oral representations to early buyers.

TYPES OF DEEDS

Approach to Deeds.

In this section, we’ll look at different types of deeds. Below is an example.

Joint Tenancy with Right of Survivorship (“JTROS”).

a. Creation.

Tenancy in common is presumed. Therefore, creations of JTROS must clearly express an intent stating that JTROS will exist.

b. Requires the Four (4) Unities – TTIP

- 1. **Time** – Must acquire at same time.
- 2. **Same Title** – Same piece of paper.
- 3. **Interest** – Same proportion.
- 4. **Possession** – Equal rights of possession

Exam Tip.

Many times, the joint tenancies will be severed. This is a *heavily* tested area. What are the interests of the parties after the severance occurs? Hint: A scenario involving tenants in common is usually created. See the essay under the Further Reading heading below.

Further Reading.

See Question 3 of the October 2020 California Bar Exam.

Severance of a Joint Tenancy.

A joint tenancy is severed when any one of the four unities discussed above is severed.

A joint tenancy may be severed by one joint tenant conveying his interest to another. A severance can occur without the permission of the other joint tenant. When a severance occurs, the new owner of the land will take as tenants in common with the remaining joint tenant.

DEEDS, TRANSFERS AND FORMALITIES

Approach to Deeds, Transfers and Formalities.

Conveyances of real property through deeds are an area you must know. Here are some common issues and rules. This type of question will usually ask something like this: What interest, if any, does each person have in Blackacre?

Deeds and Formalities Black Letter Law.

A deed is the document that transfers title of real property from one party to another. It must comply with the (1) formality requirements, (2) be delivered and (3) accepted / or acknowledged to be effective.

Note: These are discussed below. To see how this was tested before, refer to Question 5 of the July 2008 California Bar Exam.

(1) Formality Requirements.

In order to satisfy the formalities, a deed must be in writing, signed by the grantor and specify the parties and land (within reason).

(2) Delivery.

Delivery occurs when the grantor's intent to make the deed present effectively is ascertained. Intent can be inferred even if actual possession of the document itself is postponed. Note: The key word here may be "intent." There must be an intent to make a present conveyance.

Note: What if the grantor uses a third party to make the delivery? Moreover, what if the grantor states a condition? Consider the following: “Do not deliver until my death.” Does this become a will with testamentary intent? This will be something you have to analyze using the facts in the hypothetical.

Response From Model Answer.

The problem with this argument is that delivery is only effective if there is a present intent to deliver. An intent to deliver a deed in the future is not effective. Alternatively, E may argue that the written instructions are a last will and testament, devising C’s property interest to E. See Selected Answer A, Question 5 of the July 2008 California Bar Exam.

Underline format used for emphasis.

(3) Acceptance

Acceptance is generally presumed in most jurisdictions. It occurs on the date the deed was delivered (see above) into escrow unless the parties expressly state otherwise.

End of discussion.

LIEN THEORY VS. TITLE THEORY

Next, you may have to determine if the severance occurred in Lien Theory or Title Theory jurisdiction. A clue to discuss this will occur when a party acquires a loan from a lender and uses the real property as a security for the money that was borrowed. As such, be on the lookout for the presence of a mortgage. This is a huge tip. Here is an example:

"One homeowner borrowed \$10,000 from Lender and gave Lender a mortgage on the house as security for the loan."

Lien theory versus title theory has also appeared on past exams. For more on this topic, see Question 5 of the February 2005 California Bar Exam.

Severance of Mortgage In Lien Theory/Title Theory Jurisdictions.

A unilateral act of mortgaging the property may sever a joint tenancy, depending on the type of jurisdiction. There are two types of jurisdictions: Lien Theory and Title Theory.

Lien Theory.

A lien theory jurisdiction holds that a unilateral mortgage does not automatically sever a joint tenancy. Therefore, if this is a lien theory jurisdiction, normal survivorship rules would apply, and at one of the homeowners' death the following would occur: The deceased homeowner's interest would pass to the surviving homeowner through the right of survivorship.

The surviving homeowner would thus be left with a fee simple absolute, subject to L’s mortgage.

Title Theory.

However, in a jurisdiction which follows the title theory, a unilateral mortgage by a joint tenant is held to sever the joint tenancy. The result is that joint tenants become tenants in common, with the mortgagee.

Note: This is a good transition into tenancy in common.

TENANCY IN COMMON

Tenancy in Common Black Letter Law.

In a tenancy in common, the only unity that exists is the unity of possession. There is no right of survivorship.

GRANT DEED VERSUS A WILL

Grant Deed Versus a Will.

Does a grant deed trump a valid will? The answer is ‘yes.’ Consider this hypothetical: Grantor conveys half of his land to his brother via a **deed**. Moreover, Grantor gives all of his property to his children A, B, and C via a **valid will**. What results? See the example below. *See* Question 3 of the October 2020 California Bar Exam.

Fact Pattern.

Andrew, a widower with three adult children (Bobby, Carol, and Dylan), owned a forty acre parcel of wooded land called Havenwood. In 1988, Andrew by **written deed** validly conveyed the north half of Havenwood to his brother Elmo.

In 1989, Andrew died, leaving a **valid will** that gave “all my real estate to Bobby, Carol, and Dylan as joint tenants with right of survivorship.”

Results.

Elmo holds the **north half of Havenwood** if fee simple.

Bobby, Carol, and Dylan held **South H as joint tenants**.

Notice that the grant deed will trump the valid will.

RECORDING STATUTES

Approach to Recording Statutes.

Recording statutes are heavily tested. Many students erroneously consider this an easy area. However, do not underestimate this area. The language that is used is very complex. The good news is that there exist certain key language that is often used. Once you master the esoteric

language, then you will excel in this area. Certain words and phrases are highlighted in this section to emphasize key language.

Let's start with the summary of the notices. This will be followed by the black letter law of the recording statutes.

The Three Types of Notices and a Summary of the Outcome.

(1) Race.

The winner of the race wins.

(2) Pure Notice.

The **last** BFP wins. Having no notice of a previous BFP will save the day. Having notice at a BFP is present will be detrimental.

(3) Race-Notice.

First BFP *to record* wins.

Identifying the key language will save you time and lead to the correct answer.

Let's now look at the black letter law.

Recording Statutes and the Black Letter Law.

The three recording statutes are (1) Race; (2) Pure Notice; and (3) Race-Notice. These are explained below.

(1) Race.

Will protect the first person to record their deed regardless of any BFP status.

Note that *notice* is irrelevant here (i.e., the winner of the race wins). Not much will be discussed here because this concept is relatively easy to grasp and it is usually not tested as a major issue.

(2) Pure Notice.

Will protect any bona fide purchaser who records against any subsequent purchaser who is also not a bona fide purchaser.

The focus here is on **Notice**. There are 3 types of notice: (1) Actual Notice; (2) Constructive Notice; and (3) Inquiry Notice. Moreover, by definition, this has to be against a non-BFP.

Example of Language.

"Every conveyance of real property shall be invalid as against any person, except the grantor, his heirs, and assigns, having actual **notice** thereof, unless it is recorded as provided by statute.

Translation.

Every conveyance of real property shall be invalid if he has notice because having notice prevents him from being a bona fide purchaser for value. Remember the full definition of BFP: Bona fide purchaser for value *without notice* (i.e., the last BFP wins).

EXAM TIP EMPHASIZED: Pure Notice will *not* contain this language: "...whose conveyance is **first duly recorded.**" *Nor* shall it contain this language: "*And who is first to record*" or words to that effect. The focus is on **notice**. If it contains the *first to record* language, it may be Race-Notice IF there is also BFP language. In fact, let's go to Race-Notice now.

(3) Race-Notice.

Will protect a bona fide purchaser, but only if he is the first to record.

Example Language.

"Every conveyance of real estate which is not recorded is void against a subsequent purchaser in **good faith for valuable** consideration, whose conveyance *shall be first duly recorded*"

OR

"Every conveyance of real estate which is not recorded is void against a subsequent purchaser in **good faith for valuable consideration** whose conveyance shall *be first duly recorded.*"

OR

"An unrecorded conveyance or other instrument is invalid as against a **subsequent bona fide purchaser** for value without notice *who records first.*"

Review of Race-Notice.

In order for a subsequent party to prevail in a race-notice jurisdiction, he must be **both a bona fide purchaser** for value **without notice** of the prior interest and record first (i.e., First BFP to record wins).

Video Commentary.

Commentary pertaining to the recording statutes are found at this YouTube video:
<https://www.youtube.com/watch?v=4i5wvooMx1>

CREATION OF EASEMENTS

Creation of Easements and the Black Letter Law.

Easements can be created through estoppel, express, implication, necessity, and prescription.

Note: Remember the mnemonic *RIPEEN* on the next page. Content relating to the termination of easements will be discussed after this section.

Reservation Easement

The operation of a reservation in a deed is to retain in the grantor some portion of his former estate. Moreover, a reservation vests in the grantor some new right or interest not before existing in him.

Easement by Implication.

An easement by implication usually arises out of a prior-existing use. For example, when a single parcel of land is divided into two or more parcels, with parcels going to different owners.

Easement by Prescription

A prescriptive easement arises when one uses or occupies another's land without permission. To succeed, one must demonstrate that the use was (1) open and notorious, (2) hostile, (3) continuous, and (4) meets the statutory period.

Distinguish Between Adverse Possession.

Easement by prescription and adverse possession share many of the same elements. The difference is that easement by prescription does not have the element of "exclusive use." Adverse possession is discussed in the next section.

Easement by Prescription In Action.

The following excerpt is from Question 3 of the February 2018 California Bar Exam:

"In order to establish that there is an easement by prescription, the seeker of the easement must demonstrate **(1) continuous use of the subservient estate, (2) for a statutory period, (3) that was open and notorious, and (4) hostile.** Unlike in adverse possession, there is no requirement that the easement holder have had exclusive use over the property, since the easement does not eliminate the property owners' rights entirely."

Easement by Estoppel.

Easements by estoppel are created when the conduct of the owner of land leads another to reasonably believe that he has an interest in the land so that he does acts (or does not act) in reliance on that belief. The owner of the land must have knowledge that the other person has a reasonable expectation that reliance will occur.

Express Easements.

An express easement can occur through a grant. An express grant of an easement must be in writing.

Easement by Necessity.

An easement by necessity exists when a landowner severs title to his land by selling only a portion of the land. This results in strict necessity. Under the majority view, strict necessity exists when the severed parcel has no legal right of access to a public road.

Commentary.

This is not an exhaustive list. We now turn to ways in which easements can terminate.

Mnemonic of Easement Creation.

Remember this mnemonic: *RIPEEN*.

(R)eservation; (I)mplication; (P)rescription; (E)stoppel; (E)xpress Grant; (N)ecessity.

TERMINATION OF EASEMENT

Termination of Easement.

When discussing easements, also consider if the easement has terminated. Use this mnemonic “End Cramp.”

Mnemonic: End Cramp.

E Estoppel
N Necessity (End of Necessity)
D Destruction

C Condemnation
R Release (Express agreement)
A Abandonment
M Merger
P Prescription

ADVERSE POSSESSION

Mnemonic OCEANS.

Use the mnemonic OCEAANS. It stands for (1) Open, (2) Continuous, (3) Exclusive use, (4) Actual use, (5) Adverse, (6) Notorious, and (7) Statutory period is met.

Distinguish From Easement By Prescription.

As stated above, easement by prescription does not have the element of Exclusive use. See the section titled *Creation of Easements*.

Further Reading.

See Question 5 of the July 2011 California Bar Exam. See also Question 3 of the October 2020 California Bar Exam.

FUTURE INTERESTS

Approach to Future Interests.

Future interests have been tested on the 1-hour essay portion and are sure to appear again. Study the following rules. Even refer to the cited exam if you don't have a good understanding of this area.

Types of Interest.

The facts may tell you what interest a person has in the land. If so, identify that interest and proceed from that point. For example, the facts may tell you a person has a "fee simple absolute" in certain real property. That person will then convey that interest. The following rules appeared on Question 2 of the July 2015 California Bar Exam. Only the rules are stated here.

A Fee Simple.

A fee simple is the largest property interest possible.

Here _____ (do the facts state if someone has a fee simple?)

Thus, _____ (Fee Simple Holder) has a fee simple interest.

Two Common Types for Conveyances: (1) Fee Simple Subject to a Condition Subsequent vs. (2) Fee Simple Determinable.

Fee Simple Subject to a Condition Subsequent.

An ownership interest in land whereby the present possessor owns the land until a specified condition occurs, whereby the grantor then has the option of exercising his right of reentry and retaking possession of the land. It is created when the grantor uses terms that indicate a condition is present (on condition that, but if, however if, etc.).

Commentary.

The right of reentry is not automatic. This is in contrast to fee simple determinable. See the next entry. Also note that a condition must be stated. This is also in contrast to the words of duration found in fee simple determinable. See the next entry.

Fee Simple Determinable.

The grantor of a fee simple determinable interest retains a possibility of reverter. It is created when the grantor uses words of duration to limit a defeasible fee interest (as long as, for the time that, until, etc.). The conveyance contained explicit language that he retained a possibility of reverter. A possibility of reverter means that fee simple automatically reverts to the grantor at the time the designated event occurs. The grantor need not go to court to claim this interest; the interest automatically vests at the occurrence of the subsequent event.

Restraints on Alienation.

The conveyance may not be valid because it may be an undue restraint on alienation. Generally, courts do not allow title instruments/conveyances that absolutely prohibit future transfer of the property. Restraints on alienation may be allowed if the restraint is only conditional/for a moderate time period.

However, absolute restraints on alienation are invalid. Any language indicating such absolute restraint will be struck from the instrument, so the resulting interests will remain.

Future reading.

See Question 5 of the July 2011 California Bar Exam. *See also* Question 2 of the July 2024 California Bar Exam.

Exam Tip.

Do not confuse “restraint on alienation” with “Rules Against Perpetuity.” Be careful with issue spotting here. Let’s now go to the area of easements.

LANDLORD-TENANT

This is another must-know subject as it is commonly tested.

Issue: Landlord Tenant and Types of Leases.

Approach to Types of Tenancy.

There are four of these. See below. Do not confuse a "tenant" here with a "tenant in common." Rather, think of a "tenant" as a person that rents from a landlord. On the other hand, think of a "tenant in common" as a homeowner that shares an interest with another homeowner.

Black Letter Law.

1. Tenancy for years.

There is a fixed date of termination with no notice required to end the arrangement.

2. Periodic Tenancies.

Is one that continues for a specified period. For example, for a week or a month until it is effectively terminated.

3. Tenancy at will.

The tenancy can end at any time.

4. Tenancy at sufferance.

When one stops paying rent but remains on the premises, one becomes a holdover tenant. A holdover tenant is one who was once properly on the landlord's premises, but has exceeded her permission to occupy the premises, and thus remains on the premises unlawfully. A landlord has the right to evict the holdover tenant and sue for past rent, or the landlord may create a new periodic tenancy, by operation of law, with the tenant.

There exist tenant defenses. These are discussed in the next area.

TENANT DEFENSES FROM LANDLORD

Warranty of Habitability Blackletter Law.

If a landlord provides premises that are not inhabitable, tenant's duty to pay rent may be excused.

“Uninhabitability” has been fairly strictly construed by courts. Property is typically considered “uninhabitable” only if it fails to provide the barest essentials - four walls, a roof, and running water/plumbing.

Constructive Eviction.

If the problem with the toilet or other necessity of the home renders the premises completely uninhabitable, forming a nuisance, then upon proper notice to the landlord, the tenant can quit the premises. He will be relieved of his obligation to make future rent payments by virtue of the doctrine of constructive eviction.

Further Reading.

See Question 3 of the February 2019 California Bar Exam.

REMEDIES
TABLE OF CONTENTS

**COMPENSATORY DAMAGES – MAJOR COMPENSATORY
REMEDIES**

1. Compensatory
2. Expectation
3. Consequential
4. Incidental
5. Reliance

**NON-MAJOR COMPENSATORY REMEDIES (COMPENSATORY
DAMAGES CONTINUED)**

1. Nominal
2. Cover

RESTITUTION

1. Restitution

PUNITIVE DAMAGES

1. Punitive Damages

MISCELLANEOUS

1. General
2. Special

OTHER REMEDIES

1. Replevin
2. Liquidated Damages

MAJOR EQUITABLE REMEDIES AND INJUNCTIONS

1. Temporary Restraining Order (“TRO”)
2. Preliminary Injunction
3. Permanent Injunction

OTHER EQUITABLE REMEDIES

1. Specific Performance

MISCELLANEOUS REMEDIES

1. Rescission.
2. Reformation.

REMEDIES RELATING TO CRIMINAL / UNLAWFUL ACTS

1. Constructive Trust
2. Equitable Lien
3. Resulting Trust

TORT REMEDIES APPLICABLE TO LAND

1. Trespass To Land & Ejection
2. Trespass to Chattel
3. Conversion (Note The Difference Between Trespass To Chattel And Conversion)

OTHER LAND REMEDIES

1. Ejection
2. Lien
3. Injunction

TORTS IN THE SALE OF REAL PROPERTY

1. Misrepresentation / Fraud

SETTING UP FOR REMEDIES

Common Set Up for Remedies.

We begin by exploring the format relating to remedies. For the most part, remedies are usually tested with other subjects. There are three major structures for this set up. They are as follows: (1) Contract/Remedies; (2) Torts/Remedies; and (3) Remedies/Crimes.

Remedies and Other Subjects.

The most common area where remedies will be tested will be a crossover between contracts and remedies. Torts and remedies questions may also appear. You may also have a hypothetical where some type of crime took place and a remedy is being sought. We'll cover examples in this text.

COMMON SETUP

The Set Up: Two Approaches.

It is extremely helpful to understand that there are two approaches to the usual Remedies question relating to compensatory damages. These approaches can seem worlds apart. But they are not. Either approach will get you passing points.

Having alternative solutions may be one reason as to why people find this area so complex. You look at a sample answer from a past exam and the responses vary. And you end up scratching your head even more. This stops today. Capish?

Let's now look at these two approaches to compensatory damages.

The Set Ups.

You will see that the elements may overlap. Let's discuss the first approach.

This is the first alternative you can use.

First Set Up. Compensatory Damages.

Compensatory Damages (This is the heading). **These include:**

- 1. Expectation.**
- 2. Consequential.**
- 3. Incidental.**
- 4. Reliance.**

We'll stop here. Let's now move to the second set up.

Second Set Up. Compensatory Damages.

1. Causation.

2. Foreseeability.

3. Certainty.

4. Unavoidability.

The Next Steps.

The next step is for you to understand the legal terms that are presented above. We'll talk about this below. Once you do that, pick one set up and consistently use that approach.

Do I recommend a certain approach? Yes I do. I recommend you use the first set up. The reason is that more issues are specifically named. Again, you can use the second set up and still be awarded equivalent points.

There are four requirements for monetary damages to be awarded. Think of these as the basic underlying requirements. These are included in the second approach. Here they are: 1. Causation; 2. Foreseeability; 3. Certainty, and 4. Unavoidability.

The point being that if you discuss the First Set, you will eventually discuss most of the underlying requirements for money damages.

Further Reading.

Don't make this confusing because it is not. For an example of a bar question on compensatory damages, refer to Question 2 of the February 2017 California Bar Exam.

LEGAL REMEDIES SECTION

Approach to Legal Remedies.

In this next section, the following legal damages will be discussed. Keep in mind the major difference between legal remedies and equitable remedies. Do you know what it is? When a plaintiff asks the court of legal remedies, he is often asking the court for monetary compensation. Contrast this with equitable remedies where monetary awards are not necessarily included. Think about an injunction against a defendant compelling him to remove waste from plaintiff's real property.

FIRST SET UP

Expectation Damages Black Letter Law.

The purpose of expectation damages is to put the non-breaching party in the position it would have been had the contract been fulfilled. The measure of damages is the difference between the contract price and the market price at the time the breach occurred.

Commentary.

Notice that this remedy contains a formula. Here it is:

The difference between the contract price and the market price at the time of breach.

Consequential Damages Black Letter Law.

Damages that are foreseeable by both parties at the time they made the contract.

Further Reading.

Before discussing the actions of the plaintiff in this example, consider whether his acts were foreseeable: (1) He quit his job; (2) He bought an expensive champagne bottle; (3) He Purchased luggage and clothing. *See* Question 4 of the July 2002 California Bar Exam.

Incidental Damages Black Letter Law.

Losses that are reasonably associated to actual damages.

Commentary.

This rule appears complex at the outset. But think of a basic definition of *incidental* to better understand this remedy. Think of the layperson's definition of incidental. Webster defines it as "taking place as a minor part or result of something else." Thus, consider that definition to understand this remedy. Let's look at some examples.

Reliance Damages Black Letter Law.

Reliance damages seek to put the plaintiff in the position he would have been in had the contract itself not been entered into by the parties. These awards can be a reimbursement for losses that the plaintiff suffers in reliance on the defendant's contractual promise that has been breached. The reliance reimbursement can be reasonable *out-of-pocket* losses.

Commentary.

Distinguish reliance damages from expectation damages. For example, expectancy damages seek to put the plaintiff in the position he would have been in *if the performance was rendered*. In contrast, reliance damages seek to put the plaintiff in the position he would have been in had the contract itself *not been entered into* by the parties.

SECOND SET UP

Compensatory Damages Black Letter Law.

The goal is to make the injured party whole again. The elements for compensatory damages are: (1) Causation; (2) Foreseeability; (3) Certainty; and (4) Unavoidability.

Commentary.

Some of the terms above overlap with some of the issues that you have already learned. For example, for *causation*, use the “but for” test from Torts. *Foreseeability* was discussed under *consequential damages*. As for *certainty*, there is a requirement that damages must be not be speculative. Rather, damages must be proven to a reasonable certainty. As for *unavoidability*, there is the duty to mitigate damages.

Compensatory damages may include other areas of damages. These *other* terms now follow starting with expectation damages.

OTHER COMPENSATORY REMEDIES

Other Compensatory Remedies.

We will now examine *other* or non-major compensatory remedies. Moreover, we are still covering legal remedies. Here is a quick overview.

Reliance.

Nominal.

Cover.

You may have to discuss these along with the major compensatory remedies that were mentioned earlier. The purpose for having this “other” category is merely to avoid confusion by the possibility of overwhelming the reader.

Reliance Damages Black Letter Law.

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Distinguish reliance damages from expectation damages. For example, expectancy damages seek to put the plaintiff in the position he would have been in *if the performance was rendered*. In contrast, reliance damages seek to put the plaintiff in the position he would have been in had the contract itself *not been entered into* by the parties.

RESTITUTION

Restitution Black Letter Law.

The purpose of restitution is to prevent unjust enrichment.

Commentary.

Restitution is not considered a compensatory remedy. However, it can be tested alongside compensatory damages. Let's now move away from the setup to discuss implied-in-fact and implied-in-law contracts. Restitution will reappear below.

Approach to Implied-In-Fact and Implied-In-Law Contracts.

As stated above, the basic purpose of restitution is to prevent unjust enrichment. Two common areas where restitution appears frequently are in the areas of *implied-in-fact* and *implied-in-law* agreements.

On written exams, implied-in-law hypotheticals have appeared frequently (versus implied-in-fact contracts). Nonetheless, we'll discuss both legal concepts here.

Implied-In-Fact Black Letter Law.

A contract based on intent whether the intent is express or tacit. It may involve an unenforceable contract. It may be considered a form of restitution to prevent unjust enrichment. The amount of damages may be based on *quantum meruit* (the reasonable value of services rendered).

Example.

Parent has his child take the karate class without making an initial payment to the karate instructor. No contract is expressly formed. However, intent to enter into an agreement is implied by the conduct of the parent.

Implied-In-Law Black Letter Law.

The term implied-in-law is more modernly referred to as a quasi-contract. The contract never existed since an offer or acceptance is not always required. In other words, the contract can be created by fiction of law. It may be considered a form of restitution to prevent unjust enrichment. The measure of damages can be based on *quantum meruit* (reasonable compensation for services rendered).

Example.

Here is a case that discusses implied-in-contracts in more detail: (1) *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164. This is the case where a person is thrown out of a trolley and another person, who happens to be a surgeon, performs a medical procedure. Even though the person did not survive, the surgeon demands payment for his services.

PUNITIVE DAMAGES

Punitive Damages Black Letter Law.

Punitive damages are awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit. These damages are intended to penalize the wrongdoer.

OTHER REMEDIES

Replevin.

Replevin is an action seeking return of personal property wrongfully taken or held by the defendant. In exchange for the personal property, the plaintiff in the action pledges a security and is allowed to hold the property until the case is resolved by the court.

Liquidated Damages.

Liquidated damages are an exact amount of money a party will owe if it breaches a contract, in order to compensate the injured party for its losses. Liquidated damages must be clearly stated in a section or clause of a contract and agreed upon by the parties prior to entering a contract.

EQUITABLE REMEDIES SECTION

Introduction to Equitable Remedies.

This area will focus on equitable remedies. It is important that the reader know the difference between legal and equitable remedies. In sum, legal remedies usually involve some type of

monetary compensation as an award for the harm. For equitable remedies, a monetary reward will not necessarily be awarded. We'll begin this section with injunctions.

INJUNCTIONS

Injunctions.

These types of injunctions can also be referred to as *Provisional Remedies*. These injunctions can include temporary restraining orders ("TRO") and preliminary injunctions. Here are the three most commonly tested injunctions.

Most Commonly Tested Injunctions.

(1) TRO: (2) Preliminary Injunction; and (3) Permanent Injunction

Let's now get more specific.

TEMPORARY RESTRAINING ORDER

The Temporary Restraining Order Black Letter Law.

A TRO is a court order that preserves the status quo until the applicant's hearing for a preliminary or permanent injunction can be heard. A TRO is issued when (1) there is an emergency; and (2) irreparable harm will result.

Moreover, TRO proceedings can be heard under *ex parte* proceedings. This is proper when an emergency may be present. In such instances, notice to the opposing party may not be required.

Commentary.

Read the question closely to determine whether timing is an issue. For example, is the sale of an item scheduled to occur soon? Also, the question may ask you in broad terms whether an injunction can likely be awarded. Approach with caution and pay close attention to what is being asked in the interrogatory. The elements are now discussed individually.

PRELIMINARY INJUNCTION

Preliminary Injunction Black Letter Law.

A temporary injunction issued before trial. The plaintiff must show: (1) irreparable harm; (2) Balance of hardship; and (3) that he is likely to succeed. Under this rule, the defendant must be given notice.

Commentary.

Some of these elements are now discussed individually.

Likely To Succeed.

Decisions at the preliminary injunction stage are less formal due to the incomplete record of undisputed facts. Courts may apply a *Likelihood* test: (1) How likely is it that the plaintiff will prove his claim; and (2) How likely is it that the plaintiff will likely withstand the challenges.

Balance of Hardship.

Consider a balancing test here between these two scenarios: (1) the harm that will be suffered by the plaintiff if the injunction is *not granted*. Balance this with the harm that is suffered by the defendant if the injunction *is granted*. This element will favor the party that suffers the most between the two.

This ends the discussion on the most common provisional injunctions. We'll now shift to the area of permanent injunctions.

PERMANENT INJUNCTION

Permanent Injunction Black Letter Law.

A permanent Injunction is granted after a final hearing (versus an *ex parte* or preliminary hearing). The plaintiff will have to prove these five elements: (1) Inadequate remedy at law; (2) Property interest; (3) Feasibility; (4) Balance of Hardships; and (5) Defenses are not present.

Mnemonic.

“I put five bucks down.”

1. Inadequate Remedy At Law.

Where money would adequately compensate the plaintiff for the harm, there would be no inadequate remedy at law.

Commentary.

What does this mean? It means that an inadequate remedy at law must be present (to be granted a permanent injunction). This sounds a bit confusing. Let's eliminate that confusion now.

Here are examples where there exists an inadequate remedy at law (and thus meet the element to grant the injunction): (1) money damages are speculative; (2) the defendant is insolvent; where the property (or real property) is unique. The most popular on exams is where real property is at issue.

This prong will appear again under “Specific Performance.” We'll further discuss this element during that time. Since it appears in more than one type of remedy, it is very important that you get a firm grasp of this legal concept.

2. Property Interest.

The modern view is that any protectable interest will be considered by the court. The old view was that only tangible property would be considered.

3. Feasibility.

It must be feasible for the court to supervise the order. Administration and costs to the court can be factors.

4. Balance of Hardship.

Consider a balancing test here between the harm that will be suffered by the plaintiff if the injunction is *not granted*. Balance this with the harm that is suffered by the defendant if the injunction is *granted*.

5. Defenses Not Present.

For a court to grant the injunction, the defendant must have no defenses. Here are two common defenses. Know these: (1) Laches and (2) Unclean hands. It will probably be necessary for you to discuss them (even if the discussion is done briefly).

Laches.

Laches is an unreasonable lapse of time in pursuing a right that a party may be entitled to. Also, the court will consider whether the lapse of time is prejudicial to the defendant. Note that this is not the same as a *statute of limitations* argument.

Unclean Hands.

The plaintiff seeking relief must not be guilty of violating an equitable principle.

SPECIFIC PERFORMANCE

Specific Performance.

Specific performance is the rendering of a performance under a contract through a decree. It is issued when monetary damages would be inappropriate. The elements are as follow: (1) Contract is valid with definite and certain terms; (2) Conditions in contract are satisfied (if any); (3) Inadequate legal remedy; (4) Mutuality of performance; (5) Feasibility of enforcement; and (6) Defenses are not present.

Commentary:

In other words, the court may compel a party to perform under the original terms of the contract. For example, a decree may order a defendant to finalize the sale of John Lennon's psychedelic Rolls Royce Phantom V.

Take note that specific performance may fall under equitable remedies. If the question asks for *remedies* or *equitable remedies*, you should keep this legal concept in mind. Also, look for

transactions involving real estate. One party to the contract will usually breach. Seriously consider discussing specific performance.

Key Words for Specific Performance.

- 1. Contract is valid with definite and certain terms.**
- 2. Conditions in contract are satisfied.**
- 3. Inadequate legal remedy.**
- 4. Mutuality of performance.**
- 5. Feasibility of enforcement.**
- 6. Defenses are not present.**

Mnemonic:

Cha Cha Is My Favorite Dance!

These elements are now individually discussed below.

1. Contract is valid with definite and certain terms.

There must be a valid contract already in place between the parties.

2. Conditions In Contract for Plaintiff are Satisfied.

The plaintiff must have performed any conditions that he is required to perform under the contract.

3. Inadequate Legal Remedy.

Where money would adequately compensate the plaintiff for the harm, there would be no inadequate remedy at law.

4. Mutuality of Performance.

Under this element, both parties must be able to perform (versus a party that lacks capacity, for example). In other words, the right to performance must be mutual. In essence, to compel a party to perform, the other party must also be able to perform.

5. Feasibility of Enforcement.

Consider the difficulty the court may have in supervising the court order. Administration and costs to the court can be factors.

6. Defenses Are Not Present.

For a court to grant the injunction, the defendant must have no defenses. Here are two common defenses. Know these: (1) Laches and (2) Unclean hands.

End of discussion.

RESCISSION & REFORMATION

These two can fall under equitable remedies as well: (1) Rescission and (2) Reformation.

Rescission Black Letter Law.

A remedy where the contract is canceled as if it never happened. The goal is to put the parties back to the position they were in before they entered into the agreement.

Commentary.

Be on the lookout for hypotheticals where there is fraud or a mistake. This scenario is heavily tested.

Reformation Black Letter Law.

In cases usually involving mistake or fraud, the court may allow the parties to rewrite the portion of the contract to reflect the actual intent of the parties.

Future Reading.

See Selected Answer B, Question 6 of the February 2014 California Bar Exam. *See also* Question 5 of the July 2024 California Bar Exam.

REMEDIES RELATING TO CRIMINAL / UNLAWFUL ACTS

Here are the three most common remedies that are used when you have unlawful acts: (1) Constructive Trust; (2) Equitable Lien; and (3) Resulting Trust.

We will go through these individually. We'll begin the discussion with constructive trusts.

CONSTRUCTIVE TRUST

Constructive Trust Black Letter Law.

A constructive trust is a court-imposed equitable remedy against a person who has obtained property unlawfully. It may also be imposed to prevent unjust enrichment. The defendant will involuntarily hold the property for the benefit of the plaintiff. The defendant may then be compelled by the court to convey title to the plaintiff. Upon the passing of title, the plaintiff may then directly capture the property. Moreover, it is a trust in name only since it is not created by the intentions of a settlor.

Exam tip: Let's look at an example. Look for a misrepresentation (fraud) that took place in the course of purchasing real property. Other categories to look for: a scenario involving undue influence, the violation of a trust, or any other wrongful act.

Moreover, look for fact patterns where Dan (the presumed defendant) was unjustly enriched. For example, Dan sold the real property and made a \$100,000 profit.

Property Changes Form and Tracing.

When the property changes form, the plaintiff may trace it to the other form. For example, the money gained from the sale of the real property is used to purchase stock from Acme Corporation. For this to occur, the property must be traced with certainty.

If the traced property gained value, the plaintiff is entitled to the enhanced value. For example, if the stock from Acme increased in value, the plaintiff will be entitled to that increased amount. To grasp this concept, let's look at an example.

Example From Model Answer in Past Exam.

Here, [Plaintiff] may seek a constructive trust on [Defendant]'s \$250,000. [Defendant] invested the money in stocks that are now worth \$750,000. Because the original \$250,000 can be clearly traced to the stocks, [Plaintiff] may recover the full, enhanced value of the property. Thus [Plaintiff] is entitled to the stocks which are now worth \$750,000. *See* Selected Answer A, Question 6 of the February 2014 California Bar Exam.

Let's move on now to equitable lien. You can then compare and contrast the two since you may have to discuss both.

EQUITABLE LIEN

Equitable Lien Black Letter Law.

An equitable lien is a court-imposed security interest in property held by the defendant. The outcome would be to achieve a fair result where the defendant has acted unlawfully or where the court seeks to prevent unjust enrichment.

Commentary.

In essence, the property is sold and the proceeds are awarded to the plaintiff (or lien- holder). Thus, the holder must foreclose on the property to satisfy the judgment. However, note that the plaintiff does *not* have possession of the fund or the property.

Moreover, the plaintiff may *not* recover the sum of the value that appreciates or any enhanced value (contrast this with the constructive trust where the enhanced value may be

attained). However, the plaintiff may trace the property if it changes form. See the next paragraph for a better appreciation of the term *tracing*.

Sample From Model Answer.

An equitable lien is a court-imposed security interest in the property which must be sold and the proceeds returned to the plaintiff. If the sale results in less money than is owed, the plaintiff may get a deficiency judgment and a lien on the defendant's other property to secure that judgment. However, the plaintiff may not recover any enhanced value in the property. *Tracing* may also be used to ensure return of the property. (See Selected Answer A, Question 6 of the February 2014 California Bar Exam). Emphasis in *italics* is added.

Comparing the Equitable Lien and the Constructive Trust.

Now follows a list of the major differences between an equitable lien and a constructive trust: (1) Both allow tracing. (2) The plaintiff can directly capture the title of the property with a constructive trust. This is not possible under an equitable lien. (3) Plaintiff can recover an enhanced value of the property under a constructive trust. This is not true under an equitable lien.

Regarding the Direct Capture of the Property and Other Issues.

As stated earlier, the plaintiff of an equitable lien can sell the property to satisfy the judgment. However, the plaintiff does not directly *capture the property*.

In contrast, the constructive trust permits the defendant to convey title to the plaintiff. As such, the constructive trust allows for direct capture of the property. The difference then, is that the equitable lien is a security for the debt. To the contrary, the constructive trust transfers title to satisfy the debt.

RESULTING TRUST

Resulting Trust Black Letter Law.

A resulting trust arises by operation of law when a person holds the property for the benefit of another person. The trust property is said to *result* back to the transferor.

Commentary.

A key characteristic here is when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property. As stated earlier, look for a resulting trust where the facts suggest that an unlawful act has occurred.

Moreover, you may be under a cross-exam question dealing with criminal law, trusts, torts, or other combination. Now let's move on to Tort Remedies.

TORT REMEDIES APPLICABLE TO LAND

Focus on July 2013 Remedies Question.

The scenario that follows will be based on Question 6 of the July 2013 California Bar Exam. This particular question is noteworthy because the content is not widely discussed in neither law school nor in past bar exam questions. The full exam question is placed on the next page. Take the time to read it. It would also be extremely beneficial if you treat it as a practice exam and spend 60 minutes writing an answer *before* reading the commentary that follows. Here is a list of the issues that will be covered.

Trespass To Land Black Letter Law.

Trespass to land occurs when an individual intentionally invades the real property of another. The trespasser need not know the land is not his own – he need only intend to go where he goes or do what he does. Another important aspect of the rule is that trespass can occur with more than just the trespasser's body. When a trespasser causes a physical object to go onto the land of another, he has trespassed, even if his body does not actually break the relevant plane.

Trespass to land also occurs when a licensee (or any other guest) goes to a part of the land where he does not have permission to go. See Selected Answer A, Question 6 of the July 2013 California Bar Exam.

DEFENSES TO TRESPASS TO LAND

Approach to Defenses.

You may also wish to discuss defenses such as a license and the scope of the license.

License Black Letter Law.

A license is a permission to use another's land in a particular way. A license need not be in writing or evidence any of the formalities of an easement. However, a license is freely revocable.

Scope of License.

Importantly, a licensee may only act within the scope of the license.

End Abstract.

Let's now move to legal remedies. We will stay on trespass to land as it appeared on the July 2013 exam.

REMEDIES FOR TRESPASS TO LAND

Diminution in Land Value Black Letter Law.

The diminution in value is the decrease in value of the property. *See* Selected Answer B, Question 6, California Bar Exam, July 2013.

EJECTMENT

Introduction to Ejectment.

This is a continuation of Question 6 of the July 2013 exam. The focus here is ejectment. Keep in mind that an ejectment is different than an unlawful detainer. In particular, for an ejectment to take place the tortfeasor cannot be a tenant.

Ejectment Black Letter Law.

Ejectment allows a person in rightful possession of land to eject a trespasser who is present on his land. This action is only appropriate where the trespasser is still on the land. *See* Selected Answer A, Question of the July 2013 California Bar Exam.

TRESPASS TO CHATTEL

Trespass to Chattel and Black Letter Law.

Trespass to chattel is where the plaintiff owned or possessed personal property. The defendant must intentionally interfere with the personal property without the plaintiff's consent. Furthermore, plaintiff was harmed and the defendant was the cause of that harm.

Commentary.

Distinguish trespass to chattel from trespass to land. The difference is that trespass to land requires that the presumptive defendant enter upon another person's property (thus invoking the presence of land). Whereas trespass to chattel involves the interference of plaintiff's personal property.

CONVERSION

Approach to Conversion.

Conversion and trespass to chattel can be thought of as being closely related. They are within the same family. Think of trespass to chattel as conversion's little brother. As you can probably tell from this statement, conversion is a more serious tort. In sum, a plaintiff can recover the *full value* of the damaged item. This is in contrast to trespass to chattel where a plaintiff can only recover the value of the *lost use* of the property (and the property itself, of course). Here is how one examinee stated the rule. Again, we will continue with Question 6 of the July 2013 exam. The writer here is examining the damages to the motorcycle. The question at issue is whether trespass to chattel or conversion would apply.

Rule as Stated in Past Exam.

The remedies to this theory of tort liability turn on the distinction between trespass to chattel and conversion. These torts are largely overlapping – the main difference is one of degree. Conversion consists of the trespass to another's chattel that so interferes with his right to possession that the owner is entitled to a replacement of the chattel. Essentially this is a "forced sale," where the tortfeasor has to pay the reasonable market price of the chattel. See Selected Answer A, Question 6, July 2013, California Bar Exam.

Torts

Table of Contents

Defamation
False Imprisonment
Intentional Infliction of Emotional Distress
Negligent Infliction of Emotional Distress
Trespass to Land
Trespass to Chattel
Conversion
Ultra Hazardous Activity
Wild Animals
Products Liability
Negligence Template.
 Discussed Under Duty and Standard of Care:
 Anticipated Trespasser
 Child Attractive Nuisance
 Landlord Duties and Invitee
 Discussed Under Breach:
 Negligence Per Se
 Strict Product Liability
 Res Ipsa Loquitur
Independent Contractor (Negligence Continued)
Joint Tortfeasors and Liability

DEFAMATION

Defamation Black Letter Law.

Liability is found where these elements are met: (1) a defamatory statement; (2) of or concerning plaintiff; (3) publication; and (4) damages.

(1) Defamatory Statement.

A defamatory statement is one that harms a plaintiff's reputation.

(2) Of or Concerning Plaintiff.

The plaintiff must establish that a reasonable recipient of the statement would understand that the statement is of or concerns the plaintiff.

(3) Publication.

Publication requires that the defamatory statement be communicated to a third party.

(4) Damages.

This area depends on whether the cause of action is libel or a type of slander.

This area can get messy. This means that you must be especially careful to maintain an organized discussion as damages relating to defamation tend to confuse many bar candidates. Let's talk about damages in the next section.

DAMAGES PERTAINING TO DEFAMATION

Approach to Damages.

The objective here is to have a clear discussion. To this end, let's talk about situations where damages are presumed. When damages are presumed, the plaintiff does *not* have to prove the harm. The first area is **libel** and the other area is **slander per se**. We'll talk about libel first.

Libel Black Letter Law.

Libel is defamation that is written. In such a situation, **general damages are presumed**. Even though the plaintiff does not have to prove damages, he may offer evidence of damages.

Slander

Slander is defamation that is spoken. In such a situation, **the plaintiff must prove damages**. An **exception to proving damages is slander per se**.

Slander Per Se

Slander per se exists when the defamatory statement consists of: (1) accusations of misconduct in business; (2) accusations of a crime or a crime of moral turpitude; (3) a suggestion that the person is unchaste or has engaged in sexual misconduct; or (4) the person has a loathsome disease.

Conclusion.

The **key** is to determine if libel or slander per se are present. If so, state that the damages are presumed. However, this does *not* end the discussion. Next, move to the area of constitutional defamation. This is the next area.

Constitutional Defamation Black Letter Law.

When a defamation involves a matter of public concern, the plaintiff must prove two additional elements: (1) falsity; and (2) fault.

Matter of Public Concern:

A matter of public concern is one that poses a political, social or other concern to the community.

Note:

Discuss whether the matter involves public concern. If the matter involves public concern, then move to the area of falsity and fault (these are discussed on the next page). For purposes of explaining this concept, we will assume that the matter involves a public concern.

Matters of Public Concern

Falsity

It is required that the statement be false. If the statement is true, there will be no liability against the defendant.

Fault

The type of fault depends on whether the plaintiff is a public or private figure. If the plaintiff is a private figure, the plaintiff must prove negligence. If plaintiff is a public figure, the plaintiff must prove malice.

Malice

Malice is present where the statement was made with knowledge that it was false or that it was made with reckless disregard as to whether the statement was true.

Negligence

Negligence is not an intentional act. See the definition above.

Recap:

Matter of Public Concern: Requires two additional elements

- o (1) falsity; and (2) fault
 - Under (2) Fault
 - If public figure → Malice
 - If private figure → Negligence

Let's move now to defenses to defamation.

DEFENSES TO DEFAMATION

Defenses to Defamation and Black Letter Law.

Absolute Privilege.

Absolute privilege may be used by the defendant to absolve him of liability. This defense may exist under the following situations: (1) during judicial proceedings; (2) statements by legislators in debate; and (3) in compelled broadcasts.

Qualified Privileges.

Qualified privilege may also be used by the defendants. This defense may exist under the following situations: reports of official government proceedings, (2) statements by an employer regarding an employee. This is not an exhaustive list.

Further Reading.

See Question 4 of the February 2009 California Bar Exam. *See also* Question 1 of the February 2020 California Bar Exam.

FALSE IMPRISONMENT

False Imprisonment Black Letter Rule.

False imprisonment occurs when a defendant, intending to confine another within boundaries fixed by defendant, so confines and the person is conscious of the confinement or is harmed by it.

Intent.

The requisite intent is merely the intent to confine.

Confinement.

Confinement occurs when a person is prevented from leaving a given area. The confinement must be complete, and the person must have no reasonable escape known to him. The confinement may be by means of actual or apparent barriers.

Time.

There is *no* specific amount of time required with false imprisonment charges. False imprisonment can occur if someone is restrained for a very brief amount of time. For example, a person can point a gun at another person while demanding their money. An argument for false imprisonment can be made even if the duration of this encounter was for seconds. *See* Question 1 of the July 2010 California Bar Exam.

Defenses.

Shopkeeper's Privilege and Shoplifters.

Shopkeepers may have a common law or statutory privilege to detain persons reasonably suspected of shoplifting. The duration must be for a reasonable time and in a reasonable manner for the purpose of conducting an investigation.

Example.

Gas store clerk holds plaintiff for more than 25 minutes after mistakenly believing that plaintiff had stolen merchandise. Under the circumstances, was the detention of reasonable duration. *See* Question 1 of July 2006 California Bar Exam.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Introduction.

In this section, we'll look at the black letter law for Intentional Infliction of Emotional Distress (IIED) and for Negligent Infliction of Emotional Distress (NIED). An example and an explanation of the differences will be provided. We'll start first with IIED.

Intentional Infliction of Emotional Distress (IIED) Black Letter Law.

Defendant will be subject to liability if the following elements are present: **(1) Extreme and outrageous conduct; (2) Intention or recklessness; and (3) Severe emotional distress on the part of Plaintiff.**

Exam Tip.

Burglar demands a woman's purse while pointing a handgun at her around midnight in a parking lot. The burglar states, "You made me mad, so now I'm going to shoot you." Notice that the burglar's acts are intentional. The issue is whether the person can succeed on a theory based on IIED against the burglar. *See* Question 1 of the July 2010 California Bar Exam. *See also* Question 1 of the February 2020 California Bar Exam.

Also, DON'T discuss crimes, like robbery, if the call of the question does not ask for it. Be careful. Consider this question from July 2010: "Under what theory or theories, if any, might Patron bring an action for damages against Homeowner, Burglar, or Cinema? Discuss." Notice that the question does state something similar to this: "What crimes can Homeowner reasonably be charged with?"

Keep this in mind: usually, only the District Attorney can file criminal charges. A private party may bring forth a tort.

Let's now move towards NIED.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Negligent Infliction of Emotional Distress Black Letter Law.

Defendant will be subject to liability if (1) Negligent conduct is caused by the defendant against a person; (2) In Plaintiff's presence; and (3) Plaintiff suffers subsequent physical symptoms.

Differences Between IIED and NIED.

The difference between IIED and NIED is the role of the plaintiff in comparison to the defendant. For IIED, the plaintiff will be *intentionally* (or recklessly) harmed by the defendant. For NIED, the plaintiff must be present while the defendant causes negligence against a *third person*. To this end, it is important that the reader understand the difference between intentional torts and negligence. See the next section.

Intentional Torts Versus Negligence.

When approaching Torts questions, there are two major areas that are usually tested. These are intentional torts and negligence. Be cognizant of the differences and also carefully read the call of the question to ensure you will be responsive.

The Difference.

The major difference between an intentional tort and negligence is that an intentional tort occurs when a tortfeasor acts on purpose. In contrast, negligence takes place when someone is not careful enough and unintentionally injures another person.

Here's a simple way to remember. Think about when a family member says to you: "be careful." They are really saying: "Do not be negligent. Exercise due care." Of course, not in those words, but that is the meaning when translated into language dealing with negligence. The point being that they know you would not *intentionally* act foolish. However, a person can act foolishly by another manner under than purposefully.

The difference here is emphasized because this difference can be tested in a subtle way. Let's look at an example.

Example.

This question appeared on an exam: "What intentional tort claims can Paul reasonably bring against Doug and what remedies can he reasonably seek? Discuss." See Question 6 of the July 2013 of the California Bar Exam.

Just by looking at the question (without even reading the fact pattern), think about what you can discuss and think about what you should not discuss. Take a moment now to think about it.

Here is what you should *not* discuss: negligence. This is because *intentional* acts do not amount to negligence. The point is that you should not rely on the essay questions to tell what *not* to discuss. By the way, you should also think about discussing *tort remedies*. Tort remedies are not tested as often as intentional torts or negligence. Nonetheless, you should also be familiar with tort remedies. Don't worry. We also have *Template Cheat Sheets* for Tort Remedies. Let's now move away from this topic.

TRESPASS TO LAND

Trespass to Land Black Letter Law.

Occurs when a person intentionally (1) enters the land or causes a thing or third person to do so; (2) remains on the land after his privilege to be there has expired; or (3) fails to remove from the land a thing which he is under a duty to remove.

Defenses to Trespass to Land.

Private Necessity.

When there is an emergency situation, a person may enter the land of another to avoid extreme physical harm or injury. However, the person entering the land is still liable for damages.

Consent.

When there exists authorized permission, there is consent and this will serve as a valid defense.

Commentary.

There are two common forms of trespass in torts: trespass to land and trespass to chattel. Trespass to land is more common in daily circumstances. This topic can also be straightforward. However, for exam purposes, it is also helpful to understand trespass to chattel as this may also be tested. That topic now follows.

Further Reading.

Question 3 of the February 2018 California Bar Exam.

TRESPASS TO CHATTEL

Trespass to Chattel Black Letter Law.

Occurs where the plaintiff owned or possessed personal property. The defendant must intentionally interfere with the personal property without the plaintiff's consent. Furthermore, the plaintiff must be harmed and the defendant must be the cause of that harm.

Commentary.

Again, distinguish trespass to chattel from trespass to land. The difference is that trespass to land requires that the presumptive defendant enter upon another person's property (thus invoking the presence of land). Whereas trespass to chattel involves the interference of plaintiff's personal property. *See* Selected Answer A, Question 6 of the July 2013 California Bar Exam.

CONVERSION

Approach to Conversion.

Conversion and trespass to chattel can be thought of as being closely related. They are within the same family. Think of trespass to chattel as conversion's little brother. As you can probably tell from this statement, conversion is a more serious tort. In sum, a plaintiff can recover the *full value* of the damaged item. This is in contrast to trespass to chattel where a plaintiff can only recover the value of the *lost use* of the property (and the property itself, of course). Here is how one examinee stated the rule. Again, we will continue with Question 6 of the July 2013 exam. The writer here is examining the damages to the motorcycle. The question at issue is whether trespass to chattel or conversion would apply.

Rule as Stated in Past Exam.

The remedies to this theory of tort liability turn on the distinction between trespass to chattel and conversion. These torts are largely overlapping – the main difference is one of degree. Conversion consists of the trespass to another's chattel that so interferes with his right to possession that the owner is entitled to a replacement of the chattel.

Essentially this is a "forced sale," where the tortfeasor has to pay the reasonable market price of the chattel. (*Commentary: Again, both terms are closely related. However, conversion would usually apply where the Damages are greater. In the next paragraph, the examinee states that conversion would be appropriate and gives his reason.*)

A court would most likely find that the trespass consisted of conversion. The key fact is that the repair cost of the motorcycle is more than the cost to purchase a new one. This suggests that the damage is quite extensive, and that Paul should have the right to force a sale of the motorcycle on Doug for its reasonable fair market value.

Conversion Black Letter Law.

Conversion is the deprivation of another person's right to use or possess personal property.

End Abstract.

The black letter law is stated before the commentary because background information makes the tort easier to understand.

NEGLIGENCE
(aka PRIMA FACIE NEGLIGENCE)

Approach to Negligence.

What now follows is a template that we will refer to simply as *Negligence*. It can also be referred to as *prima facie negligence*. This essentially means that a plaintiff must prove elements A, B, C, D, and E. See the *Oversimplified Structure of Negligence* heading below.

Negligence is easy to discuss. It is too easy. As such, it almost never tested in a straightforward manner. Rather, it will usually be mixed in with a strict liability issue (think ultra-hazardous activities, wild animals, or strict products liability).

During the exam, you will be required to discuss prima facie negligence along with a variation of strict liability. View the oversimplified structure below that accomplishes the interaction. Think of this template as a foundation in which to approach negligence issues. Once you master this skeleton outline, you will be able to consistently produce an organized discussion.

Oversimplified Structure of Negligence.

Step #1. Discuss Prima Facie Negligence.

Rule: To succeed, the plaintiff must prove A, B, C, D, and E.

A Duty.

Cardozo View (Majority).

Andrews View (Minority).

Breach of Duty.

Standard of Care.

Causation.

Actual.

Proximate.

Damages.

Explore Defenses.

End of Prima Facie Negligence Discussion.

Step #2. Discuss a strict liability issue(s).

Example: Ultra Hazardous Activity. Other commonly tested issues include Wild Animals and Strict Products Liability.

Issue and Rule: Discuss.

A Duty. Do not mention.

Breach of Duty. Do not mention.

Note: Begin your discussion starting with causation. For the rule statement, merely write: *See above.*

Causation. Rule: See above.

Discuss.

Damages. Rule: See above.

Discuss.

Explore Defences. Rule: See above.

Discuss.

Exam Tip.

On the actual exam, you may want to discuss the strict liability issue(s) first. Then discuss prima facie negligence. The reason prima facie negligence is discussed here before strict liability is to demonstrate the skeletal outline. Then you can begin to discuss in an organized manner.

Advanced Tip.

On the actual exam, you will probably discuss a strict liability issue before discussing prima facie negligence. This is fine and it is expected. As such, you should be able to switch between discussing prima facie negligence first and then discussing a strict liability issue.

At such point, when you discuss strict liability first and prima facie negligence second, causation, damages, and defenses can be displayed as seen below.

Causation.

Rule: See above.

Damages.

Rule: See above.

Causation.

Rule: See above.

With these important topics discussed, let's now move to the prima facie negligence black letter law.

Negligence (aka Prima Facie Negligence).

Black Letter Law.

To prevail on a negligence claim, the person must prove (1) a duty; (2) breach of duty; (3) causation; (4) damages; and (5) Explore defendant's defenses.

Duty.

Every person owes a general duty to not place others in unreasonable risk of harm. There is a majority and minority view as discussed below.

Cardozo View (Majority). (Notice that this falls under "Duty.")

The Defendant is liable to those who could be reasonably foreseen to be within the zone of danger.

Andrews View (Minority). (Notice that this also falls under "Duty.")

Defendant owes a duty of care to all.

Exam Tip.

Keep the discussion of duty brief. Far too many examinees provide a lengthy argument to the element of foreseeability under *Cardozo*. However, this is not a good place for an extensive argument. The reason for this is because a party can use the *Andrews* minority view that applies to all. As such, begin your discussion with *Cardozo* and keep this argument short. Reach a conclusion and move on to the *Andrews* view. Simply state: *The plaintiff can argue that the Defendant's duty applies to all under Andrews. Thus, the element of duty is met.*

Moreover, foreseeability can usually be analyzed under proximate causation. Save your time and energy under that issue as you can likely score points there.

Breach.

Defendant must have created an unreasonable risk of harm in light of the applicable standard.

Standard of Care.

A defendant has a duty to act as a reasonably prudent person would have acted in the same or similar circumstances.

Approach to Causation, Damages, and Exploring Defenses.

Note: The standard of care goes under breach. After discussion of the standard of care, move on to causation and so forth.

Causation.

Actual Causation and Proximate Causation rule statements.

Damages.

Rule statement.

Explore Defenses.

Rule statement.

End of discussion. But wait! Let's return to the *standard of care* because this can be an umbrella issue with sub-issues. These issues are discussed below.

OTHER DOCTRINES UNDER STANDARD OF CARE

Anticipated Trespasser.

Where a landowner foresees trespassers, he has a duty to warn of known artificial conditions that present serious risks of bodily harm.

Attractive Nuisance.

Where a landowner has an attractive nuisance on his land, he has a duty to make the artificial condition safe. He may also have a greater duty than to just warn the trespasser. These elements must be met: (1) Foreseeable to have children trespassers; (2) Unlikely to appreciate the danger; and (3) The cost to make safe outweighs the risk of harm.

Let's move now to the possessors of land and the duty of care that is owed.

Possessor of Land and Standard of Care That Is Owed.

This area tends to be confusing since the elements appear to be similar. We'll go over the differences. There are two main categories under this topic: (1) Licensee and (2) Invitee. Note that invitees are usually further broken down into (i) Public Invitees and (ii) Business Visitors. Let's discuss Licensees first.

Licensee and the Standard of Care That Is Owed.

A licensee enters with the possessor's permission for the benefit of the licensee. The possessor owes a duty to warn of dangerous conditions that are known to the possessor and unlikely to be discovered by the licensee. The possessor must exercise reasonable care of active operations on the land. Since the licensee is benefiting, the possessor does not need to inspect nor make the land safe.

An example of a licensee is a social guest.

Invitee and the Standard of Care That Is Owed.

Invitees enter the land for the benefit of the possessor. The duty of care that is owed is similar to the duties owed to a licensee. However, the possessor must *also* inspect the land to discover non-obvious dangerous conditions and to make the land safe.

An example of an invitee is a shop owner.

Difference Between Public Invitee and Business Visitor.

A public invitee is a person who enters the land as a member of the public for a purpose for which the land is open to the public. A business visitor is a person whose purpose for being on the land is directly *or indirectly* connected with business dealings with the possessor of the land.

Further Reading.

The facts that give rise to landowner duties may be subtle so be alert. Below are two examples where the issues arise. One setting is apparent. The other setting is not.

Example 1.

Man goes into a **gas station** to buy gasoline and to buy gum. The classification there is a business invitee. *See* Question 1 of July 2006 California Bar Exam.

Example 2.

Man sold puppies and customers went into his living room for this purpose. The classification there is that of business invitees. *See* Question 2 of the February 2019 California Bar Exam.

Duty Section Continued.

We are still covering *Breach*. However, we now depart from the section pertaining to the *standard of care*. Let's move now to the area of *negligence per se* (and back to the area of breach).

End of discussion.

BREACH
(Breach Continued)

Approach to Negligence Per Se and Re Ipsa Loquitur.

There are other ways to prove that breach has occurred *without* applying a standard of care analysis. Two common areas are as follows: (1) Negligence Per Se and (2) *Res Ipsa Loquitur*. Let's begin with Negligence Per Se.

Negligence Per Se.

Negligence that is established as a matter of law and a jury need not make this determination. A statute must be present. Additionally, all three elements must be met: (1) the injury caused by defendant's conduct is the type that the statute was intended to prevent; (2) plaintiff is a member of the class intended to be protected; and (3) the defendant's acts caused the harm.

Exam Tip.

Usually there will be a state or city ordinance. For example, the facts will state that there is a statute that requires that all firearms must be stored in a secure container. *See* Question 1 of the July 2010 California Bar Exam.

The Bar Examiners may also give you a hint that a state regulation exists. They may do this by noting a certain code. Here is an example:

A notice posted on the kitchen wall, entitled "Health and Safety Code Section 300 Notification," stated: "To avoid food poisoning, all poultry products must be cooked at a minimum temperature of 350 degrees." *See* Question 6 of the July 2014 California Bar Exam.

Again, pay special attention to organization. You can do well here by discussing *negligence per se* under *Breach*.

Res Ipsa Loquitur.

A Latin phrase that translates to *the thing speaks for itself*. Under this doctrine, the plaintiff must prove three elements: (1) the injury is the kind which does not occur without negligence; (2) the injury was caused by an instrumentality within the exclusive control of the defendant; and (3) the injury was not the result of a voluntary action or a contribution on the part of the plaintiff.

Examples.

Look for facts where damages occur and the owner is not present. For example, an elevator stops and makes sudden violent motions that causes the occupants to fall. Other examples include rolling objects. For example, safety locks on barrels become loose when not secured properly while parked at a warehouse. While no one is supervising the area, the safety locks break and the barrels roll down the street and cause harm to property. In such situations, the concept of *res ipsa loquitur* can apply. Remember: insert this issue under *Breach* to stay organized. Let's move now to the area of *Causation*.

CAUSATION

Causation

Actual cause and proximate cause elements must be met.

Actual Cause

But for the defendant's acts, the harm would not have occurred. Note: This is the “but for” test.

Proximate Cause

The harm must be foreseeable. Note: Of course this is the foreseeability test.

Superseding Act.

Where plaintiff's injury is brought about by a later cause of *independent origin* that was *not foreseeable*. This will absolve the defendant from liability.

Note:

Remember this foreseeability test: If the superseding act is foreseeable, it will *not* absolve the defendant from liability.

Intervening Act.

A superseding act can also be an intervening act. However, **remember the foreseeability test.** If the intervening act is foreseeable, it will *not* absolve the defendant. Moreover, if the intervening act is not foreseeable, it will fit the superseding act definition (and the defendant will not be liable). To avoid confusion, discuss the superseding act definition as described above. Ensure you discuss the foreseeability element there.

DAMAGES AND DEFENSES

Damages

Plaintiff must prove physical injury or property damage.

Look to the facts to see what damages are being alleged. Let's move now to defenses.

Defenses

Contributory, Comparative, Assumption of Risks.

Comparative/Contributory Negligence

Where one unreasonably contributes to his own injuries in a negligence claim he is barred from recovery (comparative) or assigned a percentage of fault (comparative).

Note: Use the rule above when you are short on time.

Assumption of Risk

Where the plaintiff appreciates the risk and goes forth with the activity despite the danger.

End of Discussion.

Let's move now to the strict liability section.

STRICT LIABILITY ISSUES

Issues Presented:

ULTRAHAZARDOUS ACTIVITIES WILD ANIMALS PRODUCTS LIABILITY

Approach to Strict Liability.

Strict liability issues are closely related to a prima facie negligence discussion. As such, ensure you read the prima facie negligence discussion above.

Here is a list of commonly tested issues that accompany prima facie negligence.

Ultrahazardous Activity
Wild Animals
Strict Products Liability (SPL)

Let's move now to the first issue under strict liability.

ULTRAHAZARDOUS ACTIVITY

Approach to Ultrahazardous Activity.

This section is divided into two parts. In the first part, we'll discuss the black letter law for ultrahazardous activity. In the second part, an example of the template in action will be provided. Let's go now to the black letter law section.

First Part.

Ultrahazardous Activity and Black Letter Law.

Liability will be found where these elements are met: (1) Activity that is inherently dangerous; (2) Uncommon to the geographic area; (3) Cannot be made safe and (4) Whose risk is outweigh its social utility.

Key.

The fourth element is the most complex here. Once you understand the "risk versus the social utility" element, understanding this issue will become very simple.

In essence, apply a balancing test to determine if the risk outweighs the social utility. **If the social risk outweighs the risk, the defendant will not be found liable.** Let's do an example.

Example.

This example involves an electric tower. Notice that the author states that the social utility is high. As such, the fourth element above will not be met and the defendant will not be held liable.

The social utility of providing electricity to homes is high. People need electricity for basic survival needs. Moreover, while the activity cannot be made safe, the related risks can be lessened. For example, the defendant used fences, razor wire and signs to prevent people from being harmed.

Therefore, the social utility outweighs the risk.

Moreover, there is a discussion on lessening the risks. As stated above, the defendant will probably not be found liable.

Second Part An Example of Ultrahazardous Activity

Let's now run through an example here. This way you will appreciate how ultrahazardous activity is tested. The following is an actual model response. You will note that the elements are made in outline form. This style is ideal if you'd like to emphasize certain issues. We'll use it here as an example. However, when writing your essay, you should keep your format standard. This means you should write in a paragraph-like format (as opposed to the outline-format seen here).

The following is an excerpt from Selected Answer A, Question 1 of the February 2008 California Bar Exam.

Begin Example.

The following courses of action might reasonably be asserted against PLC by Peter's father on behalf of his son:

I. Strict Liability for Ultrahazardous Activity

A defendant (Δ) can be held strictly liable for damages caused to a plaintiff (π) where the defendant is engaged in an ultrahazardous activity. An ultrahazardous activity is one that is 1) inherently dangerous, 2) uncommon to the geographic area, 3) cannot be made safe and 4) whose risk outweighs its social utility.

- A. **Inherently dangerous.** Electricity is inherently dangerous. In this case, the substation was a high voltage station. This element is met.
- B. **Uncommon to the geographic area.** Substations are often located in neighborhoods or near them. In this case, the station was located in a field near 's house, not close where it might be uncommon, for example, next to his house. Arguably, a substation in a field near a residential community is not uncommon. This element weighs against finding an ultrahazardous activity. This element [is met].
- C. **Cannot be made safe.** Arguably, high voltage electricity cannot be made safe.

- D. **Social utility vs. risk.** The social utility of providing electricity to homes is clear. People need electricity for everyday purposes. Moreover while the activity cannot be made safe, the related risks can be lessened. In this case, fences, razor wire and signs were posted and used to prevent people from coming into contact. Therefore the social utility outweighs the risks.

On whole, the factors weigh against finding an ultrahazardous activity and holding strictly liable.

Further Reading.

See Question 1 of the February 2008 California Bar Exam. See also Question 5 of the July 2017 California Bar Exam.

STRICT PRODUCT LIABILITY

Note. The question may ask you: Under which theories can the plaintiff sue. Before listing the common types, we'll just say that a run-through of Strict Products Liability (SPL) as demonstrated below will be where you want to focus. As such, memorize the SPL components shown below.

Here are the five common theories: (1) SPL; (2) Negligence; (3) Breach of warranties (both express warranty and implied warranty); (4) Misrepresentation; and (5) Battery. We'll discuss SPL in detail now.

Strict Products Liability (SPL) Black Letter Law.

The prima facie case for strict products liability is: (1) strict duty; (2) breach of that duty (supply a defective product); (3) causation; and (4) damages.

Strict Duty

Commercial supplier, distributor or a supplier that places the product in the stream of commerce.

Breach

Liability will be found where there is a defect. A defect may be found in three ways: (1) design defects; (2) Manufacturing defects; and (3) inadequate warnings.

(1) Design Defect.

A design defect occurs when every product on an assembly line has the same dangerous propensities. A plaintiff can use two tests. These tests are now discussed:

(a) The Consumer Expectation Test.

Where the product failed to perform as safely as the ordinary consumer would expect, anticipating reasonable misuse.

(b) The Reasonable Alternative Design Test.

Where a product's foreseeable risks could have been avoided by adoption of a reasonable alternative design, then the product's risks must have outweighed its utility.

(2) Manufacturing Defect.

A manufacturing defect occurs when one or a few of the products is defective. Note: To prove liability, use the two tests mentioned under *design defect*.

(3) Inadequate Warning.

Where there is no warning of a danger related to the product.

Causation.

Damages.

Explore Defenses.

Comments.

Once you perform your discussion of duty and breach, then move on to causation. Causation here is the same as in negligence. Remember that you *don't* have to discuss causation twice. Discuss it just once.

Further Reading.

See Question 1 of the February 2006 California Bar Exam. See also Question 2 of the July 2007 California Bar Exam. An example of the structure will be demonstrated below. See Selected Answer B.

Example of Strict Products Liability

Below, we'll run through the issues. A sample analysis is provided to facilitate understanding of the issue and rule structure.

PRODUCT STRICT LIABILITY

The prima facie case for strict products liability is: (1) strict duty; (2) breach; (3) causation; and (4) damages.

Strict Duty

Commercial suppliers have a strict duty to supply safe products. This includes all commercial suppliers in the chain of distribution. Note: *The discussion of Duty is very brief here. This is because a plaintiff does not have to prove a breach of duty. Contrast this with Duty under ordinary negligence.*

Breach

May be found where there is a defect and that product was defective when it left the defendant's control. A defect may be found in three ways: 1) design defects; 2) Manufacturing defects; and 3) inadequate warnings.

Design Defect

A design defect occurs when every product on an assembly line has the same dangerous propensities. To prove the existence of a design defect, the plaintiff can use the **(1) Consumer Expectation Test**; or **(2) the Risk-utility Test**.

Under the **Consumer Expectation Test**, the plaintiff must show that the product failed to perform as safely as the ordinary consumer would expect, anticipating reasonable misuse;

Under the **Risk-Utility Test**, the plaintiff must show that the defendant could have made the product safer without serious impact on the product's price or utility.

You don't have to use all of the potential tests. To determine which test(s) to use, apply the facts as a guide. In this fact pattern, there are two alternative designs that are given ("two existing technologies"). As such, the Risk-Utility Test can be of better use.

Risk-utility Test. *Think of an alternative design.*

Where there is an **alternative manner** of producing the product at the time it is manufactured such that pursuing that manner does not unreasonably impact the price or utility of the product and is less dangerous. Here, A had the following two alternative manners of producing the airbags. Each is arguably less dangerous by alerting the occupants to the fact that the belt is not buckled.

1. Sensor.

A sensor under the passenger seat that would turn off the airbag upon detection of a child's presence. Using the sensor could negatively and unreasonably impact the utility of the airbag because it was relatively new and untested. It would have unreasonably impacted the price of the roadster because it would increase the price by \$900, an amount arguably significant when compared to the overall price of a new roadster.

Thus, there is no design defect by failure to use the sensor.

2. Switch.

A safety switch operated by a key would allow the passenger airbag to be turned off manually. Using the switch, there is an increased risk that people might forget to turn the airbag back on when an adult was in the seat. This is an unreasonable impact on the utility of the airbag because research showed that most riders were adults, increasing the likelihood of injuries to that class of passengers. However, the impact on price is negligible at \$5 compared to the price of a roadster which runs tens of thousands of dollars. Nonetheless, the risk of forgetting to turn on the switch again outweighs the low cost.

Thus, there is no design defect.

Note: This concludes the discussion on *design defect*. However, you may still have to run through *manufacturing defect* and failure to warn (these are discussed below).

Manufacturing Defect

A manufacturing defect occurs when one of the products on an assembly line is more defective than the rest. To prove a manufacturing defect, the plaintiff can prove either of the two tests laid out under the *design defect* section.

Inadequate Warning

Where the manufacturer fails to warn of a danger associated with the use of its product that is not apparent to users.

Defect Was Present When it Left Defendant's Control

End of the *Breach* section. Now move on to *Causation*.

Approach to Causation, Damages, and Defenses.

Thereafter, you may need to discuss causation, damages, and defenses. Or, if you already discuss these. Just write: *See above*.

Causation.

See above under _____.

Damages.

See above under _____.

Explore Defenses.

See above under _____.

Further Reading.

For a strict products liability question, *see* Question 1 of the February 2006 California Bar Exam. For a wild animals question, *see* Question 2 of the February 2019 California Bar Exam.

INDEPENDENT CONTRACTOR

Introduction.

A party may be liable for the actions of another party under a **vicarious liability** theory. However, the finding of an independent contractor may absolve the defendant from liability. The topic of

independent contractor is usually tested under negligence. The black letter on this follows along with exemptions.

Most likely you will discuss this topic under general legal principles (versus using California Law). In the rare event you are asked to use California law, you may have to consider the ABC test for independent contractors. This law took effect in 2018. Otherwise and most likely, use the Borello Test. We will start with the Borello Test and then move to the ABC test.

Borello Test to Determine if Independent Contractor is Present.

An employer will want to focus on these factors to exclude the person from being categorized as an employee. Some factors are listed here:

- 1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;**
- 2. Whether the work is a regular or integral part of the employer's business;**
- 3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;**
- 4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;**
- 5. Whether the service provided requires a special skill;**
- 6. The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;**
- 7. The worker's opportunity for profit or loss depending on their managerial skill;**
- 8. The length of time for which the services are to be performed;**
- 9. The degree of permanence of the working relationship;**
- 10. The method of payment, whether by time or by the job;**
- 11. Whether the worker hires their own employees;**
- 12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and**
- 13. Whether or not the worker and the potential employer believe they are creating an employer-employee relationship.**

Other Considerations.

Non-Delegable Duties.

Where the safe performance of duties is **of sufficient importance to the community**, an employer is vicariously liable for the negligence of his independent contractor. In such a circumstance, these duties are personal to Defendant and are *not* delegable to an independent contractor. *See* Answer A, Question 6 of the July 2014 California Bar Exam. Bold emphasis added.

Example 1.

Is the owner of a restaurant liable for not checking the caterer's references? *See* Question 6 of the July 2014 California Bar Exam.

Example 2.

A person needs help moving paintings. The person offers to pay a high school student for such help. Is the student an independent contractor? *See* Question 4 of the February 2011 California Bar Exam.

JOINT TORTFEASORS

Joint Tortfeasors and Liability Introduction.

If there are multiple tortfeasors in the fact pattern and they cause a single injury (an indivisible injury), you may be asked about liability. For this reason, you have to understand the traditional concept of *joint and several liability*.

Joint and Several liability.

When two or more persons are responsible for the same harm, they are jointly and severally liable for all of Plaintiff's damages. Plaintiff may sue one or all to obtain judgments for the full amount of his damages.

Example.

Valet driver, while on duty at a restaurant, hurts a pedestrian while recklessly parking a vehicle. Pedestrian sues the driver, the restaurant owner, and the real property owner. A court, if allowed in the jurisdiction, may find the driver, the restaurant, and the real property owner jointly and severally liable.

In such a situation, the pedestrian may seek judgment from the real property owner to ensure payment. Since some defendants, such as a driver, may not have substantial assets, a plaintiff may prefer a jurisdiction where joint and several liability is allowed. Contrast this with several liability as discussed below.

Several Liability.

Some jurisdictions permit joint tortfeasors only "severally" liable to Plaintiff. In such a situation, the plaintiff is limited to his proportional share of the total liability. In the example involving the pedestrian above, the pedestrian may not prefer several liability since the person most at fault, probably the driver, may not have sufficient funds to pay for the damages that were caused.

Further Reading.

This is a sample question from a past exam: “If Harry prevails against Doug and Electric Company, how should damages be apportioned? Discuss.”

Here, a discussion of joint and several liability would be proper. *See* Question 5 of the July 2017 California Bar Exam.

Moreover, you may see such a question as this: “What damages can be recovered?”

WILLS & TRUSTS

Table of Contents

- Basic Structure To Wills & Trusts Question
- Creation of a Will
- Creation of a Trust
- Types of Trusts
- Common Terms
- Common Issues With Explanations
 - Ademption by Extinction
 - Codicil
 - Revocation
 - Expressly
 - By Physical Act
 - Intestate Disposition
 - Per Capita With Representation v. Per Stirpes
- Trusts Relating to Crime Essays and Remedies Essays

BASIC APPROACH TO A WILLS AND TRUSTS QUESTION

Approach to Wills and Trusts.

Below is the basic structure from a wills and trusts question. As a side note, also read the *Community Property* book that is part of this series. It is not uncommon that Wills and Trusts be crossed over with Community Property.

Here is a typical scenario that is presented in an overly simplified manner.

Scene 1: Person makes a will. **Scene 2:** Person makes a change to the will. **Scene 3.** The person dies. **Scene 4:** Are the changes from Scene 2 valid?

Let's expound on this with more specific examples.

Example.

Scene 1: Will is formed 10 years ago.

Scene 2: A new instrument (or an action by the testator) will appear that may render the original will (or a clause within the will) from 10 years ago invalid.

Here are some acts by the testator that can form issues: a holographic will, a revocation, or a codicil that was created two years ago.

With this said, let's first discuss wills. We'll then jump into trusts.

CREATION OF A WILL

Creation of Valid Will.

A valid will requires the following five elements: (1) A testator with capacity; (2) testamentary intent; (3) signature; (4) a writing; and (5) be attested by two witnesses.

Comments.

Do not discuss all of the elements if the facts state that a *valid will* was formed. In such a situation, just state that a valid will is present because this is indicated in the fact pattern.

In the following section, the creation of a living trust will be discussed. Thereafter, issues that pertain to these subjects will be presented.

CREATION OF A TRUST

Creation of Valid Trust.

A valid trust requires the following seven elements: (1) Beneficiary; (2) Trustee; (3) Delivery; (4) Capacity; (5) Trust res; (6) Intent; and (7) Legal Capacity.

Mnemonic.

Remember this mnemonic. For some reason it sounds like something out of a pirate movie: *Bastard Captain Legal.*

Bastard = Beneficiary, Trustee, Delivery

Captain = Capacity, Trust Res; Intent

Legal = Legal purpose

TYPES OF TRUSTS

There are various types of trusts. Here are some types of trusts that have appeared on past exams:

Charitable Trust, Discuss Cypress, Discretionary Trust, Spendthrift Trust, Support Trust. See the glossary below for the black letter law.

Commentary.

There are two common types of trusts that are created by courts: (1) Resulting Trust and (2) Constructive Trust.

Other Terms Regarding Trusts.

Other terms that are commonly applied: (1) Express Trust, (a) Inter Vivos Trust and (b) Testamentary Trust. These are described below.

(1) Express Trust.

A private express trust may be created via an (a) inter vivos transfer or through a (b) testamentary instrument. These two terms are now discussed.

(a) Inter Vivos Trust. This means that it is a transfer of property between living beings. As such, it is created *during* the lifetime of the trustor.

(b) Testamentary Trust. This means that it was created by a will (or some type of will such as a pourover will).

COMMON TERMS

Approach to Commonly Used Terms.

Have a solid understanding of the following terms. This is not an exhaustive list. Rather, it is a list of common terms that have appeared on past exams. The definitions will be provided in the next section. Thereafter, we'll go through examples to see how these issues are tested.

Black Letter Law.

Abatement. *See also Ademption By Extinction* below. Abatement refers to a lessening of an asset. Abatement occurs when the estate cannot meet its obligations to pay its devisees or its creditors.

Anti-Lapse Statute. If a testator devises a gift to a person in his will and the devisee predeceases the testator, the anti-lapse statute will allow the gift to pass on to the devisee's descendants rather than force the gift to pass through intestacy.

Ademption by Extinction. When a testator devises *specific* property in his will and the testator no longer owns that property. That specifically devised property is therefore adeemed and the devise fails. This doctrine does *not* apply to general dispositions. See the next section titled *Common Issues*.

Charitable Trust. A charitable trust must have a charitable purpose and there must be no readily ascertainable beneficiary or group (as opposed to a private express trust in which the beneficiaries must be ascertained). Note that if the beneficiaries are readily identifiable, the trust may be classified as an express trust and not a charitable trust.

Furthermore, a charitable trust may be of indefinite duration as the Rule Against Perpetuities does not apply. The court may apply the cy pres doctrine to select an alternative charity. See the definition below. Moreover, charitable trusts are usually enforced by the attorney general of any given state.

Codicil. A testamentary document similar to a will. It may serve to amend, rather than replace, a previously executed will. See the next section titled *Common Issues* for more on this topic.

Constructive Trust. This type of trust is created by the court. A constructive trust is not an actual trust. It is used as a remedy for unjust enrichment. The constructive trust orders the person who would otherwise be unjustly enriched to transfer the property to the intended party.

Cy Pres Doctrine. A doctrine used by the courts to alter the terms of a charitable trust. When a person creates a charitable trust, the express charitable purpose of the trust may become impossible to fulfill. Instead of terminating the trust, courts may alter the purpose of the trust to allow it to continue. However, the court must keep it as closely in accordance to the original intention of the settlor.

Discretionary Trust. Related Terms: *Support Trust* and *Spendthrift Trust*.

A discretionary trust usually is intended for a beneficiary's support but can also allow a trustee discretion to make payments beyond, or regardless of, what is necessary for the beneficiary's support. The beneficiary does not have the power to make disbursements.

Discretionary Trust's Relations to Spendthrift Trust and Support Trust.

“Spendthrift trust” is sometimes used as a generic term to describe all trusts designed to protect trust assets from a beneficiary's creditors, but such trusts are more properly divided into three categories: spendthrift trusts, discretionary trusts, and support trusts.

Spendthrift trusts provide that a beneficiary's interest may not be alienated or assigned to creditors. With such trusts, the trustee might have no discretion over when to make payments or how much to pay, and the trust need not be limited to providing for a beneficiary's needs, though such a purpose is presumed unless another is stated in the trust. *See* 13 Witkin, Summary of Cal. Law (10th ed.2005), Nature and Validity of Spendthrift Trusts, § 151, p. 715; 60 Cal.Jur.3d, Trusts, § 127, pp. 194–195.

A **discretionary trust** usually is intended for a beneficiary's support but can also allow a trustee discretion to make payments beyond, or regardless of, what is necessary for the beneficiary's support.

Similarly, a **support trust** often might give the trustee some discretion as to making payments and determining what the beneficiary needs, but it can require that certain minimum payments be made periodically regardless of the trustee's discretion. (See 60 Cal.Jur.3d, Trusts, § 133, pp. 201–202.)

See Young v. McCoy, 54 Cal. Rptr. 3d 847, 855 (Cal. App. 2d Dist. 2007). Bold text added for emphasis.

Dependent Relative Revocation (“DRR”). A doctrine that makes a revocation of a former will ineffective if the testator made the revocation through execution of a new will, and that newly executed will is determined invalid.

Extrinsic Evidence Analysis. Courts may use extrinsic evidence to resolve an ambiguity. However, courts may not allow extrinsic evidence to add, subtract, or to reinterpret words to mean something other than their plain meaning.

Gift. This area is divided into two sections: (1) Specific Gifts and (2) General Gifts.

Specific Gifts.

A specific legacy is a gift of some particular thing or of some interest forming part of the testator's estate. It must be identified by a *sufficient* description. For example, an art collection left to a particular son would be an example of a specific gift.

General Gifts.

A general gift is one that does not require the transfer of a particular asset. Nor does it require that an item come from a particular source. Examples of general gifts include: a gift of \$1,000; a gift of “all of my furniture”; a gift of “any three of my horses.”

Notice that it is a general gift because it doesn't specify the source of the monetary funds.

Holographic Will.

A holographic will must be (1) signed by the testator; (2) with its material provisions appearing in the testator's handwriting; (3) intent to create a will must be present; and (4) testamentary capacity is also required.

It is acceptable to use a pre-written form where the testator fills in the material language.

Incorporation By Reference. Allows a testator to incorporate into a will a document or writing if (1) the reference is in existence at the time of the will; (2) the reference must be clear and unequivocal; (3) and the intent to incorporate is present.

Acts of Independent Significance (or Acts of Independent Significance). The doctrine of acts of independent significance allows a testator to change the disposition of his property without changing a will if acts (or events) changing the disposition have some significance beyond avoiding the requirements of the will.

Example. The testator (Mr. Employer) devises assets to a class of beneficiaries (Employees). Mr. Employer leaves the contents of his bank account "to all my employees at the time of my death." When Mr. Employer fires an old employee and hires a new one, the new employee will inherit the asset under the will.

Intestate Disposition. When one dies without a will, he is said to die "intestate." His property passes by statute to his heirs. Relevant issues are discussed below under the section titled *Common Issues*.

Lapse and Anti-Lapse Statute. When a testator devises a gift to a person in his will and the devisee predeceases the testator, the anti-lapse statute may apply. This statute allows the gift to pass on to the devisee's descendants rather than force the gift to pass through intestacy.

Obliteration (or Imperfect Alteration). See also *Revocation*. A testator may purport to alter a will by crossing out and writing in a new provision. This alteration may not be enforceable for failure to execute a proper revocation.

Omitted Child. See *Pretermitted Child*.

Pour-over Will. A testamentary device wherein the writer of a will creates a trust and decrees in the will that the property in his estate at the time of his death shall be distributed to the trust. The trust must be identified in the will. Moreover, the terms of the trust are incorporated in a writing executed *before or concurrently* with the will.

Prenuptial Agreement. This is also known as a prenup. It is an agreement made by a couple before they marry concerning the ownership of their respective assets in the event the marriage results in divorce.

Pretermitted Child. If a child is omitted from the will, he has certain rights to take from his parent's estate under the pretermitted heir statute. The following elements must be met: (1) where a child is unknown to the parent at the time the testamentary document is created; (2) the omission was not intentional; and (3) the decedent did not have one or more children and devised all the estate to the other parent of the omitted child.

Pretermitted Spouse. When a person marries after making a will and the spouse survives the testator, the surviving spouse shall receive a share in the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate, unless: (1)

Provision was waived by the spouse by prenuptial or postnuptial agreement; (2) The spouse is provided for in the will; or (3) The will discloses an intention not to make provision for the spouse.

See the next section titled *Common Issues*.

Purchase Money Resulting Trust. Where one party has provided all or part of the consideration for purchase of property, but title to the property is taken in another party's name, a resulting trust will be imposed in favor of the party that has provided the consideration. Where the title holding party sells the property to a third party, the party providing consideration may impose a resulting trust on the consideration the title-holder received in exchange for the property.

Republication. The re-execution with proper formalities of an existing will, or of a codicil to it that contains some reference to the will, which has the effect of confirming that will.

Compare *Revival of Will*.

As opposed to revival, which restores a *revoked* will. Republication, on the other hand, confirms a *valid* will. Republication occurs when a testator re-executes a will for the express purpose of republishing it or by making a codicil to the will.

Residue. Any portion of the testator's estate that is not specifically devised to someone in the will. It is also known as a residual estate.

Resulting Trust. This type of trust is created by the court. Occurs where property is transferred to someone who pays no value. It is then implied to have been held for the benefit of another person. The trust property is said to *result* back to the transferor.

Revocation. There are two common ways to revoke a will: (1) Create a new will that revokes the prior will (or part expressly or by inconsistency); or (2) destroy the original will by a physical act.

Physical act means being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the will. This second prong (re: physical act) may also include *Partial Revocations*.

Revival. This is also known as a *Revival of a Revoked Will*.

A will may be revived if the testator revokes the will he no longer wants to be his will and republishes the old will either by re-execution or by codicil. Compare *Republication* above.

Spendthrift Trust. *See also Discretionary Trust and Support Trust.*

Spendthrift trusts provide that a beneficiary's interest may not be alienated or assigned to creditors. With such trusts, the trustee might have no discretion as to when to make payments or how much to pay, and the trust need not be limited to providing for a beneficiary's needs, though such a purpose is presumed unless another is stated in the trust. *See* 13 Witkin, Summary of Cal. Law (10th ed.2005), Nature and Validity of Spendthrift Trusts, § 151, p. 715; *see also* 60 Cal.Jur.3d, Trusts, § 127, pp. 194–195.

Support Trust. *See also Discretionary Trust and Spendthrift Trust.*

A support trust often might give the trustee some discretion as to making payments and determining what the beneficiary needs, but it can require that certain minimum payments be made periodically regardless of the trustee's discretion. (See 60 Cal.Jur.3d, Trusts, § 133, pp. 201–202.)

Termination of Trusts. A trust can be terminated when (1) the term of the trust expires; (2) the trust is revoked; or (3) the trust purpose is fulfilled, becomes impossible to fulfill, or becomes unlawful.

Trustee and Fiduciary Duties of the Trustee. The duties include, among others, a duty of loyalty, requiring the trustee to administer the trust solely in the interest of the beneficiaries; a duty not to use trust property for the trustee's own profit or for any other purpose unconnected with the trust; and a duty to exercise reasonable care, skill, and prudence in administering the trust, including a duty to diversify investments unless it is prudent not to do so. A trustee also has a fiduciary duty to act in good faith in the exercise of any discretionary powers conferred on the trustee by the trust instrument. *Uzyel v. Kadisha*, 116 Cal. Rptr. 3d 244, 262 (Cal. App. 2d Dist. 2010).

Undue Influence.

Undue influence exists when the testator was influenced to such a degree that his free will was subjugated. A prima facie case of undue influence is established by showing the following: (1) the testator had some sort of weakness (e.g., physical, mental, or financial) that made him susceptible to influence; (2) the person alleged to have exerted the influence had access to the testator and an opportunity to exert the influence; (3) there was active participation by the influencing person in the devise (the act by the person that gets them the gift); and (4) an unnatural result (i.e., a gift in the will that is not expected). See Selected Answer A, Question 4 of the February 2008 California Bar Exam.

Widow's Election.

Gives a surviving spouse the right to choose certain property from the estate, even if that property was not part of the surviving spouse's inheritance. Under California's elective share provisions, a surviving spouse has a right to one-half of the community property, as well as one-half of quasi-community property. The widow's election may prevail even if the deceased spouse executed a valid will that contradicts the surviving spouse's right to the inheritance. See Question 1 of the February 2019 California Bar Exam.

COMMON ISSUES WITH EXPLANATIONS

Introduction to Common Issues.

Within this section are common issues that have appeared on past exams. The purpose here is for the reader to become familiar with how these issues may be presented. Moreover, focus on what other issues may be triggered. We will start with the issue of codicil.

ADEMPATION BY EXTINCTION

Approach to Ademption by Extinction.

When a testator devises *specific* property in his will and the testator no longer owns that property. That specifically devised property is therefore adeemed and the devise fails. Again, this doctrine does *not* apply to general dispositions.

CODICIL

Issue: Codicil.

What is a Codicil? This term appeared in a past exam. Source: Question 6, July 2003 California Bar Exam.

Facts.

In 1998, Tom executed a valid will. The dispositive provisions of the will provided:

1. \$100,000 to my friend, Al.
2. My residence on Elm St. to my sister Beth.
3. My OmegaCorp stock to my brother Carl.
4. The residue of my estate to State University (SU)."

In 1999, Tom had a falling out with Al and executed a valid codicil that expressly revoked paragraph 1 of the will but made no other changes.

In 2000, Tom reconciled with Al and told several people, "Al doesn't need to worry; I've provided for him."

In 2001, Beth died intestate, survived only by one child, Norm, and two grandchildren, Deb and Eve, who were children of a predeceased child of Beth. Also in 2001, Tom sold his OmegaCorp stock and reinvested the proceeds by purchasing AlphaCorp stock.

Tom died in 2002. The will and codicil were found in his safe deposit box. The will was unmarred, but the codicil had the words "Null and Void" written across the text of the codicil in Tom's handwriting, followed by Tom's signature.

Tom was survived by Al, Carl, Norm, Deb, and Eve. At the time of Tom's death, his estate consisted of \$100,000 in cash, the residence on Elm St., and the AlphaCorp stock.

What rights, if any, do Al, Carl, Norm, Deb, Eve, and SU have in Tom's estate? Discuss.

Answer.

Below is an example of a model answer. The source for the abstract is from Selected Answer A, Question 6 of the July 2003 California Bar Exam.

1. AL

Al was initially provided with \$100,000 under the valid 1998 will.

Codicil

A codicil is a supplement to an existing will executed with full formalities according to the statute of wills that revokes only inconsistent provisions of the prior will and adds new provisions. Both the codicil and prior will (consistent) are valid and deemed executed as of the date of the codicil.

Thus, by executing a valid codicil in 1999, T revoked the inconsistent paragraph 1. At common Law T may have been required to also make additions, but that is not the law in California.

Revocation

A will, and codicils, can be revoked expressly by a subsequent will or by physical act.

Expressly

A will can be revoked by a subsequent holographic express revocation. For a valid holographic will the Testator must sign and the material provisions must be in T's handwriting.

Here, Tom wrote the words "null and void" in his own handwriting and signed the codicil. Therefore he likely revoked the codicil expressly.

By Physical Act

Tom also may have revoked by physical act, which can be done by crossing out language of the existing will or writing null and void so long as language of the revoked instrument is touched.

Here T wrote the words across the face of the codicil touching the language and therefore it likely also could be interpreted as revocation by physical act.

Therefore the codicil was validly revoked. . . .

Revival [*See rule in the glossary of this text*]

Where a codicil to a will is revoked the validly executed will remains valid. Whether the inconsistent provisions are thus revived depends on evidence of the intent of the testator.

Al will point to the statements by Tom to several people that T said, "Al doesn't need to worry, I've provided for him."

However, SU will likely argue it is unclear whether these statements were made near the time that T revoked the codicil. They were made, however, after T and Al reconciled, so likely Al can use these statements and their later reconciliation to show he intended to revive the will.

Dependent Relative Revocation

T likely cannot rely on Dependent Relative Revocation, which provides that where the T revokes a will under mistaken belief that a prior gift is valid the revoked will will be revived. This does not aid Al because he does not want the gift in the codicil revived, as there is no gift for him there.

Therefore, if the codicil is revoked, Al likely prevails under the existing valid will and will get the \$100,000.

INTESTATE DISPOSITION

Intestacy Distribution to Surviving Spouse and Children. *See also Pretermitted Child and Pretermitted Spouse* in the glossary section.

Deceased's Community Property.

Under intestacy, the surviving spouse receives all of the deceased's community property (the outcome is different under separate property).

Deceased's Separate Property.

The separate property of the deceased is treated differently as opposed to the community property.

Under intestacy, the surviving spouse receives all of the separate property if there are no children.

If the deceased is survived by the spouse and one child, each gets $\frac{1}{2}$ of the deceased's separate property.

If the deceased is survived by the spouse and two or more children, the spouse gets $\frac{1}{3}$ of the deceased's separate property. The children divide the $\frac{2}{3}$ that remain amongst them.

Commentary.

Note that this rule is mostly applicable for exam purposes since the hypothetical will usually not include grandchildren, parents, siblings, or nieces/nephews. The entire rule states that if the spouse is not survived by children, grandchildren, parents, siblings, or nieces/nephews, the surviving spouse or domestic partner gets all of the separate property.

Further Reading.

See Question 3 of the July 2004 California Bar Exam.

PER CAPITA WITH REPRESENTATION V. PER STIRPES

Approach to Per Capita With Representation v. Per Stirpes.

There are two common areas here. These are listed below: 1. Meaning of *per capita with representation* and 2. Per Stirpes meaning (versus per capita). We'll now define these two and provide examples.

PER CAPITA WITH REPRESENTATION

Per Capita With Representation Black Letter Law.

Per capita means that assets are divided at the first generation where there is a living beneficiary and then split. The assets are split evenly between the number of living descendants at that level, and the number of deceased descendants who have issue. See Answer B, Question 4 of the February 2007 California Bar Exam.

Exam Tip.

This is a topic that is difficult to understand by means of a lecture or by reading. The best way to understand per capita with representation (“Per Capita”) is through practical application. In other words, simulate an exam scenario. After you do this, you will gain a solid understanding. We’ll walk through the steps and you can participate.

Step 1:

State the black letter law. See above.

Step 2:

Identify the first generation after the testator. In other words, simply identify A’s children. For example, let’s say A is the testator. He has three children: B, C, and D. As such, B, C, and D would be the generation closest to the deceased testator.

Step 3:

Identify the *subsequent* generation after the children. In other words, identify A’s grandchildren. We’ll assume the grandchildren are named in the fact pattern. Let’s say B had two children. These are A’s grandchildren. We’ll call them B1 and B2.

Notice that up to this point, Steps 2 and Steps 3 are about identifying the people in the family.

Step 4:

Do the division in the following manner. The first generation will divide the gift. As such, A’s children would divide the gift. In our example, B, C, and D would each get $\frac{1}{3}$.

If one of the children has predeceased the testator and grandchildren are living, then the grandchildren would divide what is left from the children. Let’s do two examples.

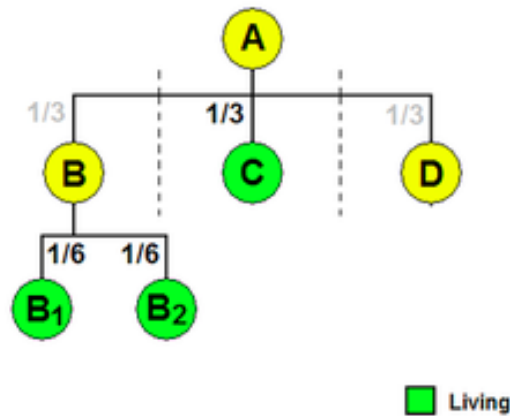
Think of this division process in this way: “**What did the grownups leave behind?**” In our example, if the children left behind $\frac{2}{3}$, then the grandchildren will split the $\frac{2}{3}$ between them.

Example 1.

B, C, and D are the children. B has died and left behind two children. B’s children are also A’s

grandchildren and their names are B1 and B2.

C and D each get $\frac{1}{3}$. Again, ask: "What did the grownups leave behind?" They left behind $\frac{1}{3}$. Thus, B1 and B2 each get $\frac{1}{6}$. This is because $\frac{1}{3}$ divided by 2 is $\frac{1}{6}$. Notice that B1 and B2 split what is left from *all* of A's three children (from B, C, and D). This will be an important point to remember when we discuss per stirpes. See this diagram.



Let's do another example. See the next page.

Example 2.

In this example, A will have two children that predeceased him. Let's say B has predeceased A again. Also, D has predeceased A as well. B has two children and they are also A's grandchildren and they are named B1 and B2.

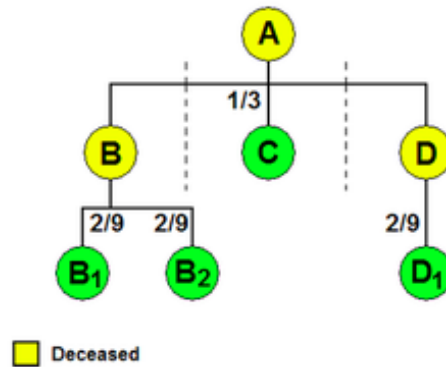
D has one child and this is also A's grandchild. His name is D1. Now there are three grandchildren.

Here is how to divide them. Again, ask: "What did the grownups leave behind?" First, ascertain what is left from A's children. Only C is living from A's children. C gets $\frac{1}{3}$. This means there are $\frac{2}{3}$ left from *all* of the children's gift.

The $\frac{2}{3}$ will be split between B1, B2, and D1. The procedure is to divide $\frac{2}{3}$ by 3. There are $\frac{2}{9}$ that remain since C took $\frac{1}{3}$. Also, there are three grandchildren.

Here, you must remember how to divide fractions by whole numbers. Ah! Math again. $\frac{2}{3}$ divided by 3 is $\frac{2}{9}$. So B1, B2, and D1 will each get $\frac{2}{9}$. See the diagram below.

Per capita by generation



Source of Diagram: Wikipedia link:

https://en.wikipedia.org/wiki/Per_stirpes#Per_capita_with_representation

“What is the relationship between per capita and per stirpes?” You may rightly ask. Let’s find out.

PER STIRPES

Approach to Per Stirpes.

The per capita with representation is a modern version of per stirpes. Here is a simple trick to approach per stirpes. As you may recall, to figure out per representation, it was useful to ask this question: “What did the grownups leave behind?” There, the next generation took what remained from *all* of the children.

For per stirpes, the distribution is *not* made from what *all* of the grownups left behind. Rather, the distribution is made from the property that the specific parent (versus all of the parents as in per capita) left behind.

Per Stirpes Black Letter Law.

An estate of a decedent is distributed per stirpes if each branch of the family is to receive an equal share of an estate.

Commentary.

Let’s do an example using the cast from Example 2 above. A has two children that predeceased him. Let’s say B has predeceased A. Also, D has predeceased A. B had two children and they are also A’s grandchildren. They are named B1 and B2.

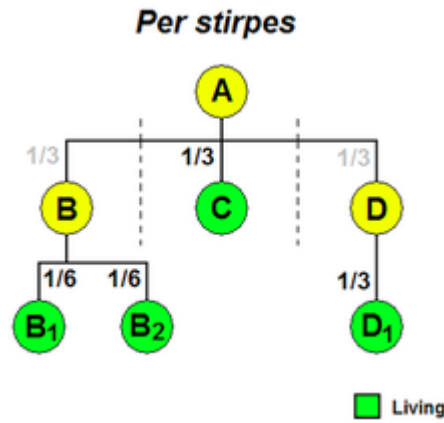
D has one child and he is also A’s grandchild. His name is D1. Now there are three grandchildren.

Here is how to divide them. Ask: “What did the *individual* parent leave behind?” First, ascertain what is left from A’s children. Only C is living from A’s children. C gets $\frac{1}{3}$.

So far so good right? It is the same as the per representation above. However, B and D are each

entitled to $\frac{1}{3}$. This means that B will pass $\frac{1}{3}$ to his two children. As such, B1 and B2 each receive $\frac{1}{6}$. See the chart below.

D will pass $\frac{1}{3}$ to his only child. This means that D1 will get $\frac{1}{3}$. See the chart below.



Source of Diagram: Wikipedia link:

https://en.wikipedia.org/wiki/Per_stirpes#Per_capita_with_representation

Further Reading.

Note that California uses per capita with presentation, versus per stirpes. To fully grasp this concept, it is suggested that you read the February 2007 past exam carefully.

TRUSTS RELATING TO CRIME ESSAYS AND REMEDIES ESSAYS

Approach to Trusts where Crime is Present.

Trusts may also be tested with an essay involving crimes. Look for facts where embezzlement, for example, has taken place. Also, be aware of facts where there is some type of fraud. Potential remedies are the Purchase Money Resulting Trust. See the definition below.

Also, see the Remedies book as part of this series. You may have to discuss a constructive trust and/or an equitable lien. See Question 6 of the February 2014 California Bar Exam.

Purchase Money Resulting Trust

Where one party has provided all or part of the consideration for purchase of property, but title to the property is taken in another party's name, a resulting trust will be imposed in favor of the party that provided the consideration. Where the title holding party sells the property to a third party, the party providing consideration may impose a resulting trust on the consideration the title-holder received in exchange for the property.