



California
Bar
Examination

Essay Questions
and
Selected Answers

July 2011

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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JULY 2011

ESSAY QUESTIONS



California

Bar

Examination

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate

your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Vicky operates a successful retail computer sales business out of the garage of her house. Vicky told Dan that she intended to go on vacation some days later. Dan subsequently informed Eric of Vicky's intended vacation and of his plan to take all of her computers while she was away. Eric told Dan that he wanted nothing to do with taking the computers, but that Dan could borrow his pickup truck if Dan needed it to carry the computers away.

While Vicky was scheduled to be away on vacation, Dan borrowed Eric's pickup truck. Late that night, Dan drove the truck over to Vicky's house. When he arrived, he went into the garage by pushing a partially open side door all the way open. Vicky, who had returned home early from her vacation, was awakened by noise in her garage, opened the door connecting the garage to the house, and stepped into the garage. When she saw Dan loading computers into the back of the truck, she stepped between Dan and the truck and yelled, "Stop, thief!"

Dan pushed Vicky out of the way, ran to the truck, and drove off. He immediately went to Fred's house where he told Fred what had happened. In exchange for two of the computers, Fred allowed Dan to hide the truck behind Fred's house.

What crimes, if any, have Dan, Eric, and/or Fred committed? Discuss.

Answer A to Question 1

I. Dan's Crimes

By plotting to break into Vicky's home to steal her computers and then actually doing so, Dan committed the crimes of burglary, larceny, robbery, and battery. He may have also conspired to commit burglary and/or larceny with Eric.

Burglary

At common law, burglary was defined as the unlawful breaking and entering of the dwelling house of another at night with the intent to commit a felony therein. Most modern jurisdictions have amended the elements to include burglary of any structure and have not limited it to nighttime burglaries.

Here, Dan committed burglary when he entered Vicky's home to steal the computers.

Breaking and Entering

Burglary requires that the burglar break and enter into the structure. "Breaking" constitutes any form of forcible entry, including pushing open a partially open door. "Entry" requires physical entry by any part of the burglar's body or a tool under his control.

Here, Dan pushed a partially open side door to V's garage fully open in order to gain entry. This is evidence of breaking. Further, Dan entered the garage, which is a part of Vicky's residence. Thus, the elements of breaking and entering are satisfied.

Structure of Another

Dan entered into Vicky's garage, both the location of her retail sales business and part of her home (her dwelling place). This is sufficient to constitute a protected structure for purposes of burglary, which belonged to another (Vicky). Therefore, this element is met.

With the Intent to Commit a Felony Therein

Burglary requires the intent to commit a felony (or a misdemeanor in some jurisdictions) inside the structure at the time of the breaking and entering.

In this case, Dan had the intent to commit larceny of Vicky's computers when he entered her garage. He had previously expressed this desire to Eric, and nothing in the facts suggests he changed his mind prior to entering. In fact, his actions of actually taking the computers demonstrates that the intent was present.

Therefore, Dan committed burglary.

Larceny

Larceny at common law was the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the victim of the property.

Trespassory

Trespass is the unprivileged, nonconsensual invasion of another's protected space.

Here, Dan did not have the consent of Vicky to enter the garage at night and therefore his decision to do so was a trespass. While Dan might argue it was not trespassing because Vicky opened her business up to the public and her business was located in the garage, this argument will fail because he clearly did not have implied or actual authorization to force his way into the garage at night when Vicky was not operating her business and was in fact supposed to be on vacation.

Asportation

Asportation is the taking and carrying away of another's property. For larceny purposes, even slight movement of the property is sufficient.

In this case, Dan took computers from Vicky's garage, loaded them into his truck and drove off with them. Thus, he moved the computers and this element is satisfied.

Personal Property of Another

The computers were the tangible, moveable personal property of Vicky and her business. The computers did not belong to Dan and he had no claim of right to the computers. Therefore, this element is satisfied.

Intent to Permanently Deprive

At the time of the taking, the defendant in a larceny case must have the intent to permanently deprive the owner of the property.

Here, Dan had the intent to permanently deprive because he planned to steal the computers and presumably sell them for value. Nothing in the facts indicates a contrary intent on Dan's part, so this element is satisfied.

Therefore, Dan also committed larceny.

Robbery

Common-law robbery requires that the defendant take and carry away the personal property of another from their person or presence by force or threat of force, with the intent to permanently deprive.

The requirements that Dan took and carried away the computers belonging to Vicky with the intent to permanently deprive have been described above. The remaining elements follow.

Person or Presence

Robbery requires that the items be taken from the victim's person or presence, which has been broadly defined to include anything the victim is holding or, indoors, items from the same room that the victim was in at the time of the taking.

Here, Vicky was present in the garage when Dan loaded some of her computers into the truck. In fact, she stepped between Dan and the truck as he was attempting to flee with the computers, so it suggests that she was immediately present when her property was taken. Therefore, this element is likely satisfied because the computers were taken from within a very close proximity to Vicky. As such, they were taken from her immediate presence.

Force or Threat of Force

A robber must use physical force or threaten to use physical force to commit robbery.

Here, as he was attempting to flee, Dan physically pushed Vicky out of the way. Shoving another person is physical force, which Dan used to accomplish and complete his taking of Vicky's computers.

Dan will argue that he did not accomplish the taking by force because he already had the computers in his possession before Vicky confronted him. He will defend by saying that the force was only used to effectuate his escape, and not the robbery itself. However, because the robbery would not have succeeded but for the physical force to the victim, it's likely to satisfy the requirement of forcible robbery.

For those reasons, Dan also robbed Vicky.

Battery

Battery is the intentional unlawful application of physical force to another person. Battery is a general intent crime, meaning there is no requirement that the defendant intend to cause injury to the victim. He must only intend to commit the physical action that constitutes the force.

Here, Dan physically shoved Vicky out of the way as he was escaping. He intended to complete the shoving action because it allowed him to get Vicky out of his way and proceed to the truck. Therefore, Dan committed a battery.

Conspiracy to Commit Burglary/Larceny

Conspiracy is an inchoate offense that required at common law an agreement between two or more people to accomplish the same unlawful objective with the intent to complete that objective. Many jurisdictions require proof of an "overt act" to establish conspiracy. In a majority of states, only bilateral conspiracies are permissible, but a minority of states recognize the idea of a "unilateral conspiracy," where the defendant

believes he is conspiring with another "guilty mind" who in fact shares a different objective.

The prosecution may attempt to argue here that Dan conspired with Eric to rob Vicky because he discussed his plans with Eric in advance and Eric loaned Dan his truck for purposes of the robbery. However, as will be addressed below, it is not clear that Eric had the intent for the robbery to be completed. If Eric lacked the requisite intent to accomplish the robbery, then Dan can only be convicted of conspiracy in a jurisdiction that recognizes unilateral conspiracy.

II. Eric's Crimes

Conspiracy to Commit Burglary/Larceny

The issue is whether Eric had the intent to enter into an agreement with Dan for an illegal purpose (the burglary/larceny) and if Eric intended for the illegal object to transpire as planned. Here, the facts suggest that Eric lacked that intent, so he is likely not guilty of conspiracy.

The prosecution will argue that Eric's decision to loan his truck to Dan knowing that Dan intended to use it to burglarize Vicky's business is evidence that Eric conspired to commit that crime. However, Eric specifically told Dan that he wanted "nothing to do with taking the computers." Although the prudence of nonetheless letting Dan use his truck to commit the robbery is questionable, the facts do not prove that Eric intended to participate in the burglary or that he shared Dan's goal for the burglary to succeed. He may have been indifferent to the theft being committed or even favorable to the idea, but this is not persuasive evidence that he intended for Dan to succeed in the burglary. Since the prosecution will have the burden to show intent beyond a reasonable doubt, this is unlikely to be a persuasive argument.

Therefore, it's likely that neither Dan nor Eric could be convicted of conspiracy.

Accomplice Liability

An accomplice is someone who aids, abets, counsels or encourages the principal to commit a crime with the intent that the principal succeed. A majority of jurisdictions

hold accomplices liable for all reasonably foreseeable crimes that the principal committed.

Burglary and Larceny

Here, Eric was likely an accomplice to the burglary and larceny committed by Dan, and he should be convicted of those offenses. By offering to let Dan use his truck to carry away the computers after he stole them, Eric aided Dan by giving him a getaway vehicle. Without Eric's participation in loaning Dan his truck, it's not clear that Dan would have been able to commit the crimes. Therefore, if it was foreseeable that Dan would commit burglary and larceny, Eric is liable therefor.

In this case, Eric knew that Dan intended to enter Vicky's business and take her computers. Therefore, he was personally informed of Dan's intent to commit larceny and burglary. In fact, he specifically told Dan that he could use Eric's truck "if Dan needed it to carry the computers away." Therefore, Dan is liable as an accomplice to burglary and larceny.

Robbery

Eric will argue he is not an accomplice to the robbery of Vicky because it was unforeseeable that Vicky would be home and therefore that Dan would take anything from her person or presence. He will claim that he thought Vicky was on vacation, and that therefore, the most that Dan could be guilty of is burglary and/or larceny.

On balance, however, this argument is likely to fail. Eric had no personal knowledge of Vicky's travel plans, and by agreeing to lend Dan his truck for the purposes of escaping with Vicky's computers, he assumed the risk that Dan might have erred in determining Vicky's travel plans. Further, because the business was in Vicky's garage and therefore on her property, it would not be unforeseeable that someone might be either on Vicky's property for business purposes or that someone else besides Vicky was living there. As such, the presence of another person was reasonably foreseeable, and so was the robbery of the computers from that person's presence.

Eric is therefore guilty of robbery as an accomplice.

Battery

Similarly, Eric will argue that it was not reasonably foreseeable that Dan would commit battery against Vicky because he didn't even know that Vicky would be present. For the reasons discussed above, this argument will likely fail. Committing a home invasion always carries with it inherent risks that someone will be present, and breaking into a business carries similar concerns. It was foreseeable that Vicky or another person might be there during the burglary, and therefore, that Dan might use force against them in order to effectuate his escape.

As such, Eric is guilty as an accomplice to battery.

III. Fred's Crimes

Accessory After the Fact

Most jurisdictions will label an individual who aids, abets, counsels or encourages a criminal in avoiding apprehension to be an "accessory after the fact" if they did not play any role in the crimes before they happened. Such a defendant is an accomplice, but is generally only punished for his own behavior in obstructing justice rather than the crimes of the principal.

Here, Fred knew that the computers Dan brought to his home were stolen from Vicky by Dan. Nonetheless, in exchange for two of them, he agreed to let Dan hide his truck on Fred's property. This action aided Dan in covering up the crime and aiding detection. Hiding the getaway vehicle that Vicky had seen Dan driving away increased the chances that Dan would get away with the theft of her property, and therefore Fred acted as an accessory after the fact.

Receipt of Stolen Property

If the jurisdiction in this case recognizes knowing receipt of stolen property as a criminal offense, Fred is likely guilty of that crime as well.

Dan specifically informed Fred that the computers were stolen, but Fred agreed to take them in exchange for hiding Dan's truck. Therefore, the scienter requirement is

met here because Fred had firsthand knowledge of the computers' stolen status but agreed to take them into his possession.

Answer B to Question 1

Dan's criminal liability:

Burglary:

Burglary is the breaking and entering at nighttime into the dwelling house of another with the intent to commit a felony therein.

Breaking and Entering:

A person must physically enter the dwelling house of another to commit a burglary. Here, Dan entered into the garage of Vicky's house by pushing a partially open side door all the way open. Although he did not literally break anything to enter into the garage because the door was already open, this element is still met. Only the slightest movement is required to "break" into the house. The door need not be locked either. Thus, by pushing the partially opened door to the garage open and subsequently entering the garage, Dan committed a breaking and entering.

At nighttime:

Although modern statutes have eliminated the requirement that a burglary be committed at night, the common law crime of burglary required that the burglary happen at night. Here, the facts indicate that Dan drove over to Vicky's house at nighttime. Thus, the common law element and any modern statutory elements are met.

Dwelling house of another:

The common law definition of burglary required that the breaking and entering be of the dwelling house of another, that is, where the person lived and slept. Modern statutes have expanded this element to include any structure such as an office building. Here, Dan broke into the garage of Vicky's house. Vicky did not sleep in her garage, but she did conduct her computer business out of her garage and frequently spent time in there. Additionally, the garage was connected to the house by the door that Vicky entered when she heard the noise. Thus, the garage is part of Vicky's dwelling house, and this

element is met under the common law definition of burglary. The element is also met under a modern statutory definition because a garage would be considered a structure.

Intent to commit a felony therein:

A person must have an intent to commit a felony inside the dwelling house at the time that they committed the breaking and entering. Here, when Dan learned that Vicky was going away on vacation, he informed Eric that he planned to take all of her computers. Thus, Dan intended to commit larceny, analyzed below, once he broke into Vicky's house. He had this intent at the time he pushed the partially open side door. Thus, Dan had the requisite intent to commit a felony once inside the garage, and his intent was simultaneous with his breaking and entering.

Because Dan broke and entered into Vicky's garage, at nighttime, with the intent to commit a larceny, he has committed burglary.

Larceny:

Larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive.

Trespassory taking and carrying away:

A person must take the personal property from the possession of another and move the property, if only the slightest bit. Here, Dan loaded Vicky's computers into the back of the truck. The computers were in Vicky's possession because they were stored in her garage as part of her retail computer sales business. Thus, Dan has met the element of a trespassory taking and carry away

Personal Property of another:

Here, the computers belonged to Vicky as she ran a retail computer business out of her garage. Thus, this element is met.

Intent to Permanent Deprive:

A person must intend to permanently deprive the victim of the possession of the personal property or act knowing that their actions will result in a substantial risk of loss. Dan intended to take all of her computers, which he told Eric. Although the facts do not indicate what he was going to do with the computers once he took them, it is unlikely that he was going to return them to Vicky, especially after he pushed her out of the way and drove off with them. Thus, Dan acted with the intent to permanently deprive Vicky of the computers. Because all the elements for larceny are met, Dan committed larceny when he took Vicky's computers.

Robbery:

Robbery is the trespassory taking and carrying away of the personal property of another by the use or threat of force from the person of another. Here, Dan took the computers from Vicky's garage and loaded them into his truck meeting the requirement of a trespassory taking and carrying away. The computers were Vicky's personal property, which she stored in her garage. Although Dan thought Vicky was away when he entered the garage, Vicky heard him and stepping into the garage as Dan was loading the computers into the back of the truck. She stepped in between Dan and the truck, at which point Dan pushed her. Although the computers were not on Vicky's person, the computers were in the immediate area. When she yelled at Dan, he pushed her by using force. Therefore, Dan used force to take the computers from the area in Vicky's immediate control. Because of the use of force when he took Vicky's computer, he has committed robbery as well.

Battery:

Battery is the unlawful application of force on the person of another, committed with the intent to cause the application of force to another. Here, Dan pushed Vicky out of the way when she stepped in between him and the truck. This was the unlawful application of force on Vicky. He acted with the intent to push Vicky out of the way because he was trying to move her to escape. Thus, Dan committed a battery as well.

Eric's Criminal Liability:

Conspiracy:

A conspiracy is the agreement of two or more person for an unlawful objective, with the intent that the unlawful objective be obtained. Additionally, statutes now include that an overt act be committed in furtherance of the conspiracy. Here, Dan told Eric of his plan to take all of Vicky's computers while she was away on vacation. Eric told Dan that he wanted nothing to do with the theft although he let Dan borrow his truck knowing Dan would use the truck to take the computers away. Eric did not agree with Dan to commit the burglary of Vicky's home. He did not have the same unlawful as Dan. Although he handed Dan his keys, which would qualify as an overt act, he did not have the intent to burglarize Vicky's home and steal her computers. Thus, he did not enter an agreement with Dan for the unlawful purpose of stealing from Vicky. Eric is not liable for conspiracy.

Accomplice Liability:

An accomplice to a crime aids, encourages, counsels, or abets a person committing the crime, with the intent that the person commit the target crime. Here, Eric gave Dan his keys to his pickup truck so that Dan could use the truck to move the computers. This was aid to the principal, Dan, who actually committed the burglary because Dan was able to move the computers once he could use Eric's truck. Although Eric wanted nothing to do with Dan taking the computer away, he told Dan that he could borrow his truck if he needed it to carry the computers away. Thus, although Eric did not want to actually take part in the burglary, he acted knowing that burglary would take place. He knew that Dan would use the truck to burglarize Vicky's house. Eric had the requisite intent for accomplice liability. Because he both aided Dan in committing the crime against Vicky, and acted with the intent to aid Dan, Eric is liable as an accomplice.

Vicarious Liability for the Target Crime:

An accomplice is liable for the crimes committed by the principal if the principal's crimes were foreseeable. It was completely foreseeable that once Eric gave Dan the keys to his car, Dan would steal all of Vicky's computers and Dan would use Eric's truck to move them. Additionally, it was foreseeable that Vicky might be home even though she told Dan that she would be on vacation; it is possible that her vacation plans had to be cancelled, as it turned out. If Vicky or anyone else was in the house, it was foreseeable

that Dan would use some measure of force to take the computers. Thus, Eric is liable for Dan's crimes of burglary, larceny, robbery and battery because all of these crimes were foreseeable once Eric gave Dan his keys to his truck knowing Dan would try and steal the computers.

Fred's Criminal Liability:

Accessory after the fact:

Under the common law, accomplices were liable as accomplices in the first degree or in the second degree based on how they aided the principal and when their aid occurred. Modernly, a person who aids a felon in his escape is liable as an accessory after the fact. This is a separate crime, and an accessory is not liable for the principal's target crime. Here, Dan immediately went to Fred's house after he drove off from Vicky's house. He immediately told Fred what he had done. Thus, Fred knew that Dan was a felon and that he was trying to escape after he stole Vicky's computers. He aided Dan because he allowed Dan to hide the truck behind Fred's house. This would make it harder for the police to spot that truck that Vicky would report, and thus help Dan in his escape. Fred is liable as an accessory after the fact. Unlike Eric who acted as an accomplice, Fred's liability as an accessory does not mean that he is also liable for the separate crimes that Dan committed.

Receipt of Stolen Property:

Receipt of stolen property requires that the person receive, buy, or accept property knowing that the property was stolen. Here, Dan immediately told Fred what he had done once he arrived at Fred's house. Fred was aware that the computers belonged to Vicky, and that Dan had just unlawfully taken them from Vicky's garage. When Fred accepted two of the stolen computers in exchange for allowing Dan to hide his truck behind Fred's house, he accepted the property knowing that it was stolen from Vicky. Thus, Fred is criminally liable for the crime of receipt of stolen property.

Question 2

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.

1. How should the court rule on Perry's motion to compel Doctor to answer? Discuss.
2. How should the court rule on Bolton's motion to dismiss Perry's claim on the ground that the statute of limitations had run? Discuss.
3. How should the court rule on Perry's motion for summary judgment? Discuss.

Answer A to Question 2

Perry v. Doctor

1. Perry's Motion to Compel Doctor to Answer

Discovery provides fact-gathering tools for parties to obtain relevant evidence to the case. The scope of discovery is broad but not limitless. A party may only discover relevant evidence/information or facts reasonably calculated to lead to relevant evidence/information. However, a party may not discover privileged information. Therefore, the scope is broader than evidence admissibility as not only relevant evidence is discoverable, but also those that provide a good lead to relevant information. Deposition is one of these fact-gathering tools.

During a deposition, typically there is not judge present, but attorneys should still make proper objections for the future purpose of excluding any answers at trial. If an attorney does not make an objection during deposition to a question or an answer, it is considered waived and the same question cannot be objected to in the future. If the opposing attorney later wishes to admit the objected question and/or answer at trial, the judge will determine whether the attorney's objections at the deposition should be sustained or overruled. At the deposition, because there is no judge present to determine the objection, the witness must still answer because, as stated above, all relevant evidence or facts reasonable calculated to lead to relevant evidence/information is discoverable. One deposed does not have to answer a question unless the answer would reveal privileged information.

Here, 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 on the basis of relevance - asserting that the information requested had nothing to do with whether Doctor was negligent as to Perry, so Doctor refused to answer. The question asked is a relevant question because Perry is suing Doctor for negligence. In this case, Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton. Shortly after the surgery, Perry developed severe back pain where the rod was inserted. If Doctor has

performed similar surgeries with the same Bolton's rods in the past and those have also resulted in complications, that would be relevant to the question of Doctor's duty and breach of duty. For example, if Doctor had performed similar surgeries and had resulted in complications, then a reasonable doctor with similar skill, knowledge and experience as another doctor in the same field of profession may decide to no longer use Bolton's rods or to improve or change his technique so as to avoid future surgical complications. The answer to this question could reasonably lead to Perry's attorney finding other patients for relevant information and may also discover the techniques used during those surgeries. Thus, the information is relevant and reasonably calculated to lead to relevant information. Thus, this information is discoverable, and the Doctor must answer. Because the attorneys properly met and conferred concerning Doctor's refusal to answer and could not come to an agreement, the motion to compel was properly filed. The court should grant Perry's motion to compel Doctor to answer.

Doctor may argue that revealing such information would violate doctor-patient confidentiality, thus privileged information. However, the question simply asked whether Doctor had performed other spine surgeries using Bolton's rods, and whether any of those surgeries had resulted in complications. The answer only requires a yes or no answer. The answer would not require Doctor to reveal any patient's names or medical conditions. Thus, Doctor's argument would fail.

The court should grant Perry's motion to compel.

2. Motion to Dismiss Perry's Claim on the ground that Statute of Limitations had run

Assuming that this is a diversity of citizenship case in federal court (because negligence is typically not a federal question), the Federal court must apply the Erie doctrine where Federal Rules of Civil Procedure (FRCP) for procedure and apply state law for substantive law. Courts have established that in a diversity case, the state statute of limitations must be used as that is considered substantive law. Under FRCP, a party has 14 days to amend a complaint after original filing.

To amend a complaint after the statute of limitations had run, the complaint must relate back to the original complaint that was filed before the statute of limitations had

run. To relate back to the original complaint while adding a defendant on the amended complaint, 3 elements must be satisfied: 1) the claim arises out of the same transaction or occurrence as the original complaint, 2) the new party knew of the original action within 120 days of filing, and 3) the new party, but for the mistake, knew that they should have been named as the original party.

Here, the original complaint was filed in federal district court within the applicable statute of limitations for a tort action for negligence. Perry alleges that Doctor was negligent in using Bolton's rod for the kind of back condition from which he suffered.

Same transaction or occurrence

The amended complaint includes a claim that alleged that Bolton negligently designed the rod. Because Perry was suing Doctor for negligence for using Bolton's rod during surgery for Perry's kind of back condition, the new claim against Bolton arises out of the same occurrence because they both arose out of Doctor's surgery and inserting Bolton's rod. Thus, this element is satisfied.

New party knew of original action

It is unclear whether Bolton knew of the original action where Perry sued Doctor for negligence. If doctors are sued based on products they used on patients, it is not unusual that doctors would seek indemnification or contribution from the manufacturers of those products. Thus, if Doctor informed Bolton of Perry's lawsuit (or if Bolton somehow was aware of it) within 120 days of filing, then this element is satisfied. Otherwise, this element is not satisfied.

But for the mistake, Bolton knew they should have been named

There is no indication that Perry had originally wanted to file a claim against Bolton. Perry's original claim was that Doctor negligently used Bolton's rods for his type of injury, thus alleging that Bolton's rods were wrongly used. Perry did not allege that anything was actually wrong with the rod itself. Therefore, there appears to be no mistake regarding the identity of the defendant. In fact, there is no facts to suggest that Perry had even considered suing Bolton for negligence until 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. Clearly, Perry did not make a mistake as to the defendant when he filed the original claim prior to reading this newspaper. Only after reading the newspaper did he "immediately sought" to amend his complaint. The evidence shows that there is no mistake as to the identity of the defendant in Perry's suit.

Even if Bolton was aware of the suit, no indications on the claim would lead Bolton to believe that Doctor had originally meant to sue Bolton instead of Doctor. Therefore, this element is not satisfied.

The court should grant Bolton's motion to dismiss because the applicable statute of limitations had run and the amended complaint does not relate back.

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.

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 merit (which means it did not end based on jurisdiction, venue or indispensable party), and 3) the claimant is asserting the same claim as case #1 (same claim usually means arises out of the same transaction or occurrence).

The first lawsuit was brought by another patient, not Perry. Thus, the first element requiring the same claimant and defendant fails because Perry was not the plaintiff in the first case, as he is in the second case. Although it appears that case #1 ended in valid final judgment on the merits, case #1 did not assert the same claim because it is not the same transaction or occurrence. The previous patient's claim arises under his individual surgery, and Perry's claim arises out of his own separate surgery. Thus, claim preclusion should not be asserted.

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 (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 5) collateral estoppel is being used by one who was a party in case #1 (satisfies mutuality requirement in those jurisdictions who require it), 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.

Valid Final Judgment

No facts suggest that the first case did not end in final valid judgment on the merit. No facts state that case #1 ended based on jurisdiction, venue or indispensable party. Thus, if it did not end in one of these bases, then it ended in valid final judgment, and this element is satisfied.

Issue actually litigated

The facts state that "Doctor had lost a lawsuit brought by another patient... who also alleged negligence for inserting Bolton's rod into his spine." Therefore, it appears that the issue of negligence was actually litigated. If it was, this element is satisfied.

Issue essential to judgment

Because the previous patient brought an action based on negligence, the issue of negligence was likely essential, and if the court or jury in case #1 had found Doctor not to be negligent, then the outcome of case #1 would have been different. Thus, this element is satisfied.

Used against party in case #1

Perry is asserting issue preclusion against Doctor, who was the defendant in case #1 because in the previous case, Doctor was sued by another patient. Doctor is a current defendant in Perry's case and was a defendant in case #1. Thus, this element is satisfied.

Used by nonparty in case #1 but plaintiff in case #2

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

Answer B to Question 2

1-Motion to compel Doctor (D) to answer

Scope of discovery- relevance

During discovery, both parties to a lawsuit may engage in discovery through depositions, interrogatories, requests for production, requests for admissions, and other discovery devices any evidence that is relevant to the lawsuit. Relevance is a low standard and it just requires that the evidence sought to be discovered be likely to lead to the discovery of any admissible evidence relevant to a claim or defense in the subject case. Here, Perry (P) is bringing a lawsuit against D for negligence. Negligence is a tort action that requires the plaintiff to establish 1) duty, 2) breach, 3) actual causation, 4) proximate causation, and 5) damages.

Here, P is seeking discovery of whether D had performed any other spine surgeries using Bolton's rods, and if so, whether any of these surgeries resulted in complications. Although D is arguing that this information has nothing to do with whether D was negligent as to Perry, this evidence is relevant to the issues of duty and breach- which P will have to establish as part of his prima facie negligence lawsuit.

Although this information does not involve P, it is relevant to duty because it helps determine what standard of care D should be held to. A physician is typically held to the standard of care of an average member of his profession in good standing. Thus, D will be held to the standard of care of an average back surgeon in good standing. Here, if D in fact used Bolton's rods before and these surgery's resulted in complications, this would indicate that D should have warned P about these complications. An average back surgeon in good standing would warn his patients of complications that occurred when the doctor performed similar surgeries on other patients.

This information is also relevant to breach. In order to establish breach, a plaintiff has to establish that the defendant fell below the applicable standard of care. Here, if other spine surgeries using the same rod had led to complications, this would be relevant to whether D fell below his standard of care because either he did not inform P of these

complications (which he should of done) or because he in fact used this rod for the spine surgery knowing that it had a potential to lead to complications.

Thus, the evidence that P is seeking is relevant to his negligence theory and should have been discoverable.

Privilege/ work product

Relevant evidence is discoverable unless there the party against whom the discovery is sought can claim a privilege such as doctor-patient confidentiality or work product privilege. Here, D will have to answer P's request unless he can claim either of these privileges.

Although many jurisdictions, including CA, recognize the doctor-patient privilege, the federal courts do not. Here, P is suing D in federal district court thus the doctor-patient privilege does not apply and D will not be able to assert it to avoid his discovery obligations to P.

Work product privilege protects the work of the attorney and parties that is done in anticipation of litigation. Here, there is no indication that D's attorney compiled a list of other spine surgeries in anticipation of this litigation, thus D will not be able to claim the work product privilege.

Conclusion

Because the evidence as to other spine surgery complications is relevant to P's negligence claim against D and not subject to any privilege, the court should grant P's motion to compel D to answer his deposition question.

2-Motion to dismiss on ground that statute of limitations (SOL) had run

Generally, a plaintiff must file his complaint with all claims and all defendants within the applicable SOL. There are 2 limited exceptions, outlined below, where there plaintiff may 1) add a new claim and 2) add a new defendant after the SOL has run. In these situations, the new claim/ 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 with his new claim/ defendant.

Here, P filed a suit against doctor within the applicable SOL, thus whether P can add the claim against Bolton depends on whether it "relates back."

Relation back- Amendment of pleadings to add a claim

A plaintiff may amend his complaint to add a new claim after the SOL has run if the claim arises out of the same transaction or occurrence as his original claim against the original defendant. Here, P wants to add a claim against Bolton based on negligent design of the rod. P's original claim is against the doctor for negligence in using this rod. Thus, P's claim against Bolton arises out of the same transaction or occurrence as his original complaint- both the new claim against Bolton and the original claim against D arise out of the back surgery/ rod insertion that led to P's severe back pain. Thus, P will be able to amend his complaint to add this claim.

Relation back- Amendment of pleadings to add a defendant

A plaintiff may amend his complaint to add a new defendant after the SOL has run only in very limited circumstances. The 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.

Here, P wants to include a claim against Bolton, alleging that it had negligently designed the rod that D placed in his back during the spin surgery. P's original claim is against the doctor for negligence in using this rod. Thus, P's claim against Bolton arises out of the same transaction or occurrence as his original complaint- both the new claim against Bolton and the original claim against D arise out of the back surgery/ rod insertion that led to P's severe back pain. Thus, this first element is satisfied.

Here, P will also have to establish that Bolton knew about his claim against D within 120 days of its filing. Here, there is no indication that Bolton received a copy of P's complaint

against D or had any notice that P brought a claim against D as a result of his surgery. Thus, unless P can establish that Bolton knew about the lawsuit, he will not be able to establish this element.

Here, P will also have to establish that Bolton knew that he made a mistake and that he would have originally named Bolton but for the mistake. Here, P will try to argue that Bolton had been sued by several other patients who alleged that they suffered severe back pain after Bolton's rod was inserted during spine surgery. Thus, P will argue that Bolton knew that P should have filed the lawsuit against it. However, P will not be able to establish this element. P did not make a mistake and negligently name the wrong defendant- rather, he named Doctor who is likely a proper defendant and then subsequently named Bolton after he learned more information. He did not even learn this information through discovery/ deposition of Doctor- he learned it by reading a newspaper article. This is not a situation where the plaintiff completely puts the wrong name in the applicable line of his complaint. P did not make a mistake at the time of his complaint and rather learned about a potential claim against Bolton too late. He will be barred by the SOL.

Conclusion

Here, P's new claim will relate back to his original complaint. However, his addition of Bolton as a new defendant will not relate back to the original complaint and P will not be able to add his claim against Bolton. Thus, the court should grant Bolton's motion to dismiss P's claim on the ground that the SOL had run.

3-Motion for summary judgment based on preclusion

A motion for summary judgment requires the moving party to establish 1) there is no genuine dispute of material fact and 2) he is entitled to judgment as a matter of law. Preclusion is a common ground for a motion for summary judgment because it involves the judgments of prior lawsuits so there is genuinely no dispute as to material fact (the outcome of these lawsuits).

Res judicata/ claim preclusion

Res judicata (RJ) bars a subsequent lawsuit (lets call it case 2) when there is a prior lawsuit (call it case 1) and 1) case 1 and case 2 involve the exact same parties (the exact same plaintiff and the exact same defendant), 2) case 1 ended in a final judgment on the merits, and 3) case 2 involves the same transaction or occurrence as case 1.

Here, P will not be able to assert RJ against Doctor. Here, case 1 is the lawsuit brought by another patient against Doctor. Case 1 involved a negligence action for inserting a Bolton rod into his back. Although P's lawsuit (case 2) is very similar, RJ will not apply because P was not a party to the prior case 1. RJ requires the exact same persons to be parties to both the first case and the second case. Although D was a party to the first case, P was not, thus he will not be able to assert RJ against D.

Collateral estoppel/ issue preclusion

Collateral estoppel (CE) bars a subsequent lawsuit (case 2) when 1) case 1 and case 2 involve the same issue, 2) this issue was actually litigated and decided in case 1, 3) this issue was essential to the judgment in case 1, 4) issue preclusion is being asserted in case 2 against a party who was a party in case 1, and 5) traditionally, is being asserted by a party who was a party in case 1 (mutual collateral estoppel) but modernly, does not to be asserted by a party who was a party in case 1 (non mutual collateral estoppel).

Here, case 1 (the lawsuit by the other patient) and case 2 (P's negligence suit against D) will likely involve similar issues. They are both negligence suits so they will both have issues such as 1) what was the defendant doctor's standard of care? 2) did the defendant breach this standard of care by installing a Bolton rod in his patient's spine, 3) did the insertation of the Bolton rod cause the patient to suffer subsequent back pain, etc. Thus, case 1 and case 2 will involve many of the same issues, and this first element will be satisfied.

Because Doctor lost the first negligence lawsuit, many of these issues will also have been litigated and decided, thus there are a number of issues which will have been actually litigated and decided in case 1, thus P will likely be able to satisfy the second element of CE.

Similarly, many of these issues would have been essential to the judgment in case 1. A plaintiff has the burden of establishing all of his prima facie negligence elements so each of these issues would have been essential to the first patient prevailing in his negligence suit against Doctor, thus this third element will likely be satisfied.

P is also asserting issue preclusion in case 2 against Doctor, who was a party in case 1. Thus, issue preclusion is being asserted against a party who was a party in case 1 and the fourth element is satisfied.

For the fifth element, traditionally, mutual collateral estoppel was required and CE could only be asserted by a party who was also a party to case 1. However, unlike the fourth element (which is required by due process), due process does not require the party who is asserting CE to be a party to case 1. Thus many jurisdictions allow nonmutual use of collateral estoppel. The standard that must be met depends on whether the party is asserting CE as a plaintiff or as a defendant. If the party is asserting it as a defendant (defensive collateral estoppel) the court will apply CE to bar further litigation of this issue as long as the plaintiff had a full and fair opportunity to litigate the issue in case 1. However, if 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.

Here, P was not a party to case 1 however he still may be able to use nonmutual collateral estoppel since most courts have got rid of the mutuality requirement. P is a plaintiff and he is the one asserting CE against D. Thus, P is trying to make offensive use of CE. The court will look at a number of factors- whether Doctor had a full and fair opportunity to litigate the first lawsuit against the other patient. Whether Perry could have joined the first negligence lawsuit involving the Bolton rod- did P know of this claim at the time it was brought? Whether the doctor could have foreseen that there would be multiple lawsuits like this- here multiple patients had sued Bolton from back pain they suffered so D likely could have foreseen that plaintiffs would bring lawsuits against him

as well for use of the rod. And finally, whether there are inconsistent judgments against Doctor. Here, this appears to be the only other lawsuit against this particular doctor involving negligent use of the rod thus unless there are other lawsuits where the Doctor prevailed on this issues, there are unlikely to be inconsistent judgments.

Conclusion

The court should dismiss Perry's motion for summary judgment as to his claims of res judicata but likely should grant his motion as to his claims of collateral estoppel for a number of negligence issue (outlined above) depending on the factors (outlined above).

Question 3

Betty is a physician. One of her patients was an elderly man named Al. Betty treated Al for Alzheimer's disease, but since she believed he was destitute, she never charged him for her services.

One day Al said to Betty, "I want to pay you back for all you have done over the years. If you will care for me for the rest of my life, I will give you my office building. I'm frightened because I have no heirs and you are the only one who cares for me. I need to know now that I can depend on you." Betty doubted that Al owned any office building, but said nothing in response and just completed her examination of Al and gave him some medication.

Two years passed. Al's health worsened and Betty continued to treat him. Betty forgot about Al's statement regarding the office building.

One day Betty learned that Al was indeed the owner of the office building. Betty immediately wrote a note to Al stating, "I accept your offer and promise to provide you with medical services for the rest of your life." Betty signed the note, put it into a stamped envelope addressed to Al, and placed the envelope outside her front door to be picked up by her mail carrier when he arrived to deliver the next day's mail.

Al died in his sleep that night. The mail carrier picked up Betty's letter the following morning and it was delivered to Al's home a day later. The services rendered by Betty to Al over the last two years were worth several thousand dollars; the office building is worth millions of dollars.

Does Betty have an enforceable contract for the transfer of the office building? Discuss.

Answer A to Question 3

Applicable law

The common law governs all types of contracts except those for the sale of goods. Here, the contract between Al and Betty was for services of medical care in exchange for an office building thus it will be governed by the common law.

Valid contract

A valid contract must have been formed by an offer, acceptance, be supported by consideration and no subject to any defenses. If Betty can show that these all existed she will have an enforceable contract. This is decided by the objective manifestations of the parties, thus Betty's subjective thoughts in believing that Al did not have the office building or in forgetting about the offer do not impact the formation of the contract.

Offer

An offer is a manifestation of intent to enter into a contract that is certain and definite and communicated to the offeree. Here, Al stated that he would give Betty his office building in exchange for her to continue to give him medical care until his death. This shows intent to be bound to the offer on those terms and was stated to Betty. Thus, his statement is an offer. On the other hand, the offeree did not think there was an offer because she did not think he owned a building and his statement was phrased in such a way as to suggest that he was merely expressing gratitude for Betty's work, by saying she was the only one who cared for him and that he did not have any other heirs. Overall, although couched in language that would not be an offer, there is a clear intent to give Betty his building in exchange for her caring for him for the rest of his life.

Bilateral or unilateral contract.

The issue is whether Al's offer was an offer to enter into a unilateral or bilateral contract. A unilateral contract is one that can only be accepted by performance. Here, Al said he would give Betty the office if she cared for him for the rest of his life. He was not seeking her promise to care for him for the rest of her life, but rather that she actually care for him for the rest of his life.

On the other hand, most contracts are construed as bilateral, that is are formed by the promises to perform. And here the offer could be accepted by Betty's promise to provide medical services.

Termination of an offer

An offer may be terminated. Here, there is no indication that Al terminated his offer in the two years after the conversation.

Lapse of time

An offer will terminate if it is not accepted after a reasonable period of time, if none is suggested by the contract. There is usually a reasonable time limit on offers. Here, Betty did not accept the offer until two years later when she learned that Al actually owned the building. It should be argued that the offer has lapsed. However, since it was an offer to care for him for the rest of his life, two years may not be an unreasonable period of time, depending on his age and need for care.

Death

Death of the offeree will terminate the offer. Here, Al died before receiving the acceptance. However, Betty may have accepted the offer before her death, see acceptance, and thus his death would not be an issue, since death only terminates an offer, not necessarily a contract.

Irrevocable offer for unilateral K

Betty will argue that the offer was unrevocable because she had started performance of the unilateral contract by continuing to care for Al through the next two years.

Acceptance

Acceptance is the unequivocal manifestation of assent to the offer by one with power of acceptance. Here, the offer was made to Betty so she had power of acceptance. There are several arguments Betty will make to show acceptance.

Silence

Here, Betty was silent when the offer was first made. Thus she made no manifestation of assent. However, she did continue to treat him for the remainder of his life and thus her silence could be deemed acceptance since she continued to perform the contract by providing medical care.

Mailing Acceptance

Normally an acceptance is effective upon mailing. Here, the effectiveness of Betty's actions depend on whether properly addressing and stamping the envelope and putting it outside is an effective mailing of the acceptance. On one hand, she completed all actions required for mailing and putting it outside her door to be picked up by a mailman is no different than walking to the post office and dropping it in the mailbox. All that remains is the actual mailing of the envelope. On the other hand, when one goes to a post office or hands mail to the mailman one cannot thereafter get that mail back. Betty could easily have gone outside and retrieved the envelope from her own mailbox at any time before the mailman arrived and thus the letter was not posted. Overall, it is likely that this is not proper dispatch of the mail since she could so easily retrieve it. As such it was not an effective acceptance until the mailman picked up the letter the next morning. As discussed above, once Al had died the acceptance could no longer be effective since the offer was terminated. Thus she did not accept the offer by mailing.

Acceptance by Performance of a unilateral Contract

Betty will also argue that she accepted the contract by performing the terms of the unilateral contract. She continued to provide Al with medical care until his death. Thus upon Al's death she had fully performed and had the makings of an enforceable contract.

Consideration

A valid contract must have consideration. Consideration is the bargained for exchange of something of legal value. Here, Al is offering Betty his office building in exchange for

her medical care, these are both of legal value or detriment because they are giving up an office building and Betty is giving up payment for her services.

Bargained for exchange: The promise must induce the detriment and the detriment induce the promise. Here, Al's offer to give the building was to induce Betty to give him medical care. However, Betty did not think he had the building and continued to give him medical care anyhow for two years before "accepting" the offer. This suggests that she was not induced to give medical care for the rest of his life by the promise of the building.

Past Consideration

Al's heirs should also argue that Al's promise was really for past consideration. That is the work Betty had done before. This is evidenced by Al's statement I want to pay you for all the "work you have done over the years." Consideration is not present where the work has already been done. However, this argument will fail because Al not only offers for the previous work done by Betty but also by the remaining work that he will do.

Illusory

The heirs should argue that the promise is illusory because Betty may only have to do work for Al for one day or even one hour. However, this argument will fail because she will be bound to complete the medical work until he dies, which could be in twenty years or in 2 minutes.

Overall, it does not seem like there is consideration since the promise of the building did not induce the medical work.

Promissory Estoppel

Betty will argue that while there is no consideration she should be able to enforce under a promissory estoppel doctrine. There, a person must have relied upon a promise, to their detriment, and done so justifiably. Betty will argue that in providing free medical care to Al for two years she was relying on his promise. However, she had forgotten about the statement regarding the building and thus her actions were not a result of reliance on the promise, but rather her own good work.

Defenses

Assuming there is consideration there are several defenses to contract formation that can be raised and prevent the enforcement of the contract.

Statute of frauds

The statute of frauds requires that certain contracts be in writing in order to be enforceable. The sale of land is one such contract. Here, although Al is not obtaining the typical purchase money in his conveyance he is nonetheless receiving a service of value in exchange for his land. Thus, it could properly be considered a sale of land. Additionally Betty could argue that it is a contract that cannot be performed in under a year, however this will fail since Al could die at any time and the contract would be performed.

Additionally, since this is a contract to give something at death it could be considered an executory contract, but this does not fit either since it is not relating to the executor giving a promise to pay the debts of the estate.

The statute of frauds is satisfied by a writing signed by the party to be charged or by part performance or detrimental reliance. Here, Al orally offered the building to Betty and thus there is no writing that evidences the contract. The letter from Betty to Al will not satisfy the writing requirements because although it contains the material terms (building for medical care) as required to satisfy the statute of frauds it does not contain the signature of the party to be charged, here, Al.

Further, the statute is not satisfied by the performance because in the sale of land this is satisfied by two of three things: possession, improvement or payment. Here, Betty's "payment" of medical services would satisfy one, but she did not take possession and did not make any improvements to the land thus it would not be removed from the statute of frauds.

A contract that cannot be performed in under a year would be satisfied by full performance, as here where Betty provided care until Al's death, but as discussed

above this has no merit since this was not a contract that could not be performed in under a year.

Finally, there is no detrimental reliance on the contract since she forgot about while giving care for the two years until she found out he actually owned the building. She was not relying on the contract. Thus she will not remove the contract from the statute of frauds through detrimental reliance.

Betty could argue that this agreement is not within the statute of frauds since it is not for the conveyance of property for money. She will likely fail as the substance of the agreement is the office building for an amount of service.

Incapacity

A contract is voidable at the option of a person who does not have the capacity to contract. Here, the facts state that Al has Alzheimer's disease. Thus he may not have been able to understand the contract or enter into it. If Al did not understand what he was doing when he offered the building due to his mental disease and could not properly contract a contract will not be enforced. Here, Betty was his doctor and should have known that he was incapable of contracting. She knew he had a mental disease and thus even if he showed no outward signs of incapacity at the time he entered into the contract, she was aware. However, incapacity does not depend on the awareness of the other party. A party that does not have capacity due to mental disease cannot be found to have entered into an enforceable contract regardless of whether the other party knows of this.

Undue influence

A contract will be voidable if it is a result of undue influence. Here, Betty was in a position of power - giving him medical care. Al was clearly frightened by the prospect of not having medical care in the future as evidence by his statements that he needed to be able to depend on her. This suggests that the contract for the building is a result of her power over him as a physician and not freely contracting to give her the building. The fact that she had previously provided medical care buttresses the argument since Al had come to rely on her and she could use her influence to her advantage. However,

this argument is likely to fail since she did not say anything in response to his offer and simply continued her exam and gave him the medication he needed.

Conclusion

Betty probably does not have an enforceable contract for the transfer of the building because it is not supported by consideration or a consideration substitute and it is barred by the statute of frauds.

Answer B to Question 3

Applicable Law

This is a contract for Betty's personal services as a physician. Therefore, the common law applies.

Contract Formation

To form a contract, there must be offer, acceptance, and consideration. Betty will argue a contract exists based on theories that (a) an implied contract was created when Betty accepted the offer as implied by her conduct; (b) an express contract was created when Betty sent the letter; and (c) a contract was formed when Al made the offer in payment for past services. Each theory will be examined below. Also, a number of defenses exist, which are discussed at the end.

Implied Contract

Betty will argue that Al made an offer, and her acceptance can be implied by her conduct.

Offer

An offer is a manifestation of a present intent to enter into a contract. It must be definite and clear, and it must be communicated to the offeree. Here, Al offered to enter into a contract when he offered to give her the office building in exchange for continued care. His statement shows that he intended, at that moment, to enter into this relationship with Betty. His statement was unambiguous and on precise terms, hence it was definite and clear. Al said it to Betty, thus it was communicated to the intended offeree. Therefore, Al's statement is a valid offer.

Acceptance

An acceptance must be an unambiguous communication from the offeree to the offeror showing acceptance of the offer on its terms. The acceptance can be through words or conduct, and is judged by an objective standard. Here, Betty will argue that her conduct should reasonably be understood to show acceptance, because right after Al offered to

give her a building in exchange for treatment, Betty completed her examination and gave him medication. Therefore, Betty will argue that her conduct shows an unambiguous intent to be bound by the offer's terms.

However, in the context of their past dealings, Betty's conduct does not show an intention to accept the offer. Betty had long treated Al without charge. After Al made the offer, Betty said nothing and proceeded with business as usual. If this had been their first meeting, then her subsequent performance (by treating Al) would be indicative of an acceptance of the offer. However, given their past dealings, Betty's subsequent performance was perfectly in line with what would be expected if she rejected the offer. In other words, it could be argued that Betty did not intend to be obligated to Al for the rest of his life, and her conduct was merely consistent with how she had acted in the past.

Therefore, Betty's conduct was ambiguous, in that it is unclear whether she intended to accept the offer, or reject the offer and continue their relationship as it existed before the offer. Thus, Betty most likely did not accept the offer by her conduct.

Acceptance by silence

Courts have sometimes found acceptance by silence, if the parties' past dealings would create a reasonable expectation that silence equals acceptance. However, the rule will not apply here. Betty and Al do not have a history of previous contracts. Betty's treatment of Al has been purely gratuitous, therefore there is no history of prior dealings on which to base an expectation of the form of acceptance. Thus, Betty will not be able to establish silence by acceptance.

Consideration

Consideration is the bargained-for exchange of legal detriments. Each party must suffer a detriment, and the detriments must induce each other. Here, Betty will argue that she suffered a detriment in the obligation to care for Al for the rest of his life, and Al suffered a detriment by giving up his office building.

However, the detriments must induce each other. Here, Al was induced into giving his office to Betty in exchange for medical care. However, Betty was not induced into providing services to Al for his office building. In fact, Betty "doubted" whether Al even owned an office building. She even forgot about Al's statement, which by itself does not have legal significance, but it does serve as evidence that the office was not something Betty considered important. Most people, even rich Doctors, would not forget that they are due an office building, if they really expected to receive one.

Furthermore, once Betty learned about the office building, she responded immediately and enthusiastically with an acceptance letter. This shows that Betty did not provide her earlier services in exchange for Al's promise to give her an office building. It also shows that she did not believe she had accepted the offer with her prior conduct. Therefore, even if a court were to imply that Betty's conduct constituted an acceptance, there arguably would not be mutually-induced consideration.

Express Contract

Betty will argue that Al made an offer that she expressly accepted with her written letter.

Offer

Al's statement is a valid offer. See above.

Acceptance

See rule above. Betty will argue that she expressly accepted the offer with her letter. The letter was unambiguous. It will be a valid acceptance.

Consideration

See rule above. Al suffers a detriment (giving up his office building) in a mutually-induced exchange for Betty's promise to care for him the rest of his life. Even if that life were short, it would still be valid consideration, because courts do not generally question the sufficiency of the amount of consideration. Courts may choose not to enforce some contracts with an imbalance of consideration on duress or unconscionability grounds, discussed below.

Expiration

Unless stated otherwise, an offer stays open for a reasonable amount of time. Here, Betty attempted to accept Al's offer after 2 years. It was so long that she had even forgotten about Al's offer. Two years is most likely longer than a reasonable amount of time. Therefore, the offer expired, and Betty's attempt to accept it will not be valid.

Revocation

Offers are revoked on the death of the offeror, even if the offeree is not aware of that death. Here, Al died at night after Betty placed the letter in her mailbox, but before the mail carrier picked up Betty's letter. Therefore, Betty's letter will only be valid if it fits in the mailbox rule and thus accepted the offer before Al died. Note, even though Al's life was only for a few hours after acceptance, consideration is still valid for the reasons discussed above.

Mailbox Rule

If sent by mail, acceptances are valid when sent. A letter will be sent when it is placed in the mailbox or location where the mail is collected. Here, Betty's mail was usually picked up from a location outside her front door. Therefore, Betty's acceptance was valid once she placed the letter outside her front door, and thus the mailbox rule applies. Betty accepted Al's offer, and a contract was formed.

Contract formed by past services

Betty could argue that Al's statement was an offer to pay for past services rendered. Betty had treated him for years for free. She will argue his statement is an offer to pay the moral debt he owes to her.

Consideration

See rule above. Here, Al is offering to give his office to Betty, but there is no bargained-for exchange. Betty provided her past medical services gratuitously, and she was not induced by to do so by Al's subsequent promise to give her an office building. Therefore, there is no consideration to support this contract.

Past Moral Obligations

Courts will enforce offers to pay for past moral obligations. Typically, this is the situation where a debtor offers to pay his unenforceable debts. Here, Al does not owe Betty any debt. While she offered him free medical care, that did not create a moral obligation to pay. Indeed, many doctors are motivated by a dedication to their patients, as evidenced by their socratic oath. Therefore, Betty's motives were likely altruistic, and thus were gifts. Al's promise to pay her back for all she has done cannot be construed as an offer to pay for past debt.

Defenses

Statutes of Frauds

A contract for the sale or transfer of land cannot be enforced without a writing, signed by the party to be enforced against, evidencing the existence of a contract, i.e. showing the material terms. Here, Al's offer to Betty was an oral attempt to transfer ownership of land. The only signed writing appears to be Betty's letter. While it shows the material terms, and is signed by Betty, it was not signed by Al. Therefore, even if Betty formed a contract with Al, it cannot be enforced against him.

Duress

Al's estate could argue that the contract was formed under duress. Here, they can point to Al's statement that he has no heirs or anyone who cares for him. He needs someone to help him, and he appears to be in a state of loneliness and fear. Therefore, the estate could make an argument that Al was pressured into forming a contract out of duress, and he had no real choice but to form the contract.

However, this argument would most likely be rejected, since Al was the one who made the offer, and Betty gave no sign that she would withhold medical care if Al did not give her an office building.

Unconscionability

Similarly, Al's estate could argue that the deal was unconscionable, in that Betty took advantage of her superior position to extract a payment out of Al. Al's dependence on her created an element of unfair bargaining power, which Betty used to her advantage. It was improper for a doctor to make such a contract with a dying patient.

However, this argument will be rejected. The facts show no evidence that Betty in any way exerted pressure on Al. Indeed, Al's statement appears to be spontaneous.

Capacity

Al's estate can argue that Al lacked the capacity to enter into a contract. Al was an Alzheimer's patient. He most likely did not have the mental faculties necessary to enter into a contract.

Betty will counter that the statement was perfectly clear, and that it was made during one of Al's moments of lucidity. Therefore, at that moment, he did have the capacity to enter into a contract.

Question 4

Austin had been a practicing physician before he became a lawyer. Although he no longer practices medicine, he serves on a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. The committee develops recommendations, but its members do not personally engage in public advocacy. Austin is a close friend of several of the other physicians on the committee, though as a lawyer he has never represented any of them.

In his law practice, Austin represents BHC Company, a health insurance provider. BHC has been sued in a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay, and denial and reduction of reimbursements for medical services. Austin initially advised BHC that he was not confident it had a defense to the lawsuit. After further research, however, Austin discovered that a stated policy of the health care law is the containment of health care costs. He advised BHC that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He explained that he would argue for a modification of existing decisional law to allow such a result based on public policy.

When Bertha, counsel for the class of physicians, heard the defense Austin planned to assert in the lawsuit, she wrote him a letter stating that if he presented that defense she would report him to the state bar for engaging in a conflict of interest.

1. What, if any, ethical violations has Austin committed as an attorney? Discuss.
2. What, if any, ethical violations has Bertha committed? Discuss.

Answer according to California law and ABA authorities.

Answer A to Question 4

1. AUSTIN'S ETHICAL VIOLATIONS AS AN ATTORNEY

Duty of Competence

An attorney owes to a client the duty of competence. Under the ABA Rules, an attorney must possess the legal knowledge, skill, thoroughness, and preparation of an average member of the profession. Under the California Rules, an attorney must have the requisite diligence; learning and skill; and mental, emotional, and physical ability of an average member of the profession.

Here, the facts do not state Austin's particular area of legal practice. However, there is nothing in the facts to suggest that Austin is not competent in the present matter. Thus, Austin has not violated his duty of competence.

Duty of Confidentiality

An attorney owes to his client a duty of confidentiality, whereby the attorney may not disclose the client's confidential communications made during the representation either during or after the termination of the representation.

Here, the facts indicate that Austin has not represented any of the physicians in the medical association committee, nor has he represented any of his physician friends (to the extent that they are not part of the association committee). Thus, it does not appear as though Austin has obtained any confidential information from any prior representation of any of the parties involved in this action.

As such, it does not appear that Austin, as of yet, has violated any duty of confidentiality.

Duty of Loyalty

A lawyer owes to his client an ethical duty of loyalty. Pursuant to this duty, the lawyer owes to his client a duty of utmost trust and confidence. A lawyer may violate his duty of loyalty to his client if he has a concurrent or former conflict of interest with the client.

Concurrent Conflict

Under ABA Model Rule 1.7, an attorney must not represent a client where the attorney represents another client whose interests are directly adverse to the prospective client, or where there is a significant risk that the attorney's services will be materially limited due to the attorney's present or former personal relationships or interests or due to the attorney's representation of a former client. An exception to this rule exists where the attorney (1) reasonably believes that he can competently and diligently represent the client in the face of any such conflict; (2) the conflict does not require the attorney to advance a claim for the client in issue against another client in the same proceeding; (3) the representation is not prohibited by law; and (4) the clients give informed, written consent. The California Rules of Professional Conduct (CRPC) differ in three ways: (1) they apply to both present and potential conflicts; (2) they do not have a "reasonable belief" standard as under the ABA Rules; and (3) the attorney needs only give written disclosure to the client---as opposed to informed, written consent---where the conflict relates to the attorney's personal interests (actual conflicts between clients require informed, written consent). Finally, an attorney must obtain the client's informed written consent and comply with the above exceptions each time a potential conflict arises.

Austin's Service on a Local Medical Association

As a general rule, an attorney's mere service on a corporate board of directors or a local association does not in and of itself violate any ethical rules. However, such membership is highly discouraged due to the high risk such membership poses in terms of creating conflicts of interest in future client representation.

Thus, while Austin's membership in the association is not a per se ethical violation, it may cause a concurrent conflict to arise with respect to his representation of BHC, as described below.

Austin's Representation of BHC Company (BHC)

Here, Austin is presently representing BHC in defending a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay and denial and reduction of reimbursements for medical services. This poses a potential conflict of

interest between his representation of BHC and Austin's membership on the local medical association committee, as well as Austin's prior occupation as an attorney and close friendship with many physicians on the committee. The issue then becomes whether Austin's personal relationships and interests here create such a conflict as to pose a significant risk of material limitation on his services.

That Austin serves on a committee that specifically works to further the rights of physicians with respect to fair compensation by health care providers is in direct conflict with his defense of BHC in a matter involving delay and denial of reimbursements for medical services. Thus, Austin's personal interests do appear to pose a significant risk of materially limiting his representation of BHC, as it could be very difficult for Austin to put aside his personal beliefs and convictions in order to aid BHC's defense. This is further supported by the fact that the association may publicly ostracize Austin's representation of a perceived "enemy." Thus, Austin must meet the exceptions enumerated above.

Reasonable Belief (ABA)

There are no facts directly revealing Austin's reasonable belief that his personal interests will not impede his diligent and competent representation of BHC. In fact, Austin's initial advice to BHC prior to any research was that he was not confident that BHC had a defense. The facts are unclear as to Austin's motivation behind this statement, but to the extent that the statement was based on his personal beliefs rather than a disinterested professional legal opinion, this statement likely makes Austin liable for discipline.

After further research, however, Austin appears to have formed a reasonable belief that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He further expressed his belief that he could make an argument for a modification of existing decisional law to allow such a result based on public policy. This may reflect Austin's reasonable belief that he could in fact represent BHC competently and diligently. Thus, the "reasonable belief" requirement under the ABA rules could likely be met.

Assertion of Claim Against Another Client/Not Prohibited by Law

Because the facts indicate (as discussed in more depth below) that Austin has not represented any of the physicians in the committee previously, nor does he presently represent any of them now, Austin's representation of BHC will not require him to assert a claim on BHC's behalf against any of his present clients. Further, there is no indication that Austin's representation of BHC is contrary to any law.

Informed Consent

As stated above, under the ABA Rules, an attorney must obtain the client's informed, written consent from his client to proceed in the face of a personal conflict that poses a significant risk of materially limiting his services to another client. Under the CRPCs, the attorney needs only make written disclosure of the conflict.

Here, Austin likely fails to meet his ethical duty under both the ABA and California Rules. There are no facts indicating that Austin either obtained BHC's informed, written consent nor gave BHC written disclosure of his personal relationship with his physician friends, his prior occupation as a physician, or his membership in the medical association committee. Indeed, there are no facts that Austin made such disclosures at all, even orally.

Thus, because Austin neither obtained BHC's informed, written consent to proceed with the representation nor gave BHC written disclosure of his personal conflicts, Austin is subject to discipline under both the ABA and the California Rules.

Former Conflict

Under the ABA Rules, an attorney who has represented a former client may not thereafter represent another client in the same or a substantially related matter where the representation of the current client would be materially adverse to the former client, unless the attorney obtains the former client's informed, written consent. The California Rule is substantially the same.

Here, although Austin serves on the local medical association committee that works to further the rights of physicians to be compensated by health insurance providers, the facts indicate that Austin has never represented any of the other physicians in the committee.

Thus, for the purposes of the former conflict rule, because none of the physicians are former clients of Austin's, Austin has not violated his ethical duty of loyalty to BHC for purposes of the former conflict rule.

Duty of Candor to the Court

Under the ABA Rules, Federal Rule of Civil Procedure 11, and the California Rules, an attorney may not bring a claim that is not warranted under existing law or that is meant to harass or delay.

Here, Austin's initial belief that BHC did not have a valid defense may reflect Austin's belief that BHC did not have a valid claim that Austin could assert in good faith. However, the facts later indicate that after further research, he believed he could make an argument for a modification of existing decisional law to allow such a result based on public policy. Under the ABA Rules and the California Rules, an attorney is permitted to bring an action for a good faith proposal to modify existing law. Here, the facts do not indicate that Austin's belief that he could make an argument for a modification of existing decisional law was in bad faith or was intended to harass or delay.

Thus, Austin should not be subject to discipline for bringing an action to argue for a modification of present law.

2. BERTHA'S ETHICAL VIOLATIONS

Reporting Ethical Violations

Under the ABA Rules, an attorney must report another attorney's ethical violation to the state bar. Under the California rules, reporting ethical violations is only permissive (not mandatory), unless an attorney knows of the other attorney's misconduct and the attorney fails to report the conduct to prevent such conduct from occurring or continuing.

Here, Bertha has become aware of Austin's engaging in a conflict of interest. As such, under the ABA Rules, Bertha is required to report Austin's ethical violation to the state bar. In California, Bertha ordinarily would not be required to report Austin's violation, but she could if she were so inclined. Here, however, it appears that Austin intends to proceed with his representation of BHC in the face of a conflict. Thus, Bertha will likely be required to report Austin's continued violation of an ethical rule.

Threats to Obtain an Advantage in a Civil Case

Under the ABA Rules, an attorney may threaten criminal or disciplinary action against an attorney, so long as the charges are sufficiently related to the civil action. Under the California Rules, an attorney may not threaten criminal, administrative, or disciplinary action to gain an advantage in a criminal case.

Here, as discussed above, Bertha is likely under a duty under both the ABA and California Rules to report Austin's violation. Further, Bertha's letter to Austin is manifestly a threat, as she stated that she would report him if he presented a specific defense in the case. Under the ABA Rules, Bertha's threat to Austin likely does not violate an ethical duty, as the threat is reasonably related to the litigation, i.e., Austin's conflict of interest in this particular case. Under the California Rules, however, while Bertha may---and likely must---report Austin's conduct to the California State Bar, Bertha is nevertheless absolutely prohibited from using that fact as a threat to gain an advantage in this case.

Thus, while Bertha is likely not subject to discipline under the ABA Rules, she is subject to discipline under the California Rules.

Answer B to Question 4

1. Austin's Potential Ethical Violations

Duty of Loyalty

A lawyer has a duty of loyalty to his client. The lawyer must ensure that no personal interest or duty to a third party materially impairs his ability to loyally represent the client. Here, Austin's client is BHC Company, a health insurance provider. By the nature of its business, BHC is interested in minimizing the amount it pays to physicians, because the more that BHC compensates physicians, the less able it will be to successfully compete in the market for health insurance providers. Furthermore, BHC has an obvious interest in winning its law suit for both financial and reputational reasons.

Conflict of Interest Posed by Austin's Committee Membership

Austin has a personal interest outside of his legal practice in that he is a member of a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. As a former doctor, Austin seems to be passionate about this cause.

The fact that BHC has a diametrically opposite interest, which is to pay as little as possible to physicians, creates a conflict of interest. How can Austin be loyal to BHC when he is absolutely opposed to BHC's cause? Thus, in the face of this conflict Austin must decide whether it is reasonably objectively possible to represent BHC without materially impairing its interests, and if it is possible Austin must disclose and get BHC's written consent.

Is the Conflict Consentable?

The conflict is only consentable if Austin objectively and reasonably believes he can adequately represent BHC. Austin may believe this, saying he can compartmentalize his life outside the firm from his life as a lawyer. He may also argue that as a committee member he is working to change the health care laws, while as a lawyer he is working to ensure that his client complies with the law but is not forced to

pay beyond what the law requires. If Austin is successful in changing the law in his role as a committee member it may not hurt BHC because costs for all health insurance providers will rise equally so BHC will not be put at a competitive disadvantage.

On the basis of these arguments, the conflict posed by Austin's committee role is probably consentable provided that Austin discloses to BHC and gets its written consent. Austin may also have a duty to inform the committee that BHC is a client because that may appear deceptive to the fellow committee members if Austin does not disclose. However, in so disclosing Austin must make sure he has BHC's prior consent in order not to violate the duty of confidentiality (discussed further below).

Conflict of Interest Posed by Austin's Friendships

Austin is a close friend of several of the plaintiff's in the class action suit that he is defending on behalf of BHC. Friendship is a personal interest of the lawyer that could potentially be materially adverse to the lawyer's duty of loyalty to the client. Thus, Austin must decide whether he can objectively reasonably believe he can adequately represent BHC in the face of this conflict.

Once again, Austin will state that he can compartmentalize between his work life and his outside interests. However, Austin may be faced by the reality that his close friends will not accept this compartmentalization and will begin to distrust him. If Austin is faced with losing some of his closest friends, will he really be able to continue zealously representing BHC as his duty of diligence requires him to? Lawyers are often required to speak impassionately against the other side and BHC may want to employ a take-no-prisoners strategy in the litigation; perhaps by impugning the work done by the plaintiffs including Austin's friends. For example, Austin may be called on to cross examine a friend in front of the jury to make the point that the friend overcharges for low quality medical services.

Based on these considerations, Austin can not objectively reasonably believe his representation of BHC will be adequate, and disclosure and consent will not be enough. Therefore, Austin should withdraw from the representation.

Duty of Confidentiality

A lawyer has a duty of confidentiality to the client, and may not discuss any information relating to the representation. Here, it is difficult to believe that Austin could meaningfully participate on his committee without discussing information relating to the representation of BHC. Therefore, Austin has very likely violated his duty of confidentiality.

Duty of Candor and Truthfulness to the Court

As part of his duty to the court, Austin must disclose adverse legal authority and may not make frivolous arguments. Here, Austin wants to make an argument to modify existing court decisions based on public policy grounds. This is a good faith argument to overturn precedent based on a legal argument not previously made, and therefore Austin may ethically go forward with the argument even if he is not confident the court will accept it. Indeed, as part of his duties of competence and diligence Austin must make such arguments if he thinks they have a reasonable prospect of success, as long as he is careful to fully inform the court of previous decisions that control within the jurisdiction and go against his argument.

2. Bertha's Possible Ethical Violations

Duty to Report

Under the ABA model code, but not California rules, an attorney has an ongoing duty to report any ethical violation of another lawyer. Thus, by not reporting Austin's ethical violations immediately, Bertha has violated the ABA code.

It is important for Bertha to report because it is unfair to the court and to the clients on each side of the case if one client's lawyer has a conflict of interest, because it creates the possibility of a mistrial or other delays.

Duty of Fairness

A lawyer has a duty of fairness to both the court and to her adversary. Here, Bertha is flagrantly violating this duty by using the threat of reporting an ethical violation to stop a lawyer from presenting a valid defense. This is essentially blackmail; Bertha is telling Austin to throw his case or risk being reported for an ethical violation. This is

grossly unfair to the court, to Austin, and to BHC. Therefore under both the ABA code and the California rules, such behavior is prohibited. While it is permissible, and indeed required under the ABA, to report ethical violations, using the threat of reporting ethical violations as a bargaining chip is prohibited and constitutes a serious ethical violation.

Question 5

Prior to 1975, Andy owned Blackacre in fee simple absolute. In 1975, Andy by written deed conveyed Blackacre to Beth and Chris “jointly with right of survivorship.” The deed provides: “If Blackacre, or any portion of Blackacre, is transferred to a third party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre.”

In 1976, without the knowledge of Chris, Beth conveyed her interest in Blackacre to Frank.

In 1977, Beth and Frank died in a car accident. Frank did not leave a will and his only living relative at the time of his death was his cousin Mona.

In 1978, Chris and Andy learned that Beth had conveyed her interest in Blackacre to Frank. When Mona approached Chris a day later to discuss her interest in Blackacre, Chris told her that he was the sole owner of Blackacre and she had no interest in Blackacre. Chris posted “No Trespassing” signs on Blackacre. He also paid all of the expenses, insurance, and taxes on Blackacre. Andy and Mona have never taken any action against Chris’ possession of Blackacre.

1. What right, title, or interest in Blackacre, if any, did Andy initially convey to Beth, Chris, and himself? Discuss.
2. What right, title, or interest in Blackacre, if any, are held by Andy, Chris, and Mona? Discuss.

Answer A to Question 5

1. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE DID ANDY INITIALLY CONVEY TO BETH, CHRIS, AND HIMSELF?

Andy owned Blackacre in fee simple absolute, which indicates absolute ownership and means he had the full right to convey Blackacre.

Joint tenancy

In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship."

A conveyance of land requires that the deed be lawfully executed and delivered. A conveyance to multiple parties can create a tenancy situation. A conveyance creates a joint tenancy when the four unities are present: possession, interest, time and title. The unity of possession means the joint tenants have the equal right to possession; interest means they have an equal ownership interest in the land; time means they received their ownership interest at the same time; and title means they received their ownership interest via the same instrument (such as a deed).

When a joint tenancy is created, it carries a right of survivorship (ROS), which usually must be expressed in the conveyance itself. The ROS means that when one joint tenant dies, the other succeeds to her entire interest in the land. In a situation involving two joint tenants, this means the surviving joint tenant would succeed to the entire ownership interest in the property. However, a joint tenancy can be severed by a sale, partition, or mortgage (in title theory jurisdictions). The severance of a joint tenancy typically results in a tenancy in common.

Here, Andy created a joint tenancy between Beth and Chris. This is because the deed expressly contained the words "jointly with a right of survivorship," and the four unities were present: Beth and Chris each have a 1/2 interest in Blackacre, right to possess the whole, and received their interest at the same time (1975) and by the same instrument (the deed from Andy).

Thus, there was a joint tenancy between Beth and Chris.

Fee Simple Subject to Condition Subsequent

However, the deed also contained another provision which potentially affects the parties' rights in Blackacre: the deed provided "If Blackacre, or any portion of Blackacre is transferred to a third party, either individually or jointly by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Through this language, Andy purported to create a fee simple subject to a condition subsequent (FSCS). A FSCS is 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 re-taking possession of the land. To create a FSCS, the grantor must use express conditional language in the conveyance and reserves a right of reentry, using words such as "but if" and "the grantor shall have the right to re-enter." In other words, the express conditional language must indicate that the interest conveyed is subject to the grantor's right of reentry if the specified condition occurs subsequent to the conveyance.

Here, the specified condition is the transfer of Blackacre or any portion thereof, either individually or jointly by Beth and Chris. Andy carved out the right of reentry by stating "Andy shall have the right to immediately re-enter and repossess Blackacre." Thus, Andy purported to create an arrangement where he could cut off Beth and Chris' rights in Blackacre, reenter the land and possess it, if any portion of the land was transferred. This constitutes a FSCS.

Thus, under Andy's purported conveyance, Beth and Chris would be joint tenants with respect to their interest in Blackacre: a fee simple subject to a condition subsequent.

Restraint on Alienation

However, Andy's purported conveyance is problematic because it is a restraint on alienation. A restraint on alienation occurs when the grantor attempts to restrict the alienability (e.g. transferability) of the land. A grantor may impose certain conditions in connection with his conveyance of the land, such as restrictions on what purpose the land may be used for. However, when the grantor attempts to impede the grantee's

ability to transfer the land to others, the courts will classify that as a restraint on alienation.

The law will uphold reasonable restraints on alienation, but not unreasonable restraints on alienation because of the public policy favoring the free transferability of land. When there is an unreasonable restraint on alienation, the court will simply strike the restraint from the conveyance and declare that the grantee holds the property without the restraint. A restraint is generally reasonable if the restriction lasts only for a specified period of time, such as a restriction during the grantor's life. It is generally unreasonable if the restriction continues indefinitely and applies even to the grantee's heirs and assigns.

Here, there is a restraint on alienation: the conveyance completely restricts Beth and Chris' rights to transfer the property because it provides that Blackacre or any portion thereof may not be transferred. This is probably an unreasonable restraint on alienation because there is no time limit to this restriction - Beth and Chris are indefinitely prohibited from transferring Blackacre; presumably, even their heirs/devisees could not transfer the land. Moreover, the prohibition is not for a reasonable time, such as for a set period of years.

Andy may argue the restraint is reasonable because it does not expressly apply to Beth and Chris' "heirs and assigns" -- he may argue that this restriction does not apply indefinitely, but rather only during the period of Beth and Chris' lifetime. He may argue their heirs and assigns are free to transfer the land. He may also argue that the creation of a joint tenancy restricts their ability to transfer anyway because doing so will sever the joint tenancy. However, these are weak arguments. The restraint is still probably unreasonable because it is a total restriction during the tenants' lifetimes, which is a significant amount of time. Beth and Chris may not even transfer a portion of Blackacre. While they would lose joint tenant status by a transfer, they still have the option of doing so in the absence of the restraint. Thus, the restraint is unreasonable.

Accordingly, the court would likely strike the condition Andy included in the deed. This would mean that Beth and Chris hold Blackacre in fee simple as joint tenants.

Conclusion: initial conveyance

Thus, the initial conveyance means Beth and Chris held Blackacre in fee simple as joint tenants.

2. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE ARE HELD BY ANDY, CHRIS, AND MONA?

1976: Beth's conveyance - severance of joint tenancy

In 1976, Beth conveyed her interest to Frank.

A joint tenant may sell her interest, but as indicated above, the sale of her interest severs the joint tenancy because it destroys the unity of time/title. When a joint tenancy is severed, the new tenants hold as tenants in common (TIC) with each other. TIC have no right of survivorship, which means that upon death, their interests in the property pass to their devisees/heirs through a will/intestate succession.

Here, Beth's sale to Frank severed the joint tenancy because it destroyed the unities: Frank and Chris do not have their interests conveyed by the same instrument and at the same time. So Frank became a TIC with Chris, and Beth no longer had any ownership interest. As of 1976, Frank and Chris both had a 1/2 interest in Blackacre. This is the case even though Chris did not know about the sale to Frank--the sale severed the joint tenancy nonetheless.

1977: Beth and Frank's death

In 1977, Beth and Frank died. Beth no longer had any interest in Blackacre. Frank's 1/2 interest as a TIC with Chris would pass via will or intestacy. Because Frank did not have a will, his interest would have to pass through intestate succession. Frank's only living relative was his cousin Mona, so she would be his heir under the principles of intestate succession. Thus, Mona would get Frank's 1/2 interest in Blackacre via intestate succession, and continue to hold Blackacre as a TIC with Chris.

Thus, as of 1977, Mona and Chris each had a 1/2 interest in Blackacre as TIC; Andy had no interest in Blackacre.

1978: Chris' ouster

In 1978, Chris learned about Mona. The issue is whether he deprived her of her ownership interest in Blackacre through his actions.

Chris and Mona were co-tenants (and specifically TIC) which means each had certain rights and duties. Each tenant has a right to possess the entire premises, so one tenant in exclusive possession has no duty to pay rent to the other. Moreover, the tenants are jointly responsible for paying ordinary expenses associated with the property, such as property taxes and maintenance expenses.

Moreover, because each tenant has the right to exclusive possession of the property, a tenant in exclusive possession cannot claim ownership of the entire property through adverse possession unless he commits an ouster. An ouster is when one tenant expressly excludes the other from possession of the premises, by preventing the tenant from possessing the premises and/or through words/conduct indicating they have no right to possess the premises.

Here, Chris probably committed ouster of Mona. As a co-tenant, she was entitled to possession of the premises, but Chris would not let her have possession. Chris told her he was the sole owner of Blackacre and she had no interest in Blackacre, which constitutes an expression that she had no right to possess Blackacre. Moreover, Chris put "no trespassing signs" on Blackacre, and also paid all of the expenses, insurance and taxes on Blackacre (he never sought compensation from Mona). Thus, his exclusive possession of Blackacre was notwithstanding Mona's consent--even though she did not take any action against Chris' possession of Blackacre, that does not indicate that Chris and she consented to this arrangement whereby he would have exclusive possession. Rather, he clearly indicated that she could not possess the premises, thus committing an ouster and entitling him to claim adverse possession if he meets the elements discussed below.

Adverse possession

A person in possession of land may have the possession ripen into title through the application of adverse possession (AP). A tenant must meet several elements to show they have acquired title through AP: continuous possession of the land for the statutory period, open and notorious possession, exclusive possession, actual possession, and hostile possession.

Continuous:

The possession must be continuous throughout the statutory period. It is unclear what is the statutory period in this jurisdiction, but Chris has possessed the property for such a long time that it is likely he has met the statutory period. Since his ouster occurred in 1978, it has been 32 years that he has possessed the property. The statute of limitations usually ranges from 10-20 years, so he likely has met the element of continuous possession.

Open and notorious:

The possessor must possess the property as the true owner would--in other words, his possession must be open and notorious such that a reasonable inspection of the property would reveal the possession. Here, Chris took ample actions to make his possession open and notorious; not only did he live on Blackacre, but he also posted no trespassing signs, paid the upkeep, and informed Mona that she had no interest in Blackacre. Thus, his possession would put a true owner on notice.

Exclusive:

Chris' possession was exclusive because he alone lived on Blackacre.

Actual:

Chris actually possessed the whole of Blackacre because he presumably lived on it.

Hostile:

Finally, the possession was hostile (i.e. without the true owner's consent) because Chris committed ouster, as described above.

Thus, Chris can probably meet the elements of adverse possession and claim title to Blackacre entirely (he already had 1/2 interest in Blackacre, and acquired the other 1/2 of Mona's interest through AP). Andy and Mona have never taken action against Chris' possession of Blackacre, so they did not defeat his claims and he likely owns it all via adverse possession. Note that he would have to file an action to quiet title before he could convey Blackacre to a third party.

Conclusion:

Thus, the final rights, title and interest in Blackacre are as follows: Chris owns all of Blackacre; Andy and Mona own nothing.

[Alternative analysis re restraint on alienation]

If the restraint on alienation analyzed above in Andy's original deed was valid, and Andy did in fact have a right to re-enter and repossess Blackacre, the final outcome would be the same because Andy never exercised that right of re-entry, and Chris succeeded to ownership of the whole property by adverse possession. (Of course this might be problematic because Andy could argue that the "hostility" element of AP was met because he allowed Chris to possess the property because he did not try to exercise his right of reentry). Nonetheless, the better analysis is that the restraint on alienation was invalid.

Answer B to Question 5

1. Andy's Initial Conveyance of Blackacre / What interest was Conveyed?

Joint Tenancy Discussion

Andy (A) conveyed Blackacre by written deed, thereby satisfying the Statute of Frauds, to Beth (B) and Chris (C). The language of the deed was to B and C "jointly with right of survivorship." On this language alone, B and C have a joint tenancy.

Joint tenancies are created when two or more people receive land under circumstances such that the four unities, possession, interest, time, and title, are met. Here, both B and C took possession at the same time (from A's grant), they have the same interest (they both own an undivided one-half interest in Blackacre), they have the same right to possess the whole, and the title they have in Blackacre will be the same (although exactly what title they own will be discussed further here).

Additionally, to create a valid joint tenancy, express language concerning the right of survivorship should be used. The right of survivorship means that when one joint tenant dies, he or she may not pass their share via will or intestacy; it passes automatically to the remaining joint tenant or tenants. Express language is required, because this automatic passing on an interest bypassing the probate system, which is generally "frowned up." Thus, courts will infer a tenancy in common (to be discussed further below) if express language is not used. Here, express language was used, as A conveyed to B and C "jointly with right of survivorship." As such, the requirement for a valid joint tenancy were met.

Attempt at Fee Simple Subject to Condition Subsequent

A's deed to B and C also contained language that "if Blackacre, or any portion of Blackacre, is transferred to a 3rd party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Here, A was attempting to create a fee simple subject to a condition subsequent. Unlike a fee simple absolute, where the recipient has full ownership and control of the land indefinitely, and which is alienable, descendably, and devisable, a fee simple

subject to a condition subsequent means that the takers ownership is conditioned upon a certain occurrence either being met or avoided. A fee simple subject to a condition subsequent is similar to a fee simple determinable in that both reserve an interest in the grantor, here A. However, a fee simple determinable uses express durational language (To A, for so long as....) where as a fee simple subject to a condition subsequent conveys the interest in full, but then conditions it upon a certain occurrence or non-occurrence. Another important distinction is that a fee simple determinable creates a possibility of reverter in the grantor, which means that the grantor's right vests automatically as soon as the occurrence takes place (without any action needed on the part of the grantor) while a fee simple subject to a condition subsequent creates a right of re-entry, which does not occur automatically and requires that the grantor affirmatively exercise his or her right to retake the land if the condition is met. Here, A attempted to create a fee simple subject to a condition subsequent, retaining a right of re-entry in himself. He did not use durational language, but instead conveyed to B and C as joint tenants, but then he added a condition. He also used the words "right to immediately re-enter" which indicate a right of re-entry rather than a possibility of reverter.

Restraint on Alienability

Though A attempted to reserve for himself a right of re-entry, the condition on the land amounts to a total restraint on alienation. A restraint on alienation is when a grantor attempts to make it so that the grantee cannot sell the land. The right to sell land, however, is one of the rights inherent in property ownership, such that restraints on alienation are not viewed favorably. Reasonable restraints of alienation may be tolerated. For example, a condition that the grantee cannot sell the land for 15 years, until a cloud on the title will be resolved, may be tolerated. Similarly, other restraints are possible, such as those that affect the appearance of the land, or the purpose for which the land is used. Total restraints on alienation, on the other hand, will be stricken as void. Here, the condition that A attempted to include will amount to a total restraint on alienation, as it stated that B and C could not transfer Blackacre or any portion of it, and it was an indefinite condition. Therefore, the condition will be considered to be void, and it will be stricken from the deed.

Conclusion

Because this was a fee simple subject to a condition subsequent, the effect of the stricken clause will be that B and C have a fee simple absolute (discussed above). A's future interest will be eliminated. Thus, A initially conveyed to B and C a joint tenancy with right of survivorship in fee simple absolute.

2. Rights, Titles, and Interests in Blackacre of Andy, Chris, and Mona

Andy's Interest

As discussed above, Andy's interest in Blackacre terminated when he included a total restraint on alienation in his deed to B and C. Because the condition will be stricken, there is no stated occurrence that can cause A to be able to validly exercise his "right to immediately re-enter and repossess Blackacre" though that was his intent and desire. Because his right to re-entry is impossible, it too will be stricken and A has no remaining interest in Blackacre.

Mona's Interest

In order to discuss what interest Mona has in Blackacre, it is necessary to first discuss Beth's conveyance to Frank and Frank's subsequent death.

Beth's conveyance to Frank

B conveyed her interest in Blackacre to Frank without the knowledge of C. When one joint tenant conveys his or her interest in the joint tenancy, the result is that the joint tenancy is severed. The reasoning is that the grantee who receives the conveyance will not share the four unities with the remaining tenant, thus they cannot be joint tenants with respect to one another. However, this does not mean that B cannot convey her interest in Blackacre - she can - it simply means that the person she conveys to will be a tenant in common with her former joint tenant.

A tenancy in common is when two or more people each own an undivided interest in land. An undivided interest means that each has the right to possess the

whole. The four unities are not required, so that one tenant in common may own a larger interest in the land, but each will still have the right to possess the whole.

Here, when B conveyed to Frank, the joint tenancy was severed as between B and C, and C and Frank became tenants in common, each with an undivided one half share in Blackacre. There will be no remaining right to survivorship, as tenants in common do not have this right. The fact that B did not give notice to C of her conveyance is irrelevant - joint tenants do not need the consent of one another to convey their individual interests in the land.

Frank's Death

Frank died in a car accident after he received his interest in Blackacre. He did not leave a will, meaning that he died intestate. The facts indicate that his only living relative was his cousin Mona, which means that Mona will receive all of Frank's real and personal property via intestacy.

Mona's Interest

Mona thus received Frank's undivided one-half interest in Blackacre via intestacy, and became a tenant in common with C. This means that at the time of Frank's death, Mona HAD the right to possess Blackacre with C. However, as will be discussed further below, Mona may have lost this interest via adverse possession. More facts are needed as to the passage of time since Chris told Mona that she had no interest in Blackacre and posted "no trespassing" signs, thereby ousting Mona and initiating a hostile possession of Blackacre. If the statutory length of time has passed, Mona will have lost her interest in Blackacre, because (as discussed below) the other requirement for adverse possession will have been met. If, however, the requisite amount of time has not passed, Mona can exercise her undivided one half interest in Blackacre and remain a tenant in common with Chris. She would be advised to bring an action to quiet title in order to do this.

Chris's Interest

As discussed above, C was initially a joint tenant with B, and then became a tenant in common with Frank when B conveyed to him. Subsequently, he became a tenant in common with Mona when she inherited Frank's interest via intestacy.

C, though, may now possess all of Blackacre in fee simple absolute via adverse possession. When C told Mona that she had no interest in Blackacre, he effectively ousted her, basically meaning affirmatively kicked her off the property, thereby starting the adverse possession clock running. The requirements of adverse possession are a continuous, adverse, open, and hostile possession for the required statutory period of time. Here, C's possession was continuous for however long it's been since he ousted Mona - the facts do not indicate that C ever stopped possession Blackacre. His possession is open - he lives there and posted a No Trespassing sign for all to see. It is hostile and adverse, because it is not with Mona's consent. For this prong, it doesn't matter if C thinks that he is entitled to full ownership or not as subjective good or bad faith is irrelevant. The fact that C paid the insurance and taxes is not required by a majority of jurisdictions, but it certainly does not pose a problem for C that he did pay them, as indicated in the facts. Therefore, as long as the statutory time period is met, C will possess all of Blackacre via adverse possession.

Finally, it should be noted that although C may have acquired title via adverse possession, it will not be marketable. In order to convey the land in fee simple to someone else, and not just convey his one half interest, C will have to bring an action to quiet title against Mona.

Question 6

In 2003, Wendy and Hank were engaged to be married. They discovered that the \$10,000 monthly income Wendy derived from a trust fund would terminate upon her marriage or upon her reaching the age of 25, whichever came first. Therefore, they decided to postpone their wedding until Wendy's 25th birthday, in 2006, and instead began to live together.

Also in 2003, Wendy and Hank agreed that Wendy would pursue a master's degree in education and that Hank would quit his job and stay home, taking care of the household chores. Wendy opened a checking account in both of their names, into which she deposited her \$10,000 monthly trust income. Wendy used funds in the checking account to pay living expenses for Hank and herself. Wendy also used funds in the checking account to buy a new car. She put title to the car in both of their names.

In 2006, Wendy and Hank married. Wendy's \$10,000 monthly trust income terminated. Afterwards, Wendy began teaching at a local college.

In 2008, Wendy learned that her compensation was less than that of her male counterparts and made a claim against the college.

In 2009, Wendy separated from Hank and filed an action for dissolution of marriage. Shortly afterwards, she settled her claim against the college in return for additional salary in the amount of \$10,000 per year for the next three years.

Unbeknownst to Wendy, Hank had run up a gambling debt to a casino during their marriage. At the time of their separation, Hank owed the casino \$50,000.

Upon dissolution of marriage, what are Wendy's and Hank's rights and liabilities with respect to:

1. The car? Discuss.
2. The \$30,000 in additional salary under the settlement? Discuss.
3. The \$50,000 owed to the casino? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. The community property system applies to people who are legally married or registered as domestic partners. All property acquired before or after marriage or separation and all property acquired by gift, bequeath, devise, or descent is presumptively the acquiring spouse's separate property (SP). All other property acquired during marriage is presumptively community property (CP). This question involved the dissolution of a marriage. Upon dissolution, each spouse is entitled to all of their separate property and community property should be divided equally between them.

The Car

CP Principles do not apply

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.

Here, H and W were engaged and postponed their wedding until she turned 25 so W would continue to receive payments under her trust fund. They then moved in together. As unmarried cohabitants, they are outside the CP system even though they were engaged and had planned to marry. There must be a valid marriage for any property to be CP. However, they may have contract rights under Marvin.

Contract Formed between H and W

An enforceable contract may be found between cohabitants when there is an agreement supported by consideration of each party and the consideration is more than sexual services.

H will argue that there was an enforceable agreement between him and W. H will show the joint bank account that the trust funds were deposited and the use of the trust funds to pay living expenses as evidence of this agreement. H may also argue that the agreement constitutes a valid contract as his household duties were consideration for

W's contribution of her income to support the couple so that W could attend school and earn her master's degree. This argument would likely be effective in most courts as it seems to be established under the facts that there was a meeting of the minds and the consideration on both sides was valid.

Interests in the Car under a valid agreement

Where there is a valid agreement between cohabitants, they may be able to acquire property interests under its terms.

W purchased the car while she and H were cohabitating before marriage. W paid for the car with her trust income, which is undisputably her SP as she has not yet married. The car was title in both H and W's names and the funds used were from a joint bank account. While certain title presumptions would control under CP system, here the interests in the car are governed by principles of contract and equity. H will argue that he has an interest in the car because he and W agreed that she would attend school and he would stay home and they would live off of her trust income until it expired when she turned 25. Further, the car was purchased with funds from a joint bank account to which H would have had a right to withdraw, showing an intent that the funds benefit both H and W. Further, W put the car in both names, confirming her intent that there be a joint interest. Therefore, H should be given an equitable interest in the car. W will argue that while they agree to use her income to support themselves, she never intended to agree to give H any interest in the car that would exist beyond their relationship and only put his name on the title for convenience while they were living together. At dissolution, then, the car should be treated as a gift and not as something to which H has an interest. However, because there is clear evidence of an agreement regarding the use of the trust income to support H and W in exchange for H's household duties and it was W who opened a joint checking account and deposited the trust funds there and then put the car in H and W's name, H will likely be found to have some interest in the car, likely one-half of its now depreciated value as the agreement and form of title indicate a desire to share equally, despite the fact that the purchase funds are traceable to W's SP.

The \$30,000 Salary Under the Settlement

Termination of the Marital Economic Community

The marital economic community is formed at marriage and determinates upon permanent separation, which occurs when the parties live separate and apart and at least one spouse does not intend to return to the marriage.

W separated from H in 2009 and filed for dissolution of marriage. This evidences an intent not to return to the marriage and thus constitutes permanent separation and terminates the marital economic community.

What to the proceeds of the settlement replace?

Any labor performed by a married person is considered community labor and any salary earned during marriage is CP. However, salary earned following permanent separation is SP. Courts have found that when funds received following permanent separation are intended to replace wages that were earned during marriage, those funds are CP because they are traceable to community labor.

Here, W began working at a local college in 2006, after marriage to H. All salary earned prior to separation is therefore CP. In 2008 she discovered she was being paid less than male colleagues and filed suit. In 2009 and post-separation, she settled for \$10,000 additional salary for the next three years. H will argue that the settlement is CP because it is intended to replace the salary that W should have been paid and was earning during marriage. W will argue that because the funds are going to be distributed as post-separation salary, they are her SP. Here, replacement analysis favors H and will result in the CP characterization as the settlement related to a claim for wages that should have been paid during marriage, as the claim was filed during marriage, and therefore are intended to replace CP earnings.

Distribution of Settlement Funds

In cases of personal injury settlement, courts have classified the settlement proceeds for injuries occurring during marriage as CP but strongly favor awarding such funds to the injured spouse upon dissolution in a rare exception to the presumption that CP should be divided equally.

W will likely try to analogize to these cases, arguing that the discrimination was an injury during marriage and even if the proceeds are CP she is entitled to them upon dissolution as they are compensation for her injuries. This argument will likely be unsuccessful. Personal injury funds are awarded because they typically compensate for the injured spouse's present and future suffering and medical expenses and as such should be given to the injured spouse both because he or she will have a continued increase in need and because the injury was personal to the spouse. Further, even with personal injury damages, the award will be divided to the extent equity requires, including when there has been a loss to the community. Here, the loss compensated was entirely the community's as W was underpaid for her community labor and thus did not receive the salary she should have, which would have been entirely CP. Therefore, H and W will each have a one-half interest in the proceeds at dissolution.

Rights of H and W to the settlement

The settlement is CP and so H and W each have a right to one-half the amount, or \$15,000. This amount could be paid to H now by giving him a CP share in an amount that accounts for his \$15,000 or by imposing a remedial trust on the funds such that H and W are each entitled to one-half of the payments over the next three years.

H's Gambling Debt

Liability During Marriage

During marriage, debts acquired before or during marriage are community debts and any CP and the acquiring spouse's SP will be liable for the debt. Therefore, whether H acquired the debt entirely during marriage or not, the CP would have been liable during marriage.

Liability Upon Dissolution

At dissolution, the community property is divided and thus no longer exists. While CP is divided equally, courts have more discretion in the division of liabilities acquired during marriage. Where one spouse has acquired a debt and the debt was not for the benefit of the community, it would likely be assigned to the debtor spouse upon dissolution.

H ran up a gambling debt of \$50,000. This was without W's knowledge and not for the benefit of the community and therefore upon dissolution, a court would likely assign the remaining debt to H as that would be the equitable result and is within the court's discretion.

If a Creditor Makes a Claim post-separation and prior to property distribution

While separation terminates the marital economic community, it does not automatically terminate the CP estate. If a creditor makes a claim while the CP estate is still in existence, then the CP estate can be reached prior to the CP being distributed. In cases of contract debt, the creditor may opt to recover from the CP or the debtor spouse's SP.

In this case, even though W was not aware of the debt at the time of separation, the CP estate would still be liable. The casino could opt, at any time before property distribution, to seek recovery from CP or H's SP. However, any of W's SP would not be reachable to satisfy H's debt.

Answer B to Question 6

California is a community property state. All property acquired during marriage, other than separate property, is presumed to be community property. All property acquired before marriage or during marriage by gift or inheritance is presumed to be separate property. Further, all property acquired during marriage with the use of separate property funds is presumed to be separate property.

To determine the character of property upon divorce, the court will look to the source of the funds used to acquire the property. A mere change in form of the property will not change its character. Further the courts will also look to the actions of the parties which may have an effect on the character of the property and any presumptions that apply. Upon divorce, the court will divide all community property equally, unless the interest of justice require otherwise.

With these principles in mind, we can turn to the property in issue.

1) The Car?

No marriage- Separate property funds used to acquire

Here the car was acquired before marriage. In 2003 Wendy and Hank were engaged to be married. They discovered that the \$10,000 monthly income Wendy derived from a trust fund would terminate upon her marriage or upon her reaching the age of 25, whichever came first. Therefore they decided to postpone their wedding until Wendy's 25th birthday, in 2006, and instead began living together. Also, Wendy in 2003 opened a checking account in both of their names, into which she deposited her \$10,000 (which would be considered her separate property as there is no marriage) into an account in both of their names. Wendy also used the funds to buy a new car.

Thus at this point, their relationship would not be governed by community property law.

Hank will assert that he is entitled to a portion of the car because Wendy opened a checking account in both of their names, into which she deposited her \$10,000 monthly trust income. Thus, Hank will assert that she made a gift of the trust property,

which before marriage, and even after marriage would have been considered separate property (as trust income is usually characterized as a gift or inheritance). However, Hank would have to satisfy the requirements of a contract under California's view on meretricious relationships.

Meritricious Relationship

California does not recognize common law marriage, but will recognize one that was contracted in another state that does recognize a common law marriage. Because there is no marriage at this point, any funds used would be separate property. Thus, as there is no community, any agreements the parties have as to any property would be governed by contract law, unless the main thrust of the contract is sexual relations. Here because instead of marrying one another and terminating the trust income payments, Hank and Wendy decided to move in together, there is no valid marriage and any agreements they have as to property would be governed by contract law.

Title to the car in both of their names

Accordingly, here Hank will assert that they had an agreement as to the car that it was to be in both of their names and thus he has a right to distribution of the car as partially his property. This would require that Hank prove that there was a contract between the two, as community property principles would not apply in this situation as, at this point there is no marriage.

Wendy will assert that she owns the car as her own separate property. She will assert that she used her funds prior to marriage, and thus the court should trace back the source of the property to her earnings prior to marriage. However, as noted above, if Hank is able to show that they had an agreement as to property acquired during the time pending their marriage and he is able to show that taking title in joint names evidences this agreement, he will be able to assert an interest in the car based on contract law. Further he will point to the fact that he quit his job in reliance upon their agreement to take title jointly to her trust income and thus there was valid consideration.

Further he will attempt to assert that the consideration for the contract was not sexual relations, rather it was the agreement that she would pursue an education, while

he would take care of the household chores. If Hank is successful, the car would be distributed pursuant to a contract between the parties, likely here equally as title was taken in both of their names.

Lucas- Anti Lucas

Alternatively Wendy will assert that Lucas decision and Anti Lucas apply here. Under Lucas, when a spouse expends separate property to take title jointly, a presumption arises that for the purposes of divorce, it is treated as community property. Under Lucas, all separate property expended for the acquisition of property in joint form would be presumed a gift. However California enacted Anti Lucas statutes to overturn this decision and entitle the separate property to be reimbursed in the form of an interest free loan. Thus she will assert that because title was taken in both of their names, the Anti Lucas statutes apply and she should be entitled to her down payment for the property in the form of interest free loan. However, because there is no community, this is not applicable here.

Wendy's use of trust income to pay living expenses for Hank and herself

It should be noted that Wendy's use of separate property, her trust income prior to marriage, for the living expense for Hank and herself will not entitle her to any reimbursement, unless they had an agreement to the contrary. It is presumed that when one party uses separate property for the expenses of another party, that it was intended as a gift. Thus, unless Wendy can show an agreement to the contrary, she will not be entitled to reimbursement for such expenditures.

2) The \$30,000 in additional salary under the settlement?

Cause of actions that arise during marriage

A cause of action that arises during marriage is deemed to be a community property asset, subject to division upon divorce. Here in 2006, Wendy and Hank married. Thus the community commenced and all community property principles will attach to the relationship.

Wendy's \$10,000 monthly trust income terminated. Afterwards, Wendy began teaching at a local college. In 2008, Wendy learned that her compensation was less than that of her male counterparts and made a claim against the college.

Consequently, because the cause of action arose during marriage, likely the court will find that any subsequent award is deemed community property.

Wendy will assert that because shortly after her separation, she settled her claim against the college in return for additional salary in the amount of \$10,000 per year for the next three years, she will claim that this settlement was meant not as a settlement for past wages but as wage replacement for future years.

Wage replacement

Wendy will claim the settlement is meant as a form of wage replacement for the future years. Wage replacement under community property law are characterized upon receipt. Thus if received during marriage, will be deemed community property, however if received after marriage, will be deemed the working spouse's separate property. Here, Wendy will assert that as such, the \$10,000 should be deemed her separate property. She will argue that wage replacements are characterized at the time they are received rather than at the time the cause of action arose. Thus she will assert that because she will receive the \$10,000 after marriage, they should properly be deemed wage replacements characterized upon receipt.

Community property right to settlement

However, Hank will likely prevail in his assertion that the payments are for past services that occurred during marriage. All time labor and skill expended during a marriage is considered a valuable community property asset. Further all wages earned during marriage are considered community property. Here Hank will point to the fact that Wendy in 2008, learned that her compensation was less than that of her male counterparts and made a claim against the college. The following year, Wendy and the college settlement for an additional \$10,000 per year for the next three years. Because this settlement was likely due because of the fact that during the marriage she was

earning less than her male counterparts, the intent of the college was to compensate her for her labor expended in the past.

Thus because Hank will successfully assert that the settlement was entered into to pay Wendy for past services, namely her years of employment at the college from 2006 to 2009, he will be entitled to a community property interest in the \$30,000. Thus each will likely be awarded \$15,000.

Education expenses

It should also be noted that if the community pays down the loans incurred to gain an education and that spouses earning capacity has been enhanced, the community will be entitled to reimbursement for such expenses made from community funds even if the education was gained prior to marriage, unless 1) the community has already substantially benefitted from the education, 2) the other spouse has gained a community funded education and 3) if it lessens the need for spousal support upon dissolution. Here there are no facts to indicate whether the education that Wendy received was at all funded by the community during marriage. However, in the case that the community did pay part of her education, she will assert the exceptions.

Community has already substantially benefitted

There is a presumption that arises if the education was gained 10 years before the end of a marriage, the community has already substantially benefitted and is not entitled to reimbursement. Here this is exception is inapplicable because Wendy earned the education in 2003, they married in 2006, and the community ended in 2008.

Other spouses Community funded education

There are no facts to indicate that Hank has received an education.

Lessen the need for spousal support

Wendy will likely assert that although she gained the education prior to marriage, it lessened her need for spousal support upon dissolution. She will assert that she was living off of a trust which expired in 2006, thus her education enabled her to gain

employment which lessened the need for spousal support. Thus she will claim that H is not entitled to reimbursement.

3) The \$50,000 owed to the casino?

Debts during marriage

All parties during the marriage have equal right to manage and control the community. Thus each spouse is allowed to incur debt and borrow money. Such debt incurred during marriage is generally presumed to be community property. However, debt acquired during the marriage will likely be awarded to the debt incurring spouse. The non debt acquiring spouse's separate property will not be liable on the debt incurred by the other spouse. Here Unbeknownst to Wendy, Hank had run up a gambling debt to a casino during their marriage. At the time of their separation, Hank owed the casino \$50,000.

Thus this debt during marriage would properly be characterized as community property debt. However, upon dissolution, the court will likely award the debt to the debt incurring spouse.

Necessaries

There is an exception to the general rule that one spouse's separate property will be unavailable to the other spouse's creditors. This exception applies for all debt incurred during marriage and even during the separation if the debt is incurred for a necessary. A necessary is one that is a requirement of life, such as medical care and food and water. Here because the debt was incurred by Hank for gambling at a casino, likely this exception would not apply. Debt incurred at a casino is not a necessary of life and as such Wendy's separate property will not be available to the casino.

Interest of justice require different allocation

The court may however, in the interest of justice require that different debt allocation be made upon divorce. The rationale is that at this point, the interest is in protecting the creditors. Thus the court may look to see which spouse is in a better position to repay the debt and may allocate the debt to such a spouse. Here the facts

indicate that Wendy was working for a college and actually earning a salary. However, Hank and Wendy agreed that Hank would quit his job and stay home taking care of the household chores. Thus if Hank is unable to repay the debt, it may be that the court will assign the debt to Wendy to assure that the Casino is repaid.