



California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

July 2002

## ESSAY QUESTIONS AND SELECTED ANSWERS

### JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2002 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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## ESSAY EXAMINATION INSTRUCTIONS

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

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

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

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

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

## QUESTION 1

Theresa and Henry were married and had one child, Craig. In 1990, Theresa executed a valid will leaving Henry all of her property except for a favorite painting, which she left to her sister, Sis. Theresa believed the painting was worth less than \$500.

On February 14, 1992, Theresa typed, dated, and signed a note, stating that Henry was to get the painting instead of Sis. Theresa never showed the note to anyone.

In 1994, Theresa hand-wrote a codicil to her will, stating: "The note I typed, signed, and dated on 2/14/92 is to become a part of my will." The codicil was properly signed and witnessed.

In 1995, Theresa's and Henry's second child, Molly, was born. Shortly thereafter, Henry, unable to cope any longer with fatherhood, left and joined a nearby commune. Henry and Theresa never divorced.

In 1999, Theresa fell in love with Larry and, with her separate property, purchased a \$200,000 term life insurance policy on her own life and named Larry as the sole beneficiary.

In 2000, Theresa died. She was survived by Henry, Craig, Molly, Sis, and Larry.

At the time of her death, Theresa's half of the community property was worth \$50,000, and the painting was her separate property. When appraised, the painting turned out to be worth \$1 million.

What rights, if any, do Henry, Craig, Molly, Sis, and Larry have to:

1. Theresa's half of the community property? Discuss.
2. The life insurance proceeds? Discuss.

3. The painting? Discuss.

Answer according to California law.

### **ANSWER A TO ESSAY QUESTION 1**

#### Theresa's half of the Community Property

The parties' rights to Theresa's (T) one-half of the community property (CP) depends upon the validity of her will and upon CP legal principles.

California is a CP State. All property acquired during marriage is presumed CP. All property acquired before married is presumed separate property (SP). Also, property acquired after permanent physical separation is presumed SP. In addition, property acquired any time through gift, devise, or descent is presumed SP.

In order to characterize assets, courts allow tracing to the source of funds used to acquire the asset. Generally, a mere change in form will not alter the characterization of an asset.

At death, a testator has testamentary power to dispose of one-half of her CP and all of her SP.

Here, T had the power to dispose of her ½ of the CP.

#### Validity of T's 1990 Will

In 1990, T executed a valid will. Thus, it is presumed that the will was properly signed and attested by two witnesses.

T left "all of her property" except the painting to Harry (H). Thus, H is the beneficiary of T's ½ of the CP.

A will can be revoked by a subsequent express written instrument or by an inconsistency. Here, T wrote a note in 1992 and a hand-written codicil in 1994. Both of these documents relate to the painting and not T's CP.

It does not appear that either document expressly revoked the 1990 will. Also, there are no facts indicating that the 1990 will was revoked by physical act.

As a result, H would offer the 1990 will into probate and argue he is entitled to all of T's ½ of CP valued at \$50,000.

#### Molly's Rights as Pretermitted Heir

Molly may argue she was omitted from T's will because she was not born yet. Thus, Molly may argue she is entitled to share of T's CP.

A pretermitted child is one born or adopted after a will was executed. The omitted child is entitled to an intestate share unless the omission was intentional; the child was provided for outside the will or the property was left to a parent when another child was alive at the time of the execution.

Here, Molly was born in 1995, which is after the 1990 will was executed. However, all of the property was given to H. Furthermore, Craig, another child, was alive when the 1990 will was executed. As such, Molly would be unable to recover under this exception.

Also, Molly would only be entitled to her interstate share. Under California law, when a person dies without a will allows their CP goes to a surviving spouse. Here, even if T died without a valid will, H would take all of the property under intestacy laws. Molly would only be entitled to a portion of T's SP.

Thus, Molly has no right to T's CP.

#### Craig's Rights to T's CP

Craig is not a pretermitted child because he was alive at the time the 1990 will was executed. Also, similarly to Molly, Craig would have no right to T's CP under intestacy laws.

### Sis and Larry's Rights to T's CP

Sis is T's sister. The intestate laws do not allow a sibling to take the testator's CP when the surviving spouse with rights to that CP is still alive. T did not devise any of her CP to Sis. As such, Sis has no rights in T's CP.

Larry appears to have been someone T fell in love with after H left. T never devised any of her CP to Larry. Larry has no rights in T's CP.

H will take T's CP worth \$50,000.

### T's Life Insurance Proceeds

Ordinarily under CP principles, proceeds from a whole life insurance are CP to the extent they were acquired during marriage. The time rule is applied to determine the CP interest. Proceeds from a term life insurance policy are generally the type of the last premium paid.

H may argue in 1999 when T bought the life insurance policy they were still married and therefore the \$200,000 is CP. If so, Larry as the named beneficiary would only be entitled to \$100,000 as T has power to dispose of her ½ interest.

Larry would argue T and H's marriage had ended. A community ends with a physical separation with the intent not to resume. Larry will argue H left and joined a commune. Larry would assert this shows H's intent to end the marriage.

Larry will also argue and CP presumptions will be rebutted by tracing the source of the life insurance proceeds. T bought the life insurance with her own SP. Therefore, Larry will successfully argue even if T was still married and her economic community had not yet ended, she used her SP to acquire the policy.

Since T used SP to buy the policy, the \$200,000 proceeds would be SP as well. A mere change in form does not alter the characterizations of property. Thus, Larry would argue as the sole beneficiary he should take all the proceeds since T has the power to dispose of all her SP.

### Craig and Molly's Rights to the Life Insurance Proceeds

The children may attempt to argue they have a right to a portion of the \$200,000. However, they will not succeed. They were both alive when T made this "will

substitute” and T had the power to give the proceeds all to Larry and none to them.

Sis also has no claim to the proceeds.

Thus, Larry is entitled to all of the life insurance proceeds valued at \$200,000.

### The Painting

#### T's 1990 Will

In her 1990 will, T devised the painting she thought was worth \$50,000 to Sis. Therefore, under the 1990 will, Sis is entitled to the painting.

#### The Effect of the 1992 Note

A codicil is an instrument made after the execution of a will that disposes property. A codicil must be executed with the formalities of a will.

#### Formal Attested Codicil

In order for typewritten codicil to be given effect it must be signed by the testator. Also, the testator must sign or acknowledge her signature or will in front of two witnesses. Those two witnesses must sign the will with the understanding that it is a will.

Here, T did type, date and sign a note in 1992. This note purported to change her 1990 will so that H got the painting and not Sis.

However, T never showed the note to anyone. That implies she never had two witnesses sign the note. Also, she never acknowledged her signature or will to two witnesses. Therefore, it was not properly attested to. As a result, the codicil will not be given effect.

#### Holographic Codicil

A holographic codicil is valid when all material provisions are in the testator's handwriting and she signs it.

Here, the note was typed and so it was not handwritten. Thus, it will not be given effect.

#### Revocations by Express Subsequent Codicil

A will can be revoked by a codicil. However, the codicil must be valid and meet the formalities of a will in order to be given effect as a revocation.

Here, as shown above the codicil was not executed by proper formalities. Thus, it did not revoke the 1990 will.

By itself, the 1992 note has no effect on the 1990 will. Thus, Sis would still be the beneficiary.

#### Effect of the 1994 Codicil

The codicil written in 1994 was handwritten. It was also properly signed and witnessed. It appears T was attempting to validate her 1992 not by stating “the note I typed on 2/14/92 is to become a part of my will.”

#### Incorporation by Reference

A document can be incorporated by reference. It must have been in existence at the time of the will execution, sufficiently described in the will and reasonably been the document the will was referring to.

Here, the note was in existence at the time the codicil was written. The codicil was written in 1994 as is attempting to incorporate the 1992 note. The codicil did sufficiently describe the note by stating “The note I typed, dated and signed on 2/14/92.” The description accurately gives the date the note was made.

H would offer the note and argue it sufficiently was described. Also, H will argue the note is the document the codicil was referring to.

As such, a court may find that the prior defective note has now been republished and reexecuted by this 1994 codicil that was handwritten and signed. Even though a holographic codicil does not require attested witness, the fact that it was properly witnessed should not preclude the court from finding it a valid holographic codicil.

Therefore, it is very likely H will prevail and will take the painting over Sis.

#### Craig and Molly's Rights to the Painting

The children may argue since T was significantly mistaken about the painting value, the gift to either Sis or H is invalid.

The children will attempt to argue if T knew the painting was worth \$1 million she would have not given it to Sis. Rather she would have left it to them.

A court will not likely agree with this argument. Existing evidence of a mistake is generally allowed if it is reasonably susceptible with the will.

Here, it is not reasonable to assume T would have given it to Craig and Molly. She may have left it to H as she did not in the codicils.

Therefore, the children likely have no right to the painting.

They may argue H's rights were revoked by operation of law.

A gift to a spouse is revoked upon divorce.

Here, T and H never divorced. As such, H likely takes the painting because a legal separation may not be enough to invoke revocation by law.

## ANSWER B TO ESSAY QUESTION 1

### 1. Theresa's (T's) Half of Community Property

California is a community property state. Under California law, a spouse may dispose of one half of the community property through her will. The provisions of T's will will control the \$50,000 (her half of the community property) unless a legal presumption prevents or alters application of the will.

#### 1990 Will

The 1990 will was "validly executed" (a will is validly executed when signed with testamentary intent by a testator before two witnesses who know that the document is a will). The devise of \$50,000 to Henry (H) and the painting to Sis (S) are therefore valid unless modified by later wills or legal presumptions.

#### 1992 Note Is Not Valid Alone But Is Valid After 1995 Codicil

The 1992 note was not a valid modification when written. The note is typed and unwitnessed (never shown to anyone). A codicil to a will must satisfy the same formalities of execution, as the original will. A codicil is valid if made with testamentary intent before two witnesses who knows the document is a will. Here, T never showed the note to anyone, so it is unwitnessed.

Holographic Wills – unwitnessed wills prepared by the testator – are valid only if signed and if the material provisions are written in the testator's handwriting. Here, the codicil was typed and therefore the material provisions are not handwritten, and the codicil is not a valid holographic codicil.

#### 1994 Codicil Validly Incorporates the 1992 Note For Reference

The 1994 Codicil was handwritten, signed and properly witnessed, and affirmed to the disposition of the 1992 note. Under the doctrine of incorporation by reference, a valid will can incorporate disposition in the other documents so long as the other documents are (1) clearly identifiable from the instrument's language and (2) in existence and the time of the referencing document's creation. Here, the 1992 note is clearly identified by date and character (typed, signed), and was in existence when 1994 codicil was executed.

The facts indicate that the 1994 note was properly witnessed, indicating that it satisfied the requirements of a formally attested will. Even if it did not, it is handwritten and signed, so would be a valid holographic will. Typed documents may be incorporated by reference into a holographic will.

The wills clearly leave the \$50,000 share of T's community property to H, who will take unless some legal presumption prevents him from doing so.

### Separation is No Bar to H's Taking

After Molly executed her last codicil, H left her and joined a commune. Under California law, when a married couple divorces after execution of a will, neither takes under the other's will executed before divorce (each spouse's will is read as if the other had died), unless the will has been republished or the gift reaffirms through conduct.

Here, however, T & H have not divorced but have only separated. The divorce presumption will not apply unless T & H reached a legally binding property settlement. If they did so, H does not take under the will and the community property passes heirs through intestacy statutes – her children Molly (M) and Craig (C) will each take \$25,000. If no settlement was reached H still stands to take all \$50,000.

### Pretermitted Child

M was born after the T executed all wills. Under California law, a pretermitted child (one born after execution of all wills and not provided for in wills by class gift) may take an intestate share of the parents' property.

In this case, Molly's intestate share would be  $\frac{1}{3}$  of the estate (including the painting) since there is one surviving spouse of T and two surviving children. Craig is not pretermitted since he was born prior to the execution of the last will – his omission is presumed to be intentional.

The pretermitted child presumption does not apply if there is evidence the testator allocated funds for the child in another way, such as a separate inter vivos gift, or if there is an older non-pretermitted child who is omitted, with the bulk of funds left to their children's parent. The latter situation is the case here – by omitting Craig from her will and leaving the bulk of her estate to H, T evidenced intent to allow H to provide for the children. Their separation

does not affect this presumption. The pretermitted child rule will not apply, and H will take the full \$50,000.

## 2. H will take the Painting under the 1994 codicil

As discussed above, the 1994 codicil is valid and validly incorporates the 1992 note by reference. A codicil to a will will be read as consistent with the will wherever possible. Where inconsistent, the later document controls.

Here, the 1994 codicil's incorporation of the note giving the painting to H not S is inconsistent with the prior gift to S, so the later gift to H controls. Again (see above), H will take the painting despite the marital separation, unless H & T signed a valid property distribution agreement, in which case the divorce (see above for discussion) presumption will apply and H will take nothing under the will and the painting will pass through intestacy to M & C.

## 3. Life Insurance

Life insurance is will [sic] a named beneficiary does not pass through probate with the will. The named beneficiary will receive so long as the insurance policy is wholly separate property.

California is a community property state. Earnings during marriage are presumed community property (CP), while earnings outside of marriage, gifts, devices and inheritances are presumed separate property (SP). The character of any asset can be determined by tracing it to funds used to purchase it, unless a legal presumption or conduct applies to change characterization.

A marriage community ends upon separation with permanent intent (intent not to reunite). T & H separated in 1995 and H went to live in a commune – a court would likely regard this as intent to separate permanently which dissolved the community.

A term life insurance policy buys the designated protection for a term of one year. Therefore a term policy is designated CP or SP by tracing to the most recent payment. T took the policy out in 1999, after the community dissolved. Assuming she used post-community earnings or other SP to pay for the policy, it will be SP and pass completely to Larry.

## QUESTION 2

Able owned Whiteacre in fee simple absolute. Baker owned Blackacre, an adjacent property. In 1999, Able gave Baker a valid deed granting him an easement that gave him the right to cross Whiteacre on an established dirt road in order to reach a public highway. Baker did not record the deed. The dirt road crosses over Whiteacre and extends across Blackacre to Baker's house. Both Baker's house and the dirt road are plainly visible from Whiteacre.

In 2000, Able conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants but did not mention Baker's easement. Mary paid Able \$15,000 for Whiteacre and recorded her deed.

Thereafter, Mary borrowed \$10,000 from Bank and gave Bank a note secured by a deed of trust on Whiteacre naming Bank as beneficiary under the deed of trust. Bank conducted a title search but did not physically inspect Whiteacre. Bank recorded its deed of trust. Mary defaulted on the loan. In 2001, Bank lawfully foreclosed on Whiteacre and had it appraised. The appraiser determined that Whiteacre had a fair market value of \$15,000 without Baker's easement and a fair market value of \$8,000 with Baker's easement. Bank intends to sell Whiteacre and to sue Mary for the difference between the sale price and the loan balance.

The following statute is in force in this jurisdiction:

Every conveyance or grant that is not recorded is void as against any subsequent good faith purchaser or beneficiary under a deed of trust who provides valuable consideration and whose interest is first duly recorded.

1. What interests, if any, does Baker have in Whiteacre? Discuss.

2. What interests, if any, does Bank have in Whiteacre?  
Discuss.

3. What claims, if any, may Mary assert against Able?  
Discuss.

### **ANSWER A TO ESSAY QUESTION 2**

#### 1. Baker's Interest in Whiteacre

##### Easement

An easement is an interest in land that grants someone a right to use the land of another. An easement can be created in a number of ways. One way an easement can be created is by express writing. Here, Able gave Baker a valid deed granting the easement for the right to cross Whiteacre to reach the public highway. Therefore, the easement was created at that time.

An easement will be perpetual in duration unless otherwise specified in the instrument creating it. Here, Able did not include any termination date for the easement. Therefore, the easement to Baker was to be perpetual in duration.

There are two types of easements: easements appurtenant and easements in gross. An easement appurtenant is one that involves two adjacent parcels of land where one piece of land is used to benefit the other. The benefited estate is called the dominant estate, while the burdened estate is called the servient estate. Here, Blackacre is the dominant estate and Whiteacre is the servient estate.

An easement, even though perpetual, can be terminated by the parties. A dominant estate can release the servient estate from the easement by writing. The writing would have to meet deed formalities to satisfy a valid release. The easement can also be abandoned. However, it cannot simply be an oral abandonment. The oral abandonment must be coupled with some action by the dominant estate showing that they are abandoning the

easement. The servient estate can also terminate the easement by prescription. Here, none of these actions of termination have occurred. So, at first glance, Baker's easement across Whiteacre should still be in existence.

### Recordation

An interest in land can be protected by recordation. At common law, an interest in land was protected by the first in time, first in right doctrine. The problem with the doctrine was that it did not protect bona fide purchasers. Modern law has produced recording systems and recording statutes that spell out the protection afforded to those that record their interests. At common law, since Baker was first in time the easement, then his interest would be protected against subsequent purchasers. But, as we are told, there is a statute in this jurisdiction that controls.

An important concept in recordation is the concept of the bona fide purchaser ("BFP"). BFPs are granted special status in many recordation statutes. A bona fide purchaser is one who purchases for value and without notice of any other interests. There are three types of notice. Actual notice is, of course, characterized by the actual knowledge on the part of the purchaser of the previous interest. Constructive notice is that which comes about by there being a deed or interest recorded in the buyer's direct chain of title. Finally, there is inquiry notice. Inquiry notice comes about whenever an inspection of the property or title records would lead a reasonable purchaser to launch a further inquiry. Here, we are told that Baker did not record his deed granting the easement. Therefore, we know that Mary and Bank could not have had constructive notice of easement. However, we are also told that the easement road leading to Baker's house on Blackacre was plainly visible from Whiteacre. This visibility is enough to put a subsequent purchaser on inquiry notice. Therefore, Mary and Bank are not BFPs.

There are three types of recordation statutes. There is a race statute which will protect the first person to record their deed or interest regardless of their status. There is a notice statute which will protect any bona fide purchaser who records against any subsequent purchaser who is also not a bona fide purchaser. There is also [a] race-notice statute which will protect a bona fide purchaser, but only if he is the first to record. Notice and race-notice statutes give protection only for BFPs; therefore, we know that if the statute in this jurisdiction is a notice or race-notice statute, then Mary and Bank will not be

protected against Baker's easement. Baker's easement, rather, will protected [sic] by the common law rule of first in time, first in right. The statute here a race statute [sic]. It will protect any good faith purchaser for value or beneficiary under a deed of trust as long as they recorded first. Here, we know that Mary was a good faith purchaser for value. We are also told that Mary recorded her deed. Therefore, the statute will protect her interest in Whiteacre and will make Baker's deed void as against Mary.

### Necessity

An easement can arise by necessity. Necessity arises when one parcel of land is cut off from any viable road or passageway. If the land is cut off, an easement by necessity will arise across an adjacent piece of land for right of way to the highway or other means of travel. The servient estate has the right to place the easement anywhere on the property as long as it is reasonable. Here, if the voiding of Baker's deed of easement will cut off Blackacre from any public highway, then an easement of necessity will arise and he will still be able to cross Whiteacre. However, the holder of Whiteacre will be able to place the easement wherever they wish as long as it is reasonable.

## 2. Bank's Interest in Whiteacre

### Deed of Trust

A deed of trust acts like a mortgage. The title is held by a trustee until such time as the loan is paid back and then title reverts back to the landowner. Because this acts like a mortgage, courts will treat it like a mortgage and will require the procedures of a mortgage. These procedures will include a judicial proceeding (foreclosure) before a sale of the property to satisfy the loan. The deed of trust will also be a recognized interest in property, as is the mortgage. Therefore, it can be recorded and protected like a mortgage.

### BFPs

As stated earlier, we know that a BFP is a purchaser for value that takes without notice of a previous interest. Here, we are told that Bank does not make a physical inspection of Whiteacre before making the loan and taking their interest. If they had done so, as a reasonable party would have, then

they would have seen the dirt road leading to Bakers' house. Therefore, Bank was inquiry notice and is not a BFP.

### Shelter Rule

Under the shelter rule, a subsequent purchaser can be sheltered under a BFP's protection. This means that if a jurisdiction has a statutory scheme that only protects BFPs, that there is still a loophole that will allow a non-BFP to get protection. The subsequent purchaser must take in a line descending from the BFP. If the subsequent purchaser takes from BFP, he can use the BFP's protection under the statute for himself. The purpose of the rule is protect [sic] the alienability of the property for the BFP. Here, we know that Mary is not a BFP. We also know that the statutory scheme does not require that one be a BFP. However, if we did have a notice or race-notice statute, then Bank would not be protected under the shelter rule because Mary is not a BFP.

### Recordation

As stated above, one who holds an interest in land can protect that interest by recording it pursuant to the recording statutes of its jurisdiction. Here, we know that the recording statute applies to the beneficiary of deeds of trust. Here, Bank was the beneficiary of the deed of trust on Whiteacre. The statute requires valuable consideration be paid for the interest. Here, Bank loaned Mary \$10,000 for its interest in the deed of trust. Bank also recorded its interest. When Bank recorded its interest, it made Baker's deed of easement void as to Bank's interest. Therefore, Bank has an interest superior to Baker's.

### Foreclosure

Bank's deed of trust was secured by Mary's interest in Whiteacre. As stated before, the deed of trust acts like a mortgage so it will be treated as such by the courts. This will require a foreclosure proceeding. Once the proceeding has been established, Bank will be able to force the sale of Whiteacre to satisfy its claim. Because Baker's easement will be void as to Mary and Bank, there will be no deficiency against Mary.

### 3. Mary v. Able

### Easement

An easement on a servient estate passes with the servient estate. Therefore, when Whiteacre passed from Able to Mary, Mary took subject to the easement. However, the recordation statute has saved Mary from this.

At common law, a seller of land did not have to disclose anything to the buyer. The buyer took at his own peril under the doctrine of caveat emptor. However, a general warranty deed did require disclosures.

### General Warranty Deed

Able passed Whiteacre to Mary on a general warranty deed. A general warranty deed comes along with six covenants of title. There are three present covenants and three future covenants. The present covenants are the covenants of: seisin, right to convey, and against encumbrances. These present covenants are breached, if at all, at the time that title is passed. The future covenants are the covenants of: warranty, quiet enjoyment, and further assurances. The future covenants are breached, if at all, at some later time when another party makes a claim of paramount title.

### Covenant Against Encumbrances

The covenant against encumbrances basically says that the title will be free of any encumbrances not previously disclosed by seller. Encumbrances include easements, restrictive covenants, and mortgages, among other things. Here, Able did not disclose the easement held by Baker. This was a breach of the covenant against encumbrances at the moment that title passed. Therefore, Mary can sue for this breach and can collect any damages that she suffered as a result.

## **ANSWER B TO ESSAY QUESTION 2**

Baker's interest in Whiteacre:

### Easements:

An easement is a non-possessory interest in land that allows the easement holder to use the property of the true owner. Baker's easement can be described as an easement appurtenant. Whiteacre is the servient estate. Blackacre is the dominant estate. As the holder of the easement appurtenant, Baker can use the road over Whiteacre to travel from Blackacre to the public highway.

Unless they qualify as easements by necessity or by prescription, easements must be in writing to be valid, and must satisfy the statute of frauds. Here, Able granted Baker a valid deed, which will satisfy the writing requirements. Therefore, it appears that Baker has a valid express easement to use the road over Whiteacre for access to the public highway.

Additionally, easements are presumptively perpetual. They are terminated by the terms of the instrument themselves, by express writing, by abandonment, by condemnation of the servient estate, or by merger of the servient and dominant estate. None of those things appear to have occurred here, so Baker's easement has not been terminated.

### Failure to record:

Although Baker appears to have a valid easement, his failure to record may affect his rights here. Recording statutes, such as the one in this jurisdiction, are primarily for the purpose of protecting subsequent BFPs. They do not effect the validity of land transfers themselves. Thus, despite his failure to record, Baker had a valid easement when Able conveyed the deed to him, assuming it was properly delivered and accepted.

### Mary as a BFP

The next issue is whether Baker's easement fails against a challenge by Mary, because she purchased the dominant estate, Whiteacre, after Baker did not record his deed to the easement. There is a recording statute in this jurisdiction. The recording statute can best be described as a race-notice

statute. This means that in order to be protected under the statute, the subsequent purchaser must take the property without notice and record their deed first. Because Mary recorded her deed, and Baker never recorded his, the race component of the race-notice statute has been satisfied, as Mary recorded first.

The issue then becomes whether or not Mary satisfies the requirement of being a subsequent good faith purchaser, which I will refer to a[s] BFP for short. A BFP is a purchaser who pays valuable consideration and who takes without notice of the other interest in the property. Mary paid \$15,000, so she did pay consideration.

Notice:

The main issue is whether Mary took without notice.

Subsequent purchasers are not good faith BFPs if they have either actual notice, constructive notice, or inquiry notice. Here, there are no facts that suggest that Mary in fact know about the easement, so we cannot simply conclude that she had actual notice. Constructive notice is the type of notice that comes from recording. Because Baker did not record his deed, Mary did not have constructive notice. Inquiry notice comes from physical inspection of the land. Here, the facts indicate that both Baker's house and the dirt road were plainly visible from Whiteacre. This indicates that upon inspection of Whiteacre, Mary could have discovered the easement and inquired about it before purchasing Whiteacre from Able. Thus, it can be said that Mary did indeed have inquiry notice. As such, Mary fails as a BFP, and cannot defeat Baker's interest in Whiteacre. Therefore, it appears that Baker's easement over Whiteacre is valid.

Bank:

Moreover, the race-notice statute also protects mortgagors, such as the Bank. The bank also satisfies the recording first component of the statute, but did not physically inspect the land before taking its security interest in it. Therefore, the Bank also had inquiry notice, and cannot simply defeat Baker's easment.

Bank's interests in Whiteacre

### Bank v. Baker

The race-notice statute in this jurisdiction protects beneficiaries under a deed of trust. The bank is a beneficiary under a deed of trust, and therefore the bank is protected by the recording statute. As discussed above, the Bank satisfies the "race" component of the recording statute, as it recorded the deed of trust and Baker never recorded his easement, therefore the Bank recorded first.

Also as discussed above, the Bank did not inspect the land, but if it had it would have discovered the easement. Therefore, the Bank had inquiry notice of the easement and cannot defeat Baker's interest in Whiteacre.

### Bank v. Mary

The Bank lent Mary \$10,000. In exchange, the Bank received a note secured by a deed of trust in Whiteacre. In a title theory jurisdiction, this would have meant that Bank held title to Whiteacre at equity. In a lien theory jurisdiction, this would have meant that Bank simply had a lien on Whiteacre. In any case, when Mary defaulted on the loan, Bank had a right to foreclosure on the property. Mortgage law requires that a valid foreclosure sale takes place, and the facts state that the Bank lawfully foreclosed.

Following foreclosure, the Bank became the owner of Whiteacre. Thus, the Bank owns whatever interest in Whiteacre Mary owned, which means it owns Whiteacre in fee simple absolute, subject to Baker's easement.

The issue then is whether the Bank has a valid claim against Mary for the \$2000 difference between the loan amount and the value the land has been appraised [at] first. Before the Bank can actually bring an action against Mary for the difference, it must sell Whiteacre. Only after it sells Whiteacre on the market can the Bank actually assert a deficiency judgment against Mary. Had the Bank had the property appraised before granting the security interest, the Bank likely would have discovered the easement and would have discovered that the land was not worth \$10,000. For this reason, Mary will argue that the Bank assumed the risk of this deficiency.

Mary's claims against Able

Abel conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants, but did not mention Baker's easement. Although land sale contracts contain implied warranty of marketable title, the land sale contract merges into the deed at closing, therefore Mary's only claims against Able must be based on the deed, and Mary must proceed under the principles of real property law. The issue here is what actions Mary has against Able based on the deed.

Deed covenants:

Warranty deeds contain present and future covenants. The present covenants can only be breached at the time of the conveyance, and are therefore not an issue here. However, the future covenants can be breached later. Here, at a time following the conveyance, Mary took a mortgage out on Whiteacre based on the value of the land without Baker's easement. This occurred after conveyance, and therefore Mary can bring an action against Able under the future covenants. The future covenants are for quiet enjoyment, further assurances and warranty.

These covenants represent guarantees made by Able that Mary owns the land outright, free from encumbrances and from challenges to her ownership interests by third parties. Here, the bank is threatening to sue Mary for the \$2000 deficiency between what she thought she owned and the value of Whiteacre with Baker's easement on it, as with the easement, the value of Whiteacre is insufficient to pay off the \$10,000 mortgage. Mary can sue Able for the \$2000 different [sic] under the future covenants, and she should prevail because Able failed to inform Mary about the easement and the easement was not mentioned in her deed. The facts regarding inquiry notice and Baker's failure to record are irrelevant here, as recording statutes do not affect the validity of the deed conveyances.

### QUESTION 3

Betty, a prominent real estate broker, asked her attorney friend, Alice, to represent her 18 year-old son, Todd, who was being prosecuted for possession of cocaine with intent to distribute. Betty told Alice that she wanted to get the matter resolved “as quickly and quietly as possible.” Betty also told Alice that she could make arrangements with a secure in-patient drug rehabilitation center to accept Todd and that she wanted Alice to recommend it to Todd. Although Alice had never handled a criminal case, she agreed to represent Todd and accepted a retainer from Betty.

Alice called her law school friend, Zelda, an experienced criminal lawyer. Zelda sent Alice copies of her standard discovery motions. Zelda and Alice then interviewed Todd. Alice introduced Zelda as her “associate.” Todd denied possessing, selling, or even using drugs. Todd said he was “set up” by undercover officers. After Todd left the office, Zelda told Alice that if Todd’s story was true, the prosecution’s case was weak and there was a strong entrapment defense. Alice then told Zelda that she, Alice, could “take it from here” and gave her a check marked “Consultation Fee, Betty’s Case.”

Alice entered an appearance on Todd’s behalf and filed discovery motions, showing that she was the only defense counsel.

At a subsequent court appearance, the prosecutor offered to reduce the charge to simple felony possession and to agree to a period of probation on the condition that Todd undergo a one year period of in-patient drug rehabilitation. Alice asked Todd what he thought about this, and Todd responded: “Look, I’m innocent. Don’t I have any other choice?” Alice, cognizant of Betty’s wish to get the matter resolved, told Todd she thought it was Todd’s best chance. Based on Alice’s advice, Todd accepted the prosecution’s offer, entered a guilty plea, and the sentence was imposed.

Has Alice violated any rules of professional responsibility?  
Discuss.

### **ANSWER A TO ESSAY QUESTION 3**

Alice's Professional Responsibilities

Who does Alice represent?

Despite the fact that Betty, Alice's friend, requested that Alice represent her son in a "possession of cocaine with intent to distribute" matter, it should be noted that Alice's client in this situation is Todd. Todd is legally an adult, and it is Todd whom Alice has a professional relationship with – not Betty. Therefore, this could create potential conflicts for Alice.

Duty of Loyalty

An attorney owes his client a duty of loyalty. This duty arises in situations where the interests of a third party, the client or the attorney, might materially limit, or adversely affect the attorney's ability to effectively represent his client. When there is a possibility that this may occur at some point during the course of the representation, it is called a potential conflict of interest. When the conflict does in fact exist, it is called an actual conflict of interest.

In situation where this arises, under the ABA, an attorney should not undertake (or continue) representation unless (1) he reasonably believes the [sic] he can effectively represent his client despite the potential conflict of interest, or that an actual conflict of interest will not adversely affect his representation; (2) disclose the conflict to his client; (3) obtain the client's consent; and (4) the consent must be reasonable (in the opinion of an independent outside attorney). California has stricter requirements, requiring that the attorney obtain the client's consent in writing.

### Betty's Involvement

Under the facts of this case, a potential conflict of interest exists. For starters, Betty is a friend of Alice's. This could affect Alice's judgment. However, if she reasonably believes that it would not, and meets the other requirements, this should be acceptable.

Second, Betty informed Alice that she "wanted to get the matter resolved "as quickly and quietly as possible'." This definitely creates a potential conflict of interest, since Alice does not know at this point what it is that Todd wants to do. She should have consulted with Todd, and informed him that his mother wanted to have the matter resolved quickly. Furthermore, she should have obtained his consent to continue with the representation.

Third, she is asking Alice to recommend to Todd to go to a drug rehabilitation center. As mentioned above, this also creates the potential for a conflict of interest, since she is unaware of what Todd wants at this point. Again, she should have disclosed this to him during their meeting, and obtained his written consent.

Lastly, Betty is paying Alice for her representation of Todd. This creates a potential conflict of interest, since a third party is paying for a client's legal fees. Alice should have informed Todd of this and obtained his consent. Furthermore, Alice must keep in mind that despite the fact that Betty is paying for Todd's legal fees, it is Todd who is her client. Alice should have also pointed this out to Betty at the time, so that all parties understand their relationship to another.

### Actual Conflict of Interest

The duty to disclose to a client a conflict of interest and to obtain that client's consent is a continuing duty, and the duty of loyalty requirements must be met each time a conflict arises, before the attorney should continue representation. After consulting with Todd, Alice should have realized that an actual conflict on [sic] interest existed. Betty desired to have the matter resolved quickly. Todd, Alice's client, on the other hand insisted that he was "set up" and was innocent. The two interests are incompatible, since pleading innocent to such a charge would prolong the process of resolving the matter. Alice should have again disclosed her conflict of interest to Todd. Furthermore, Alice should have withdrawn from representation if she did not believe she could effectively

represent Todd or if she had failed to disclose the conflict and obtain his consent.

### Todd's Guilty Plea

Alice's violation of her duty of loyalty to her client culminated in her advice that Todd accept the guilty plea. Clearly, Todd did not want to accept the plea, as he maintained his innocence. However, Alice, in attempting to comply with Betty's wishes, insisted that he accept it, informing Todd that it was his "best chance." Her actions were unacceptable and violated her professional responsibilities to Todd as an attorney. She should be subject to discipline and Todd would have a good chance at success if he were to sue her for malpractice.

### Duty of Competence

A lawyer also owes his client a duty of competence. This duty requires that the lawyer have the legal knowledge, the skills, the preparation, and thoroughness necessary for effective representation of his client. If a lawyer does not have experience in a certain field of law, he can still undertake representation if he can learn the necessary knowledge within a reasonable time that does not cause delay to the client, or if he associates with an attorney that does have such experience.

Here, the fact that Alice had never handled a criminal case before would not necessarily preclude her from taking the matter, if she reasonably believed she could prepare herself for effective representation, or if she associated herself with someone who had such experience. Here, Alice associated with Zelda, an experienced criminal lawyer. Zelda assisted Alice in interviewing Todd. However, Alice should have made clear to Todd that Zelda was there merely to assist, so as to not lead him to believe that he was forming the same attorney-client relationship with Zelda as he had with Alice. While obviously, an attorney-client relationship had been formed between Zelda and Todd, the parties should have been clear that Zelda's scope of representation was limited to assisting in preliminary matters.

While Alice did associate with Zelda for the interview with Todd, she may have breached her duty of competence to Todd when she told Zelda that she "could take it from here." There is nothing in the facts that suggest that [she] had taken the time to learn the appropriate law in order to effectively represent Todd. Rather, it appears that she made this decision to continue alone, only after Zelda

informed [her] that if Todd's story was true, the prosecution's case was weak and that he had a good entrapment defense. If such was the case, Alice should have continued to associate with Zelda throughout the trial, or should have taken the time to learn the necessary knowledge if she believed she could have done so in a timely matter. Instead, she entered an appearance on Todd's behalf, and filed motions suggesting she was the only defense counsel.

#### Duty to Maintain the Proper Scope of the Relationship

In an attorney-client relationship, a client is the one that makes the substantive decisions regarding, among other things, whether or not to plead guilty. The attorney is the one who makes the decisions regarding procedural matters, such as which witnesses to depose, etc.

Here, the decision of whether or not to plead guilty to the simple felony possession was Todd's. Alice breached her duties owed to him, when she encouraged him to take the plea. While it was true that it was Todd that made the final decision, this was not an informed decision, but rather Alice's will. Thus, she improperly made a decision as to a substantive issue of Todd's matter.

#### Duty to Render Competent Advice and to Pursue Matter Diligently

A lawyer also owes his client a duty to render competent legal advice. If she is unaware of the current state of the law, she should research it. Furthermore, a lawyer owes his client a duty to pursue the matter zealously and diligently.

Alice breached all of these duties she owed to Todd. First, she failed to give him competent legal advice. She informed him that pleading guilty to the charge was his "best choice" without really understanding criminal law, or considering his options. Instead, she based her decision on Betty's wishes to resolve the matter "quickly and quietly."

Furthermore, she did not pursue his matter zealously, but instead, pursued it according to Betty's wishes and not Todd's interests.

#### Duty of Confidentiality

A lawyer also owes his client a duty of confidentiality. This duty requires that an attorney not use or reveal anything relevant to representation of a client without his consent, regardless of whether or not the client asked him to keep it confidential, or whether the attorney believes it would be harmful to the client or cause him embarrassment.

While the facts do not necessarily suggest that Alice breached this duty, Alice should be careful that she not reveal anything relevant to Todd's representation to any other party (excluding her agents assisting her in representation) INCLUDING BETTY. It is likely that Betty would like to know the progress of Alice's representation, however, Alice cannot divulge this information since Todd, and not Betty, is her client.

#### Fiduciary Duties

A lawyer also owes her client certain fiduciary duties, relating to among things, the fees of representation. Under the ABA, an attorney's fees must be reasonable. A lawyer is allowed to split fees with another attorney as long as he obtains his client's consent, and the fee is proportional to the amount of work done. In California, an attorney's fees must not be unconscionable. Furthermore, the lawyer can split fees with another lawyer, [as] long as he obtains his client's written consent. Unlike under the ABA, there is no proportionality requirement and referral fees are acceptable as long as it does not increase the overall fee.

Here, Alice has paid Zelda a consultation fee for assisting her in interviewing Todd. Before paying Zelda, however, Alice should have gotten Todd's written consent. If she had done so, then the payment to Zelda would be appropriate under the ABA if it proportionately represents the amount of work Zelda did in the interview. In California, upon consent, such a payment is acceptable regardless of the amount of work Zelda did, as long as it does not increase the overall fee.

#### Duty to Communicate with the Client

A major theme running through all of Alice's breaches also constitutes a breach in it of itself – Alice failed to communicate with Todd. Alice failed to communicate with Todd her conflicts of interest, her inexperience in the field of criminal law, and the options he had at plea hearing.

## Duties Owed to the Court and Third Parties

Alice not only breached some duties to Todd, but she also breached duties owed to the court and third parties. Alice was not candid with the court, when knowing [she] allowed Todd to submit a guilty plea which she knew did not represent Todd's wishes, but rather those of her own and Betty. Furthermore, she breached her duties of dignity to the profession, in that she allowed herself to continue representation despite the countless conflicts of interest and breaches on her part.

## **ANSWER B TO ESSAY QUESTION 3**

### Question 3

#### Duty of Confidentiality

The duty of confidentiality arises any time a person seeks legal representation and discloses confidential information in the course of establishing an attorney-client relationship. The duty of confidentiality extends to all communications between the attorney and her client, whether or not the client has asked that they be kept confidential or whether or not use of them will damage the client. The duty of confidentiality attaches when a client seeks legal representation, whether or not it attaches. The duty of confidentiality extends to any information obtained in representing a client –whether from the client or her agents or other parties.

The facts are silent as to whether Betty thought she was entering an attorney-client relationship with Alice when she sought representation for her son, Todd. Perhaps Betty's statements to Alice were made in confidence, friend-to-friend. If so, then Alice likely did not even owe a duty of confidentiality to Betty at all. However, if Betty was impliedly seeking legal counsel from Alice—either erroneously thinking that Alice's relationship with Todd would extend to her, or seeking approval of her goals for the litigation as a separate attorney, then an attorney-client relationship attached. If it is the case that Betty was seeking legal representation for Alice or reasonably thought a relationship attached to her, then Betty's communications with Alice that she wanted the matter resolved "as quickly and quietly as possible" and that she wanted Alice to recommend an in-patient drug rehabilitation treatment program to Todd were confidential information that Alice could not use in any way in her representation of Todd.

If Alice violated her duty of confidentiality to Betty, she is subject to discipline and civil liability.

#### Duty of Loyalty: Potential Conflict

The greatest duty that an attorney owes her client is to act with great loyalty. An attorney's duty of loyalty to a client supercedes her duty to all other people. If an interest of another client, the attorney, or a third party stands in the way of this duty or threatens to materially limit the representation of a client, then an actual or potential conflict of interest exists and the duty of loyalty is in danger of being compromised.

When Alice agreed to represent her friend Betty's son on criminal drug charges, she faced a potential conflict. First, Betty was seeking representation on behalf [of] her son, who was not at the meeting. Alice likely wanted to do a good job for her friend who was in a tight spot and she also likely felt that it was important to protect Betty's reputation as a prominent real estate broker in the area whose reputation likely matter[ed] to the success of her business. When approached by Betty, Alice should have realized that a potential conflict existed between her representation of her friend's son, Todd, and Betty both paying for the representation and attempting to direct the representation, as well as the feelings of loyalty that one feels toward a friend.

With the existence of this potential conflict, Alice should have determined whether she thought she could have provided Todd with effective representation, and whether or not Betty's payment for the services and influence as a friend and person seeking to direct litigation would materially limit her representation of Todd. Perhaps Alice could have provided adequate representation to Todd if she had explained to Betty that Todd would be the client and made each person's role in the litigation and representation clear. It seems that even if Alice tried to make Betty's limited role very clear, it would have been very difficult for Alice to honor Betty's wishes to get the matter resolved "as quickly and quietly as possible" and to recommend an in-patient drug rehabilitation program and at the same time to reach a conclusion that would be the one that Todd wanted from the litigation. The potential conflict between the two parties is obvious. Alice likely should have realized that her effective representation of Todd would be materially limited by her friendship with Betty and Betty's payment for the services.

Even if Alice did reasonably believe that she could provide Todd with representation that would not be materially limited by Betty's influence, payment for the services, or friendship, Alice still breached the duty of loyalty. In addition to determining whether she believed she could provide Todd with adequate representation despite the existence of the potential conflict, Alice also should have (1) disclosed the actual or potential conflict to Todd, (2) received consent from Todd (in California, this consent should have been in writing), and (3) determined if such consent was reasonable.

Clearly, Alice did not disclose the potential conflict to Todd, nor did she receive consent – written or otherwise – from Todd. Even if Todd had consented, however, it is unclear whether such consent would have been reasonable. The reasonableness standard is whether or not a disinterested, independent attorney

would have counseled the client to consent to such representation. If it was impossible for Alice to keep Betty at bay (i.e. to keep her from interfering with Todd's representation), then the consent would not have been reasonable.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the potential conflict that existed. Alice is subject to discipline and civil liability.

### Duty of Loyalty: Actual Conflict

An attorney also has a duty to keep her guard up for evolving conflicts of interest that arise as representation continues. While it is clear that Alice should not have taken on Todd's representation without adequately disclosing and obtaining reasonable consent regarding the potential conflict between Betty and Todd, she should have handled the actual conflict that arose later in the litigation differently.

When the prosecutor offered Todd one year of probation if he underwent a one-year period of in-patient drug rehabilitation, Alice should have realized that any recommendation she made to Todd about the program was an actual conflict. Alice was right to ask Todd what he thought about the program as an alternative to not reducing the charges. However, Alice responded to Todd's uncertain inquiries about what he should do by honoring Betty's wishes. Alice compromised her duty to Todd, which should have come before any other duty to any other party concerned in the matter. She recommended a course of action to Todd that Alice knew Betty wanted: a quick, hassle-free resolution with an in-patient drug rehabilitation program.

When Alice realized the actual conflict existed, she should have reevaluated whether or not she could continue the representation of Todd. In the unlikely event that Alice thought she could still proceed with the representation of Todd, Alice should have disclosed the actual conflict that existed, sought consent from Todd ( in writing in California), and proceeded only if she determined that consent was reasonable. It seems that few disinterested attorneys would find consent reasonable in this instance, as Todd's interests in his liberty and having a guilty plea entered on the record against him was materially adverse to his mother's interest in a speedy resolution and getting Todd into an in-patient drug treatment program.

Knowing that she likely could not provide Todd with adequate representation because of the conflict and because of confidential information she obtained

from Betty, Alice should have withdrawn, as continuing to represent him would violate ethical duties of loyalty and confidentiality owed to clients.

As discussed above, if Betty was seeking an attorney-client relationship with Alice when she sought representation for Todd (not knowing that the relationship would only extend to Todd), Betty disclosed confidential information that would make it impossible for Alice to provide adequate representation to Todd while ignoring Betty's wishes. By acting on the information that Betty provided to Alice, Alice breached her duty of loyalty to Todd, her duty of loyalty to Betty if a relationship attached, and her duty of confidentiality to Betty by acting on information she gave Alice rather than Todd's wishes.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the actual conflict that arose during the course of litigation. Alice is subject to discipline and civil liability.

#### Client Decides Substantive Rights/Counsel Decides Legal Strategy and Procedure

The duty of loyalty also provides that the client must make all decisions regarding substantive rights, including such decisions as whether or not to testify in criminal prosecution or whether to accept or reject a settlement offer. Alternatively, the attorney makes decisions regarding procedure or legal strategy. Alice in effect usurped Todd's ability to decide whether or not to accept the prosecutor's "settlement" offer for a plea bargain. While at first blush it seems that Alice did allow Todd to make the decision as to whether he should accept the plea agreement, she did not provide him with all of the necessary information he needed to make that choice. Alice did not disclose that she was giving him advice based on his mother's wishes, rather than what Alice thought was the best possible choice for him.

Thus, Alice breached her duty of loyalty to Todd by not allowing him to make an informed decision as to his substantive rights. Alice is subject to discipline and civil liability.

#### Duty as a Fiduciary

An attorney owes her client a fiduciary duty to reach all agreements clearly and quickly. In California, the agreement must also be in writing, disclose how the fee is calculated, what services are covered, and the rights and obligations of the

client and attorney. In addition, fee splitting is generally disfavored under the Model Rules. In order to engage in fee splitting with another attorney under the Model Rules, (1) the fee must be reasonable, (2) the client must consent, and (3) the fee splitting must be proportional to the work done. In California, fee splitting is appropriate between attorneys where (1) the fee is not unconscionable, (2) the fee arrangement is disclosed in writing, (3) the client consents in writing, and (4) the fee is not increased in order to cover the split. In addition, California does not require a proportionality principle.

Under both standards, Alice's paying of Zelda with the check marked "Consultation Fee, Betty's Case" was improper. While it may have been reasonable, neither Betty nor Todd consented and the fee was not proportional to the work done because Zelda did no more than sit in on one meeting with Todd. Under California law, the fee was likely not unconscionable (the facts are silent here) and it is not certain from the facts whether the overall fee was increased in order to cover the split. However, it is fatal that the fee split was not disclosed in writing to Todd or Betty and no consent in writing from either was obtained.

Thus the fee splitting with Zelda was improper. Alice is subject to discipline and civil liability.

#### Duty of Competence

An attorney owes a duty of competence to act as a reasonable lawyer would with respect to the skill, preparation, and thoroughness required for adequate representation. This duty includes not taking on a case where the attorney is not knowledgeable in an area unless she will be able to seek help from an attorney with experience in the area without undue delay, burden or financial harm to the client. Alice had no idea how to handle a criminal case, much less one that involved a serious drug felony. Alice did not disclose to Betty when she (Betty) sought Alice's representation for Todd that she had no criminal experience. It certainly would have been prudent to disclose her inexperience in this area to Betty at the time she accepted the representation. It may have been more prudent to recommend an attorney (i.e. make an appropriate referral, perhaps to Zelda who was familiar with such matters or alternatively to the State Bar so that they could suggest an alternate attorney) so that Todd could have counsel experienced in the area of criminal law, particularly serious drug charges.

While Alice was prudent in seeking help from Zelda, she only sought her help with respect to the first interview with Todd. Zelda only informed Alice that “if Todd’s story was true” the prosecution had a weak case. However, Alice did not use Zelda to further inquire what kind of situation Todd would face if his story was not true. Zelda did not have the adequate knowledge to handle such a case. While consulting Zelda was proper, she should have sought more help from her in representing Todd, and she should not have shown herself as the only defense counsel on the case. In addition, she should have disclosed to Todd and Betty that she would need to employ Zelda’s help to get familiar enough to take the case and obtained their consent to using Zelda (in California, in writing).

Alice is subject to discipline and civil liability for her breach of the duty of competence to Todd.

#### Diligence

Finally, Alice has the duty to zealously pursue [the] case to completion for client’s best interests. She did not do this when she breached her duty of loyalty to Todd by honoring Betty’s wishes over his. She did not use diligence is [sic] advocating zealously for what was best for her client. When she knew that Todd was unsure about what to do when the prosecution offered a plea bargain and when he insisted on his innocence, Alice should have zealously pursued whatever cause or goal Todd wanted rather than what Betty wanted.

Alice is subject to discipline and potential civil liability for breach of her duty to treat Todd’s case with due diligence.

#### Duty to Communicate

Alice also has a duty to communicate with her client, keeping them abreast of the developments in his or her case. Alice should have kept in constant communication with Todd both inside and out of court about Zelda’s involvement or lack thereof in the case, the actual conflict that emerged, and her inability to advise Todd adequately about the plea agreement.

#### Duty of Candor/Truthfulness, Fairness, and Dignity/Decorum

Alice owes a duty of candor and truthfulness to all third parties and to the court and her adversaries to state the law truthfully and pursue her representation of

clients with honesty and integrity. When the actual conflict between Betty and Todd arose during Alice's representation of Todd, she should have sought withdrawal of her representation of Todd from the court. In addition to being honest with her client and notifying him of the actual conflict that existed, Alice also should have been up front with the court and the prosecutor that she was unable to properly and adequately advise her client on the option of the plea agreement in exchange for one-year probation that included a year-long in-patient drug rehabilitation program.

## QUESTION 4

Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. Travelco's advertisement stated: "The winner's name will be picked at random from the telephone book for this trip to 'Golfer's Heaven.' If you're in the book, you will be eligible for this dream vacation!"

After reading Travelco's advertisement, Polly had the telephone company change her unlisted number to a listed one just in time for it to appear in the telephone book that Travelco used to select the winner. Luckily for Polly, her name was picked, and Travelco notified her. That night Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne.

The next day Polly bought new luggage and costly new golfing clothes for the trip. When her boss refused to give her a week's unpaid leave so she could take the trip, she quit, thinking that she could look for a new job when she returned from Scotland.

After it was too late for Polly to retract her job resignation, Travelco advised her that it was no longer financially able to award the free trip that it had promised.

Polly sues for breach of contract and seeks to recover damages for the following: (1) cost of listing her telephone number; (2) the champagne; (3) the luggage and clothing; (4) loss of her job; and (5) the value of the trip to Scotland.

1. What defenses should Travelco assert on the merits of Polly's breach of contract claim, and what is the likely outcome? Discuss.

2. Which items of damages, if any, is Polly likely to recover? Discuss.

### ANSWER A TO ESSAY QUESTION 4

1. What defenses should Travelco assert on the merits of P's breach of contract claim, and what is the likely outcome?

First, Travelco should defend on the grounds that no valid contract was formed.

Formation – Offer, acceptance, consideration.

First, Travelco ("T") will argue that the promotional ad was not an offer at all. Usually, ads are a mere invitation to deal; an offer requires, on the other hand, a manifestation of an intent to commit, communication, and definite terms—ads don't usually show an intent to commit. However, this ad could be construed as an offer to enter into a unilateral contract ("K")—it is like a "first come, first served" ad—where even if the offeree is not named, there can still be a binding offer; here, the language you will be eligible if you're in the book expresses enough intent to be bound for the ad to constitute an offer.

Next, T should argue that even if they made an offer, offers are generally revocable until accepted and that T validly revoked. Offers are revocable before acceptance unless supported by consideration; also, in a unilateral K, which is an offer that can only be accepted by performance, once performance is begun the offer is to be held open for a reasonable time. T's argument here will probably fail, because T notified Polly ("P") before revoking the offer, so P probably had already accepted.

Consideration

T should argue that there was no contract because there was no consideration. Contracts require some mutuality of obligation, a bargained for exchange, to be enforceable. Some courts require a bargained for legal detriment, and others allow a bargained for benefit. T will argue that the ad was a gratuitous promise, and that P cannot enforce against T because P was not mutually bound—P did not give up anything. P may argue that getting listed in the phone book was consideration, but this is not a good argument because that did not confer any benefit on Travelco (unless Travelco owns the phone book company...). In fact, there is no consideration supporting this agreement because P is not bound to do or give up anything.

### Promissory Estoppel/Detrimental Reliance

If T defends on the grounds of no enforceable contract, T will have to defend against P's claim of detrimental reliance. Even when an agreement also lacks consideration, it may still be enforceable if P foreseeably and reasonably detrimentally relied on the agreement. Here, P did detrimentally rely — she spent money by buying new luggage and clothes, and quitting her job, after being notified by T she had won.

T will argue that P's reliance was unforeseeable and unreasonable. However, things like buying luggage and clothes, for a vacation you have won, is reasonable, and T should have foreseen P's change in position in reliance on T's notification she had won the trip.

T will correctly argue that P's quitting her job was not foreseeable (see below); but because the luggage, clothes, champagne were foreseeable, P can enforce the contracts, and T will raise this in the damages phase.

### Statute of Frauds

The facts don't indicate whether the contract was in writing; but regardless, SOF is not a good defense to formation because this agreement, (not for the sale of goods, can be performed within one year...) is not required to be in writing. Also, P's reliance would wipe out this defense.

### Impossibility

T will argue that they are excused from performance by impossibility. This is judged from an objective standard, and applies when because of unforeseen events judged at formation, there is truly no way at all that T could perform. T is no longer financially able to perform. However, mere difficulty in paying is unlikely to rise to the level of impossibility so this defense is unlikely to work.

### Impracticability

This defense applies where circumstances unforeseeable at formation would cause T severe economic hardship if T had to perform. Here, there is no indication how severe the hardship would be to T; also, the short time between the ad and breach make it look like T should have foreseen financial difficulty.

### Frustration of Purpose

This applies where changed circumstances unforeseeable at formation completely wipe out the purpose, known to both parties, of the contract. This defense will not work for T, because P still wants a trip; it has merely become financially difficult/impossible for T to pay.

### Mistake

T may try to argue their unilateral mistake in their solvency should void the contract. However, unilateral mistake is not a good defense unless P knew of T's mistake, where here, P did not.

### Good Faith

Because it appears that T's breach may be in bad faith—that they placed the ad to drum up business, never expecting to award the trip—they may have to defend on good faith—this will not relieve them of their underlying obligations, however.

Therefore, T is liable because their K became enforceable on P's foreseeable detrimental reliance; or because there was a valid unilateral contract supported by P's putting her name in the telephone book.

## 2. Damages

Generally, for breach of K, P will be entitled to her expectancy—the benefit of the bargain—plus any consequentials not unduly speculative reasonably foreseeable to T. Punitive damages are generally disallowed in breach of K.

(1) The cost of listing her phone number:

This took place before any K was formed, and may even be viewed as P's consideration for the deal. There was no K until P actually won the trip, so she won't collect this.

(2) The champagne:

P will argue that the cost of the champagne is recoverable as a consequential—it was not part of the K, but it was foreseeable that some one would buy champagne after winning—basically, she will argue reliance damages.

T will argue that buying costly champagne was unforeseeable, thus not recoverable.

P will recover if the court takes a reliance view, but possibly not on a benefit-of-the bargain view.

Probably she will recover because champagne is foreseeable.

### (3) Luggage and Clothing

P and T will make the same arguments as above; the luggage was probably a foreseeable consequential, but the clothes may not have been, if they were too “costly”.

### (4) Loss of her Job

T will not be liable for the loss of P’s job, because under either a reliance or expectancy theory, it was unreasonable and unforeseeable that P would quit her job just to take a vacation. Also, P would have a duty to mitigate, by searching for comparable employment, which she probably will be able to find, since she thought she could look for a new job when she returned.

### (5) Value of Trip

If the court takes a pure reliance approach, based on promissory estoppel, P will not be awarded the cost of the trip.

But under the standard breach of K expectancy, which is the standard measure of K damages, P is entitled to what she would have gotten absent T’s breach, which is the value of the trip.

Note that restitutionary damages are not available, because T has not been unjustly enriched.

## **ANSWER B TO ESSAY QUESTION 4**

### TRAVELCO'S DEFENSES

#### No Valid Contract was Formed: Lack of Consideration, Promissory Estoppel

The first defense that Travelco will assert is that there is no valid contract for them to breach. The issue is whether there was consideration for Travelco's promised prize. For a valid contract to form, there must be a bargained for exchange. The court will not look into the sufficiency of the consideration, whether it was a fair exchange, only if there was some legal detriment exchanged by the parties. Here, Travelco will assert that they made a gratuitous promise to award a travel prize at random to someone listed in the phone book. The winner did not have to give anything in exchange for the promise, therefore there was no consideration given by the winner for the promised prize. Without consideration, Travelco will assert that there was not valid contract, and therefore they could not be in breach of the contract.

Polly will respond with two arguments. First, she will try to assert that being listed in the phone book was the consideration required. The Travelco prize stated that a person must be listed in the phone book to be eligible. Polly took the step of changing her unlisted number to a listed one in order to qualify for the contest. While this is not a significant legal detriment on Polly's part, she was not required to list her number, and therefore it would qualify as consideration. As mentioned, the court will not examine the amount of consideration. Travelco will respond that there was no bargained for exchange because the advertisement was not asking for persons to be listed in the phone book in exchange for the prize. Had the advertisement been run by the phone company, the situation may be characterized as an exchange. However, here the advertisement was run by what appears to be a travel agency. Therefore, it appears that Travelco has the better argument, and there was no bargained for exchange. Without the exchange, lack of consideration means that no valid contract was formed unless there is a consideration substitute.

Polly's second argument is that even though there was no consideration for the promise, she can claim contract rights by promissory estoppel. Here, the issue is whether Polly detrimentally relied on Travelco's promise to award a trip in a reasonable matter that would make it unjust for Travelco not to honor their promise. Polly can assert that she detrimentally relied on the promise in several ways. First, she listed her number in the phone book. Polly will claim that

changing her number from unlisted to listed was a detrimental reliance. The detriment is that she will now be more likely to receive unwanted phone calls. Her second claim is that purchase of champagne. Her reliance will be the cost of the champagne. Third, she purchased golf clothes and luggage. Again, the lost purchase price is her reliance. Finally, she quit her job. Clearly this is a detrimental reliance.

Travelco will respond that the changing of the phone number is not sufficient because it was done before the awarding of the prize, not in response to it. And even if it was in response to their ad it was not a foreseeable result of running the ad and it is not a sufficient detriment to require equity to award a week long trip. They will assert the same argument concerning the bottle of champagne, clothes, luggage and quitting the job: not a foreseeable response, and/or it is not sufficient to warrant requiring that they comply with their promise.

The court should find that there was sufficient foreseeable detrimental reliance to warrant enforcement of the promise by promissory estoppel. While Travelco may be right concerning the listing of the phone number, the actions taken by Polly after the prize was awarded are sufficient. It is clearly foreseeable that someone would celebrate winning a prize as well as purchase clothing and luggage for the trip. Whether this is sufficient to warrant equitable enforcement of the promise depends on the cost of the trip and the price of the purchased items. It appears to be sufficient. The quitting of the job will not be considered because it is not a foreseeable response to winning a 1 week trip. However, given Polly's other actions, the promise should be enforced by promissory estoppel.

### Impossibility

Travelco's next defense will be that they no longer able to perform their promise because they are not financially able to do so. Whether this excuse will be accepted depends on whether there is true impossibility, or if it is simply financially difficult. If in fact Travelco has gone broke or will be forced into bankruptcy in awarding the trip, they may be excused. However, this seems unlikely, and the court will probably reject this claim.

### POLLY'S DAMAGES RECOVERY

The purpose of damages is to put the plaintiff in the position they would have been in had the other party not breached. Damages include the compensatory,

as well as incidental and consequential damages. Consequential damages must be foreseeable by the party at the time the contract was formed. Punitive damages are not typically awarded in contract cases unless the breach can be characterized as a tort (e.g. fraud or misrepresentation) and then punitive damages may be appropriate if the breach was intentional.

### Phone Listing

Polly wishes to claim the cost of listing her number in the phone book. The question is whether this cost is something that Polly would have had to bear had Travelco performed as promised, because listing her number was not in response to the promised prize, but was instead a cost that Polly had to incur to be eligible, she should not recover this cost. If the court awards this cost, Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

### Champagne

Here, the question is whether that purchase of an expensive bottle of champagne is a foreseeable response to the awarding of the prize. It appears to be a reasonable response, since it could be expected that a person would celebrate. Therefore, Polly should recover this cost. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

### Luggage, Clothing

As with the champagne, this is a foreseeable cost that would be incurred in response to the awarding of the prize, and therefore will be recovered as a consequential damage. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of trip. (See below).

### Loss of Job

Travelco will argue that this is not reasonable cost in response to the awarding of a 1 week vacation. They will claim that at the time they awarded the prize, they could not have foreseen that someone would quit their job to take a one week vacation. Polly will respond that it is a foreseeable response, and therefore she should recover as a consequential damage. The court is likely to agree with

Travelco, that this is not a foreseeable result of the promise of the vacation. Therefore, Polly should not be able to recover damages for the loss of her job.

### The Price of the Vacation

Here, Polly will argue that she should be awarded the cost of the promised vacation. This is the purpose of compensatory damages, to put Polly in the position she would have been in had Travelco not breached. The court will therefore award Polly the value of the vacation. Because money damages are sufficient in this case, and there is no indication that Polly sought specific performance anyway, the court will not force Travelco to actually award the trip.

Travelco will try to argue that because Polly is being awarded the value of the trip, she should not be awarded damages for the phone, champagne, clothes, or luggage. To award these damages and the trip would put Polly in a better position than she would have been had Travelco performed. Had Travelco awarded the trip as promised, the cost of these items would have been borne by Polly, not Travelco. Therefore, Polly should either be able to recover the value of the trip and not these other damages, or alternatively, Polly should recover these damages and not the trip. The latter solution would put Polly in the position she would have been in before the promise was made (except for the job, which is not recoverable because it was not reasonable or foreseeable).

The court should find Travelco's argument persuasive. Therefore it will award Polly only the value of the trip, or alternatively, it will award Polly damages for the champagne, luggage, clothing, and possibly the phone listing.

## QUESTION 5

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as “the modern, safe means of controlling allergy symptoms.” Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her Doc (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because “this pill is the best-known method of controlling allergy symptoms.”

Bud, Sally’s brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally’s eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally’s medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

## ANSWER A TO ESSAY QUESTION 5

Sally will bring products liability actions against Mfr. based on strict liability, negligence, intentional torts and warranty theories.

### Strict Products Liability

A strict products liability prima facie case requires a manufacturer or (dealer) of the goods, an unreasonably dangerous product that could have been made safer with adequate warning, a foreseeable user of the product and a foreseeable use of the product that results in injury.

Mfr. is the manufacturer of the prescription allergy pills. The pills were rendered unreasonably dangerous by Mfr's failure to include a warranty that there was a remote risk of permanent loss of eyesight associated with the use. Sally was a foreseeable user because she was an allergy sufferer who read the Mfr's advertisement. Sally was injured because she suffered a substantial loss of eyesight as a result of using the pills, with eventual, total loss of eyesight.

### Mfr's Defenses

Mfr. will first assert that the allergy pills are available by prescription only and they had informed doctors of the remote risk (Doc here was aware of the risk), and they were entitled to rely on Doc as a learned intermediary that would adequately warn patients as part of his prescription analysis and treatment.

This will not succeed as Mfr. directly advertised the availability of the allergy pills as "the modern, safe means of controlling allergy symptoms" directly to Sally. Sally relied on the advertisement in requesting Doc to prescribe the pills.

Next Mfr. will assert Sally assumed the risk by taking the prescription pills. This will surely fail. Sally was not aware of the risk, much less willing to take it.

Finally, Mfr. will assert Sally had a duty to mitigate her damages. If a person unreasonably fails to seek medical care that could prevent or lessen damages, the defendant will not be liable for that preventable danger.

Here Sally had the opportunity to undergo surgery to replace a cornea. Her brother Bud was a willing and compatible donor and the surgery would likely

have been a complete success. Additionally, Sally's insurance would have paid all expenses.

Because Sally was fearful she was unwilling to undergo the surgery. The issue is whether Sally was reasonable in that fear and whether Mfr. should be liable for her resulting complete loss of eyesight.

Normally a defendant is liable for all a plaintiff's injuries caused by the defendant even if the extent is more serious than expected. It is likely though that a jury would find Sally unreasonable under the circumstances here because of the low risk, the likelihood of success and the full coverage by insurance. Mfr. will be liable for some damages for Sally's loss of eyesight but not for permanent and total loss.

#### Mfr. Negligence Products Liability

Sally must establish Mfr. owed her a duty of care, that they breached that duty and the breach is the actual and legal cause of her damages.

#### Duty

Mfr. owes a duty of care to all foreseeable users of its product. All allergy sufferers are foreseeable users; Sally is owed a duty.

#### Standard of Care

Mfr. owes Sally a standard of care of the reasonably prudent manufacturer of prescription drugs.

#### Breach

Mfr. breached its duty to Sally by failing to provide a warning with the allergy pills Mfr. was aware of a remote possibility of risk of permanent loss. The burden of providing a warning is minor compared with the magnitude of potential harm. Mfr.'s failure to provide this warning was a duty breach and resulted in Sally's injury.

### Actual Cause

The facts state that the allergy pills were a direct cause of Sally's loss of eyesight.

### Legal/Prox Cause

It is foreseeable that a failure to include a warning could result in injury. Sally is entitled to rely on the presumption that she would have heeded the warning had she been informed.

### Damages

Sally suffered permanent total loss of eyesight in both eyes.

### Defenses

In addition to those described above under strict liability, Mfr. will assert contributory negligence. They will assert that Sally failed to use a reasonable standard of care to prevent injury to herself. This defense will not succeed. Sally was not aware of the risk of danger and this defense is not successful if her only negligence is in failing to discover the defect, here the lack of warning.

### Intentional Tort Battery

Sally will assert that Mfr. acted to cause a harmful or offensive contact.

Mfr.'s act was intentional in that they knew with substantial certainty that there was a remote risk of eye damage. They intentionally did not include a warning. The harmful or offensive contact was Sally's loss of eyesight.

Damages as discussed above.

Mfr. will assert the defense of consent. Sally will argue Mfr. exceeded the scope of her consent by failing to include the warning that eye damage could result.

Because Mfr. knew of the risk and intentionally failed to warn Sally may prevail here as well.

Additionally Sally will assert warranty theories.

### Express Warranty

Mfr. advertised “modern safe means of controlling allergy symptoms.” No disclaimers are given in the facts, but disclaimers not valid as to express warranties anyway.

Sally will be entitled to recover here as well.

### Implied Warranty of Merchantability

Implied in all sales of goods is the warranty by a merchant seller – here Mfr. – that the goods conform to reasonable standards of the use for which they are designed. While remedies could be limited here, they couldn’t be eliminated and disclaimers are deemed unconscionable when personal injury results.

### Implied Warranty of Fitness for Particular Purpose

Sally may bring this action against Mfr. or Doc or both. Sally was seeking relief from allergy symptoms. While there is no evidence she did get relief for allergy, it isn’t reasonable that the loss of eyesight accompanies such relief. Sally will seek damages from Doc for negligence in prescribing the pills. Sally must show duty, breach, causation and damages.

### Doc’s Duty to Care and Standard of Care

Doc owes Sally the duty of a member of good standing practicing medicine in a similar area. It is minimally the duty of a reasonably prudent professional. If Doc is an allergy specialist he will be held to a higher standard.

Sally is owed a duty as a reasonably foreseeable plaintiff. As Doc’s patient, Sally is clearly owed a duty.

### Breach

Doc breached his duty to Sally by failing to give her informed consent about the allergy pills he was prescribing.

The standard of breach here is judged two ways:

- 1) What a reasonable person would have wanted to know about the risk;
- 2) What Sally would have wanted to know.

### Causation

If a reasonable person wouldn't have consented or Sally wouldn't have consented if the risks were known and if the risks did in fact occur, Doc's breach was the actual and prox cause of injury.

Sally said she had not been warned and would not have consented to take the pills if she had known of the risk. Perhaps Sally had a[n] unusually high sensitivity to concern over eyesight. It doesn't really matter why she wouldn't have consented.

The lack of warning was the actual cause and prox cause of breach.

Damages are discussed above.

Doc will raise same defenses as above.

Doc and Mfr. will each seek contribution on the negligence claims.

## **ANSWER B TO ESSAY QUESTION 5**

### Sally v. MFR – Strict Products Liability

Sally may assert a claim of strict products liability against manufacturer. Manufacturers are held strictly liable for products they put into the market in a defective condition creating an unreasonable risk of injury or danger to the consumer. In this case, Sally has the burden of showing that the allergy medication produced by Manufacturer (Mfr) were [sic] defective when it left Mfr's control and the defect created an unreasonable risk of danger or injury to the consumer.

### Failure to Warn

A product may be properly deemed "defective" for the purpose of strict liability if the manufacturer fails to place proper warnings on the product. If consumer warnings may be affixed to the product at relatively low cost to the manufacturer, it may be held liable on a products liability for failure to do so.

Here, Mfr will assert that its medication presented a remote risk of permanent eyesight. Inherent in almost all medication is the risk of some sort of unwanted side effect. Mfr will claim that the "remote" nature of the risk means that the product did not pose an unreasonable risk of danger or injury. However, the degree of harm that may be incurred by takers of Mfr's allergy medication is significant. Permanent blindness is a serious debilitating condition. As such even a remote risk may be something a reasonable person may not be willing to assume. As such, it is likely the court will find that the allergy medication produced by Mfr posed an unreasonable risk of danger or injury due to the fact that Mfr failed to place in warnings in its advertisements or on its packaging. Although the facts do not indicate the cost involved in making such warnings, it is unlikely that a label on a package or a statement in advertising is so cost prohibitive to warrant excuse from its duty to warn. As such, Sally will be able to prove that the allergy medication produced by Mfr is defective for failure to make adequate warnings.

### Duty

As mentioned above, Mfr had a duty to warn of the damages inherent in its product.

It breached that duty when it failed to make such warnings. In order to recover, Sally must show that she is a foreseeable plaintiff to whom that duty was owed.

Under the majority test, a plaintiff is foreseeable if she is in the “zone of danger” created by defendant’s conduct. Here, any person who received a prescription for the allergy medication produced by Mfr was within the zone of danger created by the risk involved in taking the pills. As such, Sally is a foreseeable plaintiff within the zone of danger under the majority approach.

A minority of jurisdictions follow the Andrews approach which holds that all plaintiffs are “foreseeable.” As such, Sally would be a foreseeable plaintiff under this approach as well.

#### Causation

Once Sally has shown that the allergy medication was defective when it left the control of Mfr and Mfr breached a duty owed to her, she must then establish that the defect was the actual and proximate cause of her injuries.

#### Actual Cause – But for Test

Sally should have no problem proving the defect caused by failing to adequately warn caused her injury. The facts state that Sally would never have taken the pills if she had been warned of the possible side effect of blindness. Therefore, but for Mfr’s failure to warn, Sally would not have ingested the pills and subsequently lost her eyesight.

#### Proximate Cause – Foreseeability Test

Even though Mfr is the “but for” cause of Sally’s injury, Sally must also prove that her injury was foreseeable. Here, Mfr was well aware of the risk presented by its allergy medication. Mfr should have been aware of the fact that its failure to warn would cause users of the medication to unwittingly subject themselves to the risk and some of them would in turn suffer blindness. Here, Sally actively sought a prescription for the pills. There was no warning in the advertisements nor on the package and therefore Sally took the medication unaware of its incumbent risks. As a result, Sally lost her sight. Her injuries were foreseeable and therefore proximately caused by Mfr’s breach of duty in failing to warn.

Mfr may assert that Doc's failure to inform Sally of the risks involved in the use of the medication was a supervening factor operating to relieve it of liability. A supervening factor is one that is unforeseeable and extraordinary. It is well established that ordinary negligence in the world is foreseeable and not extraordinary. Consequently, Doc's failure to warn is not a supervening factor because his conduct amounts to negligence and is not so extraordinary or unforeseeable as to amount to a supervening factor. As such, Mfr's conduct survives proximate cause analysis.

### Damages

Lastly, Sally must prove that Mfr's failure to warn resulted in damages to her. As mentioned, Sally went blind and so damages are easily established.

### Sally v. Mfr – Products Liability – Negligence

In the alternative to strict products liability, Sally may also pursue under a negligence theory. The analysis would be the same as for products liability; however, Sally's burden with respect to breach of duty would be different. In pursuing a negligence claim, Sally must show that Mfr was negligent in its production of the allergy medication or failure to include a warning. In other words, Sally must show that Mfr could have taken reasonable steps to prevent the harm caused. Once shown, the analysis would proceed for causation and damages as stated above. Here the facts support equally a theory of negligence and strict liability. Because strict liability is an easier approach to pursue, Sally will likely proceed under this theory.

### Breach of Warranty

#### Express Warranty

Sally may also assert that Mfr breached an express warranty made in its advertisement claims that the allergy medication was the "modern, safe means of controlling allergy symptoms." Sally may assert that the risk imposed means that the medication is not in fact "safe," and therefore Mfr's representations otherwise are unfounded.

### Misrepresentation

In addition, Sally may assert that Mfr engaged in intentional misrepresentation. Sally will claim that Mfr's omission with regarding to the risks amounts to a misrepresentation of safety with knowledge of the falsity of the communication. In addition, Sally will claim such communication was made with the intent that consumers rely. Sally, as a consumer, relied on the representation of product safety and was injured. As such, she can proceed under this claim as well.

### Defenses

#### Contributory Negligence and Comparative Fault are NO DEFENSE to Strict Liability and Intentional Misrepresentation

Mfr cannot assert any contributory negligence or comparative fault of Sally as a defense to her strict liability and intentional misrepresentation claims.

#### Contributory Negligence and Comparative Fault Available for Negligence

Although contributory negligence and comparative fault are available defenses under negligence, the facts do not indicate that Sally was negligent in taking the medication and so Mfr will not be able to assert these claims.

### Assumption of Risk

Assumption of risk is a defense to strict liability if defendant can show that plaintiff went forward in face of a known risk. Mfr may try to assert assumption of risk in that Sally actively sought and procured a prescription for the allergy medication and thereby assumed the risk involved in taking the new medication. However, Sally's conduct was in response to Mfr's advertisements and as mentioned above, such advertisements did not contain any warnings of the risks. In addition, the packaging did not contain any warnings. Crucial to the defense of assumption of risk is the element of "knowledge" on the part of the plaintiff. Here, Sally clearly did not have knowledge of the risk of blindness and therefore cannot be said to have assumed the risk.

### Duty to Mitigate

A plaintiff has a duty to mitigate her damages. In other words, plaintiff must act to minimize her loss. Failure to do [so] limits the liability of a defendant for any

aggravation of injury caused by the failure to mitigate. Here, Mfr may attempt to limit its liability for Sally's blindness by pointing to her refusal to engage in the cornea transplant operation that could have been accomplished with minimal risk and no cost to her. Sally opted not to go through with the surgery out of her fear of the operation. Plaintiff's duty to mitigate is judged by the reasonable person standard. If the court determines that Sally's decision not to undergo the surgery was not reasonable, Mfr's liability for damages will be seriously curtailed. However, because the mitigation at bar involves major surgery, it may well be likely that a reasonable person would not choose to undergo the risk involved. Even though the risk is stated to be minimal, this is not the same as involving not the same as involving no risk at all. In fact, Sally may well point to the "remote" risk realized by taking Mfr's medication as grounds for her decision not to undertake any further risks with her health and well-being. Depending on the court's determination of the reasonableness of Sally's decision, Mfr's responsibility for damages may or may not be reduced.

#### Sally v. Doc – Negligence

Sally may assert a claim against Doc in negligence for his failure to warn Sally of the risks involved in taking the allergy medication.

#### Duty

Here, Doc had a duty to conform his conduct to the reasonable doctor in good standing in the professional community in which he is situated. This means that if Doc fails to act as a reasonable doctor in good standing in his community, he will be held to have breached his duty of care.

#### Breach of Duty – Failure to Inform

Doctors have a duty to obtain informed consent of their patients with respect to medical treatment. The duty to "inform" is judged by what a reasonable patient would want to know in making health care decisions. This standard is judged from the patient's perspective, not the doctor's. It is irrelevant that the average doctor would not make a disclosure if the court finds that a reasonable patient would want to know the relevant information at bar.

Here, the risk of blindness is information that a reasonable patient would want to know in deciding whether or not to take medication. This is supported by the fact

that Sally states that she would never have taken the medication had she known of the risks. Therefore, Doc's failure to advise is a breach of duty.

### Causation

Here, the facts indicate that Doc's failure to warn was both the actual and proximate cause of Sally's injury. Similar to Mfr, Doc cannot point to Mfr's failure to provide a warning as a supervening cause that relieves him of proximate liability. Doc was aware of the risk and therefore had a duty in his own right to warn Sally. His failure to do so caused Sally to take the medication uninformed and she suffered injury because of it.

### Damages

As mentioned above, Sally's blindness amounts to sufficient damages for recovery.

### Defenses

#### Contributory Negligence & Comparative Fault

As mentioned above, the facts do not support a defense on grounds of contributory negligence or comparative fault as Sally manifested no signs of her own negligence in taking the medication.

#### Assumption of Risk

Doc's claim of Sally's assumption of risk will fail for the same reasons stated above with respect to Mfr.

#### Duty to Mitigate

The analysis with respect to Doc's liability for damages and any claim based upon Sally's failure to mitigate will proceed in the same manner as discussed above with respect to Mfr.

## QUESTION 6

In 1997, Hank and Wanda, both domiciled in Illinois, a non-community property state, began dating regularly. Hank, an attorney, told Wanda that Illinois permits common-law marriage. Hank knew this statement was false, but Wanda reasonably believed him. In 1998, Wanda moved in with Hank and thought she was validly married to him. They used Hank's earnings to cover living expenses. Wanda deposited all her earnings in a savings account she opened and maintained in her name alone.

In February 2000, Hank and Wanda moved to California and became domiciled here. By that time Wanda's account contained \$40,000. She used the \$40,000 to buy a parcel of land in Illinois and took title in her name alone.

Shortly after their arrival in California, Wanda inherited an expensive sculpture. Hank bought a marble pedestal for their apartment and told Wanda it was "so we can display our sculpture." They both frequently referred to the sculpture as "our collector's prize."

In March 2000, a woman who claimed Hank was the father of her 6 year-old child filed a paternity suit against Hank in California. In September 2000, the court determined Hank was the child's father and ordered him to pay \$800 per month as child support.

In January 2002, Wanda discovered that she never has been validly married to Hank. Hank moved out of the apartment he shared with Wanda.

Hank has not paid the attorney who defended him in the paternity case. Hank paid the ordered child support for three months from his earnings but has paid nothing since.

1. What are Hank's and Wanda's respective rights in the parcel of land and the sculpture? Discuss.

2. Which of the property set forth in the facts can be reached to satisfy the obligations to pay child support and the attorney's fees? Discuss.

Answer according to California law.

### **ANSWER A TO ESSAY QUESTION 6**

#### 1. Hank (H) and Wanda's (W) Rights to the Parcel of Land and the Sculpture

Hank and Wanda's rights to the parcel of land and the sculpture will be determined according to their status as married couples.

#### Putative Spouse

A putative spouse is one who reasonably believes they are married to another but for some reason their marriage is invalid. Here W believed she was married to H because she believed a common-law marriage was permitted in Illinois. Because H lied to W only he knows they were not really married and thus W's status as a putative spouse should be established.

The courts have yet to determine whether H would be considered a putative spouse under these circumstances because he knew no common-law marriage was established, however in this case the court should find that H and W are in a Putative Marriage because of W's reasonable belief that she was married in Illinois via a common-law marriage due to H's (an attorney) representation that they were married. California recognized Putative Marriages as an alternative to common-law marriages, and because H and W are currently domiciled in California a putative marriage is established.

#### Quasi-Marital Property (Q-MP)

In California all property acquired during the putative marriage is deemed marital property and treated the same as community property. Such property acquired by gift or inheritance during the marriage is the spouse's separate property (SP) as well as any property acquired before the putative marriage and after permanent separation is the SP of the acquiring spouse.

In determining the character of any property the court will consider the above general presumptions as well as the source of funds used to acquire any property, any actions taken by the parties, and any special presumptions that may apply to the property. Property acquired outside California is treated as quasi-marital property and the court will treat it as community property or marital property [f] such property were to be community property if acquired in California.

With these general principles in mind we can now examine the properties at issue.

#### Illinois Parcel of Land

The source of the Illinois parcel of land was the \$40,000 W had earned from her earnings during marriage to buy the land. Thus, since the earning[s] were earned during the marriage it is Q-MP earnings and so the parcel is Q-MP in which both H and W have a ½ interest in.

Wanda took title in her name alone which could be deemed as a valid transmutation, which after 1985 requires a writing expressly stating that such property is the spouse's SP. If H knew and consented to W taking title in her name alone this could be SP, however, absent such consent the land would still be Q-MP.

Married Women's special presumption gives W a presumption of SP if title is taken in her name alone, however, such a presumption would not apply here because it is only applicable to property acquired before 1975 by W. Here the general presumption would apply and since the source was Q-MP and it was acquired during marriage the land should also be Q-MP.

#### Sculpture

The source of the sculpture was W's inheritance and so it should be deemed her SP under the general presumptions. W's statement to H that the sculpture was "our sculpture" could suffice as a valid transmutation. However, this was not in writing and a transmutation to be valid after 1985 requires that there be a writing clearly expressing a transmutation. Since there was no writing the general presumption will control and the sculpture is entirely W's SP.

2) Which Property Set Forth in the Facts Can Be Reached to Satisfy the Obligations to Pay Child Support and the Attorney's Fees?

Child Support Claim

Generally creditors' claims against either spouse are determined to be SP or Q-MP of the liable spouse depending on when such claim arose.

If the debt is SP debt then the creditor must satisfy his claim from the spouse's SP first before seeking satisfaction from the CP (here Q-MP). If the debt is a MP debt then the creditor will seek satisfaction from any MP (or Q-MP) first before seeking satisfaction of the claim from the SP of the debtor spouse.

Singe Hank's obligation to pay child support of \$800 per month was a debt of H's personally and was not acquired for any benefit to the marital community such obligation is H's separate obligation. The child support claim must be satisfied from H's SP before seeking the MP.

If H is unable to pay from his SP, woman can seek satisfaction from the land as MP. However, an exception to reaching the MP earnings of the nondebtor spouse (W) arises if she has kept her earning separate with no accessibility to H.

Here W's earnings uses to buy land were deposited in an account in her own name of which presumably H had no access to, then such earnings were used to buy the land which was titled in W's name alone. Thus under this exception the claim of child support could not be reached by woman.

However still another exception arises when the debtor spouse's debt[s] are for "necessaries" which the court could deem child support payments to be. Spouses are liable to each other for necessary debts because of their duty to support each other.

Thus under this exception the child support could be satisfied from the land even if the court determined the land was entirely W's SP. She could still be liable if the child support claim were a necessary debt obligation of H.

Otherwise, if the debt is not necessary it could not be satisfied from the land because of the action's taken by W to separate her MP earning or if it was deemed entirely W's SP.

### Attorney's Fees

The court provides that attorneys' fee's can if not paid give the attorney a right to a real property lien and any of the SP of the debtor spouse of the MP of the spouses. This is known as the family lawyer's real property lien.

Further if such debt were deemed necessary the fee could be satisfied from either the sculpture or the land.

If should be noted, however, that generally creditors' claims cannot reach the SP of the nondebtor spouse unless such was a necessary debt, thus as to the child support claim the sculpture which is W's SP should not be subject to the child support claim unless it is deemed necessary. The same rule would apply to any Attorney's fees owed by H.

## **ANSWER B TO ESSAY QUESTION 6**

CA is a community property state. All property acquired while domiciled in CA is presumed to be community property. All property acquired before marriage and when the economic community has come to an end and all property acquired by gift and inheritance is separate property.

Property acquired while a married couple is domiciled in a non-community property state, becomes quasi-community property when the couple moves to California so long as it would have been community property if acquired while domiciled in California.

Before discussing Hank and Wanda's respective rights, it is important to determine the status of their relationship.

In 1997, Hank and Wanda, both domiciled in Illinois, a non-community property state, began dating. Hank told Wanda that Illinois permits common-law marriages. Hank knew the statement was false, but Wanda reasonably believed him. In 1998, Wanda moved in with Hank, thinking they were validly married. As a result of Wanda's mistaken belief that she was validly married to Hank, Wanda is a putative spouse.

Because Wanda is a putative spouse, quasi-marital property law will apply. Quasi-marital property law will apply. Quasi-marital property law is the same as community property law. As a result, the moment Wanda and Hank moved to California, all the property acquired by either of them while living in Illinois will be quasi-community property (so long as if it would've been community property if acquired while domiciled in California).

### 1. Hank's and Wanda's Respective Rights In The Parcel of Land and the Sculpture

#### Parcel of Land

Wanda used \$40,000 from a savings account to purchase the parcel of land. The source of the money in the account was all of Wanda's earnings acquired while domiciled in Illinois. Because the \$40,000 would have been community property if it was acquired while the couple was domiciled in California, it is considered quasi-community property.

The \$40,000 of quasi-community property was used to purchase the parcel of land. In order to determine the character of a piece of property, a party must trace to the source. The land was purchased with quasi-community property and is therefore quasi-community property.

Wanda, however, took title in her name alone. Because this took place post-1974, Wanda will not be entitled to the Married Women's Special Presumption (applies pre-1975 and presumes that property is the woman's separate property so long as title is in her name alone). Wanda will try to argue that it was a gift of quasi-community property to her as separate property. The gift argument will fail, however, because she made the "gift" to herself.

Moreover, all property acquired during marriage is presumed to be community property. Unless Wanda can rebut the presumption, the parcel of land is quasi-community property. At separation, Wanda and Hank will each take  $\frac{1}{2}$  of the land (or proceeds from the sale of the land).

### The Sculpture

Wanda inherited the sculpture. As a result, the sculpture was Wanda's separate property in the beginning. However, Hank bought a marble pedestal and told Wanda it was "so we can display our sculpture." Moreover, both Hank and Wanda referred to the sculpture as "our collector's prize."

Hank will argue that the parties' actions transformed the character of the sculpture from separate property into community property. By referring to the sculpture as "ours," Wanda intended that the sculpture be a gift to the community.

If the court finds that Wanda intended the sculpture to be a gift to the community, then Wanda and Hank will each take  $\frac{1}{2}$  of the value of the proceeds.

However, any transmutation that takes place post-1984 must be in writing. There is an exception, however, for interspousal occasions, etc. Because this alleged transmutation took place in 2000, a writing is required. Because there is no writing and the sculpture was not given as a birthday or

anniversary gift (and is likely to be very valuable), then transmutation was not valid. As a result, Wanda will take the entire sculpture.

## 2. Which Property Can Be Reached to Satisfy the Obligations to Pay Child Support and The Attorney's Fees?

### Child Support

Quasi-Community Property can be reached to satisfy the obligations to pay a creditor even when the obligation arose prior to the marriage. However, if the nondebtor spouse placed his/her earnings into a separate account in his/her name alone, creditors cannot reach the money in the account so long as the account is not accessible by the debtor spouse.

Hank's child support obligations arose 6 years ago when his child was born. Wanda and Hank were not together at the time the obligation arose. However, because the parcel of land is quasi-community property, it can be reached to satisfy the child support obligations. Wanda's sculpture, however, is her separate property. Then nondebtor spouse's separate property can't be reached to pay an obligation that arose prior to marriage.

### Attorney's Fees

The attorney's fees were incurred in 2000, (during the period of time Hank and Wanda were "married"). All debts incurred during marriage may be satisfied by quasi-community property (and of course community property), the debtor spouse's separate property, and the nondebtor spouse's separate property, so long as the debt was incurred for necessities.

Because the parcel of land is quasi-community property, it can be reached to satisfy the attorney's fees. The sculpture, however, is Wanda's separate property. The issue is whether the attorney's fees were incurred for "necessaries." Hank will argue that defending himself if in a child paternity suit should be considered a "necessary". A necessary of life, however, is [sic] food, clothing and shelter. As a result, the sculpture cannot be reached to satisfy the attorney's fees.