



California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

February 2007

**ESSAY QUESTIONS AND SELECTED ANSWERS**  
**FEBRUARY 2007 CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

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TUESDAY MORNING  
FEBRUARY 27, 2007

# California Bar Examination

Answer all three questions.  
Time allotted: three hours

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

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

principles. Instead, try to demonstrate your proficiency in using and applying them.

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

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

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

## Question 1

Builder sold a shopping mall to Owner. The recorded deed from Builder to Owner conveyed the mall and parking lot where the parking spaces were numbered 1 to 100. The deed reserved to Builder the exclusive right to use parking spaces 15 through 20 as a place to set up a stand to sell sports memorabilia and sandwiches on Sundays. The shopping mall was located adjacent to an existing residential neighborhood.

Owner entered into a written 30-year lease with Lois leasing to her a store in the mall and parking spaces 1 through 20. Under the lease, Lois agreed to pay rent monthly and not to assign the lease without Owner's prior written approval. After occupying the leased premises for five years, Lois subleased the store and parking spaces to Fast Food for a term of ten years without first having obtained Owner's written approval.

Fast Food occupied the premises and paid rent to Owner. Fast Food, which operated a take-out restaurant on the premises seven days a week, used state-of-the-art equipment and operated in compliance with all local health ordinances. Notwithstanding this, on warm days when Fast Food was particularly busy, unpleasant cooking odors were emitted from Fast Food's kitchen. The unpleasant odors caused discomfort to many of the homeowners living in the adjacent neighborhood.

On the first Sunday after Fast Food opened its take-out restaurant, Builder set up his memorabilia and sandwich stand in parking spaces 15 through 20. Fast Food, not aware of the provision in the deed, complained to Builder about the competition of Builder's sandwich sales and the occupancy of parking spaces allocated to Fast Food. Builder ignored Fast Food's complaints. Fast Food then informed Owner that it would cease paying rent until Owner took steps to prevent Builder from using the parking spaces. Owner explained to Fast Food that there was nothing he could do about it, but Fast Food insisted that it would not pay further rent until Owner stopped Builder from setting up his stand. Thereupon, Owner hired a locksmith, who changed the locks on the space occupied by Fast Food, thus denying Fast Food access to the premises.

1. Did Lois violate the "no-assignment" provision in her lease with Owner? Discuss.
2. If Fast Food brings an action in trespass against Builder for his use of parking spaces 15 through 20, is Fast Food likely to prevail? Discuss.
3. Did Owner have the right to change the locks on Fast Food's premises? Discuss.
4. Can the homeowners establish a claim for nuisance against Fast Food? Discuss.

## Answer A to Question 1

1)

### 1) No Assignment Provision

“No assignment” provisions in leases are enforceable; however, they are strictly construed as restraints on alienability. An assignment is the transfer by a tenant of all their remaining interest in a leasehold, whereas a sublease is a transfer of something less than the full interest remaining. In this case, Lois and Owner entered into a 30-year term of years lease, which, at the time of sublease, had 25 years remaining. Lois’s sublease to Fast Food was therefore not an assignment, but a sublease, because Lois only subleased to FF for 10 years, and Lois and Owner remained in privity of estate and privity of contract. Owner would therefore be entitled to seek damages against Lois (who could then look to Fast Food for indemnification), but since the clause at issue was a “non-assignment” clause, the sublease of the premises to Fast Food did not violate the clause.

Owner will argue that the power to prevent an assignment includes the power to prevent a lesser transfer of interest, in this case the sublease. Although Owner is correct that an assignment confers a greater interest than an assignment, this argument is unlikely to be persuasive because of the fact that the court will strictly construe the non-assignment clause as prohibiting only assignments and not subleases.

Lois will be able to advance another argument in defense of her assignment to Fast Food: she will claim that Owner is estopped from arguing that an actionable violation occurred. Generally, a party who could otherwise assert a claim for violation of an agreement will be estopped from bringing the claim where he or she acquiesced in the violation. Here, even if Owner had a right to bring an action for damages or eviction based on violation of the non-assignment clause, he likely forfeited that right by accepting rent from Fast Food. Acceptance of Fast Food’s rent indicates acquiescence and waiver of the right to enforce the clause, and since Fast Food (and, by extension, Lois) likely reasonably relied on Owner’s acquiescence, Owner should be estopped from bringing an action for breach of the non-assignment.

### 2) Fast Food v. Builder

Fast Food’s rights against Builder depend on whether the covenant in the original deed created an express easement in favor of Builder.

An easement is an interest in land that allows the holder to use the land for some designated purpose. Easements can arise from proscription, by express writing, or by implication. In this case, the deed from Builder to Owner expressly reserved the right of Builder to use spaces 15 through 20 for his commercial activities on Sundays. Since this easement benefits Builder alone, separate from his interest in land, it is an easement in gross rather than an easement appurtenant. Easements in gross generally do not run with

the land, except when the easement relates to economic or commercial activity. In this case, the use of the parking spaces for selling merchandise and food on Sundays relates to economic activity, and will therefore be valid even as against subsequent owners or interest-holders.

FF can bring an action against Builder for trespass, which is the physical invasion of one's land by another without consent or privilege to do so, but Builder will assert that he has been expressly granted the right to do so in the deed to Owner. Although FF was not a party to this deed, he will be bound by the easement so long as the easement has not been extinguished. Extinguishment of an easement can occur by several different means, including condemnation, proscription, express agreement, estoppel, end of necessity out of which the easement was created, merger of two parcels of land where an easement appurtenant is involved, and abandonment combined with physical actions indicating intent to never use again. None of these circumstances seem present here, and thus FF will be bound by the easement. Binding FF to this easement will not be unjust, as he had notice of Builder's reservation of his rights in the original deed. The deed was recorded, and even if FF did not have actual notice of the easement, he will nonetheless be bound because easements run with the land and FF had record notice of the easement.

### 3) Owner's Changing the Locks

\_\_\_\_\_ Owner's rights against FF are determined by landlord-tenant law. The issue is whether a landlord may engage in self-help and evict a tenant who has breached a duty.

A tenant has a duty to pay rent. If FF actually refused to pay rent (rather than simply stating that it would not pay), FF is in breach of his duty. However, the remedies for a landlord with respect to a tenant in possession that has breached a duty are limited to a) initiating eviction proceedings, and b) allowing the tenant to remain while suing for damages. Self-help is strictly prohibited. By changing the locks, landlord has evicted FF without engaging in the required formalities of eviction proceedings, and therefore did not have the right to change the locks.

Whether Owner had a right to evict or sue FF for damages isn't clear from the facts of the question. If FF merely stated that he would not pay rent (but was otherwise current with his rental payments and had breached no other duty), Owner's rights as against FF would not have ripened. Owner would be required to wait until an actual breach occurred prior to initiating eviction proceedings or suing for damages. On the other hand, if FF was in actual present breach of his duty to pay rent, Owner would be permitted to seek relief in one of the two ways mentioned above, but never by engaging in self-help by causing the actual eviction of FF.

### 4) Homeowners v. FF

\_\_\_\_\_ A public nuisance is defined as activity by the defendant in the use of his land that

causes interference with the health, safety, or well-being of the public at large. A private individual may only bring action based on a theory of public nuisance if he has suffered some particular injury to his property as a result of defendant's conduct. Since the facts indicate discomfort, but not threats to health or safety, public nuisance doctrine is not likely applicable to the claims of homeowners.

Private nuisance claims can be brought where defendant's activity in connection with the use of his land create a substantial and unreasonable interference with plaintiff's use and enjoyment of his land. Unpleasant odors might create a close factual case as to whether the interference with the use of homeowners' land was "substantial" enough, especially because they only emanated from FF on warm days when FF was particularly busy; that question would be for the trier of fact. While it seems pretty questionable that the interference was substantial enough, assuming for the purposes of this question that it is, homeowners would also be required to show that the interference with their land was unreasonable.

That inquiry involves weighing the utility of FF's conduct, as well as considering the general neighborhood conditions. Another factor the court would consider is FF's compliance with the local health ordinances, although that evidence would not be conclusive. A final factor the court would consider is FF's investment in the property, which in this case seems substantial. In total, this presents a close case. The utility of a restaurant located close to a residential neighborhood is high. FF's conduct has been approved by local health codes, and only occasionally interferes with homeowners' use of their land. FF has invested in the restaurant by obtaining state of the art equipment, a factor that also indicates that this cooking cannot be performed in any less annoying or interfering manner. However, if the court were to determine that the hardships balanced in favor of the homeowners, they could obtain (under the strict minority view) an injunction against FF's cooking conduct that created the odor, and would further be entitled to damages for the interference with their use and enjoyment of their land. But given that this is a close call, and the high utility of FF's conduct to the residential community, homeowners would likely be required to compensate FF for the expense of relocating their operations.

## Answer B to Question 1

1)

### Assignment

Lease is valid. Under the Statute of Frauds, a contract such as a lease, that conveys an interest in land for a period longer than a year must be in writing and signed by the person to be charged. Therefore, in order for O to enforce the lease provisions against L, the lease between O and L must have been in writing and signed by L. We know that L and O entered into a 30-year lease. Therefore the SOF applies. Further, we know that the lease was in writing. However, it is unclear if the written lease was signed by L. If the lease is signed by L then the written terms of the lease are enforceable against L.

Assignment is valid. As a general matter, a lease is assignable unless the lease agreement specifically states that the lease cannot be assigned. Courts do not favor complete limitations on assignments so these provisions are interpreted narrowly. In this case, the term is not a complete limitation on assignment. The lease term permits assignment with the prior written consent of the owner. In this case, the limitation is in the written lease and allows for some flexibility. Therefore, upon reviewing the lease in an action between L and O, the limitation is [sic] in the written lease will be enforced by the court.

Sublease v. Assignment - An assignment occurs where a tenant assigns his rights and obligations to a subtenant for the entire term of the lease. A sublease occurs where the tenant transfers his rights and obligations to a subtenant for a portion of the term of the lease. The important difference between the two types of agreement is that the T has remaining rights to the property when an [sic] sublease occurs and does not have remaining rights when an assignment occurs. In this case, T entered into a lease agreement with FF for a period of 10 years. T had only occupied the property for 5 of the 30 years of the lease term. Therefore after the 10 years given to FF is [sic] completed, T will still have the rights under the lease for 15 more years. Therefore, T entered into a sublease with FF.

The lease agreement specifically stated that an assignment of the lease is prohibited without the consent of the landlord. However, the lease was silent as to subleases. The lease agreement in this matter involved commercial vendors likely with business experience. In such cases, the court would be unlikely to imply that the prohibition against assignments prohibited subletting. Therefore, because the agreement between L and FF is a sublease (as discussed above) the prohibition does not apply and L is not in breach of the lease agreement.

Estoppel - However, an L can be found to have approved an assignment/sublease where the owner accepts rent from the subtenant without objection. This is true even where the lease requires that the lease is in writing. In this case, the L accepted rent from



FF. Therefore, L is estopped from alleging breach of the assignment provision by L. Essentially, by taking the rent, L approved the sublease.

### **Trespass**

In order to bring an action for trespass, the landowner of the person with exclusive right to the land brings an action against a person who without permission physically invades the land. In this case, FF will assert that B is invading the land by erecting the Sunday business on the property. However, a landholder cannot bring an action for trespass where the alleged trespasser has a right to use the land under an easement. Therefore, in this case, if B has a right to use the land, FF cannot bring an action for trespass.

Express Easement - In this case, B and O entered into an express easement as part of the deed when B sold the property to O. An express easement occurs where the owners of the benefited land and the owners of the burdened land expressly agree in writing giving a property interest in the other. In this case, the deed expressly conveyed the right to use parking spaces 15-20 for a once a week shop. This is an express easement because it was recorded in the deed.

Easement in Gross/Easement Appurtenant - An easement in gross occurs where a person grants an easement to another landowner that is specific to the person and not specific to the land of that person. An easement appurtenant is an easement that is granted by the owner of one parcel of land to another land owner that specifically relates to the land. In this case, the property right owned by B and held by deed is an easement in gross. Generally, an easement in gross is not transferable by the holder. However, the easement burden will transfer.

Notice - An express easement is enforceable against future owners when it is properly recorded. In this case, O leased the land to L. L's lease included the right to spaces 1-20. L occupied the property for 5 years. Presumably, B operated his shop on 15-20 during this time period. Therefore, L had notice of the operation. L then sublet the property to FF. Apparently, FF took the lease without notice of the easement. However, because the easement is recorded, FF cannot sue for trespass.

### **Change the Locks**

Duty to pay rent - When a sublease occurs, the original T remains obligated to pay the rent unless there is a written agreement with L stating otherwise. In this case, L remained obligated to pay rent to O even though there was a valid sublease. As a result of the sublease, FF was also liable to pay rent to O. In this case, FF refused to pay rent to O.

Constructive Eviction - Constructive eviction occurs where a (a) the tenant notifies the landlord of a condition on the property that constitutes a substantial interference with

tenants' use and enjoyment of the property, (b) the landlord does not fix the problem after notice, and (c) the tenant leaves the premises. A constructive eviction eliminates a tenant's obligation to pay rent. In this case, FF was not subject to a constructive eviction. FF did notified [sic] B of the problem; there was no indication that he notified either O or L. Second, FF did not leave the premises. Therefore, constructive eviction did not release FF from its obligation to pay rent.

Self-Help Eviction - A L cannot evict a T through self-help eviction. Self-help eviction occurs where the L takes action to limit the T's ability to access or use the property without going through the judicial process. In this case, FF was subject to eviction for failure to pay rent. O changed the locks and evicted the tenant without going through the legal process. O did not have the right to change the locks without going through the judicial process.

## **Nuisance**

A nuisance occurs where a person/entity ("offender") uses their land in such a manner that unreasonably interferes with another landowner's ("injured") quiet enjoyment of their land. A nuisance is different from a trespass. A trespass involves the physical invasion of the property: a nuisance involves no invasion. There are two types of nuisance: Private and Public. A private nuisance is where the activities of the offender's use interferes with one or a small number of injured's specific use of their land. A public nuisance occurs where the offender's activities unreasonably interferes with the property rights of the general public. In order for a person to recover damages for a public nuisance, the injured must show actual damages. In this case, the homeowner's [sic] are complaining of a private nuisance because they are complaining about an injury that is occurring to a [sic] identifiable group of individuals. While the alleged conduct effects [sic] "many of the homeowners" the result is a private nuisance because it does not effect [sic] the public at large.

In order to state a claim for nuisance the injured must make two showings: (a) that the conduct of the offender interferes with some property right, and (b) that the conduct is unreasonable. An interference occurs where the offender uses their property in a manner that is an annoyance and would be considered offensive or burdensome to a reasonable person. In this case, the nuisance complained of is that on warm days offensive cooking odors are emitted from the FF business and those odors cause discomfort to many of the homeowners in the adjacent neighborhood. A nuisance will not be found if the injured is hypersensitive. In this case, we know that many of the homeowners are effected [sic]. Because there is a large group that find the conduct offensive, the injured in this case is not hypersensitive. Further, in order to determine whether or not this conduct constitutes an interference, it would be important to know how many "warm" days there are in a given year. If there are only a few, then this is not likely to be a nuisance. However, if there are more than a few days in which the homeowners are subjected to the offensive smell, it is likely that a court would find that a reasonable person would be offended by the smell of unpleasant odors involved in this case.

However, even where the offender's conduct is found to interfere with the property right of the injured, the court must determine if the interference is unreasonable. Unreasonableness is determined by balancing the hardships - balancing the interests and needs of the homeowners against the interests in having the business continue operating. During this process, the court will look at many factors including: whether the homeowners purchased their land at a discount because of its near location to the shopping center (coming to the nuisance), the offender's right to use his property as he wishes, the value of the business to the community including the number of employees, whether the nuisance can be abated by modifications of the offender's business, the length of time the offender has been in business, the possibility of using the property for some other purpose, the offender's investment in the business, etc.

In this case, certain factors indicate that the use by FF will be considered unreasonable. The offender has only been in business for a short period of time. It is unclear from the facts whether HO purchased at a discount based on nearness to the shopping center, but because the business is new the court is unlikely to find that HO came to the nuisance.

However, other factors indicate that the use by FF will not be considered unreasonable: FF has a right to use his property as he sees fit; FF has a right to use the shopping center property for a restaurant. Further, FF has put considerable investment into the operation as a FF establishment by purchasing top of the line equipment. This is not an unusual use for such a property. Further, it does not appear that the business could be abated. We know that FF is complying with all health ordinances and that the business is operated using the best equipment.

While the facts of this case will present a close call, the court is unlikely to find that there is a nuisance that should be abated. This is particularly true if there are a few number of warm days. The interest in allow [sic] FF to operate its business outweighs the interest of the homeowners for the reasons discussed above. As such, the court will not grant an injunction. However, if the court finds that there is some level of nuisance, the court may require FF to pay some measure of damages to HO to compensate them for their injuries arising from their nuisance.

## Question 2

Rita and Fred wanted to form a corporation to be named "Rita's Kitchen, Inc." (RKI) for the purpose of opening a restaurant. They contacted 75 friends who agreed individually to become investors in RKI. Five of these investors also agreed to serve on the RKI Board of Directors with Rita and Fred.

Rita and Fred entered into a five-year lease with Landlord for restaurant space, naming "Rita's Kitchen, Inc., a corporation in formation" as the tenant. They signed the lease as "President" and "Secretary," respectively.

Rita and Fred retained Art as their attorney to form the corporation. They told Art that 75 of their friends had committed to invest and become shareholders of RKI. Irv was a duly appointed representative of the 75 investors. Rita, Fred and Irv met with Art, and they agreed that Art would represent Rita, Fred, and all the investors. After extensive discussions with Rita, Fred, and Irv about the operation of the proposed business, Art agreed to prepare the necessary documentation to incorporate RKI.

Later, outside of Irv's presence, Rita and Fred asked Art to draft a shareholder agreement that would specifically designate Rita and Fred as permanent directors and officers of RKI and set Rita and Fred's annual salaries at 12.5% of the corporate earnings. Without further discussion, Art properly formed the corporation. He then prepared the shareholder agreement, including the terms that Rita and Fred had requested.

The 75 investors each purchased their shares of stock and signed the shareholder agreement. RKI operated for one year but failed to make a profit. RKI ceased operations and currently owes three months of back rent under the lease.

1. Can Landlord recover the unpaid rent from Rita and Fred individually? Discuss.
2. Is the shareholder agreement valid? Discuss.
3. What ethical violations, if any, has Art committed? Discuss, including distinctions, if any, between the ABA Model Rules and California authorities.

Do not discuss federal and state securities laws.

## Answer A to Question 2

2)

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

### Liability of Promoters on Pre-Incorporation Contracts

Until such time as a corporation complies with all formalities of incorporation and files its articles of incorporation, it does not have a separate legal existence, and cannot enter into contractual obligations such as a lease. Prior to incorporation, it is typical for the corporation's promoters and/or founders to enter into contracts on its behalf. Here, Rita and Fred entered into the lease with the Landlord on behalf of Rita's Kitchen, Inc. ("RKI"), which had not yet been formed. Under the law, a promoter remains personally liable on a pre-incorporation contract unless there has been a subsequent novation (ie., all parties agree to substitute the corporation for the promoters as the party liable on the contract whereby the promoters are thereafter relieved of further personal liability) or unless the contract is explicit in providing that the promoter has no personal liability on the contract.

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

### Indemnification from Corporation

Note also that it is not clear where RKI has ever ratified the lease. If no corporate action was taken to ratify the lease, then the corporation would not be liable thereunder, unless it silently took the benefits of the lease. Here, if RKI did not ratify the lease, it could still be held liable because it took the benefit of the lease without objection.

Note that although Fred and Rita would be held liable for the unpaid rent on the lease, they would have a claim for indemnification against RKI for any amounts that they had to pay personally to the landlord. They will not be able to recover, however, if the corporation does not have sufficient funds to pay.

2. Is the shareholders agreement valid?

As a general matter, shareholders of a privately held corporation such as RKI can and often do enter into shareholders agreements dealing with their rights and obligations as shareholders. These types of agreements commonly provide for matters such as transfer restrictions, rights of first refusal, put and call rights, "tags and drags", preemption rights and registration rights in the event that the corporation becomes public in the future.

Shareholders agreements can also provide shareholders with certain veto rights regarding the overall management of the company. In the context of a closely held private corporation, shareholders can also enter into a shareholders agreement whereby they become the directors of the corporation by agreement, thus doing away with the need to have a separate board of directors. In such situations, the shareholders step into the shoes of the directors and owe each other and the corporation duties as fiduciaries.

It appears that the shareholders agreement in question is problematic for two main reasons. First, it prohibits shareholders from exercising their rights as shareholders to be able to elect and fire directors. Secondly, it prohibits the directors from being able to exercise their responsibility for setting their compensation and the compensation of officers in accordance with principles of prudence and good faith.

#### Rights of Shareholders to Elect and Remove Directors

Shareholders have the right to elect and fire directors, both with and without cause. An agreement that prohibits shareholders from being able to exercise these powers would be contrary to public policy and likely unenforceable. At the very best, shareholders must have the authority to fire directors for cause (ie, breach of duty of care, duty of loyalty, etc.). To the extent that the shareholders agreement prohibits shareholders for exercising their powers as shareholders by giving Fred and Rita permanent directorships, it is invalid. While shareholders can agree as to the election of directors, directors cannot make themselves permanent and unremovable by way of a shareholders agreement.

#### Rights and Duties of Directors

A director is a fiduciary, and obligated at all times to act in the best interests of the corporation. A director has certain powers and obligations granted under the corporation's code and at law.

#### Right to Appoint and Fire Officers

The Board of Directors has the power to appoint and fire officers. The shareholders agreement is problematic because it usurps the authority of the Board to make this determination by making Rita and Fred permanent officers. Officers owe a corporation duties of care and loyalty, and cannot by agreement be made unremovable. At the very least, they must be removable for cause. Therefore, the provision in the shareholders agreement which makes Rita and Fred unremovable as officers is invalid.

#### Duty of Care and Business Judgment Rule

A director owes the corporation the duty to act as a reasonably prudent person in the management of his or her own affairs, in good faith and in the best interests of the corporation. In exercising his or her duty of care, a director can rely on the business judgment rule if he or she acted in a reasonable, informed manner, with due care and diligence, in exercising his or her judgment.

### Duty of Loyalty

A director owes the corporation a duty of loyalty as a fiduciary to act in the best interests of the corporation and to avoid self-dealing to his or her own benefit and/or to the detriment of the corporation.

### Breach of Duty of Care and Loyalty

Under the law, directors cannot, as a general matter, agree in advance as to how they will exercise their powers as directors. Here, the shareholders agreement in essence does just that – it provides that the directors (recall that the Board of Directors is made up of five of the investors, plus Rita and Fred) agree in advance not to fire Rita and Fred as officers. This the directors cannot do and, for this reason also, this provision is invalid.

This provision is also likely in violation of the directors' duty of care, because it is improper to agree to never remove officers, as there may be good reason and justification to remove Rita and Fred at some point in the future. Likewise, directors have the duty and obligation to set their own compensation and officers' compensation in accordance with reasonable, good faith parameters, taking into account the needs of the corporation and ensuring that they do not commit a waste of corporate assets in setting compensation. Agreeing in advance to what Fred and Rita's compensation is going to be - at 12.5% of corporate earnings - may constitute a violation of this duty, because it is unclear whether this figure will or won't be a reasonable and proper amount as the corporation moves forward.

Likewise, making themselves unremovable and giving themselves a fixed salary as a percentage of earnings, regardless of whether it is appropriate in light of the corporation's then financial circumstances, constitutes a breach of Fred and Rita's duty of loyalty to the corporation, as they are clearly putting their personal interests ahead of those of the corporation.

For all of the foregoing reasons, the provisions in the shareholders agreement are invalid.

### 3. What Ethical Violations has Art Committed?

An attorney owes his clients various duties under the applicable rules of professional responsibility. Chief among these is the duty of care, the duty of loyalty and the duty of confidentiality. One of the chief difficulties Art faces is that he has not separately addressed or differentiated between the different clients he represents. He has acted to incorporate RKI, and is arguably counsel to the corporation, whereby he would owe the corporation itself duties of care and loyalty. He is also apparently counsel for Fred and Rita in their personal capacities as incorporators and as officers of the corporation. Finally, he has acted as counsel for the investors in drafting the shareholders agreement. Art's main ethical violation stems from failing to differentiate between the potential and actual conflicting interests of his various clients and failing to advise them to obtain separate counsel as appropriate.

### Duty of Care/Competent Representation

Art clearly acted as counsel for the investors by meeting with Irv and representing the investors' interest in drafting the shareholders agreement. In so doing, he breached his duty of competence to exercise the skill, knowledge and diligence that would be expected of an attorney practicing in his community. As discussed above, the shareholders agreements contain provisions that are not in compliance with applicable corporate law and corporate governance principles. Art should not have drafted an agreement containing provisions that are invalid and, in so doing, likely committed malpractice. Likewise, in his role as counsel for Rita and Fred, he should have advised them that the provisions that they sought would not be enforceable, and breached his duty to them in this regard also.

### Duty of Loyalty

An attorney is obligated to act in the best interests of his client and cannot take on representation that will result in him not being able to properly represent a client on account of conflicting duties and obligations owed to other clients (for example, where one client's interests are adverse to another's). If an attorney is of the view that he can competently represent all of his clients, he is required to disclose to all that he is representing everyone's interests and to seek the written consent of each client to such joint representation.

Here, Art failed to obtain the written, informed consent all parties to his joint representation of each of them and, in so doing, breached his ethical obligations. Moreover, he failed to seek further consent when it became apparent that Fred and Rita's personal interests as officers (ie, to be permanently appointed and to obtain a guaranteed percentage of corporate earnings) came into conflict with the investors' interests as shareholders in maximizing the return on their investment and fully exercising their rights as shareholders. When it became apparent to Art that Fred and Rita's interests were different than those of the investors (ie, when Rita and Fred spoke to him outside of Irv's presence), he should have alerted them to the fact that he was representing the investors and the corporation and that he could not separately seek to represent their interests. He should have advised Fred and Rita to seek separate, independent counsel to negotiate their compensation and tenure packages with the corporation. Art also failed to alert Irv, as he was arguably required to do, of the validity and desirability (or lack thereof) that Rita and Art had requested. Art therefore failed to fulfill his ethical responsibilities to all clients involved.



## Answer B to Question 2

1. Can Landlord recover unpaid rent from Rita (R) and Fred (F)?

### Promoter Liability

A promoter is a person who works prior to the incorporation of an entity to secure contracts and services for the to-be-formed entity. A promoter has a fiduciary duty to the other promoters and to the entity to be formed. A promoter can enter agreements on behalf of the to-be-formed entity but can be subject to liability on those agreements.

### Adoption and Novation

A corporation does not become liable on a contract entered by a promoter until it adopts the contract. A contract can be adopted expressly by the corporation agreeing to be bound or impliedly by the corp. choosing to accept the benefit of the promoter's contract. Here, there is nothing to indicate that RKI expressly adopted the terms of the lease entered into by their promoters - R and F. However, RKI did accept the benefit of the lease by using the space for its restaurant. Thus, RKI will be bound on the lease.

### R & F are also bound

The corporation's act of adopting a contract does not absolve the promoters from liability unless there is an express provision in the contract or a novation in which the corp. and the other party agree that the promoter will not be liable. Here, there is nothing on the lease to indicate R and F would not be liable. It only says they signed as Pres. and Sec. of RKI, "a corporation in formation". Further, there is no evidence of an agreement or novation after RKI was formed absolving them of their liability. Thus, there is no novation and R and F will still be individually liable on the lease with Landlord for the unpaid rent because they were promoters who were not relieved of liability.

2. Is the Shareholder Agreement Valid?

To have a valid shareholder agreement, there needs to be approval from the shareholders. Here, we are told that each of the 75 investors signed the shareholder agreement. Thus, the shareholder agreement is presumptively valid but the terms of the agreement must be examined.

### Election of Directors

Directors of a corporation are elected by shareholders at the corporation's annual meeting. Here, the shareholder agreement specifically designated R and F as permanent directors and officers of RKI. By having this provision in the shareholder agreement, the agreement purports to strip the shareholders of their ability to elect directors annually. In this regard, it is invalid.

### Removal of Directors

Along with the ability to elect directors, shareholders also have the ability to remove directors with or without cause. The provision of this shareholder agreement indicates that

R and F would be permanent directors. Because shareholders have the ability to remove a director, no director can be permanent. Thus, to the extent the shareholder agreement purports to make R & F permanent directors, it violates the right of shareholders to remove a director and is invalid.

#### Shareholders Can't Have a Predetermined Agreement of How They Will Vote if Elected Officers [sic]

Shareholders may have agreements for how they will vote on shareholder elections but can't agree to how they will vote as directors. To the extent this shareholder agreement commits R and F along with the 5 other investors who agreed to serve on the RKI board to elect R and F as officers and to set R and F's annual salaries at 12.5% of corporate earnings, it takes away their ability to act in their fiduciary capacity as duly elected directors and is invalid.

#### Board Decides Its Own Salaries

A board of directors is charged with the management of the company and makes decisions for the company on things such as their salaries. Here, the SH agreements purports to set R and F's salaries. Because the board, and not the shareholders, have the power to manage the company, the shareholders cannot set director and officer compensation. To the extent the SH agreement tries to do this, it is beyond the shareholder's powers and invalid.

#### Board Elects Officers

Another power inherent in the board of directors is the power to elect officers. Shareholders may have the power to elect directors but they can't elect officers. Thus, to the extent that shareholder agreement elects R and F as permanent officers of RKI, it is invalid because the directors, not the shareholders, are responsible for electing officers.

Thus, while the shareholder agreement as signed by all shareholders is presumptively valid, it is invalid to the extent it improperly elects directors and officers, it does not provide for removal of directors, it binds shareholders to how they will vote as directors, and it improperly sets director and officer compensation.

### 3. Art's Ethical Violations

#### Who Does Art Represent?

The first issue in deciding whether Art (A) committed any ethical violations is to determine who Art represents. Here, Art was originally approached by R and F to form the corporation. Also, A met with R and F as well as Irv (I) who was the duly appointed representative of the 75 investors. After meeting with R, F, and I, A agreed to prepare the necessary documentation to incorporate RKI. As a result, A potentially represents R & F, Irv and two other investors, and RKI, the corporation he helped form.

#### Duty of Loyalty

An attorney owes his client the duty to exercise his professional judgment solely for

the client's interests. If the interest of the attorney, another client or a third person may materially limit the attorney's representation or becomes adverse to the client's interests there is an actual or potential conflict of interest. When an attorney is presented with a conflict, he can only accept or continue the representation if he reasonably believes he can effectively represent all parties, he informs each party about the potential conflict, and the client consents to the representation in writing.

Without consent, an attorney should refuse to take the representation or withdraw from the representation.

#### A representing R & F and Irv and the Investors

Here, A has a potential conflict by representing both R & F as well as Irv and the investors. While A can say that R, F, and I all had the same interests and wanted to incorporate RKL, because he was representing multiple interests, he needed to be aware of potential or emerging conflicts.

When R & F approached A to draft the shareholder agreement without Irv being involved, A should have been suspicious. When he learned that they wanted the agreement to designate them as officers and directors and set their salaries, their interests were potentially conflicting with I and the investors. At that point, A should have disclosed the proposal to Irv and obtained written consent from I to draft the agreement as requested by R and F. It is also unlikely that a reasonable attorney would believe he could adequately represent both R and F and the investors.

In any event, A should have sought written consent from Irv. Because he did not, he violated his duty of loyalty.

#### Duty of Confidentiality

A lawyer also has a duty not to reveal anything related to a client's representation without consent. Thus, A can argue that he couldn't tell Irv about his conversation with R & F outside of his presence without violating his duty of confidentiality to R & F. If this is the case, A should have withdrawn from his representation of Irv and the investors and advised them to seek independent counsel re: the shareholder agreement.

#### Duty of Competence

A lawyer owes his client the duty to use the legal skill, thoroughness, preparation, and knowledge necessary and reasonable for the representation. Here, A had a duty to competently draft the shareholder agreement. For all the problems pointed out above about the shareholder agreement, A violated this duty.

#### Duty to Communicate

An attorney owes his client a duty to communicate about the matters of the case. Here, A had a duty to tell Irv about the provisions he was drafting in the agreement. Again, A would claim he could not communicate this to I without breaking his duty of confidentiality to R & F. As mentioned above, this again meant A should have withdrawn from the

representation of at least Irv and possibly R & F and urged the parties to seek independent counsel.

#### Art's Defense

Art will argue that any potential problems were avoided because the investors signed the agreement with the term R & F requested. However, the ends do not justify the means. A had ethical obligations to his client during the representation that he breached. Their later approval of the agreement does not equal informed consent to his breaches throughout.

### Question 3

Dan has been in and out of mental institutions most of his life. While working in a grocery store stocking shelves, he got into an argument with Vic, a customer who complained that Dan was blocking the aisle. When Dan swore at Vic and threatened to kick him out of the store, Vic told Dan that he was crazy and should be locked up. Dan exploded in anger, shouted he would kill Vic, and struck Vic with his fist, knocking Vic down. As Vic fell, he hit his head on the tile floor, suffered a skull fracture, and died.

Dan was charged with murder. He pleaded not guilty and not guilty by reason of insanity. At the ensuing jury trial, Dan took the stand and testified that he had been provoked to violence by Vic's crude remarks and could not stop himself from striking Vic. Several witnesses, including a psychiatrist, testified about Dan's history of mental illness and his continued erratic behavior despite treatment.

1. Can the jury properly find Dan guilty of first degree murder? Discuss.
2. Can the jury properly find Dan guilty of second degree murder? Discuss.
3. Can the jury properly find Dan guilty of voluntary manslaughter? Discuss.
4. Can the jury properly find Dan not guilty by reason of insanity? Discuss.

### Answer A to Question 3

3)

#### 1. Guilty of First Degree Murder

First degree murder is a specific intent crime typically statutorily provided for. Typically, first degree murder consists of: (1) intentional killing of a human, (2) with time to reflect upon that killing, and (3) doing so in a cool and dispassionate manner.

Here, while there appears to be no statute that provides for first degree murder, it is unlikely that Dan would be guilty of first degree murder just the same.

#### Intentional killing

An intentional killing is one done with specific intent to take the life of another.

Here, the prosecutor will argue that Dan expressed a specific intent to kill Vic when he yelled he would kill Vic, which was accompanied by a striking of Vic with Dan's fist.

Therefore, it is likely given Dan's express words of intent, the prosecutor will meet her burden of proving a killing by intent.

#### Time to Reflect Upon the Killing

First degree murder requires time to reflect upon the killing. This is commonly known as premeditation. Premeditation, not in keeping with the lay person's understanding of it, however, requires merely a moment's reflection upon the killing.

Here, the prosecutor will argue that Dan reflected upon the killing of Vic when he took the time to say to Vic, "I'm going to kill you." However, Dan will argue that there was no time to reflect upon the killing of Vic because he "exploded" and then hit Vic. Such an intense anger coupled with a spontaneous statement "I'm going to kill you" will likely not be construed as sufficient time to reflect.

Therefore, a jury should not properly find this element of the crime established.

#### Cool and dispassionate manner

The defendant must have committed the killing in a cool and dispassionate manner. That means that the defendant killed another person in a calm and calculated manner without passion.

Here, the prosecutor will argue that Dan's action of striking Vic with his fist without an expression of sadness or fright may amount to cool and dispassionate. However, such an argument is tenuous.

Dan will successfully show that his actions were the result of an explosion, regardless of the reasonableness of those actions. Dan "exploded." This could hardly be construed as

“cool.”

Therefore, a jury should not properly find this element of first degree murder established.

In sum, a jury would not properly find Dan guilty of first degree murder.

### Defenses

Even if a jury could find Dan guilty of first degree murder, such an offense will be subject to the defense of insanity (discussed below).

## 2. Second Degree Murder

Second degree murder or common law murder is the intentional killing of a person with malice aforethought. Malicious intent will be implied by: (1) the intent to kill a person, (2) the intent to inflict a substantial bodily harm on someone, (3) an awareness of an unjustifiably high risk to human life, and (4) the intent to commit a felony.

### Intent to kill a person

As discussed earlier, Dan could be found to have intentionally killed Vic as evidenced by his expressed words “I’m going to kill you.” While words alone are sufficient to manifest intent, this is a subjective standard and a jury will be allowed to look to the totality of the circumstances. The jury will be able to consider that Vic told Dan that he was crazy and should be locked up, which aroused such anger that would negate a malicious intent.

However, a jury could find that Dan intended to kill Vic by using words of that intent, coupled with an action that indeed killed Vic.

Therefore, Dan could properly be found guilty of second degree murder, malicious intent implied by the intent to kill Vic.

### Intent to Inflict Substantial Bodily Harm

If Dan is not found to have the intent to kill, the prosecutor will argue that he did manifest the intent to inflict substantial bodily harm on Vic.

Here, Dan used his fist to strike Vic. The striking of another person could inflict substantial injury on another, depending upon where the person made the strike. Dan used his fist to strike Vic on the head, causing a fracture to his skull. The prosecutor will argue that Dan must have intended substantial bodily harm because striking a person in the head is a place of extreme vulnerability.

On the other hand, Dan will argue that people get into fistfights all the time, whether it be on the streets or boxing. He will argue that fistfights are a common way for people to work out their arguments and no substantial injury is intended. This argument has little merit given the high susceptibility to injury from striking someone in the head.

Therefore, a jury could properly find that Dan intended to inflict substantial bodily harm.

#### Awareness of an Unjustifiably High Risk to Human Life

Again, the prosecutor will argue that even if Dan did not intend to inflict death or substantial bodily harm, surely Dan was aware of the high risk of human life.

Here, the prosecutor will argue that Dan was aware of this unjustifiably high risk because striking another on the head with the force of fracturing his skull is a high risk of which Dan could be aware.

Therefore, a jury could properly find that Dan had an awareness of an unjustifiably high risk to human life.

#### Felony Murder

There is no evidence that Dan was intending to commit a felony, the intent from which can be implied to the killing of Vic.

Therefore, there would be no second degree murder based on an intent to commit a felony.

In sum, a jury could properly find Dan guilty of second degree murder.

### 3. Voluntary Manslaughter

An intentional killing will be reduced to voluntary manslaughter by a provocation that arouses a killing in the heat of passion. Voluntary manslaughter consists of: (1) a provocation that would arouse intense passion in the mind of an ordinary person, (2) the defendant in fact was provoked, (3) no reasonable time for the defendant to cool between the provocation and the killing, and (4) defendant in fact did not cool [sic].

#### Sufficient provocation

Sufficient provocation to commit a killing is one that would arouse intense passion in the mind of an ordinary person.

Here, Dan will argue that shouting to someone that they are crazy and should be locked up is sufficiently inciting to induce anger. This is subjectively true where Dan had spent so much time in and out of mental institutions. He will argue that he was highly vulnerable to such insults.

On the other hand, the prosecutor will rightfully point out that this is a reasonable person standard that does not take into consideration the surrounding circumstances. A reasonable person would not be incited to kill simply by an insult of insanity.

Based on this argument, the prosecutor will successfully refute Dan's attempt to reduce his killing to voluntary manslaughter.



That being said, the other elements appear to exist.

Dan in fact provoked.

Dan was in fact provoked when he “exploded” and simultaneously killed Vic.

No reasonable time to cool between provocation and killing

Dan immediately struck Vic on the head after the insult. There was no reasonable time to cool and Dan did not in fact cool [sic].

#### 4. Insanity

In order to be convicted of a crime, the defendant must complete a physical act (actus reus) contemporaneously with the appropriate state of mind (mens rea). Insanity is a defense to all crimes except strict liability because insanity negates the requisite intent necessary to be convicted of murder in all forms.

Insanity is a legal defense that must be set out by applying the requisite elements as opposed to expert testimony of a psychiatrist. There are four theories of insanity a defendant may set forth and will depend upon which theory a jurisdiction adopts. All four theories will be discussed below to determine which, if any, are proper.

##### M’Naughten Test

Insanity under this test is defined as the defendant was unable to understand the wrongfulness of his conduct and lacked the ability to understand the nature and quality of his acts.

Here, Dan testified that the crude remarks were so incitant that he was unable to stop himself. However, the prosecutor will argue that Dan showed his ability to understand the wrongfulness of his conduct because he shouted he would kill Vic. In addition, the mere fact of being unable to stop yourself implies that you indeed know it to be wrong but were unable to control yourself.

Based on this evidence, Dan would not successfully raise a defense under this issue.

##### Irresistible Impulse Test

Under this test, the defendant may prove a defense of insanity if he shows he lacked the capacity for self-control and free will.

Dan will probably be more successful to claim a defense of insanity under this test. As mentioned above, Dan “could not stop himself.” This specifically evidences his inability to control himself. His will was subjugated by the insanity.

Based on this evidence, Dan will likely successfully claim a defense of insanity under this test.

### Durham Test

The Durham Test subscribes to the theory that a defendant will have an insanity defense if his unlawful conduct was the product of a sick mind.

Dan will argue that he has spent much time in and out of mental institutions. Indeed, several witnesses testify as to Dan's history of mental illness. Such a history suggests that his conduct was a product of a sick mental condition rather than the product of his own free will.

Dan will likely succeed in bringing a defense of insanity under the Durham test.

### Model Penal Code Test

Finally, under the test adopted by the Model Penal Code, a defendant's actions may be defended by way of insanity if he was unable to conform his actions to the requirements of the law.

Here, Dan will offer his history of mental illness and continued erratic behavior despite treatment as a way to prove that he lacked the ability to conform himself to the requirements of law, i.e. not to kill. This, however, seems to be a less compelling argument as Dan has been able to conform himself to the requirements of law in other aspects of his life. He was able to work in a grocery store and successfully stock the shelves.

Because Dan appears to have the ability to conform his actions to the requirements of law in all other instances, the prosecutor will likely defeat Dan's claim of an insanity defense.

## Answer B to Question 3

3)

### **1. 1<sup>st</sup> Degree Murder**

Murder is the killing of another human being with malice afterthought. The crime of murder is subdivided into degrees based on the intent of the accused. First degree murder is the most serious of the degrees of murder. A person is guilty of first degree murder if the prosecution can show beyond a reasonable doubt that he killed someone with deliberation and premeditation; or, in jurisdictions that recognize the felony murder rule, if someone was killed as the foreseeable result of his act, or of the act of a coconspirator, during the course of an enumerated felony. This is the felony murder rule.

### **Felony Murder**

Dan will not be found guilty of first degree murder under the felony murder rule because he did not commit one of the underlying felonies. To be guilty under the felony murder rule at common law, the accused must have committed either rape, burglary, robbery, kidnapping, or arson, and the victim must have been killed during the commission of the crime (before the accused had reached a place of safety). The facts indicate that this killing occurred as the result of either no crime, if he was insane, or a battery, because he struck Vic. Battery is not an enumerated felony. Hence Dan cannot be guilty of first degree murder under this theory.

### **Premeditated and Deliberate**

Premeditation requires that decision to kill have arisen when the accused was acting in a cool, composed manner, with sufficient time to reflect upon the killing. Deliberateness requires that the accused had the intent to kill when he engaged in the act that resulted in the death.

The facts indicate that Vic [sic] was stocking shelves before Vic encountered him. There is nothing to indicate that he had any animosity towards Vic prior to the incident, or even knew Vic. The facts indicate instead that Dan punched Vic after he exploded in anger in response to a comment Vic made. Vic's death resulted from a skull fracture caused by his impact with the ground. At no time do the facts indicate that Dan calmly and coolly reflected on killing Vic. In addition, it is not clear that he had the intent to kill Vic, as he only hit him once, an act that does not usually cause death. Although he shouted that he would kill Vic right before he killed him, the jury could likely not find that this shouting alone immediately before throwing the punch was enough. Moreover, it does not evidence a cool dispassionate manner, but instead, evidences the opposite. Therefore, because Dan's actions appear neither premeditated nor deliberate, he will likely not be found guilty of first degree murder.

Dan will also have the defense of insanity, discussed below, and the defense of diminished capacity if the jurisdiction recognizes it. Under diminished capacity, Dan will have to show that a disease of the mind prevented him from forming the intent required, even though it

did not raise to the level of insanity.

## **2. 2<sup>nd</sup> degree murder**

Second degree, at common law, murder is the killing of a human being with malice afterthought. The mens rea of malice is satisfied when the accused intended to kill, intended to cause great bodily injury, showed a reckless disregard for an unjustifiably high risk of death, or killed during the commission of a rape, burglary, robbery, kidnapping, or arson. Because there is no issue as to the cause of Vic's death, the prosecution's issue will be in proving that Dan killed with malice and not in the heat of passion, as discussed in section 3 infra, then it cannot convict him of murder because he will have lacked the intent, and therefore must instead convict him of manslaughter. Again, Dan will also have the defense of insanity, discussed below.

**Intent to kill** - As discussed above, the jury will likely not be able to find that the facts show that Dan formed the intent to kill Vic because the facts indicate that Dan was in a rage when he punched Vic. Although Dan's testimony that he had been provoked to violence does not absolutely show that he lacked the intent to kill, if the provocation would have caused a reasonable person to become enraged, and did cause him to become enraged, and there was not enough time for a reasonable person to calm down, and Dan did not in fact calm down, then the jury will not be able to conclude that he had formed the intent to kill at the time he punched Vic. However, if the jury finds that Dan's passion was not reasonable, or he was not in the heat of passion, it could conclude that he intended to kill Vic because he shouted that he would kill Vic right before he killed him. However, Dan's actions are not consummate with the intent to kill. He only hit Vic once. He did not stomp his head in when he hit the ground or hit Vic with a weapon. Consequently, even if Dan was not in passion, it is likely that the jury would not find he had the intent to kill.

**Intent to cause bodily harm** - As discussed above in the intent to kill, it is likely that the jury would not find that Dan had formed the proper intent to cause bodily injury at the time he hit Vic because of his passion. Because it is the formation of the intent that matters, if Dan did not have the state of mind necessary to formulate the intent to cause substantial bodily injury because he was in the heat of passion as a result of the provocation, he cannot be found guilty under this theory either. However, if the jury does not find that the he [sic] satisfies the requirements for finding heat of passion, then it is likely that they will convict him for murder under this theory of malice. Not only did Dan yell that he intended to kill Vic, but Dan punched Vic, which is an act that presented the likely result of causing serious bodily harm. Thus, unlike above where he did not take an act that was likely to kill, Dan took the requisite act here. Thus, the jury could more reasonably find that he intended to cause great bodily harm when he punched Vic and because Vic died as a result of that action, Dan is guilty of murder.

**Reckless disregard for an unjustifiably high risk to human life** - To convict Dan under this theory, the jury would have to conclude that Dan appreciated the high risk of death caused by his actions, and that he proceeded to engage in reckless conduct in the face of it. As discussed above, if Dan was in the heat of passion, the jury cannot find that he

appreciated the unjustifiably high risk of his actions, and thus cannot convict under this theory. However, if the jury does not find that he acted in the heat of passion, then it would be possible to convict under this theory because Dan should have known that punching Vic could cause him to die, and Dan engaged in the actions anyway.

**Felony murder** - As discussed above, battery is not one of the crimes that satisfies felony murder, so he cannot be found guilty under this theory.

Dan will have the defense of insanity, discussed below.

### **3. Manslaughter**

To find Dan guilty of voluntary manslaughter, the jury will have to find that Vic's provocation would have caused a reasonable person to become enraged, that it did cause Dan to become enraged, that there was not enough time for a reasonable person to calm down between the time the comment caused Dan to be enraged and the time he hit Vic, and that Dan did not in fact calm down during that time.

Although manslaughter is sometimes thought of as a defense, it is not Dan's burden to prove these elements. Instead, the prosecution must show the lack of a heat of passion killing in order to establish the necessary intent to convict Dan of either 1<sup>st</sup> Degree or 2<sup>nd</sup> Degree murder, as discussed above.

**Reasonable person** - The first test is whether a reasonable person would become enraged. The typical instances are when someone finds his spouse in bed with another. Here, there was a simple altercation between Dan and Vic. Vic complained that Dan was blocking the aisle. Dan swore at Vic in response and threatened to kick him out of the store. Vic told Dan that he was crazy. Dan flew into a rage and punched Vic. Vic died. The jury would likely find that these facts do not meet the requirement for a heat of passion killing because a reasonable person does not fly into a rage because someone else tells them [sic] they [sic] are crazy during an altercation that they [sic] escalated. A reasonable person would expect the other party to make a snide comment in response to being sworn at by a store employee who might have been blocking an aisle. If the jury finds that a reasonable person would not have become so enraged as to have punched Vic under the circumstances, then Dan will not be convicted of the lesser crime of manslaughter and will instead likely be convicted of 2<sup>nd</sup> degree murder, as discussed above.

Dan's particular mental issues or state of mind is [sic] irrelevant for this test. This is an objective test; it is based on what the reasonable person would do. Thus it is irrelevant if Dan is particularly sensitive to comments about being crazy; he only gets this defense if the comments would have engendered passion in a reasonable person.

**Dan's passion** - If the jury finds that a reasonable person would have been enraged by Vic's actions, then the next issue is whether Dan did. The facts are pretty clear on this point. They state that Dan exploded in anger, shouted he would kill Vic, and then punched him. This is exemplary of enraged behavior; therefore, the jury will almost certainly find

that Dan was enraged.

**Cooling off time for a reasonable person** - If the jury finds the first two elements are satisfied, they must also find that there was not enough time for a reasonable person to cool off between the provocation and the act. The facts indicate that the entire event occurred in a very short period of time, although it does not specify how long. Had Vic or Dan left the scene of the altercation, or had someone else intervened such that there was a delay between the exchange of words and the punch, then the jury could find that there was time to cool off. However, because the facts do not show any appreciable time lapse, the jury will likely conclude that a reasonable person would not have had time to cool off.

**Dan did not cool off** - Finally, the jury must find that Dan did not cool off. The facts are pretty clear on this as well, since he punched Vic immediately after going into his rage. Thus the jury will likely find this is the case.

Dan will have the defense of insanity here as well, discussed below.

### **Insanity**

All jurisdictions recognize an affirmative defense of insanity, although there are four different theories across the various jurisdictions. Because it is an affirmative defense, the accused has the burden of proving by preponderance of the evidence that he met the test for insanity at the time in question. His sanity at the time of trial is not an issue. The evidence that supports Dan's defense of insanity is that he has been in and out of mental institutions most of his life, that he has erratic behavior, and that he could not stop himself from striking Vic. These facts tend to show that he has a mental disease that affects his ability to conform to the law, which is at the heart of all four of the insanity tests.

**M'Naughten Rule** - Under the M'Naughten Rule, an accused is not guilty by reason of insanity if, because of a disease of the mind, he lacks the capacity to understand the wrongfulness of his acts or cannot appreciate the character of his actions. This is basically a test of whether the defendant's mental disease prevents him from understanding right from wrong. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Dan's testimony explaining the punch, however, was that he could not stop himself from striking Vic. He did not indicate that he did not understand that he was striking Vic, or that striking Vic was wrong. Instead, he struck Vic because he could not control himself. Consequently, if the jurisdiction uses this test, then it cannot find him not guilty by reason of insanity.

**Irresistible Impulse Test** - Under this test, an accused is not guilty by reason of insanity if, because of a disease of the mind, he cannot exercise the self-control to conform his actions to the requirements of the law. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Dan also testified that he could not stop himself from striking Vic; in other words, he struck Vic because he could not control himself. Consequently, if the jurisdiction uses

this test and the jury believes that Dan could not stop himself from striking Vic, and that the reason he could not do so was because of his mental illness, then it should find him not guilty by reason of insanity.

**Durham Rule** - Under the Durham Rule, an accused is not guilty by reason of insanity if the mental disease is the actual cause of the criminal act. In other words, if the act would not have been done “but for” the disease, then he is not guilty. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Consequently, if the jurisdiction uses this test and the jury believes that the reason Dan could not stop himself from striking Vic was because of his disease of the mind, then it should find him not guilty by reason of insanity. However, if it finds that the mental disease was unrelated to the reason he could not stop himself from striking Vic, then it should not find him not guilty by reason of insanity.

**Model Penal Code Test** - Under this test, an accused is not guilty by reason of insanity if, because of a disease of the mind, he is unable to appreciate the criminality of his conduct, or to conform his actions to the requirements of the law. This is basically a blend of the M’Naughten Rule and the irresistible impulse test. As discussed above with regards to the latter, if the jurisdiction uses this test and the jury believes that Dan could not stop himself from striking Vic, it should find him not guilty by reason of insanity.

Therefore, if the jury uses the irresistible impulse test, the Durham rule, or the MPC test, it could properly find Dan not guilty by reason of insanity. If it uses the M’Naughten rule, it could not.

THURSDAY MORNING  
MARCH 1, 2007

# California Bar Examination

Answer all three questions.  
Time allotted: three hours

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

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

principles. Instead, try to demonstrate your proficiency in using and applying them.

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

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

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



## Question 4

In 2001 Tom, a resident of California, executed a valid typewritten and witnessed will. At that time, Tom was married to Wynn. Tom also had two nephews, Norm, and Matt, who were the children of his deceased sister, Sue.

Tom's will made the following dispositions:

Article 1: I leave \$10,000 to my friend Frank.

Article 2: I leave my shares in Beta Corp stock to my friend Frank.

Article 3: I leave \$80,000 to my sister Sue's issue.

Article 4: I leave the residue of my estate to my wife.

The \$10,000 figure in Article 1 was crossed out and \$12,000 was handwritten in Tom's hand above the \$10,000 figure. Next to the \$12,000 Tom had handwritten, "Okay. 2/15/02."

In 2003 Tom and Wynn had a child, Cole.

In 2004, Matt died in a car accident. Matt was survived by his children, Lynn and Kim.

Tom died in 2005. Tom was survived by Wynn, Cole, Norm, Frank, and his grandnieces, Lynn and Kim. At the time of his death, Tom owned, as separate property, \$500,000 in cash. He also had 100 shares of Beta Corp stock, titled in Tom's name, which he had purchased with his earnings while married to Wynn. The Beta stock was valued at \$1.00 per share at the time of Tom's death.

What rights, if any, do Wynn, Cole, Norm, Frank, and his grandnieces Lynn and Kim have in Tom's estate? Discuss.

Answer according to California law.

## Answer A to Question 4

4)

### 1. Separate v. Community Property

The distributions amongst Tom's heirs is [sic] going to be governed, at least in part, by the classification of his property at death as either being his separate or community property.

#### a. The Beta Stock

The 100 shares of Beta stock was [sic] titled in Tom's name alone, and typically creates a presumption that the stock was his separate property. However, the stock was purchased with his earnings while married to Wynn, which are [sic] community property. The 100 shares of Beta stock, therefore, are community property. Because Tom only has the power to devise his  $\frac{1}{2}$  portion of the community property, he can only devise  $\frac{1}{2}$  of the Beta stock shares, or 50 shares, to Frank.

#### b. The Cash

The \$500,000 owned by Tom at the time of his death is labeled as his separate property in this fact pattern. There are no facts present that would indicate that the \$500,000 should be considered community property. Therefore, Tom is free to devise his separate property as he sees fit.

### 2. Frank

The will, on its face as noted in 2002, leaves Frank \$12,000 and all 100 shares of the Beta stock. As noted above, the 100 shares of Beta stock are community property and because Tom cannot give away Wynn's  $\frac{1}{2}$  interest in community property, the most he can give away is 50 shares of the stock. And, although Tom indicated a desire to devise all 100 shares, something he cannot do, the devise will be treated as if Tom devised only his  $\frac{1}{2}$  community property interest in the shares. Therefore, Frank will receive 50 shares of Beta stock. Note that although the Beta stock has a cash value, because it is a specific bequest, i.e. it identifies specific property, Frank will receive the actual shares and not their cash equivalent.

Frank's will in its original form provided for a \$10,000 cash bequest to Frank, which he later attempted to increase in 2002. Typically, a testator can partially revoke even just a portion of a will. One of the methods by which a testator may accomplish this is by obliteration, or crossing out the portion of the will that he intends to revoke. However, a testator cannot increase a provision in a will without adhering to the required formalities, i.e., the signature of acknowledgment of the testator's signature in the presence of two uninterested witnesses at the same time, who also sign the will. And, although California recognizes a holographic will, which does not require a witness and requires that a testator sign the will and that the material terms be written in the testator's own handwriting, this attempted

increase will not qualify as a holographic will as there is no signature by Tom to correspond with the 2002 change. The increase is therefore invalid.

However, in this situation the doctrine of dependent relevant revocation (DRR) is applicable. DRR applies where a testator revokes his will or a provision of his will with the belief, although mistaken, that a subsequent bequest is valid. Here, it is clear that Tom believed that the increase from \$10,000 to \$12,000 was valid and there is nothing to indicate that Tom had any intent of revoking the \$10,000 bequest. In applying DRR, courts should look to the true intent of the testator and, in this case, Frank should receive \$10,000 from Tom's estate, in addition to the 50 shares mentioned above.

### **3. Sue's issue**

The disposition of Tom's \$80,000 bequest is determined based on the representation of those issue. Sue had two children, Norm and Matt. Prior to Tom's passing in 2005, Matt died leaving two children, Lynn and Kim. Norm, Lynn and Kim are all Sue's issue. However, the distribution of the \$80,000 will not simply be split between the three of them. Norm, Lynn, and Kim are issues of different degree. When confronted with issues of different degree, the bequest must be distributed by representation and the representation is determined at the closest to the decedent that qualifies for the bequest. Here, Norm and Matt are closer in degree than Lynn and Kim, and Norm is still alive; therefore, the \$80,000 bequest must be distributed at that level. Therefore 50%, or \$40,000, will be distributed to Norm. The remaining 50%, or \$40,000, will be split between Lynn and Kim, based on Matt's representation, and they each will therefore receive 25% of the total, or \$20,000.

### **4. Cole**

Cole is what is referred to as a "pretermitted heir", which means he was born after Tom executed all of his testamentary documents. The rule generally is that, unless there is an unequivocal expression that the testator intended to disinherit the child, the child is entitled to receive the share that he would have received had his father died intestate (without a will). If Tom had died intestate then Cole would have been entitled to  $\frac{1}{3}$  of Tom's separate property. However, there is an exception to the general rule for pretermitted heirs where the will leaves substantially all of the estate to his spouse who is the child's parent. Here, Tom left the residue of his estate to Wynn, his wife and the mother of Cole. Because, as discussed below, Wynn is entitled to \$410,000 of his separate property, Cole is not entitled to any share as a pretermitted heir.

### **5. Wynn**

Because Wynn was Tom's spouse at the time of his death, she is entitled to  $\frac{1}{2}$  of all community property, and Tom cannot devise her half, unless he put her to a "Widow's election" and she consented. In this case there are only two pieces of property, the 100 Beta shares and the \$500,000. As discussed above, the 100 Beta shares were community property and Tom only had the power to devise his  $\frac{1}{2}$  interest. Therefore,  $\frac{1}{2}$  of the 100

shares that Tom attempted to devise to Frank are actually Wynn's and Tom could not devise that half to Frank. Wynn is therefore entitled to 50 shares of the Beta stock.

As for the \$500,000, it is Tom's separate property and he can devise it as he wishes. The residuary clause of Tom's will provides that the residue of his estate passes to Wynn. In this case, the residue of his estate is \$410,000 ( $\$500,000 - \$80,000 - \$10,000$ ), and it all goes to Wynn.

#### In Summary

Frank: \$10,000 + 50 shares of Beta stock

Norm: \$40,000

Lynn: \$20,000

Kim: \$20,000

Wynn: \$410,000 + 50 shares of Beta stock

Cole: \$0

## Answer B to Question 4

### Wynn

The first issue with Wynn is to determine the nature of the Beta Corp's stock.

California is a community property state; thus it is necessary to decide the nature of the assets of the parties. Community property (CP) is any property obtained by either of the spouses during marriage by their labor. Separate property (SP) is any property owned by a spouse before marriage, acquired after permanent separation or by gift, devise, or bequest.

The nature or characterization of the property depends on the source of the property, acts by the parties that would change its characterization and any statutory presumptions.

Here, the Beta stock was acquired by Tom using his earnings while married to Wynn. Since, earnings gained during the marriage come from the spouse labor and earnings during marriage are presumptively CP. Since, the earnings are CP anything purchased using these funds would also be CP; hence, the stocks purchased by Tom are CP. Since the stocks are CP, and there was no action by either party showing that they were not supposed to stay that way, the stocks would be  $\frac{1}{2}$  Tom's and  $\frac{1}{2}$  Wynn's.

Thus, Wynn would be entitled to  $\frac{1}{2}$  of the Beta Corp stock, which is 50 shares.

### Residuary

The residuary is the remainder of the property of a testator that has not otherwise been disposed of in the will. Under Tom's will Wynn is entitled to the residuary, which, if all the gifts in Tom's will are valid, would be \$410,000 of his separate property cash.

### Cole

Cole was left nothing under the will and will have to claim as a pretermitted child.

### Pretermitted Child

A pretermitted child is one who is born or adopted after all testamentary documents have been executed. If a child is pretermitted they may collect a share equal to that they would have received had there been no will, i.e. intestacy. However, a pretermitted child may be prevented from claiming a share if they were intentionally left out of the will as demonstrated on the face of the document, they were provided for outside of the testamentary documents, or the bulk of the testator's estate was left to the other parent of the pretermitted child.

Here, Cole would be considered pretermitted as Tom executed his will in 2001, and Cole

was not born until 2003. Since there is no mention of other documents it is presumed that the will was the last testamentary document. Thus, Cole is pretermitted because it was executed before he was born, meaning Cole could be entitled to an intestate share of Tom's SP.

However, it is necessary to look at whether the exceptions apply. There is no evidence that Tom intended to intentionally leave out or disinherit any future born children. Thus, Cole is not blocked under this exception. Further, there is no proof or mention of a child being cared for in any way outside the testamentary instrument. However, since Tom's will leaves his residuary to Wynn, Cole's other parent, Cole may not collect under pretermitted child. This is because the residue of Tom's estate equals the bulk of his estate and he left it to Wynn. The presumption is that Wynn will use those assets to care for Cole; thus, he does not need an intestate share.

Thus, Cole has no rights in Tom's estate.

#### Norm - Lynn - Kim

Tom's will left a gift of \$80,000 to the issue of his sister Sue. The issue here is how those issue will take under the will. Where a testamentary document is silent on the issue of distribution among issue, than [sic] in California the distribution is made per capita.

#### Per Capita Distribution

Per capita means that assets are divided at the first generation where there is a living beneficiary and then split. The assets are split evenly between the number of living descendants at that level, and the number of deceased descendants who have issue.

Here, since the will merely stated to Sue's issue, it would go per capita. Thus, it would split at the first generation with a live beneficiary, which is Norm. Since Norm is alive it will split evenly between him and Matt, his deceased brother, who left 2 children. This means that Norm will get  $\frac{1}{2}$  of the \$80,000 gift, equal to \$40,000 and the other half will go to Matt's issue.

Kim and Lynn will take per capita representation, meaning they will take their father's share in his place and split it equally among those at that level of descent. Since there is only Lynn and Kim each will receive  $\frac{1}{2}$  or \$20,000.

#### Frank

Frank is Tom's friend who is to take \$10,000 and Tom's shares in Beta Corp under Tom's will.

## \$10,000

Under the original will Tom left Frank \$10,000; this amount was later crossed out and changed, raising the issue of cancellation.

### Cancellation - Interlineation

Cancellation is where a provision of the will is crossed out of the will. Where there is writing above or between the lines and occurs with a cancellation, there is interlineation. Here, Tom has crossed out the \$10,000 amount and written above it \$12,000; thus there has been a cancellation of the \$10,000 gift and interlineation of \$12,000. Since there is a cancellation there is a question of whether the gift is still valid or not. To determine what if anything Frank gets there is a need to discover if the change is valid.

### Holographic Codicil

A holographic change may be made if the material terms are in the writing of the testator and so is the beneficiary name. Here, Tom has crossed out the amount of \$10,000 and in his own handwriting changed the amount to \$12,000. However, Tom did not write out Frank's name in his own handwriting as well. Since Tom failed to put material provisions and person's name in writing, it is irrelevant that he wrote okay and dated it. It may show Tom's intent but does not meet the requirements for a valid holograph. Thus, the change to \$12,000 fails. Frank will try to keep his gift using Dependant Relative Relocation.

### Dependant Relative Relocation (DRR)

Here, a testator mistakenly revokes a will or gift under the will under a mistaken belief that another testamentary disposition would be valid. Further, the testator would not have revoked the first disposition but for the mistaken belief.

Here, Tom believed that by crossing out the amount \$10,000 and writing \$12,000 he would be validly changing the amount of the gift to Frank. This is demonstrated through the fact that Tom went so far as to write okay and date it. Thus, Tom obviously intended for Frank to receive a gift under the will, and would not have revoked the \$10,000 if he had not thought that the change to \$12,000 would be valid. Further, since the amount was an increase rather than decrease DRR may be applied to effect [sic] testator's intent. Here, since it is obvious Tom wanted Frank to receive at least \$10,000, DRR will be applied to save the gift.

### Beta Corp Stock

As mentioned with Wynn, Frank would only be entitled to those shares of stock that belonged to Tom. Since the stocks were determined to be CP and be  $\frac{1}{2}$  Wynn's and  $\frac{1}{2}$  Tom's, Frank could only collect 50 shares of stock or  $\frac{1}{2}$  of the total.

Frank is entitled to the  $\frac{1}{2}$  because Tom is able to pass by devise his  $\frac{1}{2}$  CP to anyone he

wants. Since the will said “my shares of Beta Corp to Frank” than [sic] Frank receives them. Further, by stating “my shares” in Beta Corp, Tom was only giving Frank the right to claim what belonged to Tom; meaning that Tom was only giving Frank a claim to his  $\frac{1}{2}$  CP interest in the stocks, and not attempting to give away Wynn’s  $\frac{1}{2}$  CP interest. (Thus, no widow’s election.)

In conclusion, Wynn has a right to  $\frac{1}{2}$  of the Beta Corp stock as CP and \$410,000. Cole has no rights as Wynn received that bulk of the estate. Norm has a right to \$40,000, Kim and Lynn each have a right to \$20,000 and Frank has a right to \$10,000 &  $\frac{1}{2}$  of Beta Corp stock (i.e. 50 shares).



## Question 5

City has adopted an ordinance banning tobacco advertising on billboards, store windows, any site within 1,000 feet of a school, and “any other location where minors under the age of 18 years traditionally gather.”

The purpose of the ordinance is to discourage school-age children from smoking. The likely result of the ordinance will be to cause the removal of tobacco advertising from the vicinity of schools, day care centers, playgrounds, and amusement arcades.

The Association of Retailers (AOR) was formed to protect the economic interests of its member retailers. AOR had unsuccessfully opposed the adoption of the ordinance, arguing that it would cause hardship to store owners by depriving them of needed advertising revenue. AOR believes that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising.

AOR is considering filing a complaint for injunctive relief against City in federal district court claiming that the ordinance deprives its members of rights under the Free Speech Clause of the First Amendment.

What arguments could AOR reasonably make to show that it has standing, and that its First Amendment free speech claim has merit, and would it be likely to succeed? Discuss.

## Answer A to Question 5

5)

### I. Standing

The Association of Retailers (AOR) is an organization seeking to enforce the putative rights of its members. Normally, courts do not allow plaintiffs to represent the rights of third parties. Organizations, however, fall under an exception to this general rule (as do doctors suing on behalf of patients, or accused criminals suing to enforce potential jurors' right not to be peremptorily struck due to their race). An organization will have standing to sue on behalf of its members if: (1) the organization's suit is related to an issue that is germane to the organization's purpose; (2) the organization has members that would themselves have standing to sue; and (3) it is not necessary that the organization's members themselves be party to the case.

Applying this test, it appears likely that the AOR could reasonably show that it has standing. As to the first requirement, the AOR "was formed to protect the economic interest of its member retailers." The AOR hopes to enjoin the application of the ordinance because it will lead to a diminution of retailers (shopkeepers) advertising revenue. The amount of advertising revenue lost due to tobacco advertising prohibition directly affects AOR members' economic interest, and thus the subject of the suit is sufficiently related to the organization's purpose.

As to the second requirement, it appears that at least certain of AOR's members would have the standing required to bring suit themselves. Standing generally requires (1) an injury, (2) causation, and (3) redressability. Courts will not find standing when plaintiff has not suffered a harm (or is not in imminent danger of suffering a harm), the matter at issue cannot be considered to have caused the harm to plaintiff, or, if judicial action occurred, the harm could not be prevented/cured. Here, AOR members who run shops with windows that once featured tobacco advertisements have clearly suffered a harm—the City has passed the ordinance requiring them to remove the ads, and they have (presumably) lost the revenue they once earned from displaying said ads. It is beyond dispute that the City ordinance caused the harm, as but for the ordinance, the advertisements would remain in the storefront windows. Finally, injunctive relief granted by the Court would redress the harm—if it prevented the City from enforcing the ordinance, then AOR members could display the advertisements and resume collecting advertising revenue.

As to the third requirement, there does not appear to be any particular reason why any specific AOR member would have to be party to the litigation. The harm complained of is not particular to any one member, but rather to all members who had tobacco advertisements displayed. The organization itself could represent the aggregate harm to its various members. This is not a situation, such as fraud, where particular facts as to a particular member would play such an important role that the Court should not proceed without that member.

With these arguments, it is likely that the Court would find that AOR has sufficient standing.

## II. First Amendment Free Speech Claims

At the start, AOR can predicate its Free Speech claims on the fact that the First Amendment applies to the states (and thus to municipalities) because of incorporation through the Fourteenth Amendment. To have a First Amendment Free Speech claim, AOR must show that there has been state action limiting its members' right to free speech. Again, that is not an issue here because the City (which is certainly a state actor) passed the ordinance at issue.

AOR has three options open to it in challenging the City's ordinance—it can claim (1) that it violates the intermediate scrutiny that Courts apply when the state regulates commercial speech; (2) that the ordinance is void for vagueness; and (3) that the ordinance is void for overbreadth. As we address these three options, we will determine why other avenues, though alluring, are unlikely reasonable.

### A. Commercial Speech

The ordinance clearly regulates commercial speech, in that it only bans tobacco advertising (as opposed, say, to tobacco-related art) and cites store windows and billboards as primary locations of regulation.

While the state can outright ban false advertising, or advertisement for illegal purposes, neither is applicable here. There is no evidence that the tobacco advertising is in any way false or misleading, nor is there any evidence that tobacco is illegal in City. As such, the commercial speech at issue is subject to constitutional protection. Unlike non-commercial speech, the state can enact subject-matter based regulations for commercial speech (such as banning tobacco advertising) without triggering strict scrutiny (a showing of a compelling government interest and means necessary to achieve said interest).

Instead, the City must show: (1) that there is an important government purpose unrelated to the suppression of speech; (2) that the regulation directly advances that government purpose; and (3) that the regulation is narrowly tailored to achieve the purpose. If the City meets all three requirements, it can regulate commercial speech even by subject matter.

The City will argue that the health of children, and preventing the detrimental effects of smoking, is an important government purpose. That is essentially inarguable, and AOR should not contest it.

The City will further argue that the regulation directly advances that interest by decreasing children's media exposure to tobacco—that what children do not see, they will not be tempted to buy. AOR can challenge this by arguing that, in fact, the regulation only indirectly advances the government's purpose and that restricting actual access, rather than commercial references, to tobacco would directly advance the government's interest.

However, it cannot credibly be gainsaid that limiting the advertisements would diminish children's exposure to tobacco and directly advance the City's interest. Thus, the AOR will likely not be successful contesting this prong.

AOR's best argument is that the ordinance is not narrowly tailored, and that the ordinance prohibits more advertising than substantially required to achieve its purpose. AOR, however, cannot argue that the City can only regulate so far as necessary to achieve the purpose—that would be applying strict scrutiny rather than intermediate scrutiny. The City will respond that it has "narrowly tailored" the ordinance by limiting it to billboards, store windows, proximity to schools, and "locations" where minors "traditionally gather." That is not the most restrictive means of accomplishing its purpose, but it is more narrow than a blanket prohibition against tobacco advertising. This is a closer call, mainly because of the latter clause, but at least as to the billboards, store windows, and ads near schools, the ordinance is likely narrowly tailored enough. These places are either out in the open or particularly susceptible to children's presence, and thus a Court will likely apply the ordinance as to the specifically identified locations.

AOR is unlikely to prevent the application of at least parts of the ordinance on the grounds of commercial speech.

#### B. Void for Vagueness and/or Overbreadth

What AOR will be able to do, however, is have the ordinance enjoined in regards to the clause concerning "any other location where minors...traditionally gather." This is unconstitutional both because it is unduly vague (other than bars, offices and funeral homes, where don't minors traditionally gather?) and overbroad (even to the extent that there are more identifiable traditional gathering places, this language included far more than just playgrounds and fairs). This clause will be unconstitutional as applied to at least some of AOR's retailers, and thus the Court will likely consider enjoining enforcement of the non-specified places for advertisements.

## Answer B to Question 5

5)

### I. Does AOR have organization standing?

Standing requires that the claimant have an actual stake in the controversy. To assert standing, the claimant must have an injury in fact, the injury must be caused by the activity complained of, and the court must be able to redress the injury.

An organization may have standing if certain criteria are met. The organization must show that 1) its individual members have standing to assert a claim; 2) the claim is germane, or, related to the purpose of the organization, and 3) the individual members are not necessary to adjudicate the claim.

#### 1. Do Members have standing in their own right?

Here, the members have standing in their own right because they have an injury in fact, can show causation, and the court can redress their problem. The members have standing in their own right because the ordinance prevents them from engaging in advertising, depriving them of revenue. Therefore, they have an injury in fact. Moreover, the loss of revenue is a direct cause of the City's ordinance. Finally, if the court finds that the ordinance is invalid, it will redress the injury.

#### 2. The claim is germane to the purpose of the organization.

The AOR was formed to protect the economic interests of its member retailers. Here, the ordinance arguably is causing economic hardship to AOR members depriving them of needed advertising revenue. Therefore, the effect of the ordinance is to create the type of harm AOR was formed to protect against - harm to the economic interests of the member retailers. Therefore, it is germane to the purpose of the AOR to fight the ordinance as a violation of free speech that harms economic interest of its members.

#### 3. The individual members are not needed for the court to decide the claim.

AOR is challenging a city ordinance on First Amendment free speech grounds. The court can decide whether the ordinance is a violation of the First Amendment and related issues of vagueness and overbreadth without need for the participation of the individual members of AOR.

Because AOR can show that its members have standing in their own right, that the complaint seeking injunctive relief against the City for enforcement of the ordinance is

related to AOR's purpose of protecting the economic interests of its members, and the members are not necessary to decide the matter, AOR can assert organizational standing.

## II. First Amendment Speech Arguments

The protections of the First Amendment apply to the states and local governments through the 14<sup>th</sup> Amendment. Therefore, as a state actor, City may not violate free speech rights. Generally, a state must have a compelling interest in regulating the content of speech. However, commercial speech is afforded less protection by the First Amendment.

### a. Commercial Speech

AOR may first argue that the ordinance does not meet the requirements for restraints on commercial speech. The City may regulate commercial speech if it is false or misleading. Here, there are no facts suggesting that the advertisements are false or misleading.

However, the City will likely argue that the very purpose of the ordinance was to protect minors because the advertisements for cigarettes were inherently misleading [sic] youth into believing that smoking is bad. AOR, however, will note that there is nothing misleading at all about advertisements for a certain product that say nothing aimed at minors, and that the State has offered no evidence showing that there is some attempt by the retailers to mislead youth into buying cigarettes.

Therefore, AOR has a strong argument that the City cannot regulate the advertisements as false or misleading.

### i. Regulation of commercial speech generally

Where commercial speech is not false or misleading, the City may regulate the speech only if it meets the three part test set forth by the Supreme Court for calibrating the City's interest and the Retailers' commercial interests. The Supreme Court has applied an intermediate level of scrutiny to commercial speech regulation:

Any regulation of commercial speech must be 1) substantially related to an important government interest; 2) it must directly advance the interest, and 3) there must be no less restrictive means.

Is the ordinance substantially related to an important government interest?

The City will persuasively argue that there is an important government interest in discouraging school-age children from smoking. The state will note the fiscal costs of dealing with health related problems and the addictive nature of nicotine in relation to the maturity and intelligence of school-age children. Moreover, the City may try and analogize

the broad discretion given to the states under the Constitution to regulate the sale and distribution of alcohol.

AOR will argue that the state has an important government interest in regulating school-age smoking, but that the ordinance is not substantially related to that interest. However, AOR will not likely be able to show that an ordinance that is aimed at advertisements within 1,000 feet of a school is not substantially related to the interest of protecting minors from the dangers of smoking because there is a high concentration of youth near schools, particularly youth of young ages.

AOR may argue, however, that the provision in the ordinance prohibiting advertising at any location where youth under the age of 18 gather is not substantially related to an important government interest. AOR will argue that the City's interest is strong in protecting areas around schools where there is a definite and concentrated population of youth who are sent to that location for education. But, AOR will note that this interest decreases when the government is trying to protect gatherings of youth who are free to move about in public.

Does the Ordinance directly advance the government's interest in protecting youth?

By prohibiting the advertisement of tobacco near schools and other public places where minors gather, the ordinance directly advances the interests of the government's interest in discouraging school-age children from smoking. Assuming that the State can draw connections between the advertising and its effect on children, the ordinance directly advances the state's interest.

Is the ordinance the least restrictive means?

AOR has a strong argument that the ordinance is not the least restrictive means for promoting the state's interest in discouraging school-aged children from smoking. Specifically, AOR has already argued that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising. Moreover, AOR will argue that there could be regulations of the types of advertisements or size that would not prevent all advertising in windows or other locations where minors gather. Specifically, AOR will argue that the provision banning advertisement at "any other location where minors under the age of 18 years of age" is not the least restrictive means and that the portion should be struck from the ordinance.

b. Any regulation of speech, even if a valid regulation of commercial speech, still must not be overbroad, vague, or give unfettered discretion to enforcement agencies to be constitutionally valid.

### Is the Ordinance overbroad?

A restriction on speech cannot prohibit substantially more protected speech than it may legitimately restrict. If the ordinance is found to prohibit substantially more speech than the City may constitutionally prohibit, then the ordinance will be found invalid and will not apply to any speech.

AOR will argue that the restriction on advertising at “any other location where minors under the age of 18 years traditionally gather” will prohibit substantially more speech than the City may constitutionally prohibit under the commercial speech clause. Specifically, AOR will argue that the City does not have an important interest in preventing advertising of tobacco at all places where minors gather. AOR will argue, as noted above, that while the City may have a strong argument that its interest in [sic] important in regards to advertising near school zones, the City’s interest substantially decreases as the concentration of children goes down. However, this argument will bleed into AOR’s stronger argument that the restriction banning advertising in areas where minors gather is vague, and, therefore, unconstitutional.

### Is the Ordinance Vague?

A regulation is vague if it does not put the public on reasonable notice as to what is prohibited. Here, AOR has a strong argument that the ordinance is vague because it prohibits advertisements at any location where minors under the age of 18 traditionally gather. While the provision limiting advertisements within 1,000 feet of a school on billboards or store windows is specific, places where minors gather is not defined.

There is nothing in the ordinance that either specifies places where children traditionally gather or defines how to determine what in fact is a “gathering.” How many children constitute a gathering? Therefore, AOR will likely be able to assert that the ordinance is unenforceable because of a vague provision.

### Does the ordinance give unfettered discretion to enforcement?

A regulation restricting speech must be defined and clear. And, if it gives unfettered discretion to whoever enforces it, it will be found invalid.

Because the ordinance offers no guidance as to what constitutes a place where minors traditionally gather, it gives unfettered discretion to enforcement agencies to make their own definition. Therefore, AOR can make a strong argument that the ordinance gives unfettered discretion to City officials in determine [sic] who is in violation, and therefore, the ordinance should be invalidated.

### Conclusion

Because AOR can show that the ordinance is vague in part, gives unfettered



discretion, and is not the least restrictive means of promoting the state's interest, it is likely to prevail in its claim to enjoin enforcement of the ordinance.

## Question 6

Officer Will, a police officer, stopped Calvin, who was driving a rental car at five miles an hour over the speed limit. Calvin gave legally valid consent to search the car. Officer Will discovered a substantial quantity of cocaine in the console between the two front seats and arrested Calvin. After being given and waiving his Miranda rights, Calvin explained that he was driving the car for his friend, Donna. He said that Donna was going to meet him at a particular destination to collect her cocaine, which belonged to her. Hoping to obtain a favorable plea bargain, Calvin offered to cooperate with the police. The police then arranged for Calvin to deliver the cocaine. When Donna met Calvin at the destination, she got into the car with Calvin. She was then arrested. Each was charged with and tried separately for distribution of cocaine and conspiracy to distribute cocaine.

Donna's trial began while Calvin's case was still pending.

At Donna's trial, the following occurred:

- (1) The prosecutor called Officer Will, who testified to Calvin's statements after his arrest concerning Donna's role in the transaction.
- (2) The prosecutor then called Ned, an experienced detective assigned to the Narcotics Bureau, who testified that high level drug dealers customarily use others to transport their drugs for them.

In the defense case, Donna testified that she was not a drug dealer and that she knew nothing about the cocaine. She stated that she was merely meeting Calvin because he was an old friend who had called to say he was coming to town and would like to see her.

- (3) Donna further testified that when she was in the car with Calvin, she found a receipt for the rental car, which showed that Calvin had rented it six months prior to his arrest. She offered a copy of the receipt into evidence. The court admitted the document in evidence.
- (4) On cross-examination, the prosecutor asked Donna whether she had lied on her income tax returns.

The prosecutor had no evidence that Donna had lied on her income tax returns, but believed that it was likely on the basis that drug dealers do not generally report their income. Donna denied lying on her income tax returns.

Assuming that, in each instance, all the appropriate objections were made, should the evidence in numbers 1, 2, and 3 have been admitted, and should the cross-examination in 4 have been allowed? Discuss.

## Answer A to Question 6

6)

### QUESTION 6

(1) Should Officer Will's Testimony Have Been Admitted?

#### Relevance

In order for Officer Will's testimony to be permitted it must be relevant. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Officer Will's testimony was relevant because Calvin's statements, that he was driving the car for his friend Donna and that she was going to meet him at a particular destination to collect her cocaine, had a tendency to make the fact of consequence that he was a coconspirator with Donna for distribution of cocaine more likely. Therefore, the evidence was relevant.

#### FRE 403

Although relevant, Donna may argue that it should have been excluded on FRE 403 grounds. FRE 403 provides that relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, confusing/misleading the jury, or cumulative evidence. Donna will argue that there are no reliable ways of showing that this statement was true and therefore the probative value of the evidence is substantially outweighed by risk of unfair prejudice because a jury will hear the statement and automatically want to convict her. However, witnesses or convicts are often allowed to testify and any evidence against the truthfulness of the statement would be go to [sic] weight of Officer's testimony.

#### Hearsay

Donna will argue that the testimony was impermissible hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Officer Will is testifying about Calvin's comments to him when he was arrested. The statements that he was driving the car for his friend Donna and that he was going to meet her at a particular destination to collect her cocaine are all offered to prove that indeed the car was being driven for Donna and he was meeting her because it was her cocaine. So it is an out-of-court statement offered for the truth of the matter asserted because it is an oral assertion by Calvin out of court. Therefore, it is hearsay and is not admissible unless it comes in under an exception.

#### Coconspirator Admission

Prosecutor would argue that the statement was a valid party-opponent admission. Party-

opponent admissions are categorically non-hearsay and are exempted from the hearsay rule's exclusionary effect. A party-opponent admission can be done by a statement by a coconspirator during the course of the conspiracy and in furtherance of the conspiracy. Donna would argue that Calvin had already been arrested and therefore this was not made in furtherance of the conspiracy. Therefore, Calvin's statements could not come in under this exemption, 801(d)(2).

### Statement Against Interest

The prosecutor could also have argued that this was a statement against interest and hence is an exception to the hearsay rule. Statement against interest comes in under FRE 804, which requires unavailability of the witness, which can include witnesses not testifying because of self-incrimination. Here Calvin would not be testifying because of such self-incrimination and he is not present at the trial, so therefore he is considered unavailable. Statement against interest excepts statements from the hearsay rule that are so contrary to declarant's criminal liability that a reasonable person would not have made such a statement unless it were true. The prosecutor would argue that a reasonable person would not admit his involvement in the transportation of cocaine unless it were true and therefore this falls within the exception since Calvin would be subject to criminal liability. Therefore, the evidence could potentially be admitted under this exception.

### Confrontation Clause

Donna would argue that regardless the statement should not be introduced because it violates the confrontation clause. The 6<sup>th</sup> Amendment Confrontation Clause provides that an accused has the right to confront his accusers. For this reason, hearsay testimony used against an accused is often not permitted. The Supreme Court has determined that testimonial evidence can in no circumstance be used against an accused without the right to cross-examination at trial or a prior proceeding with the same motive to develop such testimony. Testimonial evidence are all [sic] statements made that a reasonable person would believe would be used by the prosecution against another at trial. Usually there requires at least statements to the police. So when Calvin spoke to the police officer and made statements about the culpability of Donna, he was giving testimonial evidence since it could have been foreseen by telling the police it could be used against her. Furthermore, he did so in hoping to get a plea bargain and hence it shows that it was testimonial. Therefore, since he cannot testify because of self-incrimination/presence in court and Donna had no opportunity at any time to cross-examine him, the police officer's statement regarding Calvin's statements should be excluded.

(2) Should Ned's Testimony Have Been Admitted?

### Relevance

It must be determined whether Ned's testimony was relevant to the case. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Ned's testimony was relevant because it had a tendency to show that Donna was

potentially a high level drug dealer because she had someone else transport the cocaine and hence it is more likely that she should be convicted of distributing cocaine. Therefore, it should be allowed in as relevant.

### Expert Testimony

Although relevant, the testimony must be valid expert testimony in order to be allowed in. Pursuant to FRE 104, a court must make the preliminary fact determination of whether an expert is qualified to give expert testimony. Under 104, evidence is not relevant if dependent on a conditional fact unless that condition is found to exist. A judge need only find sufficient evidence to show existence of the condition to allow the question to go to the jury for credibility and weight. Here the judge would consider the Daubert factors that were incorporated into the FRE on expert testimony in order to determine whether it should be allowed in.

The factors require that the expert testimony be based on the knowledge, experience, and training of the expert, be beyond the normal experience of an average lay juror, be helpful to the determination of the action, and based on proven and reliable data and methods, and be an application of such methods and data to the underlying facts of the case. Here Ned was an experienced detective in the Narcotics Bureau and hence had the knowledge, experience and training. His testimony was beyond the normal lay juror because it involved high level drug dealers' actions. Furthermore, it was relevant and helped to determine what Donna was guilty of. Finally, it was based on reliable data of customary experience in the field that high level drug dealers customarily use others to distribute the drugs. Therefore, the testimony should be allowed in.

(3) Should Donna's Testimony and Receipt Be Admitted?

### Relevance

Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Donna will argue that the evidence is relevant because it makes the existence of the fact that Calvin had control over the cocaine more likely here and hence she was not involved. Therefore, it will be allowed in as relevant, unless there are other problems.

### Best Evidence

Prosecutor will argue that this is not the best evidence. The Best Evidence Rule requires that one cannot testify to the contents of a writing unless the writing is presented. However, a copy is permissible. Therefore, since Donna brought a copy of the receipt that she found in the car, it should be allowed in.

### Hearsay

Prosecutor will object on grounds of hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Therefore since the document asserts that Calvin rented the car, it is offered for the truth of the matter and must come

in under an exception.

### Business Records

Donna will argue this is a business record and should be admitted. Business records are records or documents made during the normal course of business with guarantees of trustworthiness. There needs to be some type of testimony demonstrating that this was in the normal course of business, and hence Donna would have needed some type of custodian or the person who entered the information testify to those facts. Therefore, the evidence will be excluded.

(4) Should the Cross-Examination Have Been Allowed?

### Relevance

Prosecutor would argue that the question was relevant as to whether Donna was telling the truth. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. If Donna had lied in the past on her income tax then it would be more likely that she would lie at trial because she is dishonest. Therefore, it is relevant to the case.

### Character Evidence of a Witness

Donna would initially argue that this is improper character evidence. Character evidence is evidence of a trait or character offered to prove action in conformity therewith. Character evidence is not allowed unless it falls under one of the exceptions to character evidence. Here this falls under the exception to character of a witness. Therefore, it is governed by 607 and 608 of the FRE.

FRE 607 allows an opposing party to generally impeach to show bias or lack of credibility of a witness. FRE 608 allows a party to use character evidence for the purpose of impeachment. However, if one wants to impeach by specific instances of conduct one can only do so by inquiring on cross-examination and not through extrinsic evidence.

Furthermore, it must bear on the truthfulness of the witness. The prosecutor's question about whether Donna lied on her tax return was valid because it was merely a question, and no extrinsic evidence was offered. It beared [sic] on whether she was telling the truth at trial after saying she knew nothing about cocaine and only met Calvin in order to see an old friend. Therefore, it was proper use of specific instances of conduct through cross-examination of a witness.

## Answer B to Question 6

6)

1. Will's testimony of Calvin's statements were NOT properly admitted.

(a) Relevance

Evidence is generally admissible if it is relevant, meaning that it tends to make a material fact more or less likely to be true. Here, Will's testimony of Calvin's statements would make Donna's alleged involvement more likely to be true, and thus is logically relevant. However, evidence should not be admitted under Federal Rules of Evidence (FRE) 403 if its prejudicial effect substantially outweighs its probative value. Setting aside the Confrontation Clause question (discussed below), this evidence is prejudicial against Donna but is also very probative as to the central issue of the trial – whether Donna is guilty of distribution of cocaine and conspiracy to distribute. As such, the prejudicial effect does not substantially outweigh the probative effect, and testimony should be admitted absent other reasons for preclusion.

(b) Competence

A witness's testimony is admissible if he is competent to testify. A witness is competent if (1) he had personal knowledge of the fact he is testifying to, and (2) he takes an oath or affirmation to tell the truth.

Here, Will was present when Calvin made the statement about Donna's role in the transaction, and thus has the required personal knowledge. Assuming he took the proper oath at trial, Will is competent to testify as to what Calvin had said.

(c) Hearsay

Hearsay is not admissible unless an exemption or exception applies. Hearsay is an out-of-court statement offered for its truth. Here, Calvin's statement about Donna was made outside the court proceedings and was offered by the prosecution to prove that Donna indeed was involved in the cocaine transaction. Thus, it is hearsay. This issue here is whether a proper exemption or exception applies.

The prosecution will argue that this declaration is (1) a coconspirator admission and (2) a statement against interest. Coconspirator statements are exempted from the hearsay rule under FRE 801(d), and can be admitted as substantive evidence. Here, Calvin was allegedly a coconspirator with Donna. If the judge finds by a preponderance that the two were indeed coconspirators, Calvin's statement against Donna can be admitted, subject to the Confrontation Clause limitations, discussed below.

On the other hand, a statement against interest is a hearsay exception, allowing admission for a statement made by an unavailable declarant which was against the declarant's own penal, proprietary, or other interest. To apply, the declarant must be unavailable by reason of privilege, absence [sic] from the jurisdiction, illness, death, or stubborn refusal to testify. However, if the declarant's "unavailability" is procured by the party seeking to offer his statement, or if the party acquiesced in a plan to make the declarant unavailable, with the result that he is in fact made unavailable, the right to use such declarations is forfeited. Here, Calvin has the Fifth Amendment privilege against self-incrimination to refuse to testify in Donna's trial, and, assuming he exercised that privilege, and that his absence from Donna's trial is not encouraged or induced by the prosecution,

Calvin is properly deemed unavailable. Nevertheless, Calvin's statement identifying Donna's role in the transaction was made with the intent to push responsibility onto Donna, in an attempt to either secure a favorable plea bargain with the prosecution, or convince the arresting officer that Calvin was not in fact involved in the transaction at all. Statements like these which are made for the purpose of currying favor with the prosecution are not against the declarant's penal interest and cannot properly be admitted under the "statement against interest" exception.

(d) Confrontation Clause

Even though Calvin's statement is exempted from the hearsay rule as a coconspirator admission, it may not be admitted against Donna in her trial without Calvin actually testifying. Under the Sixth Amendment, the [sic] criminal defendant has a constitutional right to confront witnesses against him. In a recent Supreme Court case, Crawford v. Washington, the court held that hearsay statements that are testimonial in nature cannot be admitted against a criminal defendant unless the defendant had either (1) a prior opportunity to cross-examine the declarant, or (2) a present opportunity to cross-examine the declarant at trial as a witness. A statement is "testimonial" if the declarant reasonably could foresee that it would be used against the criminal defendant in her prosecution. Here, Calvin told a police officer that Donna was the person who owned the cocaine, and thus could reasonably foresee his statement would be used to prosecute Donna, making it testimonial. If Calvin is not now produced as a witness at Donna's trial, and subjected to Donna's cross-examination, his out-of-court statement could not be constitutionally admitted against Donna.

2. Ned's expert testimony WAS properly admitted.

As per the discussion on relevance, Ned's testimony is generally admissible because (1) it would make the prosecution's theory that Donna used Calvin to transport her cocaine more probable, and (2) its probative value is great, and not substantially outweighed by the risk of prejudice to Donna.

In addition to taking a valid oath, an expert witness is permitted to give expert testimony where (1) the subject matter is one where expert opinion would be useful to the fact finder, (2) the witness is properly qualified as a witness, (3) the judge finds that the expert opinion is reliable, and (4) the expert opinion has proper bases.

Here, whether or not drug dealers usually use others to transport drugs for them is a matter outside most average people's ken, and thus is a subject matter where expert opinion would be useful. As an "experienced detective assigned to the Narcotics Bureau," Ned has specialized knowledge and experience in the matter of drug dealers' behavior patterns, and would probably qualify as an expert.

The judge must also find, by a preponderance, that the expert opinion is reliable – that is, that the methodology the expert used to reach his conclusions were reliable, and that the methodology "fits" the facts in the case. Under the Daubert case, the judge can consider these following factors in considering reliability of an expert's methodology: (1) Existence of peer review, (2) the error rate of the expert's methodology, (3) the testability of the methodology, and (4) whether the methodology were [sic] generally accepted by experts in the field. Here, Ned's methodology in reaching the conclusion that drug dealers



customarily use others to transport drugs was probably his experience in dealing with narcotics cases, and perhaps an analysis of the rate of “using others” narcotics cases to other narcotics cases. The methodology should be explained to the court, and if the judge finds it to be reliable, and that it properly “fits” with the facts of this case (alleged use of others to transport drugs for the dealer), the court will find the expert opinion reliable.

Finally, expert opinion must have a proper basis – it must be based on either facts already in evidence, or facts not in evidence that are generally relied upon by experts in the field. Assuming that the data set [sic] from which Ned drew his conclusion was not admitted into evidence, it must be shown to be data relied upon by other drug dealer behavior experts in the field.

### 3. The copy of Calvin’s rental car receipt was NOT properly admitted.

Because the evidence sought to be admitted here is a piece of writing (receipt), it must not only be relevant, but also be authenticated as the thing it is purported to be, satisfy the Best Evidence Rule, if applicable, and shown not to be barred by the hearsay rule.

Here, if the receipt was believed, it would tend to make the prosecution’s theory that Donna rented the car and had Calvin drive it to distribute drugs less likely. Thus, it is relevant. Moreover, the prejudicial effect to the prosecution is not substantially outweighed by the probative value of the receipt as to who in fact rented the car.

Because the receipt’s relevance is dependent upon it being the receipt recovered from Calvin’s car, it must be authenticated as such, meaning that defense must present sufficient evidence for a reasonable jury to decide that the receipt in court was the one recovered from the car. Donna can do this by establishing a substantially unbroken chain of custody, testifying that she had kept the receipt in a safe place since she personally retrieved it from Calvin’s car, that no one had the opportunity to access and materially alter it, and that the contents of the receipt were in fact substantially unaltered from when she retrieved it from the car.

The best evidence rule also applies here because defense is offering the receipt for its contents. Under the rule, an original or mechanically made duplicated [sic] must be presented into evidence. Here, if Donna can show that the copy presented was mechanically made from the original receipt, the rule is satisfied.

Finally, because the receipt is an out-of-court statement offered for its truth (that Calvin rented the car six months before his arrest), it is hearsay and inadmissible unless an exemption or exception applies. Here, the receipt might be admitted under the “business record” exception; if Donna could show that the receipt was made in the regular course of the car renter’s business, made in the manner such records are usually kept and at or around the time the car was rented, then the exception applies. However, this requires that a record custodian from the car rental company testify at trial as to these elements. Assuming that the defense did not present a custodian from the car rental company, the receipt cannot be deemed a business record, and cannot be properly admitted.

### 4. The cross-examination question to Donna probably should NOT be allowed.

As discussed above, a piece of fact or, in this case, a question, that tends to make a material fact in case more or less likely to be true is relevant and generally admissible. Here, if Donna lied in [sic] her income tax return, it would make her a less credible witness, and more likely a drug dealer. Thus, the question is generally allowable as relevant.

Character evidence is generally inadmissible for the purpose of showing that a

person acted on the particular occasion according to her propensity to act a certain way. However, character evidence on [sic] a witness's veracity, including specific prior bad acts committed by the witness, may be used to impeach her credibility, provided that the cross-examining party has a good faith basis to believe that such prior bad acts in fact took place.

Here, whether Donna lied on her tax return goes to her veracity, and thus is character evidence. The cross-examination question was presented for the purpose of impeaching Donna's credibility, but the prosecution did not have actual evidence to believe that Donna had lied on her income tax returns. Instead, the basis for this question was a general impression that drug dealers usually do not report their income. While this impression was honestly held by the prosecution, its basis is weak as it relates to Donna, who has not even been proven to be a drug dealer. Moreover, the question creates a prejudicial effect on the jury's mind, making them doubt the veracity of the defendant herself. As such, the prejudicial effect of this question substantially outweighs its weak probative value, and should therefore not be allowed.