



# **California Bar Examination**

## **Essay Questions and Selected Answers**

**July 2021**



**ESSAY QUESTIONS AND SELECTED ANSWERS**

**JULY 2021**

**CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the July 2021 California Bar Examination and two selected answers for each question.

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

Question Number

Subject

- |    |   |
|----|---|
| 1. | Civil Procedure                           |
| 2. | Professional Responsibility               |
| 3. | Torts                                     |
| 4. | Criminal Law and Procedure                |
| 5. | Wills and Succession / Community Property |



## **ESSAY EXAMINATION INSTRUCTIONS**

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

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

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the 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**

Jiff, a California citizen who resides in Truckee, California, just west of Reno, Nevada, provides cleaning services. At Jiff's request, customers submit written evaluations of his services so he can monitor their satisfaction.

Jiff entered into a contract with Shearer, a Nevada citizen who operates a beauty salon in Reno, Nevada. The contract, signed in Reno, obligated Jiff to use due care in cleaning. One night while cleaning, Jiff accidentally broke an antique vase, which Shearer claimed was worth \$100,000.

Shearer sued Jiff for negligence in the United States District Court for the Eastern District of California, which includes Truckee. The complaint alleged that Jiff's lack of due care caused breakage of the vase. Shearer moved to compel production of evaluations completed by Jiff's customers in the past year. The court denied the motion.

Following a trial, the jury returned a general verdict in favor of Jiff and the court entered judgment on the verdict. Shearer did not appeal.

Six months later, Shearer sued Jiff again in the same court for breach of contract. The complaint alleged that Jiff's lack of due care caused breakage of the vase.

1. Was venue properly laid in the Eastern District of California? Discuss.
  2. Did the court err in denying Shearer's motion to compel? Discuss.
  3. May Jiff take advantage of the judgment in the first suit in defending against the second suit? Discuss.
- .

## QUESTION 1: SELECTED ANSWER A

### Applicable Law

The United States District Court for the Eastern District of California is a federal court. Because the cause of action at issue here is a negligence claim, the district court must have subject matter jurisdiction through diversity. Here, the requirements of diversity are satisfied because Jiff and Shearer are citizens of different states with no indication that they intend to reside elsewhere (California, and Nevada, respectively) and because the amount in controversy—the value of the broken vase—is \$100,000. However, when a federal court is sitting in diversity, it is necessary to determine which law applies: state law or federal law.

To determine the applicable law, the *Erie Doctrine* applies. Generally, federal courts apply state substantive law and federal procedural law. Here, state "substantive" law includes the negligence cause of actions, a statute of limitations, and other necessary substantive elements. Rules of venue and discovery are governed by the Federal Rules of Civil Procedure. However, rules of preclusion (discussed below) are governed by the substantive law of the state in which the court sits. Therefore, the federal court will apply California law in determining whether preclusion applies.

### 1. Venue

Venue is proper (1) in any district in which a defendant resides, if all defendants reside in the same district, or (2) in the district where the events giving rise to the cause of

action occurred, or where the subject matter of the action is located. If neither of these is proper, then venue may be proper in any district in which a defendant is subject to personal jurisdiction.

### Defendant's Residence

Here, the defendant, Jiff, is a California citizen. Additionally, Jiff is the only defendant here. Further, the facts indicate that Jiff resides in the Eastern District of California, which includes Truckee. Therefore, because Jiff is the only defendant in this action, all of the defendants live in the same state, so venue will be proper in any district in which a defendant resides. Therefore, venue will be proper over Jiff in the Eastern District of California, because it is the district where Jiff lives.

### Events Giving Rise to Cause of Action

Though venue is proper on the above ground, this ground would not be a satisfactory ground for venue: though a contract would generally give rise to venue in a district in which it was signed, the contract that governed Jiff's cleaning services was also signed in Reno. Second, Jiff was cleaning in Reno, Nevada, when he broke the vase.

Accordingly, the events giving rise to the cause of action, or the area where the property is located, do not give rise to proper venue in the Eastern District of California. However, venue will be proper on the first ground, as discussed above.

### Conclusion

Venue is proper, therefore, in the United States District Court for the Eastern District of California.

## 2. Motion to Compel

### Discovery

Discovery enables parties to obtain information from one another relevant to their claims and defenses. As discussed above, the Federal Rules of Civil Procedure apply to the discovery here. Before parties may properly begin discovery, they must make initial disclosures of certain information, including names of those who have information, and other necessary information to disclose. Further, parties must also confer to create a discovery schedule. Here, there is no indication that such initial disclosures were made, nor that such a process was followed. Accordingly, discovery may have been improper on the grounds of improper procedure.

### Grounds for Motion to Compel

A motion to compel may be filed only upon a good faith certification by the person seeking discovery that they have either conferred or made a good-faith effort to confer with the opposing party in seeking the discovery, and the party opposing the discovery refuses to turn over the discovery regardless. Here, there is no indication that Shearer and Jiff have conferred, or that Shearer made a good faith effort to confer with Jiff. Accordingly, because the motion may not have been filed properly by Shearer, the court may have properly denied the motion to compel.

However, if this conferral and requisite procedure were properly made, then it is necessary for a court to determine if the information sought is within the scope of discovery.



## Scope of Discovery

Discovery is proper for any non-privileged matter that may lead to the discovery of any relevant evidence. Relevant evidence is evidence which tends to make any fact more or less likely. However, discovery does not have to be admissible in court in order to be discoverable; so long as it is relevant, the evidence may be properly discoverable.

Here, Shearer moved to compel production of evaluations completed by Jiff's customers in the past year, and the court denied the motion. Therefore, it is necessary to determine whether these evaluations are relevant to Shearer's cause of action. The evaluations likely contain information about Jiff's cleaning services, and the extent to which the customers are satisfied with the services. They may contain good reviews, bad reviews, and history of different incidents, including breakage of items. Shearer will argue, therefore, that because his cause of action is based on Jiff using due care in cleaning, then a history of different incidents and evaluations will demonstrate whether Jiff tends to use due care, or whether he does not. Though this information would not necessarily be admissible in evidence, this is certainly relevant to Shearer's cause of action, as it would likely tend to show Jiff's pattern of behavior while cleaning, as well as any unique incidents that occurred while Jiff cleaned.

On the other hand, Jiff may argue that the evaluations are not relevant because Shearer requested all evaluations from the last year. However, Shearer will argue that a year is likely a narrow enough time period that will enable Shearer to obtain information relevant to his cause of action.

Further, Jiff may point to the fact that he requests that customers submit written

evaluations. When a person operating a service business requests evaluations, it is likely that they are only requesting evaluations that will treat them favorably, meaning that such evaluations would not likely contain information about any negligence that Jiff was engaged in. Regardless, because Jiff cannot prove that the evaluations do not contain relevant information that can assist Shearer in preparing his claim or defense, the evaluations are properly within the scope of discovery.

### Request for Production of Documents

A party may properly request that another party produce documents. Though it may be possible to obtain such information from non-parties through a subpoena duces tecum, a subpoena would not be necessary here because Jiff is a party to the action.

Accordingly, this is a proper discovery request, because the evaluations are documents that are within the control of the other party. Though Jiff could argue that turning over the evaluations would impose too extensive a burden on him, the documents are within his control and do not appear to invade on too extensive a privacy interest, unlike the disclosure of emails between family members, for example. Accordingly, this is a valid request for the production of documents.

### Conclusion

If Shearer properly filed the motion to compel after an attempt to confer with Jiff, then the motion to compel is proper here because the information requested is within the scope of discovery, and the court erred in denying the motion. However, if Shearer failed to do so, which appears to be the case given that the facts do not mention any such conferral, then the court properly denied the motion to compel.

### 3. Judgment in First Suit

In order for Jiff to "take advantage" of the judgment in the first suit in defending against the second suit, he must either rely on principles of claim or issue preclusion.

Preclusion may either be used offensively or defensively—though certain states have different rules on the use of offensive preclusion. Here, Jiff would be using preclusion defensively in order to prevent a same claim or issue from being raised against him a second time.

#### Claim Preclusion (Res Judicata)

Claim preclusion prevents the same claim from being litigated multiple times, so long as it is (1) the same claim (2) between the same parties (3) that is a result of a final, valid judgment (4) on the merits.

#### Same Claim

To determine whether a second claim is in fact the same claim as the first, federal courts apply a "transactional" test, which requires determining whether the incident was a part of the same transaction or occurrence, or series of transactions or occurrences. However, because federal courts apply the law of the state court in which they sit when in diversity, California law would apply, as discussed above. Under California law, the test is whether the claim arises out of the same "injury," which is broader than the federal test.

Here, Shearer's initial claim was against Jiff for negligence, and alleged that Jiff's lack of due care caused breakage of the vase. Six months later, Shearer sued Jiff again in the same court for breach of contract, and alleged that Jiff's lack of due care caused

breakage of the vase. Shearer will argue that a breach of contract claim is different than a negligence claim, which arises out of tort, and that the underlying claims are not the same. However, under either the transaction or the injury test, the underlying claim is the same because it arises out of the same transaction and injury: the breakage of the vase and Jiff's alleged lack of due care as a result. Despite the different causes of action, the underlying claim in Shearer's second case is the same.

Therefore, this element is satisfied.

### Same Parties

A claim is between the same "parties" if the actual same parties are involved, or if it involves the parties' successors in interest. Here, the claim is between the same parties, meaning because the first suit was between Shearer and Jiff, and the second suit is between Shearer and Jiff.

Therefore, this element is satisfied.

### Valid, Final Judgment

In federal court, a valid final judgment is one that is the result of either a motion for summary judgment or a verdict. The judgment is final after the verdict has been rendered and there is nothing additional to perform other than entry of judgment. However, under California law, a judgment is generally not treated as final until the subsequent appeals have been exhausted. Because federal courts generally apply the preclusion law of the states in which they sit, the finality of the judgment will likely be determined by California law.

Here, however, Shearer failed to appeal the verdict. Because an appeal is generally

required to be filed within 30 days after entry of judgment, Shearer's appeal will be time barred, meaning that he has exhausted the appeals process. Accordingly, Shearer's failure to appeal the verdict means that the judgment is final. Further, the judgment was rendered by a jury after a general verdict, in Jiff's favor, and the court entered judgment on the verdict.

Therefore, this element of claim preclusion is satisfied.

### On the Merits

A judgment is on the merits if the court or a jury ruled on the case's substantive grounds, as opposed to dismissing the case on a procedural issue (though some procedural issues, too, may be treated as substantive, depending on the issue).

Here, the case was disposed of on substantive grounds because it occurred after a judgment by a jury through a general verdict in favor of Jiff. A general verdict means that the jury found that Jiff was not guilty. Accordingly, the case was properly decided on the merits, and the court later entered judgment.

### Conclusion

Accordingly, the elements of claim preclusion are satisfied, meaning that Jiff may take advantage of the judgment in the first suit in defending against the second suit. To do so, Jiff may file a motion to dismiss on grounds of claim preclusion, or a motion for summary judgment, so long as the motion is made within 30 days after the close of discovery (though discovery would not likely occur here).

### Issue Preclusion (Collateral Estoppel)

Jiff may also argue that the judgment is precluded on grounds of collateral estoppel.

### Valid Final Judgment

See rule and analysis above. Because the jury returned a general verdict in favor of Jiff, and the court entered judgment on the verdict, this is a valid final judgment.

### Same Issue

The same "issue" refers to the same factual or legal dispute as to a certain occurrence or transaction. Here, in the first case, Shearer's suit against Jiff alleged that Jiff did not exercise due care, which caused breakage of the vase. In the second suit, Shearer's suit was based on breach of contract, but still was based on litigating the same issue: that Jiff's lack of due care caused breakage of the vase. Therefore, because both suits deal with this same issue—whether Jiff failed to exercise due care such that there was breakage of the vase—then this element is satisfied.

### Actually Litigated

To determine if the same issue was actually litigated, it is necessary to determine if the parties were able to present evidence on the issue, call witnesses, and litigate the matter. Here, the matter appears to have been actually litigated because it was the sole issue in the initial case: whether Jiff's lack of due care caused breakage of the vase. The parties would have presented evidence on the matter, called witnesses, cross-examined them, and litigated the issue.

Accordingly, the same matter was actually litigated, and this element is satisfied.

### Necessarily Decided

An issue must have been necessarily decided, which means that the jury (or judge, in a bench trial) could not have ruled on some other grounds in its verdict for a party.

Though this may generally be difficult to decide in the case of a jury trial with multiple issues, this is a jury trial with only one issue: whether Jiff's lack of due care caused breakage of the vase.

Therefore, in the first case, the jury would have necessarily decided whether Jiff's lack of due care caused this breakage. However, Shearer may argue that the actual underlying "issue" that they might have decided could be different, based on a narrow interpretation of "issue." Specifically, maybe the first jury ruled the way it did because of the evidence to do with causation, or maybe it did because of the evidence of Jiff's breach. Shearer would argue that because it is impossible to identify the specific ground that the jury ruled on, especially in the absence of a special verdict, it is not possible to determine that Jiff's lack of due care was "necessarily" decided.

However, Shearer's argument would be too broad: in deciding the elements of due care, the jury would have properly considered the elements of negligence, and then decided that exact issue. Accordingly, Jiff's negligence was decided in the first case, despite the different cause of action in the second case.

Therefore, this element of issue preclusion is satisfied.

### Conclusion

Jiff will properly be able to take advantage of the judgment in the first suit in defending against the second suit based on grounds of claim preclusion and issue preclusion.

## QUESTION 1: SELECTED ANSWER B

### Was Venue Properly Laid in the Eastern District of California?

As the below analysis will show, venue was properly laid in the Eastern District of California.

#### *Preliminary Issues*

As a preliminary matter, a venue analysis is only proper after it has been determined that there is **personal jurisdiction** and **subject matter jurisdiction** to hear the claim.

In personam personal jurisdiction is the court's ability to have jurisdiction over the people involved in the claim. Subject matter jurisdiction is the ability to render a decision on the subject matter of the dispute, in line with the delimitations on subject matter jurisdiction of federal courts covered in Article III of the Constitution.

In personam jurisdiction has three traditional bases: *presence, domicile, and consent*. Here, Jiff is domiciled in Truckee, where the suit was brought and therefore the court has PJ over him through domicile and PJ over Shearer through consent (plaintiff who brought the suit consents). Therefore, no analysis needs to be made under a constitutional analysis using a long arm statute (which would be contacts (minimum contacts - purposeful availment and foreseeability), relatedness (specific or general PJ), and fairness (an analysis under specific jurisdiction)).

Article III federal courts have subject matter jurisdiction over **federal question cases and diversity cases**. Here, there is no federal question raised in the complaint of Shearer.



**Federal diversity jurisdiction** occurs when: the parties are citizens of different states and the cause of action is greater than \$75,000. Diversity jurisdiction is the mechanism through which federal courts can hear state law claims. **Diversity** is present here as the claim is for \$100,000 (it is a plausible amount based on the facts and a case will only fail this aspect if it is "beyond a legal certainty" that the amount in controversy is less than \$75,000). Also, the plaintiff is diverse from the defendant and there is complete diversity (no plaintiff can be of the same state as any other defendant). Jiff is a California citizen. Shearer is a Nevada citizen. Finally, the Eastern District of CA can hear the state law claim for negligence.

Thus, there is both personal jurisdiction and subject matter jurisdiction and a venue analysis can proceed.

### ***Venue Analysis***

Under the Federal Rules of Civil Procedure, venue is proper: (1) any district where *any defendant resides*, if all defendants are residents of the state where the district court is located; (2) where the events *relating to the cause of action* (contract formation or tort occurrence) *took place*; and (3), if (1) or (2) does not apply, in any district where personal jurisdiction can be had over a defendant.

#### *Analysis Under Defendant Resides - Prong 1*

In this case, Jiff is a California citizen who resides in Truckee, California. As the facts provide, Truckee California is located in the Eastern District of California. Shearer, a Reno Nevada resident, sued Jiff for negligence in the United States District Court for the Eastern District of California. Since Jiff resides in the Eastern District of California

(for residency purposes under a venue analysis for *individuals*), residency is determined by **domicile** which is where an individual resides and intends to stay [no facts indicate that Jiff planned on shifting his domicile so he does reside in Truckee, California as provided for by the facts].

*Analysis Under Substantial Events - Prong 2*

Since we have found that venue is proper under Prong 1, the venue analysis concludes here. However, for hypothetical analysis, venue would also have been proper if Shearer had brought suit in the federal district court that encompasses Reno, Nevada. Venue would have been proper in the district court that embraces Reno because that is where the contract was signed and that is where Jiff performed the services under the contract (cleaning Shearer's beauty salon) and where the alleged tort of negligence occurred (the breaking of the vase due to an alleged lack of due care).

While it is unlikely under these facts, since Jiff is domiciled in the Eastern District of California and it is convenient to defend the case there (and Shearer elected to bring the case there), if the parties did make a motion to transfer venue, the judge may allow the transfer of the case to a venue within the same judicial system (here the federal court system) where venue would have been proper. If such a motion for transfer was made from either party from the Eastern District of California to the federal district that embraces Reno, such a motion should be granted as venue is proper there and there are interests in favor of such a transfer (that is where the contract was made and where the alleged tort occurred). The transferee court would apply the law of the original

transferor court since venue was proper.

### *Analysis Under Prong 3*

Since Venue is proper under prong 1, no analysis is needed under prong 3. This prong usually applies when there are multiple defendants and no determination is able to be made under prong 1 or 2. This option is the fallback option in the venue analysis.

### *Conclusion for Venue - Venue is Proper*

Venue was properly laid in the Eastern District of California. Here, there is only one defendant, Jiff. He is a California citizen who resides in Truckee, California. Shearer brought suit in the Eastern District of California, which encompasses Truckee, and therefore venue is proper under prong 1 of the three- prong venue test under the FRCP (it is a district where a defendant resides when all defendants reside in the same state [which has happened here since there are no other defendants]).

## **2. Did the court err in denying Shearer's motion to compel?**

The court did not err in denying Shearer's motion to compel because the evaluation records are both relevant and proportional to the discovery issues in this case relating to a claim of negligence, specifically a lack of due care.

Under the Federal Rules of Civil Procedure, **discovery** is the part of the case where the parties make requests (through interrogatories, depositions, and other mechanisms) for evidence which the other party has in order to put forth their case (and, indeed, based on discovery certain motions can be made such as a motion of summary judgment where one side alleges that based on the discovery available and the pleadings, there

exists no genuine issue of material fact). Therefore, discovery is a critical part of federal civil procedure.

Parties initially meet for a *Rule 26f conference* to meet and confer over the plan for discovery. There are certain mandatory disclosures that must take place including the identities of expert witnesses, presence of insurance, items that they will use to support their claims and other matters. From there, discovery begins and the court only gets involved when one party refuses to comply with the discovery request of another party.

It is unclear from the facts whether Shearer initially asked Jiff for the evaluations and Jiff refused. If this was the case, then Shearer is justified in bringing a motion to compel and involving the court, since the motion is asking the court to use its coercive power (the threat of sanctions as well as, in extreme cases, contempt of court or dismissal with prejudice) to compel the discovery of certain items.

#### *Standard in Discovery - Relevant and Proportional*

The key standard that a court must use when analyzing whether to grant a motion to compel (or to determine whether anything is discoverable) is whether the item in question is **relevant** to the case at hand and whether the request is **proportional** given the circumstances of the case. It is important to note that an item might be discoverable because it is relevant even though it might not be *admissible* later on under the rules of evidence (due to issues such as hearsay which might come into play here since it involves double hearsay statements of customers submitting their written evaluations of Jiff's services).

### *Evaluations are Relevant*

The evaluations are relevant to this case. At Jiff's request, customers have submitted written evaluations of his services in the past so that he can monitor their satisfaction. Shearer will argue that these evaluations are critical to understand Jiff's track record in the cleaning industry. These evaluations could provide other examples in which Jiff has acted negligently and not adhered to a proper standard of due care. It also would be helpful to understand whether other contracts with Jiff's other customers specifically contained obligations requiring Jiff to adhere to a standard of due care in cleaning. This is relevant to show that Jiff was aware of his duties. While legal relevance under FRE 403 is beyond the scope of this question, it is likely that these evaluations would also be admissible at trial (assuming hearsay can be overcome) since the probative value is not outweighed by unfair prejudice.

Jiff might argue against their ultimate admissibility as grounds for not allowing them to be discoverable but admissibility, as stated above, is not a key touchstone in discovery analysis.

### *Request is Proportional*

The request is proportional.

This case is for negligence and for damages of \$100,000. The cost on Jiff is small to produce these records in light of the circumstances, potential liability, and hardship that Shearer would have to undergo to subpoena and identify the past customers.

### *No Privilege Applies*

Jiff might argue that these evaluations were made in preparation for trial in an attempt

to shield them under the attorney work product doctrine. This would fail as these are preexisting evaluations that predate the litigation. Even if it were determined to be work product (not likely), that would be overcome by the substantial hardship Shearer would undergo to obtain similar information (and that there are no attorney mental impressions which are absolutely privileged).

### *Conclusion*

The court erred on denying the motion to compel since the evaluations are relevant and proportional to discovery and no defense applies.

### **3. May Jiff take advantage of the judgment in the first suit in defending against the second suit?**

Yes, Jiff may take advantage of the judgement in the first suit in defending against the second suit.

The doctrines of claim preclusion and issue preclusion are both applicable to this fact pattern.

### *Claim Preclusion*

The doctrine of **claim preclusion** prevents a party from relitigating an identical case. Claim preclusion applies when there is: **(1) the same parties; (2) the same cause of action or controversy and (3) a final judgment on the merits.** *Merger* occurs when a plaintiff wins in one case and attempts to relitigate an issue that he did not raise in the first case. Such an issue merges into the first judgment and cannot be brought in a subsequent action. *Bar* occurs where a plaintiff loses and then tries to

relitigate an issue he did not raise in the first case. Such an issue is barred in a subsequent action.

Here, Shearer sued Jiff for negligence in the Eastern District of California. Following Shearer's loss in a final judgement (which was not appealed), Shearer is now bringing another action 6 months later in the Eastern District (the same court). Therefore, issue preclusion applies because it is (1) the same parties [Shearer and Jiff]; (2) the same cause of action (the damages incurred when Jiff cleaned the beauty parlor in Reno); and (3) a final judgment was issued (the jury verdict against Shearer).

Shearer could have brought the contract claim in the first case but did not and is thus *barred* now under issue preclusion from doing so.

#### *Primary Rights Doctrine - Possible Defense to Claim Preclusion*

Some states, including California, adhere to the *Primary Rights doctrine*. This means that for the same cause of action, a claim is not barred if they involve different primary rights (an example would be property damage and personal injury). Here, Shearer would make an argument that different primary rights are involved due to a tort claim and a contract claim. Shearer would argue that this is a substantive law issue that the federal court must apply CA law under the *Erie* doctrine. However, since these are not separable actions as typically found in primary rights doctrine scenario as described above (ex. property damage and personal injury), a court would most likely deny this defense and say that it is barred under issue preclusion.

#### *Issue Preclusion*

**Issue preclusion** occurs when there is **(1) a final judgment on the merits; (2) an**

**issue was *actually litigated* in the first case; and (3) it was essential to**

**judgment.** Traditionally, only *completely mutual* issue preclusion was allowed meaning that it had to be the same parties. Under the modern view, *nonmutual issue preclusion* (either *defensive* where a defendant from a previous action can use a previous action to defend against a new plaintiff or *offensive* where a new plaintiff is attacking a defendant from a prior action). Here, there is *mutuality* of the parties so a nonmutual analysis doesn't apply (although it is worth noting that CA allows for offensive nonmutual issue preclusion).

Here, there was a final judgement on the merits. Shearer might have an argument to make as to whether the issue was actually litigated. In the first case, which centered around negligence, it is highly likely that Shearer would have pointed to the contractual language of due care in order to help establish the duty that Jiff owed to Shearer and to assist helping the trier of fact (the jury) find a breach of that duty. If Shearer had pointed this out and it was *essential* to the judgment, it is likely that issue preclusion would apply.

However, if Shearer did not point to the contractual language and/or relied primarily on general negligence principles (thereby relegating the contractual provision to a minor issue status), issue preclusion would not prevent this claim from going forward.

*Conclusion:*

Shearer will be prevented under claim preclusion from filing suit again. Depending on the role contractual language might have played in the first case, issue preclusion could also prevent the claim.



## **QUESTION 2**

Laura is a lawyer. She practices family law in a suite she shares with Alex, a tax attorney. Laura and Alex share a conference room, a printer, and a receptionist. Their receptionist is Laura's son, Sam. Laura and Alex each use separate letterhead, business cards, and telephone numbers.

Laura represented Wendy, who was divorcing her husband Henry. Laura filed a request for child support from Henry. In his financial statement, Henry claimed that he had no significant assets and that he lived alone. Wendy told Laura that she suspected Henry was not being truthful, that he had more income and assets than he claimed, and that he lived with and shared expenses with his girlfriend, Ginny.

One morning, while picking up papers from the office printer, Laura saw and read a document addressed to Alex left on the printer by Sam. The document was a property deed in the names of Henry and Ginny, and listed Ginny's address as the same as Henry's. Henry had not disclosed the property on his financial statement. Alex had received the document from Ginny, whom Alex represented on a matter unrelated to Henry's divorce.

Because Laura did not want to get her son into trouble, she never mentioned the property deed to Alex, Wendy, or the court. Wendy received a lower award of child support from the court than she should have, based on Henry's incorrect financial statement.

1. What ethical violations, if any, has Laura committed? Discuss.
2. What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

## QUESTION 2: SELECTED ANSWER A

1.

### Laura and Alex Office Arrangement

Laura and Alex are carrying on their respective practices in a shared family law suite.

They must be sufficiently separate or else they risk being considered a partnership, and thus would be facing potential conflicts of interests with clients. While they share the same suite and the same receptionist, which could raise concerns about the adequacy of their separateness, they have been using separate telephone numbers, letter head and business cards. They are also each in different distinct specialties of family law and tax law, which could indicate to potential clients that they are separate practices.

With this arrangement they run the risk of not being sufficiently separate such that they could be considered a partnership. The facts do not indicate that they are clearly separated by demarcated offices, or how their respective individual practices are presented on the door of the suite. If they were deemed to be one firm, or a partnership, then they would face conflicts of interest.

A conflict of interest would exist between Laura representing Wendy, while another lawyer in the firm represents an opposing party in the same issue. If they were deemed to be one firm or partnership, then Sally would have to withdraw from representation of Wendy, or Alex would have to withdraw from representation of Henry and they would

have to shield the other partner from the case. Or they would be required to receive consent from both conflicted parties to representation, with informed written consent (CA) or informed consent in writing (ABA).

However, it is likely that Laura and Alex would be considered to be separate entities and must continue to keep their work separate and maintain clear boundaries between the two individual firms. They would need to create a new process for printing materials and keeping their practice clients' information confidential.

#### Document Addressed to Alex: Inadvertent Disclosure

When an attorney inadvertently receives confidential information or work product from an opposing party under ABA Rules, they are required to notify the sending party of the error and must not continue to read or use the document and return the offending document. In CA, the rule is that they must also refrain from reading the material and inform the sending attorney, but are not required to return the document.

Here, Laura should have stopped reading when she saw that the document was addressed to Alex. She should have also informed Alex of the inadvertent disclosure.

#### Duty of Competence

Laura owes a duty of competence to her client Wendy that she will competently represent Wendy in her case-meaning without negligence or recklessness. Here, Laura breached this duty because she had information about Henry's property and assets that were essential to her competently representing Wendy in Wendy's divorce. The property deed of Henry was essential to the determining of child support. And in declining to inform Wendy and apply it to the request, Laura was not acting competently

nor in the best interests of her client. The result was that Wendy received lower child support than she should have.

### Communication

Additionally, Laura has a duty to communicate with her client and keep her client informed of key issues and steps in representation. Discovering that Henry had a property that he had not listed as a significant asset was important information for Wendy, as the client, to know. In failing to inform Wendy of this critical fact in her case, she violated professional ethics.

### Duty of Loyalty

Laura has a duty of loyalty to her client. As discussed above, she must act competently and diligently in their representation; she must also be in communication with her client and keep them informed of the case. Here, she was concerned about her Son getting into trouble, and as a result, breached her duty of loyalty to her client by not informing Wendy of the property deed.

### Duty of Candor

Laura owes a duty of candor to the tribunal. She is aware that Hugh said he lived alone, and that he had no significant assets; however now Laura is aware that there is a property deed in Hugh's name, and that Ginny resides at the same property, meaning that Hugh does not actually live alone.

Laura has a duty to inform the court of this discrepancy.

### Duty to Supervise

Attorneys have a duty to ensure that their staff are behaving ethically. Here, Sam is a staff member of Laura as well as Alex. Laura has a duty to ensure that Sam is complying with ethical standards, which means keeping client information confidential. She has failed to supervise Sam, and additionally has failed to take steps to inform Sam of his duties after finding the property deed.

2.

### Duty of Competence

Alex has a duty to act competently in the representation of his clients. He must not act with recklessness or negligence. Here, in leaving a property deed, a client's information, in a shared and potentially public space in the printer, is a breach of duty of competence.

### Duty of Diligence

Along with competence, Alex has a duty of due diligence. This means he must timely manage and handle cases and documents. Here, Alex was not diligent in handling the property deed for Hugh and Ginny because he left it out on the office printer in a shared space.

### Duty of Confidentiality

Alex has a duty of confidentiality to his client Hugh, and to possibly Ginny who is also his client, he cannot share information about representation of a client without consent

of the client or under various exceptions, such as he may reveal confidential information to prevent serious bodily harm or death. For a client to consent to attorney sharing revealing information about representation or privileged attorney client communication, the client must give informed written consent in CA or informed consent in writing (ABA). Here, the disclosure of the property deed was inadvertent, so it does not meet any exceptions like those that allow a client to reveal confidential information to prevent serious bodily harm or death (CA and ABA) or to prevent or rectify substantial financial harm where the client is using the lawyer's services in furtherance (ABA only).

Here, Alex negligently revealed confidential client information when the deed was left in the printer. He breached his duty of confidentiality to his client.

It is not clear if Alex was aware that the property deed was not disclosed in Henry's divorce case against Wendy. If Alex was aware, he could attempt to argue that this breach of confidentiality fell under the exception of revealing confidential information to rectify or prevent serious financial harm where the client is using the lawyer's services in furtherance (ABA only). However, the facts are not clear on the seriousness of the financial harm as a result of the lower child support payment, or that Henry was using Alex's services in furtherance. The information seems to have been inadvertently disclosed by Alex and Sam.

### Duty to Supervise

Alex has a duty to supervise his staff, including Sam, who acts as a receptionist for Laura and Alex. Alex has a duty to supervise staff to ensure that they conform to ethical standards. Sam leaving out information on a printer in a shared office suite is behavior

that risks the confidentiality of clients.

Alex has failed to supervise staff diligently.

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## QUESTION 2: SELECTED ANSWER B

### Laura's Ethical Violations:

#### **Duty of Loyalty: Self Interest**

Laura (L) represented Wendy (W) and therefore, owed Wendy a duty of loyalty under both CA and ABA rules. The duty of loyalty requires a lawyer to act in the client's best interests. Under both rules, if a lawyer knows or has reason to know that there is a substantial risk of materially limiting their ability to represent their client competently or diligently because of a personal conflict, they must withdraw from representation unless (1) they reasonably believe they can provide competent and diligent representation, (2) representation would not be against the law, (3) they are not representing two clients on opposing ends of the same litigation, and (4) they obtain informed consent, confirmed in writing under the MR, or informed written consent under CA. CA differed in consent requirements because it requires that both the consent AND the disclosure be in writing, whereas the MR only require the former to be in writing.

Here, L had a personal conflict of interest because her receptionist, Laura's son, Sam (S), accidentally left a property deed on the printer. L will argue that at the start of representation, there was no conflict of interest and thus she did not have a duty to inform nor withdraw. However, after L found out that her son made a mistake, she acted on her own interests because she did not want to get her son in trouble. Since L was in a position to pick her son over her client, there was a conflict of interest here and thus, L breached it by not getting informed written consent or informed consent confirmed in



writing from W. Even if L did get the consent, it is unlikely that she could have believed that she would be able to provide competent nor diligent representation because she would have to pick her own client and put her son at risk of getting in trouble. Thus, this was a breach of her duty of loyalty under both ABA and CA rules.

### **Duty of Diligence**

Under both CA and ABA rules, a lawyer must act with hard work and dedication, to diligently act in the best interest of their client. Under CA rules, a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation. This rule does not require an attorney to breach ethical rules in order to zealously represent their client; however, they must do their best to advance their client's non-frivolous interests.

Here, Laura had a duty to use all the information that she got to W's best interest. However, she did not use the information about the deed because she did not want to get her son in trouble. L will argue that she did not use this information because she did not want to breach confidentiality between Alex and his client, Ginny. However, by prioritizing Ginny and her son's interests above her own client, L failed to do all that she could to advance the best interests of her client. Therefore, L breached her duty of diligent representation to W.

### **Duty to Withdraw**

Under MR, a lawyer must withdraw from representation if representing the client would lead to a violation of the ethical rules, or any other law. Under CA rules, the lawyer must withdraw if continued representation would lead to a violation of the ethical rules. Here,

continuing to represent W led L to breach the ethical rules of diligence, conflict of interest, and more as discussed below. Therefore, by failing to withdraw, L was also in breach of this rule under both CA and ABA rules as well.

### **Duty of Candor**

An attorney owes a duty of candor to opposing parties and the tribunal. Under both ABA and CA rules, a lawyer must not knowingly make a false statement to the court or fail to correct a false statement previously made.

#### *Tribunal*

Here, L breached the duty of candor to the tribunal because she knew that the financial statement that Henry submitted claiming he had no significant assets and lived alone was false. She knew that the court would rely on this statement when awarding Wendy's lower award of child support. However, instead of being truthful with the court and informing the falsity of this statement that she KNEW was false, she never mentioned it. Therefore, not only was this a CLEAR breach of diligence to her client as explained above, it was also a breach of candor to the court under both ABA and CA rules.

#### *Alex*

L also arguably breached the duty of candor to Alex because she failed to tell him about getting this information about his client. L will argue that she does not owe A any duties because he isn't even opposing counsel. However, as discussed below, she did owe him a duty to inform him of the inadvertent disclosure; by failing to do so she probably breached her duty of candor to him as well. (*See below, duty of fairness*).

### *Duty not to assist in perjured testimony*

L may have also breached her duty not to assist in perjured testimony or false evidence. Here, H gave false evidence to the court that said he did not have significant assets and lived alone. However, L will likely be successful in arguing that H was not her client. She therefore did not have a duty to prevent him or try to dissuade him from offering false evidence like she would have if L were trying to offer that false document. Therefore, it is unlikely that L assisted H in providing false testimony. However, her failure to inform the court that she knew that this information was false due to her own self-interest will still likely be a breach of candor to the tribunal.

### **Duty of Communication**

Under both ABA and CA rules, a lawyer has a duty to reasonably communicate with their clients. In CA, this includes updates of any significant developments in the case, which includes all written settlement offers or plea deals. Under ABA, this includes keeping the client reasonably performed of the status of the matter. Under both rules, the lawyer must keep the client reasonably informed of details necessary to make an informed decision.

Here, W told L that she believed H was not being truthful about having no significant assets and living alone. However, L found out that there was a deed in the names of both Henry and Ginny. This is likely something that is necessary to communicate to a client because it is about the status of the matter for child support, and it is a significant development under CA rules because it makes W's chance of receiving a higher award of child support more likely. However, L did not inform W of the fact that she discovered

evidence that will help W's claim. Instead, she hid it and never mentioned it to Alex, Wendy, not the court. Therefore, she breached her duty of communication to W.

### **Duty to Supervise**

Under both CA and ABA rules, lawyers have a duty to adequately supervise the staff that they manage or exercise control over. Here, L practiced family law in a suit shared with Alex (A), a tax attorney. L and A both shared a conference room, a printer, and a receptionist, who was L's son, Sam. L will argue that since S was L and A's shared receptionist, she could not exercise control over him. However, a receptionist usually follows directions given by a lawyer that they are employed by, even if that means S was under the direction of both L and A. Moreover, S was L's son, which makes a stronger case that S was within L's control. Therefore, L breached a duty of supervising S and making sure that he did not leave confidential communications on the printer. L should have provided adequate training to ensure that things like this do not happen. By failing to provide such training and corrections, and denying that this whole incident didn't happen, L breached her duty to supervise under both MR and ABA rules.

### **Duty of Fairness: Inadvertent Disclosure**

Lawyers owe a duty of fairness to opposing counsel. Under both ABA and CA rules, when a lawyer receives information that that they know or reasonably should know was sent by mistake, they must take certain steps to mitigate the harm to opposing counsel. Under the ABA rules, the lawyer must notify opposing counsel as soon as possible that they received this information. Under CA, the lawyer must notify opposing counsel and also only read as much as necessary to determine that the information was

inadvertently sent.

Here, L saw that deed in the names of Henry and Ginny and knew that H did not disclose the property on the financial statement. Under both ABA and CA rules, L was in breach because she timely failed to notify A who was in the other office next to her. She clearly did not notify him because she didn't want to get her son into trouble; however, her failure to do so was a breach of fairness to opposing counsel. Additionally, it is unclear whether L read more than necessary before she would have been required to disclose receipt of the information, but since she failed to disclose at all, she would be in breach of both rules regardless of how much of the deed she examined.

### **Contingency Fees**

It is unclear what L and W's fee agreement was. In CA, the fee agreement may not be unconscionable and under ABA, the fees charged may not be unreasonable.

Contingency fee agreements must be in writing under both authorities, and they are not allowed for criminal cases where payment is based upon a favorable judgment, or for family law cases where payment is based upon an award of spousal or child support.

We would need more facts about the fee agreement between L and W to determine whether this would have been a breach. Since L is representing W on a divorce matter and L is seeking child support, a contingency fee agreement would not be appropriate, and if L did execute one, this would be an ethical violation under both ABA and CA rules.

### **Duty of Competence**

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a

lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly, fail to provide competent representation.

Here, it is unclear whether L acted competently because it seems she did not know of the property deed until after seeing it from the printer. Assuming that the deed was recorded, it is likely that a quick title search or further research would have revealed that H and G were living together to refute any claim that H did not own any property. Assuming a reasonable investigation would have revealed these facts, L breached her duty of competence by failing to find this out. Additionally, if she was able to find this out by a title search, she breached her duty because this makes a case even stronger that she breached her duty of diligence because this information could have been lawfully obtained even despite S's mistake. A lawyer would use this preparation necessary for competent representation; by failing to be thorough and adequately prepare, L breached her duty. Additionally, L breached her duty repeatedly by failing to search, failing to disclose, and failing to advocate for her client, therefore she also breached the duty of competence under the CA rules as well.

### **Alex's Ethical Violations:**

#### **Duty of Confidentiality**

Lawyers owe a duty of confidentiality to their clients under both ABA and CA rules. Under ABA rules, the lawyer must not disclose information acquired through representation of the client, unless the client consents or it is impliedly authorized in the course of representation. Under CA rules, a lawyer must "maintain inviolate the

confidence and at every peril to himself to preserve the client's secrets." The duty of confidentiality lasts forever under the ABA rules, and ends when the client's estate is settled under the CA rules. Encompassed in both ABA and CA rules, a lawyer must take reasonable steps to avoid inadvertent disclosure of confidential communication.

Here, Alex (A) owed his client, Ginny (G), a duty of confidentiality. A received the property deed from G during his representation of her through a matter unrelated to Henry (H)'s divorce. He had a duty to exercise reasonable care to prevent inadvertent disclosure of documents received by her. A will argue that he did use reasonable care, and that it wasn't him who was careless, but L's son, S. However, assuming that S was subject to A's control, like he was subject to L's control discussed above, it is likely that A failed to use reasonable care to provide training to ensure that such careless mistakes would not happen. A should have also checked the printer from time to time to make sure that such communications would not inadvertently be shared with L. By failing to take any reasonable steps, it is likely that A breached confidentiality.

*Not confidential?*

A may also argue that the deed was confidential because it was readily available. Although the ABA rules make information that is readily discoverable not confidential, the CA rules differ in this regard. Therefore, the fact that the deed could have been discoverable by a quick title search (as discussed above), may make this not a breach of confidentiality under the ABA rules. However, under the CA rules, even if the deed was discoverable through some other means, this would not affect the analysis above.

## **Duty of Competence**

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly fail to provide competent representation.

Here, A did not use the thoroughness necessary to provide competent representation because a receptionist, subject to his control, left a document that was found by L who represented a client whose interests were related to G's interest (since they were in a relationship). A will claim he did not breach the CA rules because he did not do this repeatedly and did not know that L even had the document. It is unclear whether A was aware of this risk which make it reckless, but it is likely that if no reasonable measures were taken to make sure that Sam wasn't doing this all the time, this would be gross negligence at least. Therefore, it is likely A breached his duty of competence.

## **Duty of Loyalty, Conflict of Interest: Laura and Alex**

Certain measures must be taken under both ABA and CA rules when two lawyers are working in the same firm. It is unclear here whether A and L were working in the same firm. Although they shared a conference room, printer, and a receptionist, which suggest that they were sharing spaces, they also used separate letterheads, business cards, and telephone numbers, which suggests that they were just sharing an office space and not a practice. Moreover, since L practiced in family law and A was a tax attorney, they also practice in different areas, which still could make this analysis go either way.



## **Duty of Loyalty: Potential Conflict of Interest**

Since L and A were sharing common areas, even if they aren't working in the same firms, the policy reasons for both MR and CA rules would likely apply to their situation.

Lawyers may not represent a client if there is a substantial risk that representation will be materially limited by the lawyer's duties owed to a different client, whether that client is represented by the firm or by the lawyer individually. There will be a substantial risk when the lawyer receives harmful material information adverse to one of the clients.

Under CA rules, the information need not be harmful, but it must be material which means it is important to the subject matter of the case. The lawyer may only represent the client if they reasonably believe they can provide competent and diligent representation and they get informed written consent (CA) or consent confirmed in writing (MR).

Here, L and A were working in a common area and thus there was a substantial risk that their duties owed may be limited because harmful material information may have been shared among them with the use of a shared (arguably irresponsible?) receptionist. Therefore, they had a duty to inform both of their clients of the situation and get required consent under both rules. By failing to do so, both A and L breached their duties of loyalty. A will argue that there was no conflict of interest because he was representing W on a matter unrelated to H and W's divorce. A has a strong claim here because it is unclear whether there was a substantial risk of materially limiting representation with such different claims that are a bit removed. However, the fact that they shared so many common areas, and the fact that L's belief about H living with his girlfriend G was in direct dispute, this really could go either way.

## **Screening**

Lawyers working in a same firm, assuming that a court does apply these rules because of the shared space between L and A, are allowed to participate in a matter if the lawyer entering a firm is "screened." Screening procedures require that the lawyer is not apportioned any part of the fee from a case and the prior client is given notice and details of the procedures taken to ensure compliance with the ethical rules. CA rules also require that the former client receive a certification by a partner in the firm and from the attorney that procedures followed were in compliance with the ethical rules. Here, no such notice was given to either W, on behalf of L, or G, on behalf of A. Even though it is likely that L and A were not operating in the same firm anyway, we can confirm that no screening measures were taken absent any additional facts.

### **QUESTION 3**

State Hospital, a public hospital funded and managed by State, entered into a contract with Cook's Catering, a business owned and operated by Kimberly Cook, to provide on-site meal service to patients, staff, and visitors.

Recently, Denise Davis, the Chief Executive Officer of State Hospital, received a series of anonymous email messages threatening to carry out "a massive attack" at the hospital. In response to these threats, Davis decided to reassign a security guard from patrolling the kitchen area to patrolling the hospital lobby and entrance area. Davis did not share the information concerning these threats with anyone else at the hospital.

Several days later, Frank, a former patient, entered the hospital kitchen shortly before lunchtime and mixed peanut powder into a serving tray full of mashed potatoes. Neither Kimberly Cook nor any of her employees were present in the kitchen at the time because they had all left to use the restroom. A state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. At lunchtime, Patrick, a patient, consumed the mashed potatoes. Patrick, who had a serious allergy to peanuts, suffered severe injuries.

Patrick sued Cook, Davis, and State Hospital. Cook was found negligent for failing to comply with the state health code.

1. Is State Hospital liable for Cook's negligence? Discuss.
2. Does State Hospital owe Patrick a duty to protect him from Frank? Discuss.
3. What defense(s), if any, may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard from the hospital kitchen? Discuss.

## QUESTION 3: SELECTED ANSWER A

### PATRICK V. COOK, DAVIS, AND STATE HOSPITAL

#### (1) State Hospital Liability for Cook's Negligence

If State has waived sovereign immunity for negligence actions, then State Hospital may be liable for Cook's negligence under the doctrine of respondeat superior.

#### Sovereign Immunity

At common law, a State sovereign could not be held liable for the torts of its agents or of itself. However, most jurisdictions have passed statutes that waive sovereign immunity for negligence actions. Thus, a State can be held liable for its torts in most jurisdictions, subject to damage caps in some jurisdictions.

Here, State Hospital is a public hospital funded and managed by State. Thus, Hospital will be considered an agent of the State. Therefore, the traditional rule of sovereign immunity would prevent Patrick from holding State liable for both its own torts and the torts of Hospital's agents. However, since most jurisdictions have waived sovereign immunity for negligence actions, the suit against State can likely proceed.

#### Respondeat Superior

The doctrine of respondeat superior allows a plaintiff to hold a principal responsible for the torts of its agents so long as the tort was committed within the scope of the agent's employment. Principals are not liable for torts committed by independent contractors unless the principal owed a duty that cannot be contracted out.

### *Independent Contractor*

State will argue that it cannot be held liable for Cook's negligence because Cook is an independent contractor. A principal is not liable for the torts of independent contractors. To determine if an agent is an employee (servant) or an independent contractor, the Court will look to a variety of factors including (i) the business relationship and contract between State and Cook's catering; (ii) whether State had control over the **manners and means** in which Cook performed; (iii) whether the job performance provided by Cook was the kind of performance typically provided by an independent contractor; (iv) whether the parties had thought they were in an employee-employer relationship; and (v) whether the job performed included a **duty that could not be delegated**.

State will argue that Cook is not an employee, but rather an independent contractor. Cook's Catering is an independent company that State has contracted with in order to provide on-site meals. State will also point to the fact that it did not control the **manner and means** of Cook's work -- Cook was free to provide meals however it saw fit. But Patrick will argue that this was more akin to an employee (servant) -- employer relationship because Cook was not just providing a finished product. Rather, Cook was required to be at the hospital daily and worked on-site in preparing meals.

Patrick's strongest argument to hold State liable as master of the servant is to argue that the duty to provide safe meals **could not be delegated**. Patrick will argue that the safety of patients, staff, and visitors required that State provide safe food. A duty for safety of others cannot normally be delegated.

Therefore, the Court will likely conclude that Patrick can hold State liable for the torts of

Cook's Catering Service because the duty to ensure Cook's compliance with the safety code that applies to hospitals could not be delegated.

**(2) DOES STATE HOSPITAL OWE PATRICK A DUTY TO PROTECT FROM FRANK?**

**DUTY**

The question of whether a duty exists is one for the Court to decide. In most jurisdictions, a defendant owes a duty to act in a reasonable manner and this duty extends to everybody. However, a minority of jurisdictions have adopted the duty rule from *Palsgraf*, which limits the reasonable duty to only foreseeable plaintiffs.

Generally, there is no duty to protect from third-party tortfeasors / criminals. However, Patrick is a patient of the hospital and it is foreseeable that Patrick is a person that could be hurt if the Hospital is negligent. At common law, this would be a close call, but the court would likely find Patrick to be a foreseeable plaintiff.

The fact that the harm occurred due to a third-party tortfeasor will not be conclusive in determining duty

*Premises Liability*

Under the traditional approach, a person on premises is categorized as a trespasser, licensee, or invitee. The duty owed depends on the person's categorization. Here, Patrick will be categorized as an invitee and thus Hospital owed him a duty to ensure the premises were safe.

However, many jurisdictions, including California, have abolished categorizations and just hold that a landowner / possessor of real property owes a duty of reasonable care to everybody except **flagrant trespassers**. Here, Patrick would be owed a duty of care.

### *Inn Keeper*

At common law, certain businesses that catered to providing transport and lodging services owed a heightened duty of care. This included businesses like common-carrier and inns. These businesses owed a duty to provide the utmost care.

Here, State is a hospital, which is similar to an inn because people stay at a hospital with the intent to leave. Thus, they are relying on the owner of the premises for basic protection. However, the Court will likely hold that the common law duty of utmost care does not extend to a hospital because there is a statutory basis to find duty.

### Statutory Duty

In addition to duties provided by common law, the legislator can create duties via statute. Here, a state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. The legislation is clearly designed to protect those eating in hospitals.

Therefore, Patrick has a strong argument that the legislator created a duty for a hospital to provide safe food to all of those that would eat the food.

### **(3) WHAT DEFENSES MAY DAVIS ASSERT?**

#### **DUTY**

See rule above. Here, Davis owes a duty to use reasonable care in managing the Hospital.

#### **NEGLIGENCE / BREACH**

Negligence occurs when a party fails to use reasonable care, and as a result, the party breaches the duty it owes to the plaintiff. Negligence is found when the benefits of acting reasonably outweigh the potential harm.

Here, Davis can defend her actions by claiming they were not negligent.

#### *BPL Analysis*

The BPL analysis from Judge Learned Hand provides a formula for determining if a party has acted negligently. Under the analysis, a party has acted negligently if the benefits from acting outweigh the potential costs.

Here, Davis will argue that she acted in a reasonable manner by reassigning a security guard. Davis reassigned the security guard after receiving emails about a "massive attack" at the hospital. Thus, Davis will say the reassignment was the prudent action to take given the threat. However, Patrick can argue against this by pointing to the fact that a reasonable CEO would still have security in the cafeteria even if a reassignment was required.

Under a traditional analysis, a jury could come out either way on determining if Davis was negligent.



## Emergency Situation

In the event of an emergency, a party will be judged by the reasonable standard a prudent person would exercise *in an emergency situation*. If the Court finds that Davis failed to use reasonable care, Davis will attempt to get an emergency instruction to the jury which would require the jury to judge Davis' actions based on the fact he was acting in an emergency situation.

This argument will likely fail because there was **no present emergency**. Patrick will argue Davis received a series of emails over the course of a period of time. So, there is no reason to suspect that the attack is imminent because the emails keep on coming. Also, Davis did not tell anybody about these emails. If this were a true emergency, then Davis would have called in for backup by telling other hospital staff about the threat and potentially bringing in extra security. But Davis did none of that; all he did was reassign a security guard.

Therefore, Davis will likely be unable to get an emergency instruction to the jury.

## **CAUSE IN FACT**

The breach must be a factual cause of the injury. This is usually easily satisfied with the but-for test. Here, Patrick will argue that but-for the reassignment of security, the food would not have been tampered with. Davis can try to argue that the true but-for cause is that but-for Cook's staff going on a bathroom break, the food would not have been tampered with.

## **PROXIMATE CAUSE**

Proximate cause requires the harm that flows from the breach of duty be foreseeable.

Like with the factual argument above, Davis can further argue that the proximate cause to the incident is the lack of kitchen staff. Davis will argue that the security in the kitchen is not designed to secure the food -- that is Cook's job.

#### Superseding intervening cause

A superseding, intervening cause is an outside event that cuts one's liability off from the breach. Here, Davis will argue that the reassignment was not a proximate cause for the harm experienced by Patrick. Instead, Frank's criminal actions are a superseding, intervening cause.

#### **DAMAGES**

Patrick can show damages because of his allergic reaction.

### QUESTION 3: SELECTED ANSWER B

1. Is State Hospital liable for Cook's negligence?

Employers are generally liable for the torts of their employees conducted within the scope of their employed duties. On the other hand, a party is not generally liable for the torts of independent contractors, unless it concerns a non-delegable duty.

#### Employee vs. Independent Contractor

First, a court will need to determine whether Cook's is more similar to an employee of State Hospital or an independent contractor. The principal factor a court considers in determining whether a party is an independent contractor or an employee is whether, and the degree to which, that party was subject to the control of the employer. The more control, the more likely that party is to be an employee. Courts also consider whether the party conducts business regularly in the area in which it was contracted to perform, whether the employer supplied the tools and equipment, and other factors.

The facts do not indicate with sufficient detail the level of control that State Hospital had over Cook's. If State Hospital dictated the menu, for example, that would indicate an employer-employee relationship. But the facts only indicate that Cook's was to provide on-site meal service. Presumably, Cook's could decide which meals to prepare. On the other hand, if the hospital dictated meal- times, when staff had to arrive or leave, etc, that would indicate greater control.

The fact that Cook's Catering is in the business of catering (as evidenced by its name) and providing meals, indicates that it might be more of an independent contractor. On

the other hand, State Hospital seemed to have provided the kitchen that Cook's Catering used, since Cook's Catering was operating in the hospital kitchen. Moreover, the staff used the hospital restrooms. This seems to indicate more of an employer-employee relationship.

The question as to whether Cook's Catering is an employee or an independent contractor is a close one. But on balance, Cook's Catering is likely to be an independent contractor.

However, just because Cook's Catering is an independent contractor does not mean that State Hospital is not liable for the negligence of Cook's. Some duties are non-delegable. In such situations, a party will be liable for the breach of its non-delegable duties because it cannot delegate those duties away to an independent contractor to insulate itself from liability. For example, when a property owner invites the public onto its property, it is responsible for the safety of the public on its property, and for the negligence of independent contractors that create unsafe conditions on the property.

#### Non-Delegable Duty

Here, it is likely that State Hospital's provision of food to its patients is a non-delegable duty. Although the patients do not constitute the "public," by accepting the patients, the hospital has accepted them into its care, including providing them food. It is therefore likely that the hospital cannot delegate this duty to a catering company in order to avoid its duty of care to its patients.

Moreover, a statute may establish a duty, and here, the state health code likely established a non-delegable duty (see analysis below).

## Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against the states without the states' consent. It embodies the concept of sovereign immunity. Thus, if the State Hospital can be properly characterized as an arm of the state, it likely cannot be liable in tort to Patrick unless the State has consented to such suits (e.g. with something similar to the Federal Tort Claims Act).

Here, the State Hospital likely can be characterized as an arm of the state. It is a public hospital, and it is funded and managed by the State. The funding and management are prime indicators that it is not separate from the State (e.g. compare with a municipality, which may be sued if its funding does not come from the state).

Therefore, unless the state has consented, State Hospital is not to be liable on a negligence claim. It is unlikely that the state health code, which imposes a duty on hospitals (see below) constitutes an acquiescence to liability. The Supreme Court has held that any consent to be sued under the Eleventh Amendment must be clear and unequivocal. The statute is not such an unequivocal statement of consent. It can easily be interpreted to allow liability only for private hospitals.

2. Does State Hospital owe Patrick a duty to protect him from Frank?

## General Duty

By taking in Patrick as a patient, State Hospital assumed certain duties with respect to Patrick. In general, hospitals owe patients a reasonable standard of care in medical treatment. More generally, they owe patients a duty to act reasonably to protect them from foreseeable harms.

Here, whether State Hospital owed Patrick a duty to protect him from Frank likely turns on whether Frank's actions were foreseeable. Frank was a former patient. If Frank had a propensity to try to harm other patients and the hospital knew about it, or if Frank had come to the hospital in the past to harm other patients, then the hospital would owe its patients a duty to protect them from Frank. Even if the hospital was not aware that Frank, in particular, would likely attempt to harm its patients, but was aware that former patients or others in general have in the past tried to tamper with the hospital food, the hospital would have such a duty.

A minority of jurisdictions will find that the hospital had a duty to act reasonably to prevent harm that occurred, regardless of whether the harm was ultimately foreseeable (although the foreseeability of the harm affects proximate cause analysis in a negligence action).

### Statutory Duty

But independent of the above analysis, a statute or other law can give rise to a duty. A statute may give rise to a duty to protect a certain class of plaintiffs against a certain class of harms. If the statute is silent as to tort liability, then most jurisdictions will allow a finding of negligence per se based on the violation of the duty laid out in the statute if: a plaintiff in the class of plaintiffs the statute was designed to protect is harmed, and the harm is in the class of harms that the statute was designed to prevent.

Here, the state health code provides that food served in a hospital must never be left unattended before, during, or after meal service, in order to prevent contamination or tampering. The statute was likely designed to protect consumers of the food, e.g. the

patients. Here, Patrick was such a patient who ordinarily consumed the hospital's food. So, Patrick was in the class of plaintiffs the statute was designed to protect. Second, the statute was likely designed to protect against poisoning or other effects caused by "contamination or tampering." Here, Patrick suffered an allergic reaction, and this is likely in the class of harms that the statute was designed to protect against. So, the Hospital likely owed Patrick a duty to protect him from food contamination, whether from Frank, or someone else. This duty is also likely non-delegable (see above for analysis).

3. What defenses may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard?

### Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against a state without a state's consent. However, state officials performing official duties may be sued under the stripping doctrine. But this doctrine only allows suits for an injunction, applying prospectively, and not for retrospective damages.

Davis will argue that since she is the CEO of State Hospital, she is an employee of the state. Her decision to reassign the security guard was made as part of her official duties. She will therefore argue that a negligence suit against her is really a negligence suit against the state, that any damages would be paid out of state coffers since she was acting in her capacity as an employee of State Hospital (State Hospital is funded by the State), and that the Eleventh Amendment immunizes her against a suit for damages.

## Public Necessity

Davis may further argue that her actions in reassigning the security guard was in response to a public necessity. Where a party has a reasonable belief that actions need to be taken to protect the public interest, and reasonable actions are taken in response to such a belief, the doctrine of public necessity is a complete defense against negligence (as opposed to private necessity, which only provides a partial defense).

Here, Davis received email messages threatening to carry out "a massive attack" at the hospital. Davis will argue that there was a public need to re-assign the security officer to prevent or mitigate the consequences of such an attack. The harm arising from "a massive attack" could far exceed food contamination or tampering. And the re-assigning of a security officer was a reasonable response to such a threat.

However, Patrick will counter that the threats were all anonymous and therefore Davis' belief of a massive attack was not reasonable. Moreover, Patrick will argue that it is much more likely for food contamination or tampering to occur, since such occurrences are more frequent than "massive attacks."

It is unclear how a court would rule on this defense, but the court will likely side with Davis.

## No Breach of Duty

A breach of duty requires that the benefits of an action are outweighed by the risk and magnitude of the harm caused by the action. Using similar reasoning to the public necessity argument above, Davis can argue that she did not breach any duties at all.

The benefits of preventing a "massive attack" likely outweighs the risk of re-assigning a



security officer, because presumably the people from Cook's Caterer would still be in the hospital kitchen. Moreover, any harm from food tampering is likely to be small. So, Davis did not believe she was leaving the hospital unattended and was justified in acting reasonably in doing so.

### Comparative Fault

Davis can also further argue Cook's Caterer was contributorily negligent. Most jurisdictions allow a reduction of damages for the comparative fault of another party, e.g. if that party's negligence contributed to the damages. Davis' re-assigning of the security guard was not the sole contributor to Patrick's injury, Cook's Caterer also contributed by leaving the hospital kitchen unattended. In fact, Cook's Caterer was found negligent. Davis may therefore be able to seek contribution against Cook's Caterer against any award against her.

Davis can further argue that Frank's intentional tort constitutes an intervening action that was not foreseeable. If anything, Frank was the most culpable, having committed an intentional tort, while David and Cook's were only negligent. Most jurisdictions will allow a reduction for an intervening intentional tort, and some jurisdictions will eliminate negligence liability altogether for another's intervening intentional tort if it was not foreseeable. Because Frank intentionally contaminated and tampered with the food, leading to Patrick's injury, Frank is at least partially, and possibly fully liable.

## QUESTION 4

Detective Anna was about to subject David, who was lawfully in custody, to interrogation because she had received a tip from an anonymous informant that David was involved in transporting heroin. Detective Anna advised David of his *Miranda* rights and asked him if he knew anything about heroin shipments. David replied, "I am not sure if I need a lawyer or not." Detective Anna next asked David how he was transporting the heroin. David responded, "If I had anything to do with it, I would use my car." Detective Anna released David from custody when he refused to answer any more questions. Detective Anna then sent a message to all police officers, describing David's car, stating that it was believed to be involved in transporting heroin.

Later that day, Officer Baker, who had heard Detective Anna's message, saw the car described in the message. Officer Baker decided to follow the car to see if the driver would do anything that could justify stopping the car. When the car ran a red light, Officer Baker stopped the car and ordered the driver, who was in fact David, out of the car. Officer Baker then did a pat-down search of David and found a cell phone in his pocket. Officer Baker turned on the cell phone, saw a text message icon, clicked on the icon, and found a message to David stating, "The heroin is in the trunk; deliver it to the warehouse." Officer Baker then searched the trunk of the car, where he found 30 pounds of heroin. He arrested David and arranged for the car to be taken to the police impound lot for processing.

David is charged with transportation of heroin. David moves to suppress:

1. His statement, "If I had anything to do with it, I would use my car";
2. The text message that stated, "The heroin is in the trunk; deliver it to the warehouse";  
and
3. The heroin found in the trunk of the car.

How should the court rule on each of the motions to suppress? Discuss.

## QUESTION 4: SELECTED ANSWER A

The defendant in a criminal case may bring a motion to suppress evidence asserting a violation of his Fourth, Fifth or Sixth Amendment rights. These amendments are incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The exclusionary rule provides that evidence obtained in violation of these constitutional rights is inadmissible in the state's case-in-chief against the defendant, unless an exception to the exclusionary rule applies. The purpose of the exclusionary rule is to deter illegal police conduct and the Supreme Court has decided there are certain exceptions to the exclusionary rule where the social costs to society outweigh the deterrence value in prohibiting illegal police conduct. The exclusionary rule prohibits the admissibility of all evidence directly obtained in violation of a defendant's constitutional rights and evidence later derived from such evidence as "fruit of the poisonous tree."

### **1. Statement, "If I had anything to do with it, I would use my car"**

#### *Fifth Amendment*

At issue is whether David had a viable argument for suppression of his statement under the Fifth Amendment. The Fifth Amendment protects the right of defendants to be free from compelled self-incrimination. The Supreme Court has decided that *Miranda* warnings are necessary to protect this right so that a defendant is made aware of his right to invoke his privilege against self-incrimination and his right to counsel. Waivers of a defendant's *Miranda* rights must be knowing and voluntary. *Miranda* attaches at "custody." A defendant is in custody based on the

"freedom of movement" test, or when a reasonable person would not feel that he is free to leave police custody. Here, the facts state that David was "lawfully in custody," so we must accept that David was in custody for *Miranda* purposes, and we will not analyze whether that custody was lawful.

*Miranda* only applies to interrogations. Interrogations include express questioning by police officers as well as any statements or conduct by the police that may reasonably lead to inculpatory statements by a defendant. However, statements that are spontaneous or voluntary by the defendant are not obtained in violation of *Miranda*.

In analyzing whether a defendant has properly invoked his *Miranda* rights, the critical question is whether he did so *unequivocally*. To assert his right to maintain silent, the defendant must unequivocally state that he wishes to maintain silent; even sitting there in silence for long periods is insufficient to expressly invoke. To assert his right to counsel, a defendant must unequivocally assert his right to speak to a lawyer.

Here, it appears that David was lawfully in custody and was about to subject David to interrogation, so both prongs of *Miranda* apply. Detective Anna properly advised David of his *Miranda* rights so there was no problem with the advisement. Once she did that, she did not need to wait for David to invoke his rights; she could ask him a question and then in response, David could waive or assert his right to silence or counsel. Therefore, asking David if he knew anything about heroin shipments was valid. David then replied, "I am not sure if I need a lawyer or not." While it is possible to suggest that David was uneasy about engaging in interrogation, that was almost certainly insufficient to invoke his right to counsel, because it was an equivocal statement. He would have needed to

say something like, "I would like to speak to a lawyer" or even "I'm not sure it's a good idea to speak to you so let me talk to a lawyer first." Detective Anna then properly asked him another question because she was allowed to do so since David had not yet asserted his right to counsel or silence and thus waiver was still in effect. David then made the inculpatory statement at issue here. Therefore, because David had waived his *Miranda* rights and not asserted his right to counsel or silence unequivocally, the statement is inadmissible both in the prosecution's case in chief and for impeachment purposes. (Evidence obtained in violation of *Miranda* is still admissible for impeachment purposes but that's not at issue here since it's admissible in the prosecution's case in chief, too).

The fact that David *then* said he did not want to answer any more questions does not retroactively make his earlier inculpatory statement involuntary or inadmissible and so it is still properly admissible in court. The court should deny the motion to suppress the statement.

### *Sixth Amendment*

A defendant has the right to counsel at all critical stages of the criminal case. The Sixth Amendment right to counsel attaches when a defendant is formally charged with a crime. Here, the facts state that David was only in custody and do not suggest that he had been charged with a crime at the time that he was interrogated. Therefore, even though interrogations are a critical stage, the right to counsel only applies to interrogations conducted *after* formal charges have been filed against the defendant, and so no Sixth Amendment rights were violated here.

## **2. Text message, "The heroin is in the trunk, deliver it to the warehouse"**

At issue is whether the text message that Officer Baker saw on the cell phone was admissible against David.

At the outset, we will note that any possible fruit of the poisonous tree argument that the stop was actually made as a product of the knowledge Detective Anna earlier obtained illegally should be denied because a) the police did not violate David's rights earlier in the interrogation and so it was totally proper for Detective Anna to tell her fellow police officers about the car and the information concerning it and b) the Supreme Court has actually said that information obtained in violation of *Miranda*, unless the police do so intentionally, is not subject to the fruit of the poisonous tree doctrine.

### *Stop of car*

The first issue is whether the stop of the car was valid. A stop of a car is a "seizure" under the Fourth Amendment, because a reasonable person under the circumstances would not feel free to leave when he is pulled over by the police, generally until the police tell him he is free to go. The Fourth Amendment protects the right to be free from unreasonable searches and seizures. The warrant requirement is the heart of the Fourth Amendment and the Supreme Court has held that warrantless searches and seizures are presumed to be unreasonable unless an exception to the warrant requirement applies.

To begin, we must note that a defendant only has standing to assert violations of his own constitutional rights in a suppression motion. When a car is stopped by the police, the driver (and actually the passengers, too) will have standing to challenge the validity

of the stop. Here, David is the driver of the car, so he has standing to challenge the stop.

One of the canonical exceptions to the warrant requirement is that the police may pull over a car without a warrant provided they have at least reasonable, articulable suspicion that an offense has been committed or is being committed. This can include any traffic violation. The point of this exception is that cars freely move throughout the world and so it would be wholly impractical for the police to obtain warrants to stop and search cars of automobiles. That is the rationale behind the basis for stops of cars as well as searches for cars that we will get to shortly.

Under *Whren*, a police officer's subjective intent for conducting a search or seizure is irrelevant; as long as the officer had an objectively reasonable basis for the search or seizure, whatever subjective motivation he had in addition, would not make it unreasonable. Additionally, people do not have a reasonable expectation of privacy when they drive around the world in their cars, so David can't claim that Officer Baker tailing him for some time already violated his right to privacy.

Here, Officer Baker heard Detective Anna's message and then saw the car described in the message. He therefore decided to follow the car for as long as it took for the driver to commit some kind of violation that would justify it. This is a pretext stop and as mentioned is completely valid provided that the officer had an objectively reasonable basis for the stop. Here, the car ran a red light, which is obviously an objectively reasonable basis for stopping the car, giving rise to far more than reasonable suspicion that an offense had been committed (in fact, probable cause). Therefore, the stop was

reasonable.

### *Search of David*

The next question is whether the pat-down search of David was reasonable. Again, David has standing to assert a violation of his rights here because he personally was searched. Officer Baker had a right to order David out of the car, so that is okay. The facts suggest that Officer Baker then did a "pat-down search of David." Under the *Terry* doctrine, a *Terry* stop is valid if the officer had reasonable suspicion that the person has committed a crime or is committing a crime or is about to commit a crime. The pat-down search is only valid if the officer had reasonable suspicion based on specific, articulable facts that the defendant was armed and dangerous. Here, the facts that are known to Officer Baker are that 1) there is an anonymous informant who said that David was involving in transporting heroin. Tips of anonymous informants alone do not give rise to reasonable suspicion unless they are corroborated by other evidence indicating their reliability. 2) That corroboration was likely sufficient because of the inculpatory statement David made about the transportation of heroin which indicated that he probably had something to do with transporting heroin and that if he did, he would use his car. So, there was reasonable suspicion that David was transporting heroin at the time and it was possible that that heroin or some other illegal material may have been contained in his pockets. The bigger problem is that the officer may not have had reasonable suspicion that David was armed and dangerous. There are no specific facts about guns here. The best the officer can likely say is that heroin traffickers are very likely to carry guns in their pockets because drug trafficking is a violent industry.



That may be sufficient for some courts and maybe not for others.

The even bigger problem for the officer is that a *Terry* frisk only allows the officer to seize material that he "immediately" recognizes as contraband or evidence of a crime. The officer here simply felt a cell phone, which would clearly not be immediately recognizable as contraband. Therefore, it was likely illegal to take the phone at all at this point.

An alternate theory for which this search could be justified is a search incident to an arrest. An officer may search the person's body and the area within one lunge of his body, but the search incident to arrest exception only applies when the officer has actually made an *arrest*. Here, the officer actually could have arrested David at this point under *Atwater* because he's got probable cause that David just ran a red light. But he clearly did not arrest David at this point so that is not a valid basis for justifying the search. Therefore, the pat-down exceeded the scope of *Terry*, which means the evidence obtained thereafter would be illegally obtained, too.

No other exception to the warrant requirement applies so far.

### *Search of phone*

Even if the officer's conduct so far had been reasonable, what he did next violated David's rights. David has a reasonable expectation of privacy in his phone because he is the owner of the phone and it was on his person at the time of the search.

Under *Riley*, officers need to get a warrant to search the electronic contents of a cell phone because people have an astonishing amount of private information stored on their cell phones and thus have a reasonable expectation of privacy in them. Warrants

must be based upon probable cause, or sufficient facts to convince a reasonably prudent person that a crime has been committed by the defendant and that evidence or instruments of the crime will be obtained in the place to be searched. However, officers do not need to get a warrant to simply physically handle the phone or to analyze the physical properties of the phone; e.g. an officer could pull off a phone case and see if there was any cocaine hiding in between the phone and the case. But here, Officer Baker did far more than that: he turned on the cell phone, saw the text message icon, clicked on the icon, and then found the message at issue here. That went far beyond physical examination of the phone because he began to scrutinize the electronic contents of the phone.

David did not consent to this, so that would not be a basis for searching the phone.

Therefore, the statement obtained on the phone was obtained illegally and should be suppressed under the exclusionary rule.

### **3. Heroin found in the trunk of the car**

At issue is whether the officer could validly search the car after finding the text message. David has standing to challenge the search of the car because it's his car - he owns it.

#### *Automobile exception*

If the search of the phone had been legal, there is no doubt that the search of the car would then be legal. Under *Carroll*, a core exception to the warrant requirement is that cars may be searched based upon probable cause, or sufficient facts to convince a reasonably prudent person that evidence of a crime or contraband will be found within

the car to be searched. The parts of the car that can be searched depend on what the probable cause is for, analogous to the "particularity" requirement of the warrant requirement: PC to search for machine guns will not justify opening up a tiny container in the car because machine guns can't fit in tiny containers. There is no doubt that once the officer has seen the text message he has probable cause to search the trunk; the text message says that heroin is in the trunk. It's hard to get much more probable than that.

However, under the fruit of the poisonous tree doctrine, evidence obtained from an illegal search cannot then be used to find other evidence of a crime, subject to certain exceptions. Various exceptions to this rule under *Wong Sun* include attenuation (where the illegal police conduct that led to discovery of the originally illegally obtained evidence is very far removed in the causal chain from the subsequent search or seizure at question) or independent source, where the police could have independently obtained the evidence from a different source. Those do not apply here because the search of the phone was immediately followed by the search of the trunk. Additionally, there is no independent source for the information that would give rise to searching the trunk.

#### *Search incident to arrest*

Another possible exception here would be search incident to arrest. Under *Gant*, when a police officer searches a car after arresting a defendant, the police officer may also search the passenger compartment of the car if 1) the defendant is unsecured and capable of reaching into the car or 2) the officer believes that evidence of the offense of

arrest may be found in the car. Here, though, the exception does not apply because David again was not arrested; he was only arrested after the heroin was found. Additionally, the search incident to arrest exception only applies to the passenger compartment of the car, not the truck, which is where the heroin was found. So that exception is not valid either.

*Inevitable discovery / impound search*

Because the search of the car was likely illegal based on the above arguments, the prosecution could argue that the heroin found in the car would have been inevitably discovered by the police. The police arrested David after finding the heroin and then the car would have been taken to a police impound lot for processing. When cars are taken to police impound lots, the police conduct an "inventory search" which is meant to protect the police from allegations that any material that has gone missing was done by the police. The police look through the car and write down the items found in the car on an inventory search. Inventory searches are valid as long as they are conducted according to routine, they are based on valid authority to actually impound the car in the first place, and they are not actually abused by the police in a "pretext" to search for evidence.

Here, the car would have inevitably been subjected to an inventory search, where the police would have almost certainly found 30 pounds of heroin in the truck. Therefore, the prosecution could argue that evidence would have been inevitably discovered. The problem for the prosecution is that there likely was not probable cause to search the car until the illegal search of the phone, and so it was not inevitable that the evidence would

have been discovered. However, if a court found that there was probable cause to search the car for heroin even before the text message was discovered, that would be a basis for not suppressing the evidence under the inevitable discovery rule.

If a court did not reject the suppression motion on that basis, the heroin found in the trunk of the car should be suppressed as it was obtained in violation of David's Fourth Amendment rights.

## **QUESTION 4: SELECTED ANSWER B**

### **1. David's Statement "If I had anything to do with it, I would use my car."**

#### **Fifth Amendment Privilege Against Self-Incrimination**

The Fifth Amendment of the US Constitution guarantees people the right against self-incrimination. Miranda is a judicially-made doctrine that requires certain warnings when a defendant is in a situation of custodial interrogation. The Sixth Amendment guarantees criminal defendants the right to assistance of counsel and attaches at the time a defendant is formally indicted or charged. Here, David (D) can challenge the introduction of his statement on Fifth Amendment grounds, but the facts do not indicate that he has been formally charged with transportation of heroin. A only has an anonymous tip that he was involved in transporting heroin, which does not suffice for probable cause. Moreover, the facts do not indicate that he has been formally arrested, but rather that he is simply in lawful custody of the detective agents. Therefore, D must look to the Fifth Amendment when seeking exclusion of the elicited statement.

#### **Miranda Rights**

Miranda warnings must be given when a defendant is (1) in custody and (2) being interrogated by police or government agents. Custody is given a functionalist definition: a court will ask whether a reasonable person under the circumstances would have felt his freedom of movement restricted to the degree we associate with a formal arrest. Interrogation is the deliberate elicitation by the government of incriminating information. Here, D was "lawfully in custody" at the time that Detective Anna (A) was about to subject him to interrogation. These facts are sufficient to trigger Miranda. A discharged

her Miranda duties when she advised D of his Miranda rights, and then proceeded to ask him if he knew anything about heroin shipments.

### **Invocation of Miranda Rights**

After a defendant is Mirandized, he must either invoke his Fifth Amendment right to silence or his Fifth Amendment right to an attorney. Invocation must be clear and unambiguous, as the Supreme Court held in *Davis*, and must clearly indicate that the defendant intends to either (a) remain silent, or (b) seek counsel.

### **Invocation of Edwards Right**

If the defendant clearly and unambiguously invokes his right to counsel, this right must be scrupulously honored under *Edwards*: the interrogation must cease until defendant has an attorney present. If the interrogators fail to scrupulously observe invocation of this right, the interrogation will be the fruit of an Edwards violation, and inadmissible under the exclusionary rule. Here, after D was Mirandized and interrogated, he replied, "I am not sure if I need a lawyer or not." This is an ambiguous statement and is not a clear invocation of the right to counsel. A court will likely find that D did not invoke his Fifth Amendment right to counsel. A's persistence in interrogating D, given the ambiguity of D's statement, was not an Edwards violation. D's response that "If I had anything to do with it, I would use my car, was therefore not the fruit of an Edwards violation. It is admissible against him.

### **Invocation of Moseley Right**

If the defendant clearly and unambiguously invokes his right to silence, this right also must be scrupulously honored. The interrogation must cease unless either the

defendant voluntarily re-initiates contact, or a reasonable break in Miranda custody has occurred such that the coerciveness of the interaction has dissipated due to lapse of time and custody. Here, D refused to answer any more questions only after his statement, "If I had anything to do with it...". Detective A ceased the interrogation at this point. A has therefore not violated D's Moseley rights, and the statement is not the fruit of a Moseley violation, because D said it voluntarily before invoking his right to remain silent.

### **Waiver of Miranda Rights**

A defendant's waiver of Miranda rights must be knowing and voluntary, meaning it must be the product of his free will rather than the coerciveness of the interrogation setting. It is not necessary here to inquire as to whether D waived his Miranda rights, because he failed to clearly invoke his right to counsel or silence at any point prior to giving his statement that he now seeks to exclude. In the "grey space" in between invocation and waiver, interrogation is not prohibited.

In conclusion, A did not violate Miranda, Moseley, or Edwards, and so D's statement is not subject to the exclusionary rule.

## **2. Text Message Stating, "The heroin is in the trunk; deliver it to the warehouse."**

### **The Fourth Amendment**

The Fourth Amendment grants people the right to be secure from unreasonable search and seizure of their person, homes, papers, and effects; and provides that no warrant shall issue except on probable cause, supported by oath and affidavit, and describing



with reasonable particularity the place to be searched and the people or things to be seized. When challenging the admission of evidence on Fourth Amendment grounds, a defendant must show (1) state action; (2) that he has standing to challenge the search; (3) that a Fourth Amendment search or seizure occurred; and (4) that the search was conducted without a warrant and probable cause, and no exception to the warrant requirement applies.

### **State Action Requirement**

The Fourth Amendment requires state action, which is official conduct by the government or governmental agents. Here, the detectives are agents of law enforcement, so the state action requirement is met.

### **Standing**

A defendant has standing to challenge a search when he has a reasonable expectation of privacy in the place searched. Here, the text message was found by means of a pat-down search of David's person. The Constitution confers the greatest protection upon an individual's person (their body), and so D has challenging to challenge this search.

### **Search or Seizure**

Supreme Court caselaw provides two methods of defining a Fourth Amendment search or seizure. The first involves a two-pronged inquiry, set forth in Harlan's opinion in Katz. First, the court asks whether the individual had a subjective expectation of privacy in the place searched. Second, the court asks whether this expectation of privacy is one which society is prepared to accept as reasonable. The second method

is a property-based approach, whereby the court asks whether there was an intrusion into a constitutionally-protected area. Here, there are two searches: Officer Baker's pretextual stop and pat-down of D, and his search of D's cell phone. Each will be analyzed in turn.

### **(1) Pretextual Stop and Pat-Down**

Under the Fourth Amendment, pretextual traffic stops are permissible. A court will not inquire into the officer's subjective motivations when conducting traffic stops and policing traffic violations. Here, Officer Baker (B) saw the car described in A's message, decided to follow the car and conducted a pretextual arrest of D. He had probable cause to stop the car, because he witnessed the car running a red light. This was sufficient evidence of wrongdoing to allow B to pull D over and order D out of the car. D can therefore not challenge the introduction of the cell phone evidence on the grounds that it was the fruit of a pretextual stop.

A pat-down of a person, however, requires reasonable suspicion that the individual has weapons on his person. Reasonable suspicion is articulable facts that would lead a reasonable officer to believe that the person possessed a dangerous weapon, but is a standard short of probable cause. Here, B based his pat down on a message he received from A, describing D's car and stating that it was believed to be involved in transporting heroin. This message in turn was based on an anonymous tip, and D's statement he made in interrogation. These facts likely fall short of probable cause, because they do not suffice to create a reasonable probability that D has been or is guilty of possessing or transporting heroin. However, they do suffice to create

reasonable suspicion for the pat-down. Heroin dealers are often armed due to the nature of the trade. B could point to his personal experience that those who possess and deal drugs often are armed, and justify his pat-down of D on this basis.

Given that B's pat-down of D's person was permissible under the Fourth Amendment, the issue at this point was whether B could seize the cell phone. An officer conducting a reasonable pat-down can seize items that are evidently contraband under the "plain feel" doctrine. Here, however, B felt a cell phone in D's pocket. A cell phone is not contraband, and it feels markedly different from a gun or packet of drugs. The plain feel doctrine therefore does not operate to justify B's seizure of the cell phone. This was a Fourth Amendment violation.

## **(2) Cell Phone Search**

The issue was B's search of the cell phone after he had seized it wrongfully. The Supreme Court held in *Riley* that certain types of information are entitled to greater protection under the Fourth Amendment. In *Riley*, the Court held that Cell Site Location Information, obtained by means of cell phone searches by officers, were a type of information that was so broad, of such depth, and of such a personal nature that it was entitled to extra protection under a property-based conception of the Fourth Amendment. Officers need probable cause and a warrant in order to search a suspect's cell phone. Here, Officer B took a number of actions that together constitute a search: he (a) turned on the phone; (2) saw a text message icon, (3) decided to click on the text message icon; and (4) read the message therein. This is the message D now seeks to exclude from evidence. These actions are an unreasonable intrusion on D's Fourth

Amendment rights under Riley, because a cell phone contains a great degree of highly personal information that is entitled to Fourth Amendment protection.

In conclusion, B violated D's Fourth Amendment rights when he wrongfully seized D's cell phone from his pocket, and when he proceeded to search the contents of his cell phone. D has standing to challenge the fruit of this search--namely, the statement found in the text message.

### **3. Heroin found in trunk of car**

D seeks to challenge the evidence of 30 pounds of heroin found in the trunk of his car. We must first ask again whether D has standing, and also whether the heroin was the fruit of a Fourth Amendment violation.

#### **Standing**

See above rule for standing. D has standing to challenge the search, because he had a reasonable expectation of privacy in the trunk of his car.

#### **Fourth Amendment Violation**

When an officer seeks to search an automobile in the course of a lawful traffic stop, he may search the person and "grabbable area" around the driver and passenger compartments, provided that (1) the suspect is unsecured and could reach said areas; and (2) the officer has reasonable suspicion that these areas contain weapons. He may not search other inaccessible areas of the car unless he has probable cause to believe that they contain weapons or evidence of criminal wrongdoing. Here, B proceeded from searching D's person and cell phone to searching the trunk of the car. B will claim that

he had PC at this point to believe that the trunk of the car contained either weapons, or more likely, evidence of heroin. However, this probable cause was based on an unlawful search of D's cell phone (see above). Therefore, even if B had probable cause to search the trunk, which is all that is required for an automobile search (as automobiles are an exception from the warrant requirement), D can challenge the heroin as the fruit of an unlawful search.

### **Fruits Doctrine**

The exclusionary rule is a judicially-crafted remedy that seeks to enforce the Fourth Amendment right against unreasonable search and seizure. Courts have also crafted the "fruits" doctrine. Under this doctrine, fruits of unlawful searches and seizures are to be excluded from evidence. Evidence does not qualify as "fruit" of an unlawful search if (1) it is significantly attenuated from the wrongful search or seizure; (2) there are independent intervening acts, including voluntary acts by the defendant, that cut off the chain of causation; (3) law enforcement would have inevitably discovered the evidence; (4) law enforcement had an independent source to discover the evidence.

Here, D seeks to challenge the heroin found in the trunk as the fruit of the unlawful search of his cell phone. Indeed, but for the search of his cell phone and discovery of the incriminating text message, B would not have had probable cause to search the trunk. However, B may contend that law enforcement would have inevitably discovered the evidence, because it is common practice to impound a vehicle and conduct an inventory search of its contents upon arrest of the driver.

## **Inevitable Discovery and Inventory Searches**

An inventory search is a search done to account for the defendant's property; it must not be conducted pretextually for law enforcement purposes. However, evidence discovered in a lawful (non-pretextual) inventory search is admissible against the defendant. Here, B would have arranged for the car to be taken to the police impound lot for processing, and law enforcement would inevitably have uncovered the thirty pounds of heroin in the trunk. B therefore has a strong argument for the inevitable discovery of the heroin. D therefore will be prevented from invoking the fruits doctrine to exclude evidence of the drugs.

## **Conclusion**

In conclusion, D cannot challenge the first statement because it is not the fruit of a Miranda or other violation. The second statement will be excluded, because it was the fruit of an unlawful Fourth Amendment search. Finally, the third piece of evidence (the drugs) will not be excluded even though they are the fruit of an unlawful search, because of the inevitable discovery doctrine.

## QUESTION 5

In 2016, while single and living in State X, Hank downloaded a form will and filled it out, stating, "Because I have no children, I leave all my property to Sis." Hank signed his will in the presence of only two disinterested witnesses. Hank did not realize that a valid will in State X requires three witnesses.

In 2017, while still living in State X, Hank married Wendy. After the marriage, Hank kept land he had inherited from his mother titled in his name alone. Hank started working at a construction job, and kept all of the wages he received from the job in a bank account that he opened in his own name. Daughter was born to Hank and Wendy while they lived in State X.

State X is not a community property state.

In 2021, Hank and Wendy moved to California. Hank suffered a fatal injury on the first day of his new job in California. Hank never wrote any will after the State X will.

At the time of Hank's death, there was \$100,000 from his wages in his bank account, and he still owned the land inherited from his mother. In the probate of Hank's estate in 2021, claims have been made by Sis, Wendy, Daughter, and Son, a ten-year-old child who has proved by DNA testing that he is Hank's son, although Hank never knew of Son's existence.

1. Is Hank's will valid? Discuss.
2. What rights, if any, do Sis, Wendy, Daughter and Son have in Hank's estate? Discuss.

Answer according to California law.

## **QUESTION 5: SELECTED ANSWER A**

### **1. Is Hank's will valid?**

California courts will probate a will that was 1) validly executed as per the laws of California, 2) validly executed as per the laws of the state where the decedent was present at the time the will was executed, 3) validly executed as per the laws of the state where the decedent was domiciled at the time of the will's execution or death.

Here, opponents of this will might argue that the will should not be probated because it was not validly executed as per the laws of State X, which was the state where Hank was living at the time the will was executed. Note that nothing in the fact pattern tells us that Hank was not domiciled in the state where he was living in 2016, when the will was executed, so we can assume that the state where Hank was living in 2016 was also his state of domicile.

However, even if the will was not validly executed as per the laws of State X, California courts will probate it if the will was validly executed as per California law.

### **Was the will validly executed as per California law**

A will is validly executed according to California law if: 1) the testator has testamentary capacity, 2) the testator has present testamentary intent and 3) the will complies with applicable formalities.



## Testamentary capacity?

The testator has testamentary capacity if (1) the testator was at least 18 years or older, 2) the testator understands the nature and situation of her property, 3) the testator understands the natural objects of her bounty, and 4) the testator understands the significance of the testamentary act.

- 1) The testator was at least 18 years old – here, Hank is likely to be over the age of 18 in 2016 because we are not told otherwise and usually a person does not leave his property to his sister because he has no children if he himself is a child. The presumption people under the age 18 have is that they might have children later on in life. Also, people under the age of 18 rarely ever care about their own mortality enough to make a testamentary disposition of their wealth, assuming they have any wealth.

Thus, Hank is likely over 18.

- 2) The testator understands the nature and situation of her property-here, Opponents of the will might argue that Hank does not mention any of his property and so we cannot really be certain that he understood what property he owned. However, the bar for testamentary capacity is not that high and the fact that somebody will, who had not children, might want to simply leave all his property to his sister would suggest that he knows that he has property and wants to leave it to a sibling.

Thus, this requirement is likely satisfied.

3) The testator understands the natural objects of her bounty – Here, Hank displays that he understands natural objects of his bounty because generally we think of our family members, especially our children, as the people who we want to leave something to after we die. Since Hank states that he has no children at the time he is executing the will, it is fairly natural that he would leave his property to his sibling.

Thus, this requirement is likely satisfied.

4) The testator understands the significance of the testamentary act. Here, Hank downloaded the form and filled it out, assuming it was a will-writing form, rather than something silly with the fact pattern would likely inform us of, it would be fair to presume that he understood that he was making a will. Furthermore, Hank had two disinterested people witness the signing of his will, suggesting that he knew that he was doing a solemn testamentary act rather than just writing something out for fun.

Thus, this requirement is also likely satisfied.

Based on the above, I would conclude that Hank had testamentary capacity.

### **Present testamentary intent.**

Present testamentary intent exists if the testator intends to presently make a disposition of his property that will be effective upon his death.

Here, Hank downloaded a form will and signed it in the presence of two disinterested witnesses. In that form, he also stated that since he has no children, he is leaving all his property to Sis. This suggests that he does have the

intention to make a will and leave his property to Sis upon his death.

Thus, Hank had present testamentary intent.

### **Compliance with applicable will formalities**

In California, you can have an attested will or holographic will. California does not allow you to make an oral will.

#### **Attested will?**

An attested will is what we think of as a formal will or witnessed will, and it requires 1) a writing that is 2) signed by the testator or by someone at the testator's direction and presence, 3) in the simultaneous presence of two disinterested witnesses, 4) who understand the testamentary nature of the act, and 5) the witnesses sign the document within the testator's lifetime.

#### **A writing that is signed by the testator.**

Here we are told that Hank downloaded a form, filled it out, and signed it. Thus, we have a writing that was signed by the testator. Note that there is no subscription requirement in California, which means that the testator can sign anywhere on the will.

Thus, both of these requirements are satisfied.

#### **In the simultaneous presence of two witnesses.**

The rule is that the testator must either sign in the simultaneous presence of two witnesses or the testator can acknowledge his signature in the simultaneous presence of two witnesses.

Here, Hank signs in the presence of two disinterested witnesses.

Thus, this requirement is satisfied.

**Witnesses who understand the testamentary significance of the act.**

The witnesses must understand that what they are witnessing is the execution of the will. It is not required that the witnesses know exactly what is in the will, as long as they know that it is a will.

Here, Hank downloaded the form will, filled it out, and signed it in the presence of two disinterested witnesses, so even though we are not expressly told that the witnesses knew that they were witnessing the execution of a will, it is likely that Hank would've informed him that is what he was up to. Having two people standing in front of you watching you sign the document will likely make the two people ask what exactly are you citing and why are we there to watch it. The answers to those questions would likely be provided by Hank.

Thus, this requirement is likely satisfied.

**The two disinterested witnesses sign the document within the testator's lifetime.**

The two disinterested witnesses do not have to sign the document right after they witness the ceremony or in each other's presence; however, they must sign it while the testator is still alive.

There is no mention of this happening and none of the facts were actually leading us to presume that the two disinterested witnesses signed anything. Just because you're witnessing something being signed does not mean that you will naturally want to sign it yourself.

Thus, this requirement is likely not satisfied.

### **California clear and convincing evidence standard.**

For deaths that occur on or after 1/1/2009, California allows a will that was not perfectly executed to still be probated if the proponent can show by clear and convincing evidence that the testator intended the document to be his will. For deaths prior to that date, California had a substantial compliance standard for an attested will to be probated.

One might argue that the fact that the disinterested witnesses did not sign the document creates a significant risk that this is not really Hank's will. However, here there is fairly strong evidence that Hank intended the document he executed in 2016 to be his will. He not only took the effort to download the form, fill it out, state why he was leaving his property to Sis, but also went into the trouble of getting two disinterested witnesses to be present while he signed it. The proponent can further strengthen his case and likely satisfy the clear and convincing evidence standards if he can get the two witnesses who witness the signing of the will to either testify to that or submit a sworn affidavit to that fact. Thus, there is likely to be clear and convincing evidence that the document is the will.

Therefore, it is likely that the will may be produced in California.

### **Holographic will?**

In California, a holographic will is a will that is not witnessed by two witnesses but it is 1) in writing, 2) with material terms handwritten by the testator (e.g. gifts and recipients), 3) is signed by the testator, and 4) expressly states the present testamentary intent of the testator.

If he had failed to establish that the will complied with the formalities of an attested will, then we might want to have considered whether it would comply with the formalities for a holographic will.

However, we don't know whether Hank wrote out the beneficiary's name and the fact that she would be receiving all his property by hand or whether he typed it. Thus, it is unlikely to meet the requirements of a holographic will.

The overall conclusion is that the will is likely to be probated by the court in California as an attested will.

**2. What rights, if any, do Sis, Wendy, and him and his daughter and Sam have in Hank's estate?**

California is a community property state and so community property law applies. Community property is all property acquired during marriage, other than separate property, while domiciled in California. Separate property is all property acquired either before marriage or after the end of the marital economic community.

Separate property also includes all property acquired during marriage through gift, devise, bequest or descent. All profits, rents and issues of separate property also remain as separate property. All wages earned during marriage while domiciled in California is community property.

Quasi-community property is all property acquired during a valid marriage while not domiciled in California, that would have been community property had the acquiring spouse lived in California at the time of acquisition. During the lifetime of the acquiring spouse, quasi-community property is treated like separate property. However, upon the death of the acquiring spouse, quasi-community

property is treated like community property.

### **Hank's estate**

As Hank's is that we are told that he had \$100,000 from his wages in his bank account and that he also owned the land that he inherited from his mother.

### **Character of the \$100,000**

See above for rule regarding community property and separate property.

Here Hank died while on the first day of his new job after moving to California.

This means that all the wages he had earned were earned while he was living in a non-community property state. As per the rules above, that makes this quasi-community property because had Hank been domiciled in California all the wages would be community property. The fact that Hank kept all the wages in a bank account that was in his name alone does not defeat the community property character of his wage income.

Thus, the \$100,000 is quasi-community property.

### **Character of the land inherited from his mother**

See above for rule regarding community property and separate property.

Here, the land was an inheritance; this means that it is Hank's separate property and moving from a non-community property to a community property state does not change this. Furthermore, the land was always held in Hank's name so there is no issue as to whether Hank gifted the property to the community or whether he took any action that would lead to a transmutation, which is a change in the nature of the property from community property to separate property or vice versa.

Thus, the land is Hank's separate property.

**Is Wendy an omitted spouse?**

An omitted spouse is the spouse who was married after the execution of the last testamentary instrument by the testator and the spouse is not mentioned or provided for in those testamentary instruments. An omitted spouse will receive an intestate share of the decedent's estate- half of the community property and an interstate share of the separate property not to exceed 50%. However, an omitted spouse will not receive an interstate share if 1) if the omission was intentional and appears on the face of the instrument, 2) the spouse is provided for outside of the testamentary instruments, or 3) there was no voluntary and knowing waiver by the spouse.

Here, Hank executed the will in 2016 and married Wendy in 2017. There is no mention of Wendy anywhere in the will and there is nothing telling us that he provided for her outside of the testamentary instrument. There is also nothing in the will that tell us that the omission was intentional. In fact, there is no mention of Wendy at all in the will. As for whether there was voluntary and knowing waiver by Wendy, we don't know anything about that. What it appears from the facts is that Hank made a will in 2016, and forgot all about it, so he never updated the will.

Thus, Wendy is an omitted spouse and will receive an intestate share as described above.



### **Is Daughter a pretermitted child?**

A pretermitted child is one who was born after the execution of the last testamentary instrument and is not mentioned or provided for in the testamentary instrument. A pretermitted child receives an interstate share of her parent estate unless: 1) the omission is intentional and appears on the face of the instrument, 2) the child is provided for outside of the testamentary instrument or 3) the testator had other children at the time of the execution of the will and transferred substantially all of the assets to the child's other parent.

Here, Hank executed the will in 2016 and Daughter was presumably on board after 2017 since that is the year when Hank and Wendy got married and Daughter is their child. As with Wendy, there is no mention of Daughter in the testamentary instrument and omission does not appear intentional but seems to be due to Hank forgetting to update his will. The fact that Hank died from a fatal injury that must have happened suddenly probably is the reason why Hank had not updated his will before dying since a lot of people think that they have more years to live than they actually do and don't plan for really bad accidents happening. There is also no mention of Daughter being provided for outside of the will and as mentioned above, the will transfers everything to Sis, and not to Daughter's other parent.

Thus, Daughter is likely to be a pretermitted child as described above.

### **Is Son a pretermitted child?**

See above for rules regarding pretermitted children. Additionally, note that the child born before the execution of the last testamentary instrument may still qualify as a pretermitted child if the testator did not know about the child's existence.

Here, some would argue that Son is not a pretermitted child because he was born in 2011 and Hank executed his will in 2016. However, the rule mentioned above is likely to result in Son being classified as a permitted child since Hank never knew about his existence. As well as the court is satisfied that the DNA evidence establishes son as Hank's child and declares it so, then son will likely qualify as a permitted child and take a pretermitted child share.

Thus, Son is likely a pretermitted child.

### **Share of the following individuals:**

#### **Wendy**

A spouse's intestate share includes the half of the community property plus and intestate share of the separate property, not to exceed 50% of the separate property. In a situation where the decedent leaves more than one issue, the spouse takes one third of the separate property.

Here, since quasi-community property is treated as community property at death, Wendy will end up with the entire \$100,000 since she already owns \$50,000 as her share of the community property and will get the remaining half as well. As for Hank's separate property, Wendy will end up with one-third of the land.

### **Daughter and Son**

When there are two children and a surviving spouse, intestate share of the child will be half of the separate property that is left after the spouse takes her one-third share of the decedent's separate property.

Thus, here, Daughter will take one-third of the land and Son will take the other one third of the land.

### **Sis**

Here, unfortunately Sis ends up with nothing because of abatement. The intestate share of the spouse and both the children will come out of her share and she ends up with nothing.

## QUESTION 5: SELECTED ANSWER B

1. Is Hank's will valid?

The issue is whether Hank's (H) will is valid. California, through the full faith and credit clause, will recognize a will that is validly executed in the state in which it is executed or the state in which the testator is domiciled when he makes the will. If the will is not valid under the state laws in which it was executed or in the state in which the testator was domiciled, CA will still recognize the will as valid if the testator is domiciled when he dies and the will conformed to CA requirements.

Here, H executed the will in State X and was domiciled in State X at the time. If the will is valid under the laws of State X, H's will will be treated as valid in CA probate.

However, the facts clearly tell us that H signed his will in the presence of two disinterested witnesses, and that State X law requires three witnesses. Thus, the will is not valid under the laws of State X. However, because H was domiciled and died in CA, CA will recognize the will as valid if it conformed to CA requirements.

CA requirements for a valid will.

In order for a will to be valid in CA, it must be written and signed by the testator (T). It also must be witnessed by two disinterested witnesses. Finally, the T must have a valid testamentary intent when executing the document.

*Written and Signed by T*

The will must be in writing and signed by the testator, who has capacity. There is no question that H signed the will as the facts tell us this. It also appears that H had capacity, which means that he is at least 18 and of sound mind. Although the facts don't tell us he is definitely 18, the circumstances of him creating a will and the fact he married the next year means he probably was and, thus, this analysis will assume it. There are also no facts indicating that he was not of sound mind, suggesting he has capacity.

The main issue with this requirement is whether the fact H downloaded a form will and filled it out meets the written requirement. Although handwriting or typing a will counts as written, form wills are a closer call. However, even if it does not quite meet the written standard, CA adheres to the substantial compliance doctrine. That means that if the testator substantially complies with the wills formalities but does not quite adhere to them, a court will still allow the will to be probated if it was in substantial compliance with the wills' formalities. As a result, the court will likely recognize that this at least met the substantial compliance, if not the written requirement on its own

### *Two Disinterested Witnesses*

CA wills, to be properly attested, require the signature of two disinterested witnesses. The witnesses do not need to be aware of the actual contents of the will, such as which people get which devices, but they must be generally aware that the document they are signing is a testamentary instrument and that the T has signed it. This is known as the conscious presence test, that the witnesses are generally aware that what they are signing is a testamentary instrument.

Here, H signed his will in front of the witnesses, so there is no question of whether they knew he had signed it (if he had signed it previously, he would have had to acknowledge his signature to the witnesses). Although the facts do not quite indicate whether the witnesses knew it was a will, the fact they were in H's presence when he signed and they signed it themselves, is likely satisfactory evidence that they were consciously present of the fact that the instrument was a will and that they were signing it.

### *Testamentary Intent*

The final element that a will needs in CA is that it is signed by the T with testamentary intent. The fact H downloaded a will and filled it out and went to the trouble of getting two disinterested witnesses to sign it is pretty clear evidence that he knew he was signing a testamentary instrument. He also wrote that he was giving his property to his sister, which is further evidence he knew he was signing a testamentary instrument.

Based on the analysis above, the will appears to have met all of the CA requirements.

Even though it would not have been valid in State X, a CA court will recognize it as valid because it met the CA requirements and he died in CA while domiciled in CA.

### Holographic Will

In the unlikely event a CA court finds that the will was not valid (potentially because a form will may not have met the written requirement) and that substantial compliance doctrine will not save it, it may be viewed as a holographic will. A holographic will must have the material provisions in the testator's handwriting and be signed by the testator. There is no witness or date requirement. There is a requirement that the testator intend

the document constitute a testamentary instrument.

Although H downloaded a form will, it appears he handwrote the material provisions, such as how to dispose of his property. He also signed the will. As discussed above, his testamentary intent is also obvious. As a result, even if the court found it was not a valid will (although as explained above, this is very unlikely), it could still be probated as a holographic will.

### Conclusion

Because the will likely conformed to CA standards and H was domiciled in CA when he died, the will is valid. In the unlikely instance that it is not considered valid, a court can still probate it as a holographic will.

## **2. What rights do Sis (S), Wendy (W), Daughter (D), and Son (S) have in H's estate?**

California is a community property (CP) state. The marital economic community begins at marriage and ends upon divorce, death of a spouse, or permanent separation (constituted of one spouse indicating to end the marriage permanently and conduct consistent with that intent). Earnings, property, and debt acquired during the marriage are presumed CP. Earnings acquired before the marriage, by gift or inheritance during the marriage, or after divorce, death, or permanent separation are considered separate property (SP). Property that would have been classified as community property had the couple been domiciled in CA at the time they acquired it is considered quasi-community property (QCP).

## Effect of moving to CA on the classification of property

### H's Land

Presumption and tracing: Because the facts appear to show that H had already received the land from his mother via inheritance before his marriage, the presumption is that the land is H's SP. In addition, there is a special title presumption at death. If the land is only in one spouse's name, there is a special presumption the property was intended to be that spouse's SP. W may try to argue that the property should be QCP, or property that would have been considered CP if they had been domiciled in CA when H received it. However, because the land was inherited, the land would have been classified as SP. Absent a transmutation or act of titling the property jointly, the property will remain H's SP. There is no indication a transmutation occurred, because there is no writing signed by H, the adversely affected spouse, either converting it to CP or W's SP. As a result, H's land is SP. As discussed below, it will be devised to W, Son, and Daughter in equal shares. Because co-tenancy is the default type of co-ownership, they will each receive a 1/3 share as co-tenants.

### H's Wages

Presumption and tracing: Because H did not start the job until after he married W, all of his wages he earned during this time are presumed to be QCP. H's estate may try to argue that the wages should be considered SP, because he put it in a bank account in his name alone. However, the mere fact the bank account was titled in H's name alone is not enough to change the nature of the property from QCP to SP. There is also no indication H and W entered into a premarital agreement that would have changed the



nature of their earnings. As a result, all of the wages he earned during are considered QCP, because they would have been CP had they been living in CA. The fact the account was titled in his name only is not enough to change the source, and tracing clearly shows all of this money is wages from during the marriage, and thus is QCP.

#### Conclusion

H's entire bank account, consisting of \$100,000, is QCP.

Assuming will is valid:

#### **Sis**

Assuming the will is valid, it clearly leaves all of his property to Sis (S). However, as discussed below, Sis will end up receiving nothing, because W, Son, and Daughter will be treated as omitted spouses and children. As a result, they will all receive an intestate share, which will leave nothing for Sis.

#### **Wendy**

Omitted Spouse: A spouse who does not take under a will is considered an omitted spouse, unless the omission was intentional, or the testator substantially provided for the spouse outside of the will. Because H never made another testamentary instrument after the 2016 will, the omission was not intentional, because he was not married at the time. In addition, H did not provide for W outside of the will. As a result, W will be treated as an omitted spouse. An omitted spouse is entitled to receive what they would have had the testator died intestate. When a decedent dies intestate in CA, the spouse is entitled to the decedent's 1/2 of the CP and QCP (meaning that the spouse will

receive all of the CP/QCP) and 1/2 of the decedent's SP if the decedent has one lineal descendant and 1/3 of the decedent if the decedent has more than one lineal descendant. As discussed below, Son and Daughter will each be treated as omitted children, and thus W will receive 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP.

## Conclusion

Because the wages are QCP, W already owns half of that as her share of QCP.

Because she receives an intestate share, she will receive the remainder, so she will get all \$100,000. She will also receive 1/3 of H's SP, which means she will get 1/3 of H's property that he inherited from his mother and take it as co-tenants with Son and Daughter.

## Daughter

Omitted child: A child who is omitted under a will is entitled to an intestate share, unless the omission was intentional, the decedent had other children when the will was made and left substantially all of his assets to their surviving parent, or provided for the child outside of the will, or did not know the child existed. Here, the omission was not intentional for two reasons: first, in his 2016 will, H prefaced his devise to his sister based on the fact "because I have no children." Second, he never made another testamentary instrument after D was born. If he had, and then omitted D, it might be considered intentional, but because she was not alive at the time, it is pretty clear that the omission was not intentional. In addition, because H only had one child that he knew of, the exception that occurs when the decedent had other children at the time the

will was made and left substantially all of his assets to the surviving parent does not apply. (plus he did not leave anything to W in his will). Finally, he did not provide for D outside of the will.

Because none of the exceptions apply, D will be treated as an omitted child and will receive an intestate share. As discussed above, when a decedent in CA dies intestate, the decedent's 1/2 of CP/QCP goes to the surviving spouse. If there is more than one lineal descendant of the decedent, the spouse receives 1/3 of the decedent's SP and the lineal descendants split the remaining 2/3 of SP. As discussed below, Son will also be treated as an omitted child, and thus H had two lineal descendants at the time of his death. Therefore, D will split the 2/3 of H's SP with the son, leaving them each with 1/3 of H's SP.

#### Conclusion

Daughter will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother.

Daughter will take the land as a co-tenant with a 1/3 interest.

#### **Son**

Omitted Child. See rule above. W, D, and Sis may claim that Son should not be considered an omitted child because it appears he was born before the will was written in State X, and they will therefore argue he was intentionally excluded. However, the facts make it clear that H never knew of Son's existence. The facts also make it clear that Son has established by a paternity test that H is the father, so he will be treated as his child. Because H never knew of Son's existence, Son will be treated as an omitted child. There is also no indication that either of the other exceptions apply, because H

did not leave substantial assets to whoever Son's mother is, since his only will left it all to his Sis. Therefore, Son will be considered an omitted child and entitled to receive an intestate share. As described above, because the decedent has two lineal descendants (Son and Daughter), W will get 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP, leaving them with 1/3 of H's SP total.

DRR: Dependent Relative Revocation--alternatively, Son could argue that H had a mistake of fact when he made the will because he wrote "because I have no children," when in fact he did, and that if it weren't for this mistake of fact H would have devised his property differently. However, he won't need to make this argument.

#### Conclusion

Son will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother. Son will take the land as a co-tenant with a 1/3 interest.

If the will were not considered valid:

Even if the will were not considered valid, the disposition of property would remain the same. Because W, Son, and Daughter are all treated as omitted spouses or children, they receive intestate shares. In this circumstance, as described above, the spouse is entitled to all of the QCP/CP plus 1/3 of the H's SP if more than one lineal descendant. Son and Daughter are then entitled to split the remaining SP. As a result, the disposition would be the same regardless if the will were valid, and in neither case would Sis take anything.

