



**CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS
February 2020**

This publication contains the five essay questions from the February 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Torts
2.	Professional Responsibility
3.	Contracts
4.	Evidence
5.	Business Associations

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

Paul, an actor, had small but memorable roles in two recent Hollywood blockbusters. Paul was also a first-year law student. He began having difficulty keeping up with his studies and became increasingly anxious about failing. He told his Legal Research and Writing professor, Dan, about his anxiety and doubts about his ability to timely complete a research paper Dan had assigned. Dan noticed that Paul appeared unusually anxious and suggested he go see the school counselor.

Paul returned to the apartment that he shared with Jack, who was also enrolled in Dan's Legal Research and Writing class.

The day before the research paper was due, Jack looked for his paper in his room but could not find it. Later, after Jack returned home from school, he found the paper on his desk where he thought he had originally placed it. After submitting the paper, Jack became suspicious that Paul might have copied parts of Jack's paper on the day that it seemed to be missing. Jack went to Dan's office and told him about his suspicions. Dan pulled from a stack of submitted papers what he thought was Paul's paper. When Jack saw the paper, he recognized the footnotes and said that Paul had "copied all of the footnotes from my paper."

The next day, Dan told Jack and Paul's class that "I hope no other student has copied his footnotes from another student's paper like that two-bit actor Paul." Paul was in class and heard the statement. Deeply humiliated, Paul suffered a severe panic attack, but did not seek medical treatment.

Dan later discovered that he had inadvertently shown Jack his own paper and not Paul's paper and that Paul had not copied Jack's or any other person's materials.

Paul has sued Dan based on his statement to the class.

What claim(s) may Paul reasonably raise against Dan; what defenses may Dan reasonably assert; what damages, if any, may Paul recover; and what is the likely outcome? Discuss.

QUESTION 1: SELECTED ANSWER A

Paul's Claims Against Dan, Dan's Possible Defenses, and Paul's Potential Damages for Each

Claim

Defamation

Paul (P) may bring a defamation claim against Dan (D). To prevail on a defamation claim, the plaintiff must prove: (1) defamatory statement; (2) concerning the plaintiff; (3) published to a third party. Additionally, if the defamation claim involves a matter of public concern or a public figure, there are two additional elements that the plaintiff must prove in order to not run afoul of the First Amendment. The plaintiff must also prove: (4) the statement is false; and (5) the intent of the defendant, which will vary depending on the type of plaintiff.

Here, D will argue that the two additional elements—falsity and intent—must be proven because P is a public figure. D will point to P's memorable roles in the two recent Hollywood blockbusters. On the other hand, P will argue that he is not a public figure. P will point to the fact that his roles were small. P may also argue that he's going to law school, which shows that his acting career is not taking off, and, thus, he is not a public figure. Other factors may also impact the court's analysis—the media coverage of P generally, whether P is a household name, and other things about the nature of P's status as a celebrity.

There are no facts to indicate that P's cheating was a matter of public concern. It is not that P has cheated to win a Nobel peace prize or nationally recognized marathon, which might constitute a matter of public concern. Whether P qualifies as a public figure is likely a close call, but given that P was in two blockbuster movies, the court will likely find that P is a public figure, which means that P will need to prove the two additional elements to prevail on his defamation claim.

Defamatory Statement

A defamatory statement is a statement that is reasonably likely to harm another's reputation. The statement generally must be one of fact. Statements of opinion may be actionable if they imply facts about the plaintiff.

Here, D said "I hope no other student has copied his footnotes from another student's paper like that two-bit actor Paul." P will argue that D's statement is a factual statement where D indicates that P copied another student's footnotes. P will argue that this statement constitutes a defamatory statement. P will argue that in the legal profession where honesty and integrity are essential, an allegation of plagiarism and cheating are extremely damaging to one's reputation. P may also try to argue that referring to P as a two-bit actor was also defamatory because it is a disparaging comment about P's acting skills, which impacts P's reputation.

In response, D will argue that the two-bit actor comment is his opinion and, thus, cannot be a defamatory statement. D has the stronger argument here and will likely prevail. D will also argue that his statement, which implied that P cheated, was just that—an implication that is not sufficient to give rise to a claim for defamation. However, D's statement implies the assertion of facts that P cheated. P has the stronger argument here and a court is likely to find that the party of D's statement that implies that P cheated constitutes a defamatory statement.

Concerning the plaintiff

A defamatory statement does not need to name the plaintiff specifically, as long as a reasonable person would know that the statement is referring to plaintiff.

Here, D used P's name in the sentence. And, although D did not specifically say P cheated, he said that he hoped no other student copied another student's paper like Paul. D also made this statement during Jack's and P's class, so the students in the class reasonably knew that D was referring to P. Additionally, although D did not use P's last name, D did refer to P as a two-bit actor, making it even more clear who D was referring to. This is sufficient to notify a reasonable person that D was referring to P. Thus, P is likely to succeed on proving this element.

Published to a Third Party

The defamatory statement must also be published to a third party, which means that a third party must hear or read or perceive the statement. There are two types of defamation: libel and slander. Libel is when the defamatory statement is in a permanent format. Traditionally, libel included defamatory statements that were printed, but modernly, statements that are captured on television or the radio are also considered libel. Slander are spoken statements, not captured in a permanent format.

Here, D said the defamatory statement to the class. If P heard the statement, it is reasonable to conclude that other students in the class also heard the statement. Because the statement was not in a permanent format, like in print or on television, it is considered Slander.

Falsity of Statement

When the plaintiff is a public figure or the statement concerns a matter of public concern, then plaintiff also needs to prove falsity of the defamatory statement. As discussed above, P will likely be considered a public figure.

Here, P will argue that the statement was false. P can prove this through a comparison of P and Jack's paper. The facts indicate that D mistakenly showed Jack Jack's own paper, so there are no facts that definitively prove P copied Jack's footnotes.

D may argue that he had a reasonable belief that the statement was true, so that is sufficient to defeat this claim. However, while that may be relevant for the intent element, as discussed below, it is irrelevant to the falsity of the statement. There could also be an argument that although P did not copy Jack's footnotes word for word, he did use ideas from Jack's paper. D could call Jack as a witness to discuss Jack's missing paper on the day in question and D could

testify about P's anxiety and doubts about finishing the paper.

However, the issue will likely come down to a comparison between the two papers. Since there are no facts to indicate that P actually copied Jack's footnotes, it is likely that P will prevail on proving that the defamatory statement was false.

D's Intent

If the person is a public figure or the matter is of public concern, the plaintiff will need to prove that the defendant acted with malice, which means that the defendant intentionally made the false defamatory statement or made it with reckless disregard for the truth. If the plaintiff is a private figure and the matter is of public concern, the plaintiff will need to prove that the defendant acted negligently when making the false defamatory statement. Here, as discussed above, since P is a public figure, P will also have to prove that D acted with malice—intentional or reckless disregard for the truth.

P may argue that D's defamatory was intentionally false, but the stronger argument is that P acted with reckless disregard for the truth. P will argue that D was reckless because he did not take the care to show Jack the proper paper. P will also argue that D was reckless for not conducting any further due diligence to determine whether P actually did copy Jack's footnotes. D simply took Jack's word for it, after briefly showing Jack the paper in D's office. Based on this inadequate amount of information, D then accused P in front of the whole class of cheating. P will also try to highlight how reckless D was by highlighting how it would have been very simple for D to confirm that P cheated: D could have simply compared P's paper to Jack's paper. And, because D did not take this simple step, D acted with reckless disregard of the truth when he made the false defamatory statement.

On the other hand, D will argue that he was not reckless, but rather had a good faith belief that P cheated. D will say that Jack's statement was sufficient to cause him to believe that P cheated. D will also point to the fact that he knew P was anxious about the assignment and did not think he would be able to complete, which gives P motivation to cheat. D will also point to the fact that Jack explained his suspicions of why he believed P cheated off of Jack's paper to D, which supported Jack's claim that P copied his footnotes. In sum, D will argue that based on the totality of the circumstances, he reasonably believed that P copied Jack's footnotes, and, thus, the statement was not in reckless disregard of the truth.

P has the stronger argument here given that it would have been so simple for D to determine whether P actually copied Jack's footnotes but D did not do that. Such a failure is a gross deviation from what a reasonable professor would do, and, thus, it is likely the trier of fact would find that D acted with reckless disregard of the truth when making the defamatory statement.

Damages

There are different rules regarding pleading of damages for libel and slander. General damages are presumed for libel. For slander, special damages are presumed where the defamatory

statement falls into a slander per se category: (i) about the person's profession or trade; (ii) infers that plaintiff suffers from a loathsome disease; (iii) accuses a woman of being unchaste. Otherwise, if the statement does not fall into the slander per se category, the plaintiff must specifically plead and prove damages.

Here, P will argue that D's statement falls into a slander per se category of being about the person's profession or trade. P will argue that the statement refers to his profession of actor, but since that statement is not considered a defamatory statement, that argument will likely be unsuccessful. P will also argue that the statement about cheating, although not directly about P's ability to be an attorney, is essentially about P's soon-to-be profession.

D, in contrast, will argue that the statement does not fall into the slander per se categories because P is not yet a lawyer so the statement was not about P's profession. And even if P's attending of law school makes lawyering his profession, the statement was not about P's ability to be a lawyer necessarily, but about P's cheating on a paper. This is a close call, but because the statement involves cheating on a law school paper, it seems that would be sufficiently close to pertaining to P's profession to fall into slander per se, and, thus damages will be presumed.

Intentional Infliction of Emotional Distress (IIED)

To prevail on an IIED claim, the plaintiff must prove: (1) defendant's outrageous and extreme conduct; (2) caused the plaintiff to experience severe emotional distress.

D's Conduct

Conduct qualifies as extreme and outrageous if a reasonable person would find that it is offensive and it would cause severe emotional distress in the reasonable person. Additionally, if the defendant has reason to know about the plaintiff's particular sensitivities, then the defendant's conduct even if not offensive to a reasonable person may still qualify as extreme and outrageous behavior.

Here, P will argue that D's behavior was extreme and outrageous because falsely accusing someone of cheating would be offensive to the reasonable person and would cause emotional distress for the reasonable person. Additionally, P will argue that even if the reasonable person standard is not met, D's behavior was extreme and outrageous considering P's particular sensitivities which D knew about. P will point to the fact that he told D about his anxiety and doubts about completing the paper and he was having increasing anxiety about failing. The fact that D noticed P appeared unusually anxious and suggested that P go see the school counselor will support P's argument that D knew of his particular sensitivities, thus making D's behavior outrageous even if not outrageous to the reasonable person. P may also try to compare D's behavior to the behavior of a typical professor and argue that D was acting unprofessionally by announcing P's alleged cheating to the class rather than following the formal channels of reporting a student's cheating.

D, in contrast, will argue that his behavior was not outrageous and extreme because it would not cause a severe panic attack in the reasonable person. D will argue that he made the

statement to a small class of people, not to a wide audience, so it was not reasonably likely to lead to severe emotional distress. P will argue that telling his classmates is even worse than telling a large group of people who don't know P well because his classmates' opinions are even more important than strangers.

D may also argue that he did not know of P's particularities that would make D's conduct particularly outrageous. D may argue that although P appeared unusually anxious, D assumed that P had heeded his advice and gone to see the school counselor. Based on D's belief that P sought treatment, D will argue he reasonably assumed that P no longer suffered from his anxiety.

This is a close call because it does seem that P's reaction may not be the reaction of a reasonable person. But given that D knew of P's increasing anxiety about failing, it is likely a trier of fact would conclude that D's conduct qualified as extreme and outrageous.

P Suffered Severe Emotional Distress

For an IIED claim, the defendant's conduct must not only cause emotional distress in a reasonable person, but plaintiff must have also experienced emotional distress.

Here, the facts indicate that P suffered a severe panic attack. This will likely be sufficient to qualify as severe emotional distress. Although P did not seek medical treatment, so he does not have medical records to back up his claim, P's testimony, if believed, about his panic attack will be sufficient to satisfy this element. However, since there are no medical records, that leaves P open to D's claims that the severe panic attack did not occur.

D's Conduct Caused P's Severe Emotional Distress

For causation to exist, there must be both actual and proximate causation. Actual cause means that the defendant's conduct was either the but for cause or substantial factor. But for cause means that but for defendant's conduct the injury to plaintiff would not have occurred. Substantial factor occurs when there are multiple contributing factors, so it is impossible to determine the but for cause and the plaintiff's injury and defendant's conduct was a substantial factor in causing the injury. Proximate cause exists when the plaintiff's injury was a reasonably foreseeable result of defendant's conduct.

Here, P will argue that D's defamatory statement was the actual cause and proximate cause of his severe panic attack. P will argue that but for D's false statement about cheating, he would not have been deeply humiliated which triggered his severe panic attack. P will also argue that P's panic attack was a foreseeable result of D's statement. P will make similar arguments about why the panic attack was a foreseeable result of making such an outrageous defamatory statement.

In response, D may try to argue that P was prone to anxiety so D's statement could not have been either the but for cause or the proximate cause of P's severe panic attack. D will point to P's increasing anxiety which P stated and D observed. But, that will not be enough to defeat P's claim. Under the eggshell doctrine, a defendant takes his plaintiff as they come. That P may

have been prone to panic attacks will not defeat P's causation element. Thus, it is likely a trier of fact will find that D's statement caused—both actual and proximate—P's severe panic attack given that it occurred close in time to D's statement and D's statement was outrageous. and would either produce a similar result in a reasonable person or D knew or should have known it would produce such a result in P given P's particular sensitivities.

Damages

If P is successful in proving his IIED claim, which is a close call but likely, then P will be able to recover damages from D. In a tort action, the plaintiff may recover compensatory damages, consequential damages and incidental damages. These types of damages must be reasonably certain, caused (both actual and proximate) by defendant's conduct, and unavoidable. A plaintiff has a duty to mitigate damages.

Here, P did not seek medical treatment for his panic attack. Seeking medical treatment is considered a necessary means of mitigating damages that a plaintiff must take if reasonable under the circumstances and would not result in undue burden or humiliation. If D can show that P's damages would have been reduced had P sought medical treatment, then D may successfully be able to reduce P's damages by the amount they would have been reduced had P sought medical treatment.

Negligent Infliction of Emotional Distress (NIED)

To prevail on an NIED claim, the plaintiff must prove that (1) defendant's conduct was extreme and outrageous; (2) plaintiff was in the zone of danger; and (3) although plaintiff did not suffer physical harm from defendant's conduct, plaintiff suffered physical harm as a result of emotional distress. (There is also another circumstance in which a plaintiff may bring an NIED claim that involves harm to the plaintiff's family member, but that is not applicable under these facts.)

Here, there is no evidence that P's severe panic attack caused him physical harm so it is unlikely he will be able to bring an NIED claim.

Conclusion

P will bring a defamation and IIED claim against D. D will argue against the specific elements of those claims as discussed in above in defense of P's claims. If P prevails in his claim, P will be able to seek damages subject to the arguments that D can make to decrease the amount of those damages.

QUESTION 1: SELECTED ANSWER B

PAUL'S CLAIMS AGAINST DAN

Defamation

Paul (P) may assert a claim of defamation against Dan (D) based on Dan's statement. Defamation requires that (i) a defamatory statement was made, (ii) of or concerning the plaintiff, (iii) that was published to a third party, and (iv) that harms P's reputation.

(i) Defamatory statement

A statement is defamatory if it would cast the plaintiff in a negative light or to subject him to public ridicule.

Here, D's statement contains two aspects that would likely be defamatory. First, he states that P has copied the footnotes of another classmate, which is a negative imputation on P's character and would likely subject him to public ridicule as a person who cheats. Second, he directly calls P a "two-bit actor", which demeans and belittles P's acting career and talents, and is likely to subject to him to public ridicule as a bad professional actor.

(ii) Of or concerning P

The statement must be of or concerning the plaintiff such that they are identifiable.

Here, this requirement is met because D identifies P by name as the student who has copied another student and as the "two-bit" actor.

(iii) Published to a third party

In order to prevail, the defamatory statement must have been published to a third party.

In this case, Dan openly said the statement in front of his entire class, in which P was present. Even if P was not present, the statement is considered published to a third party because all of P's classmates in D's class would have heard the statement and understood that D intended to communicate that statement to each of them.

(iv) Harm's P's reputation

The statement must be such that it could harm P's reputation. P does not have to show that it actually harmed his reputation, only that the statement could have done so.

Here, D's statement insinuating that Paul copied another student is likely to be very harmful to his reputation. This is so because Paul is a first year law student, and truthfulness and honesty are critical attributes for law students wishing to join the legal profession. By casting him as a

cheater, D is directly attacking P's character for honesty and therefore may impact his reputation in the university and among his peers and professors.

Further, D's statement that P is a "two-bit actor" also harms P's professional reputation. Since P has made a living acting in two small, but memorable roles in Hollywood blockbusters, it is reasonable that P would consider his reputation as a professional actor important. By calling him a two-bit actor, Dan also directly attacked P's professional reputation.

Therefore, Paul is likely to establish the elements of defamation in relation to Dan's statement.

Matters of Public Concern

If the statement concerns a matter of public concern, then in order to prevail on a defamation claim, P must further show the relevant standard of fault of the publisher. A matter of public concern is one that the public or community would at large be reasonably expected to have an interest in learning about.

Here, D's statement may be of public concern because of P's standing as a Hollywood actor. He may be on the way to achieving celebrity. Therefore, the public may have an interest in how P carries himself and P's character as an honest person.

Assuming the matter is one of public concern, the standard that D will be held to as the publisher of the statement depends on whether P should be considered a public or private figure.

Public vs Private Figure

If the plaintiff is a public figure, the statement must have been made with malice. Malice requires an intention to publish a false statement, or reckless disregard for whether the statement was true or false. A person is considered a public figure if they are generally known to the public or performing a public function. If the plaintiff is a private figure, the standard is negligence such that the defendant is not guilty of defamation if the defendant reasonably believed that the statement was true.

Arguably, P is a public figure because of his status as a movie star in Hollywood blockbusters. Since he had memorable roles, he would likely be known to the public. If so, D's statement must have been made with malice. P might argue that D acted recklessly by failing to properly check whether Jack's paper was actually his. However, D could have the stronger argument if he reasonably believed that Paula's paper was the one he pulled from the stack of voluminous papers. For example, if he had hundreds of papers and Jack and P had very similar student numbers/surnames, it may be reasonable for D to have misidentified the papers.

On the other hand, P may be a private figure because the circumstances of the statement related to his performance as a law student, not a big Hollywood actor. The events occurred at university while P was attending school privately. Thus, P may also argue that P was a private figure and D acted negligently and unreasonably by making that statement without checking all

the facts. However, since D knew that P was feeling anxious about failing, and since another student Jack had alerted D to his suspicions, a court may find it reasonable for D to form the opinion that P was at risk of cheating. However, since D had inadvertently shown the wrong paper to Jack, P would have a stronger argument as a private figure and D's negligence. This is likely to be a stronger claim for P, since the standard for D to meet is lower.

DAN'S DEFENSES

Truth

Truth is a complete defense to defamation.

Here, D's statement was not true because P in fact had not copied Jack's or any other person's materials. Further, there is nothing to show that P was a poor actor, so D's statement as to Paul being a "two-bit" actor is also unlikely to qualify for the truth defense unless D can put on additional evidence to show this.

Consent

Consent by the P is a defense to defamation.

Here, P did not give D any consent, express or implied, to say the things that D said. Therefore, this is inapplicable.

Qualified Privilege

A qualified privilege exists if the publisher had a legitimate interest that it was furthering, or if he made the statement as part of a genuine public comment. This privilege usually applies to newspaper or broadcasters who have an interest in pursuing the truth.

Here, D may argue qualified privilege on the basis that he made the statement under a legitimate interest to discourage other students from cheating. However, this is not a particularly strong defense because it was not necessary to attack Paul in order do so.

DAMAGES RECOVERABLE FROM DAN

Slander

Slander is defamation via spoken word. Generally, special damages need to be proven by the P in order to prevail on a slander claim. Special damages require a showing of pecuniary damage.

Here, P has not suffered any pecuniary damage. He did not seek medical treatment so did (should he be added before did?) not incur any medical expenses. There is also nothing to show that he lost any income from acting based on the statement.

Slander per se

Slander per se are categories of slander where damages are presumed. This includes where a defamatory statement was spoken about P's business or profession.

Here, P may seek damages based on slander per se because D's statement defamed P's profession as an actor.

COMPENSATORY DAMAGES

Compensatory damages are awarded for personal injury or property damages, and aim to place the plaintiff in a position as if the tort had not occurred. These damages will be limited by foreseeability, causation, unavailability and certainty.

P will likely obtain compensatory damages caused by D's defamatory statement by application of slander per se (see above).

NOMINAL DAMAGES

Nominal damages are awarded when there is no quantifiable specific loss or injury suffered, so it is awarded to the plaintiff as nominal. P would likely seek nominal damages because of his personal injury suffered by the panic attack.

PUNITIVE DAMAGES

P may also seek punitive damages if D's statement is found to be willfully malicious and wanton. A court may likely find that disparaging P's reputation as an actor was willful and wanton, since it was completely unjustified.

CAUSE OF ACTION: INVASION OF PRIVACY

False Light

P may argue that D breached P's privacy by intentionally casting a statement to put P under a false light and misattributing a characteristic of dishonesty to him. False light requires that the act be highly offensive to a reasonable person. The same standard of fault of publisher applies as in defamation (malice vs negligence) where the matter is of public concern.

Here, P would argue that, as a private person, D attributed a false character to him by saying he was a cheater and a bad actor. As a private person, D acted unreasonably and negligently when making the statement. Therefore, applying the standard of fault of a private person, D has breached P's privacy by acting negligently and unreasonably.

CAUSE OF ACTION: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional IED

P may claim D caused intentional infliction of emotional distress (IIED) when he made the

statement. IIED occurs when the defendant has made an extreme or outrageous conduct that causes severe emotional distress to the plaintiff. No physical injury is required for P to succeed in a claim for damages. The intention element is met if the defendant acted intentionally (with substantial certainty) that emotional distress would be caused, or if he acted with reckless disregard.

Here, P suffered a severe panic attack when hearing about D's statement. P would argue that D acted intentionally because D knew that P was in the room when he made that statement. He also knew that P had anxiety already about performing poorly on the paper. At the very least, P would argue that D acted recklessly because he should have double checked which paper he showed Jack before making such an allegation against P. The fact that P didn't seek medical treatment would not prevent him recovering damages against D.

Negligent IED

P may also argue that D negligently inflicted emotional distress. Negligent infliction occurs where D has negligently made a statement, which causes severe emotional distress. However, in most jurisdictions, the emotional distress must be accompanied or caused by some physical impact or injury.

Here, P suffered a panic attack directly as a result of D's statement. He did not appear to suffer any physical impact or injury, as proven by the fact that he did not seek medical advice. Therefore, this is unlikely to be established by P.

Conclusion

P is most likely to succeed on a claim for defamation by D. He may also bring claims of invasion of privacy (false light) or intentional or negligent infliction of emotional distress. Since P suffered no pecuniary damages, he may be able to seek compensatory damages based on slander per se. Given the nature of D's allegations, P may also be able to convince a court to award punitive damages.

QUESTION 2

Linda is a lawyer with experience in representing small businesses, both for-profit and nonprofit. Nonprofit, Inc. (Nonprofit) is a newly formed California nonprofit corporation with few assets and limited income. Nonprofit is governed by a volunteer board of three directors, one of whom holds the position of board chair. Nonprofit's only employee is Ellen, who has no official title.

Ellen contacted Linda and said that Nonprofit would like to retain Linda to help it develop a formal employment agreement with Ellen, to make Ellen officially the Executive Director of Nonprofit. Ellen's position as Executive Director would be as an officer of the company, but not as a board member. Linda agreed to accept the matter. Linda did not memorialize her retainer agreement in writing.

Ellen drafted an employment agreement that included a proposed salary and sent the agreement to Linda. Ellen told Linda that her proposed salary was data-driven from a survey of similar positions, but based in the for-profit field. Ellen asked Linda not to tell the Board about the source of the survey data. Linda saw many other provisions in the draft agreement that were more favorable to Ellen than those in a typical employment agreement. Linda arranged a meeting with the Nonprofit board to discuss the terms of Ellen's employment agreement. The board chair asked Linda to invite Ellen to attend the board meeting and join their discussions.

1. With whom did Linda establish an attorney-client relationship and what ethical violations, if any, did Linda commit at the time the attorney-client relationship was created? Discuss.
2. What are Linda's ethical obligations with regard to:
 - a. Ellen's employment agreement? Discuss.
 - b. Ellen's request for confidentiality regarding the source of the survey data? Discuss.

Answer according to California and ABA authorities.

QUESTION 2: SELECTED ANSWER A

- 1. In order to have an effective attorney-client relationship, particularly when dealing with business associations, identification of the client is critical. The fact pattern is unclear as to the identity of the client. The potential clients are (1) Ellen individually, (2) Nonprofit, Inc., and (3) both.**

Based on the facts presented, it is likely that Linda was representing Nonprofit only. Ellen said "*Nonprofit* would like to *retain* Linda to help it develop a formal employment agreement with Ellen." At the same time, Linda has experience representing "small businesses," and it does not indicate that she has experience representing employees individually in negotiations with such businesses.

Importantly, a lawyer representing a corporation does not represent that corporation's employees, including senior officers and even if there is only one employee. The corporation is a distinct legal entity entitled to independent and zealous counsel. Therefore, on the facts presented, Nonprofit is probably the only client at the inception of the attorney-client relationship.

It does not matter that Ellen was the company's only employee, because there is no merger in such a situation—not even when the sole employee is also the sole shareholder. Here, it was a nonprofit, and therefore it is all the more clear that the attorney-client relationship was with Nonprofit only.

A very important (but missing) fact is Linda's fee. The client can often (but not always) be identified based on who is paying the fee. There is no reference to any fee arrangement. It thus appears that Linda is doing this work pro bono. The ABA does not require written fee agreements. If Linda was receiving a fee and more than \$1000, she might have violated the California rule requiring such agreements to be in writing if not for the fact that Nonprofit is a corporation, because that is an exception to the rule on written fee agreements (other, inapplicable exceptions include when the client in writing says it does not want a written fee agreement or there is a prior relationship and an exigent circumstance arises requiring prompt action by the lawyer to protect the client's interests). If Ellen paid the fee personally, however, that would materially alter the analysis and suggest either (1) an unethical dual representation of parties with an actual conflict without a waiver (which would have had to be obtained from members of the Nonprofit board since Ellen couldn't authorize that herself due to her own conflict), and also it would have required the fee agreement in writing as to Linda if over \$1,000, or (2) improper payment of legal expenses by a third party, without taking adequate precautions to ensure independent representation and preservation of confidentiality.

Despite the fact that the representation is for the company and, the absence of a written retainer agreement clearly identifying the client and the scope of representation is problematic. Indeed, it is clear that Ellen is receiving personal legal advice from Linda. Ellen also asked Linda to advance her personal interests and withhold information from the board. Although this

happened after the initial attorney-client relationship was formed, it could arguably have created a reasonable expectation by Ellen that Linda was her personal lawyer, too. To the extent that this rose to the level of creating an attorney-client relationship with Ellen individually, as noted above, that would be unethical. It is an improper dual representation of clients with actually conflicting interests in the absence of an effective disclosure and consent. The ABA rules apply a reasonable lawyer standard that prohibits representing actually conflicting clients unless the lawyer reasonably believes that it will not materially impair their ability to perform the required legal services competently and diligently. That conflict waiver must be confirmed in writing by both clients affected by the joint representation, after receiving complete disclosure of the risks from the lawyer. In California, there is no reasonable lawyer standard; the rule applies to both potential and actual conflicts; in case of conflicts between clients (as here), the disclosure must be in writing as well as the clients' consent to it; and in case of personal and professional conflicts, the disclosure must be in writing. Here, no such waiver occurred. Again, Ellen could not have authorized it herself on behalf of the corporation, even though she was the only employee, because she was conflicted. Consent to the dual representation could only have come from the board (since it's a nonprofit, there are no shareholders to potentially consent instead).

Moreover, Linda should have advised Ellen to retain independent counsel (though Ellen was free not to do so if she chose). From the fact that Ellen drafted an employment agreement, it is unclear whether Ellen herself was a lawyer but it certainly suggests that she did not believe she needed a lawyer of her own. Still, especially in this situation, Linda should have told Ellen this suggestion.

In conclusion, on the facts presented (though some important ones are missing), the client was Nonprofit only and Linda did not *clearly* violate any ethical rules at the point when the relationship was created. Based on Linda's subsequent discussions with Ellen, however, it seems clear that Ellen did not understand the scope of Linda's duties and may have believed Linda to be her personal attorney, and therefore under the circumstances, Linda should have disclosed the scope of representation more clearly and ideally had a written retainer agreement making that clear to Ellen.

2.a. **With respect to the employment agreement, Linda was obligated to zealously and competently represent Nonprofit's interests.**

The fact that Ellen drafted the employment agreement is not necessarily unethical in and of itself. A lawyer is entitled to rely on their employees and independent contractors to perform services subject to their supervision. A lawyer can also allow a client (or in this case, the employee of a client) to prepare documents so long as the lawyer exercises diligent and competent review and independent legal judgment in rendering advice. Here, because Ellen was on the other side of the transaction, it was essentially her opening offer to Nonprofit.

Upon receiving the draft from Ellen, Linda was required to review the document carefully and to attempt to revise and negotiate the terms to benefit Nonprofit. Because it was drafted by a nonlawyer (presumably), Linda was also required to review the draft to ensure compliance with all applicable laws. (The most significant issue presented in these facts is the salary, based on

the source of the info, and that is discussed in part b.)

When Linda recognized that the terms were unusually favorable to Ellen, she should have pushed back on those provisions and attempted to at least get them to conform to what is standard in the typical employment agreement.

At the minimum, if Linda did not seek to negotiate or revise the draft herself, Linda was right to call for a board meeting because she is obligated to tell the board about the provisions that she has recognized as too favorable to Ellen. A lawyer has the duty to communicate with the client, and where, as here, the only employee is in an adverse position, the board represents the interests of the corporation.

As a lawyer, Linda is not obligated to make business decisions for her client. The decision about the terms and how much ultimately to pay to Ellen is one for the board, not Linda.

Linda is also required to inform that board that it cannot have a privileged conversation with her about the employment agreement if Ellen is present. Accordingly, Linda should probably recommend that the board chair retract his invitation to Ellen, or at the very least ensure at the outset of the meeting that they all understand that there will be no privilege between them.

2.b. The duty to communicate includes the duty of candor and honesty to the client. Here, Linda could not honor Ellen's request for confidentiality because Nonprofit is her client, not Ellen. Linda is obligated to ensure that Nonprofit has all material facts relevant to the contract when deciding whether to agree to Ellen's requested salary.

Even if this were a dual representation situation, where Linda represented both Ellen and Nonprofit, she would have a duty to disclose this fact to Nonprofit's board because the fact is material to the representation. It is one of the reasons why disclosures in such situations are so critical, because it puts the duty to protect confidentiality in tension with the duty to communicate, and in a joint representation, that means disclosing all facts material to the representation.

Linda should have told Ellen that she could not honor her request.

Linda would not have to tell the board that Ellen violated her duty of loyalty to Nonprofit, however, because the duty of loyalty is not implicated when negotiating employment agreements. That said, Linda should tell the Board that Ellen asked her to keep the information secret, as that is important for the board to know when making the decision about whether to expand Ellen's current untitled role.

QUESTION 2: SELECTED ANSWER B

1. **With whom did Linda establish an attorney-client relationship, and what ethical violations did Linda commit at the time the Attorney-client relationship was created**

Attorney Client Relationship

Organizational Client

When a lawyer is hired to represent a corporation or organization, the lawyer's fiduciary duties are to the organization and not to the individual members, directors, or officers. A lawyer has a duty to act on the best interests of the organization and can, therefore, not engage in conduct which would benefit any individual or group of individuals at the expense of the organization.

Here, Linda was contacted by Ellen, who said that Nonprofit would like to hire her. Linda was further told that this was for the purpose of creating a formal employment agreement with Ellen, to make her the Executive Director of the Nonprofit. Therefore, Linda was hired by Nonprofit and as such, owed fiduciary duties to Nonprofit and not to Ellen.

Linda's Ethical Violations

Fee Agreement

Under ABA, a lawyer who agrees to represent a client must not put the agreement in writing, unless it is for contingency fees. However, California Rules of Professional Conduct, mandate that lawyers must put the agreement in writing if it is over \$1000. However, when the client is an organization, or a repeat client (or if there is an emergency) a lawyer does not have to write up the agreement.

Here, since Linda is representing Nonprofit, which is an organization, Linda did not violate the ABA or CA rules by failing to put the retainer agreement in writing for the purpose of the fees.

Duty of Loyalty

A lawyer owes her client a duty of loyalty, which includes the duty to avoid a conflict of interest. A conflict can arise where the lawyer knows that her client's interest will be materially adverse to that of the lawyer's own interest, or another client. When such a conflict arises, a Lawyer might still be allowed to represent the clients so long as there is no claim by one client against the other, such representation is not prohibited by law, and the lawyer's lawyer gets the informed written consent of both clients. California also allows a lawyer who has a potential conflict of interest to continue to represent the clients so long as there is informed written consent.

Here, Linda is not officially representing Ellen. However, the fact that Ellen is the one who

reached out to Linda, and the fact that the representation was for the purposes of drafting up an employment agreement between Nonprofit and Ellen, suggests that Linda was at least informally also representing Ellen. This would create a concurrent conflict of interest. As such, Linda should have sought the informed written consent of the board of Nonprofit, before she agreed to represent t Nonprofit in the manner Ellen asked. There are no facts to suggest that Linda did this and therefore, she was likely in violation of her duty of loyalty to Nonprofit.

Duty of Diligence

Under both ABA and CA, a lawyer has to promptly, adequately and zealously represent her client.

Here, Linda failed to adequately represent her client, Nonprofit, when she failed to inform Nonprofit of the potential conflict of interest that could arise. Given the fact that Linda had experience in representing businesses, both nonprofit as well as for profit, further gives rise to the fact that she should have sought t the written consent of Nonprofit before agreeing to representing them in the matter regarding Ellen's employment agreement.

At this point, Linda should have informed both Ellen, as well as the Board of Nonprofit, that this might give rise to some conflict of interest issues as she was retained by Ellen, but to work on Nonprofit's behalf in forming a formal agreement with Ellen.

2.a. Linda's ethical obligations with regard to the Employment agreement

Duty to Report (loyalty)

When a lawyer represents an organization, and learns of conduct made by an individual in the corporation which materially harms the organization in terms of financial harm or even reputation harm, the lawyer has a duty to report up. Under ABA, the lawyer has to first report the individual's conduct up to a higher authority in the company, such as the board of directors. If the board does not do anything to remedy the harm, the lawyer has to report to a relevant authority outside of the corporation. CA rules differ slightly. Under CRPC a lawyer has the duty to first report up the chain to the board of directors ,for example. If the board fails to act, the lawyer may not report out but rather should seek withdrawal.

Here, the employment agreement which Ellen prepared would clearly cause financial harm to the nonprofit because it would pay Ellen based on the appropriate payment for a for-profit company. Linda's client, will therefore be forced to pay more than they should for Ellen's job. Linda should immediately report this to the board of directors. Although Linda did set a meeting with the board to discuss Ellen's financial compensation. she should refuse to allow Ellen to attend so that she could discuss the fact that the employment agreement contained a number of provisions that were more favorable to Ellen than those in typical employment agreements.

Duty to Communicate

Under both ABA and CA rules, a lawyer has a duty to communicate important material matters regarding the representation to her client.

Here, Linda has a duty to tell the board about the fact that Ellen drafted up the employment agreement herself. Furthermore Linda must tell the board that there are provisions in the agreements that are more favorable to Ellen than usual. These are all things that are material to Linda's representation because she is representing Nonprofit for the purpose of drafting up the employment agreement.

Linda's failure to promptly notify the board as to these matters will surely result in her committing an ethical violation.

Duty of Competence/ Diligence

(See rules above)

Under ABA, a lawyer must be competent, in terms of skill, knowledge and experience to represent her client. Under California rules, a lawyer may not intentionally, recklessly represent a client. California punishes repeated acts of incompetence in representing clients.

Here, although Linda seems to have plenty of experience representing businesses, she seems to have failed to.

(See rule above)

In addition to the rule above, a lawyer owes her client the absolute duty to act in the clients' best interest. A lawyer may not benefit herself or anyone else at the expense of her client

Here, Linda is allowing Ellen to draft up the agreement. She should not allow Ellen to do this as this would constitute a violation of her duty of competence and diligence because 3

2.b. Ellen's request for confidentiality regarding the source of the survey data

Duty to Report (loyalty)

When a lawyer represents an organization, and learns of conduct made by an individual in the corporation which materially harms the organization in terms of financial harm or even reputation harm, the lawyer has a duty to report up. Under ABA, the lawyer has to first report the individuals' conduct up to a higher authority in the company, such as the board of directors. If the board does not do anything to remedy the harm, the lawyer has to report to a relevant authority outside of the corporation. CA rules differ slightly. Under CRPC, a lawyer has the duty to first report up the chain, to the board of directors for example. If the board fails to act, the lawyer may not report out but rather should seek withdrawal.

Here, Linda should certainly not keep the source of the data confidential from her own client. As discussed above, she is representing the Nonprofit and, as such, owes it her duties of loyalty. Linda should immediately report the source of the data to the board. If, for some reason, the board decided not to do anything with the information, then under ABA, Linda would have to report this to a relevant agency, such as the Secretary of the State in this case. Although the nonprofit might not have shareholders, it is a 501c3 corporation which is in essence not paying taxes precisely because of its nonprofit nature. Ellen, is seeking to have the nonprofit pay her the salary that she would have earned had it been a for profit. This would potentially be a violation of the nonprofit's tax obligations and could devastate the nonprofit if caught doing it (not to mention the harm it causes on the taxpayers as a whole). Therefore, Under ABA authorities, Linda should have reported this first to the board, and if it failed to act, to the Secretary of State. Under CA authorities, however, Linda would not be allowed to go the extra step of reporting outside of the organization if the board fails to act. She should then seek to withdraw from representing the nonprofit.

Duty to Communicate/Duty of Diligence

Under both ABA and CA rules, a lawyer has a duty to communicate important material matters regarding the representation to her client.

Here, again, Linda should communicate the source of Ellen's survey data to the board. Failing to do so will result in her being in violation of her duty to communicate as well as loyalty and diligence.

QUESTION 3

Barn Exports hired Sam, an up-and-coming artist whose work was recently covered in Modern Buildings Magazine, to paint a one-of-a-kind artistic design along the border of the ceiling in its newly renovated lobby. After discussing the work, Ed, the president of Barn, and Sam signed a mutually drafted handwritten contract, which states in its entirety:

Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay \$75,000 upon completion of the work.

When Sam began work, he was surprised that the new plaster ceiling in the lobby had not been sanded and sealed. Sam complained, but was told by Ed that preparation was part of his responsibilities. Although Sam disagreed, he spent four days sanding and sealing the ceiling. When Sam finished painting, he submitted a bill for \$78,000, having added \$3,000 for labor and supplies used in preparing the ceiling. In response, Barn sent a letter to Sam stating that, because he had not painted the borders in the two public restrooms in the lobby, no payment was yet due. Barn's letter also stated that it had recently spoken to several artists who perform similar work and learned that "surface preparation" was typically the responsibility of the artist.

According to Sam, before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations.

Sam sued Barn for breach of contract in the amount of \$78,000.

Barn countersued for specific performance to have the borders in the bathrooms painted.

1. Is Sam likely to prevail in his breach of contract lawsuit against Barn and if so, what damages will he likely recover? Discuss.
2. Is Barn likely to prevail in its lawsuit seeking specific performance against Sam? Discuss.

QUESTION 3: SELECTED ANSWER A

I. Applicable Law

Contracts for the sale of tangible goods are governed by Article II of the Uniform Commercial Code. All other contracts, such as those for services or real property, are governed by the common law. Here, the contract between Barn and Sam (S) is to "paint a one-of-a-kind artistic design," Hence, this is a services contract. Accordingly, it will be governed by the common law.

II. Sam's Breach of Contract Claim

Valid Contract

In order to bring a successful breach of contract claim, there must first be a showing of a valid contract. To form a valid contract, there must be an offer, acceptance, and consideration. Additionally, there must be no grounds for a valid defense to formation.

(1) Mutual Assent

Parties to a contract must manifest mutual assent to be parties to the contract. This is typically shown through offer and acceptance. Here, there are no facts regarding a traditional offer and acceptance between Barn (through its president, Ed) and S. Instead, after discussing the terms, the parties entered into a "mutually drafted" handwritten contract that states "Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay \$75,000 upon completion of the work." This is likely enough to show mutual assent between the parties and, thus, this element is satisfied.

(2) Consideration

Consideration is necessary for there to be a valid contract. Typically, a showing of consideration is done by facts evidencing the parties have obtained a legal benefit or detriment through the contract. Some states, however, only look to legal detriment. In either regime, the consideration requirement is satisfied here: Barn's legal detriment is having to pay \$75,000 when the work is completed; meanwhile, S's detriment is having to do the work.

(3) Mutual Mistake

A mutual mistake occurs when both parties have a belief not in accord with the facts as to a material fact underlying the contract which causes a material change in performance of the contract and for which neither party held the risk of mistake. Here, Barn may argue that S cannot recover because there was a mutual mistake as to what "all public areas" meant in their contract. Barn claims it includes the public restrooms, while S claims it does not. Because this outlines S's only obligations under the contract, this would have a material effect on performance. As such, under Barn's theory, no valid contract was formed.

This argument is likely to fail, however. There was no indication that parties had different understandings as to facts that exist out in the world. Instead, there is a dispute as to the obligations required under the contract. There is still a basis for a court to find the terms of the contract and can afford the parties the performance they anticipated under their original agreement.

Hence, because there is an agreement, consideration, and likely no valid defense to formation, S can show that a valid contract was formed.

Performance Due

Next, S will need to show establish the performance due under the contract so that a court may determine whether a breach has occurred. Barn's performance due under the contract is simple. It must pay S upon completion of the artwork. S's performance due, however, is less certain. There are two main disputes: whether S was obligated to perform surface preparation and whether S was obligated to paint the bathrooms.

(1) Surface Preparation

(A) Plain Meaning

Generally, when a court examines what is required under the contract, it looks to the plain meaning of the words therein. Traditionally, a court could not examine any extrinsic evidence to give meaning to those terms unless they were ambiguous. Here, the contract indicates simply that S "shall paint a unique design." On its' face there is nothing ambiguous about this statement. Barn will argue that the ambiguity arises when you consider that "several artists who perform similar work" stated that "'surface preparation' was typically the responsibility of the artist." The court will need to decide whether it really believes that the words as found in the contract are uncertain enough to consider this extrinsic evidence of trade usage. On balance, a court could find that the word "paint" could contain multiple obligations and so extrinsic evidence is required. Thus, a court could consider this trade usage in determining the scope of S's obligations. Because there is no evidence of course of performance or course of dealings between S and Barn, this would be the most dispositive evidence as to S's obligations.

(B) Modification

Under the common law, a good faith modification requires consideration to be valid. Here, Barn may argue that even if "paint" is not deemed to include surface preparation, the parties modified the contract after it was formed. Here, the modification would have placed an additional burden on S's performance and, thus, to be valid requires an additional burden on Barn. However, there is no indication that Barn took on that additional performance. Although S did submit a bill which included \$3,000.00, Barn is claiming that it need only pay the originally agreed \$75,000. Hence, there was likely no consideration for this modification to be valid.

On balance, however, because "paint" is likely to be found sufficiently ambiguous, S's

obligations included the surface preparation.

(2) The Bathrooms

(A) Parol Evidence

See above rule. Here, the parties argue that "all public areas of the first-floor lobby" include the two public restrooms. However, S states that "before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations."

Under the parol evidence rule, when there is a written contract, the parties may generally not present evidence of prior or contemporaneous agreements made before the writing. If the writing is meant to be a the full and final expression of the parties' agreement, then no extrinsic evidence is permitted absent a finding that the term would have been "naturally omitted." The contract is said to be a complete integration. If, instead, the writing is simply part of the full agreement, then only extrinsic evidence that does not contradict the written terms may be admitted. Such a writing is said to be a partial integration.

Here, the parties' agreement is likely to be a partial integration. Firstly, there is no merger clause, which indicates that the agreement is the final and complete expression of the parties' contract. Although the existence or lack of a merger clause is not the sole factor in this analysis, it is a substantial one. Additionally, the brevity and lack of formality of the agreement (being handwritten) also support that this is merely a partial integration.

If the court finds a partial integration, then it must ask whether S's conversation with Ed before the contract was signed contradicts the written terms of the contract and should be excluded. Barn may argue that it does because the contract covers "all public areas" of the lobby, of which the bathrooms would be included. On the other hand, S will argue that the term does not contradict but merely delineates the meaning of "all public areas." S may also argue that "all public areas of the first-floor lobby" generally mean just the lobby area itself and not any rooms or hallways attached to it. Weighing the two, a court is likely to side with S and find that the term does not conflict with the contract.

Accordingly, S's performance likely did not include the bathrooms.

Breach

When a party fails to perform as contemplated by the contract there has been a breach. However, a breach does not necessarily excuse the other party's obligation to perform. When there has been substantial performance, i.e., the nonbreaching party has received the substantial benefit of its bargain, the nonbreaching party must still perform its obligations under the contract. Only when there has not been substantial performance, will the obligations of the nonbreaching party be suspended.

(1) S's Obligations

As noted above, S's obligations likely included the surface preparation but not the bathrooms. Because of this he has not breached his duties under the contract. However, even if he was required to paint the bathrooms, he has likely substantially performed. According to Barn's letter, S has painted everything in the lobby except "two public restrooms." This is likely to be a very small part of the overall size of the lobby and so Barn is likely to have received the substantial benefit of the bargain. Thus, under either interpretation, S has substantially performed.

(2) Barn's Obligations

Based on the constructive condition of exchange, once one party's obligations under a contract become due or are excused, the other party's obligations also become due (or must be excused). Here, because S likely completed his obligations under the contract, Barn's obligation to pay was incurred. Because he refused to do so, he breached the contract.

Damages

(1) Expectation Damages

Expectation damages are the default damages in contract. They are meant to place the nonbreaching party in the same position it would be in had the breaching party performed. Here, if Barn had performed under the contract, it would have owed S \$75,000.00. S's injury here—the lack of payment—is caused solely due to Barn's breach. Thus, S is entitled to \$75,000 in expectation damages under the contract.

(2) Consequential Damages

Consequential damages are those that arise as a result of the breach that are foreseeable to the parties (either expressly or when the parties contemplated the contract), caused by the breach, and reasonably certain. Here, S is not claiming anything that could be considered consequential damages; so he will not recover for these.

(3) Incidental Damages

Incidental damages are those damages that flow from the breach. This includes damages for expenses incurred to inspect goods, ship back nonconforming goods, or to warehouse nonconforming goods. Here, S is not claiming anything that could be considered incidental damages, so he will not recover those.

(4) Restitution

If the court finds that the surface preparation was not originally part of the contract, then S may be able to recover damages related to that under a unjust enrichment theory. Restitution is available when a plaintiff confers a benefit to the defendant, without gratuitous intent, and it would be unjust to allow the defendant to keep that benefit without compensation. Here, if S

did not have to prepare the surface of the lobby under the contract, then Barn benefited in not having to find another worker to do that for it. There is no indication that S intended to do this gratuitously, particularly because S charged Barn \$3,000 for the labor and supplies used.

Restitution can be calculated either by the value of the benefit conferred on the defendant or the cost to the plaintiff in conferring that benefit. Here, there are no facts as to how much it would have cost Barn to hire someone else to do the surface preparation. Yet, we do know that Sam submitted a bill of \$3,000 for labor and supply. Assuming this is a reasonable estimate of the labor involved with the surface preparation, S will likely be able to recover this amount.

(5) Duty to Mitigate

When a plaintiff suffers a breach, they have a duty to mitigate their damages. Here, there was no indication that S could mitigate his damages so this does not apply.

(6) Saved Costs

If the court does find that the bathrooms were part of the deal, then the court should offset S's damages award for any costs he saved by not painting the bathrooms as well.

(7) Conclusion

In total, S will likely be entitled to \$75,000 in compensatory damages under the contract. If the court finds that he did not need to do the surface preparation, then he will also be entitled to \$3,000 for restitution. Finally, S's compensatory damages should be reduced by any costs saved in not painting the bathrooms if the court finds that he was obligated to do so.

II. Barn's Claim for Specific Performance

To obtain specific performance, a claimant must show (1) a valid contract, (2) the contract's terms are certain, (3) there are no conditions precedent, (4) inadequacy of the legal remedy, (5) practicality of legal enforcement, and (6) the lack of equitable defenses.

Valid Contract

As analyzed above, there is likely a valid contract between S and Barn. Thus this element is satisfied.

Certainty of Terms

Although there is some ambiguity as to what "paint" and "all public areas" mean in the contract, the ambiguities are not so great as to make it impossible for the court to discover what performance was due under the contract, as analyzed above. Hence, this element is likely satisfied as well.

Condition Precedent

Here, Barn will need to show that it is willing and ready to pay the \$75,000 required under the contract for S's performance. There is no indication in the facts that it is not able to do so; thus there are likely no outstanding conditions for performance.

Inadequacy of Legal Remedy

Specific performance is typically a rare remedy in contract. For most contracts, damages will be sufficient. S may argue that there is no inadequacy of legal remedy because Barn could simply obtain damages for the left over performance and hire another artists to do it. Barn will counter that it hired S because he is "an up-and coming artist" and he was hired to paint a "one-of-a-kind artistic design." These factors weigh in favor of Barn's argument.

That being said, Barn will still likely fail in its quest for specific performance because courts are loathe to award such relief in services contracts. Such a remedy would likely amount to indentured servitude in violation of the Thirteenth Amendment. Thus, even though S is an up and coming artist, Barn will likely be unable to require him to perform.

Practicality of Enforcement

Generally, practicality of enforcement in services contracts is another issue. The court does not want to be in charge of determining if performance is adequate. In this case, however, that is not likely to be an issue because the court can just match the work done on the lobby to that done in the bathrooms. Thus, this element will likely be met.

Defenses

(1) Laches

Laches occurs when the defendant unreasonably delays bringing suit and that delay prejudices the plaintiff. Here, there is no indication that Barn delayed in its request. It filed the countersuit as soon as S sued it for nonperformance, so this will not apply.

(2) Unclean Hands

Unclean hands occurs when the plaintiff has engaged in immoral or otherwise inappropriate behavior in relation to the contract. That again is not present here. S may argue that Barn's failure to perform constitutes "unclean hands" but generally more is required, such as intentionally making performance more difficult. Thus, that is not an element here.

Conclusion

Although most elements are found, because this is a service contract, Barn will not be successful in its countersuit.

QUESTION 3: SELECTED ANSWER B

Governing Law

Common law generally governs contracts. The Uniform Commercial Code (UCC) however, governs contracts for the sale of goods, and has special rules for merchants. Goods are movable, tangible objects and merchants are those who deal regularly in the goods of the kind or hold themselves out as having special knowledge or skill regarding the goods.

Here, the contract (K) is a service K that requires Sam, an artist, to paint designs on Barn Exports' ceilings. As a service K, common law will govern.

Sam v Barn Exports

Formation

A K is a legally enforceable agreement between two or more parties. There must be a valid showing of offer, acceptance, and consideration for a K to be valid. Here, the facts state they entered into a mutually drafted handwritten K. The issue revolves not around whether a K was formed, but rather its exact terms and the respective parties' performance.

Breach of Contract

A breach of contract occurs when one fails to perform their obligation under the K. A breach can be material or minor. A minor breach is one where a party has substantially performed and the nonbreaching party gained a substantial benefit of the bargain, but the breaching party did not fully perform every obligation under the K. A minor breach does not dismiss the nonbreaching party from performing, but the nonbreaching party may recover damages caused by the minor breach, including cost to finish the performance. A material breach occurs where a party to a K does not substantially perform, and the nonbreaching party does not substantially gain the benefit of the bargain. A material breach dismisses the nonbreaching party from performing and the nonbreaching party can sue for damages, and specific performance in some instances.

Here, according to the written K, Sam was supposed to paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay \$75k upon completion of the work. Sam finished the work, but Barn refused to pay, claiming Sam did not paint the border in two public restrooms in the lobby, so payment was not due. Barn's payment of \$75k was conditional on Sam performing his end of the K, and whether Barn is excused from performing depends on whether Sam's alleged breach was a breach, and if so, if it was material or minor. Whether Sam breached the K depends on if the bathrooms were part of the K or not.

Parol Evidence

The parol evidence rule makes evidence of oral or written communications between K parties, made prior or contemporaneous to the written K, inadmissible if they contradict the K and the K was meant to be a complete integration of the K. Typically, to show a complete integration, the parties to the K will include a merger clause or specifically state in the K that the K is meant to encompass the entirety of their agreement.

Exceptions to the Parol Evidence rule include prior or contemporaneous statements that clarify terms of the K or show that conditions precedent exist. Statements made after the written K are also admissible.

Here, the written K does not include any mention of Sam painting the public restrooms in the lobby. Rather, it states that he will paint a unique design along the entire ceiling of all public areas of the first-floor lobby. Sam tries to introduce evidence that, before the K was signed, he told Ed the president of Barn, that the restrooms could not be included because his paints were not suitable for the high humidity in those locations. Because evidence of that conversation between Sam and Ed is offered to clarify or explain what is meant by "all public areas of the first-floor lobby" it may be admissible despite parol evidence.

Vague/Ambiguous Terms

Courts typically construe terms in the K in their plain and simple meaning. When there are multiple ways to construe a certain term, then the courts will look first to the prior history between the contracting parties, if any, to define how they treated the meaning of those vague and ambiguous terms in the past. If there is no contractual history between them, the courts will look to custom and usage in the industry to determine what was meant by the terms in questions.

Here, there are two parts of the agreement that are in dispute between the parties—whether or not the restrooms were included in the "all public areas of the first-floor lobby" and whether or not surface preparation is the responsibility of the artist or an extra that increases the K price.

Meaning of "all public areas of the first-floor lobby"

As mentioned above, Barn claims that the two public restrooms on the first floor were part of the public areas of the first-floor lobby, and Sam's failure to paint them constituted a breach of K. Strictly construed, there is some ambiguity or question regarding whether all public areas of the first floor lobby include bathrooms. Are bathrooms part of the lobby? Sam will argue they are not, and further, the conversation between he and Ed evidenced that the bathrooms were not intended to be part of the K. There is no prior history between Sam and Barn, so the courts cannot look to how they construed the meaning in the past. If Barn can introduce evidence showing that it is custom in the industry for all public areas of the lobby to include bathrooms connected to the lobby, he has a good argument that the bathrooms were part of the painting agreement.

Who has the responsibility of surface preparation?

Another issue with the terms/nonexistence of terms of the K include whether the added cost of surface preparation—\$3k—was part of the contract or an unforeseen extra that Sam should be reimbursed for. In Barn's letter to Sam after they refused to pay on the K, they claimed that they had recently spoken to several artists who perform similar work and learned that surface preparation was typically the responsibility of the artist. As discussed above, there is no history between Sam and Barn to reference to see how they handled surface preparation in the past—this is the first time Sam has worked for Barn. As such, evidence of how the situation is traditionally and customarily handled in the industry will probably govern. The courts will look to the validity of Barn's claim that other artists shoulder the responsibility of surface preparation, and unless Sam has evidence to the contrary, he will likely not be reimbursed for the \$3k he spent preparing the surface. It will come from the money he makes on the K.

Substantial Performance/Minor Breach

As discussed above, a minor breach does not excuse the nonbreaching party from performance. If Sam fails in his assertion that the bathrooms were not part of the K, and the court determines they were, then his breach is likely a minor one. He completed painting the rest of the ceiling of the lobby, conferring a substantial benefit of the bargain on Barn. The two bathrooms are likely small in comparison to the rest of the lobby that was painted, and not everyone who enters the building is guaranteed to go into the bathrooms. Everyone who enters will, however, enter the lobby and see the one-of-a-kind artistic design along the border of the ceiling of the newly renovated lobby. Sam has a good argument that failure to paint the bathrooms is minor compared to the work done in the lobby and Barn is not excused from performance—they owe him for the work he did in the lobby.

Barn's Breach

A party must perform their obligations under a K, and failure to do so is a breach. Here, as discussed above, the bathrooms likely were not part of the K, which would render Sam's performance complete. As such, Barn breaches by failing to pay the \$75k K price.

If however, the restrooms were included, Sam breached by not painting them, but his breach was minor and Barn is not excused from performance. Barn will still be required to pay for the work done, minus the cost of having the bathroom painting completed by someone else.

Sam's Expectation Damages

Expectation damages are money damages awarded to the nonbreaching party that would put the nonbreaching party in the position they expected to be in had the breach. Here, if the bathrooms are not part of the agreement, then Sam is entitled to the full \$75k from Barn. He will likely not get an additional \$3k he spent on surface prep because evidence shows custom in the industry is for the artists to shoulder responsibility for surface prep.

Conclusion

Sam should be allowed to introduce evidence of his conversation with Ed prior to the K, where he told Ed the bathrooms were not part of the K. As such, his painting of the lobby is full performance and he is entitled to \$75k, the K price, from Barn. He will likely not get an additional \$3k.

If the courts conclude the bathrooms were part of the agreements, Barn still received the substantial benefit of the bargain and, to avoid unjust enrichment, the court should award Sam the fair market value of the work rendered.

Barn v Sam

Specific Performance

Specific Performance is an equitable remedy available to a nonbreaching party that would order the breaching party to perform on the K. Specific performance is only appropriate where there is an inadequacy of legal remedies, the nonbreaching party complied with any conditions to performance they were required to and were ready to perform, and enforcement of specific performance is feasible. Specific performance is only available on contracts for the sale of land, or for the sale of goods that are rare or unique. Specific performance is never an available remedy on a services contract.

Here, we have a services contract, so specific performance is not a remedy available to Barn. The courts will not force Sam to finish painting, even though his skills may be rare or unique. Barn will argue that he cannot find another up-and-coming artist whose work was recently covered in Modern Buildings Magazine to paint a one-of-a-kind artistic design along the border of the ceiling in the bathrooms in the lobby, but Barn's argument will be in vain. Again, courts will not specifically enforce a services K, nor should Barn want a begrudging Sam to complete the work, as there is a high likelihood he would not do his best work if forced to work against his will.

QUESTION 4

Des is on trial in a California superior court for possession with intent to distribute hundreds of pounds of cocaine from January through October in 2019.

At trial the prosecution called Carol, a severed co-defendant, who had pleaded guilty to reduced charges in exchange for testifying against Des. Carol testified that through 2019, she had acted as a “distributor” for a ring of cocaine dealers. In that role, Carol had sold hundreds of pounds of cocaine to many people, including Des, during the period of the charged crime. Carol further testified that all her customers agreed to sell cocaine. The prosecutor asked Carol to identify a notebook, which Carol testified was hers, and which she used to keep track of income and expenses related to the cocaine sales as each occurred. Carol testified that on pages 1–2 of the notebook were notations of sales of cocaine from January through April of 2019 by Carol to various people other than Des. She further testified that on pages 3–4 were notations of sales from May through October in 2019 to various people, including Des. The court admitted pages 1–4 into evidence.

On cross-examination, Des’s attorney asked Carol if the prosecutor, Pete, had offered her a reduced sentence in exchange for her testimony. Carol answered, “No.” Des’s attorney then called Carol’s attorney, Abe, to the stand and asked him the same question. Pete asserted attorney-client privilege. The court denied the assertion of privilege, and Abe testified that the reduction of charges against Carol had been in exchange for Carol agreeing to testify against Des.

Des took the stand and denied the charge. On cross-examination, Pete asked Des if it was true that eleven years earlier he had been convicted of forgery, a felony. Des answered, “Yes.”

1. Assuming all credible objections were timely made, did the court properly admit:
 - a. Pages 1–4 of the notes? Discuss.
 - b. Evidence of Des’s conviction for forgery? Discuss.
2. Did the court properly deny the assertion of attorney-client privilege? Discuss.

Answer according to California law.

QUESTION 4: SELECTED ANSWER A

To be admissible, all evidence must first be relevant. Evidence is relevant if it has any tendency to make a fact of consequence, which is in dispute, more or less likely.

Furthermore, the court has discretion to exclude evidence under CEC 352 if the unfair prejudice, confusion, or waste of time it would create, substantially outweighs its probative value.

In California, Prop 8 amended the California Constitution and makes all relevant evidence admissible in criminal cases. Prop 8 did not change, however, the rules of evidence relating to: (1) the U.S. Constitution; (2) hearsay; (3) character evidence; (4) the secondary evidence rule; and (5) CEC 352.

(1(a))

Relevance

The threshold question is whether this evidence is relevant. These pages are relevant because they show that Carol has knowledge of the ring of cocaine dealers, Des was involved in this ring and purchased cocaine from her. It also shows that Carol's oral testimony is more likely to be true, because it supports it.

Authentication

Nontestimonial evidence must be authenticated. Authentication requires the evidence's proponent to adduce sufficient evidence for the trier of fact to conclude that the nontestimonial evidence is what it purports to be.

These pages are nontestimonial evidence and thus, for them to be admitted, they have to be authenticated.

Here, Carol testified that the notebook the prosecutor showed her was her notebook and that it was the notebook she used to keep track of her cocaine business. This is sufficient evidence for the trier of fact to conclude that this notebook is, in fact, Carol's record of her cocaine sales and, thus, it has been properly authenticated.

Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless a hearsay exception applies. It does not matter whether a person is currently testifying at trial; what matters is whether the statement was made in or out of court. Thus if a witness seeks to testify about something she said earlier, out-of-court, for the purposes of proving the truth of that statement, it is hearsay.

Here, Carol's notations of sales in pp 1–4 of the notebook are hearsay. They are out-of-court statements: Carol wrote them in the book out-of-court and now the prosecutor is seeking to introduce them in-court. Moreover, the prosecution is introducing them to show that Carol sold the amount of cocaine to the people as she described in the notations. Thus, they are being offered for the truth of the matter asserted.

These statements, therefore, must fall within a hearsay exception to be admissible.

Statement of a Co-Conspirator

Des is accused of possessing cocaine with the intent to distribute from January through October 2019. In pp 1–2 of Carol's notebook, she notes sales to people other than Des from January through April 2019. In pp 3–4 of the other notebook, she makes notes of sales from May to October 2019, including to Des.

Statements made by a co-conspirator in furtherance of the conspiracy, offered against the opposing party, are exceptions to hearsay. The proponent of the hearsay must show by a preponderance of the evidence that there was a conspiracy between the hearsay declarant and the opposing party and that the statements offered were made in furtherance of that conspiracy. The hearsay itself can be used to show the conspiracy. (A conspiracy is an agreement between at least two people to commit a crime and at least one overt act in furtherance of that intent.)

Here, the notations in Carol's notebook are in furtherance of the conspiracy between her and the ring of cocaine dealers, including Des, to distribute drugs. She did not make these statements when she was cooperating with the police, but rather beforehand when she was working to further the conspiracy's goal of cocaine distribution.

The prosecution will be able to show sufficient evidence to establish that between May and October 2019, Des and Carol were co-conspirators. Carol's testimony about the ring of cocaine dealers, Des's involvement in the scheme, and everyone's agreement to sell cocaine, as well as the notes on pp 3–4 show that the two of them were part of a conspiracy to distribute cocaine. Thus, the notes on pp 3–4 fall within this co-conspirator exception to hearsay.

It is a closer call whether the notes on pp 1–2, which cover the time period from January to April 2019, fall within this exception. They do not mention Des and so cannot be used to show a conspiracy standing alone. However, Carol testified that she sold cocaine to many people including Des "during the period of the charged crime," i.e. starting in January 2019. This testimony may suffice to show a conspiracy existed between Des and Carol beginning in January, 2019. On the other hand, Des can argue that the fact Carol did not record any sale of drugs to him until May shows that they were not co-conspirators until that time (if at all), and thus this is a not a statement made by a co-conspirator falling within an exception to hearsay. Absent other evidence showing that Des entered into a conspiracy with Carol prior to April 2019, or Carol's explicit testimony about when she sold cocaine to Des or when he agreed to sell cocaine, the statements in pp 1–2 were not made in furtherance of the conspiracy between Carol and Des and therefore are inadmissible hearsay.

Business Records

These notes may also fall within another hearsay exception: business records.

Business records are excepted from the prohibition against hearsay. A business record is: (1) a record of facts, events, and/or activities of the business; (2) regularly recorded as part of the business's ordinary course; (3) by an employee with personal knowledge, or by an employee who learned of the information by an employee who had a duty to report this information; (4) is certified the business; and (5) there are no indications of untrustworthiness.

Arguably, Carol recorded the notations in her notebook as part of her business: selling cocaine. She did so based on personal knowledge and as a regular part of her business activities.

This exception will probably not work, however, because there is no indication the notebook was certified as accurate and there are indications of untrustworthiness: it is a record of an illegal enterprise and thus there is a strong incentive not to accurately record everything incriminating.

In sum, pp 3–4 are not hearsay because they fall within an exception but pp 1–2 most likely are inadmissible hearsay not falling within an exception.

CEC 352

Finally, the court must decide if the unfair prejudice, confusion, or waste of time caused by this evidence substantially outweighs its probative value.

With respect to pp 3–4, this evidence is highly probative of Des's involvement in this ring of cocaine dealers and therefore intent to distribute, and thus the prejudice arising out of it is not even unfairly prejudicial, let alone substantially outweighed by unfair prejudice. All evidence is prejudicial to some degree, but just because evidence shows that a defendant is more likely to have committed the charged crime does not make it *unfairly* prejudicial.

If pp 1–2 do fall within the co-conspirator exception, they should probably have been excluded as unfairly prejudicial. They are about sales to people other than Des and thus they may cause the jury to believe unfairly that this evidence shows that Des distributed more cocaine than he bought from Carol than he actually did. Furthermore, it may cause confusion about the conduct of these other dealers, who are not even defendants in this case, and Des's case.

Thus, the court correctly admitted pp 3–4 of the notes, but erred in admitting pp 1–2.

(1(b))

Relevance

Des's conviction was for forgery. Forgery is a crime of moral turpitude because it is a crime reflecting on the dishonesty of the defendant. Here, Des is being charged with intent to distribute cocaine. He has also testified in his own defense.

Thus, this evidence is relevant for two purposes. First, it shows that he is a convicted criminal and it thus has a tendency to show that he may have been more likely to have committed another crime. Second, this evidence is relevant because it tends to show that Des is untruthful and, because he is testifying, his truthfulness is relevant.

This first potential relevance is impermissible, as discussed below. But the threshold question of whether this evidence is relevant is satisfied.

Character Evidence

Character evidence is evidence of a person's character that is being used to show that the defendant acted in conformity with this character in the present case. If the conviction for forgery is admitted for the purposes of showing that Des committed this crime because he acted in conformity with his "criminal tendencies," then it is character evidence.

In a criminal case, a prosecutor generally cannot introduce evidence of a defendant's character unless the defendant opens the door. California recognizes several exceptions: (1) in a sexual assault/child molestation case; (2) in a domestic violence case; (3) in an elder abuse case; and (4) where the defendant has put on evidence of the victim's violent character, the prosecution can put on evidence of the defendant's violent character.

Here, Des has not opened the door to character evidence because he has not testified that he has any particular character trait, let alone one for being law-abiding. Furthermore, none of the exceptions apply.

Thus, this evidence is not admissible for the purposes of showing that, because Des was previously convicted of forgery, it is more likely he committed this crime.

Impeachment Evidence

The second purpose for which this evidence may be admitted, however, is to show that Des is a liar.

If someone testifies, then the opposing party can impeach the witness's testimony and show there is a reason for the jury not to trust his testimony.

Impeachment by conviction is permissible under certain circumstances. First, a party may introduce evidence of a prior felony conviction for a crime of moral turpitude. Additionally,

under Prop 8, the prosecutor may also introduce evidence of a prior misdemeanor conviction for a crime of moral turpitude in a criminal case. Unlike under the Federal Rules of Evidence, California does not impose a specific time limit for determining remoteness.

Here, Des testified and thus exposed himself to impeachment. The prosecutor then was able to introduce evidence of Des's prior felony conviction for forgery, which is a crime of moral turpitude, by asking Des whether he had committed the crime. (The prosecutor could have introduced extrinsic evidence instead of asking Des, but did not have to). This was proper impeachment evidence.

In addition, this was also proper impeachment via evidence of a prior bad act. In a criminal case, a prosecutor can ask a defendant if he previously committed a prior bad act in the past, that reflected the defendant's moral turpitude, if the prosecutor has a good faith basis for doing so. Prop 8 also allows the prosecutor to admit extrinsic evidence of this prior bad act. Here, Des's conviction for forgery is evidence of his prior bad act that reflects his moral turpitude, and thus was improper impeachment evidence under this rule as well.

CEC 352

Thus, this evidence was admissible to impeach Des and show that he was not a credible witness. The final gatekeeping question for the court was whether the unfair prejudice of this evidence substantially outweighed its probative value.

The age of the conviction—eleven years—weighs against admission because it is remote. However, it is quite probative of Des's credibility and he is denying the charge on the stand.

Thus, on balance, the unfair prejudice does not substantially outweigh its probative value and the court properly admitted the evidence.

(2)

Attorney-client privilege protects confidential discussions between a client and her attorney for the purposes of providing the client legal advice. If the privilege applies, absent waiver by the client, the attorney cannot reveal communications protected by this privilege. There are some exceptions to the privilege: (1) the client was using the attorney's services as part of criminal or fraudulent activity; (2) the client was in a joint representation with another client and the two clients are now suing each other over the subject matter of the joint representation; (3) the client and attorney are involved in a malpractice suit against one another about the representation; and (4) the attorney reasonably believes that the client is going to commit a criminal act resulting in death or serious bodily injury and the attorney could not talk the client out of it and told the client that she would reveal this privileged communication.

Here, Des's attorney asked Carol if the prosecutor had offered her a reduced sentence in exchange for her testimony. Carol said no (which was a lie).

Abe, Carol's attorney, was required to testify about the reduction of charges and the court

denied his assertion of attorney-client privilege. This reduction was offered by Pete the prosecutor. Pete's offer to reduce the proposed sentence in exchange for her testimony and Carol's acceptance of the deal would not be covered by the attorney-client privilege.

First, Pete is not Abe's client or an agent of Carol, so his statement does not fall within the privilege. Second, Carol's response was presumably communicated to Pete because the deal was reached. Thus her acceptance was not confidential or for seeking the provision of legal services. Thus, her acceptance of Pete's offer is not protected by the privilege either. In sum, the attorney-client privilege does not protect the fact that Carol and Pete entered into an agreement.

Carol's discussions with Abe in confidence about whether to accept this deal would fall within this privilege, but Abe was not required to testify about this. The question was whether Pete had offered Carol a reduced sentence and not about Carol and Abe's confidential discussions.

Thus, the court did not err in denying the assertion of attorney-client privilege.

QUESTION 4: SELECTED ANSWER B

1. Admission of Evidence

Relevance. As a starting point, all relevant evidence is admissible in a criminal trial, subject to certain exclusions and privileges. Relevant evidence is that which has a tendency to make any fact at issue in the case more or less likely to be true.

Authentication. For documentary evidence, in order to be admissible the party offering the evidence must make a showing that the document is authentic—that it is in fact what it purports to be.

Here, Carol's notes were properly authenticated by the prosecutor before they were offered into evidence. It appears the prosecutor showed Carol the notebook and inquired whether she recognized it; Carol testified that she did, and that it was her own notebook, thus establishing Carol's basis of knowledge for authenticating the notebook.

Prop 8. In criminal trials in California state court, the law known as Prop 8 acts as a victim's bill of rights, and provides that all relevant evidence shall be admitted, subject to certain restrictions and exclusions, including hearsay rules, constitutional principles, evidentiary exclusions in place before 1982, and any exclusions adopted after 1982 that were ratified by a 2/3 vote of the legislature. Absent an applicable exclusion under Prop 8, evidence that is relevant will be admitted.

a. Pages 1–4 of Carol's Notes

Relevance. Pages 1–2 of Carol's notes are arguably not relevant to Des, because, as we are told, they reflect records of cocaine sales by Carol to various people other than Des. The sales do fit the time period with which Des is charged, however, including January through April of 2019. And the standard of relevance is fairly low. Does the fact that Carol sold drugs to many other people in a pattern that likely fits the later period, in which her records do reflect sales to Des, make any aspect of her narrative more probable? A jury could logically infer that laying a foundation of Carol's earlier sales makes it more likely that the pattern continued into the period in which she has records that include Des. By the same token, Des could well argue that because Carol's notes do not reflect any sales to him during this period, that there were none. (This strategy likely wouldn't do much good for Des, as it would tacitly acknowledge the potential credibility of the later sales records.) On balance, these records likely have some minimal relevance, although their probative value is not particularly strong, and will be subject to balancing under Section 352, as discussed below.

Pages 3–4 of the notebook are more clearly relevant to Des's alleged criminal conduct. They purport to reflect cocaine sales by Carol to him within the charged timeframe, and the sales from Carol to Des would show his possession of the cocaine. Carol's testimony further provided that those to whom she sold possessed the cocaine with intent to sell it themselves. Thus,

pages 3–4 of the records would be highly relevant evidence, and would be important to corroborate the testimony of the cooperating witness, Carol.

Hearsay. The notebook, however, remains subject to a hearsay objection. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here, the statements made in the notebook by the declarant, Carol, are offered as proof of what they purport to show—that Carol made cocaine sales in certain amounts and on certain dates to the defendant, Des. Thus, the statements are hearsay, and unless an exception applies, they will be excluded. As noted, the hearsay rules are an exception to Prop 8 and still apply.

Two primary hearsay exceptions are potentially applicable here. First, the statements may be deemed statements of a co-conspirator made during and in furtherance of a conspiracy. It bears mention that Des is not charged with the crime of conspiracy. That is no impediment to use of the evidentiary hearsay exception, however, so long as an adequate factual predicate for the exception is supplied. Here, Carol's testimony appears to have done so. She does not explicitly testify to an express agreement between the various retail drug dealers to whom she sold cocaine as a wholesaler. Therefore one could argue that no such agreement existed. More likely, however, a court could logically infer an implied conspiracy among the entire group, in which Carol acts as the hub of the conspiracy and the various retail dealers are the spokes. Courts have long acknowledged this type of hub and spoke conspiracy can exist, even when the individual spokes do not know each other directly and have their explicit understanding individually with the central hub, here Carol.

Were the statements during and in furtherance of the conspiracy? It appears that they were. Carol made the records to aid her in operating and keeping track of the business, and for the efficiency and effectiveness of the overall operation. Therefore they were likely "in furtherance" of the conspiracy's aims. And they reflect the time period for which Des is charged, and appear to have been contemporaneously made at the time of the events. For these reasons, if relevant, the pages are likely admissible as co-conspirator statements. As noted, the claim of relevance is stronger for pages 3–4, although the low standard of relevance may be met for pages 1–2 as well.

The pages could also potentially be admitted as records of regularly conducted business activity. This exception applies when records are made in the ordinary course of business, by one with personal knowledge, at or about the time of the recorded activity, and maintained by the business for a business purpose. Here, although Carol's business is unlawful, the requirements appear to be met here for the drug ledger, and therefore the records could properly be admitted as business records.

The records are likely not subject to exclusion under the Confrontation Clause of the Sixth Amendment. The records are not testimonial—they were not offered to law enforcement to assist them or in their effort to solve the crime—and hence they are not subject to exclusion and do not violate Des's right to confrontation.

The evidence is still subject to the overall balancing test that evidence can be excluded when the danger for unfair prejudice substantially outweighs its probative value. Here, the relevance

of pages 1–2 is slight, and potentially it's prejudicial to Des in that it paints Des as being part of a large drug organization. But not unfairly so. On balance, the evidence is likely still admissible as more probative than prejudicial.

Because the evidence is admissible, Prop 8 would not need to be reviewed here.

b. Des's Prior Forgery Conviction

Under the CEC, Des's prior conviction for forgery was likely properly admitted. Forgery is likely considered a crime of dishonesty or moral turpitude. Des has placed his credibility at issue by testifying in the case, and therefore his credibility is something jury will need to assess.

Admission of a prior conviction in this way, when the prior conviction is for a crime of moral turpitude in California, will likely be admitted, subject to balancing its probative value against its danger of unfair prejudice.

Under the FRE, a question would arise as to whether the conviction is too old to be admitted, given that it is more than ten years old. The time period would run from Des's release from any prison term he served. However, there is no similar time limitation under the CEC. The purpose of the federal rule, however, does point to a potential issue that the probative value of a prior conviction is slight after so much time has passed. Thus, a court could potentially decide to exclude the prior conviction if it found that the danger that the jury would give undue weight to the prior conviction—in effect, branding Des as a convicted criminal and not paying careful enough attention to the more direct evidence at hand. Indeed, the evidence is relevant for the limited purpose of Des's truthfulness, and not his propensity to engage in criminal conduct generally. The danger of the propensity inference would provide a sound basis for excluding the conviction here. Any such ruling, however, would likely be reviewed for abuse of discretion, and this is a close enough call that the judge likely did not abuse her discretion in admitting the evidence.

The balancing test discussed above is one of the recognized exceptions to Prop 8, so that would not become an issue in this circumstance either.

2. Attorney-Client Privilege

The attorney-client privilege is owned by the client, and protects from disclosure confidential communications between an attorney and a client made for the purpose of seeking or providing legal advice, and that are kept confidential (i.e., not disclosed to third parties).

Here, although Abe and his client Carol have likely had many privileged conversations, the communications between Carol and the prosecutor, or between Carol, Abe and the prosecutor, are not privileged, because the presence of the third party (the prosecutor) destroys the confidential nature of the communications.

Here, even if the conversation were privileged, the "crime/fraud" exception" may well apply. It appears that Carol has given testimony that is false, and that the attorney would know is false, by stating that the prosecutor did not offer her a reduced sentence in exchange for testifying

against Des. It is possible, however, that as a result of privileged conversations with Carol, the attorney believes that Carol misunderstood this state of affairs, but under all the circumstances here that seems unlikely.

The duty of attorney-client confidentiality duty is broader than the attorney-client privilege. It is possible that if Abe had raised his professional duty of confidentiality to his client as an objection, and refused to testify on that basis, that the court would have viewed the matter differently. In California, Abe would not have been permitted to reveal client confidences unless the matter presented an imminent danger of serious bodily harm or death, circumstances not present here. But again, the conversations with the prosecutor are not privileged, and for the same reason not confidential—they took place with a third party present, and therefore it was likely Abe's obligation to testify truthfully to them after he had made the best valid objections he could. It does still raise the advocate-witness problem—by putting Abe in the position of being a witness and a lawyer in the same case—and unfortunately puts Abe in the difficult position of having to truthfully answer a question that will potentially be damaging to his client. For all these reasons, Abe should seek to withdraw from the representation, although he should do so in the way that is likely to be the least damaging to Carol's interests.

QUESTION 5

Andrew, Bob, and Christine are attorneys who formed a law firm. They filed no documents with the Secretary of State or any other state office. They equally share the firm's profits after paying all expenses and make all business and management decisions. Associate attorneys are paid a fixed salary, plus 25% of gross billings for any clients they bring to the firm. Senior attorneys are paid based upon the number of hours they bill plus an annual bonus if they bill more than 2,000 hours in a year. The senior attorney bonus pool is equal to 5% of firm profits, which is split equally by the number of qualifying senior attorneys each year. Andrew, Bob, and Christine agreed to bestow the title "nonequity partner" on senior attorneys even though senior attorneys have no management authority. The firm website and business cards for senior attorneys list their title as "partner."

Martha, a senior attorney, met Nancy at a social function. Nancy told Martha about her business's legal problems. Martha gave Nancy her business card. After looking at the card, Nancy asked Martha if as a "partner" she can agree to the firm handling her legal problems at a reduced hourly rate in return for a promise of future business. Martha was aware that the firm has a strict policy of not reducing hourly rates, but signed a written agreement for it to handle Nancy's legal matters at a reduced hourly rate.

1. What type of business entity is the firm using to conduct business? Discuss.
2. Are the associate attorneys employees, partners, members, or shareholders of the firm? Discuss.
3. Are the senior attorneys employees, partners, members, or shareholders of the firm? Discuss.
4. Is the firm bound by the agreement that Martha signed with Nancy? Discuss.

QUESTION 5: SELECTED ANSWER A

(1) TYPE OF BUSINESS ENTITY

GENERAL PARTNERSHIP

A general partnership (GP) is formed when two or more persons associate to carry on a business for profit as co-owners. There are no formalities required to form a GP. The subjective intent of the parties to form a GP is also irrelevant. You don't even need a written or formal agreement. General partners are each personally and jointly and severally liable for the debts of a GP, whether arising in tort or contract. There is no limited liability for the partners of a GP.

A presumption arises that there is a GP and that the persons are partners when such persons share profits, unless those profits are shared due to being rent or repayment of a debt rather than true profit sharing. Other factors that may evidence a partnership (but these factors do NOT create a presumption) include the sharing of gross revenues, the sharing of losses, whether the persons call themselves "partners" and call their business a "partnership" and the extent of the business activities (greater extent of business activities suggests a partnership). Partners have no right to compensation (meaning wages/salary) absent an agreement to the contrary. Partners have equal rights to manage the business of the partnership and control its affairs.

Here, A B and C formed a law firm, so there is the intent to carry on a business for profit. They didn't file documents with the state, but that is not required for a GP. They share profits after paying expenses, which creates a presumption of a partnership and that they are partners. They also make all business and management decisions which evidences that they are running a business as co-owners. It is likely the firm is a GP.

CORPORATION

A corporation is formed when articles of association are filed with the Secretary of State. The articles need to have the name of the corporation, the names and addresses of the incorporators and registered agent, the authorized stock of the company and associated rights, and the purpose of the corporation which can be any lawful purpose. A de jure corporation comes into existence only when the secretary accepts the articles. There can also be a de facto corporation if the state has an incorporation statute, the persons make a good faith colorable attempt to comply with the formalities for forming a corporation (but fail to do so), and such persons assert the privileges of a corporation.

Here, there was no filing of articles with the state, so there is no corporation. Also, no de facto corporation because no good faith effort to file.

LIMITED PARTNERSHIP OR LIMITED LIABILITY PARTNERSHIP

In a limited partnership, there are general partners and limited partners. The limited partners

have limited liability, meaning they are only liable to make their capital contributions. A limited partnership is formed when a certificate of limited partnership is filed with the state, executed (signed) by the general partners and stating the name of the limited partnership, which must have L.P. or LP or "limited partnership" in the name. An LP comes into existence when that public document is filed or on the deferred date for existence to take place, if any.

A limited liability partnership requires filing of a certificate of qualification executed by at least 2 partners, and must have "LLP" or "limited liability partnership" in the name. An LLP comes into existence when that public document is filed or on the deferred date for existence to take place, if any. All partners in the LLP have limited liability.

Here, there was no filing with the state so the firm is not a LLP or LP.

LIMITED LIABILITY COMPANY

An LLC is a hybrid organization. Its owners (members) have limited liability like a corporation. However, LLCs get the pass-through tax treatment that partnerships get. On the other hand, corporations are subject to double-taxation (taxed once at the corporation level and then again when distributions are made to shareholders). To form a limited liability company, a certificate of formation must be filed with the state. Here, there was no filing with the state so the firm is not an LLC.

CONCLUSION: The firm is a GP.

(2) ASSOCIATE ATTORNEYS

See rules above as to when persons are considered partners. Here, the associate attorneys are paid a fixed salary, they do not share profits, so no presumption of being partners. They are not given the label or title of partners nor is there any indication they participate in management or control of the business, which would have been evidence of being partners. They get 25% of gross billings for bringing clients to the firm. The fact that this is only a share of gross billings, rather than net billings (which would be profits) is evidence they are not partners. Also the fact that they only get 25%, a relatively small percentage, of such gross billings also evidences they are not partners because this shows the firm is simply providing them with an incentive to bring in new billings. If they were co-owners (partners), they wouldn't need such incentive. Given all of this, the associate attorneys are not partners.

The owners of an LLC are called members and the owners of a corporation are called shareholders. Since the firm is neither an LLC or corporation (see above), the associate attorneys are not members or shareholders.

An employee is someone who is hired by an employer to provide services to the employer regarding the employer's business. An employee is an agent of the employer, who is the principal. Evidence of an employee-employer relationship can be found when the employee is paid a fixed salary or wages and where the employer has authority for managing the details and method of how the employee performs her job. Here, given the associates get a fixed

salary, they are likely employees.

CONCLUSION: The associates are employees of the firm.

(3) SENIOR ATTORNEYS

See rules above as to when persons are considered partners. Here, the senior attorneys are paid a salary based upon the number of hours they bill, they do not share profits, so no presumption of being partners. Their salary is "fixed" in the sense that it is based upon a unit charge per hour (e.g. \$600/hour) and then that unit charge is multiplied against the number of hours the senior bills in every year. The annual bonus is part of the compensation package, but it is contingent—only applies if the senior bills more than 2000 hours a year, so such bonus does not take away from the fact that the senior is paid a "fixed" salary based on number of hours billed. While it is true that the bonus is equal to 5% of profits, split equally among the number of qualifying seniors, this is not evidence of the sharing of profits in the sense that it is not all seniors who get to participate in this share of profits—just the ones who are eligible for the bonus having billed the requisite number of hours. Put another way, it is not as though the position of being a senior automatically provides the right to share in the profits. While it is true that that the seniors have the title "nonequity partner" and that the website and business cards say "partner", the label or title of "partner" is not conclusive. The facts say that A, B and C "agreed to bestow" the title nonequity partner, which makes it seem as though this was just a concession on A, B and C's part to make the seniors feel their position in the firm was one of seniority or importance, rather than an intent for them to actually be partners in the firm. The fact that A, B and C had the power to decide what title seniors get also shows that A, B and C are in a superior position compared to the seniors rather than them all being equal partners. Furthermore, the seniors do not participate in management or control of the business, which would have been evidence of being partners.

The owners of an LLC are called members and the owners of a corporation are called shareholders. Since the firm is neither an LLC or corporation (see above), the senior attorneys are not members or shareholders.

See above for rules as to employees. Here, given the seniors do not get to participate in the management of the firm, and that all such business and management decisions are made exclusively by A, B and C, it is likely that seniors are simply employees of the firm.

CONCLUSION: The senior attorneys are employees of the firm.

(4) THE AGREEMENT WITH NANCY

A partnership is bound by the contracts entered into by its partners and employees (both of whom are considered agents) where such agents had actual authority, apparent authority or where the partnership ratifies the agreement.

Actual authority can be express or implied. Express actual authority is where the partnership expressly by words or writing provides authority. Implied actual authority exists where based

on the manifestations (words or conduct) of the partnership, the agent reasonably believes she possesses authority.

Apparent authority exists where based on the manifestations of the partnership, third parties reasonably believe the agent has authority to bind the partnership. The partnership statute says that apparent authority exists where the partner is acting within the scope of the partnership business or business of a kind conducted by the partnership, unless the partner lacked actual authority and the person knew or received notification of such.

Ratification is where the partnership agrees to the contract after it has been entered into, either formally and expressly through a formal decision or impliedly by accepting the benefits of the contract.

Here, Martha is an employee of the firm and thus is an agent of the firm. She does not possess actual authority (express nor implied) to bind the firm to a contract providing for reduced hourly rates because the firm has a strict policy of not allowing for reduced rates and Martha knows this is so (therefore, she could not have reasonably believed she had such authority).

It is questionable whether Martha possessed apparent authority. On the one hand, she did because the firm gave her a business card that refers to her as a "partner". A third party in the shoes of Nancy upon seeing such an official business card bestowed upon Martha by the firm, and that Martha was given the title "partner" on that card, would reasonably believe that Martha possesses the authority to bind the firm into contracts regarding legal business and to negotiate rates for legal services in exchange for future business. Those kinds of matters are apparently within the regular business of a law firm. Most people would believe that the title "partner" carries with it great seniority and authority. A reasonable third party in Nancy's shoes would have no idea or knowledge of the behind-the-scenes compensation package of persons like Martha which would otherwise reveal that such persons are not really partners. They also would have no idea of the firm's strict policy of not allowing reduced hourly rates because it is likely that policy is just internal and not disclosed to the public. Furthermore, the fact that the website also refers to Martha as a partner also would give third parties the reasonable belief that senior attorneys had authority to negotiate fees and fee agreements with prospective clients.

In addition, Nancy specifically asked Martha if she could agree to the reduced hourly fee arrangement and in response Martha went ahead and signed a written agreement. Presumably, therefore, Nancy responded to Martha in the affirmative and represented that she did in fact possess authority. She might even have signed her name as "partner" on the agreement or used official firm letterhead. However, it should be noted that under agency-principal law, apparent authority exists based on the actions of the principal, not the agent, so here the unilateral actions and representations of Martha alone would not be enough to imbue Martha with apparent authority as those are not actions or manifestations of the firm.

While it is true that Nancy and Martha met a social function, this is of no moment to the issue of whether the firm is bound by the agreement. Persons regularly form business relationships at social functions. It is not as though the agreement was signed at the social function. Probably

it was signed afterwards in the office of the law firm.

As to ratification, there is no indication that the law firm ratified the agreement.

CONCLUSION: The firm is bound by the agreement Martha signed with Nancy because Martha possessed the apparent authority to enter into such agreement on behalf of the firm.

QUESTION 5: SELECTED ANSWER B

1. Business Entity

First, we assess what type of entity the firm is.

Limited Partnership

A limited partnership is formed when it is filed with the Secretary of State, signed by all general partners. A limited partnership has general partners, which manage the partnership and are personally liable for the partnerships acts, and limited partners who are not liable for the partnerships acts, do not have management duties, and are only liable for their contribution/investment. Here, the business filed no documents with the Secretary of State or any other state office, and none of the partners signed such agreement. Therefore, it is unlikely that the firm is a limited partnership.

Limited Liability Partnership

A limited liability partnership must also be filed with the Secretary of State. In a limited liability partnership, all partners have limited liability and are not liable for the acts of the partnership. Here, nothing was filed with the Secretary of State, and there are no facts that suggest that they, Andrew, Bob, and Christine are limited partners or that anyone in the firm is a limited partner.

LLC (Limited Liability Company)

A limited liability company is also filed with the Secretary of State, with an agreement, and agents for service selected. Here, no facts suggest an LLC was formed or anything was filed with the Secretary of State, therefore, it is unlikely that the firm is an LLC.

Corporation

A corporation is formed when its articles of incorporation are filed with the Secretary of State, stating the corporation's purpose. Here, there were no articles of incorporation filed with the Secretary of State with anything related to the purposes of a corporation, so the firm is not a corporation.

General Partnership

A general partnership is the default form of partnership, where partners share profits, co-own, and manage the business together. No writing is required and it does not need to be filed with the Secretary of State. Here, Andrew, Bob, and Christine equally share firm profits after paying all expenses and make all business and management decisions together. This is likely a general partnership as they are co-owners of a business they run and manage together, and they share profits.

2. Classification of the Associate Attorneys

Next, we assess the classification of the associate attorneys

Employees

An employee is a person who works for the company that does not share profits, and works under the management and direction of partners/directors. At this firm, associate attorneys are paid a fixed salary, plus 25% of gross billings for any client they bring to the firm. It could be argued that associate attorneys are employees as they receive a fixed salary and are paid for their performance, 25% of gross billings for anyone they bring to the firm. They do not share profits or partake in any management of the firm, so it is likely that the associate attorneys are employees.

Partners

As mentioned above, partners run and manage a business and share profits. The associate attorneys do not have management authority and they do not share profits, two of the most crucial factors that determine whether someone is a partner. Likely, they are not considered partners.

Members

Members are people who are part of an LLC. Here, an LLC is not established, so it is unlikely that they would be considered members.

Shareholders

Shareholders are people who own stock or equity in a corporation. Here, no facts suggest they own any stock or shares in the firm or if the firm is a corporation. Likely, they would not be considered shareholders either.

3. Classification of the Senior Attorneys

Another issue is what the senior attorneys are classified as.

Employees

As mentioned above, an employee is a person who works for the company that does not share profits, and works under the management and direction of partners/directors. Here, senior attorneys are paid based upon the number of hours they bill plus an annual bonus if they bill more than 2000 hours in a year. The senior attorney bonus pool is equal to 5% of the firm's profits, which is split equally by the number of qualifying senior attorneys each year. In addition, Andrew Bob, and Christine agreed to bestow the title nonequity partner on senior attorneys even though they have no management authority. Also, the firm website and

business cards for senior attorneys list their title as "partner." Here, the senior attorneys are paid upon the numbers of hours they bill, a bonus if they reach more than 2000 a year, and an attorney bonus pool is equal to 5% of the firm's profits. They are paid based on their performance, but they do get their bonus from 5% of the firm's profits. It could be argued that the senior attorneys share profits, which is something not in the realm of what employees get to do. However, they do not have management authority. If this was a limited partnership, it could be argued that the senior associates are limited partners because they have no management authority but get to share some profits. However, no limited partnership was established here, and even though the senior attorneys have titles as partner, and share a small sum of profits, they have no management authority and are paid based on performance, so it is likely that the senior attorneys are also employees of the firm.

Partners

Here, senior attorneys are paid based upon the number of hours they bill plus an annual bonus if they bill more than 2000 hours in a year. The senior attorney bonus pool is equal to 5% of the firm's profits, which is split equally by the number of qualifying senior attorneys each year. They also have the title of partner on the firm website and agree to bestow the title of nonequity partner. However, they have no management authority, and only share as mentioned above, they lack management authority and are paid on performance rather than share all of the profits, so it is likely that the senior associates are still employees. The title and small share of profits are not enough to rule them as partners as they cannot make decisions for the partnership. If this was a limited partnership, the traits of the senior associates mirror limited partners, but as mentioned above, an LLP was not established and therefore they are likely employees of the firm.

Members

As mentioned above, members are people who run an LLC, and an LLC was not established in the facts so the senior attorneys are not members.

Shareholders

As mentioned above, shareholders own stock or equity in a corporation, and make decisions and vote for corporate issues regarding the corporation. Nothing in the facts suggest the senior attorneys are shareholders.

4. Whether the firm is bound by Martha's Agreement with Nancy

Last, we assess whether the firm is bound by the agreement Martha signed with Nancy. In order for a partnership to be liable for the acts of the partner, authority must be established. A partner is essentially an agent of the partnership and can act on behalf of the partnership to enter into agreements and conduct business.

Actual authority

First, we assess whether there was actual authority. Actual authority can either be express or implied.

Actual Express Authority

Actual express authority is when the partnership/principal gives actual express authority through an agreement, conduct, or words expressly granting the partner/agent to conduct an act. Here, Martha, a senior attorney, met Nancy at a social function and Nancy told Martha about her business legal issues. Martha gave Nancy her business card, and after looking at the card (which showed Martha as a "partner") she can agree to the firm handling her legal problems at a reduced hourly rate in return for future business. Martha was aware that the firm has a strict policy of not reducing hourly rates, but signed the agreement for it to handle Nancy's legal matter at a reduced hourly rate. Here, Martha did not have express authority to enter into an agreement with reduced hourly rates, it was strictly against firm policy and therefore Martha lacked express actual authority to enter into the agreement.

Actual Implied Authority

Actual implied authority is formed when the partner/agent reasonably believes that he/she is allowed to act in a certain way based on conduct of the partnership/principal. Here, there is no evidence of conduct that would make Martha reasonably believe she had the authority to enter into such agreement. The firm has a strict policy of not reducing hourly rates, and Martha acted against that. There was no implied authority for Martha to enter into the agreement.

Apparent Authority

Last, we assess apparent authority. Apparent authority is given when a third party reasonably believes that the partner/agent has authority to act on behalf of the principal/partnership. Here, the firm's website and business cards for senior attorneys stated that they are "partners." Nancy saw Martha's business card that stated she was a partner, and asked if she can agree to the firm handling her issues for a lower rate, in capacity as a partner. Nancy reasonably believed that Martha had authority to act in such way and enter into the agreement, and no facts suggest she could not reasonably believe so. Even though it was against firm policy, it is likely that the firm will be bound to the agreement by apparent authority.