



# **California Bar Examination**

## **Essay Questions and Selected Answers**

**July 2022**



**ESSAY QUESTIONS AND SELECTED ANSWERS**

**JULY 2022**

**CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the July 2022 California Bar Examination and two selected answers for each question.

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

<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Constitutional Law
3.	Professional Responsibility
4.	Business Associations
5.	Wills / Community Property

## **ESSAY QUESTION 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 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 to the facts.

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 resolution of the issues raised by the call of the question.

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

## QUESTION 1

Bath Stuff (Bath), a retailer located in Betaville, sent Neat Scents (Scents), an importer located in Sunville, a signed offer to purchase 1,000 individually wrapped candles at a price of \$10,000, free on board (“FOB”) Betaville. Scents promptly sent Bath a signed acknowledgment accepting the offer, which also included the following language: “Some shipping boxes have external water damage. Contents of shipping boxes guaranteed to have no damage.” Bath did not respond to the acknowledgment. No other express warranties or disclaimers were stated in the offer or acknowledgment.

Scents timely shipped the order to Bath’s warehouse using TruckCo, a third-party common carrier, at a freight cost of \$400. One-quarter of the shipping boxes showed signs of water damage. Each shipping box contained candles that were individually wrapped for retail sale. All candles and individual wrapping were undamaged. When the shipment arrived, Bath’s employees noticed the water damage on some shipping boxes. They immediately rejected the shipment without opening any boxes, promptly notified Scents of the rejection, and refused to pay any amount.

Scents paid TruckCo \$500 to ship the candles back to Sunville and notified Bath that Scents intended to resell the candles. Scents promptly solicited bids from all of its customers and received the best offer, which it accepted, from Redemption Candles (Redemption) of \$9,000, FOB Sunville.

Bath promptly entered into a valid written contract with Hot Candles (Hot), an importer in Hatville, to purchase 1,000 replacement candles for \$12,000, FOB Hatville. TruckCo was engaged to transport the candles from Hatville to Betaville. In transit, TruckCo’s truck was struck by lightning in a storm and all of the candles melted. TruckCo’s shipping contract disavows liability from acts of God, including lightning. Bath refused to pay for the candles and Hot refused to send replacement candles.

Bath sued Scents for breach of contract and Scents countersued Bath. Bath sued Hot for breach of contract and Hot countersued Bath.

1. Did Bath and Scents have a binding contract and, if so, did either party breach the contract? If there was a breach of contract, what damages are likely to be recovered, if any? Discuss.
  
2. Has Bath or Hot breached their contract? If so, what damages are likely to be recovered, if any? Discuss.

## **QUESTION 1: SELECTED ANSWER A**

### **Applicable law**

Contracts for the sale of goods (movable items of property) are governed by the UCC. Because the contracts at issue here involve candles, a movable good, the UCC applies. Additionally, under the UCC, certain provisions apply only to merchants. A merchant is one who deals in goods of the kind involved in the contract, or who otherwise by virtue of his profession holds himself out as having peculiar knowledge in the goods involved. Here, all parties are likely merchants. Bath is a retailer that appears to deal in candles. Neat Scents is an importer that likewise appears to deal in candles. Further, Hot Candles appears to be an importer that also deals in candles. Accordingly, all parties to the relevant contracts are merchants, and the UCC's provisions pertaining to merchants will apply.

1.

### **Whether B&S had a binding contract**

A binding contract requires mutual assent, consideration, and no defenses to enforcement or formation.

### **Mutual assent**

For a contract to be valid, it requires mutual assent. Mutual assent involves a "meeting of the minds," and is ordinarily shown by offer and acceptance (though under the UCC, if the parties conduct indicates that there is a contract, there may be a contract even if offer and acceptance cannot be specifically identified).

## **Offer**

An offer is an assent of willingness to be bound, made so that the offeree could reasonably expect that the offeror intended to enter into a binding agreement / make a commitment or promise. An offer must have certain and definite terms and must be made to an identifiable offeree so that he could understand that his assent would conclude the bargain.

Here, Bath sent a signed "offer" to purchase 1,000 individually wrapped candles for \$10,000. It also included a "FOB" term (with FOB being Betaville, Bath's location of business), which indicates that Bath sought to enter into a shipping contract whereby the goods would be shipped by common carrier and the risk of loss would pass to Bath once the goods reached Betaville. The facts indicate this was an offer, and it likewise meets the definition. It indicates a willingness to be bound / enter into a binding agreement for the purchase of candles. Further, it has certain and definite terms. Under the UCC, generally, an offer need only include a quantity term--all other terms can be supplied by UCC default terms. Here, the offer included the quantity (1,000) of candles while also specifying other terms, including the price (\$10,000), that they be individually wrapped, and the shipment method. Accordingly, this was likely an offer, as its terms were certain and definite such that it is capable of enforcement; it was also made to Neat Scents, an identifiable offeree.

## **Acceptance**

Acceptance is a manifestation of assent to the terms of the offer, made so as to conclude the bargain. The offer creates the power of acceptance in the offeree, and by accepting, he binds the parties to the contract. Here, the facts indicate that Scents

promptly sent a signed acknowledgment accepting the offer. In so doing, Scents appeared to assent to the terms of the offer. Under the UCC, an offer to buy goods may be accepted by prompt shipment, or by a promise to ship (the latter of which was the case here).

Under the common law, an acceptance had to be a “mirror image” of the offer; that is, it must not include any different or additional terms. However, under the UCC, the fact that an acceptance includes additional terms will *not* preclude a binding contract.

Rather, a contract is formed by the manifestation of assent to be bound, and whether the different terms become part of the contract depends on if the parties are both merchants. Accordingly, when Scents sent the signed acceptance, a bargain was concluded and the parties had a binding contract.

### **UCC 2-207 (battle of the forms)**

As referenced, Scents’ acknowledgment included additional terms. Particularly, it included language relating to the fact that the boxes would have external water damage, as well as the guarantee that the contents would have no damage.

As mentioned above, it appears that both Bath and Scents are merchants, as they both appear to deal in goods of this kind or otherwise by their profession hold themselves out as having knowledge/skill particular to candles. Accordingly, the contract was concluded with the acceptance and, under UCC 2-207, the additional terms included in the acceptance will become part of the contract unless the offeror’s offer was expressly conditioned on only the terms included, it rejects the additional terms in a reasonable time, or the terms materially change the bargain.

Here, Bath did not respond to the acknowledgment, nor did Bath’s offer appear to

include any language indicating that the offer was expressly conditioned on only being accepted on the particular terms stated without any additions. Accordingly, the only issue is whether the terms included in Scents' acknowledgment materially altered the bargain.

Scents will argue that the fact that *some of the shipping boxes* would have external water damage hardly alters the bargain. After all, it also included that express warranty that the contents would have no damage. It does not appear that Bath was entering into the bargain with any particular expectancy or desire to have the shipping boxes be in a certain condition. While they did specify the candles' condition--that they be individually wrapped--no reference whatsoever was made to the external boxes. Moreover, damage to the external boxes which does not affect the contents (which are the things being bargained for) likely cannot be said to materially alter the terms of the bargain. Further, the express guarantee that the contents would not be damaged, if anything, is a desirable term for Bath, so cannot be said to materially alter the bargain. In other words, the terms included in Scents' acknowledgment did not significantly change Bath's expectancy under the contract, nor materially alter its potential damages or liabilities. As such, since both parties are merchants, these terms likely became part of the contract.

Accordingly, a contract was formed when Scents sent the acknowledgment form, and the terms included therein--that some of the boxes would have external water damage and the express warranty (i.e., the explicit promise as to the condition of the goods) that the contents would have no damage became part of the contract.

Note that, even if the explicit promise that the candles would not be damaged had not been included as an express warranty, it likely would have been implied anyway (which



further supports the notion that it did not materially alter the contract), as--discussed below--the UCC requires perfect tender of goods. Moreover, the fact that the contract included an FOB term for Betaville (Bath's location) indicates that Scents would bear the risk of loss if the goods were damaged until they reached Betaville, thus implying that they should be undamaged.

### **Consideration**

Consideration is the bargained-for exchange of legal value. Each promise must induce the detriment, and vice versa. Here, Bath promised to pay \$10,000 if Scents promised to ship the 1,000 candles, and vice versa. Accordingly, there was consideration.

Thus, there is mutual assent and consideration here and there was a binding contract.

### **Defenses**

There do not appear to be any viable defenses to formation. Scents could try to argue there was no mutual assent based on the additional terms included in the acceptance, but as discussed above, that argument will fail.

### **Statute of frauds**

Some contracts require a signed writing to be enforceable. One such contract is a contract for the purchase of goods over \$500. Here, Bath was to buy \$10,000 worth of candles, and thus, this contract must be evidenced by a signed writing.

The writing and signature requirements, however, are liberally construed. There need not be a single writing embodying the entire contract; multiple writings can be put together, so long as they evidence that a valid contract was formed. Moreover, under the UCC, the writing(s) must indicate the quantity term.

Here, putting together both the offer--which was signed by Baths--and the acceptance--which was signed by Scents--there is likely sufficient written evidence to evidence both a contract and its essential terms (including, most importantly, quantity--1,000 candles). Moreover, the writing(s) is signed by both parties, and thus, both parties to be charged. Also note that since both parties sued under the contract, they have effectively affirmed its existence in court.

### **Merchant confirmatory memo**

Bath may argue that it only signed the *offer* and not the acceptance, and thus, that it cannot be charged with the contract because the only writing signed by it is the offer. However, this is likely not a good argument. Under the UCC merchant's confirmatory memo rule, where both parties are merchants, so long as there is a signed writing--*even if signed by the party bringing suit*--that was sent memorializing the terms' of the parties agreement, and the other party received it and had reason to know of it and did not object in a reasonable time, it can serve to bind the parties / satisfy the SOF, even if only signed by one.

Here, Scents signed the acknowledgment form and Bath received it but did not respond at all. As both parties are merchants, the acknowledgment form is likely enough to bind both Bath and Scents, even though it was only signed by Scents, under the merchant confirmatory memo rule.

Since there do not appear to be any other defenses to formation, and since there was mutual assent and consideration, the parties had a binding contract.

### **Whether either party breached & likely damages**

## **Perfect tender rule**

The UCC requires "perfect tender." This means that if a shipment of goods fails to conform in any way to the terms of the contract, then it is considered a breach and the buyer is entitled to reject all, reject some, or accept all.

Here, Scents shipped the goods timely to Bath's warehouse using TruckCo, a third-party common carrier. Though the contract did not specify the common carrier that should be used, there are no facts indicating that using TruckCo was unreasonable and, since this contract involved an FOB term, it was very likely a shipment contract requiring goods to be sent by common carrier (which is the presumption if a contract is silent, anyway). Accordingly, sending the goods in a reasonable time and via TruckCo appears to be compliant with the contract.

Moreover, though one-quarter of the boxes were water damaged, as discussed above, that term very likely became part of the contract. Though the contract indicates that "some" boxes would be damaged--which is not necessarily precise--the fact that only one-quarter of the boxes were damaged is likely compliant with that term. Moreover, all the candles inside were individually wrapped (as required) and undamaged (as compliant with the express warranty provided by Scents which, as discussed, was likely part of the contract).

As such, it appears that Scents completely complied and did not breach any terms of the contract. Accordingly, it appears that tender was indeed perfect, and thus, that Scents did not breach.

## **Bath's rejection**

Even though Bath's employees rejected the shipment because of the water damage, they were not entitled to do so, as that was a part of the contract, per the above discussion. Moreover, they immediately rejected the shipment without even taking time to inspect the goods to determine whether they complied. Though a buyer is entitled to reject a shipment where there has been imperfect tender--and though Bath did so immediately (which thus does not raise any issues re: revoking an already given acceptance) --since there was no breach by Scents, Bath was not entitled to reject the shipment. Thus, by rejecting the shipment and *refusing to pay* as they were obligated to do under the contract, Bath breached.

### **Scents' damages**

Since Bath was in breach, Scents is likely entitled to damages.

### ***Expectation damages***

The standard measure of damages when a buyer wrongfully breaches under a contract is expectation damages, which are intended to give the non-breaching party the benefit of the bargain and to put them in a position as if the contract had not been breached.

Damages can only be collected where they are certain and where they could not be mitigated.

As part of mitigating damages, a seller is entitled to engage in a commercially reasonable resale of goods wrongfully rejected. Here, Scents sold the goods to Redemption for \$9,000. It apparently solicited bids--and did so promptly--from all its customers and selected the highest bid from Redemption. As such, the resale appears to be commercially reasonable (done timely and for a reasonable amount--indeed, it was fairly close to the original amount that Bath was to pay and Scents appears to have

considered multiple offers before accepting Hot's). Since it was \$1,000 less than Scents was supposed to get under the Bath contract, Scents is entitled to \$1,000 for Bath's wrongful breach. Additionally, since Scents notified Bath that it would resell the candles, it was entitled to do so.

### ***Incidental damages***

Under the UCC, a non-breaching party is also entitled to incidental damages (i.e., commercially reasonable costs associated with dealing with the breach including shipping, storing goods, and other such costs). Here, Scents paid \$500 to ship the candles back from Sunville. This appears to be a reasonable cost of reshipping the goods; though, originally, it only cost \$400 to ship to Bath--perhaps it costs more to collect them from a buyer, or perhaps the fees were different since it was likely a few days later. Since the charge to ship them back was only \$100 more, this was likely commercially reasonable and Scents is entitled to \$500 as incidental damages. Bath may try to argue that it was not commercially reasonable to include the FOB Sunville term, but that argument will bear no weight since Scents' original contract with Bath also included an FOB term for the buyer's city of business.

Note that Scents cannot collect the \$400 it originally spent on shipping the goods to Bath, because that was always going to be an expense under the shipping contract that Scents would be required to spend.

As such, Scents is entitled to \$1,500 total.

### ***Bath***

Though Bath may try to argue that it is entitled to \$2,000--the difference it had to pay for

replacement candles--it will not succeed because, as discussed above, it breached and was not entitled to reject the shipment. As such, it will be unable to collect any damages from Scents, but rather will be required to pay \$1,500 as discussed above. Though it has sued Scents, it will be unable to recover anything and Scents will instead win its countersuit.

2.

Here, the facts indicate that the parties had a valid contract. The contract included an FOB Hatville term. As mentioned above, an "FOB" term in a shipping contract indicates that the goods will be shipped by common carrier, and that the risk of loss will pass to the buyer when the goods reached the identified location. Here, Bath and Hot's contract indicated Hatville as the FOB location. Hatville is Hot's place of business. Accordingly, Hot was responsible for getting the goods to Hatville. Once the candles arrived in Hatville, the risk of loss passed to Bath. Accordingly, even though the goods were to be shipped by common carrier (which, again, is the presumption in light of silence, but is also assumed when an FOB term is included), Bath would bear the risk of loss from the time the goods were in Hatville until they arrived with them.

### **Breach by Hot**

Bath will argue that Hot breached by not delivering the candles. As such, it will argue that it was relieved of its liability to pay given the imperfect tender. As mentioned above, the UCC requires perfect tender. Obviously, failing entirely to deliver the candles is not perfectly compliant with the terms of the contract. Moreover, melted candles obviously are not a perfect tender of the ordered candles. However, as discussed below, Hot very likely bore the risk of loss when the goods were destroyed, and thus is liable for the

contract amount.

### **Breach by Bath**

As mentioned, an FOB term indicates that the buyer will bear the risk of loss from the time the goods arrive at the specified location. Here, TruckCo was engaged to transport the candles from Hatville to Betaville. The goods were destroyed in transit, i.e., they had already left Hatville by the time they were destroyed. As such, Bath bore the risk of loss when the goods were struck by lightning. When the risk of loss has passed to the buyer, and when the goods are destroyed after--through no fault of the seller--the buyer will be liable for the full contract price.

Here, Hot will argue that the goods were destroyed by a lightning storm that struck the truck after the risk of loss passed, i.e., after the goods had been in / left Hatville.

Moreover, Hot will note that this was not their fault in any way. They will also likely point out that TruckCo's shipping contract disavows liability from acts of God, including lightning. It should be noted, though, that this is not especially relevant here because, as discussed, under the FOB term, the risk of loss passed to the buyer after the goods were in Hatville.

Bath may try to argue that the risk of loss did not pass because it would have been entitled to reject the goods. It is true that the risk of loss will not pass if nonconforming goods are the ones that are destroyed--i.e., if the buyer would have a right to reject the goods, the ROL will not pass. Bath may try to argue that the candles were melted, and thus, that it would have had a right to reject them and should not be liable for the ROL. However, this would be bootstrapping the very thing that *destroyed the goods* as an attempt to argue that it had a right to revoke the goods. In other words, there is no

indication that the goods--when sent--did not conform, or that Bath would have had a right to reject the candles had they not been melted by the lightning storm. As such, it cannot argue that the risk of loss did not pass. Accordingly, the goods were destroyed when Bath bore the risk of loss. Thus, Hot did not breach the contract. Rather, Bath did when it refused to pay for the goods.

### **Refusal to send substitutes**

Bath may argue that Hot breached by refusing to send substitute candles after they were destroyed. However, the seller is under no obligation to send replacement goods if they are destroyed after the ROL passes. As such, this was not a breach.

### **Damages**

#### ***Hot's damages***

When goods are destroyed after the ROL passes, the seller is entitled to the full contract price, provided that they had no fault in destroying the goods. This is effectively expectation damages--i.e., gives the seller the benefit of the bargain. As such, Hot will be entitled to \$12,000 from Bath and will win its countersuit.

#### ***Bath's damages***

As discussed above, since Bath breached by refusing to pay after the risk of loss passed, it was incorrect to refuse to pay Hot. Thus, it will be liable for the full contract price and will lose its suit and be entitled to no damages from Hot.



## **QUESTION 1: SELECTED ANSWER B**

The UCC will apply because this is a sale of goods.

### **Bath and Scents Contract**

Bath and Scents had a valid contract, which Bath breached. To have a valid contract, there must be mutual assent and consideration. Mutual assent is defined as an offer plus acceptance. A valid contract is breached when one party, or both, breaks a promise in the contract and there are no defenses to the contract or excuses for non-performance. The UCC requires "perfect tender," and thus even a minor breach constitutes a total breach, allowing the buyer to reject goods or the seller to seek full damages. A court will award damages based on the type of harm suffered.

### **Mutual Assent**

Mutual assent consists of an offer and acceptance. An offer is a manifestation of the intent to be bound. An offer must be relatively certain and definite. It should identify the parties and subject matter of the contract with reasonable certainty. An offer can be revoked at any time unless it is an irrevocable option contract, merchant firm offer, or one party reasonably incurs detrimental reliance. An advertisement is generally not an offer.

Here, Bath made an offer to Scents when they sent a signed offer to purchase 1,000 candles for \$10,000. The quantity and price terms (note: price terms are not required by the UCC, only quantity terms are required) are sufficiently definite, and Bath has identified the parties.

An offer is accepted when the offeree accepts the terms of the offeror's offer. An offer

must be accepted in a reasonable amount of time. Under the UCC, the offeree's acceptance does not need to mirror the offeror's terms. Additional terms will become part of the contract if: (1) both parties are merchants; (2) the terms are not material; and (3) the offeror does not object to the terms. A merchant is an individual who: (1) regularly deals in the type of goods sold; or (2) holds themselves out as having special knowledge or skills regarding the goods sold. Terms are material if they have a tendency to cause surprise or hardship to the other party. Disclaimers of warranties are always material. A person is thought to accept additional terms when they do not object in a reasonable amount of time.

Here, Scents responded "promptly," accepting Bath's offer for 1,000 individually wrapped candles for \$10,000, FOB Betaville. However, Scents' response included some additional terms. Scents stated that the boxes the candles would be sent in had external damage and added an express warranty that the contents (candles and wrapping) would have no damage. As stated above, these terms will become part of the contract if the two sellers are merchants, the terms are not material, and the offeror does not object. Here, both parties are merchants. Bath is a retailer that typically sells candles. Scents is a candle importer and that regularly deals in candles.

The terms will not become part of the contract if they are material. It is likely that the state of the shipping boxes and whether or not the shipping boxes themselves are damaged is not a material term. Water damage on the shipping boxes has no bearing on the state of the candles inside (it is stated they showed up undamaged). Shipping boxes with water damage would not cause surprise or hardship to a reasonable party. Most parties likely throw the boxes out. Still, Bath might argue that they intended

to keep the shipping boxes to use when they sell candles to their own customers, and that the damage makes this more difficult. Scents will respond that they did not have knowledge of this purpose and that the damaged boxes still have no material impact on their contract, which was simply to purchase individually wrapped candles. Scents also expressly stated a guarantee that the candles themselves will have no damage. While the disclaimer of warranties is considered material, an express warranty from a seller will become part of the contract.

Last, Bath did not object to Scents additional terms. They did not respond at all, and this will be deemed an acceptance of the additional terms. Thus, Scents' terms likely became part of their contract, and the contract was for: 1,000 candles at \$10,000 shipped FOB Betaville; some shipping boxes with water damage; and the express warranty the candles would have no damages.

### Consideration

Consideration is bargained-for exchange. A court will typically not second guess the value of any agreed consideration. Here, this is easily met. Bath paid \$10,000 for 1,000 candles. That is a bargained-for exchange.

### Defenses to the Contract

Even if there is mutual assent and consideration, a party can still seek to get out of performance if there is a valid defense to the contract, including: lack of contractual capacity, mistake, ambiguity or misunderstanding, unconscionability, and violation of the statute of frauds. If the subject matter of a contract falls under the statute of frauds, the contract must be in a signed writing. The statute of frauds includes: (1) any promise in which the consideration is marriage; (2) contracts in which performance cannot happen

in less than a year; (3) land sale contracts; (4) executorships; (5) sale of goods \$500 or more; and (6) sureties.

Here, the statute of frauds is applicable. This is a sale of goods over \$500. However, this is easily met. Both parties sent signed documents stating the quantity and price terms of the transaction. No other defenses apply, so neither party will be able to have the contract declared unenforceable.

### Excuses for Non-Performance

Excuses for non-performance include impracticability and frustration of purpose. Impracticability is when an unforeseeable event has caused the performance of a contract to be rendered impossible or highly impractical. Frustration of purpose occurs when both parties are aware of the contract's purpose and an unforeseeable event has occurred that renders this purpose void.

Here, none of these excuses apply so, as stated above, there is a valid contract between Bath and Scents to which no excuses or defenses apply.

### Breach

Under the UCC, there is the perfect tender rule. The perfect tender rule states that a contract has been breached when performance does not occur perfectly. When a seller breaches, the buyer may either: (1) accept all goods; (2) reject all goods; or (3) accept and reject some of the goods.

Here, it appears that Scents has met the perfect tender rule. Scents shipped the order to Bath's FOB Betaville. As Scents had stated, some of the boxes showed water damage and all of the candles and wrapping were undamaged. Thus, Bath did not have

a right to reject the shipment and refuse to pay. Bath should have opened the boxes and inspected the contents before deciding if the shipment was not up to their standards. Because the terms of their contract included the term that some of the boxes would have water damage, Bath does not have the right to now say that the contract is breached. As stated above, this term became part of the contract when Bath did not object to the additional terms.

Thus, Bath is in breach of this contract and Scents can pursue damages.

### Damages

A court will most likely award Scents expectation damages. Expectation damages are damages intended to put the non-breaching party in the position they would have been had the contract been performed as stated. Here, the contract was for \$10,000. Still, sellers are obligated to use good faith and seek to resell any items rejected by the buyer. The buyer will be responsible for the difference between the original contract price and the new contract price.

Here, Scents was able to resell the candles to Redemption for \$9,000. It appears that Scents attempted to cover in good faith, solicited bids from many customers, and indeed chose the best / highest offer. Thus, Bath will not be able to argue that Scents did not resell in good faith and that the damages should be reduced accordingly.

A non-breaching party will also be able to recover incidental damages. Incidental damages are damages that result from seeking to remedy the breach. Here, this would likely include any cost Scents had to pay to solicit bids from new customers and the \$500 shipping cost they had to pay to ship the candles back to Sunville.

Scents will not be able to recover the initial \$400 shipping fee as expectation damages, because, had the contract been performed fully and Bath paid the \$10,000, Scents would have always been out the \$400.

Last, Scents might try to argue they are entitled to lost profits damages. Lost profits damages are awarded when a seller is able to sell an infinite number of the goods in question and thus should be able to recover the lost profits from the sale. Here, the sale of candles likely qualifies as a lost profits situation. There is not a limit on the number of candles to be sold, and presumably Scents could order and sell as many candles as wanted. Thus, they may try to seek lost profits damages. However, I do not have enough facts to determine what the profit would have been on the 1,000 candles sale.

Bath might try to argue that any damages they owe Scents should be reduced by \$2,000, because they had to purchase candles from Hot for \$12,000. However, this argument is likely to fail because, as stated above, Bath is the breaching party and thus cannot recover any damages from Hot.

In conclusion, it is likely that a court will award Scents the \$1,000 difference in contract prices, the \$500 cost to ship the candles back to Sunville, and any expense they had to make to find a new buyer for the candles.

### **Bath and Hot Contract**

As stated in the fact pattern, Bath and Hot had a valid written contract, so I will assume that mutual assent and consideration is satisfied.

### Defenses and Excuses for Non-Performance

The defenses and excuses stated above do not apply here. Bath might try to argue that

it is unconscionable for them to have to pay \$12,000 when the goods were damaged and lost in transit. However, unconscionability of contract enforcement is determined at the time the contract was formed. Here, there is no indication the contract for 1,000 candles at \$12,000 is unconscionable.

### Breach

Hot has not breached the contract. Bath has breached the contract by refusing to pay. Bath and Hot had a shipment contract. A shipment contract is a contract in which the seller disclaims all liability for damage or accident to the items once the seller has delivered the goods to the third-party common carrier and notified the buyer. A shipment contract is formed when the seller is a merchant, and the contract states: FOB [seller's city].

Here, the seller is a merchant. Hot regularly deals in the type of goods sold (candles). The contract stated "FOB Hatville." Hot is located in Hatville; thus, this is the seller's city and the parties had a shipment contract. TruckCo is a third-party common carrier and it appears that Hot properly delivered the items to TruckCo. Thus, the cost of any accident or damage that occurs in transit or delivery of the items lies with the buyer, and Bath has no right to refuse to pay Hot. In addition, Hot is not required to send replacement candles. Hot has fulfilled their duty under this contract, i.e., deliver 1,000 candles to TruckCo.

### Damages

Because Bath is in breach, a court will likely award Hot expectation damages as well. Here, the contract was for \$12,000, so to put Hot in the position it would have been had the contract been performed, Bath must pay Hot \$12,000.

## **QUESTION 2**

Public School District (District) in State X is attempting to reduce gang violence in District's high schools. After consulting with local law enforcement, District has determined that most violence results from confrontations between two gangs, the Westsiders and the Eastsiders. As a result, District has adopted the following rule for all high school students: "No student shall wear any label, insignia, words, colors, signs or symbols that reflect gang-related activities. Students violating the policy will be immediately suspended or expelled from school."

For several years, Paloma, a high school senior, has had a small tattoo of a dove on one wrist, her "self-expression" as a peaceful person. Paloma has never been associated with any gang, including the Westsiders and Eastsiders. After learning of Paloma's tattoo, District officials described it to local law enforcement officials who said that it sounded like a Westsider gang symbol, which includes birds. Paloma was suspended for the last ten days of school after she refused District's request that she either wear long sleeves to cover her tattoo or have it removed.

Paloma, now graduated, and attending the college of her choice, has brought a declaratory relief action challenging the validity of District's policy under the First and Fourteenth Amendments to the United States Constitution. District has moved to dismiss Paloma's lawsuit as moot on two grounds: (A) because she is no longer a high school student, and (B) District has now redefined "gang-related activities" in its rule in a manner consistent with State X's criminal code.

1. What arguments can Paloma make in support of her First and Fourteenth Amendment claims? Discuss.
2. Will either or both of District's arguments in support of its motion to dismiss Paloma's lawsuit be successful? Discuss.



## **QUESTION 2: SELECTED ANSWER A**

### **First & Fourteenth Amendment Claims**

#### **First & Fourteenth Amendments**

Paloma (P) is suing District (D) on the grounds that it violated her constitutional rights under the 1st and 14th Amendments. The First Amendment provides that Congress shall make no law abridging the freedoms of speech, press, association, and religion. The First Amendment is applied to the states via the 14th Amendment Due Process Clause (in other words, the First amendment is "incorporated" to apply to the states under the 14th Amendment Due Process Clause). Thus, P must show that her 1st Amendment rights, which apply to D under the 14th Amendment, were violated.

#### **Standing**

To bring a constitutional action in federal court, the plaintiff must have standing under Article III (because Article III only grants jx to "cases or controversies"). To show standing, the plaintiff must show: 1) injury in fact; 2) causation; and 3) redressability.

Here, P has suffered injury in fact because she was suspended for the last ten days of school (in other words, she has suffered actual harm as a result of D's policy). Second, P can show causation; the reason that she was suspended was because of D's policy prohibiting gang-related speech. Third, P can show redressability because a favorable court decision would declare the policy invalid and could potentially remove the suspension from her academic record. Thus, P has sufficient standing to bring this action (assuming it is not moot, see arguments below).

#### **Freedom of Speech**

P will argue that D's policy violates her freedom of speech under the 1st and 14th Amendments of the US Constitution. As a preliminary matter, speech is broadly defined under the 1st Amendment, and it can include symbolic/expressive conduct that would not be traditionally thought of as speech. Here, P was punished for having a small tattoo as an act of self-expression; the fact that she wore this tattoo as an act of self-expression shows that this is a symbolic/expressive act that counts as speech. P's tattoo constitutes expressive/symbolic speech that implicates the 1st Amendment.

### State Action

To show a First Amendment violation, P must first show that there was state action (the Constitution does not apply to private actors, other than the 13th Amendment, which is not at issue here). State action simply means government action (it need not be at the "state" level; it can be local, federal, etc.). Here, P is challenging the actions of D, a public high school district. As a public school district, D is a part of the government and is thus a state actor. This requirement is met.

### Vagueness

Laws/policies infringing on the freedom of speech cannot be vague; this requires that the law give fair notice of the prohibited conduct such that a reasonable person would understand what is prohibited by the policy.

Here, P can challenge D's policy on the grounds that it is vague. It prohibits symbols that reflect "gang-related activities," however, it does not define what exactly "gang-related activities" means. D will argue that given the prevalence of the two gangs, W and E, in the community, it would be obvious to a reasonable person what constitutes gang-related activities. However, P can argue that "gang-related activities" is a broad

and unclear term with no set definition, and thus it does not put a reasonable person on notice of what conduct is prohibited--indeed, P had never had any association whatsoever with W or E, yet the symbol tattooed on her arm apparently was enough to get her suspended. P will argue that she was punished simply because her tattoo was a bird and birds are included in W's gang symbols--the phrase "gang-related activity" was insufficient to put her on notice that her own small dove tattoo may be punished. P has a good argument that this regulation was impermissibly vague.

### Overbreadth

Similarly, a speech regulation will be struck down if it is overbroad, i.e., it regulates more speech than is necessary. P can also argue that D's regulation is impermissibly overbroad because it purports to broadly prohibit all symbolic speech reflecting "gang-related activities." This could include speech such as P's, which is not gang related in any way, simply because it looks similar to gang-related activity. This regulation could have been drawn more narrowly by clearly defining what constitutes gang-related activity; by allowing D officials to punish any speech that looks remotely gang-related, this regulation goes too far, and P can potentially challenge it as overbroad. D will argue that the rule was drawn as narrowly as possible to only impact gang-related activities but, given that that term is not defined and could be construed very broadly (as it was in P's case), D will have a difficult time proving this law is not overbroad.

### Prior Restraint

A prior restraint is an order (such as an injunction or gag order) or a licensing scheme that seeks to prohibit speech before it has occurred. Here, although the regulation punishes speech, it does not appear to be a prior restraint in the way the court has

traditionally defined it (this policy punishes speech after it happens, like most speech related laws). Thus, P cannot challenge this policy on the grounds that it is a prior restraint.

### Symbolic Speech

P will argue that D's policy impermissibly regulates expressive speech under the 1st and 14th Amendments. The test is as follows: a regulation will be upheld only if: 1) it serves an important, non-speech related interest; 2) it burdens no more speech than necessary; and 3) the primary aim is not the suppression of speech. The government, D, has the burden of proving this test. Also, as a threshold matter, the government must have the power to create the law--here, the school district has the power to create reasonable regulations on public high school students, so D has the authority to implement such regulations.

Here, D will argue that this regulation passes the symbolic speech test. First, D will argue that it serves an important interest unrelated to speech--here, the purpose of this regulation is to reduce gang violence in public high schools. D will argue that a consultation with law enforcement has revealed that two main gangs, W and E, are responsible for gang violence in the community, and the goal of this regulation is to identify those students who are associated with the gang and may lead to violence. D will argue that there is an important interest here in making sure that children are safe from gang violence while at school. Moreover, D will argue that the primary aim of this law was not the suppression of speech, but rather to ensure the safety of students while at school. D will argue that permitting students to flash gang signs and represent their gangs will disrupt school and lead to violence; the goal of this law is not to suppress

speech, but rather to facilitate public safety. Finally, D will argue that this policy does not burden any more speech than necessary--D will argue that this policy was narrowly drawn to only prohibit symbols/expression involving gang-related activities. D will argue that students can still express themselves in many other ways while at school and that this regulation only burdens gang-related speech; and is thus narrowly tailored and burdens no more speech than necessary. D will also point out that P could have simply worn long sleeve shirts for the final 10 days of her high school career and there would have been no issue (thus, the law is not overly burdensome on student speech because she was not required to remove the tattoo, she simply had to wear certain clothes to cover it up).

On the other hand, P will argue this regulation fails the test. P will argue that D's true aim is not to encourage safety in the school, but rather to suppress any speech it does not like by defining it as gang-related--she will point out that she is a peaceful person who has never been associated with any gang, and yet she was still punished and suspended from school for 10 days. P will argue that even if there is a valid interest in protecting student safety, this regulation burdens more speech than necessary by punishing students who engage in symbolic, expressive speech that is not gang-related, but arguably could be. She will argue that being suspended from school simply because she has a bird tattoo and one of the gangs (W) used bird symbols is a prime example of how this regulation is not narrowly drawn and burdens more speech than necessary---birds are an incredibly common symbol in numerous different contexts (religion, product logos, national symbols, etc.), and construing the ban on gang-related symbols to include all bird-related symbols is going much too far--this will result in the regulation of

far more speech than is necessary to serve the interest of reducing gang violence and protecting students from such gang violence. P will argue that D's policy clearly burdens more speech than necessary by applying to anything that is even remotely gang-related, even if it is simply a bird tattoo that is designed to show "peaceful" self-expression.

On balance, even though D can likely establish an important, non-speech related interest motivating this policy (the safety of students at school and reduction of gang violence), P will likely prevail here by showing that the law burdens more speech than is necessary to protect that interest. P can most likely demonstrate this policy is an unconstitutional regulation of symbolic/expressive speech, and thus the court should strike it down and grant her relief on that basis.

#### Content-Neutral vs. Content-Based

If the court did not apply the symbolic/expressive speech test set forth above, and instead took a more traditional freedom of speech approach, the court would examine whether the regulation was content-neutral, or content-based. Content-neutral regulations are subject to intermediate scrutiny-like analysis, while content-based regulations receive strict scrutiny.

Here, the regulation is content-based given that it specifically targets gang related expressive conduct/speech (it regulates a particular type of content, not the time/place/manner of the speech's occurrence). Because it is content-based, it must pass strict scrutiny. Strict scrutiny requires that the government show the regulation is the least restrictive means of achieving a compelling government interest. Here, D will argue that it has a compelling interest in the protection of high school students from

gang violence. A court may or may not find this to rise to the level of compelling.

However, even if it is compelling, the policy still fails strict scrutiny because P can show that it is not the least restrictive alternative. Broadly banning all symbols/labels/colors that reflect "gang-related activity" (which is not clearly defined) is not the least restrictive way of preventing gang violence--the school could establish clear guidelines showing what counts as gang-related activity and could establish some sort of review process rather than outright suspending/expelling students. Because the district policy is not the least restrictive means of achieving the goal of reducing gang violence, it would fail strict scrutiny. Thus, P could successfully challenge it as a content-based regulation of speech that fails strict scrutiny.

### Unprotected Categories of Speech

There are certain categories of speech that are viewed as unprotected: incitement, fighting words, true threats, and obscenity. Here, D may try to argue this regulation is attempting to regulate speech that falls into one of these categories. However, the problem is that this regulation is broadly drawn to impact all expressive speech related to "gang-related activities." This does not explicitly regulate incitement (words that have a likelihood of inciting imminent lawless activity), fighting words (words that tend to cause an immediate breach of the peace), true threats of violence, or obscenity (sexually explicit material under the 3-part Miller test; not seen here). Although gang-related speech *may* tend to incite violent activity and *may* tend to cause a breach of the peace, a broad regulation prohibiting any gang-related expressive conduct does not qualify as a regulation of a category of unprotected speech, and D could not defend against P's claims on that ground.

### Type of Forum: SCHOOL

Additionally, there is an issue raised by the fact that this is a public high school regulating speech within its walls. As SCOTUS held in *Tinker*, public students do not shed their First Amendment freedoms at the schoolhouse gate. Thus, the fact that this speech took place while at school does not give the school district plenary authority to regulate it; it can only regulate speech at school if there is a substantial and material likelihood that the speech will cause disruption to class. Although there is a likelihood that gang-related conduct/speech could cause disturbances at school, there are zero facts to suggest that P's small, peaceful dove tattoo caused a substantial/material disruption to the mission of the school. Thus, even though D was regulating her speech while at school, P can still challenge the constitutionality of that regulation under the 1st and 14th Amendments.

### Conclusion

P can likely succeed on a First Amendment freedom of speech claim, either because this fails the test for regulating symbolic speech or because it fails the content-based strict scrutiny test.

### **Freedom of Association**

The First Amendment also guarantees the freedom to associate with groups whom one chooses. Arguably, a regulation prohibiting gang-related speech would violate the freedom to be associated with that gang. P may potentially consider raising a challenge under this provision of the 1st Amendment as well, although she would likely be better served by challenging this on speech grounds since it would likely be difficult to convince a court that high school students should have the right to associate with



gangs, which are often a source of violence/criminal activity in local communities.

### **Fourteenth Amendment Claims**

Additionally, P may be able to argue that this regulation violates her constitutional rights under the 14th Amendment only.

### **Procedural Due Process**

Under the 14th Amendment procedural Due Process Clause, no person shall be deprived of life, liberty, or property without due process of the law. This requires a showing that 1) there was a deprivation of a protected interest, 2) without due process protections (namely, notice and a hearing). When deciding what process is due, the court looks at the nature of the interest affected, the probable value of additional safeguards, and the burden on the government.

The court has recognized that students have a protected interest in public high school education; they cannot be denied the opportunity to attend school without some level of due process protections. Here, the decision to suspend P took place immediately and it does not appear the speech regulation allows for any opportunity of notice and a hearing. Notice and a hearing are generally viewed as the bare minimum for PDP, and here P was provided with neither. P can argue that a hearing would have been helpful because she would have been able to present evidence that shows her tattoo was a peaceful non-gang-related symbol, and that the burden on the school district to have a pre-suspension hearing would be relatively minimal (it would not be too difficult for D to hold a quick hearing in connection with each suspension rather than implementing it immediately). Thus, given that P was not provided with any sort of due process protections and was suspended immediately, she likely can show a PDP violation here.

She may be able to challenge this law on PDP grounds because she was suspended without any sort of due process protections (i.e., notice and a hearing).

### **Substantive Due Process**

Under the 14th Amendment substantive Due Process Clause, the government shall not infringe on individual rights in an arbitrary or irrational manner. If the right is fundamental, strict scrutiny applies; if the right is not fundamental, it is subject to rational basis review. Here, D will argue that there is no fundamental right to attend public school, and thus suspending her from school did not violate her fundamental rights and this action should be viewed under the rational basis test. If the rational basis test is applied, the law will be upheld as long as it is rationally related to a legitimate government interest (here, preventing gang related symbols is rationally related to the interest in preventing gang violence at school; the law will likely be upheld).

On the contrary, P will argue this law infringes on her rights of speech/self-expression while at school, and the First Amendment rights are regarded as fundamental. She will argue that strict scrutiny should apply here, and as set forth above, this policy will fail strict scrutiny because it is not narrowly tailored/least restrictive alternative.

The court could potentially go either way, depending on whether it views this regulation as infringing on the right to go to school (not fundamental) or the right to free speech (fundamental). P would be best served by pursuing the First Amendment claims set forth above, but she could also potentially raise this substantive due process argument.

### **Equal Protection Clause**

The EP clause protects from unconstitutional discrimination. If the law discriminates

based on a suspect class or involves a fundamental right, strict scrutiny applies; if it's not a suspect class, rational basis review applies.

Here, P may argue this law violates EP because it discriminates against students wearing gang-related symbols and students who do not. However, people who belong to gangs are not a protected class, so the law will be subject to RBR (will be struck down; see above). The arguments re whether it involves a fundamental right will be the same as they were for SDP (see above).

The Equal Protection Clause is not the best argument for P to advance. She would be better served by focusing on the First Amendment and procedural due process issues.

### **D's Arguments in Support of Motion to Dismiss as Moot**

D has moved to dismiss P's action as moot. An action is moot when a live controversy under Article III no longer exists. Here, D will argue that this case is moot and there is no more controversy because: 1) P is no longer a student being harmed by the regulation; and 2) the district has redefined "gang-related activities" to be consistent with the criminal code (implying that under this new definition, P would not have been punished).

#### **1. P No Longer HS Student**

D argues the case is moot because P is no longer a high school student and thus no longer subject to D's policy. However, P will argue that this falls under an exception to the mootness doctrine: cases capable of repetition yet evading review. The key example of this exception is pregnancy: claims involving pregnancy often evade review because the length of time is short, but because one can get pregnant again, they are

capable of review.

P will argue that such cases will keep arising as more and more students are subjected to this policy (i.e., her type of claim is capable of repetition), and yet because high school only lasts four years and the process of litigation a case often also takes years, it is often that these claims will evade review because students will graduate by the time the claim gets through the court system. D will argue this should not apply because the length of time (4 years) is far longer than something like a pregnancy (9 months), so it is not truly going to evade review (although it unfortunately does for this specific plaintiff, given that she sued so late into her career). Moreover, D will argue that it is not capable of repetition because P will not go to high school again.

On balance, the court will probably side with P and not dismiss it as moot because the claim is capable of repetition (more students will be subjected to the policy in the future and thus will have claims), but evading review (students will graduate before claim is finished because high school only lasts 4 years).

## **2. Redefined "Gang-Related" Activities**

Another exception to the mootness doctrine arises when the defendant voluntarily ceases the offending activity--the case will not be deemed moot simply because the offender has ceased the activity, given that they could always do it again and that would render the case no longer moot.

Here, P will argue that D's voluntary redefining of the term in the policy does not render her action moot because D's voluntary choice to change the policy could always be overturned (it's not as though the state's legislature changed the law; a school district policy can be changed far easier). Here, P will argue that D's voluntary choice to change

the policy does not make her case moot because D could always choose to change the policy back, and thus everyone would be right back in the same situation. A declaratory relief action can help clarify the constitutionality of this policy and will prevent future cases if the district decides to simply change the policy back. Thus, on balance, a court will likely find that P's action is not moot on this ground, because D could always re-define the policy in a manner that is overly broad/unconstitutional.

## **QUESTION 2: SELECTED ANSWER B**

### **I. ARGUMENTS THAT PALOMA CAN MAKE IN SUPPORT OF HER FIRST AND FOURTEENTH AMENDMENT CLAIMS**

#### **Sovereign immunity**

Paloma is suing the public school district for declaratory relief challenging the validity of the district's gang-related clothing rule. Under the Eleventh Amendment, a state cannot be sued in state or federal court by a citizen unless certain circumstances exist. A citizen may sue for declarative relief or sue a local government or municipality.

Here, Paloma seems to be seeking a declaratory judgment holding that the District's rule is unconstitutional, thereby abolishing the rule. This type of declaratory judgment does not fall within sovereign immunity protection. Furthermore, Paloma is suing a school district, which likely qualifies as part of a local government or municipality, which can be sued under the Eleventh Amendment. Thus, there is no Eleventh Amendment bar to Paloma's suit.

#### **State action**

Only a unit or instrument of government can be sued for violating the Constitution, because private parties not subject to state action cannot violate the Constitution. Here, the District is an instrumentality of the state, seeing as it's a public school, and can be sued for unconstitutional actions. Thus, Paloma may sue the District for constitutional violations.

#### **Standing**

An individual only has standing to sue when there is an injury in fact, causation, and

redressability. Here, Paloma has suffered an injury by being suspended from school for violating the District's policy, the injury was caused by the District enacting and enforcing its policy, and the injury is redressable if a court awards declaratory relief to Paloma because she may be able to get damages based on the District's action or ensure that the rule is not enforced for future students. Thus, Paloma has standing to sue.

### **Ripeness and Mootness**

As will be analyzed further below, the issue of the constitutionality of the District's policy is ripe because Paloma suffered an injury from it and the policy is still in effect. The issue is not moot because it will be a continuing harm that can be redressed for future students and for Paloma's incurred injury, even though Paloma is no longer a high school student. Thus, the requirements of ripeness and mootness are satisfied.

## **1. FIRST AMENDMENT CLAIMS**

The First Amendment prohibits the government from limiting an individual's freedom of expression in most cases. There are a variety of First Amendment grounds upon which Paloma could challenge the District's policy. If a court finds that Paloma succeeds on any of these grounds, then the District's policy constitutes an unconstitutional violation of the First Amendment.

### **Symbolic Speech**

Symbolic speech, such as freedom of expression when doing an action (i.e., flag burning) is protected by the First Amendment. The speech at issue in this case is Paloma's dove tattoo, which isn't written or spoken speech, but qualifies as symbolic

speech because it is her "self-expression" as a peaceful person. The government (here, the District as a public school) may only regulate symbolic speech if the regulation is narrowly tailored, related to a significant government interest, and not primarily concerned with the suppression of symbolic speech.

### Narrowly tailored

A regulation is narrowly tailored when it is not too restrictive and targets the conduct at issue.

The District's policy prohibits all students from wearing any "label, insignia, words, colors, etc... that reflect gang-related activities." This is very broadly tailored to basically encompass all forms of bodily expression, including clothing and tattoos, that bear any relation to a gang. The District could have narrowly tailored this policy by providing specific restrictions, such as prohibiting an exact bird gang sign or finding the actual signs used by the Westsiders and Eastsiders and banning the use of those signs. Instead, the District enacted a broad rule that covers almost everything on a student's body, and which can be related to "gangs" in general, not even mentioning the Westsiders and Eastsiders. Additionally, the restriction provides a broad and harsh punishment that is not narrowly tailored to fit any violation of the restriction.

Thus, the restriction here is not narrowly tailored.

### Related to a significant government interest

In addition to being narrowly tailored, the restriction on symbolic speech must be related to a significant government interest. Here, the District has a significant interest in reducing gang violence in schools. The District has consulted with local law



enforcement to determine that the most violence results from gang confrontations between the Westsiders and Eastsiders. The District, in overseeing public schools, has a significant interest in fostering a safe learning environment without violence so that students can learn peacefully and be shielded from the gangs and violence beyond the school. Thus, the District has a significant government interest in reducing gang violence and this interest is related to the District's policy prohibiting students from wearing labels that reflect gang-related activities.

### Suppression of symbolic speech

To be valid, a restriction on symbolic speech must not be primarily enacted to suppress that speech or have that effect. Here, the District will argue that its purpose in enacting the policy is to suppress gang violence and reduce the violence in the District's high schools, not ban students from having dove tattoos and engaging in self-expression of their peacefulness. However, Paloma will argue that the District's failure to narrowly tailor its policy effectively results in the suppression of symbolic speech, as any symbolic speech that bears a relation to gang-activity in general will constitute a violation of the District's policy and open the student to a harsh punishment.

Thus, the lack of narrow tailoring in the District's policy leads to an unjustifiable suppression of symbolic speech, even though the policy is related to a significant government interest. Thus, the District's policy is unconstitutional as a suppression of symbolic speech.

### **Time, Place, or Manner Restriction**

If the court does not accept Paloma's argument that the District's policy unconstitutionally suppresses symbolic speech, Paloma can argue that the policy is an

unconstitutional time, place, or manner restriction. These restrictions apply to the government's limitation of speech in traditional public forums or designated public forums and enable the government to place restrictions on the time, place, or manner of speech so long as the restriction is content-neutral.

A content-neutral restriction does not regulate the content of speech, and to be valid as a time, place, or manner restriction, it must be narrowly tailored to serve a significant governmental interest and leave alternative avenues of communication available. A content-based restriction is subject to strict scrutiny and must be necessary for a compelling governmental interest and narrowly tailored to that interest.

Paloma may try to argue that her high school is a traditional public forum whereby students can engage in free speech. A court may not accept this characterization, but if it does, then Paloma can argue that the District's policy is an invalid time, place, or manner restriction that regulates students' speech during the time they are at school.

### Content-based

A content-based regulation prohibits some speech on the basis of its content and is subject to strict scrutiny. Here, Paloma will argue that the District's policy is a content-based one because it prohibits expression related to gang activities, so it regulates the content of gangs.

Under strict scrutiny, the regulation must be necessary for a compelling governmental interest and narrowly tailored to that interest. The burden is on the District (the governmental unit) to prove these elements. The District will argue that it has a compelling governmental interest in reducing gang violence in high schools, for reasons of student safety and school functioning outlined above. The District will argue that the

regulation is narrowly tailored because it only regulates expression related to gang activities, and only while the student is in school. The District will argue that gang signs are changing and numerous, and the District or law enforcement officers may not have all the information on what constitutes a gang sign, so it is necessary to restrict students from having anything that might be related to gang activities in order to discourage students from aligning with their gangs in school or breaking out in fights upon seeing the sign of a rival gang and disrupting school operations and student safety. The District will thus argue that its policy is necessary due to the problem of gang violence in its high schools and the difficulty of nailing down who exactly is a gang member and what constitutes a gang sign, and thus that its policy passes strict scrutiny.

However, as analyzed above, Paloma will argue that the policy is not narrowly tailored because it prohibits basically any expression related to a gang activity without defining these terms and comes with a harsh punishment. Even if the policy is necessary for a compelling governmental interest, Paloma has a good argument that it is not narrowly tailored, and thus the regulation will likely fail strict scrutiny.

### Content-neutral

The elements of being narrowly tailored to a significant governmental interest have already been analyzed above under the symbolic speech analysis. The additional element here is that there are alternative avenues of communication available. The District will argue that its policy only applies in schools, and that students are free to wear gang insignia outside of school so there are alternative avenues of communication. However, Paloma will argue that the District is requiring students to remove things like tattoos, which are not temporary and cannot be banned in school

while existing outside of school. Even though the District gave Paloma the option of covering up her tattoo, it confines her to only being able to show the tattoo outside of school which may be impossible if she has strict family that will not let her show the tattoo. Additionally, students often spend much of their day in school and there are not many alternative avenues of communication outside of school for students who go to school and then return home.

Thus, even if classified as a content-neutral time, place, and manner restriction, the District's policy will likely fail, primarily because it is not narrowly tailored.

### **Nonpublic forum**

The government has more freedom to restrict speech in nonpublic forums, such as prison. In these forums, a restriction on speech is valid so long as it is viewpoint neutral and related to a significant government interest. The District will argue that a school is a nonpublic forum and should be subject to this analysis, instead of being classified as a traditional or designated public forum and subject to strict scrutiny or the time, place, and manner analysis.

If a court accepts the District's classification of a school as a nonpublic forum, then the restriction is valid if viewpoint-neutral and related to a significant governmental interest.

The significant governmental interest has been analyzed above in the suppression of symbolic speech point. The District may argue that the policy is viewpoint-neutral because even though it bans content-based speech on the subject of gangs, it does not take a viewpoint stance on gangs. Rather, the language of expression that reflects "gang-related activities" can cover viewpoints that are supportive of gangs, as well as viewpoints that are opposed to gangs, as long as the viewpoint is related to gangs.

Thus, the District likely has the best chance of convincing the court that its policy is constitutional if it argues that a public high school is a nonpublic forum and subject to that analysis.

### **Vagueness**

A restriction on speech is unconstitutional if it is too vague. The District's policy that "no student shall wear any label, insignia, words, colors, signs... that reflect gang-related activities" is likely much too vague and unconstitutional for vagueness. This is because the policy basically prohibits any form of clothing, tattoo, paint, or anything that a student can wear, possibly extending even to backpacks and items that touch a student --essentially any item, so there is no limitation or definition on what constitutes a banned item. Furthermore, the term "gang-related activities" is much too broad and not defined at all. As analyzed above, this term encompasses both viewpoints supportive and dismissive of gangs, and can encompass any gang, not just the Westsiders or Eastsiders. It could conceivably encompass a fictional gang, a gang in another city that causes no harm in the District's schools, or symbols that have a non-gang meaning and possibly a gang meaning, such as Paloma's tattoo. The lack of definition makes the policy too vague and almost absurd because it has no limit, essentially.

Thus, the policy is very likely to be void for vagueness.

### **Overbreadth**

A restriction on speech is unconstitutional if it is overbroad and encompasses too much protected speech. As analyzed above, the District's policy is not narrowly tailored, to the point of being overbroad because it encompasses too many items, and "gang-related activities" is not defined to the point where it can be broadly interpreted to encompass

symbolic speech such as Paloma's tattoo. Thus, the District's policy is likely to be void for overbreadth.

## **2. FOURTEENTH AMENDMENT CLAIMS**

The Fourteenth Amendment applies to the states and contains the Equal Protection Clause as well as the Due Process Clause.

### **Equal Protection Clause**

Under the Equal Protection Clause, all individuals must be treated equally without discrimination. A restriction is subject to strict scrutiny if it discriminates on the basis of a suspect class such as race or national origin, subject to intermediate scrutiny if it involves gender or legitimacy, and subject to rational basis review for everything else.

Here, Paloma will likely argue that the District's policy violates the Equal Protection Clause because it discriminates on the basis of gang members or those who may be gang members. Gang members are not a suspect class, so the policy would be subject to rational basis review under which the challenger must show that the policy is not rationally related to a legitimate governmental interest. As analyzed above, the District has a legitimate interest in reducing gang violence in its high schools.

Paloma will argue that there is no rational relationship between the District's policy prohibiting gang-related symbolic expression and the District's interest in reducing gang violence. However, this argument will likely fail because it is conceivable and likely that the District's prohibition on gang-related symbolic expression will make it harder for gang members to identify each other at school and get into disputes, so there is a rational relationship here. Thus, Paloma's Equal Protection Clause challenge will likely

fail because the policy satisfies rational basis review.

## **Due Process Clause**

Under the Due Process Clause, a person may not be deprived of life, liberty, or property without due process. This clause comes from the Fifth Amendment but is applied to the states through the Fourteenth Amendment. Paloma will argue that her procedural due process and substantive due process rights have been violated by the District's policy.

## **Procedural due process**

Procedural due process guarantees protective procedures such as notice and hearing when an individual is deprived of life, liberty, or property.

### Life, liberty, property interest

Paloma will argue that she has a liberty interest in wearing what she wants at school, or a property interest in her body such that the school cannot make her cover up her tattoo or remove it. Paloma can further argue that she has a liberty interest in going to school and cannot be immediately suspended or expelled without an opportunity for notice and hearing. Here, Paloma was immediately suspended for ten days when she refused to cover up or remove her tattoo. A court will likely find that Paloma's liberty and/or property interest was implicated here.

### Notice and hearing

A court weighs many factors in deciding what process is due. The main issue is Paloma's suspension, seemingly without notice or a hearing. It is unclear when the District enacted the policy or how much notice Paloma had, especially considering she had her dove tattoo for years without issue. More facts are needed here, but if the

District did not broadcast its policy and adequately inform students, then it is likely that Paloma did not have notice. Furthermore, due to the vagueness and overbreadth of the policy, it's likely that, even if Paloma knew about it, she did not know that it could apply to her dove tattoo due to the lack of definitions or examples in the policy.

Thus, Paloma likely lacked notice of the policy and was likely entitled to a hearing of whether she should have been suspended, especially considering she was not a gang member and she lost out on the last few days of her high school experience.

### **Substantive due process**

Substantive due process applies when the government prohibition at issue impacts an individual's fundamental right, such as the right to travel, vote, or have privacy. Here, Paloma will argue that her right to privacy was intruded on when the District tried to make her cover up or remove her tattoo.

### **Right to privacy**

An individual has a right to privacy, including a right to what they wear on their body.

This is a fundamental right that is subject to strict scrutiny. If the court finds that Paloma had a valid privacy right in her tattoo and her choice of how to display it, then the District has to pass the strict scrutiny standard. This standard is the same for purposes of due process and the Equal Protection Clause, so the strict scrutiny analysis above will apply to Paloma's right of privacy. Even if the court finds that Paloma doesn't have a right to privacy here, and that any right is only subject to rational basis review, that analysis has also been done above and will apply here.

### **Conclusion**



Paloma can make all the above arguments in support of her First and Fourteenth Amendment claims, but her strongest argument is that the policy is unconstitutional due to vagueness and overbreadth.

## **II. WILL EITHER OR BOTH OF DISTRICT'S ARGUMENTS IN SUPPORT OF ITS MOTION TO DISMISS PALOMA'S LAWSUIT BE SUCCESSFUL**

The District can dismiss Paloma's lawsuit in the first instance if it can show that Paloma does not have standing to bring the suit. A lack of standing will cause the court to dismiss the lawsuit. The District will argue that Paloma's lawsuit is moot, meaning that the injury has passed and there is no current or continuing harm to sue on.

### **1. Mootness--Paloma is no longer a high school student**

A claim is moot if the injury has passed and is not capable of repetition. But, as in abortion standing cases, mootness will not bar a suit when the injury is one that eludes judicial review because it passes before a court has time to hear and decide the issue.

The District will argue that Paloma's injury has passed because it occurred when she was in high school and she is now in college, so the lawsuit is now moot because Paloma will never again be subject to the District's policy for high school students.

However, Paloma can argue that when the harm occurred in high school, she was not able to sue for some reason, or that the harm is one that will likely repeat itself for future high school students in the District. Paloma can likely successfully argue that the brevity of her high school experience (this injury occurred during the last days of senior year) is similar to the abortion-standing in that the harm eluded judicial review, but is capable of repetition. Paloma will likely prevail on this point given that the District's policy still exists.

## **2. Mootness--District has redefined "gang-related activities" in a manner consistent with State X's criminal code**

A court may still hear a case even if the offending party has stopped its criminal conduct or reformed its conduct. This is because there is no guarantee that the criminal or otherwise prohibited conduct will not continue because the offending party may merely be pretending to conform to avoid judicial review or has the discretion to repeat the offensive conduct in the future in the absence of an injunction or a judicial determination that the conduct is unconstitutional.

Here, the District may not argue mootness merely because it has redefined "gang-related activities" to be consistent with State X's criminal code. First, there is no guarantee that the District will adhere to this definition or not change the definition in the future, thus repeating the harm that Paloma is suing upon. Second, it is unclear whether its redefinition is constitutional because it may not be enough to redefine the term in accordance with a criminal code that itself may be unconstitutional. Third, the redefinition of gang-related activities does not solve the other parts of the policy that may be unconstitutional, namely the vagueness and overbreadth in what items of clothing/tattoos/etc. are covered under the policy, and the harshness of the immediate suspension or expulsion without any procedural protections in place.

Thus, both of the District's mootness arguments will likely fail, and the case will proceed.

### **QUESTION 3**

Clint hired Linda, a lawyer, to represent him in a personal injury lawsuit against Dan, the driver of the car that collided with Clint's car, thereby causing him serious bodily injury. Clint could not afford to pay Linda, so Linda told Clint not to worry about paying anything until there is a recovery in the case. Linda told Clint that if a recovery is obtained, Linda would take 50% as her attorney fee and Clint will get the other half, less any costs Linda incurred. Clint orally agreed to this fee arrangement.

Dan's insurance company, Acme Insurance (Acme), emailed Linda before Linda completed any substantive work on the case, and offered to settle the matter for \$100,000. Linda was thrilled and replied to the email that she accepted the settlement offer. Linda then told Clint about the settlement. Clint was relieved that the case settled so quickly.

Acme delivered a check for \$100,000 payable to Linda, who deposited it into her law firm's business account. Linda then wrote a check from that account to Clint for \$50,000, minus her costs, and mailed it to him. Upon receipt of the check, Clint complained about Linda's fee and threatened to sue Linda for malpractice and report her to the State Bar. Linda offered to return \$10,000 of the fee in exchange for an agreement releasing Linda from all liability associated with the representation. Clint accepted and executed the release.

What ethical violations, if any, has Linda committed? Discuss.

Answer according to California and ABA authorities.

## **QUESTION 3: SELECTED ANSWER A**

### **Formation of Client Relationship**

#### **Formation**

A lawyer-client relationship is formed when the client reasonably believes that the relationship has been formed. Here, Clint (C) asked Linda (L) to represent him, and L agreed. At this point, C would reasonably believe that L was his lawyer so a lawyer-client relationship had been formed.

#### **Duty of Competence**

A lawyer should not accept representation of a client unless they are competent to perform the duties or can reasonably become competent through preparation. Here, there is no evidence that L has experience doing anything to do with personal injury law. If she did not have personal injury experience, then she either needed to ensure that she could adequately represent C through adequate preparation, or associate with a competent lawyer with C's permission, or decline the representation. Because there is not enough information to determine if L was competent to accept representation, there is no clear violation here.

#### **Conflicts of interest**

A lawyer also must ensure that they have no conflicts of interest that would prevent them from providing competent and diligent representation to the client before accepting or continuing representation. This could be due to personal conflicts or current, former, or prospective client conflicts. Here, there is no evidence of conflicts of interest, so there is no violation.

### **Working with an indigent client**

A lawyer may waive fees for an indigent client and may advance reasonable expenses for litigation. If the client is in fact indigent, then the client does not need to pay the lawyer back. If the client is not indigent, then there must be arrangements for the client to repay the lawyer for the advanced costs. Here, it states that C cannot afford to pay L so there is some indication that he may be indigent. Therefore, L could ethically advance only the legal costs and is not obligated to force C to repay her for those if he is in fact indigent. Otherwise, C must repay her.

### **Contingency Fee Agreement**

A lawyer is permitted to work for a contingency fee in most cases. The exceptions are when there is defense of a defendant in a criminal case or when the lawyer is working on a divorce or divorce settlement case and the contingency fee is based on obtaining a divorce or the amount of settlement. Here this is not the case, so L is able to agree to a contingency fee.

### **Writing Requirement**

Under both the ABA and CA rules, all contingency fee agreement must be in writing.

For the ABA, the agreement must be: (1) signed by the client; (2) include the allocation of expenses; and (3) outline the scope of the representation. Under CA, the agreement must: (1) be signed by both the client *and the lawyer* and a copy must be given to the client; (2) include allocation of expenses; and (3) outline the scope of performance.

Here, L did not comply with the ABA or CA requirements. This is a contingency fee arrangement because it is based on a percentage of the outcome of the case. However,

it is not in writing, it is not signed by anyone, and C never got a copy. C and L merely agreed orally to the arrangement. L did state that it would be "less any costs," but this was not an exact definition of what costs C should be expected to pay and what costs L will pay as is required. It also did not dictate when this would be paid, nor did it state the scope of their relationship.

Therefore, L violated her ethical duties through making this oral agreement with C for a contingency agreement.

### **Fee must be reasonable / not unconscionable**

Any time a lawyer represents a client, the fee must be reasonable (ABA) and not unconscionable (CA). Under the ABA, the reasonableness of the fee is determined by the complexity of the case, the preclusion of other employment, the expertise and reputation of the lawyer, the actual outcome achieved, structure of the fee (fixed v. contingent), and community standards for these kinds of cases.

### *Characteristics of the case*

Here, this is a very easy case of a personal injury suit negotiating with an insurance company. L did not have to give up any other employment as she ended up doing no real work on the case. She also was likely not expecting to give up substantial work as this is a one-off personal injury case, so it was unlikely to lead to wide reaching conflicts of interest. While this case may have taken some work, it was not likely to dominate her entire practice and preclude her from taking on other jobs. This kind of case requires some expertise, but not extensive as it seems like it is a standard accident personal injury negligence case and there is also no information on L's reputation in the field.

### *L's Actual Work, Fee structure, and Community Standards*

Her actual outcome was good for C as it was a fast and efficient resolution getting him a large settlement, but that was not actually due to anything that she did, but rather her just accepting a settlement so this does not deserve such a large fee. This is a contingent fee agreement, which does inherently come with more risk for the lawyer. Therefore, in general, it is reasonable for the fee on contingency to end up being higher than a fixed fee as the lawyer takes on more risk when structuring the agreement this way. However, it is not justifiable to have a fee that is grossly disproportionate to the amount of work done. Contingency fees also must still be reasonable on community standards. There is no information about the kind of fee normally charged, but, in general, contingency fees tend to be 20-30% of the settlement, not 50% plus fees. Here, L is getting \$50,000 plus costs for doing no substantive work at all on the case other than accepting an unauthorized agreement for settlement. This fee is grossly disproportionate to the services that she rendered to the client and would imply an outrageous hourly rate of about \$100,000, assuming she even did 30 minutes of work total on the case. Therefore, this fee seems unreasonable.

### *CA's Unconscionably also looks to the negotiation process*

Under CA, most of the above elements are also considered. CA does not expressly look at the community standard for fees, but they do take into account the complexity, time/skill, reputation of lawyer, structure of the fee, and preclusion of other employment when considering the fee. In addition, they add several more requirements to these by looking at the time when the agreement was made. This includes elements such as if the lawyer committed fraud or misrepresentation in making the agreement, the relative

sophistication between lawyer and client and the existence of a preexisting relationship. Here, this fee was also likely unconscionable. L had a duty to memorialize this agreement in writing and get C to sign it, but she did not. Instead, she spoke it orally when C was likely desperate for a lawyer. Therefore, the instance of negotiating this fee was unethical on L's part. Additionally, there is likely a large discrepancy in the sophistication of the parties because C was a potentially indigent client who could not pay. He is seeking a lawyer because of a personal injury suit, not a business relationship, which indicates that he may have no prior experience with the law. Therefore, there is a substantial power imbalance here that makes the negotiation and agreement to the fee unconscionable as well as the rest of the factors described above. Therefore, the fee is unconscionable as well and L violated both her duties under ABA and CA.

### **C has option to void, and L would get reasonable fee**

Because the writing requirement for a contingency fee was not met, C would have the option to void the contingency fee contract. In this instance L would get a reasonable fee, which would be substantially less than \$50,000.

### **Agreement to settle**

#### **Duty to communicate settlement offers**

A lawyer has a duty under the ABA to communicate all settlement offers. Under CA, the lawyer in a civil case has a duty to communicate all written settlement offers and all oral significant settlement offers. Here, this is a written settlement offer being made by Acme (A) to settle the claim. This means that under both ABA and CA, L had a duty to



communicate this settlement offer to C. She failed to communicate this offer to him prior to accepting the deal. This was a violation of her ethical obligations under both ABA and CA.

### **Client's decision to accept settlement offers**

The clients and lawyers have different spheres within the representation. The lawyer has control to make decisions regarding the strategy of the case, but the client has complete authority to make all decisions that are substantively related to the rights under the case, such as acceptance of settlement offers, plea deals, or demand for a jury trial. Here, it was only within C's power to accept the settlement offer. L was not permitted to accept the settlement offer without express authority from C. If C had given her express authority to accept any settlement above \$90,000, then L's acceptance would have not been unethical, but here there was no such agreement beforehand. Therefore, L violated her ethical duties by accepting this agreement.

L may argue that C was happy with the settlement and was not harmed by this.

However, a client need not be harmed for an ethical violation to occur. Therefore, L has still violated her ethical duties and should still be punished accordingly.

### **Duty of Competence**

A lawyer has a duty of competence to their client, which means that the lawyer must act with the required knowledge, skill, thoroughness, and preparation of a reasonable lawyer to provide services to the client. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide competent representation to a client. The standard of competence for CA is similar, requiring knowledge and skill as well as the appropriate physical and emotional state to serve the

client.

Here, L likely breached her duty of competence to her client. She failed to take any investigation or preparation to uncover if the \$100,000 settlement offer was in fact in the best interest of her client. She took no action to understand similar claims, what her client's claim may be worth if they went to trial, or what the chances of success on the merits would have been. By accepting the settlement offer without making any effort to properly investigate the claim or the potential alternatives that C would have if he did not accept it, L breached her duty of competence.

### **Duty of Diligence**

A lawyer has a duty of diligence to their client, which means that the lawyer must act with the reasonable promptness to provide services, managing their workload to ensure that they can see the matter through to the end. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation to a client. Here, L could have also been said to have violated her duty of diligence by quickly accepting the settlement offer and cutting short the chance to fully explore all the options. However, she did respond quickly and take prompt action, which is also required under the duty of diligence. Therefore, this violation is less clear.

### **Duty of Loyalty**

The lawyer also owes a duty of loyalty to act in the best interest of their client. A lawyer need not press for every possible advantage for the client, but they must reasonably act to serve the best interest of their client and not act in a self-serving manner that undermines the best interest of the client.

Here, L violated her duty of loyalty by accepting the settlement offer without making reasonable investigations into the true value of the claim. L was acting in her own best interest when she did this because she was going to make \$50,000 for doing no work. However, she clearly did not adequately consider the client's best interest as she had completed no substantive work yet on the case. Therefore, it was not possible for her to reasonably know if accepting the settlement offer would be in C's best interest. As a result, it was a violation of the duty of loyalty to accept this settlement (regardless of the issues with lack of client consent) without proper investigation.

### **Receiving settlement check**

#### **Client Trust Account and Commingling Client Funds**

When a lawyer receives client funds, they must keep that money in a separate client trust account. A lawyer is strictly prohibited from commingling the client funds with the lawyer's personal assets or firm's assets.

Here, L violated her duty to keep the client funds separate. She took the \$100,000 check that was given to her from A as the settlement and deposited the check into her law firm's business account. This meant that she commingled C's settlement with the rest of the firm's assets. This is strictly prohibited and is a violation of both ABA and CA rules.

#### **Disputed amount**

L then sent C the amount that she believed that he was entitled to under their agreement by mailing him a check for \$50,000 less fees. L was right to promptly deliver the client their funds from a settlement. A lawyer has a duty to hold client property and

promptly distribute all client settlements to the client once the settlement is complete. Therefore, this action itself was not a violation.

However, once there became a dispute with the funds L was obligated to continue to hold the rest of the fee, or any disputed amount if not all the amount is disputed, in the client trust account until the matter was resolved. Here, L never had a client trust account which was a violation, as explained above. Now that there is a dispute, it continues to be a violation as L is required to hold all disputed funds in the client trust account. Only funds that she has a clear legal and undisputed right to can be deposited into her own account. Here, she deposited the funds in her own account prematurely and this is a violation.

### **Settling claims of malpractice**

A lawyer under CA rules is strictly prohibited from making agreements to prospectively limit their malpractice liability. Under the ABA, a lawyer is permitted to do this only if the client is represented by independent counsel when they make this release. Here, under both rules, L would have violated as C was not represented by counsel.

Here, L is negotiating after C has threatened her to sue for malpractice. Therefore, this should be analyzed as a settlement offer for malpractice rather than a prospective release.

### **Written Release and Representation by independent counsel**

Here, when negotiating settlements of malpractice liability, the client should be advised and given an opportunity to seek external counsel. This makes the negotiation process substantially more fair and will allow the client the best chance to protect their own

interest. Here, L never told C that he should seek independent counsel, nor did she give him an opportunity to do so.

L and C only negotiated orally on the release after C threatened to sue. L offered to return him \$10,000 of the settlement that she had withheld in exchange for him not suing. While under contract law, this likely would be an enforceable contract. This is also unethical because this was purely an oral conversation in which C had no counsel. Additionally, C did have a reasonable claim and could have voided the entire agreement. This was an option that C was not aware of because he was not advised of his rights. Therefore, L violated her duty of loyalty to C in this situation as well by failing to provide him with an adequate warning and opportunity to seek counsel.

### **QUESTION 3: SELECTED ANSWER B**

#### **Fee Agreements**

Under the California rules (CA), a written fee agreement is required if fees will likely exceed \$1,000. It must be signed by the client and attorney, and the client must get a copy. It must explain the basis of the fee. Under the ABA Model Rules (MR), a writing is not always required except for contingency fees. Under both rules, cases on a contingency fee basis always require a writing. In CA and the MR, fees must be reasonable. Under CA rules, they must not be unconscionable.

Even if this were not a contingency fee case, the fact that the agreement was oral, not written, would violate the California rules. Were it not contingent, the lack of a written agreement would be acceptable under the MR, though that is not the case here.

#### **Reasonable Fee**

Fees must be reasonable, and this is evaluated on factors including the skill of the attorney, the time the matter will take, the matter's complexity, the amount to which the work will preclude other employment, and the standard fees generally charged in related matters and circumstances. In California, the prohibition on unconscionable fees also looks to the relative sophistication of the parties in negotiation.

50% of a client's recovery in a case is very high for a personal injury contingency fee.

Contingency fees are generally around 30%, so this is significantly higher and could be viewed as unreasonable.

Clint is likely not a sophisticated negotiator regarding personal injury representation.

There's no indication he has prior experience seeking legal services, nor that he works

in a related field. This made him lack knowledge about negotiating the fee and could suggest procedural unconscionability. Clint also said he is unable to pay for a lawyer, so is in a disadvantageous financial position, giving him less power in negotiating a fee. Due to his inability to pay, he may think that he is unable to afford a lawyer at all, and this offer may seem generous to him, or at least, the only offer he is able to get.

The fact that C was surprised at how low his cut of the settlement amount was also indicates that he was not provided with information on how the fees and costs would be allocated--another ethical issue.

### **Contingency Fee Agreements**

Under both the CA and MR, a contingency fee requires a written fee agreement. Under the MR, this requires a writing signed by the client indicating the basis of the fee and the extent to which the client will be responsible for costs at the end of the case. The CA rules are more stringent and require the agreement, again, to be signed by both the client and the attorney. They require noting the basis of calculation of the fee, the extent to which the client is responsible for costs in the outcomes of the case, and a statement that the fee is negotiable, if it is not a medical malpractice case.

When C told L he didn't have money for an attorney, L told C not to worry about payment and that instead she could provide legal services where she took 50% of the ultimate recovery. This is a contingency fee agreement and, under MR and CA rules, requires a writing signed by the client (MR and CA) and, in CA, also the attorney. There was no writing here, as C orally agreed to the terms.

There is no indication C knew the fee was negotiable, which would violate CA rules.

L told C she would take 50% as well as "any costs" she incurred. This is likely insufficient information to meet the requirements that the agreement specify his responsibility for costs. It doesn't indicate what types of costs that could include, and whether and to what extent he would be responsible for them in the case that he did not prevail. This would likely violate CA and MR rules.

CA also requires an explanation of how fees are calculated. L would say that noting the 50% split is sufficiently specific. However, this doesn't make any explanation of costs of litigation, which may be insufficient. She merely told him to "not worry about it," which is vague, providing no basis or explanation.

### **Advancing Costs of Litigation to Clients**

An attorney may not give money to clients, however under CA and MR, an attorney may advance litigation costs so long as the client must repay those at the end of litigation.

L did not pay C but did front litigation costs as under their agreement she would pay for any costs and then recoup them from the ultimate recovery amount at the end of the case. This was permissible.

### **Scope of Employment**

In an attorney-client relationship, the client has control over setting the goals of the case, while the attorney can make strategic decisions. The client controls aspects of the representation such as whether to waive a jury trial, testify in a criminal case, or accept settlement offers among others.

D's insurance company emailed L with a settlement offer for \$100,000. L accepted it without D's consent. This violated her duty as that was D's choice, not L's.



L would argue that D was relieved when he heard of the settlement, so there was no issue, but that does not absolve her of her violation.

### **Communicating Settlement Offers**

A lawyer has a duty to communicate with the client, keeping them reasonably apprised of the status of the case. In the model rules, the lawyer must communicate all settlement offers to a client. In CA, the lawyer must communicate all written offers as well as any oral offers that are a significant advancement in the case.

Dan's insurance company emailed Linda with a settlement offer. She did not communicate it to Dan before accepting it. This violated the CA and MR rules as it was both written and a significant advancement in the case.

L would argue that D didn't object to the settlement as he was "relieved" it settled so quickly. However, this doesn't cure her ethical violation. Dan did object later once he came to understand how little he would recover (again indicating the issue of fee reasonableness discussed above). Also, harm to the client is not required for an attorney to be in violation of ethical duties.

### **Duty of Competence**

Under MR and CA rules, a lawyer has a duty of competence and must have the requisite skill, knowledge, training, and preparation to represent the client. In CA, an attorney may not repeatedly, recklessly, or grossly negligently fail to provide competent representation. If a lawyer is not competent in an area, they may accept representation if they are able to educate themselves on the matter enough to become competent in a timely manner, seek assistance from another attorney who is competent in the area, or

in an emergency.

Here, L didn't set an appropriate fee agreement, which arguably shows a lack of knowledge regarding how to proceed in a personal injury case on a contingency fee basis. She also accepted a settlement offer without asking for C's permission, also arguably demonstrating a lack of competence as a client advocate.

There is no indication whether L has experience in personal injury cases, or whether this was an area she was unfamiliar with. Her overall conduct indicates lack of competence which may suggest this wasn't her usual area of practice; if so, she should have not taken the case, done additional preparation, or retained co-counsel to assist. This situation was also not an emergency.

L didn't do any substantive work on the case before accepting a settlement offer, also indicating lack of preparation and skill in negotiating and advocating for a client. L likely violated her duty of competence.

### **Duty of Diligence**

Per the MR and CA rules, a lawyer has a duty represent the client diligently, including keeping the client reasonably apprised of updates in the case, pursuing a matter to completion, meeting all filing deadlines, and managing workload.

L had not done any substantive work on the case when she received and accepted the settlement offer. This is clearly a lack of diligence as she did no work on the case. Had she done work on it, she would have had the knowledge about the extent of his injuries, applicable law, and comparable amounts of recovery at trial or by settlement in comparable cases. As it stands, she has seemingly no basis for determining whether

this was a reasonable settlement offer in the circumstances (this overlaps with the competence issue). It also violates this duty in that she did not keep her client updated on a serious development in the case.

As noted above, the duty of diligence also includes the duty to keep clients reasonably updated on their case. Here, L only informed him after she accepted the offer. Based on C's surprise at how little he received, it seems that her explanation of the situation to him did not in fact provide him with a reasonable amount of information, suggesting failure to adequately communicate regarding substantive information as well as timing.

### **Client Trust Account**

An attorney may not mingle their assets and a client's assets under the CA and MR. A lawyer must keep all a client's money in a separate client trust account. An attorney may only move money out of the trust account into their account once they have earned the fees.

Here, A gave L a \$100,000 check and she put it in her firm's business account. She did not put it in a client trust account. She mingled this with her assets. After depositing the money in her account, she then wrote a check to C for \$50,000 minus costs.

She would argue that she paid C in a timely manner, but that is not sufficient to meet the requirements of either the MR or CA rules.

### **Disbursement of Disputed Fees**

When there is a dispute about the fees owed to an attorney or payment due to a client, the attorney must immediately pay the client all money that is not disputed as theirs and maintain the rest in the trust account until the matter is settled.

D disputed that the amount L took as costs deducted from the check was not acceptable, complaining about it and threatening to sue her. At that point, L should have maintained the disputed amount of money in a trust account until the issue of fees was resolved. But she did not, as she had the money in her firm account and kept it there.

### **Settlement of Malpractice Claims**

Under the CA and MR, an attorney may not settle a malpractice case with a client before advising the client to seek independent legal counsel and giving them an opportunity to do so.

C threatened to sue L for malpractice and report her to the State Bar. L offered him \$10,000 to settle the malpractice allegation as well as all liability with the representation. L did not advise C to seek independent counsel, nor gave him the opportunity to do so. C accepted the money and executed the release without having the opportunity to seek counsel. L violated her ethical duties here.

## **QUESTION 4**

The Articles of Incorporation for Corp Inc. (Corp) provide that it is a closely-held corporation formed for the purpose of manufacturing televisions. Corp has been highly profitable in this business for twenty years. The Articles also provide that, for the purpose of electing directors, each shareholder shall have one vote per share that they own multiplied by the number of open director positions, i.e., cumulative voting.

Aliyah and Bowen each owned sufficient shares to elect, through cumulative voting, one of the three directors of Corp. Aliyah and Bowen entered into a signed written agreement stating that they will vote to elect themselves to the board of Corp and agree on the election of any successor board members and, if they cannot agree on a particular successor, will abstain from voting in that election. They also agreed that, once they became directors, they would select Palmer as the new president of Corp. The agreement stipulated that it is binding on all subsequent owners of the shares. Aliyah and Bowen stamped "Subject to Agreement" on the backs of all of their share certificates.

Aliyah and Bowen were subsequently elected to Corp's board of directors, along with Chantal. At the next board meeting, Aliyah and Bowen voted to select Palmer as the new president of Corp, Chantal abstained, and Palmer was named as president.

Palmer immediately instituted several costly changes intended to shift Corp solely into the manufacturing of bicycles. Palmer reasoned that, by the time the directors heard anything about the changes, Corp would be so profitable that no one would complain.

Bowen discovered almost immediately what Palmer had done. Bowen then informed Daya of all of these facts, sold his shares to her, and resigned from the board.

Esgar, a shareholder of Corp since its inception, wishes to seek legal relief regarding Palmer's actions and Corp's change to solely manufacturing bicycles.

1. Is the agreement between Aliyah and Bowen valid? Discuss.
2. Is Daya bound by Aliyah and Bowen's voting agreement with respect to the election of successor directors? Discuss.

*QUESTION CONTINUES ON THE NEXT PAGE*

3. On what theory or theories, if any, might Esgar bring an action to enjoin Corp from moving solely into manufacturing bicycles, and what is the likely outcome? Discuss.
4. On what theory or theories, if any, might Esgar bring an action for damages against Palmer related to Corp moving solely into manufacturing bicycles, and what is the likely outcome? Discuss.

## **QUESTION 4: SELECTED ANSWER A**

### **1. Is the agreement between A and B valid?**

#### Type of Entity

The first issue is what type of business entity is at issue. A de jure corporation is one that has been properly formed through the filing of articles with the secretary of state. Here, the facts indicate that Corp Inc. is a closely held corporation. Thus, it will be presumed that Corp Inc. (C) was properly formed and is a valid de jure corporation. Because it is a corporation, C has distinct legal personhood and the capacity to sue, or B sued. Additionally, its shareholders will enjoy limited liability.

#### A and B's Role in the Company

The next issue is the role that A and B play in the company. A corporation is generally managed by a board of directors, but financially owned by shareholders (who enjoy limited liability). Here, the facts indicate that A and B each own shares in Corp, thus they will be considered shareholders. It is unlikely that they will be controlling shareholders, given that each was only capable of electing one director to the board through cumulative voting (had they been controlling shareholders, they likely could have elected more individuals to the board than one each). Thus, A and B are shareholders of Corp Inc., and, as shareholders, they also have the power to vote in the corporation's annual election of the board of directors. Corp adheres to cumulative voting, so A and B, as shareholders, are permitted to pool their votes behind one candidate in the hopes of electing someone to the board (as they did here).

Moreover, A and B were subsequently elected as directors, and thus also serve as

directors of Corp in addition to being shareholders. This may potentially expose them to liability (see more discussion below). However, the agreement they entered into was done so prior to them becoming directors, thus this agreement will be viewed as an agreement between shareholders, not directors.

### Validity of Agreement to Vote Together as Shareholders

The issue is whether A and B's agreement is valid. The agreement contains two key provisions: 1) A and B agreed to elect themselves to the board and to agree on the election of successor board members (and if they could not agree, they would abstain from voting); and 2) A and B agreed that once they became directors, they would select P as the new president of Corp. Moreover, the agreement indicated that it would be binding on subsequent owners of their shares (and they indicated as such on the actual share certificates). Here, each of the two provisions will be addressed separately.

The first provision provides for how A and B will vote as shareholders. A shareholder voting agreement, known as a "voting pool," is permissible, as long as it is in a signed written agreement clearly setting forth the terms. Here, A and B will argue that they entered into a valid shareholders agreement when they agreed to elect themselves to the board of directors. Shareholders are permitted to enter into contracts agreeing on how to vote at director elections and, here, A and B entered into a signed written agreement doing just that. Thus, the provision of the shareholder agreement which provides that A and B will vote to elect themselves to the board of directors will likely be upheld as valid.

However, it is less clear whether this voting agreement would be binding on successor shareholders (this will be discussed further below).



### Validity of Agreement to Select P as President

The next issue is whether the second major provision of the shareholder agreement, providing that they will elect P as president, can be upheld. Although shareholders are permitted to enter voting agreements, they are *not* permitted to enter into agreements that will control how they will vote and act in their capacity as *directors*. This is because directors are required to exercise their independent business judgment and have a duty to look out for the best interests of the corporation, thus we don't want them to be constrained by prior voting agreements (if they have contracted to elect P, but P is a bad option, we want the directors to make the best decision for the company, not feel bound by a prior K). Here, A and B have entered into an agreement providing that they will select P as president of Corp once they become directors. This part of the agreement must be struck down as invalid because shareholders cannot limit their discretion as directors through agreements such as this. The court will likely find that this agreement was designed to control their actions as directors and it will be struck down as invalid.

Some courts have recognized a limited exception to this rule in the context of a close corporation, where all of the shareholders enter into the agreement (if all the shareholders are on board with an agreement as to how to elect the directors, that may be permissible). The concern behind this rule is that courts don't want controlling shareholders who can elect directors entering into agreements that will harm the minority shareholders; thus, if all the shareholders enter the agreement, this concern is eliminated. Here, A and B may argue this exception should apply. However, this argument will fail, because even though C is a closely held corporation, this agreement

was only entered into by A and B, not by all of the shareholders.

Thus, the provision of the agreement providing that they will elect P as president once they are made directors will be struck down as invalid.

### Conclusion

The provision of the agreement governing how A and B will vote as shareholders at director elections will be upheld as valid. The provision governing how A and B will vote for P once they become directors will be struck down as invalid.

## **2. Is D bound by A and B's voting agreement with respect to the election of successor directors?**

The facts indicate that B, unhappy with P's actions, sold his shares to D and resigned from the board. As discussed above, the voting agreement between A and B provided that it would be binding on subsequent owners of the shares. As already demonstrated, the voting agreement between A and B was likely valid given that shareholders are permitted to enter agreements governing how they will vote at director elections. Thus, the issue becomes whether this agreement binds D.

In order to form a voting agreement that is binding on subsequent shareholders, some jurisdictions may require that the parties enter into a "voting trust" that is filed with the secretary of state. Here, it does not appear that A and B have done so, so this agreement will likely not be found to apply to subsequent shareholders if the jurisdiction follows such a rule.

However, they will argue that the agreement should still be binding on D under general contract/equitable principles because D, the subsequent purchaser of B's shares, had

valid notice of the agreement given that B informed D of "all of the facts" and the shares had "subject to agreement" stamped on the back. A and B will argue that D had notice of their agreement and of their intent to make the agreement binding on subsequent purchasers, and as such, D should be estopped from arguing she is not bound by the agreement. A court may go either way, but the more likely result is that since D was on notice of the agreement and bought the shares "subject to" the agreement, D too will be bound by the agreement's terms.

### **3. E's Action to Enjoin Corp from Manufacturing Bicycles**

E seeks to file an action against C in the hopes of enjoining C from changing from a corporation that manufactures televisions into a corporation that manufactures bicycles. In order to do so, E should bring a derivative lawsuit on behalf of the corporation to enjoin it from engaging in ultra vires actions.

#### E's Status in the Corporation

The facts indicate that E has been a shareholder of Corp since its inception. Thus, E is a shareholder of Corp and has standing to bring either a direct action to vindicate his own rights or potentially a derivative action on behalf of the corporation to protect the corporation's rights. A shareholder can only bring a direct action to challenge specific harms to them, such as being denied a distributed dividend or if a tort is committed against them by the corporation.

#### Derivative Shareholder Lawsuit

A shareholder of a corporation may bring a derivative lawsuit on behalf of the corporation against its own directors/officers, where the shareholder believes those

directors/officers are not protecting the rights and interests of the corporation. In order to do so, the shareholder must: 1) have been a shareholder at the time of the wrong and continue as a shareholder throughout the time of the suit; 2) adequately represent the interests of the shareholders; and 3) make a demand on the board, unless such demand would be futile.

Here, the facts indicate that E has been a shareholder since Corp's inception, and there are no facts suggesting he is no longer a shareholder; thus the first requirement is met. There are also no facts to indicate that E does not represent the interests of the other shareholders; this requirement is likely met. Finally, there are no facts to suggest that E has already made a demand on the board. If E does not do so, E may be prohibited from bringing suit. However, E can argue that demand here would be futile--the board contains three members, A, B, and Chantal, and two of those three members elected the president whose actions E is challenging. E can argue that A and B are interested directors because they made the decision to hire P, and thus 2 / 3 of the board members would be biased in favor of not bringing a lawsuit (because it could potentially open them up to liability, as the ones who voted to have P as president). Demand would likely be futile on these facts.

Thus, it appears that E can bring a derivative lawsuit, assuming that E either makes adequate demand or demonstrates demand is futile.

### Ultra Vires Action

Through the derivative lawsuit, E will challenge P's decision to move Corp solely into the business of manufacturing bicycles as an ultra vires action that is not permitted by Corp's Articles of Incorporation. When a corporation registers with the secretary of state,

they will file Articles of Incorporation. The AOI will state a purpose for the corporation. In modern times, most AOI state a very broad purpose for the corporation such that almost any legitimate commercial activity is permissible. However, even today, there are still corporations with a limited, enumerated purpose in the AOI. If the corporation's controlling officers/board take an action contrary to the stated purpose, shareholders can bring a derivative action to prevent the action as an improper "ultra vires" action.

Here, C has an AOI with a stated purpose: manufacturing televisions. Moreover, C has been highly profitable in this business for years, and there are no facts to suggest that C has ever engaged in any activity other than manufacturing televisions. Thus, E will argue that C's purpose as a corporation is limited to manufacturing televisions.

However, once P became president, P instituted numerous costly changes that shifted C into the business of manufacturing bicycles--E will argue this is an ultra vires prohibited act that is contrary to Corps stated purpose in the AOI. E can point out that televisions and bicycles are vastly different products that are manufactured differently, sold in different markets, and serve different purposes. E will argue that shifting C's purpose from making TVs to bikes constituted a fundamental corporate change that required amending of the AOI, and yet there was no valid amendment of the AOI. To amend the AOI, there must be a special meeting of shareholders called to vote on whether to amend the AOI. Here, there was no such special meeting; P simply made the unilateral decision to change the purpose of the corporation that has been operating for years. This was an ultra vires action without approval.

Accordingly, E can likely establish that manufacturing bicycles is an improper ultra vires action that Corp should not be permitted to undertake.

### Direct Action

E can also potentially bring a direct action on the grounds that his shareholder rights were violated because he was not permitted to vote on a fundamental corporate change, i.e., the amendment of the Articles of Incorporation. E will argue that P's actions were an attempt to unilaterally amend the AOI without calling a special shareholder voting meeting and, as such, E's rights as a shareholder were violated by Corp and E may be permitted to sue directly on these grounds.

### Right to an injunction

In order to obtain a permanent injunction the moving party must show success on the merits, inadequate remedy at law, irreparable harm, the balance of hardships/equities tips in their favor, and public interest does not disfavor the injunction. E can likely establish these elements given that Corp engaged in a wrongful ultra vires action that will likely cause imminent harm to the shareholders' interest in the form of lost profits.

### Conclusion

E can likely bring a derivative lawsuit to enjoin Corp from changing to bicycle manufacturing because this is an ultra vires action and there was no special shareholder meeting called to amend the AOI.

### **4. E's Action for Damages Against P**

E also seeks to bring an action against P directly for damages in connection with the ultra vires action. As a preliminary matter, E would once again need to bring a derivative action on behalf of the corporation itself, not a direct action (see above; analysis would be the same--E can probably bring a derivative lawsuit). E will bring a shareholder's

derivative action against P in his capacity as a corporate officer and allege that he breached the duty of care.

### Liability as an Officer

Officers are generally viewed as agents of the corporation (an agent is one who agrees to work for the principal's benefit subject to the principal's control). P, as president of Corp, is thus considered an officer and an agent of Corp. As an agent, P owes the corporation a duty of care and a duty of loyalty.

### Breach of Duty of Care

Here, E will argue that P's decision to move Corp solely into bicycle manufacturing constitutes a breach of the duty of care. Corporate officers/agents are required to act as reasonably prudent persons, and their goal must be to serve the best interests of the corporation. Here, E will argue that P breached his duty of care by unilaterally implementing costly changes that entirely changed the direction of Corp's business. E will argue that Corp has been operating for twenty years in the TV manufacturing industry, and they have been highly profitable. Thus, E will argue it was unreasonable for P to cast aside twenty years of effort and goodwill in the hopes of pursuing a new line of business. E will argue that P also acted unreasonably by making these changes without going through the proper channels and acting unilaterally behind the directors backs--E will argue that shareholders have a right to vote on such fundamental decisions or, at the very least, P should have ran such a serious decision by the board of directors (had he done so, it is clear that B likely would have disagreed and voted against such a change given that B resigned from the board immediately upon finding out P's actions).

E will likely successfully be able to show that P failed to act as a reasonably prudent person when P made the unilateral decision to entirely change Corp's business and engage in an ultra vires action without ever seeking the consent of the board or the shareholders.

### Business Judgment Rule

P will argue his actions were protected by the business judgment rule.

The business judgment rule provides that corporate officers and directors are not liable for mistaken business judgments that were made in good faith. This creates a rebuttable presumption that the director/officer (here, P) was acting in good faith in the best interests of the corporation. This can only be overcome by a showing of bad faith, fraud, illegality, or the failure to be reasonably informed.

P will argue he was acting in good faith and is thus protected by the BJR, because his reasoning behind the decision was to increase Corp's profits. He was not acting out of self-interest, but rather he was trying to maximize Corp's profits by entering a new market (his hope is it would be so profitable that no one would complain). He will argue that the costly changes he implemented were in a good faith attempt to expand C's business and maximize shareholder profit and is thus protected by the BJR.

Here, however, E can likely overcome the business judgment rule for two reasons: 1) there are no facts to suggest that P did any research or investigation into whether this would be a good decision for the company, so it was highly likely that P was not reasonably informed (overcomes the BJR); and 2) P appears to be acting in bad faith/slightly fraudulently because he made all of the changes unilaterally without telling the directors, in the hopes that they would not find out until it was too late and C was



already making money from the bikes. The fact that P intentionally concealed his plans for the company's new direction suggests he was acting in bad faith (and potentially even fraudulently since he failed to disclose that he was making material, fundamental changes to the business).

### Conclusion

E can derivatively sue P for breaching his duty of care owed to Corp as an officer by unreasonably and unilaterally engaging in ultra vires acts, and E can most likely overcome the business judgment rule presumption.

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

### 1. Valid Shareholder Agreement

Shareholders have the power to vote directors into office. Additionally, shareholders are able to vote for fundamental changes such as mergers, dissolutions, amendments to articles, and sale of substantially all assets. Additionally, shareholders are able to enter into voting agreements with each other. Voting agreements are contracts between shareholders to vote in a specific way. Voting agreements must be signed and must pertain to matters in which shareholders have the power to vote on. Here, Aliyah ("A") and Bowen ("B") entered into a written agreement stating that they will vote to elect themselves to the board of Corp and agree on the election of any successor board members, and if they cannot agree on a particular successor board member, they will abstain from voting. This agreement is enforceable because it is written and both A and B have the power to elect directors because of their status as shareholders. The fact that the voting is cumulative does not impact A and B's ability to enter into a voting agreement.

However, their agreement to vote for Palmer once they became directors will not be enforceable. Board members do not have the ability to enter into voting agreements with each other. Board members are charged with exercising a duty of care to act as a reasonable director under the circumstances, which means being informed on matters and having a good faith and honest belief that their actions are in the best interest of the corporation. A voting agreement among directors runs counter to a director's duty to act with care and reasonableness. Therefore, this provision of the voting agreement is unenforceable.

## 2. Is Daya Bound?

Voting agreements can be binding on successors if the successor has notice of the agreement (i.e., there is some notice on the actual stock certificate). Here, A and B stamped the certificates with "subject to agreement" on all of their stock certificates so Daya ("D") would be on notice of the shareholder agreement between A and B. Thus, she is probably bound to the enforceable terms of the voting agreement (see above). Daya could argue that she is not bound because B violated federal securities laws by selling his shares to her. A corporate insider runs the risk of violating Rule 10b5 when they trade on the basis of material, non-public information without first disclosing the information to the person they are trading with. Here, B did disclose all of the material facts to D. Thus, he likely didn't violate federal securities laws and Daya will probably be bound.

## 3. Enjoining Corp

To be valid, corporations must have a suitable purpose (as well as filing Articles of Incorporation with the secretary of state). Generally, a corporation's purpose is stated as "any lawful purpose." That is sufficient to fulfill this requirement. However, when a corporation is formed for a specific purpose, such as for the purpose of manufacturing televisions, that purpose must be strictly adhered to. If not, the director or officer has committed an ultra vires act. Remedies available for ultra vires act include an injunction if brought by a shareholder, damages for breach of duty if brought by the corporation, or dissolution if brought forth by the state and there is evidence of unlawful actions or other wrongdoing. Here, Corp was incorporated for the specific purpose of manufacturing

televisions. Corp has adhered to this purpose for twenty years. Palmer's attempt to shift the corporation into the bicycle manufacturing industry diverges from the specific purpose of manufacturing televisions that is stated in the Articles of Incorporation. This is an ultra vires act. As such, Esgar is a shareholder and can sue to enjoin Palmer's actions. Additionally, Palmer can be civilly liable to the corporation for damages caused by a breach of duty if he has committed one. The facts do not suggest that there was unlawful activity, so the state is unlikely to seek dissolution.

Palmer will argue that he had authority to take the actions he did. An agent can bind a principal if there is an agency relationship in which both parties have consented that agent is to act for the benefit of principal and principal asserts control over agent. For an officer (i.e., agent) to be able to bind a corporation (i.e., principal), there must be either actual or apparent authority to act. Actual authority can be express or implied. Express authority derives from the express agency agreement between the two parties. Implied authority is present when the agent has a reasonable belief that they have the power to take the action in question based on the principal's conduct (i.e., past dealings, necessity, emergency, etc.). Here, the facts do not state whether Palmer had actual authority to shift corporate operations into another industry. Normally, the president of a corporation has implied authority, if not actual authority, to enter into business transactions with other entities. However, because Corp has a limited purpose to manufacture televisions, it is unlikely that Palmer had a reasonable belief that he could move Corp into the bicycle manufacturing business. In fact, he reasoned that no one would care once his actions proved to be profitable. As such, Palmer probably did not have a reasonable belief based on Corp's conduct that he had the implied authority to

take the course of action he did. Absent express authority, which is unlikely given the specific purpose of Corp, he probably will not have a justification for his actions.

Palmer could also argue that he has apparent authority to act. Apparent authority is present when a third party reasonably believes that an agent has the authority to take a certain action based on the principal's conduct. Here, apparent authority is unlikely because Corp has a specific purpose, so any third party that dealt with Palmer could not have a reasonable belief that Palmer had authority to enter into the bicycle manufacturing business. Thus, Palmer likely did not have apparent authority either. Furthermore, he will be liable for the transactions because he acted without actual authority.

Palmer could argue that Corp has ratified his actions, and therefore, Esgar is not able to enjoin Palmer's actions. A board of directors can ratify a transaction if they expressly accept it by way of a board resolution, or if they accept the benefits of the transaction. Here, the facts do not state that the board has made any board resolution or otherwise accepted the benefits of Palmer's actions. Thus, the board of directors likely did not ratify Palmer's actions.

#### 4. Damages Against Palmer

##### Derivative Suit

Shareholders can bring actions directly when their rights as shareholders have been infringed. Additionally, a shareholder may bring forth a derivative suit on behalf of the corporation when the corporation is harmed because of an action taken by a director or officer. To be able to bring forth a derivative suit, a shareholder must have standing,

must be able to adequately represent the corporation's interests, must be a shareholder through the duration of the litigation, and must file a demand on the corporation's board of directors to take action. A shareholder must wait ninety days after making demand on the board to take action before filing a suit. In some states, the demand requirement is not required if making such a demand would be futile or if irreparable harm will result. A shareholder has standing to sue if they owned stock in the corporation when the transaction or conduct occurred. Here, Esgar has standing to sue because he has been a shareholder since its inception. Furthermore, nothing in the facts suggests that he won't be able to adequately represent Corp's interests.

The facts do not state that Esgar has made a demand on the Board to take action against Palmer for his acts. However, Esgar can argue that waiting 90 days until the Board decides whether it will take action or not can lead to irreparable harm to him as a shareholder. If a court accepts this argument, Esgar will be able to successfully bring forth a derivate suit against Palmer so long as he remains a Corp shareholder throughout the litigation.

Note that, in the event that Corp wins the suit, Esgar will not be entitled to any damages. Damages will be awarded to Corp. However, Esgar will be able to have his legal fees paid for.

## QUESTION 5

Hari and Wanda were married to each other for 20 years, being domiciled in State X (a non-community property state) for the first 15 years, and thereafter, until Hari's death, being domiciled in California for 5 years.

At Hari's death in 2020, two documents were submitted for probate:

1. A formal will signed by Hari and Witness One on June 1, 2018 and signed by Witness Two on June 3, 2018. Both witnesses were disinterested. This document left all of Hari's community property to Wanda, but did not mention any separate or quasi-community property.
2. An undated pre-printed will form that had printing at the top, declaring that it was intended to be a will. On the form Hari had written, in his own handwriting, "All of my separate property and 25% of my community property goes to my son, Samir." Hari signed the will form, but no witnesses signed it, and there was no date on the form.

Hari had full mental capacity throughout his life.

At his death, Hari's property consisted of:

- A. Separate property worth \$100,000;
- B. Community property – Hari's half being worth \$50,000;
- C. California land worth \$100,000, which Hari had bought with his earnings while he and Wanda were still living in State X. In 2017, without Wanda's written consent, Hari gave this land to himself and his daughter, Deepa, as joint tenants on her birthday.

What rights, if any, do Wanda, Samir and Deepa have in Hari's estate? Discuss.

Answer according to California law.

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

What rights, if any, do Wanda, Samir, and Deepa have in Hari's Estate?

Wanda will have a right to all of Hari's community property, as well as a one-half interest in the California land. Samir will have a right to all of the separate property, worth \$100,000. And lastly, Deepa will have a one-half interest in the California land.

*Hari's Death in 2020*

At his death, Hari left behind a formal will and a holographic will. The validity of each will be discussed in turn.

*Will Witnessing Requirements*

To be a valid will in California, certain formal witnessing requirements must be met. There must be: (1) a signature by the testator or someone else at the testator's direction; (2) in front of, or previously signed and then acknowledged in front of; (3) two disinterested witnesses; (4) who sign in the testator's lifetime; and (5) who understand that the document that they are signing is a will.

Here, Hari's will seems to comply with nearly all the formal statutory requirements, but there may be some doubt as to the complete adherence to formality because of the witnesses' signatures. It appears that one witness signed on June 1, 2018, and the other on June 3, 2018. These signatures are within Hari's lifetime because he died in 2020. However, there is no requirement that the witnesses sign at the same time, and no facts indicate the witnesses did not witness actual signing or acknowledgement at the same time. If the reason for these two dates is that Hari did not either sign his will in front of them at the same time or acknowledge the signature in front of them at the



same time, then the will may fail the formal witnessing requirements.

### *Substantial Compliance Doctrine*

In an event where the formalities of witnessing requirements are not perfectly met, the proponent of the will may still be able to have the will properly probated if they are able to show substantial compliance with the witnessing requirements and that the testator intended the document to be their will.

Here, if there is some doubt raised as to the witnesses' signatures, the proponent of the will should be able to show intent by Hari that this document be his will, in part because of how closely he followed the strict requirements.

Thus, this will is valid despite any perceived inadequacies in the witnessing requirements; it is valid and Wanda has interest in the will.

### *Holographic Wills*

A holographic will is a handwritten will and it does not necessarily need to follow the same formal requirements as a typed will. A holographic will is valid if it contains: (1) a signature by the testator (in whatever marks the testator intended to be a signature); (2) in the testator's own handwriting; (3) and the will contains the material provisions.

Material provisions are the beneficiaries and the gifts to be distributed. A date on a holographic will is very helpful to understanding the disposition of property but is by no means necessary to finding a valid will.

Here, the undated pre-printed will form is signed by Hari and written in his own handwriting, which satisfies the first few requirements. Additionally, the will names the beneficiaries "my son, Samir" and the gifts to be bequeathed, "All of my separate

property and 25% of my community property," which successfully handles the material provisions requirement. Samir will likely be the proponent of this will, as he would want to obtain the property, and he will have a successful claim to the estate.

However, Samir will run into problems with the gift of community property because it is inconsistent with the other will from 2018. Unless he can prove that the holographic will came after the formal will and revoked the community property clause, he will be unable to assert rights to that part of the estate.

### *Revocation*

A will or its clauses may be revoked physically, expressly, or impliedly. Physical revocation may be some physical act, such as tearing, crossing out, obliteration, destruction, or burning. Express revocation occurs where a subsequent will specifically disavows a previous will. Implied revocation occurs where a subsequent will contains clauses or gifts which are inconsistent with the previous will, such that they cannot both exist at the same time. In these cases, the latter will controls.

Here, the formal will leaves all community property to Wanda, but the holographic will leaves 25% of the community property to Samir. Because the holographic will has no date, the courts will probably not consider it to be the "second will," and will probably consider the dated will's disposition of the conflicted property as being superior. As such, the terms of the formal will were probably not "revoked".

Thus, the courts will likely distribute the community property solely to Wanda.

### *Conclusion as to Samir*

In conclusion, Samir will have a right to all of Hari's separate property at the time of his death, in the amount of \$100,000.

### *Capacity*

A testator must have proper mental capacity when making their will. This means they must: (1) be over 18; (2) be of sound mind; (3) understand the nature of their assets and the extent of their bounty (those who could possibly receive under the will); and (4) understand that they are creating a will.

Here, the facts state that Hari had full mental capacity throughout his life, so his disposition of property would be tough to challenge. The fact that he left inconsistent terms in his wills does not sufficiently demonstrate a failure to understand the nature and extent of his assets, and so a challenge to capacity.

Thus, capacity is likely a non-issue.

### *California Community Property*

California is a community property state. This means that all property obtained during the marriage is presumptively community property. All property obtained before and after the marriage is separate property. Community property includes wages of a spouse, in addition to the fruits of a spouse's efforts and labor. Furthermore, title alone nor change in nature of the property will not determine the characteristic of the asset. Where the asset is unclear, courts will "trace" the funds used to purchase a property to determine whether it is community property or not. Quasi-community property is any property obtained in a non-community property state, which would be community property had it been obtained in California.

California community property laws take effect at either death or divorce.

Here, Hari and Wanda lived in State X, a non-community property state, for 15 years,

and then eventually in California for 5 years whereupon Hari died. Because Hari died in California, certain property will be administered under California community property laws. Hari purchased California land worth \$100,000 with the earnings he made in State X. It appears that Hari had purchased this land and put title in his name alone, using funds that he earned solely on his own, which is a valid disposition of separate property in State X. However, because he retained his interest until death and he died in California, the land will become quasi-community property.

Thus, the land is quasi-community property at Hari's death.

### *Gifts During the Marriage*

Where one spouse wishes to gift community property to someone outside the marriage, the spouse must obtain the written consent of the other spouse to make such a gift.

Failure to obtain consent gives rise to the non-gifting spouse to demand reimbursement to the community, or to refuse the gift altogether.

Here, Hari gifted a one-half interest in California land to his daughter, which was quasi-community property at his death, but at the time of the gift it was separate property. Because the funds can be traced back to his separate property earnings in State X, and he had neither died nor divorced in 2017, the property was still separate property.

Thus, Hari did not need Wanda's consent to make the gift to Deepa.

### *Joint Tenancy with Right of Survivorship*

A joint tenancy with right of survivorship occurs where two or more tenants have simultaneous interest in: (1) time; (2) title; (3) interest; and (4) possession. When one joint tenant dies, the other receives the ownership interest that the other one had. This

interest cannot be disposed of by will. There are four ways to sever a joint tenancy: inter vivos conveyance, contract, mortgage in a title theory jurisdiction, and agreement.

Under the *Strawman* rule, a self-conveyance does not break joint tenancy, even though it is an inter vivos conveyance because it prevents the needless complication of someone transferring land to a third person and simply transferring it back to oneself.

Here, in 2017 Hari created a valid joint tenancy with right of survivorship with his daughter, which was within the time of the marital community (2000 to 2020). Although an inter vivos conveyance may sever a joint tenancy, it is doubtful that the self-conveyance would qualify as a severance due to the *Strawman* rule.

Under normal circumstances, at Hari's death the property interest would fully vest in Deepa as his survivor. However, because of the *Clawback* rule, this situation must be examined more closely.

#### *Clawback Rule*

Where quasi-community property owned by a deceased spouse and given away without paid-for consideration, but while retaining some ability to exercise ownership or control over the property (such as a trust or joint tenancy property ownership), the surviving spouse may "claw back" the property to their own possession as community property at the death of the spouse.

Here, Hari gave the half-ownership in the California land to Deepa as a gift for her birthday. Because he gave it to her as a gift, there was no paid-for consideration.

Further, because he maintained a one-half ownership in the property, he maintained ownership and possession of the property until his eventual death in California. Once he dies, California community property rules apply, and Wanda will be able to reclaim his

quasi-community property ownership in the property as her own because no consideration was paid in the conveyance.

Thus, Wanda owns a one-half interest in the California land as tenants in common with Deepa.

#### Conclusion as to Wanda

Thus, Wanda has an interest in all of Hari's half of the community property and a one-half interest in the California land worth \$100,000 (her share \$50,000).

#### Conclusion as to Deepa

##### *Pretermitted Children*

A child who is unintentionally left out of a will is nevertheless able to have rights in the will and inherit some of their parent's property. However, a pretermitted child will not be able to recover when: (1) the testator intentionally left the child out of the will; (2) the testator left a sizable estate to the child's parent; or (3) the child is provided for outside the will, such as with a trust.

Here, Deepa was not left anything under either will, and all of Hari's property has been disposed of, so she may challenge the will claiming she is pretermitted. This argument would likely fail as she was provided for outside the will in \$50,000 worth of land, and her mother has received a sizable estate from Hari which could be used to provide for her. Also, as mentioned above, Hari had full mental capacity so he probably did not leave her off the will unintentionally.

Thus, Deepa is likely not a pretermitted child and has no interest in the estate.

## **QUESTION 5: SELECTED ANSWER B**

### **How is community property treated in California?**

California is a community property state in which there is a presumption that all of the property that is acquired during the marriage will be considered to be community property. Upon death, each spouse may only freely transfer or will away one-half of the community property. Separate property is all the property that was acquired either before marriage, after marriage, or as a result of earnings of separate property. A spouse has full disposition of this property upon his death.

Here, Hari has \$50,000 worth of community property and the distribution is discussed below. Hari also has \$100,000 of separate property, which is discussed in its disposition below.

### **Was there a valid will in 2018?**

A valid will has the following requirements: (1) there must be a writing concerning the disposition of property upon death; (2) the writing must be signed by either the testator or by someone in the testator's presence and at their direction; (3) there must be at least two disinterested witnesses who were both present contemporaneously at the time that the testator signed the will, and they must then (4) both sign the will at some point during the testator's lifetime; and (5) they must understand when they are signing the will that the document that they are signing is the testator's will. A valid will does not have to dispose of all of a decedent's property, as any remaining parts of the property will go through intestacy. Additionally, even if there was not a valid witness requirement that was met, after 2009, as long as the proponent of the will can show by clear and

convincing evidence that the testator intended the document to be his will at the time that he signed it, then the will is still able to be probated.

Here, there was likely a valid will from Hari that he made on June 1, 2018 because there was a writing concerning the disposition of his property that he signed on June 1, 2018, and the facts state that the witnesses both signed the will before Hari's death in 2020, and because the last signature was on June 3, 2018. Additionally, the facts state that Hari was competent at all times when he disposed of his property. Even though Samir might argue that there was nothing in the facts to indicate that both of the disinterested witnesses were contemporaneously present at the time that the will was actually signed by Hari, even if they were not both present, given that Hari was of full mental capacity through his life, the proponent (Hari's wife) would likely be able to show that Hari intended the document to be his will at the time that he signed it.

Thus, here, Hari had a valid will in 2018.

### **Was there a valid Holographic will?**

California allows testators to use holographic wills as wills and as codicils; all that they require is that the material terms of the will must be in the testator's handwriting and that the will be signed by the testator in his own writing. The material terms are usually considered to be who is getting the property and what amount of the property they are getting. Holographic wills do not have to dispose of all of the decedent's property in that instrument and they do not have to be dated. However, if the holographic will is not dated and there is another will that conflicts with the undated holographic will, then the dated will is likely to prevail unless there can be clear and convincing evidence that the other will was made after.



Here, it is likely that Hari's undated will on the pre-printed will form would have been a valid will because Hari wrote the material terms of the will in his own handwriting, stating that all of his separate property was going to his son and that 25% of his community property would be going to his son as well. The holographic will was signed by Hari in his own writing. However, because the holographic will is undated there will be a problem with the conflicting terms in the holographic will and the 2018 will regarding who gets the community property because the 2018 will that is dated states that Wanda gets all of the community property.

Therefore, unless Samir can rebut the presumption and show clear and convincing evidence that the undated holographic will was created after the 2018 will, Samir will only take the separate property gift under the valid holographic will.

If the holographic will was shown by clear and convincing evidence to be made after the 2018 will then who would take the 25% of the community property?

A party may revoke their will by a subsequent will, codicil, or valid holographic will as long as they can show that they had an intent to revoke, and as long as they followed the proper will requirements. Then any subsequent will, codicil, or holographic will that is made that directly conflicts with a prior will takes effect over the prior inconsistent provision.

Here, in the (unlikely) event that Samir could prove by clear and convincing evidence that Hari made the holographic will after the 2018 will, then the subsequent holographic will would revoke the 25% gift of community property to the mother.

**Who would get the Quasi-Community Property Real Property Upon Hari's Death?**

### What is Quasi-Community Property?

Quasi-community property is all property that was acquired while living in another state that would have been considered to be community property had the spouses been domiciled in the state of California at the time of the acquisition of the property. If a spouse has quasi-community property and then dies while domiciled in California, during the spouse's lifetime, the quasi-community property will be treated as separate property. However, upon dissolution it will be treated as community property and, upon death, all personal property will be treated as community property. All real property will be governed by the state in which the property resides.

Here, the house would have been treated as quasi-community property because the house was purchased by Hari with his earnings, which would be presumed to be community property as stated above. Not only did Hari purchase the property with his marital earnings, but he also purchased the property while married and living in State X. Because he purchased the property while married and living in another state, it would have been considered to be community property had they been living in California at the time of purchase, and thus the property would be considered to be quasi-community property at death, but separate property during his lifetime.

### Was there an illusory transfer of the quasi-community property house during Hari's lifetime?

Generally, QCP is treated as separate property during a marriage, which means that the owning spouse is free to sell or manage the property how they would like. However, there is an exception if there is an illusory transfer. There will be an illusory transfer of quasi-community property if: (1) the decedent dies while domiciled in the state of

California; (2) the spouse sold the property for less than its fair or reasonable value or gave it away; (3) did so without the other spouse's consent; and (4) the decedent spouse retained some control over the quasi-community property by “keeping their hooks in the property,” either by retaining some sort of right of reentry in the property, joint title in the property, or retaining some other usage. If there is an illusory transfer of quasi-community property, then the non-transferring spouse can demand back up to one-half of the QCP after the death of the decedent spouse. If there is a right of survivorship that is granted to another party, which gives joint title to both holders and then avoids probate altogether, courts usually consider this to be a means to retaining control over the property.

Here, Deepa is likely going to try and argue that she has a right to the real property in California because Hari granted himself and Deepa a right of survivorship on her birthday. Thus, Deepa would claim that the real property will pass over probate and go straight to her upon Hari's death. However, Wanda is likely to argue that Hari's transfer of the real property was an illusory transfer because: first, Hari died while domiciled in California; second, Hari gave the property away to Deepa as a gift and thus it was given away for less than substantial value; third, Wanda did not provide her consent or agreement to the transfer of the real property. Thus, Wanda would claim that, under the illusory transfer rules, she is entitled to one-half of the real property located in CA and thus should get \$50,000 worth of the land. Given that the property was given away for free and without Wanda's consent, the court is likely to agree with Wanda that this was an illusory transfer.

Thus, there would be an illusory transfer and Wanda and Deepa would each get one-

half of the cabin, both getting \$50,000 and they will each own the property as tenants in common.

**Who gets what share of the property?**

In light of rules stated above, the following is the likely disposition of the property: (A) First, regarding the \$100,000 of separate property, this will all go to Samir through the holographic will; (B) Second, regarding Hari's \$50,000 of community property, this will all go to Wanda, unless it can be shown by clear and convincing evidence that the holographic will was made after the 2018 will; and (C) third, regarding the California property, one-half (or \$50,000) worth will go to Wanda and one-half (or \$50,000) worth will go to Deepa.