



California Bar Examination

**Essay Questions
and
Selected Answers**

February 2026



ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2026

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2026 California Bar Examination and two selected answers for each question.

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

Question Number	Subject
1.	Real Property
2.	Contracts
3.	Professional Responsibility
4.	Civil Procedure
5.	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 situation 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

Olivia owned a house in Havenwood, a subdivision with 15 homes on large wooded lots. The developer of Havenwood had conveyed each lot, including Olivia's, by a recorded deed stating that the conveyance was for "residential purposes."

When Olivia died last year, she bequeathed a life estate in her house to Linda, leaving the remainder to Reed. Linda already owned a house and wanted to use Olivia's previous house as a florist shop instead. Shortly after taking title, Linda cut down valuable mature trees and privacy hedges on the lot to make room for parking. Linda then obtained a construction permit to renovate the house and a license to operate her business. Linda's renovation reduced the square footage of the house from approximately 5,000 square feet to 2,000 square feet, which significantly reduced the value of the structure.

Nancy, one of Linda's neighbors in the subdivision, threatened to sue Linda for violating the residential covenant in Olivia's original deed. However, Linda pointed out to Nancy that (i) five other businesses have been operating out of five homes in the subdivision for over 10 years, including two coffee shops, two clothing stores, and a dry cleaner, and (ii) neither Nancy nor other lot owners had complained previously.

1. What claims and remedies, if any, may Reed reasonably pursue against Linda? Discuss.
2. Were the developer's residential deed restrictions valid? Discuss.
3. Will Nancy succeed in her claim against Linda? Discuss.

QUESTION 1: SELECTED ANSWER A

R's Claims and Remedies Against L

Present and Future Interest

Linda (L) has a life estate, whereas Reed (R) has a future remainder interest in the land. Life estates are a present interest that last for the duration of the life tenant's life. Life tenants have a duty to not commit waste on the land. Waste can be voluntary, permissive, or ameliorative. Permissive waste is reduction in the value of land due to negligently failing to maintain the property, and is likely not an issue here. Voluntary and ameliorative waste are analyzed below.

Future remainder interests may be subject to the rule against perpetuities, under which future interests are not valid if they are not certain to vest within 21 years of a life in being at the time the conveyance was made. That will not be an issue here because the remainder interest will vest at L's death, thus it will vest within 21 years of a life in being (L) that is present at the time the conveyance was made.

Voluntary Waste

Voluntary waste by a life tenant is intentional changes to the land that reduce the value of the land. Here, L cut down valuable mature trees and privacy hedges without obtaining the consent of R, and as the facts indicate, this is a change that R does not approve of. L may argue that by replacing these trees and hedges with parking, she has actually improved the land, but as described below, ameliorative waste (that is, waste that increases the value of the land) is also waste that a life tenant may be liable for. In any case, it is not clear that the value of the entire parcel has actually been improved. The facts indicate that the value of the structure, which presumably does not include the parking area, was reduced in value. Thus, given the reduction in the value of the structure, as well as the fact that L has gotten rid of trees and hedges that we are told are valuable, there is likely ample evidence to show voluntary waste.

Ameliorative Waste

Ameliorative waste is a change that results in an increase in value of the property, but is still considered waste to the extent it constitutes a material change in the condition of the property without the consent of other interest holders of the property. Here, L would likely argue that the parking improvement and renovation of the house are actually benefits to R. But even so, because these changes have considerably changed the nature of the property, they will constitute ameliorative waste.

Damages

The most likely remedy R will get from a court is damages to compensate R for the changes made to the land. With respect to the structure, we know that the value was reduced, so R will likely obtain that amount as compensatory damages. Damages can

only be granted if the plaintiff can show causation, foreseeability, certainty, and that they are unavoidable. These requirements are likely going to be satisfied here. Causation is present because the value of the structure likely wouldn't have changed but for the changes made by L (although a damages expert may have to separate out any market effects contributing to the change in value from the change due to L's "improvements."). These damages are also foreseeable because L would have known at the time that any major changes she would make to the property could impact its value. The damages are likely to be certain enough because the court will use fair market value before and after the changes. They are also unavoidable on R's part because he was not given any say in whether the changes should be made.

TRO / Injunction

Apart from damages, R might seek to get a temporary restraining order and/or a preliminary injunction to get L from making any further changes or to get her to restore the property to its previous state. To obtain a TRO, R would have to show a likelihood of success on the merits, irreparable harm, balance of equities, and public interest. An injunction requires the same factors to be shown, and additionally requires notice to be given to the other side (a TRO can be granted ex parte in certain circumstances, although there is no emergency situation here that would warrant an ex parte TRO). A court is unlikely to grant a TRO or injunction on these facts because R can be adequately compensated with damages (thus irreparable harm will not be satisfied). Moreover, a court will likely be reluctant to make L tear down the improvements made. The negative TRO or injunction (to stop further changes) is more likely, however, and the court may order L to not make any further changes without R's consent.

Validity of Deed Restrictions

Valid Deed

As a preliminary matter, for the restrictions on the deed to be valid, the deed itself has to be valid, which requires the following: a writing, intent, delivery, and acceptance (which is usually presumed). There is nothing in the facts to indicate that the original deed granted by the developer was not valid. Additionally, the deed here was recorded, which creates a presumption of delivery and intent.

Covenant

A covenant imposes a restriction on a deed, breach of which is usually compensated by damages. To be valid, covenants require privity, writing, intent, notice, and must touch and concern the land. Both horizontal and vertical privity may be satisfied here depending on who is suing L because the developer conveyed the land to Olivia (horizontal privity) and Olivia then bequeathed the property to L via a life estate (vertical privity). However, if Nancy (N) is the one enforcing the covenant, there is no privity between N and L. But N can sue on an equitable servitude or common scheme theory, as described below.

The writing and intent requirements are likely satisfied because the restriction is

expressly recorded in the deed. Similarly, notice is satisfied because the recording of the deed provides constructive notice. Additionally, L is a donee and not a bona fide purchaser, so it is likely that a court would not even require notice to uphold the restriction as applied to her.

Finally, the restriction touches and concerns the land because it is a condition imposed on how the land can be used.

Equitable Servitude

Equitable servitudes are similar to covenants but do not require privity, and are enforced in equity (and are therefore often used where the plaintiff seeks equitable remedies rather than damages). If the court finds that privity is lacking, the restriction can always be enforced as an equitable servitude. To be valid, equitable servitudes also require writing, intent, notice, and touch and concern. As noted above, all these requirements are likely satisfied here.

Common Scheme / Implied Reciprocal Servitude

Finally, the restrictions here likely also form a common scheme or implied reciprocal servitude because the residential purposes restriction was present in the deed of each of the 15 lots. To be valid, common schemes usually require intent and notice. Intent is present here because of the express condition in the original deeds. Notice is present because these deeds were recorded, thus providing constructive notice to future bona fide purchasers (although, as mentioned above, notice may not even be required as to L because she is not a purchaser for value).

Common schemes are typically enforced for negative restrictions, that is a prohibition on certain uses, rather than requiring a particular use. That is satisfied here because the restriction is a negative restriction against any use that is not residential.

Common schemes can be enforced by the original grantor but also by anyone else bound by the common scheme, which is why it is likely the theory N will use.

N's Claim Against L

N is likely to be able to show that there is a valid deed restriction that should bind L. Nevertheless, L may prevail because of equitable reasons because there are various other businesses operating in the subdivision and the court may find it unjust to enforce the restriction only against L.

Standing

As described above, N can enforce the common scheme against L because she is also part of the same subdivision and bound by the same restriction.

Termination by Estoppel

The success of N's claim depends on whether the common scheme or equitable servitude remains. L will likely argue that the restriction is no longer valid because there

are five other businesses in the subdivision that have been operating for over ten years. Thus, L may have reasonably believed that the restriction was no longer being enforced. Estoppel usually requires detrimental reliance on an action. Here, L has detrimentally relied because she spent money to adapt the use of the property from residential to a business. However, there is no active affirmative act on which she could have relied. Rather, her theory would be that she relied on the neighbor's lack of action against other business owners, which may not be a strong argument for termination by estoppel.

Termination by Prescription

An alternative argument L might make to argue that the restriction is no longer valid is that the common scheme / equitable servitude has terminated by prescription because five other businesses have been operating for over ten years (which is longer than the prescription period in California, but may not be enough under common law).

Termination of a restriction by prescription requires open and notorious use, hostile use, and continuous use (exclusive possession is not required in this context). L will argue these requirements are satisfied by the fact that these businesses have been openly operating for a continuous period of over ten years, and are clearly violative of the residential restriction.

Termination Due to Changed Conditions

In rare situations, a court may also deem a restriction terminated for equitable reasons, such as changed conditions. L might argue that the fact that all these other businesses have been operating in the area has effectively changed the nature of the subdivision and it would be inequitable to apply the restriction to her. Moreover, applying the restriction to only her and not the others may lead to other issues, such as an equal protection challenge. Thus, a court will likely be reluctant to only prohibit L's use, but it will also likely not want to stop multiple long-running businesses from operating all of a sudden. Thus, although equitable reasons to terminate a restriction are rarely used, it may be appropriate here.

Effect of License

L will also likely point to the fact that she obtained a valid license to operate her business. Although that does not go toward whether she is in violation of the deed requirements, the court might consider that forcing her to abandon her business use might amount to forfeiture of a valid property interest. Thus, although the license does not directly help L as to whether there is a valid restriction, it will likely have an impact on the equities and make it more likely that the court will rule in her favor.

QUESTION 1: SELECTED ANSWER B

1. What claims and remedies, if any, may Reed reasonably pursue against Linda?

Life Tenant Duties

Life tenants owe certain duties to the property they have a life estate in. These include the duties not to commit waste and to pay taxes. Here, as set forth below, Reed may pursue claims against Linda regarding her committing waste on the property in which she holds a life estate.

Voluntary Waste

Voluntary waste occurs when one engages in some intentional destructive conduct with respect to the land. Voluntary waste can include damaging or destroying the premises or removing other valuable resources from the land. A life tenant cannot commit voluntary waste of the parcel in which they have a life tenancy. They must maintain the land in a reasonable state of repair for the benefit of the remainder interest holder. A life tenant generally cannot make any substantial changes to the land unless all remainder holders consent or do not object, or if it is otherwise necessary to maintain the land. One exception for when a life tenant may remove valuable resources from land is when the land they have a life estate in already has open mines. This exception is known as the open mines exception, and a life tenant is entitled to continue removing minerals from the open mines.

Here, Olivia bequeathed a life estate in her house to Linda and left a remainder to Reed. Linda owned a house already and wanted to operate the house as a florist shop, so Linda cut down valuable mature trees and privacy hedges on the lot to make room for parking. Further, she obtained a construction permit to renovate the house and a license to operate her business, whereafter her renovations reduced the square footage of the house from 5,000 square feet to 2,000 square feet. The removal of the privacy trees and hedges would likely constitute voluntary waste. While it is not clear from the facts whether these trees were particularly valuable, the facts state they were "mature." This indicates that the trees and privacy hedges were likely a part of the premises for a long period of time. Thus, for Linda to cut all of them down for no other reason other than to make room for parking, this likely shows that she intentionally destroyed this portion of the land which constitutes voluntary waste.

Furthermore, the fact that Linda obtained a permit to renovate the premises is not determinative. The facts show that Linda's renovations decreased the square footage of the house from 5,000 square feet to 2,000 square feet. Linda's renovations removed over half the square footage of the house. There is no indication that Reed had consented to or approved these changes. Thus, Linda committed voluntary waste by removing the trees and hedges, as well as by renovating the house so as to remove

over half the square footage.

Linda committed voluntary waste here and Reed likely has multiple potential remedies, discussed below.

Permissive Waste

Permissive waste occurs when a life tenant or other interest holder negligently maintains the premises and allows it to fall into a state of disrepair.

Here, Linda's actions in removing the hedges and trees as well as renovating the home and reducing the square footage were willful. Thus, it is more likely she committed voluntary waste instead of permissive waste because there is no indication that she negligently maintained the premises or allowed it to fall into a state of disrepair.

Ameliorative Waste

Ameliorative waste occurs when a life tenant or other interest holder makes valuable improvements to the land. These improvements are usually done to reflect changing neighborhood conditions. A life tenant is not permitted to make these changes or improvements generally without the consent of the future interest holder. However, there are generally no damages in this situation because the value of the property increases, however a remainder interest holder may be able to obtain an injunction.

Here, Linda may argue that she has committed ameliorative waste rather than voluntary waste. This argument may be based on the fact that Linda attempted to change the premises to operate a business out of it. Further, Linda may argue that her improvements reflect changing neighborhood conditions given the fact that there are five other businesses operating out of five homes in the same subdivision. However, these are not the type of changes that would permit a life tenant to improve the premises. Additionally, it is unlikely a court would find that Linda improved the premises by demolishing over half the square footage of the house.

Thus, Linda's potential argument that she committed ameliorative waste rather than voluntary waste likely would not succeed.

Remedies

Preliminary Injunction

A preliminary injunction issued by a court may be either mandatory or negative. A mandatory preliminary injunction requires a defendant to do something whereas a negative injunction requires a defendant to refrain from doing something. The plaintiff must be able to show that they are likely to succeed on the merits, that the hardships balance in the plaintiff's favor, that they have an inadequate legal remedy, that the court could feasibly enforce the injunction, and that the public interest weighs in favor of receiving the injunction.

Here, Reed may seek an injunction to prevent the further destruction of the premises. Reed also may seek an injunction to attempt to have Linda restore the premises to their initial state. While Reed may seek a preliminary injunction, his best option would be to seek a permanent injunction as discussed below. As more fully discussed below, the hardships likely weigh in Reed's favor because his interest in the land is being substantially affected. Further, Linda committed voluntary waste and therefore Reed would be likely to succeed on the merits. Reed does not have an adequate legal remedy for the waste because the land is unique. A court likely could feasibly enforce the decree permitting further destruction. Furthermore, the public interest likely weighs in favor of Reed here to protect remainder interest holders.

Reed would likely be successful in seeking a preliminary injunction but his best option would likely be to seek a permanent injunction, which would only be obtained after a full trial on the merits.

Permanent Injunction

A permanent injunction requires a plaintiff to show that they will succeed on the merits after a full trial. Further, for a permanent injunction to be issued, a plaintiff must show that the balancing of hardships weigh in the plaintiff's favor, that they have an inadequate legal remedy, that the court could feasibly enforce the injunction, and that the public interest favors issuing the injunction.

Success on the merits

Here, Linda committed voluntary waste by removing mature trees and hedges and as well as by reducing the size of the house from 5000 sq. ft. to 2000 sq. ft. for her renovations. Linda is only a life tenant and there is no indication that she received consent or permission from Reed, the remainder holder in the home, to make these changes. Reed would be likely to succeed on the merits of his claim although a full trial has not been held yet to fully determine this.

Hardships

Here, Linda's hardships in not being able to commit additional waste or renovations would be that she would be unable to run her business as desired if the court ordered her to restore the land. Reed's hardships here are that he is unable to enjoy and use the land as it was originally given to him as a remainder interest by Olivia. The hardships likely weigh in Reed's favor.

Inadequate legal remedy

An inadequate legal remedy refers to a plaintiff not being able to be put in the best position they can be with money damages. A legal remedy is inadequate if land is involved or unique goods are involved. Here, the land is involved and therefore is unique. While Reed may be compensated with damages for the destruction that already occurred, this is not an adequate legal remedy. Further, if Linda committed further waste then Reed's interests in the property would be diminished.

Feasibility of enforcement

A court could likely enforce a decree prohibiting Linda from creating further destruction. While a court likely would not be able to feasibly enforce the repair of the premises to their original state, damages may be permitted instead.

Public interest

The public interest generally favors the use of property but also the preservation of the property for the remainder holders. Thus, committing any kind of waste against a remainder interest holder's property is usually actionable. Here, the public interest would likely weigh in favor of Reed.

Reed would likely be successful in obtaining a permanent injunction to prevent future waste.

Damages

Damages seek to put the plaintiff in the position they would have been in had the waste not been committed. They may be in the amount of the diminution in value of the premises.

Here, Reed would likely be able to seek damages from Linda for the destruction of the house and the premises. He would likely be successful in obtaining monetary damages in the amount of the waste committed by Linda to the premises.

Conclusion

Reed may seek a permanent injunction and damages against Linda for committing voluntary waste on the premises.

2. Were the developer's residential deed restrictions valid?

Restrictive Covenant

Restrictive covenants are covenants which allow a landholder to do something, or require them to refrain from doing something. Restrictive covenants run with the land. In order for a subsequent possessor of a servient parcel to be bound by a restrictive covenant, the burden must run with the land. Restrictive covenants are generally valid and enforceable so long as they are not against public policy.

Burden to run

In order for the burden to run on a particular parcel of land, there must be a showing that (1) the covenant was in writing, (2) the successors in interest intended for them to be bound by the covenant, (3) the covenant touches and concerns the land, (4) there is horizontal and vertical privity, and (5) they had notice of the covenant.

Writing

Here, there was a residential covenant in Olivia's original house deed which stated the conveyance of the house in the subdivision was for "residential purposes." This indicates that there was a writing in the original deed.

Intent to be Bound

Here, the fact that the subdivision where the house is located had 15 other homes on large wooded lots and they all contained a restriction for residential purposes indicates the intent to be bound by the same covenant for all parties.

Touches and Concerns

Here, the restriction touches and concerns the land because it directly affects how the land may be used. Thus, the restrictive covenant touches and concerns the land.

Horizontal Privity

Horizontal privity refers to the initial relationship between the parties of the covenant, such as grantor grantee. Here, Olivia purchased the home originally from the developer and thus there was horizontal privity.

Vertical Privity

Vertical privity refers to the entire interest being the same as the previous interest holder. Here, Olivia had vertical privity as she took the entire estate from the developer when she purchased the home. Thus, there was vertical privity.

Notice

Here, Olivia had notice of the original restriction because it was in the recorded deed. Notice may be either record, inquiry, or actual notice. While an individual is not required to read the record of the chain of title, they are charged with the knowledge of whatever the record reveals.

The original covenant was likely valid and may be enforceable.

Conclusion

The restrictive covenant was likely valid.

3. Will Nancy succeed in her claim against Linda?

Equitable Servitude

An equitable servitude may be enforced when an individual seeks to enforce the terms of a restrictive covenant via an injunction. There must be a showing that (1) the covenant was in writing, (2) intent to be bound, (3) touches and concerns, (4) notice.

Writing

See rule above. The covenant was in writing.

Intent

See rule above. Here there was intent to be bound based off the fact that all houses in the subdivision had the same restriction.

Touches and Concerns

Here, the covenant touches and concerns the land, because it affects how they can use the premises.

Notice

Here, Linda had record notice of the restriction. The original covenant was in Olivia's deed. This provides record notice as it was in the chain of title. Linda is not required to search the record but she will be bound by what the record reveals.

Here, Nancy may likely seek to enforce an equitable servitude against Linda for the use of her property because

Changing Neighborhood Conditions

When neighborhood conditions have substantially changed, a restrictive covenant may not be enforced to the extent it contradicts with the conditions.

Here, Linda may argue that the neighborhood conditions have substantially changed since the original deed and restrictive covenant and thus she should be able to operate the house as a florist shop. Linda will argue that five other businesses have been operating out of five homes in the subdivision for over 10 years, which includes two coffee shops, two clothing stores, and a dry cleaner and no one previously complained. This may be a valid defense for Linda as she can show the neighborhood conditions were changing and thus she should be able to operate her florist shop.

Acquiescence

An individual may be able to show that the restrictive covenant should not apply to them because there was acquiescence with others using the premises in ways that would otherwise violate the covenant.

Here, Linda may argue that five other businesses nearby had been operating for over ten years in violation of the covenant, which includes two coffee shops, two clothing stores, a dry cleaner, and no one else complained. This argument would likely be successful because in allowing these other businesses to operate for a period of ten years in violation of the covenant.

Thus, Linda will likely have a valid defense in acquiescence.

Conclusion

While Nancy may attempt to enforce an equitable servitude against Linda regarding the terms of the restrictive covenant, Linda will likely have a successful defense in showing either changed neighborhood conditions and acquiescence in the other residences operating as businesses for a period of 10 years.

QUESTION 2

Sam is a well-known dealer in valuable musical instruments, including antique violins. Betty owns a high-end music store and has occasionally purchased stringed instruments from Sam.

Sam telephoned Betty and told her that he had a violin for sale that was made by Enrico Rocca in the early nineteenth century. Betty agreed to buy it for \$200,000. Sam signed and then emailed his standard form sales contract to Betty. The contract stated in part, "Seller agrees to sell and Buyer agrees to buy the following product: violin for the purchase price of: \$200,000 ." Sam filled in the words "violin" and "\$200,000" in his own handwriting; the remaining pages of the contract were preprinted. Betty signed, dated, and returned the contract to Sam along with payment. Sam then shipped Betty the violin.

When Betty received the violin, she sent it to an expert appraiser. A week later, the appraiser told Betty that laboratory tests confirmed that the violin was not a genuine Rocca but, rather, a skillfully made recent replica worth around \$5,000. Betty immediately telephoned Sam and told him that she would return the violin and expected her money back.

Sam was flabbergasted. He sincerely believed the violin to be a genuine Rocca. Sam told Betty that she could not return the violin. Sam pointed out that their written contract specified that the violin was "sold as is, without warranty of any kind, express or implied." Betty protested that Sam had told her over the telephone that the violin was a genuine Rocca. Sam pointed out that their written contract also included a clause stating, "This written contract contains the entire agreement between the parties and supersedes any and all prior written and/or oral agreements." Furious, Betty sued Sam for breach of contract, seeking rescission or damages.

What arguments will Betty likely make to support her claim, what arguments will Sam likely make in response, and who is likely to prevail? Discuss.

QUESTION 2: SELECTED ANSWER A

Applicable Law

The Uniform Commercial Code (UCC) governs contracts for the sale of tangible movable goods, while the common law governs contracts for the sale of services. Here, the contract was for a violin, which is a tangible good. Therefore, the UCC will govern this contract.

Merchants under the UCC

When one or both parties are merchants in a contract governed by the UCC, special rules that apply only to merchants will apply. A party is a merchant if they regularly deal in the sale of the type of goods in the contract, or if they are a business engaged in a commercial transaction. Here, Sam is a dealer of valuable musical instruments, so he likely regularly deals in the sale of violins like the Rocca. Betty owns a music store, which is a business, and she appears to be buying the violin for her business. Therefore, both parties are merchants, and the special rules governing merchants will be applied below.

Contract Formation

For a valid contract to be formed, there must be an offer, acceptance, consideration, and a lack of defenses.

Offer

An offer is an objective manifestation on the part of the offeror to create the power of acceptance in the offeree. Here, Sam told B that he had a violin for sale. Therefore, S made a valid offer.

Acceptance

An acceptance is an objective manifestation on the part of the offeree to be bound by the offer. Here, B told S that she agreed to buy the violin, and she signed and returned the contract to S. Therefore, B made a valid acceptance.

Consideration

Consideration is a bargained for exchange in the legal position of the parties. Here, S agreed to give the violin to B, and B agreed to give \$200,000 to S. Therefore, consideration exists for this contract.

Contract Defense: Mutual Mistake

Mutual mistake is a defense to contract enforcement when both parties are mistaken as to an essential element of a contract. Here, B and S both sincerely believed the violin to be a genuine Rocca. S communicated his sincere belief to B. Likely, neither party would

have engaged in the transaction if they knew the truth about the violin, meaning that this term of the contract was essential. Therefore, it is likely that a mutual mistake existed, and B can assert this defense to the enforcement of the contract.

Contract Defense: Unilateral Mistake

Unilateral mistake exists when one party is mistaken as to an essential element of the contract. It can form a defense when the other party knew of the mistake and either caused or allowed the mistake to occur, and the innocent party did not bear the risk of the mistake. Here, B may try to argue that there was a unilateral mistake, because she was induced into entering into the contract based on the mistaken belief that the violin was a Rocca. However, the facts state that S sincerely believed the violin to be genuine. Therefore, B is unlikely to be able to prevail on the defense of unilateral mistake because she was not the only mistaken party.

Contract Defense: Non-fraudulent Misrepresentation

Non-fraudulent misrepresentation occurs when a party makes an innocent or unknowing misrepresentation of a material fact that induces the other party to enter into the contract, and the other party justifiably relies on the misrepresentation in entering into the contract.

Here, S represented to B that the violin was a Rocca, which would have been worth \$200,000. Although this statement was innocent because of S's sincere belief, it was incorrect. The statement was certainly material because the violin is only worth \$5000 as a replica, which is significantly less value, and it induced B to enter into the contract and pay \$200,000. B justifiably relied on S's reputation and expertise as a well-known dealer from whom B has purchased instruments in the past, and that is why she entered into the contract.

Therefore, Betty will likely be able to prevail on the contract defense of non-fraudulent misrepresentation.

Sam's Contract Defense: Statute of Frauds (SOF)

Whether the SOF applies

The SOF applies to contracts governed by the UCC for the sale of goods of at least \$500. When the SOF applies, the contract must be in writing, signed by the person against whom enforcement is sought, and contain all material terms, in order to be enforceable.

Here, the contract is in writing because it was emailed from S to B. However, it does not appear to have Sam's signature, because the entire contract was preprinted except for the words "violin" and "\$200,000", and the facts don't indicate that S signed the contract. Therefore, the SOF is likely not satisfied by this writing.

Exception to the SOF

However, a contract may nevertheless be enforceable if the SOF is not satisfied if, in

the case of a sale of goods, one party has fully performed. Here, Betty's performance under the contract was to pay \$200,000. She made full payment to S at the time she returned the contract to him. Therefore, because Betty has performed fully under the contract, this exception to the SOF applies and B can enforce the contract against S.

Sam's argument: Parol Evidence Rule (PER)

The Parol Evidence Rule prohibits the introduction of evidence or discussions to contradict a written contract when the discussions or evidence occurred prior to the writing. If a contract is fully integrated, no evidence to change or contradict the terms of the written contract is permitted. If a contract is partially integrated, evidence is permitted to the extent that it does not contradict the written terms of the contract.

Here, S will argue that the PER applies because the contract is fully integrated by virtue of an express merger clause, which states "this written contract contains the entire agreement . . . and supersedes any and all prior written/oral agreements." Because the contract is fully integrated, the PER will apply and bar evidence of prior discussions, unless an exception applies.

PER Exception: Ambiguity

Notwithstanding the PER, evidence is admissible if the terms of the contract are ambiguous in order to clarify the terms. Here, the contract was for a "violin." B will argue that this term is ambiguous because it does not state exactly which violin is to be sold. S will argue that the term is not ambiguous because the term just means that he will sell any violin to B and the contract does not require a specific violin. While this is a close call, B is more likely to prevail on this argument and therefore the evidence of past discussions can be admitted.

PER Exception: Misrepresentation

Notwithstanding the PER, evidence is admissible to show mistake or misrepresentation underlying the terms of the contract. Here, B will argue that the defenses of mutual mistake, unilateral mistake, and/or non-fraudulent misrepresentation exist, and the PER doesn't bar evidence of those defenses. See discussion of those defenses in the "Contract Defenses" section above. Therefore, B will be likely to be allowed to introduce evidence of the discussions to show these defenses, notwithstanding the PER.

Sam's argument: disclaimer of Contract Warranties

Express Warranty

An express warranty is a promise as to the character of the goods that is made by express words or communication by the seller. An express warranty cannot be disclaimed by a general disclaimer. Here, B will argue that S made an express warranty that the violin is a Rocca from the 19th century because that is what he told her

expressly. S will argue that this is not a warranty because he did not use the term “warranty” in making the statement, but because he told her that it was a Rocca, the statement will likely be deemed a warranty. Even though the contract contains a warranty disclaimer, an express warranty cannot be disclaimed. Therefore, the disclaimer language in the contract is invalid to disclaim this express warranty. B is likely to succeed in claiming a breach of contract based on violation of express warranty.

Implied warranty of merchantability

An implied warranty of merchantability applies to the sale of all goods, and warrants that the good is fit to be used for its intended purpose. This implied warranty can be disclaimed by a clear writing of an “as is” statement. Here, because the violin is a good that is being sold, the implied warranty of merchantability applies. In addition, as discussed above, S is a merchant. However, because S included an “as is” statement in the contract, and B signed the contract, the waiver of the warranty is valid. B cannot prevail on a claim of breach of the implied warranty of merchantability.

Implied warranty of fitness for a particular purpose

The implied warranty of fitness for a particular purpose applies when a buyer is buying a good for a particular purpose, and the seller knows or should know that the buyer is relying on the seller’s special expertise in selecting the good. This implied warranty can be disclaimed by a clear, conspicuous writing only.

Here, B will argue that this implied warranty applies, because B was buying the violin for the particular purpose of using or selling it as a Rocca. Because S told B it was a Rocca, S knew or had reason to know that B was relying on his expertise as a “well-known dealer” in valuable musical instruments. Therefore, this implied warranty likely applies.

However, the contract specified that the violin is sold “without warranty, express or implied.” Although the facts don’t state in what form this disclaimer took, it is reasonable to assume that the disclaimer was not hidden or made difficult to find or read in the contract. Therefore, because there was a clear, conspicuous disclaimer of warranty, the waiver of this warranty is valid, and B cannot prevail on a breach of implied warranty of fitness for a particular purpose.

Breach of contract: perfect tender

Under the UCC, performance of a contract requires perfect delivery and perfect tender. The buyer has a right to inspect goods upon delivery, and if the goods do not conform to the contract, the buyer can reject the goods.

Here, for the reasons stated in the “Applicable Law” section above, the UCC applies, and perfect tender is required. Assuming that B is able to establish the validity of the contract for the reasons discussed above, then S breached the contract by tendering a

\$5,000 replica rather than an original Rocca. Betty immediately sent the goods for appraisal when she received it, so she validly exercised her right to inspect the goods. Once she found out that the tender was not perfect, she promptly notified S that she was rejecting the violin and wanted her money back. Therefore, B will be able to establish that S breached the contract because there was not perfect tender and B exercised her right to inspect and reject.

Contract Remedy: Damages

Compensatory Damages: Expectation

Compensatory damages include expectation and incidental damages. Expectation damages are damages intended to put the party in the same position as if the contract had not been breached; i.e., to give the party the benefit of the contract. Here, B entered into a contract for a Rocca violin worth \$200,000, but instead she received a replica worth \$5000. Therefore, B lost \$195,000 on the contract, and this amount could be recovered in expectation damages.

Compensatory damages: Incidental

In addition, as part of compensatory damages, B may be able to obtain incidental damages, which are damages incurred as a result of trying to remedy the breach. B may argue that her incidental damages include the cost of having the violin appraised. However, S will correctly argue that, if he had shipped a genuine Rocca, B would have incurred this cost anyways. Therefore, B cannot recover the cost of the appraisal as incidental damages. B may be able to recover other incidental costs, such as the cost of returning the violin to S, since that cost was incurred as a result of the breach.

Reliance Damages

Reliance damages are damages incurred in reasonable reliance on a contract. However, a party must choose between reliance damages and compensatory damages, and cannot obtain both. Here, in reasonable reliance on the contract, B sent the violin to an appraiser. This could be recovered in reliance damages. However, this cost likely is much less than B's loss on the non-genuine violin, so B will probably not seek reliance damages, and instead seek compensatory damages.

Defense to damages: mitigation

A non-breaching party has a duty to mitigate their damages and not to unreasonably increase the cost of their damages. Here, B has a duty to mitigate her damages. There are no facts to suggest that she has not done so, because she promptly sent the violin to an appraiser and promptly notified S of the rescission. S may argue that B has a duty to mitigate by trying to sell the violin, but this argument will be rejected because B is seeking rescission as well, which requires the violin to be returned to S (see detailed discussion of rescission below). Therefore, unless B takes some other unreasonable action to run up her damages that is not stated in the facts, S will not be able to show a

failure to mitigate.

Remedy: Rescission

Contract rescission is the unmaking or undoing of a contract. It is available when a party shows grounds for the rescission, gives notice to the other party, and returns all benefits obtained under the contract. Some jurisdictions may require return of the benefits before suing, but most jurisdictions only require return of the benefits at the conclusion of a successful lawsuit. There are a number of valid grounds for rescission, including mutual mistake and non-fraudulent misrepresentation.

Here, for the reasons stated in the “Defenses” section above, mutual mistake does exist. In order for mutual mistake to support rescission, reformation of the contract must not be possible. Reformation here is not possible because S does not in fact own a Rocca violin that he could sell to B instead. Therefore, B has grounds for the rescission.

In addition, B also has grounds for rescission in the form of non-fraudulent misrepresentation, for the reasons stated in the “Defenses” section above.

In order to prevail, B will have had to give notice to S of the rescission of the contract. Here, B did give notice because she told S that she would return the violin and expected her money back. In addition, B will have to return the benefits of the contract. Here, B received a violin replica. She will have to return this replica at the conclusion of the case if she is successful.

Defense to rescission: laches

Laches is an unreasonable delay in bringing an action causing undue prejudice to the other party. Here, B sought appraisal promptly upon receiving the violin and there are no facts to suggest that she delayed. Therefore, S cannot reasonably raise the defense of laches.

Defense to rescission: unclean hands

Unclean hands is a defense available when the plaintiff has acted unethically or immorally in the course of dealings. Here, there are no facts to suggest that B took any unethical or immoral action. Therefore, S cannot reasonably raise the defense of unclean hands.

QUESTION 2: SELECTED ANSWER B

Merchant

Special rules govern when parties are merchants. Merchants are people who regularly deal with the type of good. Sam (S) is a merchant since he is a dealer of valuable instruments and the good sold here is violin, something he regularly deals in. Betty (B) is likely also a merchant since she owns a high-end music store and occasionally buys stringed instruments from S. They both seem to regularly deal with the purchase and sale of instruments and would likely be considered merchants.

Applicable Law

Contracts are governed by the UCC or common law. Contracts for the sale of goods are governed by the UCC. Here, the contract is for the sale of a violin, which is a good, so the UCC rules will govern.

Contract

A valid contract requires mutual assent by the parties (offer and acceptance) and consideration.

Offer

An offer requires an intent to be bound to a contract, clear and definitive terms, made to the offeree. An advertisement is not an offer but rather an invitation to bid. Here, S called B and said he had a violin to sell. He did not state the price or the terms so it could be seen that this was merely an invitation for B to bid since he didn't say a price or intend to be bound by his statement to B and was just inviting an offer to be made. B instead could be seen to have made an offer to buy the violin for \$200,000. Here, B stated she would purchase a violin for \$200,000. Thus, B made an offer.

Acceptance

Acceptance requires the offeree to assent to being bound by the terms of the offer. Under the UCC, terms don't have to mirror for there to be a valid acceptance. Here, Sam could be seen to have accepted the offer when he sent the confirmatory memo back to B stating that he would sell the violin for \$200,000. So, there was a valid acceptance on his behalf. It should be noted that alternatively it could be seen that the sending of the agreement was the offer and B signing and sending back was the acceptance. Additionally, a merchant sending a good in response to an offer is seen to be an acceptance. S sending the violin in response could also be seen as acceptance. So, S will not be able to argue he did not accept the offer by any of these actions.

Consideration

Consideration is the bargained for exchange of legal value. Here there is adequate

consideration since it required S to give B the violin for \$200,000 and B to give S \$200,000 in exchange for the violin. Thus, there is adequate consideration to support the contract.

Statute of frauds (SOF)

Contracts for the sale of goods for \$500 or more must be in writing to be valid. The party that the contract is sought to be enforced against must have signed the contract. Here, the sale of the violin is for \$200,000 and as stated above a violin is a good. Thus, there must be a written agreement to be enforceable. B might argue that there was no contract since S did not sign the agreement that was sent and thus that should be a defense to any formation of contract and provide grounds for rescission. However, where parties perform under the contract despite the lack of a valid signed written agreement, a SOF defense will not be applicable. Further, given the parties are both merchants the writing would be a sufficient merchant's confirmatory memo and thus not require both parties signature to be enforceable as a contract against the other.

Here, we are told that S sent a written contract to Betty and she signed it and returned it to S. Therefore, there the writing requirement is met. However, only B signed the agreement so S would have to sign typically to have it enforced against him. However, the SOF does not apply when one performs under the contract. Here, S sent the violin and thus would be barred from making an SOF defense to show there wasn't a contract. As stated above, this is also a valid merchant's confirmatory memo since both S and B are merchants and thus an SOF defense raised by either party would not be granted.

Terms

Under the UCC, the terms of the contract must have the quantity, identify the good and the parties to be bound. The rest of the terms can be filled in by UCC gap fillers. Here, we have a contract that states the parties to be bound (Seller and Buyer), the good to be sold (a violin), and a price. The terms also state that the contract included an express disclaimer of warranties express or implied.

Parol Evidence

When there is written agreement a court will typically not look to extrinsic evidence that existed prior to or contemporaneously with the written agreement. The court will look at the four corners of the contract to enforce the words of the contract. If a contract is fully integrated, no other information can be introduced to contradict or supplement the terms of the agreement. If it is partially integrated, no other information can be introduced to contradict the terms of the specific terms in the written agreement, but other terms agreed to that were not included in the writing may be introduced as part of the agreement. Here, S will state that the agreement includes a full merger integration clause, expressly stating that the document reflects the entire understanding of the parties, as written in the agreement. This is likely to be seen to be a fully integrated agreement and thus the parol evidence rule would prevent bringing in terms to contradict or supplement the agreement.

The parol evidence rule does not prevent information from being introduced to show

mistake or to clarify an ambiguous term. Here, the agreement stated a violin was being sold for \$200,000 and not specifically the authentic Enrico Rocca. B will argue that the term in the contract is ambiguous and the intent, as the parties discussed, was the Enrico Rocca Violin. If there is ambiguity in words, the court may use parol evidence to clarify the ambiguous term and give meaning to it. Here, the term is ambiguous and generally states violin. Thus, despite the full integration clause, B will likely be able to introduce evidence to clarify the ambiguity and give meaning to the word. Further, since both parties intended for violin to mean an Enrico Rocca Violin, the court would apply the meaning to term violin.

Breach of Performance

Under the UCC, the parties must perfectly tender the goods or it is seen as a breach of the contract. A party has the ability to inspect the goods to ensure they are perfectly tendered. If they are not perfectly tendered, they may still accept the goods or reject the goods. The party receiving the goods is given time to reasonably inspect the goods to confirm it is perfectly tendered. Here, B will argue that she was able to reasonably inspect the violin and confirm that it was indeed perfectly tendered and conformed to the contract. Thus, she was permitted to take it to an appraiser to inspect it to make sure it was genuine and still had time to reject upon inspection. Therefore, B will argue she rightfully rejected goods that did not conform with the contract and thus S breached as a result of his failure to perfectly tender the goods.

S will likely argue that the goods conformed with the contract since the contract states a violin for \$200,000 and he sent her a violin. Thus, if the terms only required sending a violin, he did perform and B would have no ability to reject. S will be successful in showing that the term violin was ambiguous and will allow the term to be clarified to give the meaning both parties intended it to mean, an Enrico Rocca 19th century violin. Thus, S breached by failing to tender perfect goods under the contract and B had the ability to inspect it within a reasonable time before rejecting.

Disclaimer

Contracts may have an implied warranty of merchantability and fitness for a particular purpose. Where there is a merchant selling the good it must be able to be used for its intended purpose. The implied warranty of fitness for particular purposes arises where a party makes it known they are relying on the other person's skill and knowledge in purchasing a good and in fact does so rely. These implied warranties may be waived if there is clear, discrete language disclaiming such warranties, such as being offset or in bold or all caps and usually must state merchantability for the implied warranty of merchantability to be disclaimed. Here, S stated that the contract disclaims warranties of any kind. It does not do so in bold or in any conspicuous manner. Further, it does not state merchantability in the disclaimer. Thus, the lack of conspicuous language may be sufficient to show that the warranty was not disclaimed. B might argue that she relied on S's particular knowledge and skill in purchasing the violin and he was aware of it since he was known to be a dealer in valuable instruments. Thus, B might be able to make an argument, despite the disclaimer, that S breached the warranty of fitness for a particular purpose.

Express warranties as to facts may not be disclaimed. Express warranties go to statements of fact made by a party and not merely opinions. Here, B will argue that S stated that it was an Enrico Rocca violin made in the 19th century, which is a statement of fact and likely not merely an opinion. S will argue that the disclaimer language in the contract disclaims any express warranty and thus the fact that the violin is not authentic was a risk borne by B instead of S. However, B will likely be successful in claiming that S breached an express warranty and would be owed damages as a result of the breach of an express warranty which could not be disclaimed even in a writing.

Rescission

A party can rescind a contract if there is a mutual mistake that is material, and neither party bore the risk of the mistake. A mistaken party can seek to rescind a contract if there is a unilateral mistake and the non-mistaken party knew or should have known of the mistake, neither party bore the risk, and it is a material term of the contract that was mistaken. Here, there was a mistake as to the genuineness of the violin. Both parties assumed originally it was authentic when entering into the contract. The authenticity of the violin was a material part of the contract since it was the good the parties contracted for. S might argue that B bore the risk of the mistake given the disclaimer language, but as discussed above, the disclaimer will not be held to be valid and enforceable thus she will not bear the risk of the mistake. Thus, B will likely be able to seek to have the contract rescinded on the ground of mistake.

Ambiguity- if there is an ambiguity in the contract and the parties don't intend the same meaning, then the contract may be rescinded if the ambiguity relates to a material term. As discussed above there is ambiguity about the meaning of violin. However, both parties understand it to have the same meaning. Thus, the contract would be reformed but not rescinded to reflect the parties' understanding of the term.

Damages

If a party fails to perform under a contract they may seek damages. Expectation damages gives one the benefit of their bargain. Here, B will argue that she contracted for an Enrico Rocca Violin worth \$200,000 and received a fake that was only worth \$5,000. In the event she is unable to have the contract rescinded, she would be entitled to an Enrico Rocca 19th century violin for \$200,000 and could seek to purchase one and S would have to pay the difference to make her whole. However, seeing that the violin is rare, it would likely be seen that coverage might be difficult to be able to get the type of violin that was contracted for. If she is able to, she could get damages awarded so that she gets the benefit of her bargain, the Enrico Rocca 19th century violin for \$200,000.

Conclusion: B will be able to reject the good since it was not perfectly tendered. Since she was able to inspect the good, and did so reasonably, she can sue for damages and get expectation damages, an Enrico Rocca violin from the 19th century for \$200,000. Alternatively, she can seek to rescind the contract on the grounds of mutual mistake.

QUESTION 3

While attending law school, Rex worked as a real estate broker and was co-owner of Realty-Co, a real estate brokerage firm. Rex sold his interest in Realty-Co when he passed the California Bar Exam. Rex is now a solo law practitioner who represents buyers of real estate. During the last year and a half, Rex was sued for legal malpractice four times. Rex has not told anyone about being sued for malpractice because there have been no judgments against him, and he believes the suits to be frivolous.

To help Rex get clients, his former partner at Realty-Co allowed Rex to place a sign in the lobby of Realty-Co, free of charge. The sign advertises as follows:

LOOKING FOR A STATE BAR-CERTIFIED REAL ESTATE ATTORNEY?
LOOK NO FURTHER! CALL REX JONES AND ASSOCIATES
1-800-BIG-FIRM

Rex recently represented a buyer at a real estate closing in California and noticed that the seller, an Arizona resident who owned only that one property in California, was represented by Nancy, an attorney Rex knew to be living in, and licensed only in, Arizona. In casual conversation, Nancy told Rex that she is temporarily representing her client in California in the real estate transaction. Rex researched Nancy and discovered that Nancy was previously disbarred in Arizona, but now she is in good standing with the bar.

1. What ethical violations, if any, has Rex committed? Discuss.
2. What ethical violations, if any, has Nancy committed? Discuss.

Answer according to both California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Rex's Ethical Violations:

Legal Malpractice - Duty to Report

Rex has been sued for legal malpractice 4 times in the past year and a half. Under the ethical rules in California, a lawyer is mandated to report themselves to the California Bar if they have been sued for malpractice 3 times in the past year. A lawyer must report even if he or she has a good faith belief that the suits are frivolous and even if there has been no final judgment against him/her. The lawyer is required to report within 30 days of them knowing or if they should have known of the filing of the suits. Here, Rex has had 4 malpractice suits filed against him in the past year and a half. This likely means that at least 3 of those malpractice suits were filed within the one-year time limitation imposed by the ethical rules of the bar, and Rex was required to report to the bar within 30 days of when he knew or should have known of the filing of the suits. He did not report himself, so therefore, he is in violation of this ethical duty. Violations of this ethical duty include sanctions and disbarment.

The ABA also imposes rules regarding ethical rule violations. A lawyer is required to report if more than 3 malpractice claims have been filed against them in one year, as well as if they have committed any ethical violations or violated the rules of any court or tribunal. Here, Rex would be required to report his malpractice suits to the ABA, as well as his ethical violation (him not disclosing the malpractice claims to the California Bar). He did not do so, and therefore violated his ethical duty. Violations of this ethical duty include sanctions and disbarment.

Solicitation of Clients - False Advertising

A lawyer may advertise his/her legal services. However, advertisements are subject to certain rules, both under the California and ABA authorities. Under both authorities, advertisements must not be false; they cannot claim a certain award amount; they must name the attorney; they must provide a phone number for the attorney or their firm, and they cannot claim a specialization unless the lawyer is specially recognized as an expert/specialist in that field by the California Bar (via taking and passing a specialized exam).

Here, there are 2 main issues with the advertisement. First: the advertisement would likely constitute false advertising because the name of the firm in the advertisement is "Rex and Associates", and the phone number listed is "1-800-BIG-FIRM". Both of these imply that Rex is just one of many lawyers at the firm. Instead, he is in actuality a solo practitioner and his law firm only has one lawyer (himself). The advertisement gives potential clients the impression that there are many lawyers at the firm, when instead, it is just Rex. This is an ethical rule violation of the duty to avoid false advertising.

The second issue with the advertisement is that Rex claims he is a state-bar certified real estate attorney. However, there is no evidence that he is a specialist in real-estate

law and has been recognized by the California Bar as such an expert. The advertisement gives potential clients the false impression that he is a state-bar recognized legal expert, which is not the case. This is a violation of the duty to avoid false advertising as well. Violations of this duty include sanctions.

Duty to Report Misconduct of Others

Lawyers are required to report certain violations of other lawyers. Under the California rules, a lawyer is mandated to report if he or she is aware of credible evidence that a lawyer has engaged in a crime, fraud, or ethical violation that casts doubt as to the attorney's suitability to practice law. Actual knowledge is not required. Under ABA authorities, a lawyer is mandated to report if he or she knows (or should reasonably know) that a lawyer has engaged in a crime, fraud, or ethical violation that casts doubt as to that attorney's suitability to practice law. Here, Rex has actual knowledge and credible evidence that Nancy is engaging in the unauthorized practice of law. Nancy is representing a client in California courts when she is not licensed by the California state bar. This is a both an ethical violation and illegal, and casts serious doubt as to Nancy's suitability to practice law. As such, Rex is required to report her actions to both the California bar and the bar of the state in which she is actually licensed (Arizona).

Operating a Business with a Non-Lawyer

Here, Rex's former partner at Realty-Co is allowing him to place a sign in the lobby free of charge. Generally, a lawyer may not operate a business with a non-lawyer if their legal services are part of the business operations. Here, while Rex's legal services are a material and integral part of what he is advertising, mere placement of a solicitation or advertisement does not constitute operating a business with a non-lawyer. This is further evidenced because Rex has been allowed to place the sign free of charge. If there were referral fees or Rex was paying his former partner, or Realty-Co was directing clients directly to Rex, this could be a violation of the ethical duty to not operate a business with a non-lawyer, when the lawyer's legal services are being used in the business. However, the facts here do not indicate that this is happening, so this is likely not a violation.

The placement of the advertisement in the Realty-Co lobby may also be an ethical violation because it gives prospective clients the impression that Rex is in fact affiliated with Realty-Co in some way. Clients may constitute the advertisement as a "referral" of legal services. Under the ABA, referral fees are not allowed. Gifts may be made after representation has concluded, and must be insignificant in value. Under the California ethical rules, pure referral fees are allowed (wherein the referring lawyer does little to no actual work). Again, here there is no indication that any referral fees or gifts are being given to either Rex or to Realty-Co in return for clients; however, due to the former relationship of Rex to Realty-Co, this is an important area for Rex to be aware of.

Conflict of Interest

A lawyer owes prospective, current, and former clients the duty of loyalty. The duty of loyalty means that the lawyer must act in the client's best interests at all times, and

place no interests before that of his/her client. There can also be no conflicts of interest between the lawyer's past, current, or former clients, a third party, or the lawyer himself.

A potential conflict of interest issue exists here because Rex used to be co-owner of Realty-Co, and is now advertising his legal services at Realty-Co. It is likely that some of his former clients from when he was a real estate broker could seek him out for his legal services now. This could create a conflict of interest between former clients and current clients. A conflict of interest exists where (1) clients are adverse to each other; or (2) there is significant risk that the lawyer's representation will be materially limited by the lawyer's loyalty to a former client, current client, third party, or the lawyer himself. The risk is measured both objectively and subjectively, meaning that the lawyer must reasonably believe that he or she will be able to provide competent and diligent representation to the client(s), and that a reasonable lawyer in the attorney's position would be able to provide competent and diligent representation to the client(s). Here, the facts do not indicate if Rex reasonably believes that he can provide competent and diligent representation to clients who are also clients of Realty-Co. From an objective viewpoint, however, Rex may be able to provide competent and diligent representation. The clients of Realty-Co and potential clients of Rex do not seem like they would be adverse to each other. Realty-Co is a brokerage service and it seems like those are the types of people that would also seek out Rex's legal services. However, a potential conflict of interest may exist because Rex used to co-own Realty-Co. He is now advertising his legal services there, and Realty-Co is still owned by Rex's co-partner. If Rex cannot be impartial because of his personal relationship with his former partner, then a conflict of interest could exist here. However, since the facts do not indicate that Rex has a special allegiance or relationship with his former partner, and it seems that he has removed himself from ownership of the business, it seems reasonable that Rex would believe that he can provide competent and diligent representation to clients who are also clients of Realty-Co.

A lawyer also owes prospective, current, and former clients the duty of confidentiality. The duty of confidentiality states that a lawyer must not divulge any confidential information that a client reveals in the context of providing legal services. Confidential information can be revealed under a few exceptions, but none of the exceptions seem to apply here (actions reasonably certain to cause death/substantial injury; revealing confidential information in order to seek legal advice regarding the ethical rules; implied or even express authorization from the client). However, Rex would want to ensure that no confidential information was revealed to Realty-Co or his former partner (or anyone else) when representing clients. Depending on the nature of Rex's relationship with his former partner, confidential information regarding clients and/or their real estate transactions could be easily revealed.

A conflict of interest can be waived when the clients are (1) not represented by the lawyer in the same litigation; and (2) all clients give informed consent, confirmed in writing (in California, informed written consent). Here, if a conflict of interest does exist, then Rex would be required to give his clients informed consent, confirmed in writing under the ABA, and informed written consent in California, and his clients would be required to sign such consent.

Nancy's Ethical Violations:

Prohibition on Unauthorized Practice of Law

As explained above, Nancy is engaging in the unauthorized practice of law because she is practicing law without a license in California. This is an ethical violation and illegal under both California and ABA authorities. Nancy has breached her ethical duties by practicing law in a state in which she is not legally licensed to do so. Further, Nancy is required to report this violation to her state bar. Under the ABA, a lawyer is required to self-report their own misconduct if such misconduct casts serious doubt as to the lawyer's suitability to practice law, is a felony, or is a misdemeanor involving false statements or dishonesty. This is likely to be a misdemeanor involving dishonesty because Nancy is holding herself out as an attorney licensed to practice in California, but is not actually licensed here (false statement, material misrepresentation). Therefore, she is required to self-report to her state bar association.

It is possible that Nancy may be operating under a pro hac vice provisional license in California. This is essentially a limited license to practice law in California, but (1) only for a specific case, and (2) an attorney licensed in California must be co-counsel on the case. Here, there are no facts that indicate that Nancy is practicing law in California under a pro hac vice license.

QUESTION 3: SELECTED ANSWER B

1. Rex's Ethical Violations

Duty to Report

Attorney's Own Violations

In CA, an attorney has a duty to self-report certain violations or misconduct to the State Bar, including when the attorney has been sued for malpractice three times within a year. This duty to report arises regardless of whether the malpractice suit against the attorney ended in a judgment for the client. The ABA does not explicitly require a duty to report under the same circumstances, but does create a duty to report if such a duty exists in the relevant state in which the attorney is barred and practicing.

Here, Rex (R) was sued for legal malpractice four times over the last year and a half. Accordingly, it is likely that Rex was sued for legal malpractice 3 times within a year, and therefore he was required to report to the relevant ethical authorities the fact that he had been sued for malpractice. The fact that there were no judgments against him and that he thought the suits were frivolous have no bearing on his duty, and he failed to fulfill that duty by not telling anyone about being sued. Indeed, the fact that he has been sued four times in such a short timespan is indicative that there might be a problem with his representation, as it is unusual for so many "frivolous" malpractice suits to be lodged against a single attorney in such a short time. Accordingly, Rex violated his duty to self-report.

Other Attorney's Violations

An attorney also has a duty to report to the relevant legal authorities when the attorney knows or should know that another attorney has engaged in certain ethical or legal violations, such as the illegal practice of law.

Here, Rex was representing a buyer at a real estate closing in California for a piece of property located in California, such that the applicable law for the transaction would be California law. Additionally, Rex knew that the seller was an Arizona resident who only had the one property in California (and therefore did not have other properties in other states that may have been a part of the transaction). Furthermore, Rex spoke with Nancy, and knew that she was living in and only licensed to practice law in Arizona. Based on the totality of the facts and circumstances, Rex knew or should have known that Nancy was attempting to practice law in California, where she was not licensed to practice. Because she was not licensed to practice law in California but was representing the buyer in the transaction anyway (as she specifically told Rex that she was temporarily representing her client in California in the real estate transaction), she was illegally practicing law.

Accordingly, Rex had a duty to report Nancy's violations to the CA state bar and to any other relevant authorities (ABA) and he failed to do so. Rex failed in his duty to report.

Duty of Honesty - Advertising

An attorney's written advertisement for services must contain the name of the attorney who should be contacted for the representation and an address at which the attorney can be found. (ABA)

Alternatively, the attorney must list the name of the attorney who should be contacted for the representation and may provide a phone number at which that attorney may be contacted. (CA)

The advertisement must not make any misrepresentations or impermissible warranties about success or payments. An attorney must maintain the utmost honesty and integrity when practicing, including in the advertisement of their services.

Here, the advertisement contained a reference to "Rex Jones and Associates," but Rex is a solo law practitioner and it does not appear that he works with anyone else or works under the name of "Rex Jones and Associates." Furthermore, the advertisement does not include the name of any individual lawyer who may be contacted for representation (just the pseudo firm name) and only contains a phone number for contact, but not an address. Further, the phone number states "1-800-BIG-FIRM" when, again, Rex is a solo practitioner and therefore not a part of a big firm. Lastly, the advertisement states that Rex is a "state bar-certified real estate attorney." There is no indication in the facts that Rex did indeed get state-bar certified in real estate. Having been a real estate broker in the past does not automatically make Rex a certified real estate attorney, and he would be required to get such a certification from the state bar.

Accordingly, the advertising is seriously misleading, as it suggests that Rex is a part of a big firm and a team of attorneys to handle real estate transactions. The advertisement fails to reference an individual lawyer, does not contain a required address, and the phone number used is itself misleading. Lastly, Rex misrepresents that he is a certified real estate attorney, which is incorrect. Thus, Rex violated his duty of honesty and also violated the ethical advertising rules of both the ABA and CA.

Advertising and Solicitation

An attorney may permissibly advertise their services or solicit business using a legal advertising company. In California, an attorney is barred from advertising their services in certain locations (such as in hospitals or at or near accident sites for personal injury) to avoid a situation in which vulnerable people are more likely to accept the attorney's services when they otherwise would not.

Here, Rex advertised his services in the lobby of Realty-Co. Realty-Co is not a licensed or certified legal advertising company. While Rex did not pay for the use of the space for advertising (Realty-Co let him do it free of charge), an attorney must avoid any circumstances in which there is any appearance of impropriety. For example, even though real estate transactions are very different from personal injury actions, and less likely to create an atmosphere of vulnerability akin to a hospital, Rex is still advertising himself as a big-firm, "state bar-certified real estate attorney" using a sign in a real estate company's lobby. Aside from the business association implications (discussed

below), Rex's use of the lobby of the real estate company to freely advertise his real estate services instead of using a legal advertising company is, if not an ethical violation, not recommended, and Rex should stop such advertisements.

Business with Non-Lawyers

An attorney may not engage in the practice of law with non-lawyers and may not share fees with non-lawyers. Additionally, an attorney must avoid any action that suggests an impermissible association with a non-legal business, regardless of whether that business does exist, to maintain decorum due to the public and legal profession.

Here, it is stated that Rex worked as a broker during law school and was a co-owner of Realty-Co at that time. It is not impermissible for a law student to operate a non-legal business. Rex sold his interest in Realty-Co when he passed the California Bar Exam, and thereafter practiced law as a solo law practitioner who represented buyers in real estate. This, too, was permissible.

To help Rex get clients, however, his former partner allowed Rex to place his misleading advertisement (see above discussion) in the lobby of Realty-Co. This was done free of charge. Nevertheless, the use of Rex's advertisement in the Realty-Co lobby may create an impression in clients that Realty-Co endorses Rex's services, or vice versa, and that they may be in business together. While Rex is not impermissibly engaged in the practice of law with non-lawyers, his advertisement creates the appearance that he may be. Thus, Rex should remove the advertisement.

2. Nancy's Ethical Violations

Duty to Disclose and Communicate

An attorney owes a duty to their client to communicate, both regarding the case and its progression, as well as any material information, such as (1) the fact that an attorney has been previously disbarred and (2) where an attorney is licensed to practice.

Disbarred

Under both CA and ABA authorities, an attorney must disclose to their client if they have been disbarred.

Here, it is unclear as to when Nancy was disbarred and if she represented the Arizona resident at the time she was disbarred, but in full compliance with her duty to disclose, should have disclosed that she was previously disbarred to her client.

License to Practice

An attorney must also inform their client as to whether they are licensed to practice law in the jurisdiction.

Here, it is unclear whether Nancy told her client that she was not licensed to practice

law in California. If she did, it is unlikely that her client would have assented to the representation by an individual who is not licensed to practice in the relevant jurisdiction (CA, where the property is located), or by someone who had previously been disbarred. Accordingly, it is likely that N violated her duty to disclose and communicate with her client.

Duty to Report

See rule above.

Nancy had a duty to report her ethical violations, such as the unlicensed practice of law. (ABA, CA). Nancy may also be in violation of Arizona's ethical rules, as well, and should contemplate self-reporting there.

Duty of Loyalty

A lawyer must act in the best interest of their client and put the client's interests above their own, as well as to avoid conflicts of interest. A conflict of interest exists when there is a significant risk that the lawyer's representation of the client would be materially limited by (1) a prior representation of another client; (2) a current representation of another client; or (3) the lawyer's own personal interests. A conflict of interest may be waived if (1) the lawyer reasonably believes she can still diligently and competently represent the client; (2) the representation is not illegal; (3) the representation does not involve a direct conflict (prior client v. current client in the same/substantially similar matter, for example), and the client provides informed consent, confirmed in writing (ABA) or informed written consent (CA).

Here, N likely violated the duty of loyalty by representing an Arizona buyer in a California transaction when she was not licensed to practice in California. It is in N's own interest to get more business and clients, and it seems she likely failed to inform the client that she was not licensed in California and/or that she was previously disbarred in Arizona. A client's knowledge of both facts would lead a reasonable person to consider alternative representation, and Nancy would have violated the duty of loyalty if she had kept these facts to herself because she wanted additional business.

With respect to the waiver of the conflict of personal interest, the representation is illegal (because N is not licensed in CA), so the conflict cannot be waived. There is also no indication that the client waived this conflict, in writing or otherwise, and therefore it is likely N violated her duty of loyalty to the client.

Duty of Competence

A lawyer has a duty to competently represent their client using the appropriate skill, knowledge, experience, and preparation necessary for the representation. (ABA) A lawyer has a duty not to intentionally, recklessly, with gross negligence, or willfully fail to represent a client with the required competence. (CA)

A lawyer may become competent to represent a client in a matter they would otherwise not be competent to represent the client in by (1) associating with a lawyer who has the

requisite competence for the representation and/or (2) through preparation, become competent to represent the client by obtaining the required skills or knowledge.

Here, Nancy did not have a license to practice California law, and she knew that she was not licensed to practice law in California, but had agreed to temporarily represent her client in a California-based real estate transaction. Nancy did not associate with a California-licensed attorney for the transaction, nor did she obtain a license to practice in California or gain a *pro hac vice* admittance. Accordingly, Nancy violated her duty of competence.

Duty of Confidentiality

A lawyer has a duty to maintain the utmost confidences of their client and not disclose any confidential information revealed in the course of the representation. The attorney-client privilege lasts until the client's estate is settled (CA) or until the client's death (FRE). Attorney-client privileged information is that information communicated between a client and their attorney in furtherance of the representation and is waived if such information is communicated to third parties (aside from those third parties reasonably necessary to facilitate the representation). The attorney-client privilege does not apply to information the lawyer knows or has reason to know is used to commit a crime or violation (ABA/CA).

Here, Nancy told Rex that she was temporarily representing her client in the California real estate transaction. This statement, in and of itself, is not a violation of the duty of confidentiality or a waiver of attorney-client privilege. It is unclear, however, if Nancy told Rex anything else about the representation, and, if she told him more details, that could amount to a violation of the duty of confidentiality. Separately, however, it is unclear whether Nancy's client is aware that she is practicing law without a license, and dialogue exchanged between them concerning her representation of the client without a license may not be subject to the attorney-client privilege or Nancy's duty of confidentiality.

QUESTION 4

Dan, a citizen of Nevada, was employed as a bus driver by Nevada Bus Lines, Inc. (NBL). While working for NBL, Dan was transporting master bingo players from Thousand Oaks, California, to a bingo tournament when Dan dozed off, failed to stop at a red light, and hit a car in Los Angeles, California.

The car struck by Dan was owned by Owen, and at the time of the accident, Owen's car was being driven by Peggy, the sole occupant. Peggy was rushed to the hospital and was treated for a broken wrist. The car was damaged beyond repair. Owen and Peggy are both lifelong residents of California.

Peggy and Owen (Plaintiffs) hired a lawyer, Larry, with a valid retainer agreement, to file a civil action in federal court in Los Angeles. Plaintiffs' complaint named NBL and Dan as defendants. Plaintiffs alleged that Dan acted negligently and that NBL is liable as Dan's employer. Peggy demanded \$100,000 in damages for medical expenses and pain and suffering. Owen demanded \$50,000 for damage to his car.

Larry went to Nevada and properly served NBL with the complaint. Larry then drove to Dan's residence in Nevada, where no one was home. Larry slid a copy of the complaint under the front door of Dan's house. Dan received the complaint when he returned home. NBL and Dan promptly answered Plaintiffs' complaint.

In a request for production of documents, Plaintiffs sought all documents from the past 10 years related to claims for injuries and property damage caused by NBL's drivers. After meeting and conferring, NBL refused to produce any documents in response to this request. Plaintiffs filed a motion to compel, and NBL opposed the motion.

1. Does the federal court have subject matter jurisdiction? Discuss.
2. Does the federal court have personal jurisdiction? Discuss.
3. Was Dan properly served? Discuss.
4. How should the court rule on Plaintiffs' motion to compel? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Does the federal court have subject matter jurisdiction?

The issue is whether the federal court has subject matter jurisdiction over Peggy and Owen's case against NBL and Dan. Subject matter jurisdiction refers to the court's ability to hear certain types of cases. In Federal courts, subject matter jurisdiction can arise in one of two ways.

Federal Question Jurisdiction

The first way subject matter jurisdiction can arise is through federal question jurisdiction. This is applicable when the plaintiff raises a claim that arises under the constitution, federal law, or other federal statute, and does so on the face of their well pleaded complaint. Anticipated defenses do not suffice for this.

Here, the subject matter at hand is a car accident claim, which arises under a theory of negligence, and respondeat superior, both of which are traditionally state law claims, not containing federal ingredients. Therefore, there is no federal question jurisdiction here.

Diversity Jurisdiction

Another way to achieve jurisdiction in federal court is through diversity jurisdiction. Diversity jurisdiction arises when citizens of two different states sue each other. In order for diversity jurisdiction to be sufficient, there must be complete diversity between the plaintiffs and defendants at the time the complaint is filed, and the amount in controversy must exceed \$75,000.

a. Complete Diversity

The issue is whether the plaintiffs, Owen and Peggy, are completely diverse from NBL and Dan. Diversity refers to a plaintiff's or defendant's citizenship. For individual plaintiffs, citizenship is determined by their place of domicile, which is where they reside and intend to remain permanently. As for corporations, citizenship is both where the corporation is incorporated, as well as where their principal place of business is, also known as their headquarters. For purposes of diversity, all plaintiffs must be completely diverse from all defendants at the time the complaint is filed.

Owen and Peggy

Here, Owen and Peggy are both lifelong residents of California, and there are no facts to suggest they do not have an intent to reside there permanently, or that there were thoughts of moving at the time the complaint was filed. As such, for purposes of diversity, Owen and Peggy are citizens of California.

Dan

As for Dan, the facts explicitly state that Dan is a citizen of Nevada. Again, there is no evidence as to his intent not to reside there permanently, or any talks about moving. As such, for purposes of diversity, Dan is a citizen of Nevada.

NBL

Nevada Bus Lines, Inc. is an incorporation, which means we must look to the state in which it is incorporated as well as has its principal place of business. The facts do not explicitly mention either of those things. However, we can infer from the name, "Nevada" Bus Lines, that they are either incorporated in Nevada, and/or have their principal place of business there. Additionally, because Dan went to Nevada later to serve NBL, it may also be inferred that they have their headquarters there. Although Dan was working in Los Angeles, California for NBL, when the accident occurred, there are not enough facts to determine whether California is NBL's principal place of business. As such, for purposes of diversity, NBL is a citizen of only Nevada.

Diversity Conclusion

Since Owen and Peggy (the plaintiffs) are both citizens of California, and Dan and NBL are citizens of Nevada, there is complete diversity.

Amount in Controversy

The next issue is whether Owen and Peggy have satisfied the amount in controversy requirement needed for diversity jurisdiction. The amount in controversy, made in good faith, must exceed \$75,000. One plaintiff may aggregate claims against a single defendant, or defendant(s) that are jointly and severally liable. However, two different plaintiffs cannot aggregate their claims to meet the amount in controversy.

Here, Peggy has claimed \$100,000 in damages for medical expenses and pain and suffering. This is sufficient for the amount in controversy. However, Owen has only claimed \$50,000 for the damages to his car. This does not exceed \$75,000, nor can Owen aggregate his amount with Peggy's to meet the \$75,000 threshold. As such, only Peggy has satisfied the amount in controversy requirement here. Owen's claim will be barred, unless there is another form of subject matter jurisdiction, as discussed below.

Supplemental Jurisdiction

The issue is whether the court has supplemental jurisdiction over Owen's claim. Supplemental jurisdiction is available to the courts when there is an original claim that has an independent source of subject matter jurisdiction, and another party, or claim, is being joined because it arises out of a common nucleus of operative fact. In this regard, the court may exercise subject matter jurisdiction over the other claim or party, so long as if it is a party that is being added, it does not destroy diversity (if the original claim arose under diversity jurisdiction).

Here, while Owen's claim did not meet the amount in controversy on its own, it will likely come in under supplemental jurisdiction, because his claim arises out of a common nucleus of operative fact, such that the damages all arose from the same car accident

between the parties. Additionally, adding Owen does not destroy diversity, because he, like Peggy, has citizenship in California.

Conclusion

In conclusion, the court has subject matter jurisdiction over both Peggy and Owen's claims.

2. Does the federal court have personal jurisdiction?

The issue is whether the federal court has personal jurisdiction over the parties (defendants) in the claim, who are NBL and Dan in this matter. Personal jurisdiction refers to the court's power over the people or things in the matter.

Personal jurisdiction can arise from the traditional bases:

a. Domicile

A court has personal jurisdiction over any residents that are domiciled in the state where the federal court sits. Here, as previously established, Dan and NBL are both citizens of Nevada, therefore, this base is not proper.

b. Served while in the forum state

A court has personal jurisdiction over persons who are served while in the forum state. Here, Larry served both parties in Nevada, not California, so this base is also not applicable.

c. Consent/Waiver

Lastly, a court can have personal jurisdiction over residents that consent to the personal jurisdiction of the convening court. Here, while there may have been improper service, both parties promptly answered the Plaintiff's complaint. The plaintiffs may argue that this constituted a form of consent, while the defendants may claim that consent is only applicable when the parties show up to court to litigate the matter in the forum state. Nevertheless, there is another applicable issue here. In answering the plaintiff's complaint, neither defendant raised any issue as to personal jurisdiction, which is a waivable defense that must be raised in a defendant's answer or motion to dismiss. Failure to do so results in a waiver of the defense. Here, both Dan and NBL failed to raise the defense of improper personal jurisdiction; as such, they will both be considered to have waived any objections, and thus consented to the forum state of California.

Modern Bases of Jurisdiction

If the court determines that the above traditional bases do not suffice, the court may alternatively utilize California's long arm statute, which is a mechanism that allows a federal court to reach beyond its borders and exercise personal jurisdiction over non-resident parties, when they have had sufficient minimum contacts with the state, such that it would not offend traditional notions of fair play and substantial justice consistent

with due process.

In determining minimum contacts, the court must look at the following:

a. Foreseeability

The court must determine whether it was foreseeable for the defendant(s) to be sued in the forum state due to their contacts. Here, NBL had sent his employee to Los Angeles, California to conduct business. In doing so, Dan was transporting bingo players to a tournament. As such, in conducting business in the forum state, both parties had reason to foresee that they could potentially be sued there if anything were to happen.

b. Purposeful Availment

Purposeful availment is present when the defendant(s) purposefully availed the benefits and protections of the forum state, such that they could be sued there. Similar to the above discussion, the defendants availed the benefits and protections of California, as they used its streets and transported persons there.

c. Relatedness

Relatedness states that the defendant(s) contacts with the forum state were related to the suit in question. This can arise under specific jurisdiction, holding that the claim(s) specifically arose from the defendant's conduct in the forum state, or general jurisdiction, which holds that the defendant(s)' contacts with the forum state were so systematic and continuous, such that it rendered them "at home." General jurisdiction is typically applicable when a corporation has its principal place of business somewhere.

Here, we have specific jurisdiction for purposes of relatedness, because the defendant(s)' conduct, driving in Los Angeles, California, was the reason for and related to Peggy and Owen's claims.

d. Fairness

Lastly, the courts will look at a few factors to determine fairness, to ensure exercising subject matter jurisdiction was in line with traditional notions of fair play and substantial justice consistent with due process. Fairness factors fall on the federal court's interest in providing redress for its citizens over the state interest, as well as the convenience to the parties. Here, the federal court likely has a great interest in providing redress for Peggy and Owen, as victims in a car accident, with the tortfeasor being a corporation and the plaintiffs being the more vulnerable party. Additionally, litigating the claim in California is convenient for Peggy and Owen, far more than NBL and Dan, who have more resources as a corporation, to litigate in a state they are not domiciled in. Furthermore, as discussed above, they have not even objected to personal jurisdiction, showing they do not think it is unfair.

Conclusion

In conclusion, the court has personal jurisdiction over the parties, specifically the defendants, both under the traditional bases of jurisdiction, as well as the modern

bases.

3. Was Dan properly served?

The issue is whether Dan was properly served. Service of process refers to the manner in which a person is notified of a suit pending against them. A plaintiff must serve process within 90 days of filing the complaint, in a manner that is reasonably likely to put the defendant on notice of the claim against them. When it comes to defendants that are individuals, the plaintiff must serve process through a person who is a non-party to the suit, who is at least 18 years of age, and do so either through personal service (which means delivering it straight to the person), or substituted service (which means leaving it with someone of suitable age and discretion that can receive service and who also lives at the defendant's home).

Here, while it is unusual for Larry, the attorney, to deliver service personally, it is okay for him to do so because he is not a party to the suit; rather, he is representing a party in the suit. Larry is also likely above the age of 18 years old. Here, Larry drove to Dan's residence in Nevada, where no one was home and merely slid a copy of the complaint under the front door of Dan's house. This was neither personal service, because Larry did not personally hand the summons and complaint to Dan himself, nor was it substituted service, since Larry did not give it to anyone else that was of suitable age and discretion. Just because Dan did receive the complaint when he returned home, that does not retroactively cure Larry's failure to serve process correctly.

As such, Larry did not serve Dan properly.

Improper service is a viable 12b motion to dismiss defense that may be raised in the first answer or motion to the plaintiff's complaint. However, the facts do not indicate that Dan objected to this in his response to the plaintiff's complaint. Unfortunately for Dan, this means he lost the right to raise this defense, because improper service is a defense that can only be raised in the first answer, or it is waived forever.

4. How should the court rule on the Plaintiff's motion to compel?

The issue is how the court should rule on the Plaintiff's motion to compel.

As a general rule, non-privileged evidence is discoverable as long as it is relevant to the needs of the case, and it is proportional, such that it would not be unduly cumbersome for the defendant to produce. Discovery may be requested only after parties have had a pre-planning conference, to make a discovery plan. Here, there are no facts to indicate a discovery conference has taken place, so the request for production of documents could simply be deemed premature and improper. However, if a planning conference has taken place, we must determine whether a motion to compel was proper.

Here, Peggy and Owen have requested a production of documents from the past 10 years related to claims for injuries and property damage caused by NBL's drivers. As a preliminary matter, it must be determined whether this discovery is relevant to the needs of the case, and whether it is proportional. It may be argued that NBL's history of injuries and property damage caused by NBL's drivers is relevant in determining the

matter of negligence, and whether the company's policies or practices lead to such negligence. This is in fact relevant, however, it may only be discoverable if the documents do not contain privileged materials. The issue lies in the need for the documents to date back to 10 years ago. The production of documents dating 10 years back is both unnecessary in achieving the plaintiff's goals, as well as likely unduly cumbersome for the defendants to produce such a high volume of records.

As such, while it may be a relevant discovery ask, it is likely going to be deemed disproportional.

Motion to Compel

A motion to compel is a motion filed with the court against a party, to compel them to turn over discovery they have failed to, or refused to, especially when the other party has not stated a reason for denying discovery. A motion to compel is only an available remedy when the parties have met and conferred in good faith to try to resolve the matter amongst themselves before seeking direction from the court. Here, the parties have in fact met and conferred, and they have not come to a resolution. As such, the motion to compel is likely the proper avenue for the plaintiffs to have sought. The court will likely sanction the defendants for not providing a valid reason for refusing discovery, but nevertheless may deny the motion to compel due to the proportionality rule.

QUESTION 4: SELECTED ANSWER B

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction refers to a court's power to hear a particular case. Federal courts are courts of limited jurisdiction while state courts are courts of general jurisdiction. Generally, federal courts have jurisdiction to hear two kinds of cases, both of which are described below.

Federal question jurisdiction

The first kind of cases federal courts may hear are those arising federal law. Under the well pleaded complaint rule, courts will examine the plaintiff's complaint to see if their claims arise under federal law. A defense arising under federal law will not confer federal question jurisdiction on a court.

Here, Plaintiffs are suing Defendants for state law negligence claims. As such, there is no federal question jurisdiction in this case.

Diversity jurisdiction

The second kind of cases federal courts may hear is when there is diversity jurisdiction. Diversity jurisdiction arises when all the plaintiffs are citizens of different states than all defendants, and the amount in controversy exceeds \$75,000.

Diversity of citizenship

To determine where an individual is a citizen, courts look to their domicile. Citizens are domiciled where they reside and intend to remain indefinitely. To determine where a corporation is domiciled, courts look to where they are incorporated and where their principal place of business is. A corporation is deemed a citizen of both states, or one if they're incorporated and have their principal place of business in the same state. A principal place of business is the nerve center of the corporation.

Here, the plaintiffs are domiciled in California. Indeed, both Peggy and Owen are lifelong residents of California and there is no indication they intend to leave. We're told that Dan is a citizen of Nevada. As to NBL, it is clear they are a corporation because "Inc." is part of their name, but it is less clear where they are a citizen. There are no facts indicating where they are incorporated or where their headquarters are. But given that Nevada is in their title and they were "properly served" in Nevada, it is likely that is where they are both incorporated and where their principal place of business is located. Assuming they are from Nevada and so is Dan, and the plaintiffs are from California, there is complete diversity since no plaintiff is from the same state as any one defendant.

Amount in Controversy

Not only must there be diversity, the amount in controversy must exceed \$75,000.

Courts determine this from the plaintiff's allegations and accept that as true unless there is a legal certainty they cannot recover more than \$75,000.

Here, Peggy seeks \$100,000 in damages. Thus, it is clear that the court has diversity jurisdiction over her case since that amount exceeds \$75,000.

Less clear is Owen's case. He seeks only \$50,000 which is less than the amount in controversy threshold. He may try to aggregate his claim with Peggy's, but a plaintiff can usually only aggregate their own claims and cannot aggregate with another's. Thus, the court does not have diversity jurisdiction over Owen's claim.

Supplemental jurisdiction

However, when a court does not have federal question or diversity jurisdiction, it may nonetheless exercise discretion and find that it has supplemental jurisdiction. A court can exercise supplemental jurisdiction when the claim arises from the same common nucleus of fact as the other claims the court has primary jurisdiction over so long as it does not destroy diversity.

Here, Owen will ask the court to exercise supplemental jurisdiction because the damage he seeks to recover arose in the same accident that caused Peggy's injuries such that there is a common nucleus of fact between the two cases. Moreover, he will argue that his presence does not destroy diversity since he is from California and the defendants are from Nevada. He has a strong argument, and the court is likely to exercise its supplemental jurisdiction.

In sum, the court does have subject matter jurisdiction over this case.

PERSONAL JURISDICTION

Personal jurisdiction (PJ) refers to a court's power over a person or property. A federal court has PJ over a defendant if a state court sitting in the same location would have PJ, and it comports with the Due Process Clause of the United States Constitution.

State law

Generally a court may exercise PJ over a defendant under state law if the defendant consents to PJ, is present in the forum state, or the state's long-arm statute allows the court the exercise of PJ over the defendant.

Consent

A defendant may consent to the exercise of PJ. A defendant may do so expressly or implicitly. A defendant does so implicitly when they fail to assert a lack of PJ defense in their first response in the case. The failure to assert results in waiver.

Here, Defendants promptly answered the complaint. Assuming this is their first response in this case, and that they did not assert lack of PJ, they will be deemed to have consented to PJ, or to have waived the argument. Thus, on this basis alone, the court may exercise PJ.

Presence

Another basis to exercise PJ is when the defendant is served while voluntarily in the state, also known as “tag jurisdiction.” Here, they were served in Nevada, not California, so this will not serve as a basis to exercise jurisdiction.

Long-arm statute

Finally, a court may exercise jurisdiction if the state’s long-arm statute allows it. In California, where the federal court is located, a court may exercise PJ if it comports with Due Process. Thus, we’ll turn to the second prong of the PJ analysis, for if that is satisfied, so is the long-arm statute.

Due Process Clause

For the exercise of PJ to comport with Due Process, the defendant must have minimum contacts with the forum state, and the exercise of PJ must comply with the traditional notions of justice and fair play.

Minimum Contacts

A court can have minimum contacts in two ways: general PJ and specific PJ.

A court has general PJ when the defendant’s contacts with the forum state are so continuous and systematic that they are essentially at home in the forum state. That typically occurs when they are incorporated in the forum state or have their principal place of business there. As discussed, we do not know for sure as it relates to NBL, but both defendants appear to be “at home” in Nevada, not California. As such, there is no general jurisdiction here.

A court has specific PJ when the defendant has purposefully availed themselves of the benefits and burdens of the forum state such that they should reasonably foresee being hailed into a court. Moreover, the lawsuit must arise out of or relate to their purposeful availment.

Here, there is a strong argument for specific PJ. NBL and Dan were doing business in California, specifically driving people from Thousand Oaks to a bingo tournament when the accident occurred in L.A. This suggests that NBL and Dan regularly provide transportation in California, thus making money off of California residents. As such, it is foreseeable that if they cause harm in that enterprise, they will be hailed into court. And here, that is exactly what happened. It was from that very activity that Peggy and Owen were harmed. As such, their suit arises from or relates to Defendants’ purposeful availment.

Fairness

To comport with Due Process, there must not only be minimum contacts, but the exercise must be fair. Courts consider the state’s interest in adjudicating the matter and the burden to the defendant. Here, California has an interest in ensuring that its residents who are harmed may recover in their home state. Moreover, defendants are

not burdened in any meaningful way since Nevada is so close to California, and they have already shown their willingness to travel to California as evidenced by the accident. Given the state's interest and Defendants' burden (or lack thereof), it would be fair exercise of jurisdiction.

In sum, because the court has a state law basis to exercise jurisdiction by way of consent/waiver and through the long-arm statute, and it comports with Due Process, the court has PJ over Defendants.

SERVICE

A party may be properly served their place of abode if the complaint and summons is left with a person of suitable age and discretion. Any nonparty over age 18 may effectuate service. If service is improper, it must be asserted in the defendant's first response, or like PJ, it is waived.

Here, the party that served the complaint on Dan was Plaintiffs' lawyer. Since he is a nonparty and presumably over 18, he can complete service. But the problem here is that while he did at Dan's abode, that is home, which is permissible, no one was home. Thus, he did not leave it with a person of a suitable age and discretion. As such, his service was improper.

That said, Dan already answered the complaint. Assuming this was his first response and that he did not raise this issue, he waived it.

MOTION TO COMPEL

Scope of discovery

A party may obtain discovery on any evidence that is relevant to a party's claim or defense even if that evidence is not admissible, so long as their request is proportional to the needs of the case and does not seek privileged information.

Here, Plaintiffs served Defendants with a request for production seeking documents going back 10 years related to injuries and property damage caused by NBL drivers. First, this evidence is relevant only if Plaintiffs claim that NBL is directly liable based on a theory of negligent hiring, training, or supervision. If that's the case, this evidence would show that NBL had notice that their drivers were inadequate and needed additional training or supervision. But if Plaintiffs are only seeking to hold NBL vicariously liable, it is less relevant. Second, even if relevant, it may seek too much information given the needs of the case. Ten years of documents may be very burdensome to produce, and given that it is not even clear that Plaintiffs seek to hold NBL directly liable, the benefit they may get from it may be outweighed by the burden to NBL. Finally, there is no indication this information is privileged.

With this in mind the evidence is probably not discoverable, or at least should be limited in scope.

Defendants' Objection

Here, Defendants refused to produce anything. But they may file proper objections before they refuse to produce anything setting forth a specific basis for their objections. The failure to do so rendered their response improper, assuming that is what happened here.

Motion to Compel

To move to compel, the material that the other party will not produce must be discoverable, and the parties must meet and confer before that occurs. Moreover, a party may only obtain discovery after the mandatory settlement conference and the exchange of mandatory initial disclosures.

Here, the evidence is likely not discoverable, or the request should at least be limited in time. Moreover, it is unclear whether the request was premature since we do not know whether the mandatory conference and disclosures have occurred. It also unclear whether the motion is premature since we don't know if they have met and conferred.

Ultimately, the motion is unlikely to be granted given the issues with discoverability and whether necessary procedural prerequisites have been fulfilled.

QUESTION 5

Harvey opened a restaurant in 2010. In 2015, Wanda inherited \$100,000 from her father that she put in her bank account. In 2016, Harvey and Wanda married in California. Wanda, who was unemployed at the time of the wedding, used \$20,000 of the inheritance money to buy Harvey a framed and signed football jersey from his favorite player. Wanda gave it to Harvey when they returned from their honeymoon. After the wedding, Wanda and Harvey bought a house for \$500,000. Wanda used \$50,000 of the inheritance as a down payment for their house. The title to the house and the mortgage were in Harvey's name, and Harvey paid the mortgage payments with his earnings from his restaurant business.

A few years later, Wanda used \$30,000 of the inheritance to buy herself a car. Harvey loved the car and drove it often.

During the marriage, Wanda worked at the restaurant and helped Harvey to manage it. During those years, the value of the restaurant increased from \$100,000 to \$500,000. Soon after Wanda stopped working at the restaurant, a celebrity posted on social media that it was his favorite restaurant. Overnight, the restaurant's value doubled to \$1 million.

Soon afterwards, Harvey filed for dissolution, moved out of the house, and stopped paying the mortgage on the house. At the time of the dissolution, the remaining mortgage on the house was \$300,000.

What are Wanda and Harvey's rights and liabilities, if any, with respect to:

1. The car? Discuss.
2. The framed and signed football jersey? Discuss.
3. The house? Discuss.
4. The restaurant? Discuss.

Answer according to California law.

QUESTION 5: SELECTED ANSWER A

Community Property vs Separate Property

California is a community property state. When two individuals validly marry, they form a marital economic community. Property acquired during marriage, including based on a party's labor or earnings, is presumed to be community property that belongs to the marital economic community. On the other hand, property acquired before marriage, or via gift, bequest or inheritance during marriage, is presumed to be separate property. The marital economic community, and permanent separation occurs when one spouse communicates to the other their intention to permanently separate and their conduct conforms to that intent. At divorce, each spouse is typically entitled to 1/2 of the community property and all of their separate property.

1. The Car

Initial Characterization

Property acquired during marriage is initially characterized as community property.

The car was acquired by Wanda during marriage, so there is a presumption that the car is community property.

Tracing

Tracing can be used to show that the initial characterization is incorrect if something that is characterized as community property was actually acquired with a spouse's separate property.

Here, the car was acquired with \$30k from an inheritance that Wanda received. The inheritance is separate property, both because it is an inheritance but also because it is funds that Wanda had acquired in 2015 prior to her 2016 marriage. Therefore, tracing will allow Wanda to show that the car is separate property.

Title

Title can be used to rebut a presumption in some cases or as evidence to support one party's characterization of the property.

Here, there is no indication of whether the car was titled jointly or in Wanda's name alone. Assuming it was titled in Wanda's name alone, this would support Wanda's tracing argument that the car is separate property.

However, if the title were joint, then there would be a presumption that Wanda had made a gift to the estate, transforming the car into community property. While it is typically not possible to overcome the joint title presumption by tracing for either personal or real property, a spouse can seek reimbursement for down payments, improvements, or principal paid off with their separate property for any jointly titled

property.

Transmutation

A transmutation is a signed writing in which both spouses agree to change the characterization of property from CP to SP or SP to CP.

There is no evidence of a writing signed by both parties with respect to the car, so no transmutation occurred.

The car is Wanda's separate property.

2. The Framed and Signed Football Jersey

Initial Characterization

See rule above. The football jersey was acquired during the marriage, so it will initially be characterized as CP.

Tracing

See rule above. As with the car, the football jersey is traceable to Wanda's separate property, the inheritance that she received prior to the wedding. Therefore, the jersey will be separate property, unless a transmutation has occurred.

Transmutation

See general rule above. One exception to the transmutation writing requirement is for (1) a gift, (2) between spouses, (3) that is of insubstantial value in the context of the marriage. If those elements are proven, then one spouse's SP could either be transmuted to CP or the other spouse's SP.

Here, Harvey will argue that a transmutation occurred via the gift exception when Wanda gifted him the jersey and that the jersey was transmuted from Wanda's SP to his SP. This was a gift between spouses, though it is not necessarily the case that Wanda intended to transmute it to Harvey as his own SP. Harvey will point to the fact that it was his favorite player and that Wanda gave it to him following their honeymoon as evidence of the intention to transmute it to him. However, even if Harvey can prove Wanda's intent to make the gift to him as SP, it will be difficult to demonstrate that \$20k was insubstantial in the context of their marriage. Wanda was unemployed when she made the gift. Although she had an inheritance, the jersey was equal to 20% of that inheritance. The value of the jersey was almost as much as the value of their car. On the other hand, Wanda and Harvey bought a \$500k home shortly after the jersey was gifted to Harvey and now own a restaurant worth \$1m.

While it is a close call, given the high value of \$20k and Wanda's lack of income at the time the gift was made, a court would likely find that the gift exception does not apply and therefore no transmutation occurred.

Accordingly, the jersey will be Wanda's SP since it is traceable to her SP inheritance.

Title

See rule above. If Wanda had conveyed the jersey to Harvey via a document that provided him with sole title, that could serve as evidence of the transmutation. However, there is no indication that he holds sole title, therefore, title will not have an impact.

3. The House

The house is an asset, but there is also a liability in the form of the mortgage that will need to be addressed as well.

Initial Characterization

See general rule above for assets. Liabilities acquired during marriage are treated as CP debt, unless it is clear from the lender's intent that they relied on just a spouse's separate property in making the loan.

The house was acquired during marriage, so its initial characterization will be CP. The mortgage was also acquired during marriage, so its initial characterization will also be CP.

Wanda and Harvey both might try to argue that the mortgage should be the other's SP debt. Harvey will point to the fact that Wanda made the down payment and so the lender was perhaps looking just towards her SP when making the loan. However, this seems unlikely given that her remaining inheritance was just \$30k after the making of that down payment, so the lender would more likely have been looking towards the couple's future income given the \$500k mortgage. Wanda will argue that she was unemployed when the mortgage was granted, that the mortgage was paid out of Harvey's earnings and that the lender was looking towards Harvey. However, that should fail, because both Harvey's actual earnings are CP and his earning potential during the marriage is CP, so the lender would have been looking towards CP.

Tracing

See rule above. At divorce, a spouse is entitled to reimbursement for any SP contributions of down payments, improvements, or principal payments.

Here, \$50k of the down payment came from Wanda's inheritance. She is entitled to reimbursement for this at divorce, since it is a down payment of SP to acquire a CP asset.

The mortgage payments -- presumably of about \$150k total, given that the value of the mortgage was \$300k remaining at divorce -- were made from Harvey's earnings from the restaurant business. A spouse's earnings during marriage are CP, even if they come from an SP business like Harvey's restaurant. Therefore, he is not entitled to any reimbursement for having made that contribution of CP to the CP house.

Title

See rule above. Here, title was taken in Harvey's name alone for both the house and the

mortgage.

Given that this was the residence that both spouses resided in and that it is traceable to Wanda's SP via the down payment and Harvey's CP via his earnings, title in Harry's name alone is not likely to change the characterization of the house as CP. There is no evidence of any transmutation that would support that.

Similarly, while the mortgage debt was taken in Harvey's name alone, as discussed above it seems like the lender would have been looking towards community property when making the loan (i.e. earning potential of one or both spouses).

Therefore, the house should be treated as community property, subject to a \$50k reimbursement to Wanda for the down payment. The mortgage is also CP debt.

4. The Restaurant

Initial Characterization

See rule above. Harvey opened the restaurant in 2010, six years before he and Wanda married. Therefore, the restaurant is Harvey's SP.

Permanent Separation

See general rule above. The marital economic community here would likely not have ended until after Harvey moved out. While it seems Wanda stopped working at the restaurant at some point prior to that, there is no indication that she had done so because she had communicated to Harvey that she wanted to permanently separate. Instead, on the facts, the first indication of the permanent separation is when Harvey files for dissolution and moves out. This is relevant to the discussion below because the date of permanent separation is relevant for the measurement point for the value of the restaurant.

Dividing Business Value

When a spouse has an SP business that has benefited from CP efforts during the course of a marriage, courts can apply either of two formulas to apportion the value of the business upon divorce: *Perreira* or *Van Buren*.

Perreira looks at the business as more like a CP asset that has benefited primarily from the CP labor, and therefore the CP gets a greater share in the increase in the value from the time of marriage to the time of separation. The CP interest is equal to the value of the business at divorce less the SP interest. The SP interest is equal to the value of the business at marriage plus a fair rate of return for each year of marriage (usually 10%).

Van Camp looks at the business more like an asset that was brought into the marriage and has grown on its own accord due to its own characteristics, not the CP labor of the spouses. The CP interest is equal to a market value salary for the spouse or spouses who worked in the business, less any CP expenses paid out of the business less the salary or salaries actually taken. The SP interest is the value of the business at divorce

less the CP interest.

On the one hand, a restaurant typically looks like a situation where application of Perreira is more appropriate. It requires a lot of CP labor and efforts to grow a restaurant. Working at the restaurant seems to have been Harvey's primary occupation, and Wanda also worked at the restaurant during the marriage. Therefore, this looks like a situation where the SP business has benefited primarily from CP efforts and therefore Perreira would apply. However, the CP labor does not necessarily explain the increase in the value from \$500k to \$1m when a celebrity posted on social media that it was his favorite restaurant. If that celebrity was speaking about the restaurant based on his experiences recently (i.e., during the marriage), then it would still weigh towards using Perreira since the celebrity's positive impression could arguably have been based on the CP efforts. On the other hand, if the celebrity hadn't been to the restaurant since 2011 shortly after its opening, then it might suggest that the increase in value is more due to the asset itself and so Van Camp would apply. Alternatively, some courts might choose to take a bifurcated approach and use Perreira for the period when the value increased from \$100k to \$500k, where Perreira is clearly appropriate, and then use Van Camp for the period when the value increased from \$500k to \$1m.

There are a number of possible approaches that could be taken to valuing the restaurant. While the restaurant itself is SP, the CP will be entitled to an interest due to the efforts of the spouses in growing the business. Perreira is highly appropriate to use for the increase in value from \$100k to \$500k. There are good arguments that both parties could make for the increase in value from \$500k to \$1m.

Goodwill

Goodwill refers to the intangible value of a business based on continued public patronage of the business. It is considered CP. Courts use two methods to measure goodwill: excess earnings or market comparison. The excess earnings methodology looks at the value of the business less its retained earnings, and anything in excess of those retained earnings is goodwill. The market comparison approach looks at comparable businesses and conducts a comparison of their typical earnings against the business in question's earnings, and the excess is goodwill.

Separate from the Perreira/Van Camp analysis, a court may choose to value the goodwill of the restaurant. The goodwill that accrued during Harvey and Wanda's marriage is considered CP. However, any valuation of the business under Van Camp/Perreira would likely already include the goodwill (i.e. most business valuation methodologies use goodwill as a component of the value of the business) and so a court would want to make sure that a goodwill division is not giving a party duplicative or contradictory recoveries. The \$500k increase in value based on the celebrity posting could potentially be apportioned as goodwill, for example.

QUESTION 5: SELECTED ANSWER B

PRELIMINARY MATTERS

California (CA) is a community property (CP) state. In a CP state, the marital economic community (MEC) begins upon marriage and ends upon permanent separation, divorce, or death of a spouse. Property acquired during the MEC is presumed to be CP.

Property acquired before marriage, after permanent separation or divorce, or acquired through gifts or inheritance during marriage are presumed to be separate property (SP). Upon the permanent separation or divorce of the spouses, CP is to be distributed evenly, unless there is an agreement in place providing otherwise. Upon the death of a spouse, CP and SP will be distributed per the principles of CP, subject to any devises made by will.

Here, H and W were married in CA in 2016. A few years later, H filed for dissolution and moved out of the home. Therefore, H and W's MEC will have been in existence from 2016 until the time that H filed for dissolution.

The Car

Presumptions

W purchased a car while H and W were married for \$30,000. Because the car was purchased while H and W were married it is presumed to be CP, unless rebutted.

Title

Title in the car is likely in W's name alone, since the facts provide that W purchased "herself" a car. However, title alone is insufficient to establish SP ownership of property. Therefore, the title on the car will not be enough to attribute the car as W's SP.

Source and Tracing

To rebut the presumption that the car is community property, the source of the funds used to purchase the care can be traced to determine if it was purchased using SP. If the car was purchased using only SP, the car will retain its SP character.

Here, W inherited \$100,000 from her father in 2015, and she put that money in her bank account. This was prior to the establishment of the MEC (see above) in 2016.

Furthermore, the funds were an inheritance W received from her father. Because these funds were received before the MEC was established and was an inheritance, the \$100,000 W inherited from her father will be considered SP. W used the funds inherited from her father to purchase the car; the car's source can be traced to SP. Therefore, W will be able to establish the fact that the car is SP.

Transmutation

A transmutation is a change in character from SP to CP or vice versa. H may argue that the car was transmuted to CP since he loved the car and drove it often. However, his argument will fail. For a transmutation to be valid, the changed character of the property must be reduced to a writing, signed by the spouse who is to be disadvantaged by the

change in character of the property. Here, for a proper transmutation to have occurred, W would have had to sign affirming that she agreed to the change in character to her SP, since she would be the disadvantaged spouse. Since there is no evidence that a transmutation was reduced to writing, H's argument that a transmutation existed will fail.

Gift Exception

H may argue that the car should be subject to the gift exception for transmutations. Under the gift exception, a gift from one spouse to another that transmutes the character of a gift does not require a signed writing. In order for the gift exception to apply, the gift must be nominal in comparison to the finances of the MEC. If a gift is substantial in nature, it is unlikely to be considered a valid transmutation under the gift exception, and will retain its character. Here, H and W led a comfortably middle-class lifestyle at the time that W purchased the car. W had a modest inheritance, and together, W and H purchased a home for \$500,000. On these facts, a car worth \$30,000 is likely to be considered a substantial gift. Therefore, it is unlikely that the car will qualify as a transmutation under the gift exception.

Distribution

Given the foregoing, the car remains W's SP, and will be distributed to W.

The Framed & Signed Football Jersey

Presumptions

If W purchased the framed and signed football jersey while H and W were married, it will be presumed to be CP. If W purchased the jersey prior to H and W's marriage it would be considered her SP until she gave it to H. Here, the facts are unclear as to when W purchased the jersey. However, since it appears that the jersey was a wedding gift, and W gave the jersey to H after their honeymoon, it is likely that W purchased the jersey prior to the beginning of the MEC. Because the jersey was likely purchased before the MEC, the jersey will be presumed SP, unless rebutted.

Source and Tracing

See rule above. To rebut the presumption that the jersey is community property, the source of the funds used to purchase the jersey can be traced to determine if it was purchased using SP. If the jersey was purchased using only SP, the jersey will retain its SP character.

See above. The \$100,000 W inherited from her father will be considered SP. At the time of W and H's marriage, W was unemployed. W used the funds inherited from her father to purchase the jersey. Therefore, the jersey's source can be traced to SP. Therefore, W will be able to establish the fact that the jersey is SP.

Transmutation: Gift Exception

See rule above. A transmutation is a change in character from SP to CP or vice versa. H may argue that the jersey was transmuted to CP since W clearly purchased the gift for H. The jersey was of H's favorite football player. Here, H has a much stronger argument that the gift was meant to be transmuted to CP. W also gave H the gift after they were married, knowing the jersey would benefit their MEC. However, again, H's

argument will fail. If a gift is substantial in nature, it is unlikely to be considered a valid transmutation under the gift exception, and will retain its character. Here, H and W led a comfortably middle-class lifestyle, as per above. On these facts, a jersey worth \$30,000 is likely to be considered a substantial gift. Therefore, it is unlikely that the jersey will qualify as a transmutation under the gift exception.

There is also no evidence W signed a writing affirming that she agreed to change the character of her jersey SP as the disadvantaged spouse. Since there is no evidence that a transmutation was reduced to writing, H's argument that a transmutation existed will fail.

Ratification

Despite the fact that the property is W's SP, she can ratify the jersey as a gift to H during the dissolution proceedings if she wishes by agreeing to turn the jersey over to him.

Distribution

Given the foregoing, the jersey remains W's SP, and will be distributed to W.

The House

Presumptions

The house was purchased after W and H were married. Because the house was purchased while H and W were married it is presumed to be CP, unless rebutted.

Title

Title in the house and the mortgage is in H's name. However, title alone is insufficient to establish SP ownership of property. Therefore, the title on the house will not be enough to attribute the house as H's SP.

Source and Tracing

To rebut the presumption that the house is community property, the source of the funds used to purchase the house can be traced to determine if it was purchased using SP.

Here, W used \$50,000 of her SP inheritance (see above) as the down payment for the home she purchased with H. H paid for the mortgage payments from his earnings from a restaurant building that he owned. Despite the fact that H owned the restaurant building as SP, since the restaurant was opened in 2010, prior to the establishment of the MEC, the facts provide that H paid for the mortgage from his earnings. Earnings are considered CP. Therefore the mortgage is a comingled asset, with the down payment funds traced to an SP source (W's inheritance) and the mortgage payments traced to a CP source (H's earnings).

Special Title Presumption

Under the special title presumption, upon the dissolution of MECs after 1985 in California, a spouse is entitled to reimbursement from the CP estate if they used SP to benefit a CP property. In this case, W used her SP inheritance to support the purchase of a CP home for both H and W. W cannot rebut the CP presumption through the SP contribution that she made, but she can argue that she is entitled to reimbursement for

the \$50,000 of SP funds W contributed to the down payment on the house.

Debt

Under CP principles, debt is equally shared by the spouses. Here, W and H owe \$300,000 on the house. Therefore, they are each liable for \$150,000 of the remaining mortgage.

Distribution

Given the foregoing, the house is CP and W and H both have a 50% interest in the house. Additionally, W is entitled to a \$50,000 reimbursement from the SP she used toward the down payment of the house.

Restaurant

Presumptions

The restaurant was opened in 2010 by H prior to the establishment of the MEC. Because the restaurant business was established prior to H and W's marriage, it is presumed to be SP, unless rebutted.

Source and Tracing

Here, though the business was started by H prior to the marriage, W worked at the restaurant and helped H to manage it. Because of both of H and W's efforts, they managed to increase the value of the restaurant from \$100,000 to \$500,000 and shortly after this increase in valuation, W stopped working at the restaurant. Therefore, both H and W contributed their labor to benefit the business.

Under these circumstances a court will use one of two formulas to determine how to distribute the comingled funds in the business, unless the spouses were already fairly compensated for their contributions. The Pereira formula is used when the efforts and labor of the spouses increase the value of the business. If the value of the business increases due to circumstance, the courts will use the Van Camp formula. Here, there are no facts suggesting whether W or H were fairly compensated for their contribution to the business. But the restaurant's increase in value from \$100,000 to \$500,000 is due to the contribution of both spouses, so the courts will likely use the Pereira formula.

Pereira

Under Pereira, the court will calculate the SP as the value of the business at the beginning of the marriage (\$100,000) multiplied by a fair amount of accrual (10%) multiplied by the years of marriage. That value will then be added to the current value of the business (\$500,000). Since we don't have all the facts necessary, we cannot do the full calculation. The CP distribution would then be calculated by taking the current value of the business (\$500,000) and subtracting the SP as calculated under Pereira.

After W stopped working at the restaurant the value of the restaurant doubled overnight from \$500,000 to \$1 million due to a comment endorsing the restaurant that a celebrity posted on social media. Because this increase in value was circumstantial, the court is likely to apply the Van Camp formula to calculate CP and SP for the period in which the restaurant doubled its value. Under Van Camp, the court will calculate the CP as the difference between the reasonable value of the service either spouse contributed,

multiplied by the years they were married. The difference between this number and the fair market value of the business is the CP calculation.

Distribution

Given the foregoing, the restaurant is a comingled asset. The amount each spouse is entitled to in CP and SP will be calculated using the Pereira formula for the period in which the restaurant increased its value from \$100,000 to \$500,000. The Van Camp formula will be used for the time in which the restaurant doubled its value overnight.