



California Bar Examination

**Essay Questions
and
Selected Answers**

February 2017



The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2017 California Bar Examination and two selected answers for each question.

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

<u>Question Number</u>	<u>Subject</u>
1.	Wills
2.	Remedies / Torts
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4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

ESSAY EXAMINATION INSTRUCTIONS

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

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

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

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

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

QUESTION 1

Mary was a widow with two adult children, Amy and Bob.

In 2010, Mary bought Gamma and Delta stock. She then sat at her computer and typed the following:

This is my will. I leave the house to Amy and my stock to Bob.
The rest, they can split.

Mary printed two copies of the document. She signed and dated both copies in the presence of her best friend, Carol, and her neighbor, Ned. Carol had been fully advised of the contents and signed both copies. Although Ned had no idea as to the bequests, he declared that he was honored to be a witness and signed his name under Mary's and Carol's signatures on both copies. Mary placed one copy in her safe deposit box.

In 2014, Mary married John. She soon decided to prepare a new will. She deleted the old document from her computer and tore up one copy. She forgot, however, about the other copy in her safe deposit box.

On her corporate stationery with her business logo emblazoned on it, Mary wrote:

I leave John my Gamma stock. My Delta stock, I leave to Bob.
Amy is to get the house.

Mary signed the document. She neither dated the document nor designated a recipient for her remaining property.

In 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock.

In 2016, Mary died, survived by John, Amy, and Bob.

Mary's estate consists of Gamma stock, Tango stock, her house, and \$200,000 in cash in separate property funds.

What rights, if any, do Amy, Bob, and John have in the assets in Mary's estate? Discuss.

Answer according to California law.

QUESTION 1: SELECTED ANSWER A

Validity of Mary's First Will:

The issue is whether the will that Mary signed in 2010 is valid. Because Mary typed this will out using her computer, this will needs to meet the requirements of an attested will. In order to be valid, an attested will needs to:

- 1) Be written, dated and signed by the testator or someone at testator's direction;
- 2) Be signed by Mary in front of two uninterested witnesses at the same time. These witnesses can either visually witness Mary's execution of the will, or be conscious of the execution in some way;
- 3) The two witnesses need to countersign the will at some point during Mary's lifetime, not necessarily when Mary signs the will, and not necessarily at the same time as each other;
- 4) Each witness needs to understand that they're signing Mary's will (as opposed to a non-testamentary instrument).

Here, we're told that Mary herself typed out, signed and dated both copies of her first will. Therefore, there's no issue as to the validity of Mary's first will as to whether Mary's first will is written, dated, and signed by a permitted party. The facts establish that Mary signed both copies of her first will in the presence of both Carol and Ned (both of whom constitute uninterested witnesses as neither benefit from the bequests stated in Mary's first will), and they further establish that both Carol and Ned countersigned the will while Mary was alive. As for whether each witness understood that they were signing Mary's will, it's arguable that this requirement is met because Carol certainly was aware as to the contents of the will, and Ned, though unaware as to Mary's specific bequests, declared he was honored to be a witness. There's no requirement that the witness be aware of the specific details of a will in order for the attested will to be valid.

In addition, for Mary's first will to be valid, she needs to know the assets contained in her estate and she needs to know the natural bounty of her estate (i.e., spouse, issue

etc.). We're told at the end of the fact pattern that Mary's estate at the time of her death consisted of her stock, her house and cash in separate property funds. By devising the house to one recipient, her stock to another, and the residue to both of her devisees, Mary demonstrated that she both knew the natural bounty of her estate and the assets constituting her estate.

There are no indications here of any kind of undue influence or fraudulent behavior by any persons in Mary's life causing her to write and sign her 2010 will, so for this reason, Mary's first will is not invalidated as result of lack of intent. Similarly, there's no indication here that Mary lacked the capacity to enter into her first will, as she is an adult at the time she drafted her first will, and there is no indication she suffered from insanity at that time.

Revocation of Mary's First Will:

The issue is whether Mary's first will was effectively revoked by Mary's actions in 2014. A will can be revoked by physical act or implication. If a will is revoked by testator's physical act, the act needs to be one that effectively destroys the will (e.g., ripping the will in half, as opposed to tearing off a corner without any writing on it), and it needs to be done by Mary as testator (or by someone at her direction) with the simultaneous intent to revoke the will. Here, Mary deleted the old document from her computer, which demonstrates the required intent present when she additionally tore up one original copy of her first will. The act does destroy the will because she "tore it up." There's no indication in the facts that her act of tearing up that original of the first will was minor in any way so as to create a doubt as to whether or not she actually fully tore up the document. Lastly the act of tearing up the will was conducted by Mary herself, so there's no issue as to whether or not it was done by the testator.

Revocation of Safe Deposit Box Copy:

The issue here is whether the fact that Mary forgot about the other copy of her 2010 will in her safe deposit box affects the validity of the revocation of said 2010 will. There is a presumption that where there are two identical originals of one will, the revocation of one constitutes the revocation of the other. Here, we've established above that the

revocation of one of the originals of her will was effective and complete. For that reason, the revocation of the other original is also deemed valid and effective. There is no indication here of any intent in leaving the copy located in the safe deposit box untouched, so there are no grounds on which to rebut the presumption that all copies of Mary's 2010 will have been revoked.

Validity of Mary's second (2014) Will:

The issue here is whether Mary's second will, signed in 2014, is valid. The facts tell us that this will was written by Mary on her corporate stationery with her business logo emblazoned on it. This likely signifies that she did not type the will; rather this is a handwritten (holographic) will. A holographic will needs to be signed by the testator (anywhere on the document) and the material terms of testator's will need to be in handwriting as well. Unlike an attested will, there's no requirement that the will be witnessed by any witnesses. Here, the facts state that Mary signed the document, and all of the material terms of this second will were also presumably handwritten (as there's no indication that she started up her computer at any point to complete this second will). The material terms are that she left her Gamma stock to John, her Delta stock to Bob, and the house to Amy.

There's a related issue as to whether her 2014 will needs to be dated in order to be valid. It does not. The rule is that a holographic will does not need to be dated in order to be effective. There are exceptions to this rule relating to when the date becomes important because there are two undated wills under consideration. But these exceptions do not apply here.

There's another related issue as to whether Mary designated a recipient for her remaining property (i.e., her residuary estate). There's no need for a holographic will to devise the entirety of a testator's estate; when the testator's estate is not entirely devised by a testator's will, the testator's estate goes to Mary's heirs by intestate succession.

As with Mary's first will, there are no indications here of any kind of undue influence or

fraudulent behavior by any persons in Mary's life causing her to write and sign her 2014 will, so for this reason, Mary's second will is not invalidated as result of lack of intent. We're told that Mary decided to prepare a new will soon after marrying John, which is a natural thing to do upon marrying/re marrying. Similarly, there's no indication here that Mary lacked the capacity to enter into her second will, as she is an adult at the time she drafted her second will, and there is no indication she suffered from insanity at that time.

Amy's Rights in the Assets in Mary's Estate:

The issue here is what asset(s) Amy is entitled to. Mary's 2014 will, which was established by the above to be valid, devised "the house" to Amy. There is a related issue as to whether this instruction is valid, because Mary did not specify the address of her house, or any other details clarifying which house Mary was referring to. In such a situation, where there's ambiguity as to the meaning of language contained in a will, or when the language could mean two or more different things (e.g., two different houses), then parol evidence can be admitted into probate to resolve the meaning as to Mary's intent. Here, there's no indication that Mary has more than the one house she's been living in, so parol evidence can be admitted to show that Mary's gift to Amy of her house is valid and refers to Mary's one and only home.

Please see the last paragraph below as to my analysis of Amy's right to a portion of the \$200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

Bob's Rights in the Assets in Mary's Estate:

Mary's 2014 will devises her Delta stock to Bob. The facts say that in 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock. The issue, known as ademption by extinction, is whether Mary's specific devise of "my Delta stock" fails by ademption by extinction, or whether one of the California exceptions to ademption by extinction apply. The rule is that a specific devise (i.e., a gift of a specific item as opposed to a general item) fails by ademption by extinction when that item is no longer in the testator's possession at the time of her death. California recognizes three exceptions to this rule: 1) when the stock is changed to another form of stock (by

merger, etc.), 2) when the executor of the estate sells the property, and 3) when Testator receives condemnation proceedings and there's no issue of traceability. Here, the first exception applies. The facts state that Mary used the proceeds from the sale of her Delta stock to purchase Tango stock. The Tango stock can be clearly traced to the proceeds of her Delta stock. For this reason, the gift of the Delta stock to Bob should not fail because of ademption by extinction because it's clear that Mary intended for her Delta stock (and/or any replacement stock purchased in lieu of her Delta stock (i.e., her Tango stock) to go to Bob. There's no indication here of lack of intent because she didn't quickly die after purchasing the Tango stock, so she had an opportunity to revise her will had she intended a different result to occur.

Please see the last paragraph below as to my analysis of Bob's right to a portion of the \$200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

John's Rights in the Assets in Mary's Estate:

Lastly, Mary left her Gamma stock via her 2014 will to John. This is just like her gift to Bob, without the added complication of ademption by extinction. We established that Mary's 2014 will is valid, therefore her specific gift of her Gamma stock to John is valid.

Please see the last paragraph below as to my analysis of John's right to a portion of the \$200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

\$200,000 in Cash in Separate Property Funds:

In addition to John's, Amy's and Bob's rights to Mary's stock and house, there's the issue of who is entitled to Mary's \$200,000 in cash in separate property funds. The rule is that when a testator doesn't devise her entire estate away using her will, and doesn't name a beneficiary with respect to any remaining property, the remaining property goes to her heirs via intestate succession. And the rule of intestate succession is a testator's spouse is entitled to all of a testator's separate property if the testator didn't leave behind any parents or issue, 1/2 of the testator's separate property if the testator left

behind one child, and $\frac{1}{3}$ of the testator's separate property if the testator left behind more than one child. Here, Mary the testator left behind 2 children, which is more than one, therefore her spouse John is entitled to $\frac{1}{3}$ of Mary's separate property, while the remaining $\frac{2}{3}$ get split evenly by Amy and Bob (i.e., each of John, Amy and Bob receive $\frac{1}{3}$ of \$200,000 in addition to the gifts specifically devised to them that are described above).

QUESTION 1: SELECTED ANSWER B

As a threshold issue to determine the rights that Amy, Bob, and John hold in the assets of Mary's estate, we must determine if Mary died with a valid will and, if so, if the will to be probated is the 2010 instrument or the 2014 instrument.

2010 Instrument

The first issue is whether the 2010 instrument was a valid will and, if so, if it was revoked by Mary's tearing up only one copy of the will in 2014.

Valid Will Instrument

In order for a document to constitute a valid will under California law, (i) the testator must have the capacity and intent to form a will through that document and (ii) the will must meet the formation requirements. A testator will have adequate capacity to form a will if (i) they are 18 years of age or older, (ii) they understand the extent of their property (i.e., they know what property they own), (iii) they know the "nature of their bounty" (i.e., they understand who their issue and/or their spouse is, among other relatives), and (iv) they intend for the document to constitute a will.

For the 2010 instrument, each of the capacity elements is met. While not explicitly stated, Mary is clearly over 18, given the fact that she has two adult children. There is also no evidence that she does not understand the extent of her property. The fact that she leaves specific items to each of Amy and Bob strongly suggests that she knows the nature of her bounty, as it is an explicit recognition of both her children. Finally, there is clear intent to create a will, as the first line in the document states "This is my will." As such, Mary had capacity to create the will.

We then move on to formation requirements. For a non-holographic (i.e., not handwritten) will, there are five formation requirements. First, the will must be in writing.

Second, the will must be signed by the testator or by a third party under the direction of and in the presence of the testator. Third, the testator's signing of the will must be in the presence of two witnesses. Each witness must be present at the same time to see the signing. Fourth, the witnesses must sign the will during the testator's lifetime. Fifth and finally, the witnesses must know that they are witnessing the execution of a will.

Here, Mary typed the 2010 instrument rather than handwrite it, so it must meet the formation requirements described above. The will is clearly a writing, and Mary signed and dated both copies, meeting the first two requirements. She signed and dated both copies in the presence of two witnesses: Carol and Ned (note that neither Carol and Ned receive gifts under the 2010 instrument and therefore there is no issue with interested witnesses). Carol, having been fully advised of the contents, signed the will immediately thereafter, so at least one witness met the fourth and fifth requirements. One might raise issue with Ned, who signed without understanding the bequests, and therefore might have some issue meeting the fifth requirement. Ned, however, only had no idea as to the specific bequests, but he still appears to have understood that a will was being signed. The formation requirements only require awareness by the witness that the document is in fact a will, rather than the contents of each specific bequest in the will, and therefore Ned's lack of knowledge should not be an issue. Even if a court were to find it an issue, however, a California court is allowed to let a will into probate even if there have been minor violations of the witness requirements for will, so long as there is clear and convincing evidence that the testator intended the document to be his or her will. Given the clear language in the document and the substantial adherence to the formation requirements, Mary's estate should be able to prove that.

Therefore, Mary both had capacity and should be deemed to meet the formation requirements necessary to have a valid non-holographic will. As such, the 2010 instrument should be probated, unless it has been properly revoked.

Revocation of 2010 Will

Now that we know the 2010 instrument constitutes a valid will, the next issue is to determine whether the 2010 will was revoked.

A will may be revoked by either (i) physical revocation or (ii) a later testamentary instrument. Physical revocation occurs when, among other things, there is a burning, tearing, crossing out, or obliteration (i.e., erasure of terms) of the physical will document, and the testator through such actions intended to revoke the will. In the event that there are multiple copies of a will, the physical revocation of one copy will create a presumption that there has been a revocation of the will, even if other copies have not been physically revoked.

Here, Mary deleted the old document from her computer and tore up one copy of the 2010 will. The deletion from the computer does not constitute an obliteration of the document, as obliteration does not apply to electronic documents, and thus that act did not constitute a physical revocation. However, Mary's tearing up a copy of the 2010 will does constitute a tearing of the will and, under the rules described above, a physical revocation of the will. This act was intended to revoke the will, as can be proved through the circumstantial evidence that she also deleted the will from her computer (showing it was not a mistake) and that she then devised a new will. Moreover, even though Mary forgot to physically revoke the copy of the will in her safety deposit box, there is a presumption that the physical revocation of one copy creates a revocation of the will, despite other copies being preserved. Here, that presumption will exist, and it will be hard to rebut. The evidence shows a clear intent to revoke, as Mary deleted the will from her computer and drafted a new will after marriage, and there is no evidence showing hesitation on Mary's part to revoke.

Thus, the 2010 instrument was properly revoked through physical revocation.

In the alternative, the 2010 will may have been revoked through later

testamentary instrument. A later instrument revokes a prior will if (i) the later instrument expressly states that it revokes the prior will or (ii) the later instrument creates an implicit assumption that the former will is revoked. For (ii), a later will that deals with the entirety of the testator's estate, and therefore leaves nothing for the previous will to distribute, constitutes sufficient implicit evidence of revocation.

Here, one could argue that the 2014 instrument revoked the 2010 will. There is no express statement of revocation, so we must look to see if it implicitly revokes the 2010 will. While there is an arguable case for implied revocation, as the 2014 instrument deals with most of Mary's estate and there are circumstances surrounding the 2014 will that suggest Mary meant to revoke the 2010 will (as described above), one could argue that the lack of a residuary clause defeats the implied revocation, as it leaves something for the 2010 will to distribute.

While good cases can be made either way for revocation by a later testamentary instrument, it ultimately does not matter, as there is a proper physical revocation of the 2010 will. Therefore, the 2010 will does not govern the rights of Amy, Bob, and John.

2014 Instrument

The next issue is whether the 2014 instrument is a valid will and therefore governs the rights of Amy, Bob, and John with respect to Mary's estate. Note that, upon the physical revocation of the 2010 will, that will was permanently revoked unless there has been a revival. There is no indication of a revival of the 2010 will under these facts. As such, if the 2014 instrument is not a valid will, the estate will pass into intestacy and distribution will be governed by the intestacy rules.

The 2014 instrument is handwritten, and therefore if it is a will, we consider it a holographic will. In order to have a valid holographic will, the document must be (i) in writing, (ii) signed by the testator, and (iii) all of the material terms of the will must be in the testator's own handwriting. The testator must also have capacity to execute a will. The material terms are (i) each gift given under the will and (ii) who each gift should go

to. The lack of a date will not invalidate a holographic will, except in certain instances where there is an issue with the testator's capacity or there is the possibility that two or more wills should be probated.

Here, Mary wrote on her corporate stationery her bequests to each of John, Bob, and Amy, and signed the document. We first need to make sure there is no capacity issue. There is clearly no issue as to age or the extent of her property; this analysis is the same as what was discussed for the 2010 instrument above. There is also no issue as to the nature of her bounty, as she knows both her children and her spouse as evidence by her gifts. While one may argue that there was not an intent to create a will since there is no clear indication that this document is a will, the surrounding circumstances are sufficient to prove intent. She deleted and tore up the old will right before writing this document, and it is generally written as a will (e.g., it makes gifts as one would expect a will to make). Therefore, there is no capacity issue.

The document also meets the requirements of a holographic will. It is signed by Mary, and each of the gifts made, as well as who it should be made to, is handwritten on the corporate stationery. Given that there is no capacity issue or an issue with multiple wills that are each possibly valid, the lack of a date should be no issue here.

Therefore, the 2014 instrument is a valid holographic will and should govern the rights of Amy, Bob, and John.

Rights of Amy, Bob, and John Under 2014 Will

Now that we have determined what will should govern the distribution of Mary's estate, we will address each of Amy, Bob, and John's rights under the 2014 will in turn. We will lastly address the issue of the \$200,000 in cash that is not subject to the will.

Amy

Under the 2014 will, Amy has been gifted Mary's house. This gift will be given to

Amy, pursuant to the 2014 will, unless there is an issue with the house as community property.

California is a community property state. Therefore, there is a presumption that all property obtained by a couple during marriage is community property. Upon the death of one spouse, the living spouse retains a one-half interest in all community property. In the event that a testator spouse's will devises more than one-half of the community property (and therefore intrudes upon the living spouse's one-half interest), then the living spouse may either elect to take its gifts under the will or to receive its proper community property share. Any property acquired prior to marriage, as well as any property acquired during marriage through the expenditure of separate property and the profits, rents, and issue arising from separate property, is considered separate property and is not subject to the community property rules stated above.

Amy's gift, the house, was purchased prior to Mary's marriage to John. Although we do not know the exact date of purchase, we know that it happened prior to marriage because it was described in Mary's 2010 will. Since it was purchased prior to marriage, it will be considered separate property, and therefore John may not assert any rights to it. Thus, Amy will receive her gift under the will, and should get the house.

Bob

Under the 2014 will, Bob is to receive Mary's Delta stock. Since Mary used the term "my" Delta stock, this is considered a specific gift under the will. A specific gift may be extinguished under the will in the event that the testator no longer owns the specific property to be gifted at the time of death. However, under California law, a specific gift will not be automatically extinguished because it is no longer part of the testator's estate if it can be proven that the testator did not intend to have the gift adeemed.

Here, Mary sold Delta stock and therefore the Delta stock is no longer in her estate. However, Bob may argue that this extinction should not cancel the gift, as Mary did not intend to get rid of the gift. He may prove this by showing that the proceeds of

the sale of the Delta stock were immediately used to buy Tango stock. Moreover, there is no evidence that the sale occurred because Mary was looking to get rid of Bob's gift. Therefore, given the direct tracing of proceeds and the lack of any evidence that Mary was looking to shut Bob out of the will, Bob has a good case to show that his gift should not be adeemed and he should receive the Tango stock, which can be directly traced from the proceeds of the Delta stock.

Likewise, there is no community property issue, as the Tango stock was bought from the proceeds of separate property (since the Delta stock was acquired prior to marriage).

John

Under the 2014 will, John is to receive the Gamma stock. There is no issue with this devise, and thus he will receive this gift.

\$200,000 in Cash

The final issue is what to do with the \$200,000 in cash. Since there is no residue clause in the 2014 will, this will pass by intestacy.

Under California's intestacy rules, in the event that there is a surviving spouse, the surviving spouse takes 1/2 of all community property and quasi-community property. The surviving spouse will also take a share of separate property, depending on whether the testator left living children. In the event that the testator left a surviving spouse and more than one living child, the surviving spouse receives 1/3rd of the separate property passing through intestacy, and the children receive the other 2/3rd, to be divided equally among them.

Here, there is a surviving spouse (John) and two living children (Amy and Bob). Therefore, the \$200,000 will go 1/3rd to John under intestacy rules, and 2/3rd to Amy and Bob. Thus, each will receive 1/3 of \$200,000.

QUESTION 2

Steve agreed to convey his condominium to Betty for \$200,000 in a written contract signed by both parties. During negotiations, Steve told Betty that, although there was no deeded parking along with the unit, he was allowed to park his car on an adjacent lot for \$50 a month. Steve stated that he had no reason to believe that Betty would not be able to continue that arrangement. Parking was important to Betty because the condominium was located in a congested urban area.

On June 1, the conveyance took place: Betty paid Steve \$200,000, Steve deeded the condominium to Betty, and Betty moved. She immediately had the entire unit painted, replaced some windows, and added a deck. The improvements cost \$20,000 in all. She also spent \$2,000 to remove the only bathtub in the condominium and to replace it with a shower, leaving the condominium with two showers and no bathtub.

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and was going to discontinue renting parking spaces. She also learned that Steve had known about these plans before the sale. She quickly investigated other options and discovered that she could rent parking a block away for \$100 a month. At the same time, she also found that, immediately before Steve had bought the condominium, the previous owner had been murdered on the premises. Steve had failed to tell Betty about the incident.

Betty has tried to sell the condominium but has been unable to obtain offers of more than \$160,000, partly due to the disclosure of the murder and the lack of a parking space. Betty has sued Steve for fraud.

What is the likely outcome of Betty's lawsuit and what remedies can she reasonably seek? Discuss.

QUESTION 2: SELECTED ANSWER A

Steve's Breach in Respect of the Parking Space

The issue is whether Steve misrepresented to Betty the facts relating to the parking space in a way that would give cause to a right of action.

A misrepresentation is a (i) statement of fact, (ii) that is false, and (iii) either material or the known to the declarant to be untrue, and (iv) which induces a person to act to their detriment in reliance on the representation.

Steve made a clear statement of fact when he said there was an existing parking space available for rent at \$50 a month and he had no reason to believe that the arrangement would not be continued. This fact is clearly false since the construction of an office building means that the parking arrangement will be discontinued.

Steve told Betty that he saw no reason she could not continue to park her car subject to the pre-existing arrangement (payment of a \$50 a month fee). Parking was important to Betty given the nature of the area (a congested urban area) - a fact that Steve should have been aware of, having lived in the area himself. Betty will argue that this was a material fact of importance in her decision to enter into the condo sale. Steve will argue the opposite, that parking is ancillary to the property purchase and therefore lacks the materiality required for misrepresentation. As Betty later discovered, Steve knew about the plans to discontinue renting parking spaces before the sale occurred, therefore even if the statement is not considered material it will satisfy the requirement of knowledge that it was untrue.

Given the importance of parking to Betty, she will argue that the fact there was a parking arrangement in place was central to her decision to purchase the condo and she therefore acted in reliance on the statement. Again, Steve will try to argue that the parking is ancillary to the condo, it was not part of the deeded property and does not

sufficiently constitute reliance as there must have been many other factors that induced Betty to purchase the condo such as price, size and location.

Given that parking is something Betty probably does on a daily basis, the existence of adequate parking arrangements is likely to be viewed by the courts as sufficient motivation for reliance. Therefore Steve's statement is indeed likely to be viewed as a fraudulent misrepresentation.

Failure to Disclose the Murder

The issue is whether Steve was under a duty to disclose that a murder had previously occurred in the condo.

At common law, the seller of property had no duties of disclosure to the buyer, under the doctrine of caveat emptor. The buyer was entitled to inspect the property prior to purchase and had the obligation to discover any defects for herself. The modern trend is to impose on sellers a duty to disclose material defects of which the buyer was not aware and could not easily discover on inspection. Liability for failure to do so arises under the principles of concealment and fraud.

The fact that a murder had taken place in the condo itself is a fact very likely to affect the marketability of the condo. Indeed Betty found the value had dropped significantly once she disclosed this fact to potential new buyers. Betty will argue that Steve had a duty to actively disclose this information to her and his failure to do so constituted fraud. Steve, on the other hand, will argue that he made no representation about the murder and never stated that a murder had not happened and therefore cannot be found liable for fraud because he did not do or say anything dishonest.

The courts will likely find that Steve did have a duty to disclose this information to Betty, as it is a material fact concerning the property that will have an adverse effect on its value. Steve's failure to disclose will amount to concealment and consequently Betty should have a strong course of action against Steve for fraud.

Appropriate Remedies

Where there is fraud in the inducement of a contract, the contract becomes voidable and entitles the innocent party to treat the contract as void and seek remedies accordingly.

The appropriate remedies for Betty will depend on whether she wishes to stay in the condo, but make good her financial loss, or whether she wishes to force a sale of the property and move out.

Money Damages

If Betty decides to stay in the condo the most appropriate course of action will be to affirm the contract and seek money damages. The various money damages rules are all aimed at compensating for loss of expectation, where the expectation was simply no breach. Expectation damages will be used to put the plaintiff in the position she would have been in had the contract been as expected. In order to claim damages, the claimant must show that (i) the defendant's actions were the cause of the loss, (ii) the loss was reasonably foreseeable at the time the contract was entered into, (iii) the loss is certain and not too speculative, and (iv) it was unavoidable (meaning the claimant has taken all steps available to reduce her loss).

For the Parking Space - With respect to the parking, Betty's expectation was that she would have a place to park her car for \$50 a month. Steve's misrepresentation is the clear cause of this loss and it was reasonably foreseeable at the time that if Steve's statement about the parking was false, Betty would suffer damage by either having no parking or potentially having to pay more for it. Betty has taken appropriate steps to find an alternative parking space and thereby mitigate her loss. But the parking space will be twice the cost of what she was expecting. This loss is certain in monetary terms (a clear \$50 per month). Therefore Betty should have a successful claim against Steve for monetary damages to make good the loss of the parking place.

Judgment for money damages is normally made in one lump sum payment, discounted to today's value without taking account of inflation. However, the modern trend of some courts is to allow for inflation.

For the Loss in Value Due to the Murder - The courts will apply the same test to ascertain damages in respect of the drop in the condo's value due to the murder.

As before, the causal link is clear - Steve's failure to disclose the murder resulted in Betty paying an inflated price for the condo; this was foreseeable at the time, since it is clear to reasonable people that such a fact would necessarily result in the property being less marketable. Betty has attempted to sell the house but has been unable to do so for more than \$160,000; therefore the measure of expectation damages will be \$40,000. However, Betty has also spent \$22,000 on making improvements to the condo and she will argue that they have raised the value of the condo and she should therefore be able to recover for these too under the consequential damages rule. Consequential damages may be sought in order to compensate the claimant for losses over and above expectation damages that were foreseeable.

Steve will argue that removing the only bathtub in the condo has in fact depreciated the property and that the drop in value is more due to this than the disclosure of the murder.

Rescission

Rescission is an equitable remedy that the courts may use in their discretion when there is no available legal remedy. Rescission would allow Betty to treat the contract as void, the condo would be returned to Steve and her purchase money would be returned to her.

If Betty decides she no longer wants to live in the condo, this would be a more appropriate remedy. Since land is always considered unique, Betty may argue that the legal remedy of damages is not appropriate and she should be entitled to avoid the contract altogether.

In addition to obtaining back her purchase money, Betty could seek reliance damages for the amounts spent on improving the property. Reliance damages seek to put the claimant in the position she would have been in had she never entered into the contract.

This would allow Betty to recover the \$22,000 spent on improvements.

QUESTION 2: SELECTED ANSWER B

Valid Contract:

Governing Law:

The UCC governs contracts for the sales of goods. The common law governs contracts for services, the sale of land, and all others not under the UCC.

Here, the contract was for the sale of a condominium (condo) which is real property; thus the Common Law applies.

Contract formalities:

A valid contract requires: 1) offer, 2) acceptance, and 3) consideration. Further, a land sale contract must be in writing to satisfy the statute of frauds (SOF).

Here, there is a written contract by both parties relating to the sale of the condo, thus this satisfies the SOF. Steve agreed to sell Betty his condo for \$200,000. Thus, this was a valid offer. On June 1, the conveyance took place. Steve deeded the condo to Betty; she paid the \$200,000 and moved in. Thus, Betty accepted.

Thus, the parties had a valid contract.

Breach of Contract:

A breach of contract occurs when one of the parties fails to perform on the contract. With land sale contracts, once the conveyance is made, it extinguishes the contract and the parties can only sue on the deed and based on which future covenants were granted in the deed (further assurances, quiet enjoyment, or warranty).

Here, the conveyance had already occurred; thus the deed will control and Betty will not be able to sue for breach of contract relating to the land sale. However, a party can

nonetheless sue based on fraud if there was an intentional failure to disclose. If Betty can establish that there was fraud, she would be entitled to sue on a fraud theory.

Fraud:

Fraud requires 1) a misrepresentation, 2) of material fact, 3) known to induce reliance, 4) actual reliance, and 5) damages.

Parking:

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and would discontinue renting parking spaces and Steve knew about these plans. Here, there was a misrepresentation because during negotiations Steve told Betty that although there was no deeded parking, she would be allowed to park on an adjacent lot for \$50 per month just as he had. Meanwhile he knew about the building owner's plans that Betty would not be able to park in that lot. Thus, there was a misrepresentation.

This was a material fact because parking was important to Betty because the condo was located in a congested urban area. The materiality is further evidenced by the fact that she is having a hard time reselling the condo because of the parking.

Further, Steve knew this misrepresentation would induce reliance because he told Betty that he had no reason to believe that Betty would not be able to continue that arrangement. This shows that he knew that Betty would rely on this fact in deciding to continue with the purchase.

The next element is met because Betty actually relied on the misrepresentation because she decided to continue with the purchase of the condo and she did not know about the lack of parking until after the sale had been completed.

Betty's damages are established because she will lose lost the ability to park in the

nearby lot.

Thus, there was a misrepresentation as to the parking.

Murder:

A misrepresentation does not have to be a lie, but can be an omission as well, if the seller knew of the defect and failed to inform the buyer of the defect.

Here, Betty learned in August, some two months after the purchase, that the previous owner had been murdered on the premises, and Steve failed to disclose to Betty about the incident. Steve knew about the murder but failed to disclose it to Betty. Such a failure to disclose would amount to a misrepresentation based on omission. Here, he knew that this was a material fact because a prospective buyer would want to know if a person had been murdered on the premises. Further, the failure to disclose such a horrible fact would result in an innocent buyer to rely on the fact that no such murders had occurred on the premises. He knew that if he disclosed the murder, Betty would back out of the deal. Further, Betty relied on the fact that there had been no murders in the condo when she decided to proceed with the sale. Had she been informed about the murder, she could have had the opportunity to decide if she nonetheless wanted to continue with the purchase. Lastly, Betty has suffered damages because she cannot sell the house for more than \$160,000, partly because she has to disclose the murder to prospective buyers.

Thus, there was a misrepresentation about the murder.

In conclusion, because Steve engaged in fraud for the misrepresentation of the parking situation and the murder, Betty will be successful in her suit against Steve.

Rescission:

A contract can be rescinded based on a mutual mistake or fraud.

Here, Betty will seek that the contract be rescinded because she can successfully assert her claim for fraud against Steve, as established above.

Reliance:

Reliance damages can be obtained to avoid any unjust enrichment on the part of the defendant. Reliance seeks to put the non-breaching party in the position as if there had been no contract.

Here, Betty was excited to own her own condo. In anticipation of living in the condo for a long period of time, she decided to make improvements to it. Betty immediately had the entire unit repainted, replaced windows and added a deck. The total value of improvements cost \$20,000. She also spent \$2,000 to remove the only bathtub and replace it with a shower. Betty made such improvements because she had relied on the fact that there were no defects with the property. It would be unfair to rescind the contract and return the condo to Steve with \$22,000 worth of improvements. Thus, Betty should be able to receive reimbursement for the \$22,000 she expended on improvements to the condo.

Expectation:

Expectation damages seek to put the non-breaching party in the same position as if no breach had occurred.

Betty will seek expectation damages to put her in the same position as if she had never purchased the condo. When she purchased the condo she expected to live in a unit with nearby parking and no previous murder. But due to Steve's fraudulent misrepresentations, Betty will not be able to do so. As a result, Betty should be compensated as if no contract had occurred.

Betty has tried to sell the condo, but is unable to get offers of more than \$160,000 because of the disclosure of the murder and the lack of parking. If Betty sells the condo for \$160,000, Steve will be required to pay her for the difference in the original sale

price (\$200,000) and the sale price of the condo. Assuming she can get \$160,000 for it, Steve will be required to pay Betty \$40,000.

Thus, Betty is entitled to \$40,000 in expectation damages.

Incidental:

Incidental damages are those damages that the non-breaching party incurs as a result of the breach.

Here, Betty will be entitled to any funds expended in the attempt to sell the condo, such as brokerage fees and listing fees. Further, she should be able to recover the difference of the \$50 to park in the current parking lot and the \$100 to park in the other lot, until the condo sells.

Punitive Damages:

Punitive damages seek to punish the defendant for willful and wanton misconduct. Generally, punitive damages are not awarded for breach of contract actions. However, a plaintiff may recover punitive damages if there is an underlying tort.

Here, Betty's underlying theory for suit against Steve is for fraud, and fraud is a tort. The court may be compelled to grant Betty punitive damages to punish Steve for his fraudulent actions, and to teach him a lesson.

Thus, Betty may be able to recover for punitive damages.

Limitations on Damages:

Damages must be causal, certain, foreseeable and mitigated.

Here, Betty's damages are caused by Steve's fraud. Her damages are certain because we can place an exact dollar figure on her damages. Her damages are foreseeable

because it was foreseeable that she would have to obtain parking at another parking lot which could cost more money. It was also foreseeable that when she discovered the murder in the condo, she would not want to live there, thus motivating her to move out and sell the property. Lastly, damages must be mitigated. This means that Betty must make a good-faith attempt to sell the condo for a reasonable sum of money and within a reasonable time. Further, until she sells the property she will be

Steve's Defenses:

Parol Evidence Rule:

The Parol evidence rule (PER) seeks to prohibit prior oral negotiations of a contract because the parties intended to put their final expression in the writing itself.

During negotiations Steve told Betty that there was no deeded parking but she would be allowed to park on an adjacent lot for \$50 per month, just as he had. Steve will argue that because such communications were oral and prior to the final contract, that the court should exclude them. This defense will fail because his actions constituted fraud, and the contract had already been performed.

Laches:

Laches seeks to bar a plaintiff's recovery if they wait too long to assert a claim and such delay of time causes an undue prejudice to the defendant.

Here, the sale occurred in June and Betty is suing in August. Thus, this was only a three month period and not an unreasonable delay.

Unclean Hands:

The court of equity will not aid suitors who come to the court with unclean hands.

Here, Betty did not engage in any misconduct. Rather, she was an innocent purchaser. Thus, this defense too will fail.

QUESTION 3

Pete sued Donna's Pizza in federal court.

At trial, in his case-in-chief, Pete testified that, as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. He sustained serious injuries as a result and was taken to the hospital.

Pete then called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that, during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence and rested.

During Donna's Pizza's case-in-chief, Erin testified that she had the green light and that it was Pete who ran the red light. Donna, the owner of Donna's Pizza, then testified that Donna's Pizza was not responsible for the accident. On cross-examination, Donna was asked whether she had ever offered to pay for any of Pete's medical expenses, and she denied she had. Donna's Pizza rested.

In rebuttal, Pete testified that, at the accident scene, Erin told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." Pete also testified that Donna visited him in the hospital and told him that Donna's Pizza would take care of all of his medical expenses. Pete testified that Donna's Pizza, however, never paid for any of his medical expenses.

Assume all appropriate objections and motions to strike were timely made.

Did the court properly admit:

1. The hospital intake form? Discuss.
2. Pete's testimony about Erin's statements at the accident scene? Discuss.
3. Pete's testimony about Donna's statements at the hospital? Discuss.

Answer according to the Federal Rules of Evidence.

QUESTION 3: SELECTED ANSWER A

1. HOSPITAL INTAKE FORM

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, Pete (P) is suing Donna's Pizza (D) for a car accident allegedly caused by D's employee, Erin (E). The hospital intake form is logically relevant because it tends to make the fact of P's physical injury, and therefore, damages, more probable.

Legal Relevance

Evidence must be both probative and material in order to be legally relevant. Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, the hospital intake form is legally relevant because it is probative and material as to whether P suffered damages, and its probative value is not outweighed by a risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, Nellie is a nurse who treated P at the hospital. She was also the one who recorded the information on the hospital intake form. Therefore, Nellie is competent to testify.

Authentication

Tangible evidence must be properly authenticated, either through personal knowledge, distinct characteristics, by showing chain of custody, or, in the event of a reproduction of a photo, knowledge of the person who took the photo. Here, the hospital intake form can be authenticated by Nellie's personal knowledge, because Nellie was the one who filled out the intake form. Therefore, the intake form has been properly authenticated.

Best Evidence Rule

The best evidence rule applies when a witness is testifying about a document or the document is at issue. It mandates that in those circumstances, the original document or a properly authenticated duplicate be entered into evidence. Here, Nellie is testifying to her personal knowledge of what P said to her at the hospital. The best evidence rule does not apply, and the business records exception allows the intake form to be admitted.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls under an exemption or an exception to hearsay. The hospital intake form may be hearsay because it was made out of court and is being offered to prove that P struck his head on the windshield and was in a great deal of pain. The intake form is hearsay within hearsay. However, it may fall under one of the following exceptions if both levels of hearsay are exceptions.

Statement for Medical Diagnosis/Treatment

When a statement is made for medical diagnosis or treatment, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that during the collision, his head struck the windshield and that he was still in a great deal of pain. If these statements were made for medical diagnosis or treatment of his head injury, then it is likely the statement will come in.

Statement of Mental/Physical Condition

When a statement is made about a mental, physical, or emotional condition, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that he was still in a great deal of pain. This will likely come in under this exception.

Business Records

Business records fall under an exception to the hearsay rule regardless of whether the

declarant is available to testify. The business records must be made in the regular course of business at or near the time of the event, by a person who had knowledge of the event. It must also be a regularly conducted activity of the business to make such records. Here, the facts indicate that Nellie recorded the information on a hospital intake form at or near the time of the event. Nellie had knowledge of the event because the person to whom P made the statements was Nellie and she recorded them during the regular course of her business as a nurse at the hospital. The facts also indicate that she recorded the information pursuant to standard hospital procedure, making the recording a regularly conducted business activity. Therefore, the hospital intake form is admissible under the business records exception to the hearsay rule.

Conclusion

The statement made to Nellie is a statement for medical diagnosis or treatment and also a statement of a physical condition; it is admissible despite the hearsay rule. The intake form itself is admissible under the business records exception. Therefore, despite being hearsay within hearsay, the court properly admitted the hospital intake form.

2. P'S TESTIMONY ABOUT E'S STATEMENTS AT THE ACCIDENT SCENE

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about E's statements at the accident scene is logically relevant because they tend to make the fact that E was responsible for the accident more probable than without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about E's statements is legally relevant because their probative value is not outweighed by the risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements E made to him at the scene of the accident; therefore, he has personal knowledge of the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about E's statements at the accident scene is hearsay because they are out-of-court statements and they are being offered to prove E ran the red light. They will be inadmissible unless they fall under one of the exemptions or exceptions to hearsay discussed below.

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, E testified during D's case-in-chief that she had the green light and that it was P who ran the red light. However, at the accident, P is willing to testify that E told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." As this statement is inconsistent with what E has testified during D's case-in-chief, it may be admissible under the prior inconsistent exemption.

Vicarious Admission

An employee's statement may be admissible in a case against the employer if the employee was acting within the scope of her duties. A vicarious admission is an exemption to the hearsay rule. Here, E is an employee of D's. She was making a pizza delivery, which is within the scope of her employment. Therefore, what E said at the accident scene is admissible as a vicarious admission in P's suit against D.

Statement Against Interest

A statement against interest is admissible as an exception to the hearsay rule, only if the declarant is unavailable. A declarant may be unavailable for a number of reasons

including she is dead, missing, or refuses to testify. Here, E's statement is a statement against interest; however, E is available, therefore, her statements to P at the accident scene will not come in under this exception.

Present Sense Impression

A statement of present sense impression is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The statement must be made at or soon after the event that is described. It is possible that E's statements could come in under the present sense impression exception because they were made to P immediately following the accident, at the scene of the accident, and they related to the circumstances of the accident--that she ran the red light because she was in a hurry. However, they are more likely to come in via the prior inconsistent and vicarious admission exemptions to the hearsay rule.

Excited Utterance

An excited utterance is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The declarant must make the statement while under the stress or excitement of the event. Excitement can be evidenced by shouting or other excited behavior. Here, there is no evidence to suggest E's statements were made to P under the stress or excitement of the accident. Therefore, they are not admissible under this exception.

Conclusion

The court properly admitted P's testimony about E's statements at the accident scene, because they were prior inconsistent statements as well as vicarious statements.

3. P'S TESTIMONY ABOUT D'S STATEMENTS AT THE HOSPITAL

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about D's

statements at the hospital is logically relevant because they tend to make the fact that E, and therefore D, was responsible for the accident more probable than it would be without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about D's statements is legally relevant because their probative value is not outweighed by any risk of unfair prejudice.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements D made to him at the hospital; therefore, he has personal knowledge about the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about D's statements at the hospital is hearsay because it is being offered to prove that D offered to take care of all of his medical expenses. However, they are not admissible, even if they fall under the following exemptions or exceptions, because of the public policy exception regarding offers to pay medical expenses (see below).

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, D testified during D's case-in-chief that D was not responsible for the accident. On cross-examination, D testified that she had never offered to pay for any of Pete's medical expenses. Since P is testifying that D had said before that she would pay for his medical expenses, these out-of-court statements may be admitted as prior inconsistent statements.

Statement of Party Opponent

A statement made by a party opponent is admissible as an exemption to the hearsay rule. Even though P's testimony about D's statements at the hospital may be a statement of a party opponent, because P is suing Donna's Pizza, it does not fall under this exemption due to the public policy exception regarding offers to pay medical expenses (see below).

Offers to Pay Medical Expenses

Offers to pay medical expenses are not admissible. Under the Federal Rules of Evidence, statements that accompany offers to pay medical expenses are admissible. Here, the only statement P is offering is D's statement that it would take care of all of his medical expenses. The offer is inadmissible under this public policy exception. Therefore, the court did not properly admit P's testimony about D's statements at the hospital.

Conclusion

The court improperly admitted P's testimony about D's statements at the hospital because an offer to pay medical expenses is never admissible. While not admissible as substantive evidence, it may be used to impeach D.

QUESTION 3: SELECTED ANSWER B

1. Hospital Intake Form

Relevance

Evidence is logically relevant if it tends to prove or disprove a material fact. Evidence is legally relevant if its probative value is not substantially outweighed by the risk of unfair prejudice. Here, the hospital intake form includes Pete's (P) statement to the nurse regarding his injury and how it occurred. Thus, it tends to prove a material fact - damages. Additionally, there is little chance of unfair prejudice here as the statement relates directly to the accident and is not shocking to a jury. The form is relevant.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, it is inadmissible, unless an exemption or exception applies. Here, the hospital intake form is offered to show P's injury immediately after the crash. It was created out of court and is therefore hearsay. It is inadmissible unless an exception applies.

Double Hearsay

Documents or statements that have different layers of out of court statements are double hearsay, and each statement must be analyzed for admissibility. Here, not only is the hospital form hearsay, as discussed, but P's statement contained within is also hearsay, as it was made out of court and is offered to prove its truth. Thus, both the form and the statement must apply to a hearsay exception to be admissible.

a. Pete's Statement

Opposing Party

A statement made by an opposing party is not hearsay and thus is admissible. Here, P has offered the hospital record which contains his statement for evidence.

Accordingly, this is not an opposing party, and this exception does not apply.

Medical Diagnosis / Treatment

An out of court statement made to obtain a medical diagnosis or treatment is considered reliable. It is therefore excepted from the hearsay rule and admissible. Here, P had just been in a car accident and was transported to the hospital. There, he told the attending nurse that he "struck his head on the windshield," and that he "was still in a great deal of pain." Accordingly, P was making these statements to obtain a diagnosis and treatment for his pain. This statement is likely admissible as an exception to the hearsay rule.

Physical Condition

A statement by the declarant describing his current physical or emotional condition is admissible as a hearsay exception. Here, P was describing his current condition - he was in a great deal of pain. The defense may argue that the entire statement does not qualify: while the "great deal of pain" portion describes P's condition, the "my head hit the windshield" does not. It describes the reason for the condition, but not the current condition itself. Accordingly, D may move to strike that portion of the statement.

However, because the statement was made for medical treatment and diagnosis, and the "my head hit the windshield" was necessary to determine the type and extent of the injury, the entire statement is admissible.

b. Hospital Record

Business Record

A business record is an out of court statement and thus is hearsay. However, it may be admissible as an exception if it was created in the ordinary course of business, by someone with knowledge, and not in anticipation of litigation. Here, the facts indicate that Nurse Nellie created the document immediately after speaking with P. She had actual knowledge of the information she included in the form. Additionally, the form was created pursuant to standard hospital procedure. Accordingly, the hospital form is

admissible as a business record.

Authentication

Evidence must be authenticated. Typically, personal knowledge is sufficient to authenticate a document. Here, Nellie herself is available to testify as to the creation and the contents of the form. She has personal knowledge and the form is properly authenticated.

Best Evidence Rule

The Best Evidence rule states that an original document must be admitted whenever the contents of a document are at issue. The contents are at issue when a witness is testifying about its contents. Here, P has moved to admit the hospital form. Accordingly, the best evidence rule mandates that the original be admitted. The facts do not indicate that the form is a copy, or that the original is unavailable. It appears that the form is the original, and the best evidence rule is satisfied.

2. Erin's Statements

Relevance

E's statement to P at the scene admits liability, and therefore proves a material fact of the case. Further, there is no risk of unfair prejudice. D may argue differently, claiming that E was acting outside of the scope of D's control and thus the statement is irrelevant to the case against D, and unfairly prejudices her. However, as discussed below, this argument will fail. The statement is both logically and legally relevant.

Hearsay

See rule above. Here, Erin (E) told the P at the scene that she "was in a hurry to make a delivery and that's why [she] ran the red light." This is an out of court statement offered to prove that E ran the red light. It is hearsay.

Opposing Party

See rule above. An employee or agent may be considered as part of the opposing party, if the statement was made within the scope of employment. Here, E was a delivery driver for Donna's Pizza (D). She was delivering pizza when the accident occurred. Accordingly, she was acting within the scope of her employment. Subsequently, when she spoke to the officer at the scene, she was speaking within that same scope of employment. E's statement can be attributed to D, and is thus a statement by an opposing party.

However, D will argue that she is not responsible for the accident. She has claimed that she has no connection to the events. Thus, D will argue, E's statements cannot be attributed to her. However, because E is acting as D's driver, within the scope of her employment, the statement can be attributed to D, and it is admissible as a statement by an opposing party.

Excited Utterance

An excited utterance is admissible as a hearsay exception if the statement is in response to a shocking or startling event, and if the statement is made while the declarant is still under the stress of that shocking event. Here, even if E were not an opposing party, P may argue that her statement is an excited utterance. She was just in a car accident that resulted in injury, a startling event, and she was describing the event immediately after it occurred.

However, D will argue that E was not still under the stress of the accident; enough time had passed and the parties were speaking calmly after the fact. This is likely not an excited utterance.

Present Sense Impression

Like an excited utterance, a present sense impression is admissible if the statement describes an event and was made during or immediately after the event occurred. Here, P will also argue that E was describing the event immediately after it occurred. However, as above, it is likely that some time had passed, and a court may rule that this does not qualify as a present sense impression.

Because E was acting within the scope of her employment, the statement is likely admissible as an admission by an opposing party.

3. Donna's Statements

Relevance

See rule above. D's offer to P tends to prove her control over the car and E's conduct. It is relevant to D's liability.

Hearsay

See rule above. D's statement to P in the hospital in which D promised to pay for P's medical expenses is an out of court statement. It is hearsay.

Opposing Party

See rule above. D is the opposing party, and the statement likely qualifies as an admission by an opposing party. This is non-hearsay, and the statement is admissible barring some other limitation.

Offers to Pay Medical Expenses

Offers to pay medical expenses, even if admissible as a hearsay exception, are inadmissible as they violate public policy. However, the statements, though not admissible as substantive evidence, may be admissible as impeachment or to establish ownership or control of the thing in question. Here, D will argue that her offer to pay P's medical expenses is inadmissible, because public policy encourages these offers. Therefore, the statement is inadmissible.

Ownership: However, P may bring in the statement for two reasons. First, D has denied liability for the accident. An offer to pay medical expenses may be offered to show ownership or control of the subject matter in question. Her offer to P then, may be offered to establish that D owned and/or controlled both the car and her employee E. This is a disputed fact and highly relevant. Thus, the statement may be offered for this

purpose.

Impeachment: The credibility of a witness is always at issue. Thus, statements offered to rebut witness testimony are admissible as impeachment evidence. D has testified on the stand that she did not offer to pay P's medical expenses. Accordingly, P may offer D's out of court statement to him, offering to pay expenses, as impeachment evidence. This is a prior inconsistent statement offered to impeach, and it is admissible.

QUESTION 4

Years ago, Art incorporated Retail, Inc. He paid \$100 for its stock and lent it \$50,000. He elected himself and two family members to the Board of Directors, which in turn elected him as President and approved a ten-year lease for a store. He managed the store and was paid 10% of Retail's gross revenues as compensation.

Subsequently, Barbara bought 20% of Retail's stock from Art.

Retail's board approved a contract to buy 30% of the inventory of XYZ Co., a company owned by Art.

Subsequently, Art began taking home some of Retail's inventory without paying for it.

Retail had net profits in some years and net losses in others. It paid dividends in some years, but not in others. In some years, Retail's board met three times a year; in others, it never met.

Recently, Retail ceased business. Its assets were limited to \$5,000 in cash. Among the claims against Retail was one by Supplier, who was owed \$10,000 for computer equipment. Another claim was Art's, for the \$50,000 that he had lent and had just become due. Supplier and Barbara, individually, filed lawsuits against Retail and Art.

1. On what legal theory, if any, can Supplier reasonably seek to recover against Art on its claim against Retail? Discuss.
2. Does Barbara have a cause of action against Art, either derivatively or personally? Discuss.
3. If Retail is forced into bankruptcy court, will Art be able to collect from Retail any portion of his \$50,000 loan? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Recovery Against Art on Supplier's Claim Against Retail

Corporation

Retail, Inc. is a corporation, as indicated by the word "Inc." (for Incorporated) in its name and by the fact it was "incorporated". Perhaps the most important feature of a corporation is the limited liability of its shareholders. The shareholders of a corporation are generally not liable to the corporation's creditors, beyond the amount of their capital contributions (i.e. their stock ownership). There is an important public policy interest in preserving the limited liability of shareholders, so that corporations can feel free to take risks, which is good for the economy and society in general.

Limited liability can be ignored by the courts only in very particular circumstances. This is called "piercing the corporate veil", and requires that: (i) the corporation be a closely-held corporation, (ii) it be necessary to prevent fraud or abuse, and (iii) it would be unfair not to do so. Courts will rarely order a piercing of the corporate veil, but may do so in circumstances such as these ones, which require piercing to avoid unfairness to Retail. Where piercing is ordered, the shareholders involved in the wrongdoing can be held personally liable for the corporation's liabilities.

Here, Art incorporated Retail, Inc. and owned 100% of the stock. He later sold 20% of Retail's stock to Barbara. Accordingly, Retail is a closely held corporation (held by Art and Barbara only). Supplier has a claim against Retail, not guaranteed by Art personally, for \$10,000 for computer equipment. Absent a finding by the court that the situation warrants piercing the corporate veil, i.e. that there is sufficient fraud or abuse, and sufficient unfairness, Supplier cannot seek recovery against Art.

Piercing the Corporate Veil

Piercing of the corporate veil can occur under either a finding of "alter ego", fraud or insufficient capitalization.

Alter Ego. Under the alter ego doctrine, the corporate veil can be pierced where the shareholders have sought to benefit from the benefits of incorporation but ignored all of its burdens. Factors which will be taken into consideration by the courts include: failure to observe corporate formalities, failure to keep the corporation's assets separate from that of its shareholders, failure to keep proper accounting, self-dealing, etc.

Here, there is some evidence that Art used the corporation as his alter ego. He elected himself and two family members to the Board of Directors and elected himself as President, all things which ensure that he keeps full control over the corporation, but which are not wrongful in any way. He then used that control to approve a compensation for himself of 10% of Retail's gross revenues, which is also not wrongful. Retail's board then approved a contract to buy 30% of the inventory of XYZ Co., a company owned by Art. Although XYZ Co. was owned by Art, the transaction is not necessary self-dealing, if it was fair to the corporation. The terms of the transaction are not known, but there is no indication of abuse or that the transaction was so much more detrimental than beneficial to Retail as to be "fraudulent" vis-a-vis Retail's creditors.

Art then began taking home some of Retail's inventory without paying for it. The facts do not state whether Art intended to return this inventory, or to keep it, or to use it for his own purposes, but it seems that he failed to keep the corporation's assets separate from his own. A court would frown upon this and see it as a relevant element in the action for piercing the corporate veil.

Retail had net profits in some years and net losses in others. It paid dividends in some years but not others. This in itself is perfectly normal.

In some years, Retail's board met three times a year; in others, it never met. This shows a disregard for corporate formalities, since a corporation's directors must meet on a regular basis. A board that does not meet at least twice a year is not complying with corporate formalities. A court would frown upon this and see it as a relevant element in the action for piercing the corporate veil.

Fraud. Under the fraud theory, the corporate veil can be pierced where the shareholders have been using the corporation merely as a shield against their existing liability and for the sole purpose of defrauding existing creditors.

Here, there is no indication that Art has used the corporation only to defraud existing creditors. The fact that the corporation is now insolvent and has unpaid debts is not in itself indicative of fraud.

Insufficient Initial Capital. Under the insufficient capitalization theory, the corporate veil can be pierced where the initial capital contributions of shareholders at the inception of the corporation were clearly insufficient to meet the corporation's foreseeable future liabilities, taking into account the corporation's foreseeable future revenues.

Here, Art incorporated Retail Inc. years ago. He paid \$100 for his stock and lent it \$50,000. Retail then entered into a ten-year lease for a store, approved compensation for himself, etc. The liabilities of a retail store are likely to quickly exceed \$100. In particular, if Art had to lend the corporation \$50,000 at its inception, it is an indication that Retail needed this amount of funding either to fund its initial operations or to induce potential co-contractants, such as the landlord, to enter into transactions. By choosing to do almost all of Retail's initial funding by loan rather than by capitalization, Art was likely trying to ensure his \$50,000 would not be last in the waterfall in the event of a distribution in bankruptcy.

It is for situations like this one that the insufficient capitalization theory exists. It was foreseeable at incorporation that Retail would have liabilities greater than \$100, yet its

initial capital was no more than \$100. When Barbara became a shareholder, she bought 20% of the stock from Art, not in the context of a corporate issuance. The corporation's capital was not increased.

Art will argue that Retail is a retail store and that it has expected revenues, which should be sufficient to satisfy liabilities. He was not operating a highly risky business. The facts show that he has had net profits in some years and that at some point Retail probably had become capable of meeting its liabilities "on its own". However, the facts also show that the initial capitalization was extremely low and that large liabilities, such as the ten-year lease, were incurred immediately at Retail's inception.

It appears that Retail was inadequately capitalized at incorporation.

Unfairness. In all cases, the proponent of piercing the corporate veil must show it would be unfair if the veil was not pierced.

Here, Retail has ceased business and its assets (\$5,000) are insufficient to satisfy all of its liabilities. If Supplier cannot seek recovery against Art personally, it will receive next to nothing on the dollar for its \$10,000 debt. Among the reasons that Retail is insolvent, Art's wrongful conduct is likely responsible: Art took home some of Retail's inventory; Art had Retail enter into a transaction with XYZ Co., a company owned by Art - which transaction was potentially unfair to Retail (this will be up to Supplier to prove); one of the biggest claims on Retail's assets is a loan by Art himself (which he had to make to Retail to make up for the insufficient initial capital contribution), etc.

Supplier can make a strong argument that it would be unfair to allow Art to hide behind the corporate veil and not hold him directly liable for Retail's debt to Supplier.

Conclusion

Accordingly, Retail is a closely held corporation and there is evidence that Art, a

shareholder, has insufficiently capitalized it at incorporation (and perhaps even used Retail as its alter ego, although this will be much harder to prove), and that it would be unfair not to allow Supplier to seek recovery against Art directly. The court will likely pierce the corporate veil and allow recovery against Art.

2. Barbara's Cause of Action Against Art

Art's Duties to Barbara and Direct Action

Shareholders generally do not owe fiduciary duties to each other. Only in closely-held corporations, majority shareholders can be found to owe fiduciary duties of care and loyalty to the minority shareholders. In accordance with those duties, majority shareholders may not abuse their position of power to abuse the minority shareholders and deny them their rights as shareholders.

If they do, a minority shareholder can ask the court to order remedies in oppression, including a mandatory repurchase by the corporation of the minority shareholder's stock. Other remedies in oppression are available to the court, going all the way to mandatory dissolution of the corporation in particularly egregious situations of oppression. Where a minority shareholder is oppressed, the proper recourse is a direct recourse by the minority shareholder against the majority shareholder(s), seeking oppression remedies.

Here, while Art and two of his family members composed the Board of Directors, Retail's board approved a contract to buy 30% of the inventory of XYZ Co., a company owned by Art. If there is evidence that the corporation was not made on arm's length terms, Barbara could argue that the transaction was an abuse of power of a majority shareholder. Art began taking home some of Retail's inventory without paying for it, which Barbara can argue is an abuse of his power as a majority shareholder, director and President of Retail.

Because Retail is closely held, Barbara cannot simply sell her shares on a stock exchange and exit the corporation. Barbara could likely seek oppression remedies. If the corporation is ordered to buy out her shares for their fair value, this will likely be worthless to Barbara: her stock is worth nothing or next to nothing, since the corporation is insolvent, and even if it had a worth the corporation would not have sufficient assets to buy her back.

A dissolution of the corporation will not be helpful either, given that the corporation is insolvent and creditors will be paid first.

Accordingly, Barbara can likely take oppression remedies against Art, but unless she can convince the court to order damages in her favor (which would be extremely difficult), this recourse will not be useful.

Art's Duties to Retail

Shareholders generally do not owe fiduciary duties to the corporation, unless they participate in the management of the corporation to a great extent, either as directors or if a unanimous shareholders' agreement gives them the power to do so.

Here, Art is a director of Retail.

Directors owe fiduciary duties of care and of loyalty to the corporation.

Duty of Care. The duty of care requires a director to act as a reasonable, prudent person would do in the management of his own affairs. The directors are not "guarantors" of their bad decisions and will generally be protected by the business judgment rule (the "BJR"), and found not to have breached their duty of care even where they made a decision which later turns out to have been ill-advised. The BJR protects directors only where the decision has been (i) informed, (ii) made in good faith, (iii) made in the absence of a conflict of interest and (iv) had a reasonable basis.

Directors will also generally be found to have acted in compliance with their duty of care if they have relied on reports, opinions, information, etc. reported to them by directors, officers and employees of the corporation, by outside advisors or by a committee of the board of which they are not a member, in each case provided that the information reported was within the competence of the person(s) reporting it and that the reliance was reasonable, taking into account the directors' duty of care to the corporation.

Here, Art voted on his own compensation (10% of Retail's gross revenues) - this is not necessarily a breach of the duty of care or duty of loyalty, if the compensation is what a reasonable, prudent person would grant to a manager. 10% of gross revenues is not unreasonable for a store manager, although it could be unreasonable depending on the store's revenues. There is no clear breach of the duty of care here.

Here, Retail entered into a transaction with XYZ Co. There is no indication that Art breached his duty of care by entering into this transaction, because the terms of the transaction are not known. Art is not protected by the BJR here because he is in a conflict of interest, but again, there is no indication that the transaction was not one which a reasonable, prudent person would approve.

The distribution of dividends is at the directors' discretion - failure to pay a dividend in some years is not a breach of the duty of care or duty of loyalty and will not be reviewed by the court absent extreme circumstances.

Finally, Art began taking home some of Retail's inventory without paying for it. This is a breach of the duty of care and a breach of the duty of loyalty.

Duty of Loyalty. The duty of loyalty requires a director to act in good faith, in what he reasonably believes to be the best interests of the corporation. A director is in a conflict of interest if he (or a close relative or another of his corporations) has a personal interest in a transaction with the corporation.

In the event of such a conflict, the director will be found to have breached his duty of loyalty unless the transaction is shown either (i) to have been fair to the corporation, or (ii) to have been approved by a majority of disinterested directors or disinterested shares, after having been fully informed.

Here, the Retail/XYZ transaction involved a conflict of interest for Art. He should not have voted on it. Neither should the other board members have voted on it, since they are family members of Art, and therefore not "disinterested" directors. A vote of a majority of disinterested shares (i.e. Barbara's shares) should have been held to approve the transaction, and she should have been fully informed.

However, the facts do not describe the terms of the transaction. If Art can show the transaction was fair to the corporation, he will not be held to have breached his duty of loyalty.

Art breached his duty of loyalty by taking home some of Retail's inventory without paying for it, unless he reasonably believed this to be in the best interests of the corporation. There are no facts indicating that this might be the case, and the conduct appears improper. This is likely a breach of Art's duty of loyalty.

Derivative Action

Where a director breaches his duty of loyalty or his duty of care to the corporation, only the corporation has a recourse, not the shareholders individually. A shareholder may, however, take a derivative action provided that (i) the shareholder held stock at the time of the alleged breach and continues to do so throughout the derivative action, (ii) the shareholder can adequately represent the corporation's interests, (iii) the shareholder has made a written demand on the board to enforce the claim, but his demand was denied, and (iv) the shareholder joins the corporation as a defendant to the lawsuit.

In some cases, the court may accept a derivative action without a written demand

having been made on the board, if the shareholder can show such demand would have been futile (for instance, if he is asking the corporation to sue all of the directors, it is extremely unlikely that the directors will agree).

If the shareholder is successful in his derivative action, the corporation will receive the benefit of the judgment. The shareholder can be indemnified for his legal costs and fees. If the shareholder is unsuccessful, he will be personally liable for all legal costs and fees, including the other party's if their reimbursement is ordered.

The corporation itself can have the suit dismissed only if it can show to the court that the transaction was fair as determined by an independent committee of the board or outside independent advisors.

Here, Barbara was a shareholder at all relevant times. She can likely represent Retail's interests adequately - there is no indication she can't do so. As noted above, she would have to first make a written demand on the board to take action. If they refuse, she can then take a derivative action to enforce Retail's rights against Art.

Conclusion

Retail has a recourse against Art for any loss caused by a breach of his duty of care or duty of loyalty. The recourse can be taken by Barbara in a derivative action. However, except for a recourse for the value of items which Art took home without paying for it, it will be difficult to show that Art is otherwise liable to Retail.

3. Collection by Art of The \$50,000 Loan to Retail

In bankruptcy, secured creditors have a priority. All unsecured creditors are treated the same, unless there has been subordination. Under the Deep Rock doctrine, when the corporate veil is pierced, the court can order that any loans made by the shareholders to the corporation be subordinated to the debts of the corporation to other ordinary

creditors.

Here, Art lent \$50,000 to Retail. Given the piercing of the corporate veil described above, Art's claim can be subordinated to the claim of Supplier. Accordingly, Supplier will be able to recover the \$5,000 if Retail is forced into bankruptcy.

Art will be unable to collect from Retail any portion of his \$50,000 loan.

QUESTION 4: SELECTED ANSWER B

1. Supplier's legal theories of recovery against Art on its claim against Retail.

Supplier's ability to recover from Art depends on what type of business entity was created and if Art has breached any duty to Supplier.

Corporation

A corporation is a business entity separate from its shareholders. Therefore, shareholders of a corporation are not personally liable for the corporation's obligations unless the corporation was not properly formed, or the shareholders abused its corporate form. A corporation requires proper formalities for creation, which include filing with the secretary of state. A closely held corporation is one in which there are few shareholders, and liability of the shareholders is more readily found because of its more intimate nature.

Here, it appears that Art incorporated Retail, Inc. years ago; therefore without any further facts it appears that Retail Inc. was properly formed with regards to formalities. Retail Inc. can also be seen to be a closely held corporation by the court.

Shareholder Liability: Corporate Veil

Assuming the corporation was properly formed at its onset, Art can only be liable if the corporation abused its corporate form and thus will not be afforded the protections of the corporate veil.

A shareholder is generally not personally liable unless the corporate form is abused. A court will disregard the separateness of a corporation and its shareholders and pierce the veil if it appears that 1) the corporation was undercapitalized at its inception, 2) the corporate formalities were not adhered to, or 3) the corporation was created to perpetrate a fraud. It will also consider whether a parent corporation was operating by mixing its directors and officers with another corporation owned by it.

Alter Ego

Art is a shareholder, director, and as president, he is an officer of Retail Inc., and at the same time he is XYZ Co.'s owner. Retail Inc.'s board approved a contract to buy 30% of XYZ's inventory, which alone may appear to only have an impact on Art's duty of loyalty as a director of Retail Co. who approved the transaction. However, it does not appear that Retail Co. owns or otherwise deals with XYZ other than the contract. Nonetheless, because Art is an owner of both, a court will consider it.

Undercapitalized

The shareholders of a corporation must put at risk enough unencumbered capital to take care of the corporation's potential liabilities.

When Art incorporated Retail, he paid \$100, for its stock, and thus he became a 10% shareholder. He also lent the corporation \$50,000 at its onset, which appears to have satisfied Retail Inc.'s potential debts because after years it had only owed \$10,000 under a contract to outside creditors and ceased business with \$5K left. Therefore, since it was able to operate for years with the \$50K capitalization, this appears to be sufficient.

Formalities

Supplier would argue that Retail's board did not hold meetings every year, which shows that it was not a proper corporation. However, Art will likely argue that since Retail's board had no significant matters to discuss, it only met when necessary, which is apparent by the fact that it met three times a year in some years. Because a corporation should hold regular meetings, this appears to be against the proper corporate formalities.

Therefore, a court can use this to decide whether to hold Art liable.

Perpetrate a fraud

There appears to be no bad faith in creating the corporation so this will not be considered.

Overall, a court is reluctant to pierce a veil absent clear evidence of lack of separateness; therefore Art may be personally liable to Supplier, but it is unlikely.

Personal Liability

If the veil is pierced, Supplier will be able to obtain \$10,000 personally from Art.

2. Barbara's cause of action against Art.

Barbara's Derivative Suit

Barbara may bring an action on her own or as a shareholder of Retail Inc. against the corporation.

Derivative Actions

A shareholder may bring a derivative action on behalf of the other shareholders of the corporation for a breach by the directors. Any recovery will go to the corporation rather than to the shareholder personally. To bring such an action, the shareholder must 1) have made a demand on the board for the complained-of action, to which the board either refused, or 90 days have passed without an answer, or demand would be futile; 2) the shareholder must adequately represent the other shareholders; and 3) the shareholder must hold shares throughout the entire suit.

Futile

Here, there are no facts to suggest that Barbara made any demand on the board, however, because Retail's board consists of Art and two of his family members, Barbara will argue that demand would be futile, because his family members would be biased in favor of Art. Art will argue that had she made a demand it would have been answered, and the derivative suit would be improper. Nonetheless, the fact that only three members are on the board and all three are related, would likely render the demand futile.

Adequately represents

The shareholder must have enough shares to adequately represent the shareholders.

Here, the only shareholders appear to be Barbara and Art; therefore, since Art took action with regard to the complained-of event, Barbara is essentially asserting it on her own behalf; therefore this is met.

Shareholder throughout suit

Barbara owns 20% stock and has retained that stock until suit, therefore this is met.

Therefore, Barbara can bring a derivative action.

Breach of Duty of Loyalty

A director has the duty to put the corporation's best interest before his own. The duty of loyalty can be breached in three ways: 1) usurping a corporate opportunity, 2) engaging in an interested director transaction, and 3) engaging in a competing venture.

Interested Director Transaction

A director is not permitted to engage as an interested party in a transaction, which essentially means that he may not sit on both sides of the transaction, or that the director may not engage in a transaction with one of his family members, unless he gets the approval of the majority of the disinterested board or its shareholders, or the transaction is substantively fair.

Here, Barbara can bring an action for a breach of duty of loyalty by Art for approving a contract to buy 30% of the inventory of XYZ Co., a company owned by him. Since Art is a director of Retail Inc. and also an owner of XYZ Co., he sat on both ends of the transaction when he approved a contract to buy inventory from a company he owned.

Approval by Board

However, Art will argue that the board approved the contract, and in the alternative that the transaction was substantively fair. However, since the board consisted of three

people, who were each related to one another, and the board also consisted of Art, who was the primary interested party, then the approval was not obtained by a majority of the disinterested shareholders, because family members are always interested parties in their family's affairs. This can be further shown by the fact that the family has close ties, since Art elected the two family members to the board, which in turn elected him as president.

Substantively Fair

If the transaction is substantively fair, an interested party transaction will be permitted after full and fair disclosure.

Even though the board could not have properly approved, the transaction involved buying 30% of XYZ's inventory, which is close to half of its inventory. While there is no price indicated, it is likely that Art gave a discounted price for the contract because he was a party to both sides. Art will argue that it was beneficial to the corporation to buy from XYZ since he could provide them with better quality inventory at a better price, whereas an outsider would have no such incentive. Nonetheless, he would have had to disclose the information to the board, and the board would have to agree. Since the board approved, he may be able to defend against the derivative suit for breach of loyalty under this theory.

However, if the court finds that the bias of his family members on the board is superior to the transaction being substantively fair, Barbara will prevail in showing a breach of the duty of loyalty.

Competing Venture

Art has taken Retail's property for himself, and since XYZ appears to have a similar business as Retail, perhaps the inventory was that which originally came from the contract between them. Therefore, if so, he would be replenishing his inventory at XYZ at the expense of Retail Co., and thus would be engaging in a competing venture.

Therefore, Barbara can also prevail by showing this.

Duty of Care

A director owed the corporation a duty of care to act in good faith as a reasonable prudent director would under the circumstances.

Good Faith

Art's taking of the inventory from Retail without paying for it can be used to show bad faith by a director. He may also be seen as an officer because he managed the lease for a store and was paid 10% of Retail's gross revenues as compensation. Therefore, as an officer, he must have also acted in good faith for the best interest of the corporation.

Ordinary Prudent Director

Barbara can argue that an ordinary prudent director would not steal inventory from the corporation without paying for it; therefore he acted against his duty of care.

Business Judgment Rule

The business judgment rule protects the good-faith decisions made by directors in compliance with the duty of care that in hindsight end up being erroneous.

Here, Art did not act in accordance with the duty of care because he acted in bad faith with regards to taking the inventory. Therefore the BJR will not protect him.

Dividends

Barbara can also bring an action derivatively for the fact that the corporation did not distribute dividends in some years. However, a corporation has discretion whether to distribute dividends, because dividends are not a right of the shareholders.

Since Retail had net profits in some years and net losses in others, it was prudent for them to withhold dividends for the years they had no profits, assuming that the times corresponded. Even if they did not correspond, distributing dividends is in the discretion of the board.

Barbara's Personal Action

A personal action may also be brought by Barbara against Art (if the veil is pierced - as a director) and if it is not pierced, then as a shareholder.

Duty To Shareholders

Generally, shareholders do not owe a duty to other shareholders, however, a majority shareholder owes the duty to a minority shareholder not to use its majority share to discriminate against the minority shareholder, and not to sell his shares to a prospective looter.

There are no facts to suggest how much the stock of Retail Inc. cost; however Art paid \$100 for its stock and Barbara owned 20% of the stock from Art. Assuming Art holds the remaining stock himself, Art would be a majority shareholder, and would thus be required to act fairly with regards to the use of his shares.

Here, Art's transaction with XYZ does not appear to prejudice Barbara as a shareholder in any way; therefore Barbara will not be able to prevail in a personal suit against Art.

3. Liability of Retail Inc. for Art's loan.

Liability of Corporation at Dissolution

A corporation that ceases business is still held liable for debts to creditors. A shareholder who contributes capital will receive reimbursement.

Equitable Subordination

Under equitable subordination, all creditors, whether shareholder creditors or outsiders, may seek to collect their debt to the corporation equally. However, if a shareholder acted wrongfully, the Deep Rock doctrine prevents him from recovering equally.

If Retail Co. is forced into bankruptcy, Art will be able to recover his loan in proportion to

the debt owed to Supplier. Since there is only \$5,000 cash left, he will be able to obtain a proportional amount, taking into consideration Supplier's \$10K debt. If Art is found to have acted wrongfully, however, then he will not be able to recover since there is only \$5,000 left and Supplier would have priority over Art's debt.

QUESTION 5

Claire met with Len, a personal injury lawyer, in his office and told him that she had burned her legs when she slipped on some caustic cleaning solution spilled on a sidewalk outside Hotel. Len agreed to take her case and they properly executed a retainer agreement. Claire showed Len scars on her legs that she said were caused by the cleaning solution. She also showed him clothes that she said were stained by the cleaning solution. Len took the clothes from her and put them in his office closet for safe keeping.

Len filed a lawsuit in state court against Hotel. Hotel's lawyer, Hannah, called Len. She told him that this lawsuit was the fourteenth lawsuit that Claire had filed against Hotel, and that she intended to move the court to declare Claire a vexatious litigant. Len and Hannah had been engaged two years ago before they amicably decided to go their separate ways.

Len called Claire and left a message asking her to call him "about an important update in the case." He also sent her an email with a "read receipt" tag, with the same request. He received a notice that she had read the email, but did not receive any response. Over the next week, he sent her a copy of the same email once each day with the same "read receipt" tag; each day, he received a notice that she had read the email, but did not receive any response. He then sent her a registered letter asking her to contact him, but again, did not receive any response. A week later, he sent her another registered letter stating that he no longer represented her and that he would return her clothing to her.

Claire soon called Len, begging him not to "fire" her, saying she had not responded to him because "I didn't think calling you back was such a big deal." He then asked her about "the thirteen prior lawsuits against Hotel." She replied: "What 'thirteen prior lawsuits'? Besides, Hotel's got more money than I do." He told her that he was sorry, but that he was no longer her lawyer.

The next day, Len went to his office closet to retrieve Claire's clothes to send them back to her. To his dismay, he realized that he had sent her clothes along with his to be dry-cleaned. He rushed to the dry-cleaner and learned that all of the clothes he had sent had been dry-cleaned and that all of their stains had been removed.

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

Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

Under the ABA and CA rules, a lawyer owes a duty of loyalty to his or her clients to zealously advocate on their behalf and be free of conflicts of interest that have a significant chance of materially affecting their ability to do so. That duty begins, at the very least, at the execution of a retainer agreement. Claire and Len executed a retainer agreement, and thus the attorney-client relationship was formed and Len owed Claire all of the duties under the ABA and CA rules.

1. Duty of Loyalty

Moreover, under both, a lawyer is deemed to have a conflict if they represent a party who is adverse to another party that is represented by one of the attorney's immediate family members. In such an instance, the lawyer is required to get the informed written consent of their client before pursuing the representation. (Such personal conflicts would not be imputed on other attorneys in a law firm, however.) Ignorance of a conflict is not an excuse for failing to obtain consent or notify about the conflict. An attorney can still represent a client, notwithstanding such a conflict of interest, so long as the client consents and the lawyer reasonably believes that the conflict will not infringe on his or her ability to zealously and competently advocate on behalf of her client. While the ABA would require written consent for such a conflict, California requires only written notification by the attorney because the conflict is only personal.

The issue, though, is whether a former fiancée of two years representing the other party is a conflict of interest at all that need be reported to the client for her consent. Under a strict framework, a former fiancée would not qualify as a family member. It is true that a current fiancée qualifies as a family member, but this rule is unlikely to apply to former fiancées from over two years ago. The rationale for the current fiancée rule is that they are engaged to be members of the family; a former fiancée has, on the other hand, specifically decided *not* to be a part of the family. Therefore, for purposes of this rule, Hannah was not a member of the family and thus this did not trigger an ethical situation

under this rule.

Nonetheless, a lawyer has a general duty to remain loyal to a client, and being close friends with the attorneys on the other side could warrant notification and consent. Here, Len and Hannah "amicably" decided to go their separate ways and Hannah seemed to "call" up Len as more of a friendly notice than as an opposing party counsel. Therefore, it seems that Len and Hannah were quite close. Indeed, in response to the notification, there is no indication that Len looked into the truthfulness of the representation, but rather accepted it at face value, showing that he still trusted Claire quite a bit. This goes to show that Len was not, in fact, able to maintain a fiduciary relationship with Claire notwithstanding the personal connection with Hannah. As a result, Len violated an ethical rule by not disclosing this conflict as it came to pass to Claire.

2. Duty to Represent a Client

A lawyer is free to (more or less without restriction) take or not take clients and causes of action (although is encouraged to do pro bono). But once they decide to do take a client, many ethical rules apply. CA and the ABA allow an attorney to withdraw from representation under certain circumstances and require an attorney to do so under others. For example, if an attorney is not receiving their fees or other obligations pursuant to the attorney-client relationship and they have notified the client and given the client a reasonable time to remedy the situation, then the attorney is permitted to withdraw. Additionally, attorneys may withdraw if the clients are using their legal services for illegal purposes. Moreover, if the attorney finds the representation of the individual repugnant to their sensibilities, they may withdraw so long as they do not materially harm the client's interests. If representing the client would require the attorney to violate other ethical rules or laws, then the attorney must withdraw. Thus, for example, if representing a client would require the attorney to file a frivolous lawsuit, then the attorney must withdraw.

a. *Frivolous lawsuits*

Here, Len will argue that he had to withdraw from representing Claire because failing to do so would violate the rule that attorneys are not allowed to file frivolous lawsuits. He will point to Hannah's representation--whom he had been engaged to and amicably decided not to marry, and thus trusted--that Claire was a serial litigant that had filed fourteen other lawsuits against the Hotel and that Hannah intended to move the court to declare Claire a vexatious litigant. But having been a vexatious litigant does not, in and of itself, show that *this* lawsuit was frivolous. In fact, Claire showed Len scars on her leg and clothes that were stained by the supposed cleaning solution that caused the scars. Opposing counsel's representation that Claire was a vexatious litigant did not even include any allegation that *this* lawsuit was frivolous. Instead, it was merely that other lawsuits filed by her might have been. And indeed, only that they *might* have been because Claire did not even represent that these lawsuits were frivolous or that a court had yet deemed her a vexatious litigant. A reasonable lawyer would not have relied solely on these representations in determining to no longer represent Claire. Instead, a reasonable attorney would have looked into whether these allegations by Claire were true by searching court documents or, at the very least, asking Claire about these cases. And Claire's later response saying "what 'thirteen prior lawsuits'" indicate that doing so might well have revealed that Claire did not actually file those, or that they were not frivolous. In sum, Len did not take reasonable precautions to ensure that the lawsuit that he was attempting to withdraw from representing Claire was, in fact, frivolous, and as such cannot rely on this rationale for withdrawing from representing her.

b. *Costs of representation*

Len might also argue that because Claire was a vexatious litigant, representing her would unreasonably financially burden him. Indeed, California allows the unreasonable financial burden on the attorney as a justification for discontinuing representation of a client. Len appears to be a solo practitioner, this making this claim more reasonable.

However, Len has not shown any financial burden that would necessarily result in trying to defend a claim that Claire was a vexatious litigant (or even that he would have to defend that claim in court). Therefore, it is unclear what financial burdens this revelation would reveal. Moreover, as discussed above, Len did not make any effort at all to determine if there was any basis for determining that Claire actually was vexatious.

c. Lack of communication

Len's best argument is that Claire's failure to respond to his numerous requests constitute a permissible reason for him not to continue representing her. Indeed, the rules allow a lawyer to withdraw from representing a client when the client fails to communicate with the lawyer. Much like a lawyer has a duty to communicate with the client (as Len effectively did here once he learned of the potential vexatious litigant problem), a client must fulfill their side of the bargain and communicate back. Len left a voicemail saying that he had an "important update" and asking to be called back. He sent her one e-mail a week with the same request, and received confirmation that Claire had read the e-mails. He then decided to send her a registered letter asking her to contact him. Notwithstanding the three forms of communication asking for a reply because of an "important" update and the *registered* letter, Claire did not respond at all. Importantly, though, Len failed to mention the reason for why he wanted her to contact him. He might respond that he could not have provided details in e-mail, voicemail, or letter because it might have violated his duty of confidentiality to keep all information he learned about her secret absent her consent (which we have no evidence of here). This will likely be sufficient, especially considering the read receipts and the registered letter confirm that Claire actually received the communications.

Even more importantly, though, is the fact that Len never made clear the ramifications of failing to respond. Much as in failures to pay attorney fees, the attorney must reasonably notify the client of the consequences of failure to and give them a chance to respond before withdrawing from representation. Here, Len violated that duty by never telling Claire that he would withdraw from representing her unless she responded.

Instead, he simply repeated the same content in different methods asking for a response. This, in conjunction with the fact that he waited what seems like no more than a little over two weeks before withdrawing from representation. If this speed were justified in light of approaching deadlines, that might be reasonable. But there is no indication here that such a rapid action was necessary or, more importantly, that Claire had any reason to believe that such a rapid action was necessary. Len did not tell Claire that he would withdraw if she didn't respond (and he cannot rely on Hannah's representation that she was a vexatious litigant without actually looking into that at all, as a reasonable attorney would, to augment the implication of her nonresponse). Taken together, Len violated his duty of continued representation by withdrawing for this reason.

d. Court's approval

Moreover, in California after a lawsuit has been filed, an attorney cannot withdraw from representing a client without attaining the judge's permission to do so. While he likely would have gotten it here, because of the failure to communicate because the case had just been filed and there is no indication that allowing withdrawal would otherwise prejudice Claire, that does not excuse his not following this rule. Therefore, regardless of the merits of any justification for withdrawal, Len breaches this rule.

3. Duty to the Court to Investigate Positions

Even if Len were correct that Claire's lawsuit was entirely without merit, he would have still likely violated ABA and CA ethics rules by filing the lawsuit in the first place. An attorney is required to investigate legal positions and pleadings taken and represented to a court before doing so. The standard for this is what a reasonable attorney would do in similar circumstances. Thus, if the lawsuit was entirely without Merit, Len likely violated his ethical rules in filing it in the first place. Len will argue that the scars and stained clothing were sufficient to file the suit, but the record does not indicate that Len provided *any* additional investigation or research into the merits of the claim. Whether

that is reasonable depends on how a qualified attorney in like circumstances would have acted.

4. Returning Property

A lawyer has the obligation to keep any property of the client's that is in his possession in a safe and secure location. Moreover, the lawyer certainly cannot destroy evidence that the client entrusts to him. The lawyer must take reasonable protective measures to safeguard such evidence, if the lawyer chooses to accept responsibility for possessing it. Here, Len accepted responsibility for maintaining Claire's clothes and those clothes were relevant to the legal claim that Claire was pursuing. As such, he had a duty to his client to implement effective measures for ensuring the safeguarding of the property entrusted in his care. However, he "sent her clothes along with his to be dry-cleaned." Thus, it seems that he did not put her property in a separate location or otherwise implement methods to ensure that the inadvertent destruction or disclosure of the evidence would not occur. Len, therefore, violated this duty to Claire.

If Len received any money following the "properly executed retainer agreement," he violated his duty by not attempting to give it back to her when he sent her the letter saying that he would send her the clothing. However, since there is no evidence that he had any property but for the clothing, he likely did not violate this duty.

QUESTION 5: SELECTED ANSWER B

Attorney-Client Relationship

Len formed an attorney-client relationship with Claire. An attorney-client relationship is formed when the client reasonably believes the relationship formed. The attorney's beliefs are irrelevant. Within the scope of the representation, an attorney determines the means, including which claims to present and which witnesses to call, and a client determines the ends, including whether to accept a settlement offer and other duties.

Retainer

L and C executed a valid retainer agreement. In California, an agreement to represent that is worth more than \$1,000 must be in writing. In ABA, it is strongly encouraged. Additionally, the fees must not be unreasonable under the ABA authorities, or unconscionable in California. Here, there is no indication that the fees were unreasonable/unconscionable. The retainer must describe the nature of the relationship, the responsibilities of the parties, and the method of determining fee. Here the facts tell us there was a properly executed retainer agreement.

Duty of Loyalty

An attorney owes a duty of loyalty to his clients, and cannot accept representation if it would result in a conflict of interest that would materially impair his representation of client. A conflict of interest may occur between an attorney and his client; between two clients, whether former and current or two or more current clients; between a third party and client; or between the members of an organization and the organization itself. A conflict of interest may occur between the attorney and his client when the attorney has a close relationship with opposing counsel in a case. Here, L has a close relationship with H, the Hotel's attorney. They were engaged for two years before amicably deciding to go their separate ways. L should have informed C of his relationship with H. In California, L needs to inform C in a written disclosure of his relationship with H. In the ABA authorities, L needs to obtain written consent from C with respect to his relationship with H. Because L did not inform C of his relationship with H or obtain

written consent, L violated his duty of loyalty to C by not disclosing his relationship with H.

Duty of Communication

An attorney must promptly and diligently communicate with his client. This duty includes a duty to inform the client of their responsibilities and obligations with respect to the representation. Here, L owed C a duty to tell her about the scope of her responsibilities, including communicating with him regarding material facts. When L met with C, he should have informed her about her duty to respond to his inquiries so that he could competently represent her. C's statement that "I didn't think calling you back was such a big deal" indicates that L neglected to tell her that she should promptly return his calls and inquiries because failure to do so may hurt her case. C has a responsibility to make decisions with respect to her representation. If L had received a settlement offer with a deadline, he could not have accepted it without C's permission. Because L failed to communicate her own responsibilities to C, L violated his duty of communication with C.

L also owed C a duty to communicate all of the material facts so that she could make an informed decision. L should have communicated with H regarding the "thirteen prior lawsuits" before attempting to withdraw from the representation. L called C and left her a message, and sent many emails and a registered letter. But none of the communications informed C that he was concerned about prior litigations or that he was considering withdrawing until he did attempt to withdraw. L owed a duty to C to communicate all of the material facts before he attempted to withdraw. Because L did not inform C of the material facts, L breached his duty of communication with C.

Duty of Competence

An attorney owes a client a duty of reasonable knowledge, skill, and ability in the scope of the representation. Here, L did not inquire into the prior lawsuits that C may have filed against Hotel. Instead, he relied on the word of opposing counsel and did not do his own research. Because L did not do his own inquiry, he violated the duty of

competence he owed to C.

Duty to Safeguard

L owed C a duty to safeguard the evidence she gave him. An attorney owes a duty to the client to safeguard possessions of the client, including money given as a retainer and any possessions or evidence entrusted to the attorney. Here, C gave L evidence related to her litigation, the clothes that were stained by the cleaning solution. L had a duty to diligently safeguard this possessions with reasonable competence. L placed the evidence in a closet and negligently sent them to the dry-cleaners, where they were cleaned. Placing material evidence in a closet is not a reasonable way to diligently safeguard important items. L should have placed them in a safe deposit box or other manner of safekeeping. Material evidence with respect to C's case was destroyed. L violated his duty to safeguard C's evidence and possessions entrusted to him.

Mandatory Withdrawal

An attorney may withdraw if representation will necessarily cause a violation of an ethical rule. Under the ABA, this extends to any law. An attorney must also withdraw if, because of his physical or mental condition, continued representation would materially impact the client. In California, an attorney must withdraw if the client insists on pursuing a claim without probable cause and with the purpose of harassing or maliciously injuring another person. Under the ABA authorities, an attorney must withdraw if he is fired. None of these events have occurred and L does not have a reason that would support mandatory withdrawal.

Permissive Withdrawal

An attorney is permitted to withdraw if a client insists on pursuing an illegal course of conduct. An attorney is also permitted to withdraw if they insist the attorney take actions against the attorney's judgment, violating the scope of the relationship so that the attorney is no longer dictating the means of the litigation. An attorney may also permissively withdraw if the client does not pay her fees or for any other "good cause shown." An attorney is also permitted to withdraw if the client makes representation

unreasonably difficult.

Here, L may argue that C has made the representation unreasonably difficult. He attempted on numerous occasions to contact C in order to inquire about the prior litigations and discuss the case with her. He called her and left a message, sent at least 7 emails that he knows she read but did not respond to, and sent a registered letter with a return receipt requested. A reasonable client would likely have understood that L had a matter of some urgency to discuss with L and would have returned his call. But a week is too short of a time for L to say that this behavior made the representation unreasonably difficult. C could have been on vacation or with limited access to email and phones, and she did not want to take the time to respond to L. A week or two is not an unreasonable amount of time for a client not to respond. He at least should have waited to withdraw until he had discussed with her the importance of returning his calls and communicating with him. It was perhaps L's failure to communicate the responsibilities of the client to C, to inform her of her responsibility to also communicate with him so that he could adequately represent her, that caused the breakdown in communication in the first place. Therefore, C's lack of communication for two weeks does not make L's representation of her unreasonably difficult.

There is no indication that C did not pay her fees. Her statement to L that "Hotel's got more money than I do" may suggest an inability to pay her fees in the future, but this is not a reason to permissively withdraw. Additionally, there does not appear to be any other "good cause shown" to permissively withdraw. L did not have any reason to permissively withdraw from the representation and therefore violated the ethics rules.

Additionally, in California, an attorney may not permissively withdraw if the matter is currently pending before a tribunal. Because L filed the lawsuit in state court, the matter is currently pending before a tribunal and L must seek court permission to withdraw. Because L did not seek court permission to withdraw, he violated the California ethics rules.

Withdrawal from Representation

When an attorney withdraws, either permissively or because the withdrawal is mandatory, he owes a duty to the client to mitigate the harm from the withdrawal. An attorney must timely inform the client of the withdrawal and give the client time to seek new representation. Here, L simply told C he was withdrawing. He did not give her adequate time to find new representation and she may therefore be prejudiced in her case if there are upcoming deadlines or other issues in the case and she is not adequately represented.

Additionally, an attorney must mitigate the harm by returning all papers or possessions to the client. Here, because he did not competently and diligently safeguard C's evidence, it was destroyed when he negligently sent it to the dry-cleaners.

An attorney may collect fees for reasonable compensation, but must return any remainder of fees to the client. In California, an attorney may retain a true retainer, meant to ensure the attorney's availability. Here there is no indication that L retained any unearned fees or was paid a true retainer.

Because L did not give C adequate notice and time to find new counsel, and failed to return C's possessions, his withdrawal from representation violated the ethics rules.

QUESTION 6

Ivan, an informant who had often proven unreliable, told Alan, a detective, that Debbie had offered Ivan \$2,000 to find a hit man to kill her husband, Carl.

On the basis of that information, Alan obtained a warrant for Debbie's arrest. In the affidavit in support of the warrant, Alan described Ivan as "a reliable informant" even though Alan knew that Ivan was unreliable.

Alan gave the arrest warrant to Bob, an undercover police officer, and told Bob to contact Debbie and pretend to be a hit man.

Bob called Debbie, told her he was a friend of Ivan and could do the killing, and arranged to meet her at a neighborhood bar. When the two met, the following conversation ensued:

Bob: I understand you are looking for someone to kill your husband.

Debbie: I was, but I now think it's too risky. I've changed my mind.

Bob: That's silly. It's not risky at all. I'll do it for \$5,000 and you can set up an airtight alibi.

Debbie: That's not a bad price. Let me think about it.

Bob: It's now or never.

Debbie: I'll tell you what. I'll give you a \$200 down payment, but I want to think some more about it. I'm still not sure about it.

When Debbie handed Bob the \$200 and got up to leave, Bob identified himself as a police officer and arrested her. He handcuffed and searched her, finding a clear vial containing a white, powdery substance in her front pocket. Bob stated: "Well, well. What have we got here?" Debbie replied, "It's cocaine. I guess I'm in real trouble now."

Debbie has been charged with solicitation of murder and possession of cocaine.

1. How should the trial court rule on the following motions:
 - a) To suppress the cocaine under the Fourth Amendment? Discuss.
 - b) To suppress Debbie's post-arrest statement under *Miranda*? Discuss.
2. Is Debbie likely to prevail on a defense of entrapment at trial? Discuss.

QUESTION 6: SELECTED ANSWER A

SUPPRESSION OF COCAINE

The Fourth Amendment prohibits unreasonable searches and seizures, and is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. For a search by a state actor to be valid, it must be conducted pursuant to a valid warrant issued by a neutral magistrate or an exception to the warrant requirement. In this case, Bob, who arrested and searched Debbie, was an undercover police officer, and therefore a state actor, so his search needed to comply with the Fourth Amendment.

Bob did not have a warrant to search Debbie. While the facts state that Alan obtained an *arrest* warrant, there was no warrant specifically for the search. That said, pursuant to a valid arrest, police can search the arrestee, including the arrestee's person and anything within the person's wingspan. Such searches are meant both to protect officer's safety and to ensure that the arrestee does not destroy any evidence within reach. The search must be at the same time and place as the arrest. Because, in this case, Bob found the white, powdery substance on Debbie's person - her front pocket - at the same time and place as her arrest, the search was lawful as long as the arrest was lawful.

Valid Search Warrant?

The first possible basis for the arrest was the arrest warrant that Alan obtained. The Fourth Amendment itself requires that warrants describe with particularity the place to be searched and the people or things to be seized. The warrant that Alan obtained appeared to satisfy this requirement, because it named Debbie as the person to be "seized," i.e., arrested.

That said, a warrant must be based on probable cause, which is defined as a fair

probability that the searched place will contain contraband or other evidence of crime, and that the arrested person has in fact committed the crime of which they are suspected. In this case, the arrest warrant was not supported by probable cause. It was based only on one statement by Ivan, an informant who had often proven unreliable. Probable cause is determined by examining the totality of the circumstances. While each determination is necessarily very fact-specific, the say-so of one unreliable informant cannot be enough to satisfy the probable cause requirement. Courts have held that a tip from an anonymous informant, while relevant to probable cause, cannot by itself establish probable cause. A tip from an unreliable informant is no more reliable than a tip from an anonymous one, so Ivan's statement did not provide probable cause for the arrest.

Good Faith Exception?

An officer can nonetheless rely on an invalid warrant if the officer relied on it in good faith, meaning the officer did not know that the warrant was lacking in probable cause. This exception is not available, however, when any of the following is true: (i) the warrant, on its face, is so lacking in probable cause that no reasonable officer would rely on it, (ii) the warrant, on its face, is so lacking in particularity that no reasonable officer would rely on it, (iii) the affiant officer misled the magistrate in issuing the warrant, or (iv) the magistrate was so biased against the object of the warrant that he could be said to have given up all neutrality.

Here, the warrant probably appeared, on its face, to be supported by probable cause. Alan had told the magistrate that Ivan was a reliable informant, and a tip from a reliable informant is enough to establish probable cause. Bob, who executed the warrant after Alan gave it to him, therefore fell outside the first two exceptions to the warrant requirement. However, the third exception clearly applies. Alan misled the magistrate by telling him that Ivan was a reliable informant, when in fact Ivan had often proven unreliable. Police cannot obtain a warrant through deception, but then take advantage of the good-faith exception by having an officer who doesn't know about the deception

execute the warrant. Debbie's arrest was therefore not permissible under the good-faith exception to the warrant requirement.

Valid Warrantless Arrest?

Police almost always need a warrant to conduct an arrest in a home or other private place, unless they are pursuing evanescent evidence, where they either have reason to believe that evidence in the house is being destroyed, or they are within 15 minutes of a suspect in hot pursuit. That said, Bob did not arrest Debbie in a private home; he arrested her in a neighborhood bar where they had arranged to meet. Police can generally effect a warrantless arrest in a public place whenever they have probable cause to believe that the person has just committed a crime. The validity of Debbie's warrantless arrest by Bob thus turns on whether he had probable cause to think she had just committed a crime.

Bob did in fact have probable cause. Just seconds earlier, Debbie had paid him \$200 as a down payment for committing murder. This gave him probable cause, at the very least, to think that Debbie had just committed a crime. Murder is the intentional killing of another person with malice aforethought. In most states, premeditated murder is first degree murder, but murder is committed even by acting with reckless indifference to an unjustifiably high risk to human life. Hiring a hit man probably satisfies the former standard, and it certainly satisfies the latter. When she paid Bob, Debbie arguably committed solicitation. A person is guilty of solicitation where they urge, request, or pay another person to commit a substantive offense. By paying Bob an advance, Debbie was arguably soliciting his commission of the murder of her husband, Carl. Because she had just committed this crime in front of him, Bob had probable cause to arrest Debbie. The arrest was therefore lawful.

Debbie may argue that she did not actually commit solicitation in front of Bob, because she made clear that she was not yet sure she wanted him to kill Carl, and that she still needed some more time to think about it. It is not clear that this defense would work at

trial, because Debbie still paid money as consideration for keeping open the promise of committing the crime. Bob had said she needed to pay him now or never if she wanted him to commit the murder, and she did pay him, albeit not the entire amount. That said, it does not matter that Debbie might win this argument at trial, because the arrest only required probable cause - again, a fair probability that the person had committed the substantive offense. By paying money to a hit man, Debbie at least came within a fair probability of committing solicitation, such that the arrest was lawful.

Furthermore, Bob had probable cause to think that Debbie had committed solicitation by offering Ivan \$2,000 to find a hit man to kill her husband. While Ivan's unreliable testimony might have not established probable cause on its own, Debbie corroborated his report by saying "I was," by showing interest in Bob's offer when she said "not a bad price," and by ultimately offering him the \$200 to keep the offer open. This earlier solicitation could also be the source of probable cause.

As mentioned above, a search can occur incident to a valid arrest. The officer can search the arrestee's person and everything within her wingspan, as long as time and place are contemporaneous. Bob's search was at the time and place of the arrest, and did not go beyond Debbie's person. It was therefore a lawful search pursuant to arrest. Once such a search is carried out, any evidence found is not subject to suppression, even if it is not evidence of the same crime for which the person was arrested. Thus, although the white powder was not evidence of the crime for which Debbie was arrested - solicitation of murder - it is not subject to suppression.

The judge should therefore deny Debbie's motion to suppress the cocaine.

SUPPRESSION OF POST-ARREST STATEMENT

Debbie's post-arrest statement, on the other hand, is subject to suppression. Under the Self-Incrimination Clause of the Fifth Amendment (and the *Miranda* case implementing it), incorporated against the states by the Due Process Clause of the Fourteenth

Amendment, police must warn people of their rights to remain silent and to an attorney before commencing a custodial interrogation. The warning need not be verbatim, but it must convey that (1) the person has the right to remain silent, (2) anything they say can be used against them at trial, (3) they have the right to speak to an attorney, and (4) that if they cannot afford an attorney, one will be provided. The trigger for these warnings is custodial interrogation. An interaction is "custodial" any time a reasonable person would not feel free to leave, and would expect that the detention will not be of relatively short duration, as with a routine automobile stop or a *Terry* stop. Another test for whether the interaction is custodial is whether it presents the same inherently coercive pressures as a station-house questioning. The interaction is an "interrogation" any time the police act in a way that they know or should know is likely to elicit an incriminating response. They need not actually conduct a formal interrogation, as long as this likelihood exists. Violations of a suspect's *Miranda* rights provide grounds to suppress any incriminating statements, though they will not necessarily lead to the suppression of the investigatory fruit of such statements.

Here, Debbie was clearly subject to a custodial interrogation. She was in custody because she was being arrested. Bob had just identified himself as a police officer, handcuffed her, and begun searching her. No reasonable person would feel free to leave such an arrest, and any questions asked while being handcuffed and arrested are just as coercive as questioning at a police station-house. Moreover, Debbie was subject to interrogation, because Bob, upon finding the cocaine, asked her "What have we got here?" Bob should have known that this question, asked by a police officer about a suspicious substance found on Debbie's person in the course of an arrest, was likely to elicit an incriminating response. Therefore, Debbie's incriminating response identifying the substance as cocaine is subject to suppression. So is her statement about being in trouble, which has the tendency to incriminate her by demonstrating her awareness of culpability.

The court should therefore grant her motion to suppress her post-arrest statement under *Miranda*. That said, the physical evidence itself - the bag of white powder - need not be suppressed, because *Miranda* suppression applies only to testimonial

statements like Debbie's verbal statement, not physical evidence. Because the powder was not obtained in violation of *Miranda*, the police are free to test it and introduce it as evidence at trial if it proves to be cocaine. Debbie might argue that the nature of the bag's content is the fruit of an illegal interrogation, because Bob only knew what was inside because Debbie told him. This argument will fail for a number of reasons. First, Bob had an independent source for knowing that the bag might be cocaine - namely, his own eyesight and common sense. A bag of white powder carried around in a person's pocket is sufficiently likely to be drugs that a reasonable officer would have it tested no matter what. Second, and relatedly, the police could claim that discovery of the powder's chemical makeup was inevitable, because all suspicious powders found on arrestees are tested as a matter of course (assuming this is true, which it should be). Third, the fruit of the poisonous tree doctrine does not apply to evidence whose discovery can be traced back to a statement suppressible under *Miranda* - only the statement itself is subject to suppression. The Supreme Court has determined that the evidentiary value of such down-the-line evidence outweighs the deterrent effect of suppression, unless the officer's failure to give *Miranda* warnings occurred in bad faith. Here, there is no indication that Bob acted in bad faith, withholding a *Miranda* warning so that he could gather evidence from Debbie to be used to further an investigation. It appears that, in the heat of the arrest and subsequent search, he simply forgot to give the warning. That said, even if this third argument against suppression failed, either of the first two would be enough to make the cocaine admissible at trial.

ENTRAPMENT

The defense of entrapment requires a defendant to show (i) inducement and (ii) a lack of predisposition. Inducement occurs when a criminal design originates with the police. A lack of predisposition occurs when the defendant was not otherwise intending to commit the crime, but only did so because the police applied pressure or some sort of other unfair deceit. The defendant must establish both elements by a preponderance of the evidence in order to make out the defense of entrapment.

If Debbie is found to have committed solicitation, it is unlikely that she will be able to establish an entrapment defense. As to predisposition, while the specific plan - to have Bob kill Carl - may have originated with the police, the underlying idea to kill her husband through a hit man was Debbie's. She had already taken a major step to achieve the underlying crime by paying Ivan \$2,000 to find a hit man - a fact that she confirmed when she said that she "was" considering it. (While she may argue withdrawal, from discontinuing her plan, the entrapment defense assumes that she has otherwise been convicted.) She will thus struggle to show that she was not already predisposed to commit the crime. The plan originated with her, and she had already put significant money toward showing that it was not a mere fancy, but in fact a serious plan.

As to inducement, Debbie would have a slightly better argument. When she told Bob that she had changed her mind because her original plan was too risky, Bob applied pressure in several ways. He told her that her change of heart was silly, because the plan was not risky at all; he tried to persuade her that her alibi would be "airtight"; he offered her a presumably unnaturally low price; and he told her that she needed to accept on the spot. These all show police attempts to induce the crime through a combination of emotional and financial pressure.

That said, mere precatory language like this is rarely enough to establish inducement, or to negate predisposition that otherwise appears to exist. Generally the government must apply more forceful pressure - like an affirmative threat - to reach entrapment. For drug stings, these elements can be satisfied by offers to buy or sell drugs at a price that is grossly more favorable to the defendant than the defendant could obtain in the real world. But for solicitation of murder, the fact of offering a discount is probably not enough to show inducement or lack of predisposition. A person who does not otherwise intend to engage in murder is generally not induced to solicit murder by being offered a low price. Debbie's entrapment defense is therefore not likely to prevail at trial.

She may have slightly better luck at sentencing, by offering either a sentencing entrapment argument or a sentencing factor manipulation argument. These typically

allow a judge to reduce a sentence, even to go below the guidelines, based on police conduct that is unfair or pressuring, but that does not rise to the level of entrapment. Bob's pressuring statements might satisfy these sentencing defenses, if Debbie can convince the sentencing judge that she in fact had decided not to carry out her plan, and indeed would not have carried it out, but for the officer's pressure. This may reduce her sentence, but it will not excuse her from criminal liability.

QUESTION 6: SELECTED ANSWER B

Suppression of Cocaine Under the 4th Amendment

4th Amendment

Under the 4th Amendment to the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, the government must not conduct unreasonable searches and seizures.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment is to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 4th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Search and Seizure of the Cocaine

As provided above, the 4th Amendment bars police from conducting unreasonable searches and seizures. There are a number of steps that we must go through in order to determine whether the seizure of the cocaine violated Debbie's 4th Amendment rights.

(1) We first need to determine whether this is government conduct. Government conduct occurs when the publicly paid police, or private police that are deputized with arresting power, conduct an action. Here, it appears as though it was government/police conduct. Alan was a detective and Bob was an undercover police officer. Accordingly, there was police/government action.

(2) Next, we need to determine whether Debbie had a reasonable expectation of privacy in the area searched or the item seized. Put another way, we need to determine whether she has standing to complain about this particular search. Standing is always present when (1) an individual owns a premises; (2) an individual is the possessor/lesor of the premises; or (3) the individual is an overnight guest at a premises. These do not apply to Debbie's particular situation. A defendant sometimes has standing if they have a reasonable expectation of privacy in the area searched. Here, the search took place on Debbie's person, in her pockets. Debbie undoubtedly has a reasonable expectation of privacy in her pocket. As such, the government/police must have had a valid warrant or a valid excuse for not having a proper warrant when they searched Debbie.

(3) As stated above, we next must determine whether Bob and Allan had a valid warrant for the search and arrest of Debbie. A valid warrant has two specific requirements: (1) particularity; and (2) probable cause. Particularity requires the warrant to state with relative specificity the items to be recovered, the person to be arrested, or the areas to be searched. Probable cause is the reasonable belief that contraband will be found in the area to be searched or reasonable belief that the individual to be arrested committed a crime. Here, there appears to be serious problem with the arrest warrant in this case, specifically with the probable cause requirement.

The particularity requirement appears to be satisfied because it is a warrant for the arrest of Debbie. This is a specific person and particular enough to satisfy the first prong of the valid warrant requirement. The problem arises with regards to the creation of probable cause. Alan obtained the warrant on the basis of an informant's information.

There are many circumstances where an informant's information may be used to establish probable cause. That being said, whether the informant may be trusted is based on the totality of the circumstances. This includes the informant's previous reliability, whether there is independent evidence to support the informant's testimony and, most importantly, whether the informant's testimony can be corroborated. Here, there does not appear to be any sort of corroboration of Ivan's testimony. Furthermore, it is made clear that Ivan has often proven unreliable. As such, there is no reason to believe Ivan's information without any additional corroborating evidence. Because probable cause is not based on sufficient information, there is a good argument to be made that the warrant was invalid to begin with.

(4) Even if a warrant is invalid, a search/arrest may still be considered legitimate if the arresting/searching officer uses good faith in the execution of the warrant. Here, there is no indication that Bob knew of the lack of probable cause, and appears to rely on the warrant in good faith. That being said, there are a number of situations where the arresting/searching officer's good faith does not excuse an invalid warrant: (1) when the warrant is so lacking in particularity that no reasonable officer could believe in good faith that the warrant is valid; (2) when the warrant is so lacking in probable cause that no reasonable officer could believe in good faith that the warrant is valid; (3) when the magistrate judge who issued the warrant is biased; or (4) when the officer who obtained the warrant lied in the warrant application. Here, there is nothing on the face of the warrant to demonstrate that it is so lacking in particularity or probable cause such that no officer could reasonably believe it valid. There is also no indication that the magistrate judge who signed the warrant is biased. There is, however, evidence that Alan lied in the warrant application in order to obtain the warrant. The facts indicate that Alan described Ivan as "a reliable informant" even though he knew that was not the case. Had the magistrate judge been aware that the warrant was solely based on information provided by an unreliable informant, they would probably not have issued the warrant because there is not sufficient probable cause to support the warrant. Accordingly, the warrant was invalid and the officer's good faith reliance on the warrant does not overcome that deficiency.

(5) If a warrant is invalid and the officer's good faith is not enough to overcome that deficiency, there are still some instances where a search and/or arrest is not required to be conducted pursuant to a valid warrant. Some such instances include, but are not limited to: (1) the plain-view doctrine; (2) searches incident to a valid arrest; (3) exigent circumstances; and (4) the automobile exception. Here, Bob may be able to validly argue that the search and seizure of the cocaine was valid pursuant to a search incident to a valid arrest. When an officer validly arrests an individual, they are allowed to search the clothes/body of the person, as well as any area around the person within their wingspan. Any contraband/evidence of crime that is obtained as a result of the search conducted pursuant to a valid arrest is admissible, despite the absence of a proper warrant. Here, Bob will argue that his search of Debbie and seizure of the cocaine was valid pursuant to a valid arrest. He will argue that he personally witnessed Debbie commit a crime (solicitation of a murder - which is discussed in greater detail below) and therefore was allowed to arrest her and entitled to search her person. Debbie will undoubtedly have a different view of the situation.

Debbie will argue that she committed no crime and that the search and seizure was not done pursuant to a search incident to a valid arrest. Solicitation requires (1) the defendant to request or ask another person to commit a crime; and (2) an intent that the requested crime be committed. Solicitation is a specific intent crime. If there is an agreement between the parties to commit the crime, solicitation merges with conspiracy and is no longer alive for purposes of prosecution. Here, it is unclear whether or not Debbie manifested the intent to commit the murder. If she did not have the requisite intent, she did not commit the crime of solicitation. Debbie used words such as "let me think about it," "I've changed my mind," and "I'm still not sure about it." While she did give Bob a down payment, she does not seem to express the necessary intent for Bob to commit murder against her husband. Her argument will be that no crime was committed, therefore there was no valid arrest and the search incident to the arrest was also improper.

Conclusion - Here, it appears a close call as to whether the court should suppress the

cocaine pursuant to the 4th Amendment. As an initial matter, there was not a valid warrant and the conducting officer's good faith reliance on the warrant does not save it because Alan lied in obtaining the warrant. There does appear to be a valid reason for the search conducted by Bob, but Debbie will argue that she did not commit the crime of solicitation because (1) she never expressly asked Bob to commit the crime of murder; and (2) she did not express the intent for Bob to commit murder. The government will counter that the down-payment was meant to obtain the services and the exchange of money was enough to establish solicitation.

Ultimately, it appears as though Debbie does not commit the crime of solicitation because she did not expressly ask Bob to commit the murder and she did not have the necessary intent. While she did provide money, there was no agreement to commit the murder or express request to commit it - it appeared to simply compensate Bob for his time spent during their meeting. If Debbie had called back later and said to apply that money towards the commission of the crime, then the money would have been given with intent for Bob to commit the murder. Accordingly, it seems as though no crime was committed and the search that Bob conducted that uncovered the cocaine was not incident to a valid arrest. Therefore, the cocaine should be suppressed.

Suppression of Debbie's Post-Arrest Statement Under Miranda

5th Amendment and Miranda

Under the 5th Amendment of the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, individuals are entitled to Miranda warnings prior to "custodial interrogation." Miranda warnings include (1) the defendant has the right to remain silent; (2) anything the defendant states can be used against them in the court of law; (3) the defendant has a right to an attorney; and (4) if the defendant is indigent and can't afford an attorney, one will be supplied to her. The warnings need not be verbatim. As previously stated, the trigger for Miranda warnings is "custodial interrogation." "Custody" means any situation in which an individual would not feel able to leave on their own volition. While this may be in a jailhouse, it can also

occur in any other situations where police conduct does not leave a reasonable belief that the person can wilfully leave. "Interrogation" occurs when the police can foresee that the line of questioning may elicit an incriminating response. Once there is custodial interrogation, the individual being questioned must be given the Miranda warnings. If not, the exclusionary rule and fruit of the poisonous tree doctrine may apply.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment are to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 5th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Custodial Interrogation of Debbie

In order to determine whether Debbie's post-arrest statement violates Miranda and is thus entitled to suppression, we need to determine whether she was in a state of custodial interrogation. After receiving the \$200 from Debbie, Bob identified himself as a police officer, handcuffed her, and searched her. During the course of the search, Bob found a vial of white, powdery substance and asked "well, well, what have we got here?" Based on the facts of this particular case, it appears as though Debbie was in custody at the time Bob made this statement. She was handcuffed and being searched by Bob. Accordingly, no reasonable person would believe that they have the right to leave on their own free will at that point.

Next, we need to determine whether Bob's question qualifies as "interrogation" under the meaning of "custodial interrogation" defined above. Bob's question is "What have we got here?" While this seems relatively innocuous, it is most definitely intended to elicit an incriminating response. When the police ask someone what the contents of a vial suspected to be contraband are, they are undoubtedly attempting to obtain a response that can incriminate the defendant.

Debbie was in "custody", as defined by Miranda, because no reasonable person would feel able to leave when they're handcuffed and searched by the police and she was being "interrogated" because Bob asked a question that is foreseeable to elicit an incriminating response, it appears as though she was entitled to her warnings under Miranda prior to Bob's questioning. Because Bob's questioning was a violation of Miranda, Debbie's response should be excluded pursuant to the 5th Amendment.

Debbie's Defense of Entrapment

As stated above, Debbie was charge with solicitation of murder. Solicitation requires (1) defendant to ask or request someone to commit a crime; and (2) specific intent that the requested crime is to be committed. Murder, the crime that Debbie supposedly wanted to commit, is defined as the unlawful killing of another human being with malice aforethought, expressed or implied. There are multiple "degrees" of murder - first and second degree. First degree is premeditated murder, with intent to kill, and knowledge, or felony murder (murder in the commission of a dangerous felony independent from the murder itself). Second degree murder is any other kind of murder. The intent required for murder is (1) intent to kill; (2) intent to commit serious bodily harm; (3) intent to commit a felony; or (4) depraved heart/reckless indifference.

While there is some question about whether or not Debbie manifested the intent necessary for solicitation, the defense determined that the defense of entrapment was a viable defense. In order to bring a successful entrapment defense, a defendant must show (1) the government unduly encouraged/enabled/aided the defendant in the

commission of the crime; and (2) the defendant would not have committed the crime but for the government's actions. This is an extremely difficult defense to establish and Debbie may have trouble succeeding in its presentation.

Initially, we must determine whether the government encouraged and/or enabled Debbie to commit the crime in question. Here, Debbie's actions seem to indicate that she was predisposed to committing the crime of solicitation of murder. First, Debbie agreed to meet Bob at a neighborhood bar when the only information he provided was that he was a friend of Ivan and could do the killing. When they met, Debbie stated "I was [looking for someone to kill my husband], but I now think it's too risky. I've changed my mind." This statement seems to suggest that Debbie is not withdrawing because she doesn't want to commit the crime, but that she is afraid of getting caught. Bob does not force her to continue, but states that "it's not risky at all" and gives her a price quotation. At this point, Debbie states "let me think about it." When Bob states that he needs an answer now, Debbie proceeds to put a down payment and states "I'm still not sure about it." Based on Debbie's statements and behavior, it does not seem that Bob unduly coerced her to commit the crime of solicitation. Bob merely provided her with the opportunity to do so. Debbie's statements seem to suggest that she has the desire to do it, but is simply afraid of getting caught. Bob's assurances that she won't get caught do not rise to the level necessary for the first prong of entrapment.

We also must determine that Debbie would not have committed the crime but for the government's actions. As established in the preceding paragraph, Debbie has the intent to commit the crime, but is simply afraid of being caught. The government will argue that the provision of money was a down payment to commit the murder and Debbie had the necessary intent to commit the underlying crime necessary for solicitation. Debbie will claim that she would not have given the money, but for the assurances made by Bob that she would not be caught. That is not enough to establish the second prong necessary for entrapment. If a separate/non-governmental actor had provided the same assurances, Debbie appears to have been likely to react in the same manner.

Because (1) the government did not unduly encourage or enable Debbie to commit the

crime of solicitation, and (2) Debbie would have still committed the crime without the government's interference, the defense of entrapment does not appear to be a valid defense for Debbie.