



California Bar Examination

**Essay Questions
and
Selected Answers**

February 2023



ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2023

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2023 California Bar Examination and two selected answers for each question.

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

<u>Question Number</u>	<u>Subject</u>
1.	Civil Procedure
2.	Constitutional Law
3.	Real Property
4.	Professional Responsibility
5.	Evidence

ESSAY QUESTION INSTRUCTIONS

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

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

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

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

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

QUESTION 1

DuraTires manufactures and installs specially coated tires. DuraTires advertised that a scientific report declared that its tires will not go flat for the first 7,000 miles of use if driven properly. DuraTires' scientific report was created at the direction of its legal counsel and contained research on flat tire incidents involving DuraTires.

Pam purchased four new tires from DuraTires and had them installed by Maurice, a mechanic. Pam drove 100 miles and one tire went flat, causing Pam to swerve and crash into another car. Pam was not physically injured in the accident. Pam gathered a written statement from the other driver, Wynne, who suffered a minor injury. Wynne's statement was favorable to Pam's case.

Pam filed and properly served a complaint in federal court against DuraTires for breach of warranty and negligent installation and manufacture of the tires. The federal court had proper jurisdiction over Pam's complaint. Pam alleged that she suffered property damage and emotional distress as a result of the accident.

DuraTires filed a motion to dismiss for failure to join Maurice as a defendant. The court denied DuraTires' motion. DuraTires filed and properly served an answer to Pam's complaint.

Pam served her initial disclosures on DuraTires, but did not produce Wynne's statement. DuraTires filed and served motions to compel Pam to produce Wynne's statement and for Pam to submit to a physical examination. The court granted both of DuraTires' motions.

DuraTires served its initial disclosures, but did not include the advertised scientific report. Pam met and conferred with DuraTires, which refused to produce its scientific report. Pam filed a motion to compel DuraTires to produce its scientific report. The court granted Pam's motion and ordered DuraTires to produce its scientific report.

1. Did the court properly deny DuraTires' motion to dismiss? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Did the court properly grant DuraTires' motions:
 - A. To compel production of the statement from Wynne? Discuss.
 - B. To compel a physical examination of Pam? Discuss.
3. Did the court properly order DuraTires to produce its scientific report? Discuss.

QUESTION 1: SELECTED ANSWER A

1. D's Motion to Dismiss

A party may move to dismiss for failure to join a necessary party. A party is deemed necessary when its participation is required for a just adjudication. A court will consider the risk of prejudice to the current parties, as well as the potentially "necessary" party if the party is absent.

Specifically, it will analyze whether the existing parties can achieve complete relief without the "necessary" party. It will also consider the risk of multiple or inconsistent obligations that may occur if that party is absent. When a party is necessary, that party must be joined if it is feasible, meaning adding them will not defeat the court's subject matter jurisdiction and there is personal jurisdiction over the party. If it is not feasible to join such a party, a court will decide whether to proceed without them, or whether to deem them "indispensable" and dismiss the entire case, so the case may be re-filed with that party. Factors that will be considered in making such a determination are the extent of prejudice that may result, and potential ways that prejudice can be mitigated.

Here, DuraTires filed a motion to dismiss for failure to join Maurice as a defendant.

Maurice is relevant to the litigation because he was the mechanic who installed the tires that allegedly caused Pam's harm. Additionally, P specifically alleges a claim for "negligent installation" of the tires, which was done by Maurice.

Potentially jointly and severally liable tortfeasors, meaning those who are both liable for a single, inseparable harm, are not necessary parties. Here, P will argue that DuraTires and Maurice fit that description, as P is suing for "negligent installation and

manufacture," which combined led to her harm, so the court properly denied the motion to dismiss for that reason. D manufactured the tires, and M installed them. It appears M was likely working for or with D, as the facts state D is in the business of "manufacturing and installing tires." The plaintiff P may still obtain complete relief from the existing defendant D, because when defendants are jointly and severally liable, the plaintiff can obtain complete relief from any one of the defendants. Further, the existing defendant D is not prejudiced because he can later seek contribution or indemnification from the third party (or seek to implead him in the current case). The third party, Maurice, is not prejudiced because he may still defend his interest in such a later contribution or indemnification claim by DuraTires. Thus, Maurice is not a necessary party and did not need to be joined.

2a. Motion to Compel Production of Wynne's Statement

The scope of discoverable material includes all material that is relevant to a party's claim or defense, is not privileged, and is proportionate to the needs of the case. Discoverable material need not be admissible, but it does need to be reasonably calculated to lead to the discovery of admissible material.

Initial disclosures must include the names and contact information of likely witnesses, relevant tangible evidence (documents and things), and insurance policies, that are in the party's possession and that the party may use to support its claims or defenses.

Prior to filing a motion to compel evidence, the opposing party must attempt in good faith to confer with the other party to try to get the relief sought without court intervention.

Here, P had possession of W's statement, which was favorable to her case, so she would likely be using this to support her claim at trial. W was also injured as part of P's accident, so her statement regarding that accident is relevant to both P's claim, and D's potential defenses.

Additionally, there is no undue burden that appears present from P being required to compel this, and she would likely need to produce it anyway as part of her final pretrial disclosures, which requires production of likely testimony of witnesses who will be testifying. Therefore, W's statement is within the scope of discovery. However, it appears that DuraTires failed to attempt to confer with P prior to making this motion to compel, so P will likely argue that the granting of this motion was improper for that reason. On balance, it is likely that the court still properly granted this motion, because the statement fits the scope of discovery, but it may sanction D for failing to confer first.

2b. Motion to Compel a Physical Examination of Pam

A party may compel a physical examination of an opposing party when it obtains a court order to do so, after showing good cause for the examination, and that the physical condition of the party is at issue. D will argue this examination is relevant because it will assist it in preparing its defense against P's claims. However, this will be unsuccessful.

A physical examination of Pam is inappropriate here because she has not alleged that she was physically injured as a result of the accident. She is only seeking relief for her property damage and emotional distress that resulted from the accident. Thus P's physical condition is not in issue, and there is no good cause for this examination. D instead could have sought a *mental* examination, because P's mental state (her alleged

emotional distress) is at issue. The court properly denied this request for a physical examination.

3. DuraTires' Scientific Report

See rule above for scope of discovery, which excludes privileged material. D's scientific report is relevant to this case because it specifies the warranty that P is claiming was breached by D-- that the tires will not go flat for the first 7,000 miles of use if driven properly, as the tires went flat after she only drove 100 miles. Further, it is tangible evidence within the possession of D, that will likely be used to support its defense, as it states that the 7,000 mile warranty is only in place when the car is "driven properly." Additionally, P properly conferred with D regarding this piece of evidence prior to filing the motion to compel. Further, if D will likely have the expert who prepared the report testify at trial, or another expert who uses this report as the basis for his opinion, the report could also be compelled as part of the mandatory disclosure of expert witness materials, which include the bases each testifying expert relied upon. However, D will likely argue that it should not have been required to produce this report because it is privileged.

Work product protects from discovery documents that were created by or at the direction of the opposing party's attorney, in anticipation of litigation or for trial. The scientific report here was created at the direction of its legal counsel, but it is unclear whether that was done in anticipation for litigation. D will argue that it was, because it contained research on flat tire incidents involving D, which D likely anticipated being sued about. Based on those facts, it is likely the document is protected by work product privilege. However, work product that does not include the attorney's mental impressions,

opinions, or legal theories or research; and instead only contains factual information relevant to the case, is discoverable when the opposing party demonstrates a substantial need for the material, and that there would be an undue burden in obtaining it from other sources. Here, the scientific report contains factual information about flat tire incidents, so if it does not also contain mental impressions, opinions, or legal theories or research (which is not indicated by these facts), it may be compelled if P shows such a substantial need and undue burden. P likely does have a substantial need for this information, as research on other flat tire incidents involving D would be highly material to her claim regarding this accident caused by such a flat tire. Additionally, conducting this research herself would be very burdensome and expensive, which would likely cause her prejudice. On balance, the court properly ordered D to produce this report under the exception to work product.

Attorney-client privilege protects against compelled disclosure of confidential communications between attorney and client, made for the purpose of obtaining legal representation or advice. D will also likely argue that the scientific report is privileged because it was created at the direction of the attorney. However, it does not appear on these facts that this was a confidential communication between D and their attorney (or investigators employed by the attorney for purposes of legal services), although more facts are needed to properly determine this. Further, because the report was the basis of D's advertisements, it does not appear that D attempted to keep this confidential or private from third parties. When material portions of an allegedly privileged communication are voluntarily communicated to third parties, the privilege as to that information is generally waived. More facts are needed regarding whether D attempted

to maintain the confidentiality of this communication. However, if D's experts will be relying on this material as basis for their opinions, it will likely be discoverable as part of the mandatory expert witness disclosures.

QUESTION 1: SELECTED ANSWER B

1. Did the court properly deny DuraTires' motion to dismiss?

The Federal Rules of Civil Procedure ("FRCP") govern the procedural process in federal court. Pursuant to the FRCP 10, a defendant may file a motion to dismiss in response to a complaint filed against them. There are numerous grounds for filing a motion to dismiss. For example, a defendant can file a motion to dismiss for failure to state a claim upon which relief may be granted, or for lack of personal jurisdiction. Here, DuraTires ("DT") filed a motion to dismiss for failure to join Maurice as a defendant. Maurice is the mechanic who installed the four new tires that Pam purchased from DT. Failure to join a necessary party is a permissible ground for filing a motion to dismiss. So, the first issue is whether Maurice was a necessary party.

Failure to Join a Necessary Party

A party is a necessary party under the FRCP if complete relief cannot be granted without them or if their absence from the case subjects them to inconsistent judgments. Generally, joint tortfeasors are not necessary parties. Joint tortfeasors are jointly and severally liable to successful plaintiffs and tortfeasor defendants may thereafter seek contribution from joint tortfeasors who have not paid their fair share of the award. However, because a plaintiff can collect their full damages from any one tortfeasor, tortfeasors are not generally necessary parties. In other words, tort plaintiffs can go after tortfeasors in one combined action, or in consecutive actions,

and tortfeasors themselves can go after joint tortfeasors in separate actions if they were not joined in an initial action.

Here, Pam is bringing suit for breach of warranty and negligent installation and manufacturer of the tires. She has chosen to sue DT, the manufacturer and installer of the tires. Despite the fact that Maurice, the mechanic, may have been negligent in installing the tires, Pam is permitted to bring her suit solely against DT. Maurice is not a necessary party and the federal court properly denied DuraTires' motion to dismiss for failure to join Maurice as a defendant.

If Pam successfully proves her claims against DT, DT can go after Maurice for contribution if he was contributorily negligent in installing the tires. Pam may also bring a second action against only Maurice for his negligence. There are many reasons for why Pam might not have brought suit against Maurice (maybe it would destroy diversity jurisdiction in federal court or maybe he's insolvent) and the court will not dismiss the claim because she did not include him.

If DT wants to join Maurice in the case, they may be able to file a third party claim against him. Third party claims are permissible in federal court. However, DT will have to ensure that the federal court has subject matter jurisdiction over that claim and personal jurisdiction over Maurice. Because this is a diversity case (we have no reason to believe that breach of warranty and negligent installation and manufacture arise under federal law), complete diversity and \$75,000 in controversy will be required. If this is not satisfied, DT will have to show supplemental jurisdiction, which will require them to show that their claim arises from the same transaction or occurrence.

2(A). Did the Court properly grant DuraTires' motion to compel the production of the statement from Wynne?

In federal court, parties are entitled to seek discovery of all relevant non-privileged information that is proportional to the needs of the case. Discoverable information is broader than admissible information. Relevant information is any information that has any tendency to make a fact of consequence more or less likely. The proportionality requirement ensures that parties do not request unduly burdensome amounts of information.

Under the FRCP, parties are required to file initial disclosures. In their initial disclosures, parties must identify and/or produce the names of all individuals who are reasonably expected to have discoverable information relevant to the claims or defenses. Parties are also required to identify and produce the documents in their possession which they intend to rely on in proving any of their claims or defenses. Opposing parties do not have to request this information prior to the initial disclosure deadline. Finally, in initial disclosures, parties must identify whether they have an insurance policy covering the claim.

Motions to compel are a discovery tool that enable a party to seek discoverable information from an opposing party when the opposing party has failed to produce the information. Generally, before filing a motion to compel with the court, parties should attempt to meet and confer regarding a discovery dispute. The point of a meet and confer is to attempt to work out reasonable disagreements about the discovery process between the parties before involving the judge. If a party has attempted to meet and confer with opposing counsel and the parties have failed to reach an

agreement, or the opposing party refused to engage in negotiations, the moving party should file a motion to compel. Pursuant to FRCP 11, the court has wide discretion to impose sanctions on a party that files frivolous discovery motions or fails to engage in the meet and confer process regarding reasonable discovery disputes. In some instances, the court could order a losing party to pay the costs of the motion to compel if they did not engage in good faith.

Here, Pam served her initial disclosures on DT, but did not produce Wynne's statement. Wynne was the other driver in Pam's accident. Pam gathered the written statement from Wynne after the accident. Wynne suffered a minor injury in the accident and her statement was favorable to Pam's case. There is no indication that DT sought to meet and confer with Pam before filing a motion to compel.

The court properly granted DT's motion to compel production of the statement from Wynne. Because the statement from Wynne was favorable to Pam's case, and it is in Pam's possession, Pam will reasonably rely on it in proving her case for breach of warranty and negligent installation and manufacture of the tires. Wynne's statement could presumably say something about what Wynne witnessed regarding the state of the tires during the accident. Pam will want to rely on this to prove her case.

Accordingly, the court properly granted DT's motion to compel production of the statement from Wynne.

(Please note that if the statement was not in Pam's possession, DT may have needed to subpoena Wynne as a third party to obtain the statement. Because it appears Pam

gathered the written statement, and it is thus in her possession, and because she is a party, a subpoena is not required.)

2(B). Did the Court properly grant DuraTires' motion to compel a physical examination of Pam?

The FRCP provide for certain circumstances in which a party is permitted to compel an opposing party to submit to a physical examination or psychological examination.

Generally, for these rules to be relevant, the party's physical condition (for a physical exam) or psychological condition (for a psychological exam) must be relevant to the claims. A psychological exam always requires court involvement.

Here, the issue is whether the court properly granted DT's motion to compel a physical examination of Pam. The court erred in granting this motion because Pam's physical condition is not relevant to the case. Pam was not physically injured in the case. Her complaint alleges only that she suffered property damage and emotional distress as a result of the accident.

Accordingly, Pam has not put her physical condition in issue in the case, and the court erred in granting DT's motion to compel a physical examination of Pam.

3. Did the court properly order DuraTires to produce its scientific report?

The next issue is whether the court properly ordered DT to produce its scientific report.

DT advertised that a scientific report declared that its tires will not go flat for the first 7,000 miles of use if driven properly. DT's scientific report was created at the direction of its legal counsel and contained research on flat tire incidents involving DT.

As set forth above, all relevant, non-privileged information is discoverable, subject to the proportionality requirement. Privileged information is not discoverable. Privileged information can be information protected by the attorney-client privilege or the work product doctrine. The attorney-client privilege protects confidential communications made by a client to counsel in furtherance of the representation. The privilege belongs to the client and survives the attorney-client relationship and the client's death. The work product doctrine protects information prepared in anticipation of litigation. These doctrines do not protect underlying facts.

Here, DT served its initial disclosures on Pam but did not include the advertised scientific report. After unsuccessful meet and confers, DT continued to refuse to produce the report. Thereafter, Pam filed a motion to compel, which the court granted.

As an initial matter, the advertised scientific report is clearly relevant to the dispute. Apparently, the report declared that DT's tires will not go flat for the first 7,000 miles of use if driven properly. This is presumably the basis for Pam's breach of warranty claim. What the report says thus is clearly relevant to Pam's claim that she had only driven 100 miles when one tire went flat, causing her to swerve and crash into Wynne's car.

The issue is whether the report is protected by the attorney-client privilege or work product doctrine. The attorney-client privilege does not apply because the report is not confidential information communicated to counsel. However, DT will likely argue that the report is protected work product because it was prepared at the direction of its legal counsel and contained research on flat tire incidents involving DT. This is a

losing argument. As set forth above, the work product doctrine protects documents prepared in anticipation of litigation or for the purpose of litigation. While DT may try to argue that the report was prepared for litigation generally, Pam will counter that "anticipation of litigation" means specific litigation. For example, work product will protect an attorney's report summarizing an interview with the client or relevant witnesses. It will also protect a report prepared by a retained expert regarding the circumstances giving rise to litigation.

This report was prepared at the direction of counsel, but before Pam's accident, so it cannot fairly be said to have been prepared in anticipation of Pam's litigation.

Another important factor weighing in favor of finding that the report is not protected by the work product doctrine is the fact that DT advertised the report. DT will argue that it did not waive its work product protection by advertising the report because it only advertised a specific claim that the tires would not go flat for the first 7,000 miles. It did not publish the entire report. If the entire report was published or advertised, then presumably Pam wouldn't need to file a motion to compel to obtain it. Pam will argue that, even if the report was prepared "in anticipation of litigation," DT waived the work product protection by advertising the report.

Additionally, the work product doctrine is intended to protect attorney mental impressions and general litigation strategy. As set forth above, it does not protect underlying facts. So, to the extent the report contains only research on flat tire incidents and scientific reporting about the efficacy of DT's tires, it will be admissible. It is important to note that if the report contains attorney mental impressions, notes or

litigation strategy information, the court should permit DT to redact this information before producing it. However, there is no reason to believe in this situation that there is anything that requires redaction.

It is also worth noting that Pam followed the required procedures and met and conferred with DT before raising the motion to compel with the court.

In sum, the scientific report is clearly relevant and is not protected by attorney-client privilege or the work product doctrine. Thus, the court properly ordered DT to produce its scientific report.

QUESTION 2

In response to a significant rise in diabetes among school-age children, and based upon links between diabetes, exercise and diet, Congress has passed, and the President has signed, the Childhood Physical Education Act (the Act). The Act, administered by the Federal Department of Education, provides significant additional funds to states for public schools with daily physical education classes for students. These funds are to be used for the hiring of additional physical education teachers and purchase of physical education equipment.

Testimony before Congress has revealed that, on average, public schools spend only 25% of their school lunch budgets on fresh fruits and vegetables. The Act requires that states accepting the funds must enact legislation setting as a minimum that 50% of public school lunch food budgets be allocated to the purchase of fresh fruits and vegetables.

Testimony has also revealed that rates of childhood diabetes tend to be highest in minority and low-income communities. The Act has significant additional subsidies for public schools where the majority of the student population is non-Caucasian.

Before the Act has gone into effect, State X, through its attorney general, has brought suit in federal court seeking a declaratory judgment that the Act is unconstitutional. The National Association of School Dietitians (NASD) is seeking to intervene in the attorney general's lawsuit. According to NASD's charter, it seeks to promote healthy diets for school-age children, especially through school lunch programs. The attorney general opposes NASD's intervention.

1. What constitutional challenges can the attorney general make to the Act and are they likely to succeed? Discuss.
2. Does NASD have standing to intervene? Discuss

QUESTION 2: SELECTED ANSWER A

1. Constitutional challenges to the Act

The Act was properly passed by Congress and signed by the President, so the AG cannot challenge the Act on those procedural grounds.

Spending Clause

The AG might argue that the Act is not a proper exercise of Congress's spending power. However, this argument will fail. Congress may spend to promote the general welfare; spending is itself an enumerated power of Congress, so spending bills do not have to be rooted in a different enumerated power. Other than the requirement that states pass certain laws, discussed more below, the Act is purely a spending bill, and any enumerated powers challenge will fail.

Spending requirement on fruits and vegetables

The Act's requirement that states enact legislation setting a minimum of 50% of public school lunch budgets be allocated to fresh fruits and vegetables is permissible under the constitution.

1. Anti-commandeering

If the requirement were a direct requirement that states pass laws, then it would be unconstitutional as a violation of the Tenth Amendment. The Tenth Amendment reserves all powers not given to the federal government to the states (or to the people). The Tenth Amendment embodies the principles of federalism, and core

among those principles is that the federal government may not command state legislatures to pass certain laws, because states are sovereign governments and not merely local agents of the federal government. This is called the "anti-commandeering" principle. To demand a state pass a certain law violates that principle.

(Further, if the law were written that way--as a direct command--then the Spending Clause would not provide a basis for Congress's act, and another basis would be required. The Commerce Clause might provide such a basis, except that Congress's commerce power cannot force anyone, which presumably includes the states, to engage in commerce.)

2. Condition on funding - Dole test

However, that is not the way the Act is written. Instead, it is a requirement for states that accept the funding to pass these fruit-and-vegetable laws. Such conditions on funding are permissible, even if they require states to pass a law, so long as the *Dole* test is satisfied: The funding must be reasonably related to the spending and it must not be such a great amount of money as to be coercive. This inquiry also looks at whether the program is well- established. Because this test is rooted in the Tenth Amendment, the separate anti- commandeering test is not further applied.

Here, the conditions are reasonably related to the spending, because the purpose of the bill is to combat childhood diabetes. It does that in several ways, including providing the spending for PE classes and the other subsidies. The fit need not be perfect; for example, the federal government may require seatbelt laws and a minimum drinking age in exchange for highway funding. The connection between the low budgets for fruits and

vegetables and combatting childhood obesity is sufficiently tight: All the federal funding for PE education may be essentially wasted if the children then go eat very unhealthy foods at lunch right after class.

The facts don't say whether the amount of money is large or small. However, state lunch programs should be quite small as a proportion of state budgets: While education is a big part of state budgets, the lunch money is a relatively small fraction of that--most of the education budget will be the buildings and buses and teachers, not the lunch food. Therefore, it is not coercive to require states to spend this amount of money on lunches (especially because it is structured as a fraction of the total public school lunch budget).

Further, the programs at issue are brand-new, so a state is especially free to turn down the funding and opt out of the program entirely. This is quite different from a situation like Medicaid, where states have long-established budgets built around Medicaid funding from the federal government. The states will not be coerced in this way either.

An additional requirement of *Dole* is that the required state act may not violate another constitutional right, such as the First Amendment. Spending money on fruits and vegetables will not violate any other such right.

Therefore, since this provision is a condition on the other funding, this requirement does not violate the constitution.

Equal Protection

The Equal Protection Clause (EPC) of the Fourteenth Amendment requires the government to treat people the same in various ways.

The EPC by its text applies to the states; but the same rules apply to the federal government via the Due Process Clause of the Fifth Amendment, which "reverse-incorporates" the EPC against the federal government.

The EPC can only be violated by the government, not private parties. There is such "state action" here in the form of the federal government passing the law and spending the money, and the states being forced to pass the lunch money laws.

1. First two provisions

The first two parts of the law, appropriating funding for PE classes and requiring states to budget lunch money for vegetables, do not differentiate on any suspect class such as race, gender, national origin, or legitimacy. Therefore, only rational basis review applies. Rational basis review requires that the government have a legitimate interest and that the means are rationally related to that interest. Both are satisfied for the first two provisions: Congress has factual findings about a significant rise in childhood obesity and the links between diabetes, exercise, and diet. Childhood diabetes is a legitimate concern of the government because it hugely affects the lives of children. And to combat childhood diabetes, the government is rationally focusing on physical education (exercise) and lunch quality (diet). (The evidence for this review need not be very strong, and can be hypothetical. But here, there is specific evidence about exercise and state budgets.) These two provisions definitely do not violate the EPC.

2. *Extra subsidies*

However, the last provision of the Act is constitutionally problematic. That provision provides "significant additional subsidies" for public schools based on whether the majority of the school is Caucasian. That is, it treats people differently based on their race (and the race of those around them). Race is a suspect class and triggers strict scrutiny under the EPC. Strict scrutiny requires that the government have a compelling government interest and take action that is necessary to accomplish that action.

Here, childhood diabetes does not rise to the level of a compelling government interest, despite its importance, because there are simply too many concerns of similar importance (even among health conditions alone) to justify the extraordinary step of discriminating on the basis of race. (Nor is there past specific discrimination that Congress is rectifying, which can be a compelling interest.)

But even if it were, the action here is not necessary or narrowly tailored. Congress is allocating "significant" budgets to schools based on their students' races. This is not "necessary" to fixing differential childhood obesity rates. For one thing, Congress could allocate such additional funds to all schools.

In any case, the action is not properly tailored: Congress has findings that diabetes is most prevalent in minority *and* low-income communities. But the funding is directed solely based on the race of the community, not its income level. So some funding will go to wealthy schools who are mainly minorities, while funding won't go to poor white

schools with sky-high diabetes rates. (Note that income is not a protected or suspect class.)

This provision of the Act violates the EPC, so the challenge to it should succeed on the merits.

Additional issues

State X standing

Standing (discussed more below) is present for State X because the law requires them to take action (passing laws) and affects their state budgets. States also get "special solicitude" in the standing analysis, so even if it were a close question, a court would likely find that there is standing.

Ripeness

Article III's "cases or controversies" requirement means that courts will not hear cases before they are ripe--before the injury is present or imminent. Here, the Act has not yet gone into effect. This might mean that the case is not ripe yet. However, a court is not likely to rule on this ground because the law has been passed by Congress and signed by the President, so the question of whether it is constitutional is ready to be adjudicated. States are now faced with the certainty of the law going into effect unless it is blocked, and must prepare themselves and their budgets now, not later.

2. NASD standing

Article III limits the federal courts to hearing "cases" or "controversies." This limitation has been interpreted to include the requirement of "standing." Standing's irreducible constitutional minimum has three components: Injury in fact, causation, and redressability.

Injury in fact

The injury-in-fact requirement means that a party must have a real, concrete harm that is actual or imminent, and not just hypothetical. Economic losses are the classic form of injury in fact.

NASD has no economic losses. Their argument will be that they still have an injury because the implementation or non-implementation of the act will further or harm their group's mission. But there is no standing based on merely an interest in seeing that the laws are applied correctly; groups cannot intervene merely because they are interested in the policy question at stake. A mission statement cannot confer standing.

A better argument is that NASD's budget will be severely affected by this legislation: if it goes into effect, they will have to spend less money advocating for healthy lunches, because states will be required to spend more money. That argument is too hypothetical, because NASD may have to spend the same or even more money as the policy space evolves. Therefore, any such injury is too hypothetical to be an injury in fact (which must be more certain).

Causation

Causation means that the other party's actions are the cause of the party's injury.

Even if a court accepted the knock-on argument about NASD's budget, the causation would be too diluted, because NASD is not itself spending its budget on fruits and vegetables. The state's expenditures would not neatly replace NASD's, so any economic harm to NASD's budget is not caused by the law going into effect or not.

Redressability

Redressability means that a court's judgment would fix or cure the injury in fact (at least in part). Here, because the injury and causation prongs are not met, the redressability prong is not met either (though arguably the court could let the law go into effect, but all three prongs must be met, so this prong need not be reached).

Other theories of standing also fail.

Associational standing

An association has standing when its members would have standing to bring the suit themselves. The NASD members appear to be school dietitians. For the reasons explained above, any given school dietician does not have an injury-in-fact, because they are not personally harmed by the law going into effect or not going into effect.

Taxpayer standing

NASD or its members cannot have standing on the basis of their status as taxpayers.

Taxpayer standing argues that the party's interest is in the correct use of their tax

dollars. But absent extremely narrow circumstances (mainly religious establishment clause issues), there is no taxpayer standing because it would swallow the "cases or controversies" requirement.

Conclusion

Therefore, NASD does not have standing to intervene.

(However, it is common in federal courts to allow a party like NASD to participate as amicus curiae in a lawsuit, but not as a party. In this capacity NASD could file amicus briefs to let the court benefit from its expertise. However, as a non-party, it could not bring claims or defenses or engage in discovery. An amicus curiae does not have to meet the standing requirement because it is not a party.)

QUESTION 2: SELECTED ANSWER B

(1) Constitutional challenges against the Act

The first issue is what constitutional challenges the attorney general ("AG") may bring against the Act. The AG can challenge the legislation as a (1) violation of the Tenth Amendment's anti-commandeering principle and (2) a violation of the equal protection clause.

1. Violation of the Tenth Amendment anti-commandeering principle

The AG can first challenge the Act as a violation of the Tenth Amendment's anti-commandeering principle. The federal government is one of limited powers, and can only act with authorization under the Constitution. States, on the other hand, have general police powers. The Tenth Amendment of the U.S. Constitution provides that all powers not vested in the federal government are reserved to the states.

The first issue is whether the federal government had power to enact the legislation. The U.S. Constitution grants to Congress the power to tax and spend for the general welfare. This power is very broad, and just requires a rational connection to a legitimate purpose. Here, the Act was enacted in response to a significant rise in diabetes among school-age children, which affects the health and welfare of the nation's citizens. The Act provides additional federal funding for the hiring of P.E. teachers, purchase of P.E. equipment, and healthier school lunches. The Act's purpose is to increase the physical education in schools and also improve the health of school lunches, which was based on the link between diabetes, exercise, and diet. Because the Act was rationally related to the goal

of reducing diabetes and improving the health of school-age children, the Act was within Congress's taxing and spending power.

The next issue is whether the federal government's act nonetheless violated the Tenth Amendment and principles of federalism. The federal and state governments are separate sovereigns, the federal government may not exercise its spending and taxing power in such a way as to "commandeer" the states to act. This is called the anti-commandeering principle.

Under the anti-commandeering principle, a spending measure enacted by Congress will be invalidated if it (1) directly compels the states to act or (2) is unduly coercive, such that the states are left with no choice but to comply with the federal government's directives.

Here, the Act does not directly force the states to enact legislation, so (1) is not applicable. However, the Act does involve strings or conditions on the receipt of federal funding that the AG may argue are unduly coercive.

Here, the Act makes receipt of the "significant" additional funds conditioned on the states enacting certain legislation related to the Act's purpose. Specifically, if the states receive the funding, they are required to set as a minimum that 50% of public school lunch food budgets be allocated to the purchase of fresh fruits and vegetables.

The AG may argue that this spending condition is unduly coercive, effectively "commandeering" the state legislatures to enact legislation that the federal government desires. AG's strongest argument is that the Act provides "significant funding," and states

may therefore feel compelled to comply with the conditions because the financial upside is so high (and public schools are notoriously under-funded.)

This argument, however, is not likely to succeed. The Act does not make any changes to the federal funding states already receive for the administration of public schooling; it merely adds additional funds. A spending condition is more likely to be found to be unduly coercive where, for example, the condition threatens a significant portion of the state's budget. For example, if the Act made the receipt of *all* federal funding for public schools conditioned on enacting the desired legislation, the AG would have a stronger argument. But the Act here keeps schools' normal amount of federal funding intact; it just gives them the option of obtaining *more* federal funding.

The AG will therefore likely not succeed in a challenge to the Act based on the anti-commandeering principle of the Tenth Amendment.

2. Violation of the Equal Protection Clause

The AG may also argue that the Act's additional subsidies to majority-non-white schools violates the equal protection clause.

The Equal Protection Clause ("EPC") of the Fourteenth Amendment provides that the government shall treat similarly-situated people or entities in a similar way. Although the Fourteenth Amendment is applicable only to the states, the Fifth Amendment's due process clause -- applicable to the federal government -- has been held to contain an identical guarantee.

The level of review applicable to a challenge under the EPC depends on whether the government's action burdens a suspect or quasi-suspect classification. Suspect classifications (including race, national origin, and alienage) are subject to strict scrutiny, meaning that the government must prove that the action is narrowly tailored to serve a compelling government purpose. Quasi-suspect classifications (gender and legitimacy) receive intermediate scrutiny; the government must prove that the action is necessary to achieve a substantial government interest. All other classifications receive rational basis review, which means the government action must be rationally related to a legitimate government purpose.

Here, the Act provides significant additional subsidies for public schools where the majority of the student population is non-Caucasian. Accordingly, the Act, on its face, draws a distinction between schools with majority white students and schools with majority non-white students. Because this is a classification based on race, the government must prove that the action is narrowly tailored to serve a compelling government purpose. The government, not the AG, bears the burden on this issue.

The stated purpose for the Act's additional subsidies is that rates of childhood diabetes tend to be highest in minority and low-income communities, so it is providing the additional funding to provide extra help to those schools in combatting these issues. The government can likely prove that reducing the rate of childhood diabetes is a compelling government purpose. The diabetes and obesity epidemic in this country results in a huge burden on the country's public health infrastructure and leads to countless deaths each year. The fact that there is a "significant rise" in childhood diabetes makes it even more crucial to combat the disease earlier rather than later.

The government, however, likely cannot prove that the additional subsidies are narrowly-tailored to serve that purpose. The facts state that there has been a significant rise in diabetes among *all* school-age children, not just minority children. The additional subsidies are based on testimony that the rate of childhood diabetes "tends to be higher" in minority and low-income schools, but there is no additional evidence that the Act's "significant additional funds" that already will be provided to all schools will not be enough to address this issue, such that the minority and low-income schools need even more funding. Moreover, the evidence of higher diabetes rates also applies to low-income schools, which may be predominantly white, and those schools will not be eligible for the additional funds since the classification was drawn entirely on race. (The government would have been better off drawing the classification on socioeconomic status, since many low-income schools are also heavily minority, and wealth is not a suspect class under the EPC.)

Accordingly, the AG can likely succeed in a challenge to the additional subsidies based on the EPC.

(2) Whether NASD has standing to intervene

All parties in federal court must have standing to assert their claims. Standing means that a litigant has a concrete stake in the outcome of the case. Standing requires (1) an injury in fact, that is concrete and particularized; (2) traceable to the challenged conduct; and (3) that can be redressed by a favorable court decision.

For an organization to have standing, it can either (1) base standing on an injury to itself, or (2) assert a claim on behalf of its members, where (a) the members would

have individual standing to assert their claims and (b) the nature of the suit or remedy requested does not require that the members participate individually.

Here, the organization is a non-profit that seeks to promote healthy diets for school-age children, especially through school lunch programs. However, it will likely be unable to prove standing to intervene because it is unclear what concrete stake it has in the case. Although the legislation is related to its stated purpose and it would therefore prefer that the legislation be upheld, an injury-in-fact must be concrete and particularized.

NASD likely lacks standing to intervene.

QUESTION 3

Tuan sells antique furniture. He signed a ten-year lease for a warehouse owned by Leo at \$1,000 a month, with a start date of January 1. The warehouse would be used to store Tuan's inventory. When Tuan attempted to occupy the warehouse on January 1, he discovered Annika there pursuant to her validly executed lease, which was not due to end until January 31. Tuan then immediately rented another almost identical warehouse from Bruno, on a month-to-month basis, for \$1,500 a month.

When Tuan returned to Leo's warehouse on February 1, Annika told Tuan she was not leaving until May 31.

When Tuan visited the warehouse on June 1, he discovered that Leo had stored equipment in the warehouse that made 25% of the space unusable. Tuan refused to take possession and informed Leo that he was terminating his lease immediately.

The next day, Leo retook possession of the warehouse and placed "For Rent" signs in several windows. Shortly after, Leo executed a ten-year lease with Juanita for the warehouse at a monthly rent of \$500, with a start date of July 1.

Tuan rented Bruno's warehouse from January to June. He later signed a new lease for 9 ½ years starting on July 1 with a monthly rent of \$1,500.

Tuan has never paid any rent to Leo.

Tuan decided to sue for damages based on his rights under his lease with Leo.

1. What claim(s), if any, may Tuan reasonably assert against Leo? Discuss.
2. What claim(s), if any, may Tuan reasonably assert against Annika? Discuss.
3. What counterclaim(s), if any, may Leo reasonably assert against Tuan? Discuss.

QUESTION 3: SELECTED ANSWER A

1. TUAN'S CLAIMS AGAINST LEO

A. Violation of Duty to Deliver Possession

The question is whether Annika's continued residence from January 1st to January 31st under a valid unexpired lease or from February 1st to May 31st without a valid lease constituted a violation of Leo's duty to deliver possession. A landlord has a duty to deliver possession of a leased premises to a tenant. Under the majority English rule, this duty is the duty to deliver both actual possession of the premises and a legal claim to superior title over the premises. Under the minority American rule, a landlord only has the duty to deliver legal possession of the premises. In either case, a tenant has the right to evict a holdover tenant.

Here, Leo violated the duty to deliver possession under both the majority and the minority rule from January 1st to January 31st. The reason is that Annika continued to have a validly executed lease that gave her priority of legal possession over Tuan. Therefore, Tuan did not have legal possession. In addition, under the majority English rule, Leo likely violated the duty to deliver actual possession from February 1st to May 31st because, although Annika did not have a legally superior right to Tuan at the time, Annika was still in physical possession so that Tuan could not retake the premises without legal action.

Under the minority rule, Tuan would have had an obligation on February 1st to evict Annika himself.

In contracts, a party is generally entitled to expectation damages consisting of the benefit the party would have received from the bargain. Additionally, because the duty to deliver

possession and the duty to pay rent are dependent covenants, Tuan would not have had to pay rent for the period in which he was out of possession. During the periods when Tuan was out of possession, he could sue for the difference between the rent he should have paid for the warehouse and the rent he had to pay in order to obtain substitute space, or \$500 a month. This would give him damages of \$500 for the period from January 1st to January 31st. For the four-month period after that when Annika was not staying under a valid lease issued to her by Leo, it is less clear what Tuan's damages would be.

Even under the majority rule it is unclear whether Tuan could sue for the full period from February 1st to May 31st because Tuan appeared to fail to inform Leo of the holdover tenant, and to surrender the premises even though he had the legal right to it. A tenant who surrenders the premises in this way does so at the tenant's own peril and may not receive full damages. A party to a contract typically has their damages reduced by any amount that the party could have avoided through reasonable efforts. Tuan could have brought an ejectment or unlawful detainer suit against Annika, or he could have asked Leo to do so if Leo had a duty to deliver actual possession.

B. Actual Eviction

A tenant is actually evicted when the tenant is denied physical possession of all or some part of the premises. If a third party has evicted the tenant from even part of the premises, then the tenant is typically not obligated to pay rent any longer. Indeed, the tenant may abandon the premises. However, if a landlord deprives a tenant of only a portion of the premises, then the tenant's obligation to pay rent is merely decreased proportionally.

Thus, Tuan may have a defense to paying rent from the entire period lasting from January 1st to May 31st because he was evicted from the premises-- a third party (Annika) was in physical possession and he could not access the premises. (As mentioned above, Tuan's failure to make any moves to evict Annika may reduce this recovery). Tuan could have justifiably abandoned the premises but didn't. Additionally, for the period from June 1 to July 1 wherein Leo stored equipment in the warehouse making 25% of it unusable, Leo had taken physical possession of 25% of the premises from Tuan, thus actually evicting him. For that period, then Tuan would have owed proportionally less rent by 25%. Tuan could not justifiably abandon the premises because he was only deprived of part of it, however (unless he proves a constructive eviction claim-- see point 1C below).

Notably, however, Tuan could not recover double on both his claim of failure to deliver possession and actual damages. In addition, Tuan's eviction claim would be subject to the same duty to mitigate discussed in A, above.

C. Constructive Eviction

The final issue is whether Leo's possession of 25% of the space in the warehouse constituted constructive eviction that would justify Tuan's abandonment and give him a claim for damages for the rest of the lease term. A tenant may claim constructive eviction if the landlord's actions or failure to act deprive the tenant of the substantial enjoyment of the premises. A constructive eviction suit justifies a tenant in abandoning the premises. To prevail in this suit, the tenant must notify the landlord of the problem, give the landlord a reasonable amount of time to fix the problem, and then vacate the premises.

Here, because the nature of the commercial property was a warehouse used to store inventory, Tuan could make a strong claim that being deprived of a quarter of the space he had bargained for deprived him of substantial enjoyment of the premises. Assuming that he selected the spot in a cost-conscious manner and only had just enough space to suit his needs, he would no longer be able to profitably operate his business with a quarter of his inventory out on the street. However, Tuan failed to inform Leo that the arrangement was unacceptable (which was likely necessary because from Leo's perspective Tuan hadn't been occupying the warehouse at all). Furthermore, Tuan gave Leo no time to remedy the problem. Instead, Tuan immediately quit the premises. Thus, it is unlikely that Tuan will be able to claim constructive eviction.

Because Tuan cannot claim he was justified in abandoning the premises, Tuan likely cannot collect the difference of \$500 monthly for the rest of his 9-1/2 year lease term under this theory.

2. TUAN'S CLAIMS AGAINST ANNIKA

A. *Trespass*

The question is whether a holdover tenant may be liable for trespass for either (1) a period during which both the tenant and the claimant held a valid lease or (2) a period during which the holdover tenant's lease had expired and the tenant had a current lease entitling the tenant to possession. The elements of trespass are an intentional entering or remaining on the land of another without the consent of the other. A tenant with a valid lease has a term of years or other present possessory interest, while a landlord holds a reversion.

Here, Annika is not liable for trespass for the period lasting from January 1st to January 31st because Annika had a right to possession of the property as demonstrated by her valid lease. The property she entered or remained on would not be the property of "another" because it was her leasehold property at the time. However, for the period from February 1st to May 31st, when Annika's lease had ended, she was not the owner of the property. Thus, if Tuan asked her to leave, she would have been trespassing because she would not have had consent from the current holder of a present possessory term of years on the premises.

Tuan's best remedy in that instance would have been an action for ejectment, which would have constituted a request to order the sheriff to remove Annika from the property. Tuan did not. However, insofar as trespass results in injury to the property or a substantial interference with the owner's right to the enjoyment of the property, the owner may also seek damages. In this instance, Annika deprived Tuan entirely of the property for four months. He could request the fair rental value of the property at that time as a measure of the use of the property he was deprived of.

3 LEO'S CLAIMS AGAINST TUAN

1. *Abandonment*

The issue is whether Tuan unjustifiably abandoned the premises in violation of Tuan's lease agreement, entitling Leo to damages for future rent he would have obtained under the ten-year lease. A tenant typically has a duty to occupy or pay rent on the leased premises for the entire term of the lease. A tenant violates this duty by unjustifiably abandoning the property. Abandonment occurs when a tenant quits the premises, has no

intention of returning, and defaults in the payment of rent. Here, Tuan left the premises on January 1st; however, he didn't form an intent not to return until June 1st, when he told Leo he was terminating the lease. Before that, Tuan continued to return on the dates he was told the warehouse would be available. Tuan has paid no rent, so he defaulted on rent as of February 1st, when the first payment of \$1,000 was due under the lease term. Thus, all elements for abandonment were present by June 1st. As noted above, while Tuan likely would have been justified in abandoning the premises from January 1st to May 31st when he was completely evicted, Tuan did not. Instead, Tuan selected June 1st, a date on which he was not justified in abandoning the premises (see point 1C above).

When a tenant abandons the premises, a landlord has one of several options. First, the landlord may accept surrender, which terminates the tenant's duty to pay rent. Acceptance of surrender may be implied if the landlord remodels or alters the premises so they are no longer suitable for the tenant's use, or it may be an explicit declaration to the tenant.

Another option is that the landlord may treat the abandonment as unjustified but relet the premises for the tenant's remaining term on the tenant's behalf and hold the tenant accountable for a difference in the value of the rent, if any. Finally, in a minority of jurisdictions wherein a landlord does not have a duty to mitigate damages, the landlord may simply leave the premises open and sue for rent as it accrues over the lease term.

Here, the facts indicate that Leo treated the surrender as unjustified and relet the premises for Tuan. Leo made no representation to Tuan that he accepted Tuan's surrender. The facts do not indicate that Leo said anything to Tuan. While Leo retook possession of the warehouse, he did not relet it for the exact period remaining on Tuan's

lease, but 10 years is close to 9.5 years and it was likely necessary to round up for the sake of a new tenant. This indicates he was merely reletting to minimize damages.

Typically, Leo's damages would be measured by the difference between the contract price and the substitute contract he was able to obtain. Tuan's lease was \$1,500, while Juanita's was \$500. This would make Tuan accountable for a difference of \$1,000 a month. However, Tuan would be able to contest these damages if the relet to Juanita was not commercially reasonable. If there were other tenants willing to pay closer to the amount that Tuan paid and Leo failed to rent to those tenants because of a non-commercial preference for Juanita, Leo's damages would be reduced proportionally.

Additionally, if Tuan made an argument that his abandonment of the premises was justified because Leo breached the lease first through Tuan's eviction from January 1st to May 31st (almost half a year) (see points 1A and 1B), then Leo would not be entitled to any future damages. A party that materially breaches first is no longer entitled to expectation damages or return performance. A material breach occurs if the other party is deprived of the benefit of their bargain. Factors in whether a breach is material include the extent of the deprivation, whether the deprivation can be cured with money damages or other remedies, the likelihood of cure, and whether breach was willful. We do not have facts indicating whether Leo knew that Tuan had been evicted or Annika was holding over. However, six months out of possession is a long time, even for a ten-year lease. While Tuan could be compensated for his extra rental expenses, property is considered unique and so his loss of use might not be able to be cured, particularly if he chose Leo's warehouse as a strategic location. Therefore, if a court does not find that Tuan's

failure to take steps to evict Annika renders the breach immaterial, Leo will not recover future damages.

2. *Rent*

A tenant has a duty to pay rent. If a tenant violates this duty, then a landlord is entitled to damages for the accrued unpaid rent. Here, Tuan has failed to pay rent for six months from January through June. Therefore, in the absence of Leo's breach, Leo would have been entitled to \$1,500 for each of the six months he has already rented to Tuan.

However, a party in material breach has no right to a return performance, as discussed above. Leo failed to deliver possession to Tuan from the beginning of the lease. From January 1st to January 31st, Tuan certainly would not owe rent because Annika's lease still gave her a legal right to possession. From February 1st to May 31st, Tuan also was evicted and Leo did not deliver on his duty to deliver possession. Leo would have to demonstrate that Tuan was at fault for failing to notify him or bring an eviction suit in order to recover rent for this period. If Tuan had occupied the premises in June, then Leo would have been entitled to 75% of rent because he was only occupying 25% of the warehouse. However, if a court finds that Tuan's obligations had already ended due to Leo's material breach by June, then Tuan would owe nothing after that period.

QUESTION 3: SELECTED ANSWER B

1. Tuan's Claims Against Leo

Failure to Provide Right to Possession

A landlord owes a tenant a duty of providing the actual right to possess the property throughout a valid lease, as well as the legal right to possess it, at least in most states. (In a minority of states, a landlord need only provide the legal right to possess.) The right to possession is the right to maintain exclusive control of the whole of the property. A tenant-possessor must have the ability to exclude anyone that he does not want on the property or else he is not in full control of all of his rights under the lease.

For the first month, from January 1 to January 31, Leo provided Tuan neither the legal right nor the actual right. Leo signed two leases for the same month governing the same property, with Tuan and Annika. Leo's failure to provide either right to Tuan for that month is a material breach of the lease, and in every state Tuan may bring a claim against Leo for that.

Actual Right to Possession

For the months February through May, Leo again failed to provide Tuan with the actual right of possession of his property. Annika remained at the property in a tenancy at sufferance, preventing Tuan from accessing or possessing it. The tenancy at sufferance began at the expiration of Annika's lease and continued throughout the period that she remained in control of the property without a lease or other tenancy.

In most states, Leo's failure to provide Tuan with the actual right of possession for these four months is a material breach of their lease. For much the same reasons as *supra*, Tuan could not access the property or control it for use of the storage of his inventory. Tuan would thus have a claim against Leo for these four months in addition to the month of January in most states.

In a minority of states, however, Leo need only provide Tuan with the legal right to possess the property. Tuan's valid lease is that legal right beginning on February 1. In this minority of jurisdictions, Annika's holdover tenancy does not mean that Leo breached the lease with Tuan. It would require Tuan to pursue his own legal action against Annika for this four-month period (discussed *infra*).

Implied Covenant of Quiet Enjoyment

Every lease includes an implied covenant of quiet enjoyment (ICQE). This requires a landlord to permit the tenant the use of and control over the property in legitimate and legal ways. It bars the landlord from substantially interfering with the tenant's right.

Tuan will argue that Leo's equipment storage - rendering 25% of the warehouse unusable - was a violation of the ICQE. Because of that violation, Tuan will argue that he was constructively evicted. A constructive eviction can occur when a landlord's substantial interference with the ICQE is not resolved within a reasonable time of the landlord's receipt of notice of the interference and the tenant elects to break the lease and leave the property. Upon a constructive eviction, the lease terminates.

The storage of goods rendering 25% of the warehouse unusable is likely a violation of the ICQE. It is a substantial interference with Tuan's use and enjoyment of the

property. Tuan leased the warehouse for the storage of his own inventory, and Leo is instead holding back 1/4 of the property for his own storage. The analysis may be different if Leo used the property in a different way that did not affect the capacity of the warehouse to store Tuan's goods, or if Leo's use of the property rendered 1% or 2% of it unusable for Tuan. But making 25% of it unusable for Tuan's storage is a substantial interference with his use of the property, and thus Leo has breached the ICQE. (A discussion of constructive eviction is *infra*.)

Mitigation and Damages

In January, upon learning Leo failed to deliver both legal and actual possession of the property, Tuan promptly mitigated his damages by renting an almost identical warehouse for \$1,500.

Tuan acted reasonably, because the replacement warehouse is nearly identical and because Tuan elected to sign a month-to-month periodic tenancy rather than a lengthy tenancy for years. Tuan would then be able to end his tenancy with Bruno's warehouse to come to Leo's warehouse as soon as it was made available for him.

Leo will likely argue that Tuan did not reasonably mitigate because he found a replacement property at a 50% cost increase. That suggests that Tuan did not shop around or that he got an unreasonably poor deal from Bruno. But Tuan will argue that Leo's failure to provide possession on January 1 forced him to immediately sign another lease to allow him a place to store his goods on that same day. Tuan did not have to spend much time shopping around, because it was already January 1 when he learned that his lease starting that same day would not be honored. A 50% price

premium - especially considering the month-to-month nature of the lease will not be seen as unreasonable on Tuan's part, and Leo will be responsible for it.

Tuan paid \$500 extra for this warehouse in January. In every state, Tuan could seek this \$500 from Leo.

Tuan also paid a total of \$2,000 above and beyond his lease with Leo to use Bruno's warehouse for the four months of February through May. Tuan's ability to pursue these funds from Leo would vary by state. In most states, because Leo failed to provide Tuan with actual possessory rights in addition to legal possession rights, Leo is liable to Tuan for his damages accrued over those four months. In a minority of states, though, because Leo provided Tuan with legal possession rights as the sole holder of a valid lease for those four months, Leo fulfilled his duties and complied with the law. Thus, Tuan would be forced to pursue Annika for those funds (see *infra*).

Finally, Tuan will argue he was constructively evicted on July 1 and was required to then pay \$500 extra per month in perpetuity for the remaining 9.5 years of the lease lifetime, a total of \$57,000 in damages. Tuan will seek this \$57,000 from Leo.

9.5 Year Lease

Tuan will argue that his constructive eviction forced him to continue using Bruno's warehouse for the remaining 114 months at the \$1,500 price. Leo will argue it is neither reasonable nor fair to require him to pay the lease-price difference in perpetuity. First, the reasons underscoring the reasonableness of the \$1,500 price in January are not present here. Tuan is no longer paying a month-to-month price premium and should be able to secure a price closer to \$1,000 for such a lengthy lease, assuming

the \$1,000 lease was in line with market conditions. Second, Leo will argue Tuan needed only a warehouse for the 25% of his goods that could not be stored in Leo's warehouse, since Tuan could still use the 75% of Leo's warehouse that remained available to him. This will turn on the constructive eviction question discussed *infra*.

The court will likely evaluate the reasonableness and foreseeability of Leo having to pay damages for the increased rent price Tuan was subjected to by leasing Bruno's warehouse. On one hand, Leo was aware that Tuan sought a 10-year storage lease because he entered into one with Tuan. It is foreseeable that Tuan could have damages for that full lease period if Leo failed to live up to the lease. Assuming Tuan was constructively evicted, a court could find that he acted reasonably in a foreseeable way.

But on the other hand, a court could find that Tuan's decision to stick with the same warehouse that he found on short notice on January 1 for a 9.5-year lease, at the same price that he originally got the warehouse when he needed it that same day and on month-to-month terms, was not reasonable. The court could determine Tuan was required to analyze market conditions and seek better terms, even if Tuan could have stayed with Bruno for another month or two on the month-to-month lease before doing so. Ultimately, if Tuan truly was constructively evicted, this middle approach is likely. The court will consider expert testimony or other evidence about market conditions and decide, after reviewing all of the facts, whether Tuan should have spent one or two more months with Bruno before signing a 110+ month lease with some other party at a price closer to \$1,000 a month.

Total of Claims

Thus, Tuan will argue Leo breached the lease by failing to provide him possession of the warehouse from January through May and that Leo constructively evicted him through a breach of his ICQE. Tuan will seek \$500 for January, \$2,000 for February through May, and another \$500 for every month after that through the end of his 10-year lease term. But Tuan is unlikely to get all of it, even if he was constructively evicted.

2. Tuan's Claims Against Annika

Tuan's claims against Annika depend on which rule the jurisdiction follows. He also can bring a tort claim for trespass to land.

Majority Rule

Under the majority rule, Leo owed Tuan actual and legal possession as of the start of the lease. Leo breached that duty throughout the entire time Annika was present because he did not deliver actual possession. Thus, Tuan will pursue remedies from Leo for that period relating to the lease. But this does not affect a trespass analysis; see *infra*.

Minority Rule

Under the minority rule, Leo complied with his duty to provide legal possessory rights as of February 1, when the conflicting leases no longer overlapped. Thus, Tuan's claims for possession of the property under the lease would be brought against

Annika. Annika would be solely responsible to Tuan under this role for any of his foreseeable damages as a trespasser to his land.

Trespass to Land

Trespass to land is an intentional tort. It is committed when a party encroaches on another's property and interferes with it. Trespass to land can be very slight, and nominal damages are available. It need not be a significant trespass to be cognizable.

Here, Annika's trespass is certainly significant. Annika is trespassing to the extent that she is using the whole of the property for herself. Tuan cannot use the property to store his goods. Thus, Annika has committed a trespass from which significant damages may flow.

Tuan may seek from Annika the \$500 per month extra that he was forced to spend in renting Bruno's warehouse from February through May. But Annika is not responsible for the \$500 extra Tuan spent in either January or June. In January, Annika was present at the property as the holder of a valid lease. Tuan's damages for January may only be sought from Leo, who unlawfully rented the same warehouse to both Annika and Tuan. And in June, Annika had terminated her lease and vacated the premises.

Still, Leo may argue that it is Annika who should be responsible for the 9.5 years' worth of \$500 additional rent. Leo will say that, because Annika held over in sufferance, Tuan gave up and left on June 1. Had Annika not held over beyond February 1, Leo will argue, Tuan never would have left. But this argument is likely to fail. It is too attenuated in its causal chain, and it is neither foreseeable nor reasonably certain that Tuan would

have stayed under Leo's lease long-term had Annika not overstayed her lease after February. Thus, Annika is not going to be liable for Tuan's damages after May.

3. Leo's Counterclaims Against Tuan

Leo will argue that Tuan breached their lease when he departed on June 1 and refused to pay. Leo was forced then to mitigate his damages and rent to Juanita for only \$500 a month. Thus, Leo will argue that the \$500 delta in rents he was paid for that 9.5 year period are Tuan's fault and Tuan owes him damages.

To determine who is right, a court will analyze whether Tuan was constructively evicted by Leo's actions. A constructive eviction occurs when a landlord violates the IWQE, the tenant notifies the landlord of that violation, the landlord does not remedy it within a reasonable time, and the tenant leaves and considers him or herself evicted. Upon constructive eviction, the lease ends. Thus, if Tuan was constructively evicted, he owed Leo no duties after June 1 and Leo cannot recover from him.

Substantial Interference

Leo will argue his use of 25% of the warehouse wasn't a substantial interference. This will likely fail for the reasons in the IWQE section *supra*. Using 25% of the warehouse that Tuan wanted to store his goods is a substantial interference.

Constructive Eviction

Leo will argue that Tuan's constructive eviction was wrongful because Tuan did not give him notice and a reasonable opportunity to cure. When Tuan arrived on June 1 and found 25% of the warehouse unusable, he terminated his lease immediately.

Tuan did not give Leo notice then and a chance to cure. This is Leo's strongest argument.

Tuan will argue that the "notice" relates back to at least January 1, when he found Annika in his warehouse. Because Leo executed valid leases with both Tuan and Annika for that month, Leo is considered to have actual knowledge of that conflict. Tuan will say that Leo was on notice as of that time. In addition, in some states, Tuan may be excused from the notice requirement for futility. Tuan may argue that it would have been futile to give Leo notice of yet another breach of his lease, because Leo had already failed to perform it for five months. Rather than the June 1 event being the sole thing giving rise to eviction, Tuan will argue, it was the last in a long series of events that gave rise to it.

The notice and opportunity to cure issue is the crux of Tuan and Leo's dispute. Tuan will argue that he was done at that point with Leo's repeated breaches of their lease. Upon showing up on June 1 - five months after his lease was supposed to start - he saw that Leo had reserved an entire quarter of the facility for his own use. Tuan will say that such a blatant disregard of the lease shows that any notice to Leo would have metaphorically gone in one ear and out the other, or alternatively, that Annika's presence for the months prior was sufficient notice.

But Leo will argue that Tuan never told him Annika overstayed her lease. While Leo will be considered to have known Annika was there in January due to the overlapping leases, no facts suggest that Tuan contacted Leo between February and June to inform him of Annika's tenancy at sufferance or to ask (or demand) that Leo provide him with

the warehouse. Leo will argue that, had Tuan told him of that, he would have fixed it. Instead, Leo simply stored some things in the warehouse on the same day Tuan was moving in. Leo might argue that he would have immediately removed those items had Tuan asked him to do so.

Because Tuan never asked Leo to move the items, it is likely a court will find Tuan was not strictly constructively evicted.

If the court decides that Tuan was constructively evicted on July 1, it will not require Tuan to pay back Leo for anything under the lease after that point. Tuan will not be liable to Leo for his cheaper lease with Juanita.

If the court decides that Tuan was not constructively evicted because he failed to give notice and a chance for Leo to remedy the issue, then Leo will be able to sue Tuan. Leo will argue that he expected \$1,000 a month for that property for the 10-year lease. His damages are \$1,000 for the month of June, in which no one paid rent, and \$500 a month for the 9.5 years after that when he only was able to get \$500 from Juanita.

Tuan will argue the \$500 lease with Juanita was not sufficient mitigation. He will likely use his lease with Bruno as evidence of market conditions. If warehouses are going for \$1,500, then why is Leo renting his for \$500? Leo will argue in return that he put "For Rent" signs in several windows to attempt to rent the warehouse. The reasonableness of this mitigation measure will likely be judged by context and business custom. If the warehouse is in the middle of a busy area in Los Angeles or San Francisco, such that many people would have seen those signs, then it will be seen as a more reasonable mitigation measure. But if the warehouse is in a rural area, or if it is intended for use

for some specialized storage purpose that a narrow class of renters might need, then Leo might have been expected to take other measures to market its availability, such as advertisements or Internet marketing.

QUESTION 4

LawnCare Company (LawnCare) manufactured and sold a liquid weed killer for lawn care. Paula brought a personal injury suit against LawnCare when her children developed breathing problems after LawnCare's weed killer was applied on her lawn. LawnCare entered into a valid retainer agreement with Andy, an attorney, to defend LawnCare in the action.

Andy is a member and financial supporter of Citizens Concerned About Chemicals (C2AC), a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as LawnCare's weed killer from the market as unsafe. Andy provided pro bono free legal advice to C2AC in the past regarding an unrelated corporate matter, but did not enter into a formal attorney-client relationship with C2AC.

Since Andy is convinced that his association with C2AC will not affect his representation of LawnCare, he did not tell LawnCare about his relationship with C2AC. LawnCare is impressed with Andy's reputation as a litigator, and Andy did not want to jeopardize losing LawnCare as a client by discussing his private concerns about their chemicals.

In response to an anonymous questionnaire sent to all C2AC members, Andy mentioned the publicly available information regarding Paula's complaint filed against LawnCare, but did not provide any other details. One week after Andy returned the questionnaire to C2AC, Andy received a call from the Chief Executive Officer ("CEO") of LawnCare, who said a representative of C2AC had called to ask about Paula's lawsuit. Andy told the CEO that he did not know where C2AC would have received that information from and recommended that LawnCare not disclose any details about the lawsuit.

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

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

Retainer Agreement:

Under ABA there is no writing requirement for a representation of a client, unless it is a contingency case. Similarly in CA, there is no writing requirement for representation up to \$1,000, corporate client, or in the case of an emergency. Here, the facts suggest that LawnCare and Andy entered into a valid retainer agreement to defend LawnCare in a personal injury case against Paula when her children developed breathing problems after LawnCare's weed killer was applied on her lawn.

Corporate Client:

An attorney representing a corporation owes a duty of loyalty to the corporation itself and not its employees. If an attorney believes that the employees of the corporation are being misled to believing that the attorney is representing them directly, the attorney must make it clear that his attorney-client relationship belongs to the corporation. Here, Andy is defending LawnCare Company in a personal injury case and if at any time during the representation any employee is misled, Andy must make it clear that he represents LawnCare and not the employee. This is done to avoid any confidential information or conflict of interest arising during the representation.

Duty of Loyalty:

An attorney owes a duty of loyalty to his client. The duty of loyalty includes refraining from conflict of interest (COI) that will materially limit the representation of the client. An attorney should not materially limit the representation of a current client by the attorney's own interest, interest of a previous client, or current client. If the

attorney reasonably believes (subjectively & objectively) that he can competently and diligently represent the client, not prohibited by the law, and gets informed consent (ABA) or informed consent, confirmed in writing (CA), then the attorney may represent the client. Limitations of the attorney's own interest in the representation can be evidenced by relationship with the opposing attorney, stake in the outcome, membership in organizations that are against what the attorney is advocating for the client. A COI may arise during representation of a client or be apparent before the representation begins.

Association with C2AC:

Andy is a member and financial supporter of C2AC, a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as LawnCare's weed killer from the market as unsafe. Unless Andy reasonably believes that he can defend LawnCare in the case without materially limiting LawnCare's representation and gets informed consent (ABA) or informed consent, confirmed in writing (CA), disclosing his membership with C2AC he may be in violation of ethical rules. Andy is convinced that his association with C2AC will not affect his representation of LawnCare and he did not disclose his relationship with C2AC; however, that is not enough because under both ABA and CA Andy should've disclosed his association with C2AC because there is a potential conflict of interest. Andy will argue that he simply wants to support organizations that care about the safety of the public and the current personal injury case between LawnCare and Paula has no bearing on it. This argument may not prevail as the facts later suggest that he even provided pro bono work for C2AC. Lastly, the COI became apparent because

Andy knew that if he reveals his personal concerns about chemicals, it'll jeopardize looking LawnCare as a client.

Conflict of interest between current and former client:

An attorney who represented a previous client may not represent another client that would materially limit the current client or potentially reveal confidential information regarding the former client, unless the attorney reasonably believes that he can competently and diligently represent the current client, not prohibited by the law, not advocate an issue that is the opposite of what the attorney previously advocated for the former client, and gets informed consent (ABA) or informed consent, confirmed in writing (CA).

Pro Bono for C2AC:

Andy provided pro bono free legal advice to C2AC in the past regarding an unrelated corporate matter, but did not enter into a formal attorney-client relationship with C2AC. Although Andy provided pro bono legal advice, that does not make any difference that C2AC is still be considered a previous client of (discussed below). Andy may have reasonably believed that his previous pro bono work for C2AC will not have any bearing on his representation with LawnCare, because there was no apparent conflict of interest; however, Andy should've disclosed the potential conflict to both LawnCare and C2AC. Andy's previous knowledge about corporate matters may materially limit his representation with LawnCare, or in the alternative will require him to reveal confidential information regarding C2AC. Additionally, the COI existed once

Andy responded to the questionnaire and at this point Andy should've disclosed to both LawnCare and C2AC his limitation.

Attorney-Client Relationship:

An attorney-client relationship begins when the client reasonably believes that a relationship has begun. Additionally, under ABA, the attorney-client relationship lasts forever and under CA, the relationship terminates once the client has died and his estate has been settled. In the case of corporate clients, it is upon dissolution of the company. Here, Andy believed that he did not enter into a formal relationship with C2AC; however, it is not the attorney who has to believe that he did or did not enter into the attorney-client relationship, but rather the client.

Anonymous Questionnaire:

An attorney owes his client a duty of confidentiality to not reveal any confidential information regarding the representation. Confidential communication encompasses anything that the client has communicated to the attorney in confidence for the representation or the attorney has gathered in anticipation of litigation.

In response to an anonymous questionnaire sent to all C2AC members, Andy mentioned the publicly available information regarding Paula's complaint filed against LawnCare, but did not provide any other details. Since the information was available only, Andy would successfully argue that he did not reveal any confidential information regarding the representation. However, it is also possible that, but for Andy's anonymous tip, C2AC would have never known about the lawsuit. Now that C2AC

knows about this, they may further push their lobbying for environmental regulations to remove LawnCare's weed killer from the market. Thus, Andy's anonymous response created a snowball effect on his clients.

Duty of Competence:

Under ABA, an attorney must represent its client with competence which includes knowledge, thoroughness, and completion. Under CA, an attorney's duty of competence is defined as the attorney must not act with reckless disregard, with gross negligence, or willfully when representing its client.

When Andy responded to the anonymous questionnaire he acted with reckless disregard, gross negligence because a competent attorney, regardless if information is publicly available or not, will not reveal any information that could potentially harm his client. Thus, under CA, Andy has failed to act with competence.

Duty of Diligence:

Under ABA, an attorney must represent its client with diligence which includes knowledge, thoroughness, and completion. Under CA, an attorney's duty of diligence is defined as the attorney must not act with reckless disregard or with gross negligence when representing its client.

Similarly here, Andy acted without diligence when he answered the anonymous questionnaire.

Duty to Communicate:

An attorney has a duty to communicate with his client regarding all critical stages of the case and disclose all potential or apparent conflicts.

Here, Andy did not want to jeopardize losing LawnCare as a client by discussing his private concerns about their chemicals. Andy had the duty to communicate with LawnCare his affiliation with C2AC, his personal concerns about their chemicals, and the pro bono work he did for C2AC.

Lying to your client:

An attorney must never lie to their client even if doing so would jeopardize their relationship with their client. An attorney has the duty to be truthful and communicate to the client about all critical stages of the case. In the case of the attorney made a mistake, the attorney should still stay truthful to the profession and notify the client about his mistake.

Andy received a call from the CEO of LawnCare, who said a representative of C2AC had called to ask about Paula's lawsuit. Andy told the CEO that he did not know where C2AC would have received that information from and recommended that LawnCare not disclose any details about the lawsuit. At this point, Andy has committed multiple ethical violations. To begin with, he has materially limited his former client (C2AC) and his current client (LawnCare). Andy has lied to his clients and has acted without competence, diligence, or any respect for the profession of law. Instead, Andy should've come forward and disclosed to LawnCare's CEO that he has made the mistake of making an anonymous response letting C2AC know that there is a pending case going.

Withdrawal:

Under both ABA & CA, an attorney must withdraw when their representation is in violation of ethical rules. At this point after Andy did not disclose his association with C2AC, has personal belief against what LawnCare does, made an anonymous response about the pending case, lied to the CEO of LawnCare about how C2AC found out about the case, Andy must give notice to LawnCare to withdraw from the representation while he does not incur further damages to the case. When giving notice of withdrawal, Andy should give enough time for LawnCare to find an alternative attorney for the representation. Andy should return any money that has not been used for the case and turn over all documents that were gathered.

QUESTION 4: SELECTED ANSWER B

1. DUTY OF LOYALTY TO LAWNCARE

The first issue is whether, by failing to inform or receive LawnCare's consent to represent LawnCare despite the fact that C2AC is his former client, Andy has violated his duty of loyalty to LawnCare.

A lawyer has a duty of loyalty to operate in the best interests of the lawyer's client, and to exercise independent legal judgment in evaluating the client's case. Therefore, under both the Model Rules and California law a lawyer has a duty not to represent a client if either (1) the client's interests are directly adverse with those of another client the lawyer has in the same or a different matter; or (2) there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's obligations to a current client, former client, third party, or by the lawyer's own interests. If either of these situations arise, a lawyer may only represent the client if the lawyer reasonably believes the lawyer can competently represent the client, the representation is not prohibited by law, the client and another client are not opposing parties in the same litigation, and the lawyer obtains informed consent, confirmed in writing (under the Model Rules) or informed written consent (under California law). Informed, written consent requires an attorney to inform a client of all of the surrounding circumstances and risks of representation, as well as reasonable alternatives.

Here, C2AC is not a current client, so the rule about directly adverse client interests does not apply. However, C2AC is a former client. The question is thus whether Andy has any

continuing commitments to C2AC as a former client that would materially limit his obligations to LawnCare. This is unlikely. The prior representation was limited to free pro bono legal advice in an unrelated corporate matter. Andy would not have acquired confidential information he would have to avoid sharing with LawnCare as a result of the representation because it wasn't about weedkiller such as LawnCare would be using, but corporate matters.

That said, Andy's relationship with C2AC as a third-party organization of which he is a member creates a significant risk of materially limiting his representation. It is clear that Andy deeply cares about C2AC's mission because he's provided free advice and given the group financial support. In addition, while Andy believed his representation of LawnCare would not be affected, he created a situation in which his obligations to C2AC and LawnCare conflicted by informing all C2AC members about Paula's complaint. This has materially limited his representation to LawnCare because Andy is now lying about his role in C2AC to LawnCare and informing the organization about LawnCare's litigation. Thus, Andy has violated his duty of loyalty by failing to inform LawnCare of this relationship and receive its informed consent to continue representation.

Finally, an attorney is permitted to be a member of a nonprofit legal services group, even if it advocates for legislation and rulings that are adverse to the attorney's client. However, an attorney is not permitted to take any action within that group if it would (1) adversely impact the attorney's current client or (2) if the attorney would be making a decision for the organization that impacts a person with interests adverse to the attorney. Here, by informing an advocacy group about LawnCare's pending litigation so that they could potentially begin a campaign about LawnCare, Andy has acted adversely to LawnCare's

interests. When an attorney acts adversely to a client's interests this violates their duty of loyalty.

2. DUTY OF LOYALTY TO C2AC

A lawyer owes a duty of loyalty to former clients not to represent future clients in the same or a substantially related matter if the future clients' interests are materially adverse to the former clients'. If the lawyer does so, the lawyer must obtain the clients' informed consent, confirmed in writing (under the ABA) or their informed written consent (under California law). Here, C2AC is a former client because they sought legal representation and Andy provided it, regardless of whether Andy and C2AC entered into a formal attorney-client relationship. However, LawnCare's personal injury litigation regarding weedkiller is not the same or substantially related matter as the corporate matters Andy handled for C2AC. Therefore, Andy did not violate a duty of loyalty to C2AC.

3. DUTY OF CONFIDENTIALITY

A lawyer owes a duty of confidentiality to all prospective, current, and former clients until the client is deceased and the client's estate is settled. Under the Model Rules, a lawyer must take reasonable care not to reveal confidential information the lawyer obtains about the client in the course of representing the client-- whether from the client or a third-party source. In California, the duty is to maintain a client's confidentiality inviolate at every peril to the attorney's self. Here, it is a close question whether Andy breached a duty of confidentiality. On the one hand, Andy only disclosed publicly available information to C2AC members. However, on the other hand, the existence of the lawsuit and its

relevance to C2AC were matters Andy would have become familiar with only through his representation of LawnCare. This indicates that the information is something Andy should have held in confidence. In summary, the claim for a violation of a duty of confidentiality is weaker than the claim that there was a violation of Andy's duty of loyalty not to take adverse action against his client-- but using information he learned through his representation likely qualifies as a duty of confidentiality violation, even if he also derived it from public sources.

4. DUTY TO INFORM A CLIENT

A lawyer has a duty to keep a client reasonably informed of the status of a matter under the ABA. Under California law, a lawyer must inform a client of all significant developments related to a case. The lawyer must also respond to all the client's reasonable requests for information related to the status of the case. Here, Andy likely had a duty to inform LawnCare of his relationship with C2AC. In addition, Andy may have had a duty, once he learned C2AC might be going after LawnCare in a way that might negatively impact trial publicity, to inform LawnCare of the risk. This would have been necessary for LawnCare to plan a public relations mitigation strategy. Regardless, however, Andy breached this duty when LawnCare directly requested information about how C2AC received information about Paula's complaint and Andy failed to respond truthfully.

5. DUTY OF CANDOR

A lawyer has a duty not to make a false representation of fact to any person, including the client. This duty applies under both the ABA and California law. Here, Andy has violated

this duty because, when LawnCare asked him how C2AC learned of Paula's lawsuit, Andy responded that he did not know. Andy did know because he supplied the information.

Therefore, Andy violated this duty.

QUESTION 5

Pedro brought a fraud and breach of contract action against Gallery in federal court.

At a jury trial, Pedro testified that he purchased a painting from Gallery for \$200,000 after seeing an advertisement bearing Gallery's logo stating that the painting was the only painting by a noted 17th century artist available for sale in the world. On Pedro's motion, a photocopy of the advertisement was admitted into evidence. Pedro also testified that the painting was worth only \$10,000 because it was a reproduction of the original and that he based his valuation on the average of three appraisals of the painting by art dealers.

Pedro called Rex, a chemistry professor, who had been retained by four art galleries to determine the age of paintings. Rex testified that the painting had been painted within the past 50 years and was a painted reproduction of the original painting. He testified that he had used the XYZ technique on Pedro's painting to arrive at his conclusion. Rex testified that he had tested the XYZ technique on paintings of known ages and that the results corresponded with their known age. He testified that the XYZ technique was reliable and used by most experts to determine the age of paintings. After cross-examination, Rex was excused and left the courtroom.

Gallery called Marie, and both parties stipulated that she is an expert in dating works of art. She testified that a publication entitled "The Science of Dating Works of Art" is generally recognized as a reliable authority. She then quoted an excerpt from that publication that asserted the XYZ technique is not reliable for determining the age of works of art. Gallery moved, and the court received, the excerpt into evidence as an exhibit.

Gallery then offered into evidence a journal article authored by Rex that included a statement that the XYZ technique is not reliable for determining the age of works of art.

Assuming all proper objections and motions to strike were timely made, should the court have admitted:

1. The photocopy of the advertisement? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Pedro's testimony about the value of the painting? Discuss.
3. Rex's testimony about the age of the painting? Discuss.
4. The excerpt from "The Science of Dating Works of Art"? Discuss.
5. Rex's journal article? Discuss.

Answer according to the Federal Rules of Evidence.

QUESTION 5: SELECTED ANSWER A

1. Photocopy of Advertisement

Relevance

Evidence must be relevant to be admitted. Evidence is logically relevant if it tends to prove or disprove a fact of consequence. Otherwise, relevant evidence may be excluded under the rule for legal relevance if its probative value is substantially outweighed by the danger of undue prejudice, confusing the jury, or undue consumption of time.

Here, since Pedro has brought an action for fraud, he is trying to prove that Gallery made a fraudulent misrepresentation in claiming that the painting was the only one of its kind. Therefore, as the advertisement with Gallery's logo stating that the painting is the only one available for sale by this artist, this advertisement tends to prove the disputed fact that Gallery made this representation. Therefore, it is logically relevant.

As there is no indication that the probative value will be outweighed by a substantial danger of undue prejudice, the evidence is legally relevant.

Therefore, this evidence is relevant. Authentication

To be admitted, evidence must be shown that it is what it is purported to be. A document or writing can be authenticated by the testimony of a person familiar with it. Additionally, documents with a trade seal may be self-authenticating.

Here, as the advertisement has been introduced on Pedro's motion and Pedro himself saw the ad, he may have authenticated the advertisement through his testimony of his familiarity with it. Additionally, since the advertisement bears the Gallery's logo, it may be considered to be self-authenticating if the logo is considered a trade seal.

Therefore, it is authenticated.

Best Evidence Rule

When the contents of a writing are at issue, the original is required. Generally, photocopies are as admissible as originals, unless a genuine question is raised as to its authenticity.

Since the case pertains to the fraudulent misrepresentation that the painting was a valuable one-of-a kind, the contents of the advertisement and its claim are at issue to show that there was fraud. While the copy admitted is a photocopy, this will satisfy the best evidence rule unless a genuine question is raised as to its authenticity.

Therefore, this rule is satisfied.

Hearsay

Hearsay is an out-of-court statement by a human declarant, offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless an exception or exemption applies.

The advertisement contains the out-of-court statement made by Gallery about its painting. Therefore, if offered for the truth that the painting was the only one by this

painter available for sale, it will be hearsay and inadmissible unless an exception or exemption applies.

Nonhearsay Purpose

Where the purpose of the out-of-court statement is not to prove the truth of the matter asserted, the statement is admissible under a nonhearsay purpose. Where the statement itself is a legally operative act, such as words of a contract, will, or deed, the statement is admissible.

Here, since the statement is part of the alleged fraud, it is a legally operative act.

Therefore, it is offered to show that Gallery committed fraud, not for the truth of Gallery's statement.

Therefore, the statement is admissible under a nonhearsay purpose.

Hearsay Exemption

An out-of-court statement by an opposing party, that is relevant, and offered against that party is admissible for the truth of the matter asserted.

As the statement in the advertisement was made by Gallery, is relevant, and is being offered against Gallery, it also satisfies the exemption for statement by an opposing party. Therefore, even if the statement is offered for its truth, it will be admissible.

Therefore, the court should have admitted this evidence.

2. Pedro's testimony about the value of the painting

Relevance

Rule given above.

As Pedro's testimony to the actual value of the painting tends to prove that its value was significantly misrepresented by Gallery, this evidence is logically relevant. While it is unfavorable to Gallery, its probative value is not substantially outweighed by danger of undue prejudice, so it is legally relevant.

Therefore, this evidence is relevant. Competence

Under the FRE, everyone is presumed competent to testify.

Therefore, Pedro is competent to testify.

Personal Knowledge

A lay witness must have personal knowledge of the matters to which he testifies.

Personal knowledge may be proven by the witness's own testimony.

Here, as Pedro has testified that his opinion of the painting's value is based on the average of three appraisals done by art dealers, his testimony is not based on his personal knowledge of the painting's value, but rather on the opinions of others.

Therefore, Pedro does not have adequate personal knowledge to testify to the value of the painting.

Lay Opinion

Generally, lay witnesses testify to facts, not opinions. Lay opinion is appropriate where it is rationally based on the witness's perception and helpful to the jury in deciding the

issues. Generally, lay witnesses can testify to perceptions, such as those of emotional states or of the value of property.

As Pedro is giving a valuation of the painting, he is offering opinion, not facts as a lay witness. Since as discussed above, his valuation is not rationally based on his own perception of the painting, but rather on the opinions of others, it is not proper.

Additionally, since the jury does not get to hear from the art dealers appraisals, but rather only hears Pedro's averaging of the dealers with actual personal knowledge, this lay opinion will not be helpful to the jury.

While value of property is often a proper subject for lay opinion, Pedro's testimony here is improper lay opinion.

Therefore, Pedro's testimony should not be admitted.

3. Rex's testimony about the age of the painting

Relevance

Rule given above.

As an issue in the case is that Gallery misrepresented the painting as a valuable original from the 17th century, expert testimony that the painting was done within the past 50 years tends to prove that Gallery fraudulently presented the painting as from the 17th century. Therefore, it is logically relevant. As its probative value is not substantially outweighed by a danger of undue prejudice, Rex's testimony is also legally relevant.

Therefore, the testimony is relevant. Competence

General Rule given above.

Therefore, Rex is competent to testify.

Expert Opinion

An expert must be qualified as an expert by their technical experience, specialized knowledge, education, or otherwise relevant experience in the relevant field. To be admissible, expert opinion must be believed by the expert to a reasonable certainty and based on reliable methods that are reliably applied. An expert may base his opinion on his own tests and experience as well as information that is presented to him at trial.

Under the *Daubert* test, courts test the reliability of a scientific technique by evaluating factors such as: whether it has been tested, the rate of error, and whether it has been peer reviewed. Under the minority *Frye* test, the method must be generally accepted in the relevant community.

As Rex is a chemistry professor who has been retained by art galleries to date paintings, he appears to be qualified in dating paintings, based on his education in the area and experience. While the opposing side may impeach his level of experience in only four galleries, he nonetheless appears qualified to testify. As he used the XYZ method to arrive at his conclusion, he is able to properly testify to out-of-court tests performed to render his opinion. Here, as Rex has testified that the XYZ method is reliable and used by most experts to determine the age of paintings, his method appears to be a reliable method reliably applied. This method is approved under the

Frye test if accepted by most experts to date paintings. While not all the *Daubert* factors are clear, Rex has testified to testing it himself to determine the accuracy. While other facts, such as high rate of error or lack of peer review may render the method unreliable, the method appears acceptable under the facts presented in Rex's testimony.

Therefore, Rex's testimony should be admitted.

4. Excerpt

Relevance

Rule given above. Evidence to impeach another witness is always logically relevant.

Here, Gallery has offered the excerpt that XYZ is unreliable to impeach Rex's testimony and disprove the claim that the painting was dated within the past 50 years.

As impeaching a witness's testimony is always relevant, this evidence is logically relevant. Moreover, it tends to disprove the assertion that the painting is from within the last 50 years. As undue prejudice will not substantially outweigh prejudicial value, it is legally relevant.

Therefore, the evidence is relevant.

Authentication

General Rule given above. Periodicals and some books are often considered self-authenticating.

Here, the excerpt has been authenticated because Marie has testified to its authenticity.

Moreover, since it is a publication, it may also be self-authenticating.

Therefore, it is authenticated.

Hearsay

General hearsay rule stated above.

Since the excerpt stating that XYZ is not reliable was made out of court and is being offered for the truth of the matter asserted, it is hearsay and will be inadmissible unless an exception or exemption applies.

Learned Treatise

Under the Learned Treatise exception to hearsay, statements from a learned treatise that is generally recognized as a reliable authority and relied on by experts may be admitted. Select excerpts may be read to the jury, but the learned treatise itself is not received as an exhibit because of the concern of how juries may interpret the learned treatise.

Here, since the publication was testified to by a stipulated expert to be a reliable authority, it fits the learned treatise exception for hearsay and the statements may be admitted. However, while the excerpts may be read to the jury, they are not received into evidence as an exhibit under this exception.

While the excerpt may be properly read to the jury, it should not be received as an exhibit.

5. Rex's Journal Article

Relevance

Rule given above.

As Rex's statement in the journal article contradicting his testimony that XYZ is reliable is impeachment evidence, it is logically relevant and casts into doubt the truth of his testimony. Its probative value is high and not outweighed, so it is legally relevant.

Therefore, the journal article is relevant.

Authentication

Rule stated above.

As periodicals are considered self-authenticating, the article was authenticated.

Hearsay

Rule given above.

Since the statements in the journal article are offered to prove that XYZ is not reliable and were made out of court, they are hearsay and inadmissible without an exception or exemption.

Learned

Treatise Rule

given above.

If the statement is from a learned treatise, it may be admissible under this exception substantively and may be read to the jury, but not received as an exhibit.

Prior Inconsistent Statement

Prior inconsistent statements are hearsay exemptions, admissible to impeach testimony. The witness must be given a chance to explain or correct the statement. If they were not sworn statements, they are not admissible substantively.

Here, Rex's statement in the journal was a prior inconsistent statement to his testimony about XYZ. Therefore, it may be offered for the limited purpose of impeaching him, provided that Rex is given an opportunity to explain. Since Rex left the courtroom, he was likely not given this opportunity. Since the statement in the article was not sworn, it is not admissible substantively under this exemption.

Therefore, Rex's statements may be admitted under learned treatise or prior inconsistent statement, provided he has an opportunity to explain.

QUESTION 5: SELECTED ANSWER B

1. The Photocopy of the Advertisement

Relevance - Logical and Legal

To be admissible, evidence must be both logically and legally relevant. Evidence is logically relevant if it tends to make a fact at issue more or less likely. Evidence is legally relevant if its probative value is not substantially outweighed by the danger of unfair prejudice or confusing the jury.

Here, Pedro is claiming that Gallery committed fraud when they advertised that the painting he purchased was the only painting by a noted artist for sale in the world. The advertisement is logically relevant because it supports Pedro's claim that Gallery made this representation. The advertisement is legally relevant because it is unlikely that the advertisement will unfairly prejudice Gallery - it does not appear that they are denying the advertisement, and it does not contain any inflammatory or misleading content.

Thus, the photocopy of the advertisement is relevant.

Authentication

When submitting documents into evidence, the proponent must demonstrate that the evidence is what it purports to be. A witness's testimony about the document is generally sufficient to satisfy the authentication requirement. Here, Pedro testified that he saw an advertisement bearing Gallery's logo, and submitted a photocopy of the advertisement. Pedro's testimony is sufficient to authenticate the document.

Best Evidence Rule

The Best Evidence Rule states that when a witness is testifying about the contents of a document, the document itself is the best evidence and must be produced and submitted to the jury. Here, the Best Evidence Rule applies, because Pedro is testifying about the contents of the advertisement.

However, the Best Evidence Rule states that photocopies of documents satisfy the rule. Therefore, because Pedro submitted a photocopy of the advertisement, the Best Evidence Rule has been satisfied.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally inadmissible as evidence unless an exception applies. Here, the advertisement was circulated out of court, and it is a statement because it is a written claim about the painting.

However, Pedro will point out that he is not offering the advertisement for its truth - that is, he is not offering it as evidence that the painting is the only painting by a noted 17th century artist. In fact, Pedro is offering it while claiming it is *not true* - that the statement is fraudulent. If he is not offering it for its truth, the statement is not hearsay and not barred by this rule.

Hearsay Exception - Admission by Party Opponent

If the court deems that Pedro is offering the advertisement for its truth, there is an exception to the hearsay rule for a statement made by a party to a case offered into evidence by the opposing party. Here, Pedro's party opponent is Gallery. He will point

out that the advertisement bears Gallery's logo and that Gallery sold him the painting referenced in the advertisement. This is sufficient to establish that the advertisement is properly considered a statement made by Gallery, and it is admissible under the admission by party opponent exception.

Hearsay Exception - Independent Legal Significance

There is an exception to the hearsay rule when the act of making the statement is an element to the cause of action. For example, in a defamation case, the fact that a statement was made is independently legally significant, because the making of the statement is an element of a defamation claim.

Here, Pedro is claiming fraud. He alleges that Gallery's claim in their advertisement was materially false, induced him to purchase the painting, and that he suffered harm. Gallery's claim has independent legal significance because the existence of the advertisement is one of the elements of Pedro's cause of action. Thus, it is admissible.

Conclusion: The court correctly admitted the photocopy of the advertisement.

2. Pedro's Testimony about the value of the painting

Relevance - Logical and Legal

(See Rules above.) Pedro is claiming that the painting he purchased is only worth \$10,000. If proven, this would make it more likely that Gallery had committed fraud when they sold the painting to Pedro for \$200,000. Thus, it is logically relevant.

The main hurdle for Pedro here is whether his testimony is legally relevant. The probative value and danger of unfair prejudice depend largely on the source of Pedro's claim, and

whether it is likely to confuse or mislead the jury. Therefore, to assess whether the testimony is legally relevant, we must assess the basis of Pedro's opinion.

Opinion Evidence - Lay Witness

A lay witness is permitted to testify to opinions rationally based on their perceptions. Lay witnesses are not permitted to provide lay opinions based upon specialized or technical knowledge.

Here, Pedro is testifying that the painting is worth \$10,000 because it is a reproduction of the original. This testimony is based on his valuation based on three appraisals made by art dealers. The appraisals made by art dealers require specialized or technical knowledge, because art appraisals are not the type of thing that an ordinary person would be able to conclude based on their perceptions.

Thus, Pedro's testimony is not a permissible lay opinion.

Opinion Evidence - Expert Witness

An expert witness is a witness who has specialized knowledge or training in an area. They may provide expert opinions if those opinions are based on their training and experience and methods sufficiently reliable as to pass the *Daubert* test. The *Daubert* test assesses whether the methods are generally accepted in the field, if there is a known error rate, if the methods have been subject to peer review.

Here, there is nothing to suggest that Pedro is an expert in art appraisals. Rather, he is introducing his conclusion based on appraisals by experts. Although the appraisals might well be acceptable expert opinions, Pedro has not established the training and experience of the dealers, nor the methods utilized to establish the appraisals.

Thus, the testimony about the value of the painting is not a permissible expert opinion.

Hearsay

(See Rules above.) Pedro is claiming that his valuation is based on the appraisals of three art dealers. The art dealers made those appraisals out of court, and Pedro is offering them for their truth - that is, the valuation of the painting. Thus, the appraisals of the art dealers are hearsay and inadmissible unless a hearsay exception applies.

Otherwise inadmissible hearsay may be admitted if it forms the basis of an expert opinion. However, as discussed above, Pedro's conclusion is not a proper expert opinion. Thus, it is inadmissible under the hearsay rule.

Best Evidence

(See Rule above.) Pedro is testifying about three appraisals that formed the basis of his opinion. If the appraisals were in writing, then Pedro's testimony about their conclusions would be subject to the Best Evidence Rule, and the appraisal documents themselves must be admitted into evidence. If the appraisals were made to Pedro verbally, the Best Evidence Rule does not apply.

Returning to Legal Relevance

Because Pedro's opinion is not based on his own expertise, and because the methods have not been confirmed to be reliable, the probative value of his own opinion is likely low. On the other hand, testimony that the painting is worth \$10,000 -- absent a sufficient basis for that opinion -- is unfairly prejudicial to Gallery, who was not permitted to cross-examine the art dealers on their conclusions. Therefore, it is not legally relevant.

Conclusion: The court should not allow Pedro's testimony about the value of the painting, because it is an improper opinion, it is hearsay, and its probative value is substantially outweighed by the danger of unfair prejudice.

3. Rex's testimony about the age of the painting

Relevance - Logical and Legal

(See Rules above.) Rex's testimony is logically relevant because he claims that the painting is a reproduction, which makes Pedro's claim of fraud more likely. Legal relevance will be discussed further below.

Opinion - Expert Opinion

(See Rule above.) Here, Rex has specialized training and knowledge because he has been retained by art galleries to determine the age of paintings. It's not clear whether Rex's expertise in chemistry is related to the XYZ technique, but assuming that the technique involves chemistry, his specialized knowledge would qualify him as an expert.

The issue is whether the XYZ technique is sufficiently reliable to meet the *Daubert* standard. Rex testified that the principles are reliable, because he has used it in the past and his results have corresponded with the known age of paintings. He testified that it was reliable and used by most experts in his field.

Gallery's Challenge to the Reliability of the XYZ Technique

After Rex was excused from testifying, Gallery brought claims that the XYZ technique is not reliable. (Discussed more below.) However, if they wished to preclude Rex's testimony on grounds that it is not reliable, they should have raised the issue before

Rex delivered his opinion. Gallery should have requested the court make a determination about the reliability of XYZ technique outside the presence of the jury. If the court determined the technique was not sufficiently reliable, Rex's testimony would have been precluded. The fact that the court allowed it suggests that either the issue was not raised prior to Rex's testimony, or that the court determined it was sufficiently reliable.

Returning to Legal Relevance

The evidence is probative because it helps the jury understand the age of the painting and the likelihood that it is a reproduction. Although there may be some unfair prejudice if it turns out the XYZ technique is not reliable, there was a sufficient basis for the court to conclude that it satisfied *Daubert*.

Conclusion: The court properly admitted Rex's testimony about the age of the painting

4. The excerpt from The Science of Dating Works of Art

Relevance - Logical and Legal

(See Rules above.) The publication is logically relevant because it suggests that the XYZ technique is not reliable for determining age of works of art, which is at issue in this case. It is legally relevant because there is not a danger of unfair prejudice to Pedro. Thus, it is relevant.

Hearsay

The publication was created out of court, and is being offered for its truth - that is, that the XYZ technique is not reliable. Thus, it is hearsay and is inadmissible absent any exception.

Hearsay Exception - Learned Treatise

Learned treatises, or documents that are generally recognized as reliable authority, are permitted to be read to the jury despite the general rule against hearsay. Here, "The Science of Dating Works of Art" is generally recognized as a reliable authority.

However, while the learned treatise exception allows the text to be read to the jury, it does not permit the text to be introduced into evidence as an exhibit.

Thus, although the court properly allowed Marie to quote an excerpt from "The Science of Dating Works of Art," the excerpt should not have gone back to the jury as an exhibit.

5. Rex's journal article

Relevance - Logical and Legal

(See Rules above.) The article is relevant because it undermines Rex's claim about the reliability of the XYZ technique, which is an important issue for the jury. Although it harms Pedro's theory and the credibility of his expert, this prejudice is not *unfair*. Thus, it is logically and legally relevant.

Best Evidence

(See Rule above.) This is satisfied because the article itself was offered into evidence.

Hearsay

Rex authored the journal article out of court, and Gallery is using it for its truth - that is, that the XYZ technique is not reliable. Thus, it is hearsay and is inadmissible unless an exception applies.

Hearsay Exception - Prior Inconsistent Statement

When a witness testifies under oath, the opposing party is permitted to introduce a prior inconsistent statement made by that witness. This can be used as impeachment evidence, which means it can be used to undermine the credibility of the witness.

Here, Rex had testified in court that the XYZ technique is reliable. His prior statement was that it was not reliable. Thus, the prior statement is inconsistent.

However, this exception requires that the party seeking to introduce the inconsistent statement confront the witness about it and give them an opportunity to explain. Here, Gallery did not introduce this during cross-examination of Rex, where he would have had the opportunity to explain or defend his positions. Instead, they introduced it after Rex was excused and left the courtroom.

Because Gallery did not introduce this statement while Rex had an opportunity to explain it, it is not properly admitted as a prior inconsistent statement.

Hearsay Exception - Learned Treatise

The evidence at issue is a journal article. Some journal articles may qualify as learned treatises, as explained above. However, it does not state that the journal article is generally recognized as a reliable authority. In fact, Rex's own testimony suggests that the journal article may not be reliable. Therefore, it should not be allowed under this exception.

Conclusion: Although the journal article would have been proper if Gallery had sought its admission during Rex's cross examination, the attempt to introduce it during their

case-in-chief is improper because it is hearsay not within any exception. Therefore, the court should exclude it.