



# **California Bar Examination**

## **Essay Questions and Selected Answers**

**February 2025**



---

**ESSAY QUESTIONS AND SELECTED ANSWERS**

**FEBRUARY 2025**

**CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the February 2025 California Bar Examination and two selected answers for each question.

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

Question Number

Subject

- |    |                             |
|----|-----------------------------|
| 1. | Criminal Law & Procedure    |
| 2. | Trusts / Wills & Succession |
| 3. | Real Property               |
| 4. | Contracts / Remedies        |
| 5. | Professional Responsibility |

## **ESSAY QUESTION INSTRUCTIONS**

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

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

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

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question. Do not include your actual name or any other identifying information anywhere in your answer.

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

## **QUESTION 1**

A man carrying a blue briefcase robbed a bank (Bank) while brandishing a gun. The bank teller informed the police that she recognized Rob, a bank customer, as the robber. Fifteen minutes later, Officer Otto, who was in uniform and armed, saw Rob sitting alone in a restaurant two blocks away from Bank. Next to him on the floor was a blue briefcase. Officer Otto ordered Rob to "Stay right where you are and keep your hands where I can see them." Officer Otto asked Rob whether he was the robber. Rob responded, "Yes, it was me." Officer Otto opened the briefcase and discovered a gun. He told Rob he was under arrest for bank robbery, handcuffed him, and took him to the police station. There, the briefcase and gun were inventoried and booked into evidence.

Two hours later, Officer Otto interviewed Rob at the station and properly advised him of his *Miranda* rights. After Rob affirmatively waived his rights, Officer Otto asked him about the stolen money, and Rob responded that he had left it in his apartment. Officer Otto then put this information into an affidavit for a search warrant for Rob's apartment. After a judge signed the warrant, officers searched Rob's apartment where he lived alone and seized the stolen money.

Prior to his trial for bank robbery, Rob brought motions to suppress his statements under the Fifth Amendment to the United States Constitution, and to exclude the gun and money under the Fourth and Fifth Amendments to the United States Constitution.

What arguments may Rob reasonably raise in support of his motions; what arguments may the prosecution reasonably raise in response; and what is the likely outcome with regard to:

1. Rob's statement "Yes, it was me"? Discuss.
2. Rob's statement that he had left the stolen money in his apartment? Discuss.
3. The gun? Discuss.
4. The stolen money? Discuss.

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

### **Rob's (R) Statement "Yes, it was me"**

#### **Fifth Amendment and Miranda**

Under the 5th amendment privileges against self-incrimination, a person has a right not to incriminate themselves and must be given their miranda warnings during a custodial interrogation.

Here, Rob made the statement "Yes, it was me" in response to Officer Otto's (O) question. The issue here is whether R's confession was voluntarily and if it was, whether it was made during custodial interrogation that required Miranda warnings under the 5th Amendment.

#### **Government Conduct**

The 5th amendment and miranda apply to government conduct. Unlike the 4th amendment, the 5th amendment does not apply to private citizens acting at the direction of government actors and the suspect does not the relationship between private citizen and government.

Here, the facts indicate that officer O was in uniform and armed when he approached R. This indicates that R knew officer O is a law enforcement agent and thus, his action constitutes as a government conduct since he works for the government as a police officer.

#### **Voluntary / Coercive Confession**

A voluntary confession made without miranda warnings may be inadmissible, but the statement made voluntary during non- custodial questioning or after proper miranda warnings can be admissible. Coercive Confession is any confession made as a result of a physical threat or coercion.

Here, the statement appears to be voluntary as it was made without any coercion. R was not physically threatened and officer O did not make any promises to imply consequences for answering. Here, R simply acknowledged his involvement in the robbery. The context of questioning R in this situation does not appear to involve coercive tactics that would render the confession involuntarily. The prosecution could argue that the confession was voluntary, and there is no indication of any coercion or improper interrogation. However, R could raise the argument that he was effectively in custody which could implicate the issue of whether miranda warnings should have been given to him earlier. Thus, the yes it was me statement was voluntary since R was not in custody.

### **Miranda Rights**

A suspect must be read their miranda rights if the suspect is 1) in custody, 2) subject to interrogation unless 3) a public safety exception applies.

### *Custody*

A person is in custody if the person is arrested or deprived of their freedom that a reasonable person would think they are unable to leave and the environment has the same inherently coercive pressures as a police station questioning.

Here, R was detained by officer O but was not formally arrested at the time of his statement. The question is whether R would have felt free to leave. Here, a reasonable person in R's position might not have felt free to leave considering he was detained by an armed officer in a public place being questioned about a robbery. However, R was not in an environment akin to a police station or under the same coercive pressures, so it may be argued that he was not "in custody" for Miranda purposes.

### *Interrogation*

Occurs when a police officer 1) asks express questions, 2) uses words or actions that the officer should know or reasonably likely to elicit an incriminating response.

Here, officer O's question "Are you the robber" is an express question designed to elicit an incriminating response thus it would be considered as an interrogation. However, since R voluntarily responded to the question without any coercive actions or threats by the officer, it could be argued that the statement was voluntary and not elicited by interrogation.

Thus, R was in custody when the statement was made which violated his miranda rights.

### **Public-Safety Exception**

Police are not required to read a suspect miranda rights during a custodial interrogation if the questioning relates to an immediate public safety.

Here, the prosecution may argue that the public safety exception applies in this case because officer's questioning could have been aimed at securing the area or preventing further danger. However, this exception usually applies to more immediate safety concerns and it's unclear if this situation falls under this situation since R was seen at a restaurant sitting without any danger to his surroundings. Thus, this exception does not apply.

### **Giving Miranda Rights**

Police must tell the suspect that 1) they have a right to remain silent, 2) anything they say can and will be used against them, 3) they have the right to counsel, and 4) if they are indigent, a counsel will be appointed to them.

Here, at the time R made the statement, he had not been informed of his miranda rights. Officer's question regarding whether he is the robber qualifies as an interrogation and Rob's statement yes it was me was a direct response to his question. Since miranda warnings were not provided before this statement, the statement could be inadmissible. However, we established that R was not in custody, thus, he did not have to be provided with the miranda rights.

## **Waiver of Miranda Rights**

Must be made knowingly and voluntarily based on the totality of the circumstances. If a miranda warning was given and was understood by the suspect, then the suspect's subsequent statements establishes an implied waiver.

Here, R did not waive his miranda rights before making the statement, as the rights were not provided beforehand. Here, the prosecution may argue that R's statement was voluntary and was not the product of coercive questioning, but the lack of miranda warnings typically renders any statement inadmissible if made while in custody and under interrogation. Thus, R did not waive his miranda rights.

## **Exclusionary Rule**

Similar to the 4th amendment, evidence is tainted and inadmissible if it was acquired through an involuntary confession, but derivative evidence is not excluded because of miranda violations.

Here, because R's statement was made prior to being read his miranda rights, it could be considered involuntary or improperly obtained, making it subject to suppression under the exclusionary rule. However, any evidence obtained from the statement such as the gun, may still be admissible if the court finds that the statement was voluntary, but the initial statement itself likely would be suppressed.

**In conclusion, Rob's statement "Yes, it was me" is likely inadmissible because it was made during custodial interrogation without proper miranda warnings and waiver.**

## **Rob's Statement regarding the stolen money**

## **5th Amendment**

Under the 5th amendment, statements made during custodial interrogation are only



admissible if the suspect has been properly advised of their miranda rights and voluntarily waives these rights.

### *Miranda Warnings*

See rule above.

Here, R was advised of his miranda rights after being arrested and before being interrogated about the stolen money.

### *Miranda Waiver*

See rule above.

Here, R voluntarily waived those rights and provided information about where the money is in his apartment. The prosecution may argue that R's waiver of miranda rights was valid and his statement about the stolen money was made voluntarily and after being properly informed of his rights. The defense may try to argue that the confession was in fact coerced in some way, but there is no strong evidence of coercion or duress.

## **Voluntary Confession**

See rule above.

Here, there is no indication that R's statement was made under duress or coercion. Thus, R's statement about the stolen money is likely admissible because it was made voluntarily after he received proper miranda warnings and waived his rights.

## **Fourth Amendment**

4th amendment protects individuals from unreasonable searches and seizures, requiring that searches be supported by probable cause. A statement made by a

suspect can establish probable cause for a search warrant which must be based on facts that would lead a reasonable person to believe that evidence of a crime will be found in the location to be searched.

Here, R's statement about the location of the stolen money in his apartment provided basis for the officer O to obtain a search warrant. The statement was made after R was properly advised of his miranda rights and it gave officer O probable cause to believe the stolen money would be in his apartment. The prosecution will argue that R's voluntary statement about the stolen money was sufficient to establish probable cause for the search warrant. The defense may argue that the statement was made under coercion and was unreliable, but given the lack of evidence for coercion the proper miranda warnings given, this argument is unlikely to succeed. Thus, the search of R's apartment is justified by the probable cause established by R's voluntary statement about stolen money.

**In conclusion, Rob's statement about the stolen money is likely admissible because he was properly advised of his Miranda rights at the station and voluntarily waived them before making the statement.**

## **The Gun**

### **Fourth Amendment**

The 4th amendment protects people against unreasonable search and seizures meaning any evidence obtained in violation of it is inadmissible in court.

### **Government Conduct**

The 4th amendment only applies to conduct of persons working on behalf of the government, such as law enforcement.

Here, officer O was acting as a government agent because he was dressed in uniform and armed when he approached R. Thus, Officer O's conduct constitutes a

government action.

### **Standing & Reasonable Expectation of Privacy**

In order to challenge a search and seizure, the challenging party must show that they have personally been subjected to unlawful search and seizure. A person cannot assert rights of another. The defendant must have a reasonable expectation of privacy in the area being searched or items to be seized.

Here, R had control over the blue briefcase as it was found in his immediate area of control. Since the gun was placed in his briefcase that belongs to him and in his possession, then R likely had a reasonable expectation of privacy in that briefcase. Thus, R has standing to challenge the search of the briefcase provided that the search was unlawful.

### **Lawful Arrest**

Under the 4th amendment, a person has a right to be free from any unlawful searches and seizures. For an arrest to be lawful, officers must have a probable cause. Probable cause arises when the officer has trustworthy facts or knowledge sufficient to warrant a reasonable person to believe that the person has committed a crime.

Here, officer O has probable cause to arrest R as he was identified by the bank teller and was in close proximity to the scene of the crime. Based on this identification and R's location, the officer had sufficient facts to reasonably believe that R had committed robbery. Thus, Rob's arrest was lawful.

### **Warrant Requirement**

4th amendment provides everyone should be free from unreasonable search and seizures from the govt. Therefore, in order for the government actors to search you, they must have a warrant.

Here, while officer O did not have a warrant to search the briefcase, however, the

search qualified as a valid exception to the warrant requirement because it was incident to Rob's lawful arrest. Since the arrest was supported by probable cause, and the search occurred immediately thereafter, the search of the briefcase did not violate the warrant requirement.

### **Exigent circumstances**

Officers can enter a home without a warrant if there is an imminent danger, evidence destruction, suspect escape, or they are in hot-pursuit with probable cause of a crime.

Here, officer O could argue that exigent circumstances existed since he had probable cause that R matches the description given by the bank teller and believes that R was involved in the robbery and that there was an immediate need to prevent further harm or secure evidence before it could be destroyed. Prosecutor might argue that R was attempting to flee the scene, or there was a risk that the evidence such as the gun would be destroyed. However, the facts presented do not indicate any of these specific exigent circumstances were present. There was no indication that R was attempting to escape, evidence was in imminent danger or the destruction of evidence. Thus, this exception does not apply.

### **Search incident to lawful arrest**

allows police to search a person and the area with their immediate control without a warrant when making a lawful arrest. This ensures officers' safety and prevents evidence destruction. The search must happen at the time of the arrest and must be limited to what the person could reach,.

Here, officer O had probable cause to arrest R based on the bank teller's identification and R's proximity to the scene of the robbery. Here, the search of the blue briefcase occurred immediately after R's arrest and was within his immediate control. Here, although a briefcase is a contained, it was located next to R which satisfies the immediate control element. Thus, the briefcase and gun inside was in the area from which R could have reached making the search valid as a search incident to his lawful arrest.

## **Consent**

An officer can search a specific area if the owner or someone who has authority or apparent authority gives consent freely and voluntarily.

Here, officer O opened R's briefcase without explicitly obtaining consent. R did not consent verbally or non-verbally to the search of the briefcase that had the gun. The officer did not ask for consent but proceeded with opening the briefcase based on his suspicion that it contained weapon used in the robbery. Since there was no indication that R gave voluntary consent, the search of the briefcase and obtaining the gun would not be justified. Thus, the search of R's briefcase and taking the gun violated his 4th amendment due to lack of consent.

## **Terry Stop and Frisk**

If an officer has a reasonable suspicion that the suspect has engaged in or will engage in criminal activity, then an officer can briefly detain the suspect and ask the suspect questions. Additionally, if an officer has reasonable suspicion that the suspect is armed and dangerous, then the officer can conduct a pat-down of the suspect's outer clothing.

Here, officer O saw R sitting alone at a restaurant and identified him as a protentional suspect in the bank robbery based on the description of the robber provided by the bank teller. The officer also observed a blue briefcase which could reasonably be connected to the robbery. Here, while officer O did not conduct a frisk initially, he may have had reasonable suspicion to detain R based on his description, proximity to the crime scene, and his possible connection to the robbery. Although a reasonable suspicion to stop R was present, the frisk would have been justifiable only if the officer had a belief that R was armed and dangerous. Thus, while the initial stop and brief questioning of R may be justified under the terry stop and frisk, the subsequent search of the briefcase was not justified and the gun discovered in it may not be admissible in court.

## **Exclusionary Rule**

Evidence from unconstional searches or seizures is excluded along with any further evidence derived from it.

Here, officer O approached Rob at the restaurant and when approaching him and ordered him to stay where he is and to place his hands where he can see them. Officer O then proceeded to search through R's briefcase and upon the search he found the gun. Once the gun was discovered, officer O told R that he was placed under arrest for bank robbery and arrested him. This did not take place until he searched his briefcase. Since the search was invalid, the exclusionary rule applies, and the gun is inadmissible as evidence in court.

### **Fruit of the Poisonous Tree**

Under this doctrine, evidence obtained as a result of an illegal search and seizure is generally inadmissible in court. However, there are exceptions to this rule 1) independent source, 2) inevitable discovery, and 3) dissipation of taint.

Here, officer O's search of R's briefcase was conducted without consent, a warrant, or any valid exception, making it an unlawful search under the 4th amendment. There are no indications that the gun was obtained through independent lawful means. The search was not inevitable because officer O did not have a warrant and the discovery of the gun was contingent on the unlawful search. Furthermore, there is no evidence suggesting that the taint of the illegal search was dissipated by factors such as time or intervening actions. The gun was simply discovered as a result of this illegal search. Therefore, the gun is considered fruit of the poisonous tree and inadmissible.

**In conclusion, the gun is likely inadmissible because the officer discovered the gun prior to placing R under arrest.**

### **The Stolen money**

#### **5th amendment & Miranda Rights**

See rule above.

R may argue that the stolen money should be suppressed because it was seized based on his statement which he contends was obtained in violation of his rights. R could argue that the statement he made about the location of the stolen money was made prior to being properly mirandized or was otherwise involuntary. However, R was advised of his miranda rights at the station and he voluntarily waived them before making the statement about the stolen money. Therefore, his statement was admissible under the 5th amendment.

#### **4th Amendment**

See rule above.

Here, R may argue that the stolen money was seized in violation of his 4th amendment. However, the search of R's apartment was conducted pursuant to a valid search warrant which was based on his statement about the stolen money. Since the warrant was signed by a judge and there is no indication that it lacked any probable cause or was otherwise defective, the search and seizure of the stolen money was lawful.

#### **Warrant Requirement**

See rule above.

Here, officers obtained a search warrant for R's apartment based on his statement about the location of the stolen money. Since the search of the house to obtain the money was conducted with a warrant, it satisfied the general warrant requirement. Therefore, the stolen money was seized under a lawful search assuming the warrant met all necessary criteria.

#### **Obtaining a Valid Warrant**

A warrant is valid if 1) there is probable cause, 2) issued by a neutral magistrate, 3) clearly indicates with particularity the place and items to be searched or seized. Any evidence obtained without a warrant will be excluded unless an exception applies.

Here, R's statement that the stolen money was in his apartment provided probable cause for the search. This info was reliable and specific and it supported the belief that evidence of the crime (stolen money) would be found at R's apartment. The warrant was issued by a judge, who is presumed to be a neutral magistrate without interest in the case and it specified R's apartment as the place to be searched and the stolen money as the items to be seized. Thus, the search of R's apartment appears to be valid because it meets all the necessary requirements under the warrant.

### **Executing a Valid Warrant**

If officers exceed the scope of a valid warrant, the search may be unconstitutional unless an exception applies. The scope of the search must align with what is described in the warrant.

Here, officer O executed the warrant to search R's apartment for the stolen money. There is no indication that officer O exceeded the scope of the warrant by searching areas not mentioned or seized items not described in the warrant. Officer O's search was limited to the apartment and the stolen money, and he did not seize unrelated items. Thus, the search of R's apartment did not exceed the scope of the warrant and the seizure of the stolen money is lawful.

**In conclusion, the stolen money is likely admissible because officer O obtained a valid search warrant for R's apartment based on his statement about the location of the money which was made after a proper Miranda warning and waiver.**



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

### Question 4

What arguments may Rob reasonably raise in support of his motions; what arguments may the prosecution reasonably raise in response and what is the likely outcome with regard to:

#### **1. Rob's statement, "Yes, it was me?"**

##### **Exclusionary Rule**

The Exclusionary Rule prevents evidence unlawfully obtained in violation of a defendant's 4th, 5th and 6th rights under the U.S. Constitution from being used and consider the evidence tainted fruit of the poisonous tree unless an exception applies.

##### **5th Amendment**

The 5th Amendment applies to the states via the 14th Amendment. The 5th Amendment guarantees the right against self incrimination, for statements, made while and during custodial interrogations without Miranda warnings.

##### **State Action**

To bring a 5th Amendment claim, there must be government action implicated in the alleged violation. Police officers, or officers of the law constitute as state action.

Here, Officer Otto, asked Rob whether he was the robber. Since Officer Otto was the officer that was investigating the recent robbery, this is sufficient state action as he is acting in his official capacity as a police officer during the questioning.

Thus, there is state action.

### **Custodial**

A person is in custody if they subjective have the belief that they are not free to leave, or have been physically restrained. The Supreme Court has held that if being held at a police station or in hand cuffs is considered in custody.

Here, Rob will try and argue that he had the subjective belief that he was not free to leave. The court will consider the totality of the circumstances in determining this. In considering the fact that Officer Otto, who was in uniform and armed, saw Rob sitting alone in a restaurant two blocks away from the Bank, and ordered Rob to "stay right where you are and keep your hands where I can see them" that the circumstances surrounding the questioning prior to the actually question being asked supports that Rob was in custody.

However, the court will consider the fact that Officer Otto merely asks Rob a question whether he was the robber and he was free to answer the question or not. Rob admits to the question "Yes it was me." The voluntary nature of this statement suggests that it was not custodial. Further, the court will look at the fact that Rob was not being restrained, or handcuffed in supporting that this was not custodial.

Thus, while this might be a close call due to the subjective belief aspect of the rule, Rob was not in custody.

### **Interrogation**

An interrogation is where the state action, here the officer asks a question that is intended to elicit an incriminating response. An incriminating response is one where it can be used against the person making the statement to implicate criminal liability.

Here, the question Officer Otto asks is whether Rob was the robber. Considering the totality of the circumstances surrounding the questioning, the fact that the Officer Otto was investigating a recent robbery upon the bank teller description, and that next to Rob there was a blue briefcase, the question suggests that it is incriminating. Rob's response to the question that he was the robber could elicit an incriminating response, that he in fact is responsible for the robbery.

Thus, there was an interrogation.

However, since it's likely that the statement was not custodial, Miranda warnings were not required.

### **Voluntary Statements**

Statements that are voluntarily made are not subject to Miranda rights and may be used against the accused by the prosecution. The statement must be knowing and intelligent and free from any undue coercion.

Here, Rob will argue that his statement "yes it was me" is not knowing or intelligent because Officer Otto had just ordered Rob to "Stay right where you are and keep your hands where I can see them." that the circumstances surrounding the questioning made it impossible for the statement to be considered voluntary.

However, this argument fails. The statement was knowingly made because there is no indication that Rob does not understand what he is saying, or that he is under any duress, or outside influence when making the statement.

Thus, it's likely that the court will consider Rob's statement voluntary.

### **Conclusion**

Therefore, the court will reject Rob's motion to suppress the statement under the 5th Amendment as it was voluntarily made.

**2. Rob's statement that he had left the stolen money in his apartment?**

**5th Amendment**

Supra.

**State Action**

Supra.

Here, Officer Otto interviewed Rob at the station and properly advised him of his Miranda rights. Since Officer Otto is acting on behalf of the police department which is a local government entity in his official capacity as a police officer, there is sufficient state action.

Thus, state action is met.

**Custodial**

Supra.

Here, the facts state that Officer Otto interviews Rob at the station which indicates that Rob was in custody. Further, since the facts leading up to Rob being at the station involved Rob being arrested, this further supports that Rob was in custody and subjectively he was not free to leave.

Thus, Rob was in custody.

**Interrogation**

Supra.

Here, Officer Otto asked Rob about the stolen money. Implying that money is stolen in questioning can elicit an incriminating response. Applying the totality of the circumstances, given the fact that someone is arrested, they are in custody and being read Miranda rights and then they are asked about stolen money, this implicates criminal activity and any affirmative answer could further implicate Rob.

Thus, there was an interrogation.

### **Miranda Warnings**

The 5th Amendment requires that Miranda warnings be properly administered where the government actor informs the alleged defendant of their right against self incrimination, right to remain silent, if they cannot afford an attorney one will be appointed to them, etc.

Here, the facts state that 2 hours later, after Officer Otto arrested Rob, Officer Otto interviewed Rob at the station and properly advised him of his Miranda rights.

### **Wavier of Rights**

A waiver of 5th Amendment rights and the right to remain silent must be knowing, intelligent and voluntary free from coercion.

Here, the facts state that Rob affirmatively waived his rights. The fact that he affirmatively waived his rights supports that he likely validly waived his rights under Miranda. As stated above, there is no indication the waiver was not knowing, nor was there any indication that the waiver was not intelligently made.

The prosecution will argue that since Officer Otto properly advised him of his Miranda rights and it's not like he was being starved for food or intimidated by physical threats that the evidence in the facts suggest that this waiver was valid.

Thus, Rob validly waived his rights.

### **Voluntary Statement**

Supra.

After valid waiver, Rob responded that he had left it (the stolen money) in his apartment. Since there is no indication that Rob was coerced to make the statement regarding the money, and that there is no evidence of physical threats or intimidation, there is no strong evidence that Rob was under coercion or forced to make the statement. Further, as stated above, there is no indication that it was not knowingly or intelligently made.

Thus, Rob's statement regarding the money is likely a voluntary statement.

### **Conclusion**

Therefore, the court will reject Rob's motion to suppress the statement under the 5th Amendment as it was voluntarily made.

## **3. The gun?**

### **4th Amendment**

The 4th Amendment applies to the states via the 14th Amendment and protects unreasonable searches and seizures by government actors in places where the person has a reasonable expectation of privacy.

### **State Action**

Supra.

Here, since Officer Otto, while under the scope of employment effectuated a warrant to search for the gun. Thus, there is sufficient state action.

### **Reasonable Expectation of Privacy**

A person must have an objective reasonable expectation of privacy (REOP) in the place searched or the thing seized. The Supreme Court has held that a person has a reasonable expectation of privacy in their home. The Supreme Court has held that places traditionally held out to the public do not constitute a reasonable expectation of privacy.

Here, the seizure of the gun took place in broad daylight, where Rob was sitting alone in a restaurant 2 blocks away from Bank. Since the restaurant is not a private place, it's a private business but open to the public, the court will likely find that he had no reasonable expectation of privacy in the restaurant.

Thus, Rob has no REOP in the public restaurant.

### **Search Warrant**

A search warrant must be obtained lawfully by a neutral and detached magistrate based on probable cause. When there is no search warrant exception to the warrant requirement apply.

### **Probable Cause**

Probable Cause is met when there is more than reasonable suspicion that crime is likely to be a foot. This cannot be mere speculation and is judged based on the totality of the circumstances.

Here, Officer Otto will claim that he had probable cause based on the fact that the bank teller informed the police that she recognized Rob, a bank customer as the robber. Since Rob was sitting alone in a restaurant and next to him was a blue briefcase, and this was 15 minutes later after the robbery, this might be enough for Officer Otto to have probable cause. Further, the fact that Officer likely has his identification description by what was provided by the Bank teller along with the fact that the statement was given thereafter, support that there is probable cause.

Thus, there is probable cause.

### **Search Incident to Lawful Arrest**

A search that is incident to lawful arrest serves as an exception to the warrant requirement. The arrest must be based on probable cause. The search can be in the arrestee's wingspan and can also if in a dwelling encompass a protective sweep.

### **Probable Cause** - See discussion above.

Here, the facts state that officer Otto told Rob he was under arrest for bank robbery, handcuffed him, and took him to the police station. The gun was found in the seizure of the briefcase that was found directly next to Rob's person. It is likely that someone being brought into custody would have their belongings seized as it is a part of their person.

Therefore, it's likely that the seizure of the briefcase was incident to lawful arrest.

### **Exclusionary Rule Exceptions**

There are exceptions to the exclusionary rule and fruit of the poisonous tree doctrine, independent source evidence, inevitable discovery, and harmless error rule.



### **Independent Source**

Evidence that can be attributed to a source independent from the violation alleged, is free from any tainting of evidence and is admissible under an exception to the fruit of the poisonous tree doctrine.

Here, the prosecution will argue that the discovery of Rob at the restaurant that led to the discovery of the gun, was due to the bank teller's description of Rob and is independent of any alleged defect in 4th or 5th amendment alleged violations.

Thus, if the court accepts this argument, it will likely allow the gun.

### **Harmless Error Rule**

The harmless error rule is an exception to the fruit of the poisonous tree doctrine and the exclusionary rule and allows evidence in if the prosecution can show that its discovery is harmless based on the totality of the circumstances.

Here, Prosecution if all else fails will claim harmless error, because they had an eyewitness describe what Rob looks like.

### **Conclusion**

Therefore, the court likely will deny Rob's motion to suppress as the evidence was lawfully obtained incident to arrest.

## **4. The stolen money?**

### **4th Amendment**

Supra.

### **State Action**

Supra.

Here, since Officer Otto, while under the scope of employment effectuated a warrant to search for the gun. Thus, there is sufficient state action.

### **Reasonable Expectation of Privacy**

A person must have an objective reasonable expectation of privacy (REOP) in the place searched or the thing seized. The Supreme Court has held that a person has a reasonable expectation of privacy in their home.

Here, the search took place in Rob's apartment, which on these facts he was using for his habitation. In conjunction with the Supreme Court, Rob will argue that he has a reasonable expectation of privacy in his apartment and that Officer Otto must obtain a search warrant based on probable cause to enter, absent any exceptions. Thus, Rob has a REOP in his apartment.

### **Search Warrant**

A search warrant must be obtained lawfully by a neutral and detached magistrate based on probable cause.

### **Probable Cause**

Probable Cause is met when there is more than reasonable suspicion that crime is likely to be a foot. This cannot be mere speculation and is judged based on the totality of the circumstances.

Here, Officer Otto used Rob's confession at the station and made it in the form

of an affidavit to obtain a search warrant for Rob's apartment. As discussed above, since the Officer obtained a waiver to rights, that was knowing and intelligent, and that the search warrant is based on an affidavit that was validly obtained by Officer Otto. It's likely a court will find that there was probable cause to search the home.

Thus, there is probable cause.

### **Neutral and Detached Magistrate** *Judge Signed the Warrant*

Here, the fact that the judge signed the warrant indicates that it was likely obtained by a neutral and detached magistrate. Absent other facts, it can be assumed that there are no defects in the search warrant.

Therefore, the search warrant was validly obtained and officer Otto properly executed the warrant in seizing the stolen money.

Should the Court find any defects in the search warrant, the prosecution will argue that exceptions apply.

### **Exceptions to the Fruit of the Poisonous Tree Doctrine**

There are exceptions to the exclusionary rule and fruit of the poisonous tree doctrine, independent source evidence, inevitable discovery, and harmless error rule.

#### **Independent Source**

Supra.

Here, Prosecution will argue that should there be any defects in the evidence that the evidence was lawfully obtained due to Rob's confession and that since the confession was voluntary, that is independent of any constitutional violation. However, Prosecution may have trouble succeeding with this argument and

likely will pursue harmless error doctrine.

### **Harmless Error**

Supra.

Here, Prosecution if all else fails will claim harmless error, because they had an eyewitness describe what Rob looks like.

### **Conclusion**

Therefore, the court will likely deny Rob's motion to suppress the evidence.

## **QUESTION 2**

Tammy, who recently died, executed a valid typewritten will before her death containing the following Articles:

1. I give \$10,000 to my niece, Natalie.
2. I give my coin collection to my friend, Frank.
3. I give the remainder of my estate to the Northern Trust Company (NTC), in trust, to establish a foundation dedicated to finding a cure for RG syndrome, a disease that impairs a person's eyesight.

When the will was offered for probate, it appeared that after executing the will, Tammy crossed out the sum "\$10,000" in Article 1 and wrote above it the number "\$20,000," her initials and the date.

In addition to her coins, Tammy had valuable medals which she kept in an album with her coins. Most coin collectors do not consider medals to be coins. The album included a typewritten note signed by Tammy which stated that she wanted Frank to take care of her album after she was gone.

A complete and inexpensive cure was found for RG syndrome soon after Tammy died. NTC petitioned the court to change the purpose of the trust to establish a scholarship at a local ophthalmology school.

1. How much money, if any, will Natalie receive? Discuss.
2. Will Frank inherit the medals? Discuss.
3. How is the court likely to rule on NTC's petition? Discuss.

Answer according to California law.

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

### **1. Natalie Money**

#### **Valid Attested Will**

A will is a document that a person creates instructing how they wish their property to be disposed of upon their death. To be valid, a testator must have intent to create a will, capacity to create a will (at least 18 and of sound mind), and must comply with the proper formalities for the type of will. In California, a valid attested will must be written, signed by the testator, and witnessed by at least two disinterested parties.

Here, Tammy created a will. The facts say that the will was valid so it can be assumed she was of sound mind, over 18, and had the requisite intent. She also signed the will, and since it was typewritten (as opposed to a handwritten holographic will), the facts suggest it was properly witnessed.

Therefore, Tammy's original will is a valid attested will.

#### **Physical Revocation**

A testator may partially or totally revoke a will. A full revocation will revoke the entire will, while a partial revocation will only revoke part of a will. A will may be revoked by (1) creating a new will that clearly intends to replace the old will, (2) executing a codicil that partially revokes and revises the will, or (3) physical revocation of the will. Physical revocation occurs when a person tears, destroys, marks up, or crosses out terms on the will physically.

Here, Tammy did not create a new will or codicil when she wanted to change the gift to Natalie from \$10,000 to \$20,000. However, she did physically make a mark on the will crossing out the \$10,000 gift. Therefore, Natalie physically revoked Article 1 of the will gifting \$10,000 to Natalie. As such, the original gift was stricken from the will and, under the traditional rule, Natalie would receive nothing unless the new gift of \$20,000 was validly executed.

#### **Modification: Holographic Will**

A holographic will is a handwritten will. In California, handwritten wills are recognized as valid if the testator has the requisite capacity and intent to make a will, so long as the will is signed by the testator and all of the material terms of the will are handwritten. For executory purposes, a signature can include initials or any marking so long as the testator intends it to be a signature.

Here, Tammy attempted to modify the terms of the will by crossing out the term \$10,000 in her Article 1 gift to Natalie. She then handwrote about it \$20,000 and initialed and dated the change. There are no facts to suggest Tammy lacked capacity or intent when she did this. Here, the only way this modification will work is if it creates a valid holographic will or at least a partial one. Here, Tammy's signature or her initials is sufficient to form a signature. However, all of the material terms are not handwritten, because the only term in Article 1 that is handwritten is "\$20,000" but the recipient "my niece, Natalie" is not. Further, the rest of the will is typed as well. Therefore, the modification will not create a valid holographic will.

### Holographic Codicil

A codicil is a supplement or addition to a will that is written after the will, references the will, and republishes it as of the date of the codicil. It requires the same executory elements of a will and may be holographic or typewritten. A typewritten will may be modified with a holographic codicil and vice versa.

Here, Natalie may argue that the modification should be read as a codicil. It is not really a separate document, though. Additionally, it will fail for the same reason the handwritten change above failed because all of the material terms must be handwritten for a valid holographic codicil to be created, and here they are not. Therefore, the change is not a valid holographic codicil and Natalie cannot receive \$20,000 under this theory.

### Dependent Relative Revocation

Generally, probate courts seek to interpret wills by looking at the intent of the testator. In California, courts will revive revoked parts of a will when it is clear that the revocation was due to a mistake of fact or law on the part of the testator. If a court decides that the testator's intent would be better served by reviving the old term, rather than striking the failed gift completely, they will reinstate it, particularly when the gift is to a family member.

Here, it is clear that Tammy was mistaken in believing that crossing out \$10,000, handwriting \$20,000, and signing and initialing it was a valid legal way to change the will and increase the gift to Natalie. It is also obvious that she wanted to leave money to Natalie, she did not cross out \$10,000 to give her less but to give her more. Therefore, even though the increased gift of \$20,000 fails as an invalid holographic execution, courts will likely revive the initial \$10,000 gift under the dependent relative revocation theory since Natalie is Tammy's niece.

## Conclusion

Therefore, Natalie will receive \$10,000.

## **2. Frank Inheritance of Medals**

### Plain Language / Ambiguous Terms

Generally, probate courts interpret will with a goal of recognizing the testator's intent, and do so using plain meaning. However, courts may admit extrinsic evidence of customs when determining plain meaning where it is ambiguous.

Here, Tammy's will stated that she gave her "coin collection" to Frank. Frank will argue that he should inherit the medals as well because while they are not coins, Tammy kept them in the same album as her coin collection, so her intent was likely that he have them too. However, because there is ambiguity about whether the coin collection included the medals, courts will look at extrinsic evidence to see whether coin collectors generally consider medals to be part of a coin collection. Here, it states that most coin collectors do not. Therefore, a court may conclude that the valuable medals are not part of Tammy's "coin collection" and should not go to Frank.

### Incorporation by Reference: Tammy's Note

Generally, extrinsic evidence that is not duly executed is not admissible to contradict the terms of a will. However, other documents may be admitted if they incorporate the will by reference. To be incorporated by reference, the document must reference the will, and vice versa. Additionally, a note incorporated by reference must be executed prior to or at the same time as the will, unless it is a list of personal property.

Here, the note will not be admitted as extrinsic evidence. Further, the will makes no reference of the note, and the note stating that Tammy wished Frank to take care of the "album" does not refer to the will. Therefore, the note will not be incorporated by reference.

### Valid Attested Will

See rule above. Here, Frank may argue that the note Tammy left is a valid attested will. It is true she evidences some testamentary intent since she says "when I'm gone" and states her wish for the album, and there are no facts suggesting she lacks capacity. However, while the note is signed, since it is typewritten it must be attested and witnessed, and here it was not. Therefore, it is likely that the note will not be



read as a will.

### Conclusion

While Frank will inherit the coin collection, he will probably not inherit the valuable medals.

## **3. NTC Petition**

### Testamentary Trust

A trust is a way of holding assets that splits legal and equitable title to the assets. Generally, it requires a settlor (who gives the trust money), a trustee (who manages the trust and holds legal title), an ascertainable beneficiary (who gets the trust assets and holds equitable title), trust res (the property in the trust), and trust purpose. A trust may be created through a will as a way of holding and giving a gift.

#### *Settlor*

The settlor must intend to create the trust. Here, Tammy's will showed her intent to create a trust when she said she was giving the remainder of her estate in trust.

#### *Trustee*

Here, she named Northern Trust Company as a trustee to manage the trust.

#### *Beneficiary*

Here, the beneficiary is a foundation that RTC is to establish to cure RG.

#### *Trust Res*

Here, the trust is funded by the remainder of Tammy's estate after the gifts to Natalie and Frank.

#### *Purpose*

Here, the purpose of the trust is clear, to establish a foundation to cure RG syndrome which impairs sight.

Therefore, there is a valid testamentary trust.

### Charitable Trust

A charitable trust is a trust that is established to benefit a specific charity. It requires the formation of a valid trust including intent to create a trust and some charitable purpose either to a specific charity, or to some specific group of individuals, or some specific charitable purpose beyond general charity.

Here, as discussed, Tammy left the remainder of her estate in a valid trust and intended to create the trust when she named NTC as the trustee and instructed them to establish a foundation. There is a charitable purpose because she specifically wanted to create a foundation to cure RG syndrome. Therefore, even though the foundation does not exist yet, the charitable purpose is definite enough to create a valid charitable trust.

### Trust Termination

Generally, a trust terminates automatically when its purpose is realized or complete. Here, the purpose of Tammy's trust was to create a foundation to find a cure for RG syndrome. However, the facts state that right after Tammy died, a complete and inexpensive cure for RG syndrome was found. Therefore, there is not really a need for this purpose to be achieved any longer. If the cure found were expensive, then there might arguably be a need for a less expensive one, and likewise if a more effective cure was needed, but here it is not. Therefore, generally the trust would automatically terminate right after this cure was found, right after Tammy died.

### Cy Pres Doctrine

The Cy Pres doctrine operates to save charitable trusts that fail by substituting a similar purpose. As probate courts generally want to effectuate the wishes of the testator, they will often seek an alternate charity that serves a similar purpose. The purpose must be sufficiently similar. A classic example is if someone leaves a testamentary trust to a church that they do not realize has closed, often the court will find a similar church.

Here, NTC will argue that the court should use the cy pres doctrine to redirect the trust to a local scholarship at an ophthalmology school. They will argue that Tammy's purpose in curing RG syndrome was to benefit eye health, and ophthalmologists cure eyes, so creating a scholarship to ophthalmology school will serve a similar purpose. However, arguably this purpose is not similar, though both are connected to eyes. It is unclear whether Tammy had a personal connection to RG syndrome, which could explain her wanting the money to go to that specifically. It would arguably make more sense for NTC to redirect the money toward curing a different disease that impairs eyesight, rather than creating an educational scholarship which is pretty different. Therefore, while the cy pres doctrine makes sense to apply in this case, NTC's specific petition to create an ophthalmology scholarship may fail.

### Conclusion

Therefore, NTC's petition may be unsuccessful and the court may need to find a better more similar charitable purpose to reflect Tammy's intent.

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

### **1). Natalie**

#### **Validity of Will**

A valid will requires that the person making the will has the proper capacity to devise their estate, that certain will formalities are executed, and that there was no undue influence in creating the will.

#### **Capacity**

Testamentary capacity is found if: (i) the individual knows of the nature of the testamentary nature of the act (i.e. the act of distributing property), (ii) the nature and extent of their property, (iii) as well as the natural objects of their bounty (those receiving the property from the Testator).

Here, we are told the will execution was valid, therefore we can assume that T had the necessary intent and capacity to make a will and there was no undue influence in inducing all or part of the will.

Formal Attested Will:

Wills can either be formal attested wills or holographic (handwritten) wills. The formalities for a formal attested will is that the will is signed by the Testator in the presence of two uninterested witnesses who understand the document to be a will and those two witnesses later sign the document during the lifetime of the testator.

Here, Tammy (T), typed her will instead handwriting. Thus, T's will was an attested will. We are told that the will is valid, thus T is the witnesses were uninterested and signed during T's lifetime.

#### **Revocation by Physical Act**

A will, or provision of a will, can be revoked in a myriad of ways, including revocation by physical act. A revocation by physical act occurs when destroys the physical copy of the will or strikes or crosses out certain provisions.

Here, it appears that T crossed out the provision in the original will regarding N's gift of \$10,000. Because Tammy crossed out the provision the provision with respect to N was revoked. N will argue that the \$10,000 provision was crossed out because T was attempting to modify her will, as evident by the fact that T also wrote \$20,000

above the stricken \$10,000, and signed and dated the will. Whether N gets \$0, \$10,000, or \$20,000 will depend upon whether the probate court finds that the attempted modification to the will regarding the gift of \$20,000 was proper. If the modification (i.e. codicil, discussed below) was not valid, then by physical revocation, N may not receive anything, unless by Dependent Relative Revival, the revocation of the \$10,000 is revived by showing that the testator would not have revoked the original will provision had the T known that the subsequent codicil was invalid.

### Codicil

A codicil is an amendment to a will and has the same formality requirements as a will. Just like a will, a codicil can be attested or holographic. The requirements for a holographic will or codicil are that the material provisions are handwritten and that the document is signed by the testator. Whether the holographic will or codicil is dated is only relevant if there is another will and there is a question as to which will was executed last.

Here, T both signed and dated the will after crosses out the \$10,000 provision and writing "\$20,000". There is a question as to whether merely writing "\$20,000" is enough to meet the requirements for a holographic will. Material terms must be in writing, here thing in writing is the dollar amount N is to receive, but not that N is the beneficiary or recipient of the gift. N may argue that the amount a person is to receive is material, and that it can be easily ascertained that she is the recipient because T only crossed out "\$10,000" from the will but still left the rest of the provision intact. Ultimately, it's a close call as to whether the "\$20,000" handwriting was a valid codicil. Given that T's intent was clearly to give N the \$20,000 a court might find that the codicil was valid. However, assuming the codicil is found to not be valid, the revocation of the "\$10,000" gift may be revived (discussed below).

### Dependent Relative Revival (DRR)

DRR is the presumption that a prior revoked will is revived if the testator would not have revoked the will or provision of the will but for the mistaken belief that a subsequent will was valid. Here, T attempted to modify the gift to her niece, N, after the will was created. As discussed above, the codicil (amendment) is likely valid, however in the event the codicil is invalid, then N would need to prove that T would not have revoked the gift of \$10,000 but for the mistaken belief that T's gift of \$20,000 was valid.

In California, DRR is not a presumption that is automatically established when a testator revokes a will before unknowingly creating an invalid subsequent will. The testator's intent must be proved.

Here, T handwrote "\$20,000" above the gift to N and signed and dated the document. Not only does the handwriting indicate she wanted to give N a larger gift,

but it also demonstrates that T had testamentary intent because she signed and dated the document as if she was attempting to execute a holographic codicil/will. Thus, even assuming the codicil was not properly executed (that a probate court finds that a mere dollar amount is not sufficiently detailed enough to constitute a material term), N would still likely be able to prove that the prior gift of \$10,000 was within the T's intent and that the gift was revived.

### Conclusion

Natalie is likely to receive the \$20,000 because the codicil was likely properly executed and the testator's intent was clear regarding T's desire for N to get \$20,000. Even if the codicil is invalid, N will likely receive the original gift of \$10,000 because as discussed above, the stricken provision was likely revived by evidence of T's clear intent to devise a gift to N at her death.

## **2). Frank**

Frank was left T's coin collection. The issue is whether the provision in the will includes the medals that were stored along with T's coins in the same album book. The existence of the typewritten note signed by T in the album may become part of the will if it meets the requirements for a valid will/codicil, or is shown to be part of the will by integration, incorporation by reference, or a list of tangible property (allowable in CA).

### Valid Codicil

See rule above. Wills or codicils can either be attested or holographic.

Here, T typed the note so it is not a holographic will/codicil and therefore must comply with the formalities required for an attested will. T signed the typewritten note but T did not sign the note in the presence of other witnesses nor did any witnesses sign the note. Thus the note is not a valid will or codicil.

In order for the note in the album to be considered part of the will the court could apply the doctrine of integration, incorporation by reference, or list of tangible property.

### Integration

Integration allows the probate court to consider other writings as part of the original will if: (i) the writing existed at the time of the will execution, (ii) the writing was present at the time of the will execution, (iii) and but for some mistaken, the writing was intended to be part of the same document (such as the papers being stapled together at one point before being separated, the continuation of writing such as

where one page ends mid sentence and the omitted page resumes that sentence, etc.)

Here, we do not know whether the typewritten note existed at the time of the will execution because no dates are provided. Further, even if we did know the typewritten note existed prior, there is nothing that indicates the note was meant to be attached to the will. There is no continuing page numbers or sentences. In fact, each writing appears to be separately written/ drafted. Thus, it is unlikely that the typewritten note would be integrated into the will.

### Incorporation by Reference

In order for a document to be considered along with the will the document must (i) exist at the time of the will execution and (ii) be sufficiently described in the will.

As discussed above, there is nothing to indicate the note existed at the time T made her original will. Even if the note did exist prior, the will does not mention the note at all and therefore incorporation by reference is inapplicable.

### List of Tangible Property

In California a testator may create a separate list of tangible property in a separate document from the will assuming that the gift is not valued at over \$25,000 and that the will sufficiently describes that the testator has or will prepare such a list. Unlike for integration or incorporation, the list need not exist or be present at the time of execution.

Here, the will did not describe a separate list of property and therefore, the note does not meet the requirements for a valid list of tangible property.

### Interpreting the Terms of the Will

The probate court tries to distribute the testator's estate according to the wishes of the testator. However, because the testator is dead, the court is also left with what is written in the will and thus it can be difficult to ascertain the testator's meaning of certain terms.

Here, the will states "I leave my coin collection to my friend, Frank". The issue is whether T meant for "coin collection" to include the medals. Frank might argue that the fact that the coin collection and medals were stored together in the same album book indicated that it was T's intent that he receive both. However, as stated by the fact pattern, the common meaning of "coin collection" as understood by most coin collectors, does not include medals. Frank is likely to argue that term is ambiguous

and therefore the court should look beyond the four corners of the will and look to the note in the album to determine testator intent. Frank will argue that the letter kept in the album book demonstrates the testator's meaning and that the community meaning of coin collectors does not apply. However, given T's status as a coin collector, it is likely she would know what "coin collection" meant and therefore, it is unlikely Frank will be able to get the medals.

### **3). NTC**

#### Valid Trust

Trust requires settlor's intent, res (property), ascertainable beneficiary, and a legal purpose. A court can supply a trustee. A trust created in a will is a testamentary trust. A trust whose purpose is charitable is a charitable trust and the beneficiaries need not be specifically identified but instead can be a class or group of unidentified people.

Here, T's settlor intent is apparent as she created the trust in her will. NTC served as trustee and the trust was created for the charitable purpose of finding a cure for RG syndrome, a disease that affected the eyes. Therefore, the trust was valid.

The issue is whether the trust is terminated after RG syndrome is cured.

#### Trust termination

Trust termination occurs when the purpose of the trust has been fulfilled. Here, the trust was created to combat RG Syndrome, however, the disease was subsequently cured soon after T's death. Thus, the purpose of the trust was fulfilled.

#### *Cy Press Doctrine*

However, when a charitable trust's purpose has been fulfilled the trust does not automatically terminate. The cy press doctrine allows a trustee or beneficiary of a charitable trust to petition the court to modify the charitable purpose if it is in line with the charitable intent of the testator.

Here, the T wanted to fund a cure for RG Syndrome, a disease of the eyes. NTC has petitioned the court to change the purpose of the trust to establish a scholarship at a local ophthalmology school. NTC is likely to argue that the charitable purpose is similar because RG Syndrome affects the eyes and a scholarship for a local ophthalmology school would also further the medical care of people struggling with problems relating to their eyesight. It might be argued that while ophthalmology involves eye care, a scholarship for a school is different than funding a cure for a disease. It may be argued that had NTC petitioned the court to establish a



foundation to fund the cure of another disease impacting eyesight that would be more in line with T's intent. The fact pattern is silent with respect with T's desire to fund a disease for RG Syndrome. If T was passionate about helping those with sight problems generally this would cut in favor of NTC's petition. However, if T had some sort of specific and personal connection to RG syndrome or curing diseases this would perhaps cut against NTC's petition.

Ultimately, because both purposes relate to further the care and treatment of those with eyesight problems it is likely that the court would grant NTC's petition and change the purpose of the trust according to the cy press doctrine.

### **QUESTION 3**

Allison bought a house and the lot on which it sits (the house) with the proceeds of a mortgage loan made by New Lending Corp. (Lender). Allison intended to repay the loan when she resold the house. To improve ventilation in the kitchen, Allison installed an air conditioning unit screwed to a bracket mounted through an exterior wall.

Impressed with Allison's improvements, Barry offered to buy the house at market price before Allison listed it for sale. Allison and Barry agreed on the terms and quickly finalized the sale of the house. Due to this haste, however, Lender did not record its mortgage until after Barry had recorded his deed. As a result, Lender's mortgage was not satisfied from the proceeds of the sale as planned.

Soon thereafter, Barry was able to sell the house at a profit to Carlos. Barry and Carlos did not actually know of Lender's mortgage when their sale of the house was finalized, although the mortgage had been recorded weeks earlier. Barry gave Carlos a general warranty deed.

The day before Barry's sale of the house to Carlos was finalized, Barry removed the air conditioning unit. Nothing was said about the unit in the parties' contract of sale.

Shortly after Carlos took possession of the house, Lender commenced an action against Carlos for repayment of the mortgage.

The house is located in a jurisdiction that has a "race-notice" recording act and indexes title documents by parcel numbers assigned to each lot.

1. Did Carlos take title to the house subject to Lender's mortgage? Discuss.
2. What claim(s), if any, does Carlos have against Barry under the general warranty deed? Discuss.
3. Is Barry liable to Carlos for the value of the air conditioning unit? Discuss.

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

1. Is Carlos's title subject to Lender's mortgage?

When someone take property that is encumbered by a mortgage, they generally take title subject to the mortgage unless it expressly states they assume the mortgage as part of receipt of the title. However, a person who pays value for the property without notice of the mortgage is a bona fide purchaser (BFP) and will not take the property subject to the mortgage.

Here, Carlos paid value for the property from Barry who paid value for the property from Allison (the original borrower).

a) Did Barry take title subject to the mortgage?

Here, Barry paid Allison value for the property. Thus, he would be a BFP and take the property without the mortgage only if he can show he had no notice of Allison's mortgage from Lender. Notice can either be actual notice (person knows of the encumbrance), inquiry notice (the circumstances create a situation where the person should investigate further), or constructive notice (encumbrance is recorded).

The facts state that Barry did not know of the mortgage so he did not have actual notice. The facts are not clear whether or not Barry would know Allison's financial status to inquire how she acquired the property and whether a mortgage would have been placed on it (i.e., no inquiry notice). And Barry took the property before Lender recorded the mortgage--no constructive notice. Therefore, Barry had no notice of the mortgage when he took the property. Since he paid value for the property, Barry was a BFP.

The jurisdiction has a race-notice statute. In a race-notice statute, the last BFP (purchaser for value without notice) who records wins. Here, the facts state that Lender recorded the mortgage only after they learned of the sale to Barry and after Barry recorded. Since Barry is a BFP who recorded first, he wins and take the property absent the mortgage on the property.

b) Did Carlos nonetheless have appropriate notice of the mortgage when he purchased?

By the time Carlos purchased the property from Barry, Lender had recorded the deed. Since title documents are documented by parcel, Carlos's title search on the parcel number would show that Lender recorded the mortgage during Barry's ownership time. Therefore, although the facts state that Carlos did not actually know of the mortgage (actual notice) or reason to further investigate (inquiry notice), he

was likely on constructive notice of the Lender's mortgage.

However, Carlos will be saved by the Shelter Rule. Under the shelter rule, subsequent owner falls into the shoes of the one whom they take title from for the purposes of clear title. Here, since Carlos took the property from Barry, the shelter rule flows Barry's status as a BFP down to Carlos. Accordingly, Carlos too takes the property absent the Lender's mortgage.

Therefore, pursuant to the shelter rule, Carlos did not take the property subject to Lender's mortgage.

## 2. Carlos's claims against Barry under the warranty deed?

Unlike a quitclaim deed which contains no warranties to the conveyed deed, a warranty deed comes with 3 present warranties (seisin, right to convey, against encumbrances) and 3 future warranties (quiet enjoyment, to defend, and further assurances). Specific to potential claims by Carlos against Barry would be the warranty against encumbrances (i.e., the property being conveyed has no undisclosed encumbrances) and the warranty of quiet enjoyment (the owner will not be disturbed by someone with superior right).

### a) Against encumbrances

A conveyer is liable under the warranty against encumbrances if the property being conveyed has any encumbrance against it that has not been disclosed to the buyer. Since this is a present warranty, this warranty is breached, if at all, only at the time of conveyance.

Here, by the time Barry conveyed the property to Carlos, Lender had recorded the mortgage potentially placing the encumbrance on the property. However, as discussed above, since Barry was a BFP (took the property for value without notice of Lender's mortgage) and recorded first, he did not take the property subject to the mortgage and thus there was no encumbrance.

Barry did not breach the warranty against encumbrances.

### b) Quiet enjoyment

The covenant of quiet enjoyment is a future warranty which promises the buyer that someone with superior title to the property will not come along. Since this is a future warranty, this is breached, if at all, only if someone with superior title comes along AND successfully establishes that they had superior title.

Here, Lender is claiming to have a mortgage against the property which potentially could make Carlos's property liable to Lender. However, as discussed above, Lender will not be successful in establishing Carlos has the title subject to Lender's mortgage.

Note, Barry may have been liable for not providing marketable title at the time he conveyed to Carlos. However, the covenant of marketable title is an implied warranty in the contract which merges into the deed once title is conveyed. Thus, Barry has no liability for the breach of marketable title.

Also, under the future warranty to defend against third parties, Barry is obligated to help defend Carlos' superior title to Lender. However, the facts do not show whether or not Barry has ditched Carlos and left him to defend on his own (in which case he is in breach) or whether he's honoring his commitment to help Carlos defend his superior title.

Therefore, since Lender will be unsuccessful in establish Carlos has title subject to the mortgage, Barry has not breached the covenant of quiet enjoyment.

In conclusion, Barry will not be liable to Carlos for any breaches to the general warranty deed.

### 3. Is Barry liable for value of the air conditioning unit?

Whether or not Barry is liable to Carlos for removing the air conditioning unit depends on whether or not the air conditioning unit is considered a fixture or personal property. Generally, personal property in the home is not part of a contract for sale of land unless the contract specifically identifies such. However, fixtures usually are implied to be part of the contract regardless if they are specifically delineated in the contract. When deciding whether something is a fixture, courts will consider how much the item is integrated into the property and what kind of damage would result in its removal.

For Barry to be liable, Carlos has the burden to show that the air conditioning unit was a fixture that is impliedly part of the property and unremovable.

Here, Allison installed the air conditioning unit prior to her selling the house to Barry. In fact, it was her work in installing the air conditioning unit that impressed Barry enough to motivate him to buy the house. Further, the facts tell us that Allison "installed" the air conditioning unit using brackets secured through the external wall as opposed to simply putting an external air condition unit in the kitchen (simpler low-tech and less evasive). In addition, since the unit was secured to brackets through the external wall, there is probably a great deal of damage left behind by the unit's removal. Finally, the purpose for Allison putting the air conditioning unit in the

kitchen was to improve ventilation. While the facts do not state whether or not this was part of what intrigued Carlos to the property or was material in his decision to purchase it from Barry, the fact that Barry paid market value from Allison and Carlos paid more than Barry (i.e., Barry made a profit), it is likely the increased ventilation in the kitchen is not trivial.

Therefore, the air conditioning unit is a non-removable fixture and Barry is liable to Carlos for its removal.

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

#### **1. Did Carlos take title to the house subject to Lender's mortgage? Discuss.**

##### **Recording Statutes**

A jurisdiction's recording statutes are enacted to assist in determining the priority of interest asserted against a land. Under a race notice recording act, a subsequent bona fide purchaser of a land without notice of the other party's interest would take the property free of the interest if they had no notice of the adverse interest and they had recorded their interest first. Notice can be deemed through actual knowledge, inquiry notice, and recording notice. Actual knowledge as its name is present if the buyer actually knew of the other party's interest. Inquiry notice occurs when a reasonable inspection of the land would reveal the other party's interest. Recording notice occurs when the other party's interest was recorded and would be revealed if investigated.

Here, Carlos is a bona fide purchaser of the land. Carlos lacks actual knowledge of New Lending Corp's interest. Carlos lacked inquiry notice as well as an inspection of the land in person would not have disclosed the fact that New Lending Corp had an interest on the land, as Allison and Barry occupied the land and not New Lending Corp. However, New Lending Corp, as shown through the facts, had recorded its mortgage interest on the land weeks before the sale to Carlos was finalized. Hence, Carlos had record notice, as an inspection of the land's recordings would have revealed New Lending Corp's interest. However, Carlos can assert the defense of the shelter rule.

##### **Defense - Shelter Rule**

Under the Shelter Rule, a bona fide purchaser of value of a seller's property would receive protection against recording acts that the immediate seller was protected under.

Here, when Barry purchased the property from Allison, he had no notice at all. Barry lacked actual knowledge of New Lending Corp's interest, an inspection of the land would not have disclosed the interest, and during that time, New Lending Corp had yet to record its interest on the land. Then, Barry offered to purchase the house after being impressed with Allison's improvements and the two of them finalized the sale of the house in a haste. In fact, Barry recorded his deed first before Lender recorded its mortgage. Barry would succeed under a race notice act, as he was a bona fide purchaser of value, he had no notice at all of New Lending Corp's interest, and he recorded his deed before New Lending Corp did. As Barry's subsequent bona fide purchase of value of the property, Carlos would receive protection under the Shelter

rule.

Therefore, Carlos takes title to the house free of New Lending Corp's mortgage due to the protection under the Shelter Rule.

## **Repayment of Mortgage**

During a sale of property which has been encumbered by a mortgage of a lender, by default, the buyer takes the property "subject to" the mortgage. Taking "subject to" the mortgage means that the buyer would not be personally liable for the payment of the mortgage. The mortgage would merely constitute a cloud over the property's title but would not interfere with the buyer's possession or ownership interest. However, if the buyer "assumes" the mortgage when purchasing the property, the buyer would become primarily liable for the repayment whereas the seller becomes secondarily liable.

Here, Allison was the one who had loaned the money from New Lending Corp when purchasing the property. Neither did Barry nor Carlos assumed the mortgage when they purchased the property. In fact, both of them did not have the knowledge of the mortgage.

Therefore, neither can Barry nor Carlos be liable for the mortgage repayment as they did not expressly assume the mortgage during their purchase.

## **2. What claim(s), if any, does Carlos have against Barry under the general warranty deed? Discuss.**

### **General Warranty Deed**

A general warranty deed provides the buyer with the broadest protection possible as it includes all six covenants which contains three present covenants and three future covenants. The present covenants includes: the covenant of seisin, the covenant of the right to convey, and the covenant of against encumbrances. The future covenants includes: the covenant of further assurances, the covenant of quiet enjoyment and the covenant of warranty.

### **Covenant of Seisin**

Under the covenant of seisin, the seller guarantees that he has title under the property to convey the property. Here, Barry was indeed possessor of title of the land as he had purchased it from Allison, hence he has title under the property.



Therefore, Barry did not breach the covenant of seisin.

### **Covenant of the Right to Convey**

Under the covenant of the right to convey, the seller guarantees that he has the right to convey the land. Here, Barry was indeed the owner of the land and did not co-own it with anyone else nor was he subjected to restrictions of sale. Therefore Barry did not breach the right to convey.

### **Covenant of Against Encumbrances**

Under the covenant of against encumbrances, the seller guarantees that there are no encumbrances imposed upon the property. Encumbrances include zoning ordinances, mortgages, rights of first refusal, etc... Here, Carlos is likely to assert that Barry had violated the covenant against encumbrances as there was a mortgage on the land. However, as analyzed above, the mortgage of New Lending Corp merely causes a cloud on the title, Carlos is not personally liable for the payment of the mortgage. Therefore, it is unlikely for Carlos to be able to succeed on a claim that Barry breached the covenant against encumbrances.

### **Covenant of Further Assurance**

Under the covenant of further assurances, the seller guarantees and further assures the buyer that he would convey title. Here, there are no facts indicating that Barry refuses to convey title to the property. Therefore, Barry is unlikely to be found in breach of the covenant of further assurances.

### **Covenant of Quiet Enjoyment**

Under the covenant of quiet enjoyment, the seller guarantees that the buyer would be able to enjoy his property without interference from the seller. Here, there are no facts indicated that Barry is interfering with Carlos' enjoyment and use of the property. Therefore, Barry is unlikely to be found in breach of the covenant of quiet enjoyment.

### **Covenant of Warranty**

Under the covenant of warranty, the seller guarantees that he would utilize good faith in defending the buyer against any valid claims brought against the buyer by third parties. As analyzed above, despite the property has a cloud due to New Lending Corp's mortgage, Carlos is not personally liable for the repayment, hence New Lending Corp's action against Carlos is futile and not of a valid basis which means that Barry is under no duty to defend Carlos against. Therefore, Barry is unlikely to be found in breach of the covenant of warranty.

Overall, it is unlikely for Carlos to be able to assert any claims against Barry under general warranty deed.

### **3. Is Barry liable to Carlos for the value of the air conditioning unit? Discuss.**

#### **Fixture**

A fixture is an object that has been attached to the real property in a way that it has merged with the real property and is deemed to be a part of it. In sales of real property, a fixture, by default, is deemed to be a part of the property sold. The fixture cannot be removed absent of specific stipulations within the property agreement, unless it is a trade fixture, of special meaning, etc...

Here, there is an air conditioning unit screwed to a bracket mounted through an exterior wall, that was originally installed by Allison to improve air ventilation in the kitchen. Barry removed the air conditioning unit the day before his sale to Carlos was finalized. An air conditioning unit is commonly found within houses, and is normally deemed as part of the houses. In addition, the facts showed that it is screwed to a bracket mounted through an exterior wall, it is clearly not an object that is separable easily. Barry is likely to argue that he has the right to remove the air conditioning unit, especially when he did so before the sale to Carlos was finalized. However, Carlos can argue that the air conditioning unit is clearly a fixture plus the fact that it was removed only the day before the sale finalization means that his visits to the house was all made under the impression that the air conditioning unit would be available after sale as it was during the viewing of the house. Plus, the contract of sale between the two of them made no mention at all about the air conditioning unit, hence the default rule that fixtures follows the property during sale should be adhered.

Therefore, Barry is likely to be found liable to Carlos for the value of the air conditioning unit.

## **QUESTION 4**

Phil worked as a science teacher at City High. His career goal was to become head of the science department there. He believed that getting experience as a school administrator would help him to obtain his goal. In March 2023, Phil learned that Delta High, a private school, had a temporary one-year opening for head of its science department next school year, running from August 2023 to June 2024. Phil immediately applied. A week later the principal of Delta High telephoned Phil and offered him the job at a salary of \$80,000. Phil said, "I'm only interested if I can be head of the science department." The principal responded, "Perfect! Our current head will be on leave. The job is half-time teaching and half-time administration." Phil said, "I accept" and the principal replied, "Great! I'll prepare the paperwork." Phil then told City High he was taking a one-year leave of absence next school year.

In May 2023, Phil received a letter from Delta High welcoming him onboard and asking him to complete a form for payroll purposes. The form, signed by the principal, was labeled "Temporary Employment" and included Phil's name, the employment duration and salary of \$80,000. The form stated nothing about the specific job title or duties. Instead, it stated: "The duties of all employees at Delta High are determined at the discretion of the School Board or its principal and are subject to change." Phil was asked to fill in his social security number and to sign and return the form, which he timely did.

When Phil reported to work at Delta High in August 2023, the principal apologized and told him, "Our science department head cancelled her planned leave. We'll still pay you the full salary, but you will only be teaching." Phil responded, "I told you I would only do the job if I could head the science department," and left the school. Phil then learned that City High had already hired a replacement for him for the school year, but he was offered a coaching job at a \$40,000 salary. Frustrated, Phil declined and took a one-year position as a gardener with a \$30,000 salary. A few months later, Phil sued Delta High for breach of contract.

1. Is Phil likely to prevail in his suit against Delta High? Discuss.
2. What remedies, if any, would likely be available to Phil? Discuss.

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

##### **1. P V. D**

##### **Applicable Law**

The UCC applies to all sales of goods, which are moveable, tangible items. Common law applies to all service contracts, contracts for real property, and employment contracts.

The contract at issue is an employment contract. Therefore, CL will apply.

##### **Formation**

In order for a valid contract to be formed, there must be an offer, acceptance, and consideration.

##### **Offer**

An offer is an objective manifestation of the offeror of a willingness to enter into a contract. A contract must be communicated to the offeree, and must have certain and definite terms, and include the essential elements of the deal.

Here, the principal of D likely extended a valid offer when he telephoned Phil and offered him the job at a salary of \$80,000. The offer was communicated properly to P, it contained the job, and it contained the salary amount. There was a valid offer.

##### **Acceptance & Mirror Image Rule**

An acceptance is an objective manifestation of the offeree to be bound by the terms of the contract. An acceptance may be communicated by any reasonable means. Statements of interest do not qualify as offers. Further, under the mirror image rule, an acceptance with additional terms will not include those additional terms unless the offeror explicitly agrees to them.

Here, it is unlikely that when P said "I'm only interested if I can be head of the science department," this constituted an effective acceptance. The statement was not unequivocal enough and conditioned his acceptance on him being the head of the science department. Therefore, P's statement was not an acceptance. Further, even if P's statement could be considered an acceptance, his terms would not be included under the mirror image rule if they were not included in the original offer.

## **Principal's Response**

When principal responded to P and confirmed the inclusion of P's term (that he would be head of science department) this constituted an acceptance on principal's part of the new terms.

## **"I accept!" Acceptance**

When P declared "I accept!" this qualified as a valid acceptance to the contract, which then included the term of P being head of the department.

## **Consideration**

A contract must be supported by consideration, which is a bargained for legal detriment by both parties. A legal detriment may be a promise to do something, or not do something.

There is consideration here because D will pay P, and P will work for D.

Therefore, a valid contract was formed.

## **Defense to Formation**

### **Statute of Frauds**

The statute of frauds (SOF) requires that a contract be in writing, be signed by the party to be charged, and contain the essential elements of the deal. The SOF applies to marriage contracts, suretyship contracts, service contracts that cannot be performed within one year, UCC contracts for \$500+, and land sale contracts. The contract does not need to be written at the time the deal is made, and may be made up of several writings.

Here, the SOF will apply because it is a service contract that cannot be performed within one year of its making. P and D signed the contract in May 2023, but the contract could not have possibly been performed until June 2024 because the teaching position was from August to June 2024. Therefore, the SOF applies.

It is likely that the SOF requirements were met in the form of the letter from D high. First, the form was signed by principal (D's agent), and D is the party to be charged. Second, the writing included the essential elements of the deal - P's name, the employment duration, and the salary. D may argue that the form was not meant to be a contract. However, all the SOF requires is that the terms of the contract be

reduced to writing, and be signed by the party to be charged. Therefore, the fact that this was a form for payroll is not material in determining whether the SOF requirements were met.

However, if D wants to sue under the terms discussed on the phone call, this may be difficult because the terms on the phone were not included in the writing.

Therefore, the SOF requirements were satisfied and there is a valid, enforceable contract. However, D will need to find a way to bring in the evidence about what was said before the writing was made (see below - Parol evidence).

### **Terms**

The next issue is whether D may sue for breach of contract for the terms discussed on the phone.

### **Parol Evidence**

D will need to present evidence of the negotiations on the phone, which may be barred under the parol evidence rule. Under the parol evidence rule (PER), evidence of contemporaneous or prior negotiations are barred as evidence if they are contradictory to the statements in the contract. The court will first consider whether the contract is a total or partial integration.

#### *Total or Partial*

If the contract is a total integration, extraneous terms will not be allowed. If partial, extraneous terms are allowed if they do not contradict the terms of the contract. A merger clause indicates that the contract is a total integration.

Here, there are no facts suggesting whether the contract is totally or partially integrated. Because there is no merger clause, the court will likely find that it is a partial integration. If it is a partial integration, only terms that are not contradictory will be allowed. The terms here are likely not contradictory because the contract does not indicate which role P will be assuming when he works for D. Indeed, the terms only indicate that they are to be determined at the discretion of the Board and are subject to change.

Therefore, P will be able to present evidence of the negotiations and terms agreed to on the phone to support his claim for breach.

Exception: Statements made after a contract are also admissible even if they contradict the terms. Therefore, P's statement "I told you I would only do the job if I

could be head. ....!" will be admissible because it was after the making of the contract.

**Modification:** D may argue that the form was a modification to the terms of the contract. However, a modification requires consideration at CL. Therefore, there was no modification.

### **Defense to Enforcement**

#### *Impossibility*

Impossibility occurs when the terms of the contract may no longer be enforced due to an unanticipated event. The nonoccurrence of the event must have been an assumption of the contract.

Here, D may argue that the contract is impossible to perform because the science teacher has cancelled her planned leave. While this may make the contract difficult, it did not make the contract impossible. Indeed, the school could have offered D another administrative role within the department, or made D co-head with the original head.

Therefore, this defense will not work.

### **Breach**

A breach occurs when a party does not receive the substantial benefit of a bargain. In service contracts, a breach must be material for one party to withhold their performance. Further, an anticipatory breach occurs when a defendant indicates in certain, unequivocal terms that they will not be performing under the contract.

Here, D likely anticipatorily breached the contract when the principal told him he would only be teaching and would not be head of the science department. D will argue this was not a material breach, as they would still pay P the full salary. However, the contract provided that the role would be half administrative, and half teaching. By denying him the ability to be an administrator (which was half of the contract), D likely breached a material term of the contract.

### **Conclusion**

P will likely prevail in his suit against D, especially because he is able to bring in parol evidence regarding the negotiations, and his statement regarding the terms after the

contract.

## **2. REMEDIES**

If D breached the contract, which it likely did, P may bring suit for money damages and equitable damages.

### **Money Damages**

Money (legal) damages may take the form of compensatory (expectation + consequential) damages, reliance damages, or incidental damages.

#### **Expectation**

Expectation damages seek to place the party back in the position that they would have been in had the contract been performed.

Here, P may request expectation damages in the form of lost wages. Specifically, though P was able to take a one year position as a gardener for \$30k, that is \$50k less than what he should have gotten under the contract with D.

Therefore, P may seek \$50k in expectation damages.

#### **Consequential**

Consequential damages are damages that flow naturally and probably from the breach. They must be calculated with reasonable certainty, must be foreseeable, and there must be causation.

Here, P might seek consequential damages in the form of whatever he would have gotten paid in the future had he gotten the experience in an administrative role with D. The facts indicate that P was hopeful to use this administrative experience to obtain his goal of becoming head of science at City High. Therefore, if P is able to establish that he would have gotten this role but -for D's breach, and that the pay would have been higher, he may be able to get consequential damages.

The problem here is that P's argument will likely be too speculative. As indicated, special damages must be able to be calculated with reasonable certainty and must have been foreseeable to the parties at the time of contracting. Not only was P's goal likely unforeseeable to the parties, but whatever damages he would be claiming are



likely too speculative. Further, P likely will not be able to prove causation, especially because it is unclear whether C would have even given P the role and fulfilled his goals.

Therefore, consequential damages are likely not available.

## **Reliance**

Reliance damages seek to place the party back in the position they'd be in had the contract not been created - they are damages incurred in reliance on the contract. There are no reliance damages here.

## **Incidental**

Incidental damages are those incurred as a result of the breach. There are no incidental damages here.

## **Defenses**

### *Mitigation*

The plaintiff must have reasonably mitigated their damages. This does not mean taking any job offer that is available, but it does mean that if a similar job was available, the plaintiff likely should take that job. If a plaintiff does not reasonably mitigate, their damages may be accordingly reduced.

Here, D has a good argument that P did not reasonably mitigate his damages. Specifically, though P did seek a new job with C, he turned down a coaching job with C that would have paid \$40,000. Instead, P took a gardening job that paid \$30,000. This was likely not a reasonable attempt to mitigate damages, and P's recovery therefore will likely be reduced by \$10,000 (the difference between the job C could have gotten, and the job he did get).

## **Equitable Remedies**

### **Specific Performance**

Specific performance is an equitable remedy in which the court will order the defendant to perform under the contract. To get specific performance, the plaintiff must prove there was a valid contract, that there were certain terms, that money damages are inadequate, feasibility, mutuality, and no defenses.

### *Contract*

See above - there is a valid contract here.

### *Certain Terms*

The terms must be certain and definite enough for the court to include them in an order.

The terms of the contract (to make P head of science) were likely certain and definite enough here.

### *Inadequate Money Damages*

Money damages must be inadequate. This usually means the subject of the contract is unique or real property.

Here, it is unlikely that money damages are inadequate. As discussed above, P will likely be able to obtain lost wages. Therefore, this factor for specific performance fails.

### *Mutuality*

The parties must be able to both perform.

There is nothing indicating either party cannot perform.

### *Feasibility*

The contract must be feasible to enforce. There are no facts indicating that it would not be feasible for the court to enforce the contract.

### *Defenses*

There must be no equitable, successful defenses.

### Laches

If P is able to successfully prove he should have specific performance, D may argue that the doctrine of laches bars his claim. laches applies when the plaintiff waited an unreasonable amount of time before bringing suit.

Here, P waited only two months before bringing suit. This was not an unreasonable amount of time, and likely did not prejudice D. Therefore, the doctrine of laches will not apply.

#### Unclean Hands

A plaintiff's claim may be barred if they engaged in immoral or unethical conduct.

There is nothing to suggest P engaged in unethical or immoral conduct here.

#### **Conclusion**

P will be able to seek money damages in the form of expectation damages. Any other money damages, or equitable relief (specific performance) are unavailable for the reasons set forth above.

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

**Applicable Law:** Every contract is governed under common law or under Article 2 of the Uniform Commercial Code. A contract for the sale of goods will be governed under Article 2 of the UCC. However, all other contracts, including contracts for services, employment, or land will be governed under common law.

Here, the contract is for the performance of services, or an employment contract, whereby Delta High is employing Phil. Therefore, the contract will be governed under common law principles.

##### **1. Phil v. Delta High:**

**Valid Contract Formation:** A contract is validly formed when there is: (1) mutual assent, meaning mutual assent to an offer and acceptance of such offer; (2) consideration; and (3) there are no defenses to formation.

**Offer:** An offer is found when the offeror communicates certain and definite terms to the offeree with the intent to enter into a binding promise or agreement. These terms must be reasonably communicated to the offeree as the offeror's ability to enter into a binding agreement.

Here, there was a valid offer by offering Phil employment at the school for a job salary of \$80,000. This offer was made over the phone by Delta High to Phil after there being a job advertisement of the same temporary employment job. Delta High's calling to offer the employment to Phil was a valid offer.

**Acceptance:** Acceptance requires that the offeree manifest assent to the terms stated in the offeror's offer. The offeree must accept all terms in the offer and must not make any counteroffer, which will be seen as a rejection and new offer.

Here, the statement by Phil being only interested if he is the head of the science department will likely not be considered acceptance of the terms by Delta High because they fail under the mirror image rule.

***Rejection - Mirror Image Rule:*** A rejection may be found when the offeree makes a counter offer that the offeror may then accept or reject. Under common law, the acceptance must be a mirror image to the offer, meaning there must not be any changes made to the offer in order for the offer and acceptance to create a binding contract. If the acceptance includes any new terms or conditions, then the acceptance will be considered a rejection since it is treated as a counteroffer that the original offeror may now accept.

Here, the statement that Phil will only accept if he is the head of the science

department will be considered a new offer that Delta High may now accept. Under the mirror image rule, the original offer by Delta High did not contain any provision about Phil being the head of the science department. Therefore, his acceptance contained a material provision not found in the offer. Thus, Delta High may not accept this new offer.

The facts indicate that Delta High accepted the new offer from Phil by stating "Perfect! Our current head will be on leave. The job is half-time teaching and half-time administration." This statement will likely be considered an acceptance based on the phrase "Perfect!" However, Phil may argue that the statement was another counteroffer because it included new terms however, it only included more description or information as to the position. Therefore, it was not a new offer that Phil could accept because he was the offeror.

Consideration: Consideration is found when there is a bargained-for exchange of legal value. This requires both of the parties to give something up for the other, meaning that the obligations must be at the detriment and benefit of either party.

The consideration requirement is fulfilled because Delta High would be providing compensation to Phil for his services as a science teacher. Therefore, there is a bargained-for exchange of legal value found.

Defenses to Formation: Any existence as to defenses to formation may render the contract void or voidable as a result of such defenses.

**Statute of Frauds**: Generally, oral contracts are enforceable. However, under common law, there is a defense of Statute of Frauds, meaning certain contracts must be made in writing in order for the contract to be enforceable. A contract to perform services more than 1 year must be made in writing and signed by the party to be charged.

Here, Delta High may argue that the contract is unenforceable because it was not in writing and it must be in writing since it is a contract to perform services for more than 1 year. However, Paul may argue that there was a sufficient writing signed. The facts state that there was a form signed by the Principal, which is the party to be charged acting as a representative of Delta High. Additionally, if Phil is the party to be charged he also signed the form. Generally, a contract for services or employment must describe the services or the duties of the employee. Therefore, this writing may not be satisfactory under the Statute of Frauds because it failed to have in writing anything in regards to the duties that Phil would be performed. Additionally, one of the main exceptions under the Statute of Frauds is contracts for permanent employment, however, this contract stated it would be temporary. Therefore, Delta High has a valid Statute of Frauds defense.

**Promissory Estoppel:** One exception to the statute of frauds is when the promise will be estopped from not being enforced. Promissory estoppel is found when it was reasonable for the promisee to rely on the promise, the promisor induced reliance on the promisee, and the promisee reasonably relied on the promise.

However, to rebut that the Statute of Frauds defense, Phil may argue that it was foreseeable for him to rely on the future promise that he would be head of the science department because it was a statement by the Principal. Additionally, Phil may argue that Delta High induced Phil to rely on such statements because Delta High knew that Phil would not accept employment unless he was the head of the science department. Furthermore, Phil may show that he actually did rely on this promise to be the head of the science department by quitting his previous job. Therefore, it is likely that Delta High will be estopped from claiming Statute of Frauds of the contract.

**Parol Evidence:** Generally, evidence of prior oral or contemporaneous statements will be inadmissible to contradict any contract terms. However, such evidence may be used to explain the meaning of terms. Parol evidence will not come in if there is evidence that the writing was completely integrated meaning based on the four corners of the document the parties understood the contract to be a final expression.

However, Delta High may argue that their Statute of Frauds argument will be upheld under the parol evidence rule. Delta High may show that the statements were prior oral statements and they were not contained in the contract. Additionally, Delta High may show that this was a complete integration because it was signed by both parties and Phil never made any statement regarding the contract not having the duties outlined. Thus, Delta High will have a strong argument as to parol evidence meaning that the oral statements made by the principal before the written contract was formed will be inadmissible to contradict the statements in the written contract.

However, Phil may argue that such evidence will only be used to supply meaning or explain the terms of the contract since the contract does not include any specification of the job title or any duties, which is required under the Statute of Frauds. The court may allow such statements to explain ambiguous terms. Phil may argue that the duties being the discretion of Delta High is an ambiguous term as to what each employee's duties include. Therefore, requiring parol evidence to explain such ambiguous terms. The court will then need to conclude when such term is ambiguous requiring parol evidence to come in to provide meaning, or whether the term is not ambiguous, therefore, not allowing parol evidence to be presented.

**Mutual Mistake:** A mutual mistake is found when both parties were mistaken as to a material fact of the contract or a material purpose of the contract and neither party bore the risk mistake.

Here, Delta High may argue there was a mutual mistake as to the material fact of whether or not Phil would be head of the science department. This mistake was a result of someone else and was out of both Delta High and Phil's hands.

***Misrepresentation:*** A misrepresentation may be fraudulent or negligence. A fraudulent misrepresentation is a misstatement of a material fact intentionally made by a party that induces the other party to enter into the contract. A negligent misrepresentation is a misstatement made by a party of material fact that induces another party to enter into the transaction.

One defense that Phil may argue to voiding the contract is that Delta High made a material misrepresentation as to a material fact, him being the head of the science department. However, this is not a strong argument seeing as Delta High had no knowledge as to the other teachers leave of absence.

## **2. Remedies Available to Phil:**

**Compensatory Damages:** Compensatory damages are money damages that may be awarded to a plaintiff based on a breach of contract.

**Expectation Damages:** Expectation damages are able to be awarded and such damages would put the plaintiff in the position they would have been in had the contract been performed as promised. Compensatory damages may only be awarded for the damages that are certain, foreseeable at the time of contracting, and unavoidable, meaning there is a duty to mitigate.

Here, the expectation damages would be the \$80,000 contract to perform the services, technically \$50,000 since he accepted a one-year position as a gardener for \$30,000. This is the valid contract price that was included in the contract, therefore, Phil would be entitled to the amount he would have received, \$80,000, had the contract been performed. His damages would be offset by the efforts to mitigate his damages, such as the entering and accepting of the \$30,000 gardening job. Therefore, Phil could recover \$50,000 plus any consequential damages incurred.

**Consequential Damages:** Consequential damages may be awarded in addition to expectation damages. Consequential damages are all damages incurred as a foreseeable consequence of the breach.

Phil may also recover any other consequential damages that he incurred as a result of the breach by Delta High.

Duty to Mitigate: Generally, damages must be mitigated, meaning the plaintiff must mitigate their damages.

However, Phil had a duty to mitigate his damages. A duty to mitigate requires the plaintiff to take employment that is substantially similar to that they would have had had the contract been performed. Here, the coaching job is not substantially similar since he would not be a science teacher and would not be the head of the science department. Therefore, Phil was not required to mitigate his damages by accepting this other job offer to coach.

**Specific Performance**: Specific performance is an equitable remedy to breach of contract whereby the court requires the defendant to perform the contract as required under the contract. In order for a court to award specific performance, the plaintiff must: (1) a valid contract; (2) mutuality of performance, meaning the plaintiff is ready and willing to perform, has performed, or is excused from performance; (3) inadequacy of legal remedies, meaning money cannot make the plaintiff whole; (4) feasibility of enforcement, meaning the court can enforce and require the defendant to perform; and (5) absence of any defenses.

Here, the court will not order specific performance as a result of there being a defect in the feasibility of performance. All other elements will be met. Such as there being a valid contract as described above. Phil is ready and able to perform his duties under the contract. Inadequacy of legal remedies is a difficult element because compensatory damages would make Phil whole because he was under a contract for \$80,000. However, Phil could argue that money damages are inadequate because they do not allow for him to reach his career goal to become head of a science department, therefore, money is not enough. However, a court will not enforce a contract to perform services because such a contract enforcement is against public policy. Therefore, it will be difficult for Phil to be awarded specific performance because the court generally does not want to force people to work with others where there has been an issue. Thus, since this is a contract for services and employment, the court will not be inclined in awarding specific performance.

**Reformation**: Reformation is another equitable remedy that a court may award when there has been a misrepresentation or a mistake. Reformation requires the court to rewrite the contract to the meaning that was found during the contract formation.

Phil may argue that the court rewrite the contract to include the specific duty that Phil be the head of the science department. However, this remedy will not rectify the harm to Phil because the court may not force Phil and Delta High to perform the contract as described above.

**Rescission**: Rescission is another equitable remedy where the court can make the contract void or enforceable as a result of a misrepresentation or mistake.



This is a contract remedy that Phil will not want because it makes the contract unenforceable meaning Phil would not be able to recover under the contract.

**Defense to Remedy:**

Latches: One defense to both legal and equitable remedies is that of latches. Latches means that the plaintiff brought the claim too late or too much time has passed since discovering the breach.

Delta High may argue that Phil is unable to bring any claim for a remedy of the breach of contract because he brought the claim too late. The facts state that Phil brought the claim months later. However, the court generally does not find that a few months passing is too late for a claim. Therefore, this argument by Delta High will lose.

## **QUESTION 5**

Larry is a divorce lawyer. With a valid written retainer agreement, Larry represented Carla in her divorce from her husband Harry. Larry's services were paid for by Carla's mother. As a condition of payment for Larry's services, Carla's mother demanded that she be informed of all aspects of the divorce matter, including Carla's statements to Larry. Carla was awarded custody of her children and support payments.

Once Carla's divorce became final, Larry sent Carla a disengagement letter that said he "was glad to have represented her," but also said he "would be happy to help her if issues arose in connection with the custody and support order." Larry kept Carla's file open because he assumed such issues might arise.

After Carla's divorce became final, she and Larry entered into a consensual sexual relationship. Larry and Carla have an on-going dating relationship and Carla has come to depend on Larry for legal and non-legal advice (without pay) on tax, child support and visitation matters.

Carla is a florist and wants to start her own business. She asked Larry if he would like to go into business with her. Larry proposed a partnership in which he would contribute the start-up capital, Carla would run the business, and they would split the profits. Larry said he would draw up the papers and suggested that "you can have your mother take a look at the agreement if you want." Carla said, "I don't see any reason for that; I trust you." Larry drew up a simple partnership agreement; he and Carla signed, and they celebrated with a dinner date.

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

Answer according to California and ABA authorities.

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

### **Preliminary Rules:**

Attorneys owe several duties to their clients. Primary among them are the duties of competence, loyalty (the duty to avoid conflicts), to maintain confidentiality, the duty to communicate, and the duty to safeguard client property.

If an attorney violates these duties, he may be subject to disciplined by the State Bar or may be liable for damages in a malpractice suit.

As a preliminary matter, the fact pattern clearly establishes that Larry and Carla were in an attorney client relationship from the beginning. Whether a relationship has been formed is determined by the subjective understanding of the client, based on the circumstances, but here, the facts show that there was a written retainer agreement and Larry represented Carla in a legal matter, so there is an attorney client relationship. A written fee agreement is not required under the ABA Models but is required under the California rules, subject to limited exceptions, but there is a written agreement here, so that is satisfied. Accordingly, all of the attorney duties attach to Larry in his representation of Carla.

**Issues:** This fact pattern presents three main issues where Larry may have violated his ethical duties:

1. the payment of the fee by Carla's mother;
2. entering into a sexual relationship with Carla;
3. entering into a business relationship with Carla; and drafting a partnership agreement and giving non-family law advice.

**Conclusion:** All three issues are analyzed below, but the conclusion is that:

1. Larry likely violated his duties of competence, loyalty, and confidentiality in entering into this third party payment arrangement.
2. Larry's sexual relationship with Carla likely violated his duties under the ABA but is more likely permissible under the California rules.
3. Larry likely violated his duty of competence and loyalty in entering into this business relationship with Carla without properly advising her first.
4. Larry likely did not violate the duty of competence by drafting a partnership agreement and advising on other matters outside his stated legal specialty.

## **Analysis:**

### **1. Third Party Payment of the Fee**

The first issue is whether Larry ethically accepted the payment from Carla's mother. The ABA and California Rules allow for third parties to pay an attorney's fee for another person, subject to certain restrictions.

#### **Rule:**

1. The payment by the third party must not limit the attorney's representation.
2. The attorney must maintain confidentiality.
3. The client must give informed consent to the payment.

#### **Analysis:**

As part of his duty of loyalty, Larry could not accept the third party payment if it would materially limit his representation of Carla. Similarly, it could violate his duty of competence if he allowed himself to be so limited. Nothing in the facts suggests that the arrangement materially limited Larry's performance, so this would favor Larry ethically accepting the fee. If Larry had felt like he was materially limited, he would have been obliged to decline the payment.

It appears, however, that the arrangement violated Larry's duty of confidentiality, the second element. The rule is that attorneys must keep inviolate all client confidences--all information not in the public domain learned by the attorney during the representation. Here, the fee payment arrangement specifically required him to disclose client confidences to the mother.

Absent client consent, a court order, or an implied authorization (which is not in the facts here), Larry could not disclose Carla's client confidences. Larry likely violated his duty of confidentiality for anything he disclosed and his acceptance of the fee on that condition violated his duty of competence and loyalty.

Finally, there is no suggestion that Carla gave informed consent to the fee arrangement. If she had, it may have cured the ethical issues with the fee arrangement and the disclosures of confidential information, but the facts do not suggest she was informed and gave consent, in writing or otherwise.

**Conclusion:** Larry likely violated his duties of competence, loyalty, and confidentiality in entering into this third party payment arrangement.

### **2. Entering Into A Sexual Relationship With Carla**

The next issue is the sexual relationship between Larry and Carla which implicates

his duty of competence.

Rule: The ABA and California Rules differ in this area.

Under the ABA Model Rules, an attorney may only engage in a sexual relationship with a client if it pre-dates the representation.

Under the California Rules, an attorney may engage in a sexual relationship with the client if it pre-dates the representation or if it post-dates the representation and

1. the sex is not in exchange for services;
2. the attorney is not materially limited; and
3. the client is not pressured into sexual relationship.

Analysis: A preliminary question is whether the representation ended after the divorce was finalized. Larry sent a letter noting the end of the matter and offered to represent her in the future, but kept the file open. Her subjective belief, based on the facts, determines whether there is an ongoing attorney client relationship. The fact that Carla continues to rely on Larry for legal matters (tax, child support, and visitation) suggests that the attorney client relationship continues, even absent payment (not a requirement for the formation or maintenance of an attorney client relationship).

Under the ABA, then, it appears that Larry has violated this ethical rule. Under the California Rules, it appears he likely has not. The facts do not suggest that the sexual relationship was conditioned on the attorney's services or that Carla was pressured into it. The final factor is somewhat questionable. As noted below. Larry may have violated his ethical duties in going into business with Carla. If he did, it could have been because he was materially limited by the sexual relationship. Absent that potential ethical lapse, the facts do not otherwise suggest Larry was limited in representing Carla in any matter because of the relationship.

Conclusion: Larry's sexual relationship with Carla likely violated his duties under the ABA but is more likely permissible under the California rules.

### **3. Entering into Business with Carla**

The final issue is whether Larry violated any duties to Carla by entering into business with her and the manner in which he did so.

Rule: Under both the ABA and California Rules, an attorney may enter into a business relationship with a client must if the following conditions are met:

1. the transaction is objectively fair to the client;

2. all material terms of the transaction are disclosed in writing to the client;
3. the client is advised to receive independent legal advice; and
4. the client gives informed consent.

#### Analysis:

Again, a preliminary question is whether Larry's attorney client relationship ended after the divorce, and whether he was acting as an attorney in relation to the flower shop. The analysis of whether the attorney client relationship ended after the divorce is the same as above, but if there is an argument that he did not remain her lawyer after the divorce (though it appears he did), there is an even greater likelihood that Carla viewed Larry as acting as her lawyer with regard to the flower shop because she said "I trust you" and Larry drew up the legal documents. Therefore, it is likely that she reasonably perceived Larry as acting as her lawyer, and so the rules for client transactions would apply.

The last two criteria are addressed first because they are clearly not met. Larry did not advise Carla to seek independent advice of a lawyer--suggesting she talk to her mother would not suffice, unless Carla's mother is a lawyer, and there are no facts suggesting she is. Further, Larry should have gone further than saying Carla could consult if she wished. He should have advised her to do so. Accordingly, it cannot be said that Carla gave informed consent.

It is also unclear from the facts if the material terms of the agreement were in writing, and in fact they suggest they are not. The facts state that it was a "simple partnership agreement" so it is possible that there were not sufficient material terms included.

Finally, it is possible that the terms are objectively fair. One general partner contributing capital and other specialized skill is a common arrangement of a general partnership. The facts do not suggest the terms are objectively unfair.

Conclusion: Larry likely violated his duty of competence and loyalty in entering into this business relationship with Carla without properly advising her first.

#### **4. Drafting the Partnership Agreement and Giving Non-Family Law Advice**

A final issue is whether Larry violated his duty of competence by drafting the partnership agreement and giving. The facts state that Larry is a divorce lawyer, but do not suggest he has experience in drafting partnership agreements. The facts also state that Larry gave Carla advice on tax issues. The rule is that an attorney owes a duty of competence, meaning that, under the ABA, the attorney must use the skill and diligence of a reasonable lawyer, and under the California Rules, that he must not repeatedly, recklessly, or grossly negligently fall below the standard of

care. Insofar as Larry is a divorce and presumably family law attorney, he could have violated his duty of competence by advising Carla on tax matters and by drafting the partnership agreement when those are not his specialty. However, an attorney may obtain the required knowledge and the facts do not suggest that he did not do that or that the other matters were particularly complicated. Larry likely did not violate his duties in this way.

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

### **What ethical violations if any has Larry committed?**

#### **Fee Agreement**

In order to have a valid fee agreement, the ABA requires that the fees be reasonable and be in writing. California requires that fee agreements be in writing and not be unconscionable. However, California waives the writing requirement if the client's fees will be under \$1000, if it is a repeat client on a repeat matter, or if the client is a corporation.

Here, we are told that there is a valid fee agreement between Lawyer (L) and Carla (C) for his services to assist her in her valid divorce, therefore, we assume that the above requirements have been met.

#### **Payment of Fees by Third Party**

A lawyer may allow that a third party pay the fees of their client so long as certain requirements are met. Under both ABA and CA rules, a lawyer must ensure that they are able to continue their professional judgement despite the third party providing payment, not allow the third party to influence the decision making of the lawyer, and be able to retain all the lawyer's duties towards their client. Moreover, CA requires that there be a written agreement from the client stating that it the third party payment is acceptable.

Here, C's mother services were paid by C's mother. As such, there was a third party who was paying the fees. This is allowable under both the ABA and CA rules. However, L had a duty to not allow C's mother's payment influence his decision making of the case. This was done by having to reveal all the information of the case to C which could have resulted in undue influence by C's mother, especially since she likely has a high stake interest in her daughter's case.

There is no information that indicates that C had agreed to this fee agreement, but a presumption can be made that she consented since she representation continued and she likely knew that she could not afford an attorney. However, without anything in writing, this was likely in breach of L's duties.

Therefore, by allowing C's mother to pay for C's fee, L likely committed an ethical violation with the actions that followed.



## **Attorney Client Privilege**

Attorney client privilege is a privilege between the client and a lawyer in which the communications are private and not to be shared so long as the communication is made in furtherance of legal advice. A lawyer must maintain their attorney client privilege (ACP) with their client at all times unless an exception applies. The ACP privilege is held by the client, not the lawyer, and as such, is enforced by the lawyer. Under CA laws, this is strictly upheld unless there is potential for death or serious bodily harm.

Here, as a condition of the payment for L's services, C's mother demanded that she be informed of all aspects of the divorce including statements made by C to L. Agreeing to this condition would result in the breach of L's ACP with C. This is because the communication between L and C is privileged as they are attorney and client. Had C voluntarily shared the information with her mother, this would have resulted in the information no longer being privileged since it was communicated towards a third party. However, here, there is no indication that C wanted the information to be shared with her mother. If she had wanted to share it, she would have done so. Therefore, the presumption continues that C intended for the communication between her and her lawyer to remain privileged.

Therefore, the agreement made between L and C's mom that L disclose the statements made by C to L is considered a breach of C's ACP by disclosing information that was made in confidence in furtherance of litigation. This is especially true since C's mother was paying the fees related to C's divorce, and not once the relationship between C and L had started.

Therefore, the agreement between L and C's mother that she be told the confidential information that L's client provides him in exchange for compensation was a breach of C's ACP and resulted in an ethical violation by L.

## **Disengagement Letter**

A disengagement letter is a letter written by a lawyer to a client to let them know what services were completed and an overview of the case.

Here, once C's divorce became final, L sent C a disengagement letter and told her that he was happy to represent her and reminded her that he was available if any issues arise in the future. This is unlikely to have breached any ethical rules as it was not coercive but instead an offer to continue their business together. Since this was a divorce case, and L's offer to help with support and custody was relevant to the case at hand, it was unlikely to have been inappropriate or outside the scope of what was acceptable to discuss.

However, an ethical committee may argue that since L knew that C had just gone

through a divorce, there was a possibility that she was vulnerable and that further communication was inappropriate. This is an unlikely argument since the communication made in the disengagement letter remained professional.

Therefore, there was no ethical violations for the disengagement letter that L sent to C.

### **Relationship with Client**

A lawyer may be in a consensual relationship with a client so long as the relationship began prior to any representation. A lawyer may not exchange legal advice for sexual services under a meretricious relationship.

Here, L kept C's file open as he anticipated an issue would arise for C as a result of her custody battle with her husband. Therefore, the relationship that was created after the case was completed was while C was still a client of L's. This is highly inappropriate under both the ABA and CA. Moreover, C continued to ask L legal questions throughout their representation and she did not pay L for the advice. While pro bono work is acceptable, it must be appropriate and follow the requirements outlined as per each state's rules. The line between client and girlfriend has been blurred by the lawyer in this scenario and is unlikely to amount to pro bono work.

As such, it is likely that under both the ABA and CA, L has committed an ethical violation by creating a sexual relationship with his client, especially given that she is using him for legal advice during the relationship.

### **Business Transactions with Client**

While a lawyer is able to go into a business transaction with a client, the lawyer must only do so if they enter an agreement that is fair to the client, have the agreement made in writing, and advise the client to retain independent legal counsel in reviewing the agreement. In California, there is the additional rule that the lawyer put in writing what their express role is in the business transaction.

Here, C as a florist wanted to start her own business and asked L to go into business with her. L proposed a partnership in which he contributed the capital and C could run the business. It is possible to argue that the agreement is inequitable to begin with since C would be doing all the work and L would be receiving half of the funds as a result. Moreover, L suggested that C have her mother take a look at the agreement, and not an actual lawyer. This was a violation of his duty since C's mother is not independent legal counsel. The agreement that was created is deemed to be a simple agreement, which seems to lack the required details that would protect his client's rights. Furthermore, in the partnership agreement, L did not put in

writing what his express role in the business is.

As such, it is likely that under both the ABA and CA rules, L has made an ethical violation in how he has entered into business with a client since he did not adhere to the requirements.

### **Duty of Good Faith and Fair Dealing**

Lawyers typically had a duty of good faith and fair dealing towards each other. Similarly, business partners have the same duty. A lawyer who is acting as a business partner must still uphold the same duty of good faith and fair dealing towards their business partner.

Here, it is possible to argue that L breached his duty of good faith and fair dealing by not advising C to retain legal counsel to review the partnership agreement that was drafted. This is especially pertinent since L, as the drafter, had material interest in how the contract was formed. In forgoing such advice, L was in breach of his ethical duty towards his business partner to act in good faith and fairly.

### **Duty of Competence / Diligence**

A lawyer must act competently in advising their client. Competence includes properly doing research in matters in which the client requests unless circumstances do not allow time for such a search. Diligence requires that a lawyer makes the required research and findings to further understand the clients needs and ensure that they are acting competently.

Here, it is possible to argue that L breached his duty of competence towards C by drafting the partnership agreement. L is a divorce lawyer. Without anymore information, it is unclear whether L had the requisite knowledge required to ensure that he was providing sound advice and a properly written partnership agreement between himself and C. Moreover, no facts indicate that L made any efforts to educate himself on partnership agreements or to ask any other lawyers for advice on how to proceed.

While it is possible for L to argue that the partnership agreement was basic and that he was competent to draft it, there is likely an invalid argument since a basic partnership agreement was not appropriate for the parties since there was a conflict of interest that was material.

Therefore, L is likely in breach of his duty of competence and diligence.

## **Fee Splitting**

A lawyer may not split fees with a nonlawyer.

Here, L and C are splitting fees as from the business that C is running. While on its face it seems to be a violation of the ethical duties against fee splitting, it may be possible for L to argue that he is not working in his legal capacity when splitting the fees with C and as such he is in no violation. Should he succeed in this argument, it is unlikely that there is an ethical violation for fee splitting since lawyers are entitled to conduct businesses with nonlawyers.

## **Legal work with non-lawyers**

A lawyer may not conduct legal work with non-lawyers.

Here, L is likely in breach of his duty to not conduct legal work with non-lawyers since C is not a lawyer, and they have created a business together to sell flowers. While L may argue that he is not conducting legal work, and was solely the capital contributor, he drafted the agreement which shows that there was the intention to use his legal skills in furthering the business.

Therefore, L is likely in breach of his duty to not perform any legal work with non-lawyers.

## **Duty of Care**

A lawyer has a duty of care towards their client. Under the ABA, this requirement is that they act as a zealous advocate and the same as a reasonable prudent attorney would. California requires similar duty from their lawyers, and also that they do not act with incompetence or in a way that is not in the interest of their client.

Here, it is likely that L is in breach of his duty of care towards his client since he has not put her interests above his own. This is both in terms of

his representation of her as a client in terms of any custody issues that may be at hand, since it is possible his personal interests may be affecting his judgment, and also his duty of care towards his client as his business partner, since the agreement made is inequitable towards C who is doing all the work while L receives the benefit of her work.

Therefore, it is likely to find that L has breached his duty of care towards his client by

not acting as a zealous advocate in their best interest.

### **Duty of Loyalty**

A lawyer has a duty to remain loyal to their client. Loyalty can be breached through a conflict of interest. A conflict of interest will arise when a lawyer has some personal or professional relationship that is at odds with their client's interests and it will materially impact the lawyer's ability to provide effective counsel. Under ABA, a lawyer may be able to continue representation so long as they inform the client who consents to the representation and the lawyer believes that they are competently able to continue. Under CA rules, a lawyer must have the client's waiver in writing. Moreover, CA does not allow any conflicts even if the client waives it if there is a personal relationship between the lawyer and the client.

Here, it is possible to argue that under both ABA and CA that L committed a breach of his duty of loyalty towards C when he allowed he entered into advising C on legal and nonlegal advice once they started their relationship.

L did not follow any of the requirements of the ABA, although he may argue that he did have the consent of C since they seem to be in a consensual relationship. However, this is insufficient to please the courts. Moreover, L did not follow any of the requirements of CA since he is in a relationship with his current client, since L did not close her account.

As such, there is a breach of L's duty of loyalty towards his client which is an ethical violation since he allowed for his conflict of interest to materially impact his ability to represent his client and by not following the requirements of CA.

### **Duty to Profession**

A lawyer has a duty towards the profession to uphold the sanctity of law and to conduct oneself in a professional way. This is to ensure that the legal community as a whole continues to be well respected by the community.

Here, L has breached his ethical duty towards the professional of the legal community by having a sexual relationship with a current client. This creates an unfavorable image towards the legal profession that a client may be able to receive free legal advice from their lawyer in exchange for sexual relationships.

Therefore, it is likely that P has breached his duty towards the legal profession by being in a relationship with a current client.

## **Duty of Integrity**

A lawyer has a duty to hold himself with integrity and honor when conducting legal practice.

Here, L has breached his duty of integrity by giving free legal advice to a current client that he is in a relationship with. This is something that he likely knows is inappropriate and looks poorly on his character and the profession in general. As such, L has breached his duty of integrity.