



# **California Bar Examination**

## **Essay Questions and Selected Answers**

**July 2025**



**ESSAY QUESTIONS AND SELECTED ANSWERS**

**JULY 2025**

**CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the July 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.

| <u>Question Number</u> | <u>Subject</u>   |
|------------------------|--|
| 1.                     | Trusts   |
| 2.                     | Torts  |
| 3.                     | Business Associations                                    |
| 4.                     | Constitutional Law                                       |
| 5.                     | Professional Responsibility / Criminal Law and Procedure |

## **ESSAY QUESTION INSTRUCTIONS**

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

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

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

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

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

## **QUESTION 1**

In 2020, Grandma died, leaving a valid will. The will created two trusts, the Farm Trust and the Ancestry Trust, and divided her residuary estate equally between them. The will stated, "Should either trust fail, for any reason, all assets of the failed trust should be given to the children of my granddaughter Betty."

The Farm Trust left Grandma's large farm to the City for the general benefit of the City. The trust stated Grandma preferred that the farm be used in perpetuity as an active organic-certified farm, on which no chemical pesticides were to be used. Bank was named as trustee of the Farm Trust.

The Ancestry Trust directed the trustee to distribute all income from the trust annually in equal shares to Tom, Betty, and Carol, Grandma's grandchildren. Tom was named as trustee of the Ancestry Trust.

In 2023, Betty's only child, Darcy, was born.

In January 2024, for reasons beyond Bank's control, Grandma's farm lost its organic certification but continued to operate as a farm. As a result of this loss of certification, Bank intends to allow City to use pesticides on the farm.

In March 2024, Tom unexpectedly incurred a large debt for medical expenses. As trustee, Tom wrote a check from the assets of the Ancestry Trust to pay off the debt. Tom planned to repay the Trust but was unable to before he died a few months later. A successor trustee was not named.

In January 2025, Betty petitioned the court to dissolve both the Farm and the Ancestry Trusts and to order Tom's estate to repay the Ancestry Trust the money he took to pay off his medical debt. Bank, Carol, and Tom's estate have objected to Betty's petition.

- A. Should the court grant Betty's petition to dissolve the Farm Trust? Discuss.
- B. Should the court grant Betty's petition to dissolve the Ancestry Trust? Discuss.
- C. Should the court order Tom's estate to repay the Ancestry Trust? Discuss.

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

### **[1] BETTY'S PETITION TO DISSOLVE FARM TRUST**

#### **Testamentary Trust**

A testamentary trust is one created by will. Because a testamentary trust is created by will it must comport with the Statute of Wills. Because the facts provide that "In 2020, Grandma died, leaving a valid will," it is assumed that the valid will complied with the Statute of Wills. Thus, the testamentary trust satisfied the same requirements.

Generally, a trust gives rise to a fiduciary relationship in which a trustee manages and administers property for the benefit of a third-party beneficiary. A valid trust requires a settlor, purpose, intent to create a trust, res (trust property), a trustee, and a beneficiary.

The settlor creates the trust. Here, the settlor is Grandma as she created the trust in her will. Grandma created two trusts within her will with different purposes. The Farm Trust and the Ancestry trust. The Farm trust is a charitable trust (discussed below); and thus must have a charitable purpose (discussed below). In this case, the trust does have a purpose of being for the benefit of the City. Grandma also had the intent to create the trust because she did so in her will and expressly stated terms for the trust, including designating trustees. The res for the farm trust is "Grandma's large farm," as well as half of Grandma's residuary estate; thus, the trust has specific/ascertainable trust property. Finally, Grandma appointed a trustee: "Bank was named as trustee of the Farm Trust." Finally, the beneficiary of the trust is the City.

Because the trust satisfies all the requirements for a trust, it is a valid testamentary trust.

#### **Charitable Trust**

The Farm Trust is also a charitable trust. A charitable trust is one that has a charitable purpose. Generally, charitable trusts do not need to abide by the rules against perpetuity (RAP); thus, Grandma stating the farm should be used "in perpetuity" does not violate RAP principles because it is a charitable trust. Further, the courts generally interpret charitable trusts' purposes broadly, for public policy reasons. Thus, a charitable purpose includes one that benefits the public at large or a specific group of people within the community whose membership is subject to change. The purpose may be to advance education, health, safety of the community, etc. Here, the charitable trust has a valid charitable purpose because it is "for the general benefit of the City." Namely, it furthers the community's access to organic farming products. Thus, the Farm trust is a valid charitable trust.

#### **Standing**

Betty has petitioned to dissolve the Farm Trust. Generally, the attorney general of the

state has standing with respect to challenging or modifying charitable trusts. However, it is likely that Betty has standing to petition, because Grandmas will provided that "Should either trust fail, for any reason, all assets of the failed trust should be given to the children of my granddaughter Betty." Because Betty's children serve to benefit from the trust failing, she likely has standing to petition for dissolution of the trust.

### Termination of Trust

Generally, a trust is presumed revocable in most jurisdictions; however, it becomes irrevocable on the death of the settlor. Here, upon Grandma's death, the trust became irrevocable.

A trust may be terminated upon expiration by its own terms or with the consent of all the beneficiaries and trustee, when it serves no valid purpose, or the purpose has become impracticable or impossible to achieve. Here, Betty may assert that the trust is no longer serving the purpose for which Grandma intended; namely, "The trust stated Grandma preferred that the farm be used in perpetuity as an active organic-certified farm, on which no chemical pesticides were to be used." Further, in 2024, "for reasons beyond the Bank's control Grandma's farm lost its organic certification, but continued to operate as a farm." The trustee (Bank) intends to allow for the use of pesticides but has not done so yet.

### Cy Pres Doctrine

Under the cy pres doctrine, a court may modify a charitable trust's purpose. The court will choose a purpose as close to the intended purpose of the settlor, if it can identify one. If the trust expresses a general intent, it is more likely to do so. In contrast, if the charitable purpose has a specific intent, the court likely will not modify the trust's purpose.

Here, Betty will argue that Grandma's trust stated a specific intent: that "no chemical pesticides were to be used." Because the farm lost its certification, however, trustee Bank intends to allow for the use of pesticides. Because the trustee only intends for this to happen, but not has yet committed the action, it is possible for the trust purpose to still be substantially served. Even though the farm lost its certification, it can still operate without the use of pesticides. This would be a close fit to the intended purpose of the settlor. Further, the terms of this trust stated that "Grandma *preferred* that the farm be used in perpetuity as an active organic-certified farm, on which no chemical pesticides were to be used." (emphasis added). Because Grandma only stated a preference, and not an outright requirement, the court may modify the trust purpose.

The City will also argue that the trust also provided that "the farm be used in perpetuity as an active organic-certified farm." The farm is still being used as a farm; thus, the trust is still serving, to some extent, the settlor's original purpose.

**Conclusion:** Because the trustee only intends to use pesticides, and has not yet done so, it is possible for the court to apply the cy pres doctrine to modify the charitable trust terms to being an organic farm (not certified), on which no chemical pesticides will be used. If the court modifies the trust purpose in this way, it should not grant Betty's

petition to dissolve the farm trust. Further, because Grandma's use of the farm was stated as a preference, the court is more likely to modify the trust terms and may even allow for chemical pesticides to be used. Overall, the court should deny Betty's petition to dissolve the farm trust.

## **[2] BETTY'S PETITION TO DISSOLVE ANCESTRY TRUST**

### **Testamentary Trust**

A testamentary trust is one created by will. Because a testamentary trust is created by will, it must comport with the Statute of Wills. Because the facts provide that "In 2020, Grandma died, leaving a valid will," it is assumed that the valid will complied with the Statute of Wills. Thus, the testamentary trust satisfied the same requirements.

Generally, a trust gives rise to a fiduciary relationship in which a trustee manages and administers property for the benefit of a third-party beneficiary. A valid trust requires a settlor, purpose, intent to create a trust, res (trust property), a trustee, and a beneficiary.

The settlor creates the trust. Here, the settlor is Grandma as she created the trust in her will. Here, grandma created two trusts within her will with different purposes. The Farm Trust and the Ancestry trust. The purpose of the Ancestry trust is "to distribute all income from the trust annually in equal shares to Tom, Betty, and Carol, Grandma's grandchildren." Thus, the trust has a valid purpose of benefitting the grandchildren. Further, Grandma had the intent to create the trust, as manifested in her will which expressly provided that the trusts be created and also stated "Should either trust fail, for any reason, all assets of the failed trust should be given to the children of my granddaughter Betty." This latter statement, in particular, shows Grandma intended to create the trust. The trust also has property- half of Grandma's residuary state. Thus, it is sufficiently identifiable property. The Ancestry trust also has a trustee, Tom. And, the beneficiaries are Tom, Carol, and Betty. Thus, all the components of a valid trust are present.

### **Standing**

As a beneficiary of this trust, Betty has standing to challenge the Ancestry trust.

### **Termination of Trust**

Generally, a trust is presumed revocable in most jurisdictions; however, it becomes irrevocable on the death of the settlor. Here, upon Grandma's death, the trust became irrevocable.

A trust may be terminated upon expiration by its own terms or with the consent of all the beneficiaries and trustee, when it serves no valid purpose, or the purpose has become impracticable.

Here, Betty may argue that one of the beneficiaries has died; thus, the trust should be terminated because it can no longer serve its purpose. Further, she may argue that the

trustee died. A trust will not fail for a lack of trustee, however, and the court may appoint a new one. Thus, this latter argument will not succeed. In terms of one of the beneficiaries dying, Carol may assert that she and Betty are still alive; thus, the purpose of the trust may still be served on appointment of a new trustee.

**Conclusion:** Because the trust may still serve its purpose of benefiting Betty and Carol, the court should deny Betty's petition to dissolve the Ancestry trust.

### **[3] COURT ORDER FOR TOM'S ESTATE TO REPAY ANCESTRY TRUST**

#### **Trustee Fiduciary Duties**

A trustee owes fiduciary duties to the beneficiaries, including the duties of loyalty, care, to account, and to disclose. The trustee must also follow the express terms of the trust; here, Grandma's express terms "directed the trustee to distribute all income from the trust annually in equal shares to Tom, Betty, and Carol." As mentioned above, Tom was named trustee of the Ancestry trust. Thus, he owes these fiduciary duties to Tom, Betty, and Carol.

#### **Duty of Loyalty**

A trustee owes the duty of loyalty to the beneficiaries, which means that the trustee must act in good faith when managing the trust and exercise independent judgment. The duty of loyalty is compromised when the trustee has a conflict of interest. Conflicts may include self-dealing, such as using trust property to satisfy debts. When self-dealing occurs, the no further inquiry rule applies and the self-dealing is automatically considered a breach of the duty of loyalty.

A conflict arose when "In March 2024, Tom unexpectedly incurred a large debt for medical expenses." To pay off his unexpected debt, "Tom wrote a check from the assets of the Ancestry Trust." Tom's estate will argue that Tom, as beneficiary of the trust himself, did not engage in self-dealing because he was a named beneficiary for the Ancestry Trust. However, Tom had not planned to distribute the income from the trust in this way as manifested by his intent "to repay the Trust." Thus, it is unlikely, though not clearly stated in the facts, that Tom distributed an unequal share of the trust income to himself in March 2024. By engaging in this self-dealing, Tom also violated the express trust terms.

Because Tom used trust property to pay off his personal debt, he engaged in self-dealing. As such Tom violated his duty of loyalty to the other beneficiaries.

#### **Duty of Care**

Under the duty of care, a trustee must act as a reasonably prudent person. The duty of care encompasses the prudent investor rule, in which the trustee is to invest the property as a prudent investor would, including diversifying the investments. The duty of care also includes being impartial to all of the beneficiaries, and not favoring one beneficiary over another.



Here, by using trust assets to pay off his unexpected debt, Tom breached the duty of care by favoring himself as a beneficiary. Specifically, the distribution of this income favored Tom, and not Betty and Carol. Thus, Tom breached his duty of care.

### **Duty to Disclose**

A trustee must keep the beneficiaries reasonably informed about the trust assets; and, has a duty to disclose material information pertaining to the trust. Here, when Tom used the trust assets to pay off his own unexpected debt, he did not disclose this information. He likely did not feel the need to since he planned to repay the trust. Thus, Tom violated his duty to disclose.

### **Remedies for Breach**

Remedies for breach include return of the assets the trustee disposed of, lost profits, damages; and removal of the trustee for breach of fiduciary duties. Here, because Tom violated his fiduciary duties as trustee, he may be removed as trustee. The court may also order Tom's estate to repay the Ancestry trust.

**Conclusion:** The court may also order Tom's estate to repay the Ancestry trust.

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

### **Betty's Petition to dissolve Farm Trust**

The key issues here are whether this is a valid charitable trust and whether the doctrine of cy pres applies to prevent the 'failure' of the trust.

#### **Valid Trust**

A valid trust requires the following: grantor capacity and intent to create the split between legal and equitable title, appointment of trustee, ascertainable beneficiaries, sufficient trust res/corpus, and a valid trust purpose (which is essentially any purpose that is not illegal or against public policy). Trusts may be express trusts, inter vivos, testamentary, and/or charitable. A testamentary trust is one that is created by a valid will. It is permissible that the trust is not 'funded' until the testator dies and the will is admitted into probate, which at that point would constitute the 'funding' of the trust. A charitable trust is one that is provided for a charitable purpose. A charitable purpose is one that is intended to benefit the public in some form, and not simply for the benefit of a few individuals.

Here, the Farm Trust is a valid testamentary charitable trust. The trust was created by the valid will was likely entered into probate in 2020, when Grandma died. It appears there was intent by Grandma to devise some of her property (for this trust, the farm) to the trust for the benefit of the City. The fact that the residuary estate funded the trust after her death is permissible for a testamentary trust, as noted above. Bank was properly noted as the trustee, and its job is to manage the trust on behalf and for the benefit of City, the beneficiary. Moreover, because this is a charitable trust, i.e. the property was left to the City for the general benefit of the City, this is sufficient to satisfy the 'beneficiaries' and 'valid purpose' requirements.

***Charitable Trusts and RAP*** - As a final note on trust validity, trust interests granted under a charitable trust are not subject to the rule against perpetuities. Thus, the grant of the farm for the benefit of the city is permissibly perpetual.

#### **Termination of Trust / Cy Press**

There are several ways that a trust may terminate: the trust's 'purpose' may be satisfied and therefore the trust becomes moot, the trust assets have all been disposed of, an express provision in the trust may call for a specified date or event for termination, or all beneficiaries may try to come together to end the trust (which is difficult in most cases because ALL beneficiaries, even contingent or unborn, may have a say in such vote).

For charitable trusts, the doctrine of cy pres allows some modification of the trust's purposes where its originally intended purpose becomes illegal, impossible or impractical. The cy pres doctrine only applies if the trust's charitable purpose is not so specific that any modification to the trust's terms that the result would not be aligned with the original intent of the grantor. If possible and not ad-odds with the original intent

of the grantor, a court may use the cy pres doctrine to alter the terms of the trust so that it can carry out with this modified, yet still largely consistent, purpose.

Here, Betty will try to argue that because the Farm is no longer functioning as an organic-certified farm, where no pesticides would be used, this constitutes a 'failure' of the trust instrument by its terms. This is a good argument for Betty largely because of the provision in the instrument that designates a specific residuary beneficiary in the event that the trust instrument fails. However, as City will point out, the trust instrument has not failed, because as a charitable trust, the doctrine of cy pres can allow the trust to continue despite losing its organic certification and the City's decision to use pesticides.

This is likely a stronger argument for several reasons. First, the language in the trust states that "Grandma **preferred** that the farm be used as an organic farm with no pesticides." Typically, the general rule of thumb with trusts is that wishful, precatory language is not given the same weight as a mandatory trust provision regarding how the property is to be disposed or managed. Thus, City has a strong argument that while the Grandma 'preferred' the farm be operated one way, a change in the mechanics regarding the farm's operations does not render the trust as failed, because the Grandma's main purpose with the trust was to benefit the City, regardless of how the farm is operated. If the city had ceased use of the farm completely as a farm, this would constitute a 'failure' that cy pres may not be able to rectify. However, under these facts, it seems the doctrine can align with grandma's purpose for the continuation of the City's use. Thus, the doctrine of cy pres may be validly applied under these facts to continue allowing the City to benefit from the farm.

### Conclusion

The charitable trust is likely to remain valid and will not be dissolved by Betty's petition

### **Betty's Petition to dissolve Ancestry Trust**

#### Valid Trust

The basic rules for valid trust formation are noted above. This is an express trust for the benefit of Grandma's heirs.

We can presume Grandma had capacity and intent to create the trust by her validly executed will, absent any facts that indicate otherwise. She created this trust in the same way as the Farm trust, through a testamentary instrument. We have appointment of the trustee in Tom, and ascertainable beneficiaries, Tom, Betty, Carol and Grandma's grandchildren (a class gift). It is permissible for Tom to be both a beneficiary and the trustee, but this dynamic often puts trustees at higher risks of breaching fiduciary duties (see below). We have the income in the trust as sufficient trust corpus, and a valid trust purpose of distributing the income annually to the beneficiaries.

#### Requirements Vote for Dissolution

As noted above, termination of an express trust can happen in several ways. Typically, a beneficiary who wants to terminate a trust must be joined by all vested and contingent beneficiaries. This means those beneficiaries who are not yet born, or whose interests have not yet vested. This can be especially difficult where there are unborn beneficiaries as part of a class gift. In CA, a party may be able to petition the court to appoint a decision maker for those beneficiaries who are unable to participate in the vote.

Here, there is an immediate problem with unanimous consent. First, we know that both Carol and Tom have objected and will not be voting in favor of dissolving the trust. In addition, even if they were in agreeance, there would still be an issue because of the provision that provides income to Grandma's grandchildren. Right now, we only know of one child (Darcy) but there may be others whose interests are at stake by virtue of the trust instrument.

Thus, Betty will likely not succeed in getting unanimous consent to dissolve the trust.

#### Other methods for Dissolution

Trusts may terminate on their own or by operation of law / order of the court in several other situations (i.e. trust purpose becomes satisfied and moot, trust becomes illegal, court order due to severe misconduct, etc.).

Betty might argue that because Tom died and no trustee was named, the trust 'fails' as a valid trust and therefore her application for dissolution should be accepted. However, the death of a trustee does not terminate a trust. The court can simply appoint a new trust, or the beneficiaries may appoint a new trustee if they can all agree on one. In addition, trustee misconduct is also not grounds for dissolution, but removal of the trustee may be a permissible remedy under certain circumstances. There are no other facts indicating why this trust would have failed, and thus Betty will fail in this order for dissolution as well.

#### Conclusion

Betty will likely fail in her order for dissolution of the Ancestry Trust.

#### **Order for Tom's repayment to Ancestry Trust**

Tom's Estate will likely be ordered to pay the trust the money he took to pay off his medical debt. The core issues here are his breach of the duty of care and duty of loyalty.

#### Duties of Trustee

Trustees have a variety of duties to the trust and to the beneficiaries. These duties include the duty of care, the duty of loyalty (no self-dealing), duty to account, duty to manage investments prudently, and several others.

## **Duty of Loyalty**

A trustee owes a very strict duty of loyalty, in which almost any self-dealing is deemed a violation of these duties even if it benefits the trust. A trustee must not engage in any transactions with the trust itself, and must also not engage on behalf of the trust with himself or with another person of which he may derive a personal benefit. Where a trustee breaches the duty of loyalty, the beneficiaries can take several actions: 1) they can affirm the transaction if it was beneficial to the trust, 2) they can order the trustee to repay all of the benefit he received from the breaching transaction, or 3) may be able to remove the trustee for this misconduct.

Here, Tom abused his trustee powers by lending himself more than his allotted share to repay off his medical debt. In doing so, he engaged in self-dealing at the expense of the other beneficiaries, who were all supposed to receive equal share of the income annually. It does not matter whether or not Tom was planning to give the money back eventually, because this duty is strict under trust laws and any self-dealing (regardless of intent) is typically found to be a breach. Thus, he breached the duty of loyalty and the beneficiaries can order Tom's estate to repay the amount he took from the transaction.

## **Duty of Care**

A trustee also owes a duty of care, which means that he must act as a reasonably prudent trustee under the circumstances in furthering the interests of the trust and the beneficiaries.

Here, a reasonably prudent trustee would know that taking more than his allotted share under the trust was not permissible and not in the best interests of the trust or the beneficiaries. Thus, as well as the duty of loyalty, Tom also likely breached the duty of care.

## **Conclusion**

The Court should order Tom's estate to repay the Ancestry Trust.

## **QUESTION 2**

Ollie owns a field which he rented to the Pelicans, a soccer team, for a soccer game against another team, the Jaguars. On the afternoon before the day of the game, Ollie checked the field for dangerous conditions. He found nothing. He did not examine the field again before the game.

Barry is the coach for the Pelicans. During the game, Barry became frustrated by the Jaguars' rough play. He therefore instructed Kate, a Pelicans player, to play more roughly. Barry knew that Kate was a very aggressive player. Barry had done this once before, and Kate started a fight with a player from the opposing team.

As Barry expected, Kate began playing very aggressively. Eventually, she knocked down a player from the Jaguars, Yvonne. When Yvonne fell, she broke her arm and badly cut her hand on broken glass lying on the field. The referee stopped play to call a foul.

While play was stopped, Yvonne asked Kate, "Why are you being such a jerk?" Kate responded by punching Yvonne. Yvonne pushed Kate, who fell and suffered some minor bruises. Yvonne suffered no further injury.

1. Could Yvonne successfully sue Ollie or Barry, or both, in negligence for her broken arm and cut hand? Discuss.
2. Could Yvonne successfully sue Kate for battery? Could Kate successfully sue Yvonne for battery? Discuss.
3. If Yvonne recovers only from Ollie and Barry in negligence, how would her damages be apportioned between Ollie and Barry? Discuss.

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

### **1. Could Yvonne successfully sue Ollie or Barry for Negligence for her broken arm and cut hand?**

#### **Yvonne v. Ollie**

A prima facie case of negligence requires the proof of (i) duty, (ii) breach, (iii) causation, (v) damages.

#### **Duty**

##### **Is a duty owed?**

A duty is owed to all foreseeable plaintiffs. Under the majority Cardozo view, a duty is owed to those within the foreseeable zone of danger. Under the minority Andrews view, if anyone may be foreseeably harmed by your conduct, then a duty is owed to everyone.

Here, Ollie rented the field that he owned to a soccer team. Thus, all players, coaches, and members of those teams were foreseeable plaintiffs. Thus, since Yvonne was a player on the Jaguars, a duty was owed.

##### **Standard of Care**

Generally, the standard of care is that of a reasonable person under the circumstances. However, special duties are owed by landowners to land entrants. Under the modern approach, the landowner owes a duty of reasonable care to all land entrants except for flagrant trespassers. However, under the traditional approach, the duty owed depends on the land entrants status. If the land entrant is an invitee, which is a business guest or the public if the land is open to the public, the landowner owes a duty to inspect for unreasonably dangerous conditions and warn or make safe known or should be known conditions. If the land entrant is a licensee, which is a social guest, the landowner owes a duty to warn or make safe known hidden conditions. If the land entrant is a known or anticipated trespasser, the landowner owes a duty to warn or make safe known unreasonable dangerous hidden and artificial conditions. If the land entrant is an unknown or unanticipated trespasser, the landowner must only refrain from willful or wanton misconduct.

Here, Yvonne was an invitee, because she was a business guest. Ollie rented the field to a soccer team and she was a member of the team. Therefore, he owed a duty to inspect and warn or make safe known or should be known dangers.

#### **Breach**

A breach occurs if the defendant failed to follow the applicable standard of care.

Under the modern approach, Ollie may argue that he exercised reasonable care

because the afternoon before the game he inspected the field and found nothing. However, Yvonne would argue he had a duty to inspect right before the game. It is likely that a reasonable landowner would inspect the land in the afternoon before the game and not right before, because unless anyone else played on the field in between the inspection and the game, there would be no reason to expect glass or other dangerous conditions to show up in a matter of hours. Therefore, under the modern approach, he likely exercised reasonable care.

Under the traditional approach, Ollie would argue he cannot be liable because he upheld his duty to inspect the premises for unreasonably dangerous conditions by examining the afternoon before the game. Whether the inspection before the game was sufficient, depends on facts such as whether there were any other players, entrants, or events on the field in between the time he inspected and the time they played the game. Moreover, it might depend on the length of time in between the inspection and the game. The rule requires that the landowner inspect but also protect against known or should be known dangers. Therefore, unless the inspection was close in time and no one else used the field in between the inspection and the game than the glass would be a "should be known condition." That is because if Ollie inspected right before the game he would have discovered the glass.

Because glass is an unreasonably dangerous condition and it would have been discovered if he conducted the inspection closer to the game, he likely breached his duty.

## **Causation**

The Plaintiff must prove actual and proximate causation.

### Actual Cause

Actual causation is but for the defendant's negligent act, the harm would not have occurred. However, if there are multiple causes, then actual cause will be found if the defendant's action was a substantial factor in causing the harm.

Here, there were two causes of Yvonne's harm. First, the glass being left on the field. Second, Kate's conduct of pushing her. Ollie can successfully argue that he was not the but for cause of the broken arm, because no facts suggest that the glass played a part in her breaking her arm. Instead, the broken arm was caused solely by the pushing and falling. However, she would not have cut her hand on the glass but for the glass being left there. Although, Ollie would argue that if she was not pushed her hand would not have been cut, the glass was a substantial factor in causing the cut.

Therefore, he is likely the actual cause for the cut hand but not the broken arm.

### Proximate Cause

Proximate causation requires that the type of harm suffered be foreseeable. If there are intervening causes in between the defendant's negligent conduct and the plaintiff's injury, this will only be a superseding cause and cut off the chain of causation, if the



intervening cause was unforeseeable. Generally, courts find negligent conduct foreseeable, but intentional and criminal conduct unforeseeable.

Here, it was foreseeable that someone would cut their hand on glass if they fell on the field. However, Ollie would argue he cannot be liable because the push was an intervening act and it was intentional because Kate was playing very aggressively on purpose. Although, this act was intentional, it was likely foreseeable that when renting out the field to a soccer team, it may involve rough play and players may fall on the field. Moreover, even absent rough play, players oftentimes fall when engages in a sport. Thus, this was a foreseeable intervening cause and does not cut off the chain of causation.

Accordingly, he is the proximate cause of the cut hand.

### **Damages**

In order to recover for negligence, the Plaintiff must have suffered personal injury or property damage. The economic loss doctrine precludes recovery for pure economic loss.

Here, she suffered a broken arm and cut hand. Thus, she suffered damages.

In conclusion, unless any defenses apply, he will be liable for her cut hand, because as discussed above he was not the cause of the broken arm.

### **Defenses**

#### **Contributory Negligence**

Under the doctrine of contributory negligence, if the plaintiff was at all negligent in causing the harm, they would be completely barred from recovery.

Here, there are no facts suggesting that Yvonne was negligent.

#### **Comparative Negligence**

Under the pure comparative negligence approach, if the plaintiff was at all negligent in causing the harm, their recovery will be reduced by the percentage of their negligence. However, here as discussed above, there are no facts suggesting she was negligent.

#### **Assumption of Risk**

Assumption of risk is a defense where the plaintiff voluntarily and knowingly assumed the risk of the activity they were engaged in. In contributory negligence jurisdictions, assumption of risk is a complete bar. However, under comparative negligence jurisdictions, it merely reduces recovery.

Here, Ollie would argue that Yvonne's decision to play soccer was a voluntary assumption of the risk. However, soccer is generally not considered a dangerous sport. Moreover, even if it is, the player only assumes the risks inherent in that sport, and breaking your hand on glass is not a risk inherent in the sport. Thus, although she may

have assumed some risk, she did not assume this specific risk.

Accordingly, no defenses apply.

### **Conclusion**

In conclusion, he will likely be found negligent for the cut, but not for the broken hand.

### **Yvonne v. Barry**

#### **Duty**

##### **Is a duty owed?**

See rule above. Here, Yvonne was a foreseeable plaintiff because she was a player on the other team. It was foreseeable that by instructing another player to "play rough" players would be injured. Moreover, she was within the foreseeable zone of danger, since she was playing on the field along with Kate. Thus, he owed a duty to Yvonne.

##### **Standard of care**

Generally, the standard of care is to act with the reasonable care of a reasonable person under the circumstances. Here, Barry would be held to the standard of care of a coach in the same circumstances.

#### **Breach**

See rule above.

Here, he breached his duty, because he did not act with reasonable care. During the game, he became frustrated by the other sides rough play and instructed a player who he knew was very aggressive, to play rough. A reasonable coach would not instruct another player, who they know can be aggressive, to play rough, just because the other side is doing so. Although, he will argue that the other side was playing rough first, this did not give him grounds to instruct his players to play rough. Instead, a reasonable coach would call a timeout or meet and discuss with the coach of the other side. Moreover, because he knew that Kate not only "played rough" but had a tendency to become very aggressive and once before had started a fight with a player from the opposing team, he lacked reasonable care in asking the most aggressive player on the team to play rough.

Accordingly, by instructed her to play rough, he breached his duty.

#### **Causation**

See rule above.

#### **Actual cause**

See rule above. Here, he was the but for cause of the injuries, because but for him telling Kate to play rough she would not have pushed Yvonne and she would not have

fallen. Although, he may argue that Kate may have played rough without his instructions, since she was a very aggressive player, this will not absolve him from liability, because he specifically instructed her to do so.

Moreover, in regards to the broken glass, he was a substantial factor in causing the cut hand, because but for his instructions she would not have been pushed and would not have been injured on the glass.

Thus, he was the but for cause of both injuries.

### **Proximate Cause**

See rule above. Here, he is the proximate cause because it is foreseeable that someone would be injured as a result of him telling the most aggressive player to "play rough" However, he will argue that he was not the proximate cause of her injuries, because Kate actually pushing Yvonne was an intervening cause. Moreover, he will argue that intentional acts are not foreseeable. Nevertheless, these arguments will not succeed, because Kate pushing Yvonne was a foreseeable intervening cause. Kate only pushed Yvonne after Barry instructed her to play rough and he knew that she had a tendency to play rough. In fact, last time he instructed her to play rough, she got into a fight with the opposing team. Thus, it was a foreseeable intervening cause.

Moreover, he will argue that it was not foreseeable for her to cut her hand on glass, because he could not have foreseen there to be glass on the floor. However, the court would likely still find proximate causation because it is foreseeable that someone would be harmed from his conduct, even if the exact way that they were harmed was not foreseeable. There is no requirement that the exact harm be foreseeable as long as the type of harm is.

Further, he may argue that Kate punching Yvonne after the time was called was not foreseeable. However, because she suffered injuries before she was punched and suffered no further injuries as a result this would not cut off his liability.

Thus, there is proximate causation.

### **Damages**

See rule above. Here, she suffered a broken arm and cut hand. Thus, she suffered damages.

In conclusion, unless any defenses apply, he will be liable for negligence.

### **Defenses**

#### **Comparative Negligence**

See rule above. As discussed above, she was not comparatively negligent.

#### **Contributory Negligence**

See rule above. As discussed above, she was not contributorily negligent.

### **Assumption of Risk**

See rule above. Here, Barry may argue that she assumed the risk of getting pushed in a soccer tournament because she voluntarily signed up for a sport that has a risk of being physically harm. However, although, you may be physically harmed in soccer, soccer is not an inherently aggressive sport such as football. Thus, by deciding to play on a soccer team, Yvonne did not assume the risk of being pushed by other players. Moreover, he will argue that since the Jaguars were engaging in rough play, they assumed the risk of the other side playing rough. Nevertheless, since rough play is generally not an inherent risk in soccer, she did not assume the risk.

Accordingly, no defenses apply.

### **Conclusion**

In conclusion, Barry will be found negligent.

## **2. Could Yvonne successfully sue Kate for Battery? Could Kate successfully sue Yvonne for battery?**

### **Yvonne v. Kate**

#### **Battery**

Battery is the intentional act that causes a harmful or offensive touching to another. The Defendant must intend the contact, but need not intend for it to be harmful or offensive. Whether the contact is offensive, is tested under an objective standard.

Here, there are two potential batteries of Yvonne to Kate.

#### **Pushing Yvonne During the Game**

First, Kate was playing very aggressively during the game and eventually knocked down Yvonne.

#### **Intentional Touching**

First, the touching must have been intentional. Kate may argue that this was not intentional, but merely an accident because rough play is inherent in a soccer match. However, considering that she has a tendency to play rough and acted in response to a request by her coach to play rough this was likely intentional. Moreover, once before she had started a fight with a player from an opposing team, which is further evidence that this act was intentional. Thus, the court would likely find it intentional, but could go either way.

#### **Harmful or Offensive**

Second the touching must be harmful or offensive. Here, it was harmful because as a result Yvonne broke her arm and badly cut her hand on broken glass. Thus, the

touching was harmful.

Accordingly, unless any defenses apply, she will be liable for battery.

### **Defenses - Consent**

If the person voluntarily and knowingly consents to the contact, then there is no battery. The battery may be express or implied for example by engaging in a dangerous sport or activity. However, the action cannot exceed the scope of consent.

Here, she will argue that Yvonne consented to being injured during the game by deciding to play on a soccer team. She will argue that sometimes players get aggressive as part of the game and it is a risk inherent in playing soccer. However, Kate may argue that soccer is not an inherently aggressive sport, like football. Moreover, Yvonne's team began playing rough first which shows they consented to the other sides rough play. Since the pushing occurred during the game, the court would likely find that she consented.

Thus, Kate would not be liable for battery.

### **Punching Yvonne After the Play**

Second, after the play was stopped, Yvonne asked Kate "Why are you being such a jerk?" In response, Kate punched her.

### **Intentional Touching**

Kate's act of punching Yvonne was an intentional touching, because people do not generally punch another by accident and the action was done in response to a question by Yvonne. Thus, it was likely intentional.

### **Harmful or Offensive**

Here, the touching was not harmful, since she did not suffer any further harm as a result of the punch. Nevertheless, a reasonable person would likely find being punched in front of their entire soccer team by another player on an opposing team to be offensive. Moreover, Yvonne likely found it to be offensive.

Accordingly, as long as there are no defenses, she can sue Yvonne for battery.

### **Defenses - Consent**

See rule above. Kate may raise a consent defense.

Here, she will argue that Yvonne consented to being harmed by playing on a soccer team and engaging in rough play during the game. However, soccer is likely not a rough sport, like football, where people are physically tackling each other, thus by deciding to play on a soccer team she likely did not consent to such aggression by another player. Moreover, even if there was consent, the punching exceeded the scope of consent, because it was an intentional act, was done after the play was stopped, and punching is not something that any player of a sport consents to by impliedly consents

to by agreeing to play the sport.

Accordingly, she cannot successfully claim that Yvonne consented to the punch.

## **Conclusion**

In conclusion, Yvonne will be successful in suing Kate for battery for the punch. But would likely not be successful in suing for being knocked down during the game.

## **Kate v. Yvonne**

See rule above. Here, after Kate punched Yvonne, she pushed her. As a result she suffered minor bruises.

## **Intentional Touching**

See rule above. Here, the act of pushing her to the ground after she punched her was intentional. Yvonne likely pushed Kate in response to the punch by Kate, since it was immediately after. Thus, it was likely intentional.

## **Harmful and Offensive**

See rule above. Here, as a result of the push, Kate suffered bruises. Although Yvonne may argue that bruises are minor and thus are not "harmful." Generally any injury is enough for battery. Thus, the touching was harmful.

Accordingly, unless any defenses apply she will be liable for battery.

## **Defenses**

### **Consent**

See rule above. As discussed above, by playing on a soccer team, one does not generally consent to rough play, because soccer is not an inherently rough sport, such as football. Moreover, the act of Yvonne pushing Kate was done intentionally and after the play was stopped. Thus, even if one consents to the aggressive play during the game, this does not extend to acts that occur after the play has been stopped. Thus, the consent defense will be unsuccessful.

### **Self-Defense**

Self-defense is a defense to intentional torts. A person is privileged to use reasonably proportionate force to defend against an imminent unlawful touching by another. The person must subjectively believe that force is necessary to defend themselves, and that belief must be objectively reasonable. Moreover, the person may not be the initial aggressor. Further, the use of deadly force is only reasonable if they fear imminent serious bodily harm or death.

Here, Yvonne may claim that she acted in self-defense. She will argue that she only pushed Kate after she knocked her down during the game and punched her after the game. Thus, she felt that she needed to push her to the ground in order to protect

against further injury inflicted by Kate. Moreover, she will argue that because Kate already hurt her twice, this shows her aggressive tendencies, and she feared that Kate may continue to harm her. Thus, she had a subjective belief of unlawful force.

Further, this belief was likely reasonable, because a reasonable person would be scared of getting hurt further, once someone already knocked them down and punched them. However, it could be argued that the fear may not have been imminent since Kate already committed the harmful acts, and Yvonne acted after those acts. Nevertheless, it was likely imminent because Kate was very aggressive and clearly had the intention of harming Yvonne. Thus, she could harm Yvonne again at any moment.

Moreover, the force was reasonably proportionate to the fear, because she merely pushed her in response to being punched. She did not use a deadly weapon.

Although, Kate may argue that Yvonne was the intentional aggressor because she asked Kate "Why are you being such a jerk," Kate is the one who knocked her down first during the game. Thus, she was not the initial aggressor.

Accordingly, Yvonne will likely succeed in claiming that she acted in self-defense.

### **Conclusion**

In conclusion, Kate will likely be unable to recover for battery against Yvonne because she acted in self-defense.

### **3. If Yvonne recovers only from Ollie and Barry in negligence, how would her damages be apportioned?**

The question on damages depends on the percentage that the court finds each party negligent and whether the jurisdiction follows a joint and several or pure several liability approach.

If the jurisdiction follows several liability, then Yvonne can only get the portion of damages from each Defendant that they are individually directly liable for. In that case, if one of the Defendant's is insolvent, Yvonne will be able to recover less. However, if the jurisdiction follows joint and several liability, she can get the entire damages amount from either Defendant. Then, the Defendant who paid more than their share can sue the other seeking indemnity and contribution.

### **Broken Arm**

As discussed above, the broken arm was likely only caused by Barry's negligence and not Ollie's negligence. Therefore, under a several liability jurisdiction, she would recover everything from Barry. However, if it is a joint and several liability jurisdiction, she can recover from either Ollie or Barry. However, Ollie will have a right to contribution from Barry for any amount he paid.

### **Badly Cut Hand**

As discussed above, the badly cut hand was caused both by Barry and Ollie's

negligence. However, the court would likely allocate more negligence to Ollie, since if he properly inspected the field before the game, he would have discovered the glass. Thus, although she may have still been injured she would not have cut her hand on broken glass. For example, the court may allocate 70% of the damages to Ollie and only 30% to Barry.

Accordingly, in a several liability jurisdiction she would only be able to recover from each defendant up to their amount of liability. However, in a joint and several liability jurisdiction she could recover the entire amount from either Defendant and then they can seek contribution from the other for the extra amount they paid.



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

### **Could Yvonne successfully sue Ollie or Barry, or both, in negligence for her broken arm and cut hand?**

#### **Ollie's Liability**

In order to be liable for negligence, the plaintiff must establish that the defendant owed a duty to the plaintiff, breached that duty, there was causation, and the plaintiff suffered damages.

#### **Duty and Breach**

Under traditional rules of liability, the degree of duty that landowners owed to people on their land depended upon their status. If one is an invitee, meaning that they are an invited guest or on the land for some benefit to the landowner, the landowner owes a duty to inform the invitee of all known artificial and natural hazardous or dangerous conditions not readily apparent, and to exercise reasonable care in reasonably inspecting the land for any dangerous conditions. If one is a licensee, they are merely a temporary visitor on the land for their own benefit. The landowner still owes a duty to inform the licensee of all known artificial and natural hazardous or dangerous conditions not readily apparent on the land, but need not exercise reasonable inspection.

Here, Yvonne is likely an invitee and not a licensee. Generally speaking, customers of commercial establishments are considered as invitees of the owner. Although Ollie's field is not necessarily a "store", Ollie nonetheless runs the field as a commercial enterprise where he rents use of the field out to soccer teams as customers. After all, Ollie derives a commercial benefit for teams playing on and renting his field. As such, Yvonne is analogous to being a customer of Ollie's field such that she is an invitee of Ollie.

As an invitee, Ollie owed a duty to Yvonne to warn Yvonne and her team of any known dangerous conditions on the field, both artificial and natural, as well as a duty to take reasonable care to inspect the field for hazards. Here, it is debatable that duty was breached. On one hand, Ollie did inspect the field the day before the game. However, it is unclear how thorough this inspection was. Furthermore, Ollie failed to inspect the field before the game, which would presumably be what a reasonably prudent field owner would do. It is certainly foreseeable that someone could have entered the field in between Ollie's inspection and the game the next day. As such, failure to inspect before the game for dangerous conditions likely breached Ollie's duty to Yvonne as an invitee.

#### **Causation**

In negligence, causation requires both actual cause and proximate cause. Actual causation, or "but-for" cause means that the plaintiff's harm would not have occurred but for the defendant's breach of duty. Proximate cause requires that the plaintiff's harm be a reasonably foreseeable consequence of the breach. If an unforeseeable,

superseding event occurs causing the plaintiff's harm, the defendant's breach is not a proximate cause.

Here, Ollie's failure to inspect before the game was certainly an actual cause of Yvonne's injury. If Ollie had inspected the field before the game, he would have discovered and removed the broken glass. As such, Yvonne would not have cut her hand on the glass. Additionally, this failure to inspect was a proximate cause. It is certainly foreseeable that some broken glass might end up on a field that is presumably outside and accessible to the general public, and that it is foreseeable that a failure to inspect that field for hazards would lead to a player hurting themselves when falling on said hazards. Moreover, Kate pushing is not a superseding intervening cause because it is highly foreseeable that during a soccer game players might get rough and push each other. Although against the rules, it is certainly an unfortunately common, and thus foreseeable occurrence. As such, there is causation.

### Damages

There are clearly damages caused by Ollie's breach. When Yvonne fell, she cut herself badly on the glass Ollie negligently failed to inspect for. Presumably this came with some sort of medical treatment and injury damages she must be compensated for. As such, all elements of negligence are satisfied for Ollie.

### **Barry's Negligence**

In addition to Ollie, Barry can be liable for negligence. For the following analysis. All the rules for duty, breach, causation, and damages discussed above likewise apply for analysis of Barry's negligence.

### Duty and Breach

In general, whenever someone acts or engages in an activity, they have a duty to exercise the ordinary care of a reasonably prudent person engaged in that activity. This duty is owed to all reasonably foreseeable plaintiffs. Thus while acting as a soccer coach, Barry had a duty to exercise reasonable care in this capacity. This would presumably include exercising reasonable care to protect both his players and that of the other team from any unnecessary or unreasonable risk of harm. As a player in the game, this duty extended to Yvonne.

Here, this duty was breached. Barry went out of his way to instruct Kate "to play more roughly." Such an intentional instruction undoubtedly put players on the other team at a heightened and unreasonable risk of harm. After all, Barry knew that Kate was an aggressive player and had intentionally hurt and fought other players before. As such, no reasonably prudent coach would give an instruction to Kate that would likely instigate her to hurt other players like Yvonne.

### Causation

There is actual cause. If Barry hadn't instructed Kate to play rougher, she wouldn't have increased the aggressiveness of her play and knocked down Yvonne, leading to her cut

and broken arm. Barry's instruction was likewise a proximate cause of Kate's injuries. After all, Barry knew that Kate was very aggressive and had started fights in the past. As such, it would be reasonably foreseeable that Barry's instruction would lead to knocking down a player on the other team like Kate. Although Barry might not know that there would be broken glass on the ground, that is irrelevant to this analysis. All that matters is that it was foreseeable that a player might get knocked down to the ground by Kate and get hurt in the fall, the foreseeability of the degree of harm felt that fall would cause does not matter. As such, there is actual and proximate cause.

### Damages

There are certainly damages. The fall caused by Kate's aggressiveness caused Kate to suffer a broken arm and a cut hand. As such, all the elements of negligent are satisfied.

### Defenses

A defense to negligence actions is assumption of risk. If the plaintiff becomes knowingly aware of some sort of unsafe condition or negligent activity, yet nonetheless makes the knowing and informed decision to assume the risk and voluntarily engage in the activity, the defendant will not be held liable for negligence.

Assumption of risk would not apply for Ollie. Although Yvonne voluntarily partook in the soccer game, she had no reason to know or expect that broken glass would unexpectedly be on the field. As such she did not assume the risk of broken glass.

With Barry, assumption of risk is more debatable, on one hand physical play may perhaps be somewhat inherent to agreeing to play soccer. However, it can be said that one assumes the risk of the other players intentionally injuring you, and Yvonne certainly did not assume the risk that an adult coach would intentionally instruct his violent player to play more aggressive knowing that it would likely lead to violent conduct. As such, no reason to say Yvonne assumed the risk Barry would instruct his players to play dirty.

### **Could Yvonne successfully sue Kate for Battery? Could Kate sue Yvonne?**

#### Yvonne sues Kate

Battery occurs when a defendant makes harmful or offense contact with the plaintiff or their immediate person. Here, Kate certainly committed a battery. After all, Kate intentionally began playing aggressively and thus knocking down Yvonne was likely intentional. This contact was harmful, as Yvonne fell to the ground, cut her hand, and broke her arm as a result of this contact.

A defense to battery is consent. In other words, there is no battery of the plaintiff consented to the touching. Similar to the assumption of risk analysis above, Kate may argue that Yvonne impliedly assumed the risk of this aggressive contact because she agreed to play soccer and contact is inherent part of playing soccer. However, Yvonne will respond that while incidental contact may be part of the game, intentionally aggressive contact that is against the rules of soccer is not implicitly consented to.

Ultimately, the outcome of this defense may hinge on the degree of "dirtiness" Kate's contact amounted to. If Kate's contact was extremely dirty and outside the bounds of commonly accepted practices of the game, Yvonne could not have deemed to have consented.

With the punching though, there will be a clear claim for battery for Yvonne against Kate as that was intentional and punching someone is certainly offensive. Additionally, when someone agrees to play soccer, they don't impliedly agree to being punched.

### Kate sues Yvonne

On its face, Kate has a battery claim against Yvonne. After all, Yvonne intentionally pushed Kate, and pushing is a type of offensive contact. However, self-defense is a valid defense to battery. If someone is using unlawful force on another, that person may use the amount of force reasonably necessary to defend oneself from the contact. Here, Yvonne will have an argument that after being punched in the face, which Kate had no right to do, pushing Kate away was a means of defending herself and preventing future harm from Kate.

### Apportionment

Under the majority approach, joint tortfeasors are jointly and severally liable. This means that she can elect to recover her entire damages caused from the fall wholly from either Ollie or Barry. After this occurs, that defendant would then be entitled to recover contribution from the other defendant proportionate to the other defendant's contribution.

Under the majority approach, when a plaintiff suffers a harm, fault is apportioned between the defendants based upon their degree of fault. When an injury is perfectly divisible, the defendant will be liable only for the harm they were specifically responsible for. If however injuries are not perfectly divisible, it will be left up to a jury to apportion what they believe to be the relative fault of the defendants.

Here, the injuries are perhaps severable between Ollie and Barry. After all, the sharp glass presumably did not cause the broken arm but just the cut hand. as such, Ollie will be solely liable for the damages caused by the broken arm. Liability for the cut hand will be apportioned by the jury based upon what they believe is the relative fault is for that injury caused by Ollie and Barry. This degree of fault will be apportioned based on a percentage basis.

### **QUESTION 3**

Ann, Bob, and Claire pooled their resources and opened a retail shoe store called ABC Shoes. They each provided initial operating capital, took an active role in day-to-day operations, and agreed to split any profits equally.

Two months later, Delta Bank (Delta) loaned ABC Shoes \$30,000 for additional marketing expenses. Ann signed the loan papers as "Ann, for ABC Shoes."

Three months later, ABC Shoes was validly incorporated as "ABC Incorporated" (ABC Inc.) with Ann as president, Bob as secretary, and Claire as treasurer. Ann, Bob, and Claire were also directors of the corporation and its sole shareholders. The board adopted bylaws and regularly held meetings thereafter.

In the following six months, Ann, with the approval of Bob and Claire, borrowed \$40,000 for business expansion from Echo Bank (Echo). Ann signed the note as "ABC Inc. by Ann, President." That same month, Ann, without consulting Bob or Claire, entered a contract with Big Shoe Co. to buy \$50,000 of inventory. Ann again signed the contract as "ABC Inc. by Ann, President." ABC Inc. then hired Fred to work in the store and occasionally pick up inventory. While driving to pick up inventory one day, Fred negligently injured Peter, a pedestrian who was walking in a crosswalk. Peter filed a lawsuit for personal injuries.

One year after opening ABC, the business ceased operations due to low demand and an economic recession. Money is still owed to Delta, Echo, and Big Shoe Co.

Who is liable for each of the following items:

- a. The Delta loan? Discuss.
- b. The Echo loan? Discuss.
- c. The Big Shoe Co. contract? Discuss.
- d. Damages for Peter's injuries? Discuss.

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

#### **a. Delta Loan**

##### **Promoter Liability**

Persons who enter into contracts on behalf of corporations who have not yet been formed are referred to as promoters, and they are in general personally liable on the contracts they enter into because the corporation has not been formed so there is no principal for them to shift liability onto. This presumption can be rebutted by a showing that the third party knew about the corporation being formed and agreed with the promoter to look solely to the corporation for performance on the contract. Promoter liability can also be eliminated by a corporation and third party agreeing to a novation that excuses the promoter from liability and puts it on the corporation solely instead. However, even when a corporation assumes the liability (without a novation), the promoter remains liable on the contract.

Here, Ann acted as a promoter because she signed loan papers with Delta before ABC was incorporated. There is no indication of Delta agreeing to look only to ABC or of a novation (or even assumption) later on. It is not dispositive that Ann signed as "Ann, for ABC Shoes" because this merely evidences that Delta knew about ABC Shoes (relevant to corporation by estoppel as discussed below). Thus, Ann is personally liable on the Delta loan on this basis.

##### **Liabilities of Partnerships and Partners**

A partnership is liable to third parties for contracts entered into by its partners on behalf of the partnership. This is because of the application of the doctrine of agency to partnerships. An agency relationship is created when a competent principal manifests and intent to have the agent act on its behalf and bind it to contracts, and an agent manifests an intent to work on the principal's behalf and to be subject to the principal's control. The requisite assent, benefit, and control exists in the context of partnerships regarding matters which are within the scope of business the partnership is engaged upon.

A partnership does not require an express writing or even specific intent to be created. Instead, a partnership exists anytime more than one person agrees to conduct a for-profit business together as co-owners, i.e., by sharing in profits. Profits need not be equal and not all partners need to contribute capital to be partners. When a partnership is created, there is no liability shield (unless gained via LLP formation, not indicated here) and the partners are personally liable for the debts of the partnership. However, if they acted within the scope of their duties, the partners' personal estates can only be accessed by creditors if a judgment is gained against them personally and the partnership's assets have been exhausted first.

Here, there was a partnership because A B and C all pooled resources to open a retail

shoe store, which was a for-profit business, and they split all profits equally. They were each involved in the active day to day operations of the business and thus are all partners of ABC Shoes.

Thus, whether A, B, C and ABC are liable as partners for the loan from Delta depends on whether A bound the partnership in signing the loan documents.

The question is whether A acted within the scope of the partnership business when she entered the contract with Delta for the loan. As a principal, the partnership is bound when a partner acts with authority. This depends upon whether Ann acted with express, implied, or apparent authority.

#### *Actual Authority*

Actual authority exists when the agent has received express or implied instructions from the principal to undertake the relevant task. While there is no express instruction mentioned here, there may be implied authority because Ann was an active partner in ABC Shoes and she got the loan for marketing for the business. She thus likely was within the scope of the partnership purpose and she acted for its benefit. Thus, Ann had implied authority.

#### *Apparent Authority*

Apparent authority exists when a principal's manifestations can be said to have caused a third party to reasonably believe that the agent acted with authority to bind the principal. Here, there are no relevant manifestations by ABC Shoes to analyze.

However, since Ann acted with actual (implied) authority, the partnership is liable. Additionally, as partners (discussed above), A, B, and C are each personally liable on the loan.

Partners remain liable for the debts of a partnership even after the partnership ceases to exist. Thus, the fact that ABC was incorporated and later ceased operations has no effect. Delta can come after A and B and C for the amount owed.

### **b. Echo Loan**

#### Incorporation and Liability Shield

A validly incorporated corporation enjoys limited liability. Thus, shareholders are not liable personally (only to the extent of their equity in the company) for the debts of a corporation unless the corporate veil is pierced by a court (discussed below). Here, ABC Incorporated was properly incorporated so this principle applies.

#### Authorities of Officers

There is no prohibition against shareholders being officers and directors of a corporation as seen here.

Officers and Directors owe fiduciary duties of care and loyalty to the corporation. Officers have authority to take day-to-day actions in the management of the corporation's affairs. This includes the implied authority (see agency discussion above) to bind the corporation by entering into contracts with third parties that are within the scope of the corporation's activities and that don't rise to the level of major corporate decisions, which are reserved for directors and/or shareholders to approve. Directors can vote to take major decisions usually via majority vote.

Here, Ann likely had express actual authority to enter this contract with Echo because she was given express approval by the other two directors, Bob and Claire. The contract does not appear to indicate any breach of fiduciary duty (principles analyzed below). Moreover, ABC Inc. was a disclosed principal because Ann signed as President of ABC Inc. Ann thus bound ABC Inc. when she signed the agreement.

Thus, ABC Inc. is liable for the money owed to Echo.

### Fiduciary Duties of Directors

Because the transaction does not appear to have been improper this analysis will be short.

Directors of a company owe fiduciary duties of care and loyalty to the corporation. This requires that they act with the ordinary care of a reasonable person in their shoes, taking into account any specialized knowledge or expertise they possess.

The business judgment rule is a rebuttable presumption (by showing dereliction of duty or bad faith or self dealing) that protects the reasonable business decisions of directors from giving them personal liability.

Here, the BJR would likely protect A B and C from personal liability if someone challenged their decision to take on the loan from Echo as unwise because there is no indication that a \$40,000 loan to expand the business was an obviously bad decision and/or improper based on conflict of interest.

Thus, A and B and C are not liable to Echo.

## **c. Big Shoe Co. Contract**

### Liability of Ann

#### *Fiduciary Duties*

A corporate officer owes fiduciary duties of care and loyalty to the corporation. This includes a duty to avoid self-dealing and to take reasonable prudence in making their decisions. If violated, the officer can be held personally liable for the debts incurred. Here, Ann did not have express authorization to enter the contract with Big Shoe Co. However, the transaction does not appear to be unwise because it is merely a contract for more inventory, and does not involve a personal gain to Ann. Thus, she did not likely



violate any fiduciary duties. Accordingly, she should enjoy liability protection.

#### Liability of ABC Inc.

The corporation is likely liable on the debt because Ann probably had implied authority to enter the contract by virtue of her position as an officer who manages day to day affairs like buying inventory. Here, there is also apparent authority because Ann's job title likely is a manifestation giving rise to a reasonable belief by Big Shoe that she had authority to enter the contract.

Thus, ABC Inc. is liable to Big Shoe.

#### Liability of B and C

There is no indication B and C knew of this transaction. They would thus enjoy limited liability because they did not breach any duties in regards to it.

#### Piercing the Corporate Veil

Big Shoe may argue that the corporate veil should be pierced to allow it to recover against A B and C personally. Courts have broad discretion to pierce the corporate veil based on a number of factors which vary between courts and look at the equity of allowing shareholders of a corporation to enjoy liability protection; usually looking for misuse of the corporate form. Courts are less likely to pierce in contracts situations than in torts. Usually, some evidence of fraudulent conduct is needed to convince a court to pierce. However, the general reasons courts pierce the veil include: inadequate capitalization at formation, fraud or malfeasance perpetrated by the shareholders; dereliction of corporate formalities; shareholder uses corporation as his alter ego (i.e., mixing corporate and personal assets).

Here, the most likely indicated factor is that perhaps ABC was inadequately capitalized at formation. But there are few facts indicating the "initial operating capital" was insufficient for the business. Big Shoe may argue the company was obviously underfunded as it had to cease operations only one year after opening due to low demand. However the relevant time is at formation not later, so while this might slightly indicate a failure to adequately capitalize, it is not that persuasive without more facts to show.

Also potentially raised is a failure to follow corporate formalities. However, here, ABC used regularly held meetings and adopted bylaws. It is not dispositive that A and B and C were all fulfilling multiple roles in the company. This is permitted.

Importantly, there is no evidence of fraud here. And courts often require more than one factor from above as weighing in favor of piercing in order to justify piercing the veil.

Thus, a court would not likely pierce the veil in this case.

Accordingly, only ABC Inc. is liable to Big Shoe Co.

#### **d. Damages for P's Injuries**

##### Vicarious Liability

An employer is liable via respondeat superior for the torts of its employee that are within the scope of employment. An employee is generally someone who is subject to a high degree of physical control as to the manner of their work and is paid an hourly or similar wage. Here, the facts do not indicate much about Fred's employment but he is probably an employee because he was "hired" to work in the store and pick up inventory. Since he does not appear to run his own business or have other clients, he's probably an employee.

##### *Scope of employment*

Peter will argue Fred's negligent driving was in his scope of employment because he was driving to pick up inventory for ABC when he crashed. ABC will argue it was outside the scope because Fred was driving negligently; however negligence is solidly within the doctrine of respondeat superior. Here there is no indication that Fred was diverting from the scope of his duties. While commuting to and from work is outside the scope, driving during the workday for work purposes is part of the scope. There is no frolic (large deviation) here. Thus, ABC is vicariously liable for Peter's injuries.

##### Veil Piercing

See rule above. Peter will argue the veil should be pierced to let him recover against A and B and C personally for the injuries. While tort is more likely to give rise to piercing, there is mere negligence here and it is unlikely a court would find piercing equitable based on the absence of other factors weighing in favor of piercing, as discussed above. There is no fraudulent use of the corporate form. And Fred was not instructed to drive badly by ABC.

Thus, veil piercing will not likely occur.

A and B and C will thus not be liable for Peter's injuries.

##### Fred Liability

Respondeat superior does not avoid liability in the direct tortfeasor. Thus, here, since the facts state Fred was "negligent" it can be assumed the elements of negligence are met (duty, breach, causation, damages) and Fred will be held liable for Peter's injuries. He can, via respondeat superior, get indemnity from ABC Inc., however.

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

#### **(a). The Delta (D) loan.**

##### *Partnership Creation*

A partnership is an association of two or more persons with intent to carry on a for-profit business as co-owners. Here, ABC Shoes was a partnership: Ann (A), Bob (B), and Claire (C) pooled their resources to open a retail store, and they had joint control over ABC's day-to-day operations. Particularly telling is the fact that they agreed to split their profits equally, which suggests that it's co-owned by the three and thus is a partnership.

##### *Authority to Bind a Partnership*

A partner has authority to bind a partnership in contract either when acting within the scope of ordinary partnership business or when authorized by the partnership. Authorization, in turn, can occur in three separate ways: actual express, actual implied, and apparent. (The partnership can also ratify a contract after it has been made, although we don't have any facts suggesting that is the case here.)

#### **1. Scope of ordinary partnership business.**

Here, we're told that the loan was for "additional" marketing expenses, which suggests that an ordinary part of ABC's business was to market shoes (perhaps predictable given that this is a retail shop). That fact also suggests that ABC had previously signed loans with D for marketing expenses. Thus, the easiest way to conclude that ABC was bound to the contract with D is to conclude that the scope of ordinary partnership business conduct for A includes her signing contracts for marketing expenses on behalf of ABC.

#### **2. Authority.**

Actual express authority is where the principal represents to the agent that the agent may bind the principal to a contract on a specific matter. Here, we don't seem to have actual express authority; we don't know, for example, whether A, B, and C got together and told A to procure a contract for ABC.

Actual implied authority is where the principal assigns a duty to the agent, such that the agent may take reasonable steps (often by reference to ordinary business practice or general trade usage) to fulfill that duty. Here again, we don't have facts suggesting that A was specifically tasked with procuring money for marketing expenses; nor is A necessarily the marketing person for ABC.

Apparent authority is where the principal's representations to the third party make it reasonable for the third party to believe that the agent has authority to bind the principal to a contract. Here, D could have reasonably believed that A had authority to bind ABC to a contract. ABC was a partnership, which means A was a co-owner. Moreover, A signed "Ann, for ABC Shoes," which might also suggest to D that A had authority to

bind ABC. (Formally speaking, though, this last fact wouldn't be enough because the representations must come from the *principal*, not from the *agent*.)

In conclusion, whether because A was acting within the scope of ordinary business purposes for ABC or because A had apparent authority to bind ABC, the contract binds ABC.

### *Liability for a Partnership*

A partnership is not a limited liability entity: That is, creditors may collect from the partners for the debts of the partnership and, indeed, the partners are jointly and severally liable for those debts. Thus, all three of A, B, and C would be liable.

### *Promoter Liability*

As discussed below, ABC will later incorporate into a formal corporation, which is a limited liability entity that protects the shareholders from personal liability. A person who purports to bind the corporation to a contract prior to incorporation is known as a "promoter," and a promoter is personally liable for the debts incurred putatively for the corporation unless there is a novation releasing her liability. Thus, A is also liable under a promoter liability theory.

### *Effect of Limited Liability from the Corporation*

As noted earlier, ABC becoming ABC, Inc. would imply that ABC, Inc.'s debts cannot be collected from ABC, Inc.'s shareholders—that's the whole purpose of limited liability. So there's a question of whether the later incorporation of ABC, Inc. should shield ABC, Inc.'s shareholders from liability for the pre-incorporation debt (i.e., the loan with D).

The answer is no. The contract was made between ABC and D, and D, in agreeing to the contract, relied on the fact that ABC's ability to repay the loan is backed by the joint and several liability of its partners. ABC, Inc., could assume the contract by ratifying it later and re-procuring D's consent, but we have no facts that that occurred. Allowing ABC, Inc. to take the debt and then excuse A, B, and C's independent liability would be perverse to D as a creditor, because it would allow A, B, and C to magic away their previous liabilities.

### **Conclusion:**

If, as concluded above, A validly could bind ABC to the contract and the incorporation of ABC, Inc. doesn't protect against this debt, then all A, B, and C are personally liable for the Delta loan. However, if A couldn't validly bind ABC or if the incorporation of ABC *does* protect against this debt, then only A would liable under a promoter liability theory.

### **(b). The Echo (E) loan.**

*Authority to Bind ABC, Inc.*

See above for rules. Here, A was acting with the express approval of the only other directors of the corporation (B and C) to enter into the note with E for \$40,000. Thus, A had actual express authority. And, in any event, it would be very easy to conclude that she had apparent authority, because she was the president of ABC and signed "ABC Inc by Ann, President," which is sufficient representation that E could reasonably believe that A had authority to bind ABC, Inc.

Note that when an agent acts on behalf of a principal, the agent can also personally become a party to the contract (a version of that is what occurred earlier with the promoter liability theory). But here we have no indication that A was signing for herself; she signed "ABC Inc. *by Ann, President*" (emphases added), which suggests that she was only signing in her official capacity as an embodiment of the corporation rather than as a private individual. E thus can't try to get A's personal assets under the theory that she was actually a party to the contract.

### *Effect of Limited Liability*

As noted earlier, a corporation has limited liability, which means creditors of the corporation cannot reach the corporation's shareholders to recover. So after ABC Inc. ran out of money, E wouldn't be able to get money from A, B, or C separately as ABC, Inc's sole shareholders, unless the corporation's veil is pierced.

### *Piercing the Corporate Veil*

A court may allow a creditor to reach the corporation's shareholders for debts through veil piercing. The test is whether, under the totality of the circumstances, the corporation was acting as an alter ego of its shareholders. Alternatively, if the corporation was engaging in fraud or if it was undercapitalized, courts may also sometimes order veil piercing. Courts tend to reject veil piercing for liabilities incurred through contract on the theory that the creditors were aware that they were making a contract with a limited liability entity.

Here, we have little evidence that ABC, Inc. was acting as an alter ego of A, B, and C. The strongest fact in favor of an alter ego theory is that A, B, and C were ABC, Inc's sole directors *and* shareholders. So no one is involved in this corporation except the three.

But on the other hand, the three adhered to corporate formalities—they "adopted bylaws and regularly held meetings thereafter." There's no evidence that A, B, and C were commingling their funds with the corporation, using corporate assets for personal expenses, or otherwise treating the corporation as if it was a personal asset. Finally, there's also no evidence that A, B, and C were using the corporate form to avoid liability for reasons other than ordinary business decisions (i.e., a desire to be able to make riskier decisions as to financing their business without incurring personal liability). So while a court could conclude there was an alter ego here, it probably shouldn't.

In addition, there are no facts here that suggest ABC, Inc was engaging in fraud. Although we know ABC breached some of its contracts, these appear to be because of

"low demand and an economic recession"—not because A, B, and C were purposefully entering into contracts they couldn't repay in an effort to defraud creditors.

Finally, we simply don't have enough facts about whether ABC, Inc. was undercapitalized. Courts consider whether a corporation was undercapitalized at the moment of the corporation's formation for assessing whether veil piercing would be a proper remedy. Here, we know that ABC, Inc. was borrowing money early on in its existence, but that is ordinary business practice, not dispositive of undercapitalization.

In conclusion, a court is unlikely to pierce the veil for E's debt.

**Conclusion:** A, B, and C are personally protected by the limited liability of ABC, Inc. Only ABC Inc. is liable for E's debt, and a court is unlikely to pierce the veil of limited liability.

### **(c). The Big Shoe Co. Contract.**

*Authority to Bind ABC, Inc.*

See rules above. Here, because A acted without consulting B or C, she can't bind ABC, Inc. through actual express or implied authority. The question thus becomes whether she could bind ABC, Inc. based on her apparent authority.

The answer is probably yes. Although we don't have much information about her role as president, she was president of ABC, Inc., which would lead a reasonable creditor to believe that she had authority to bind the corporation—after all, she was the corporation's highest officer. And she also purported to sign in the name of ABC ("ABC Inc. by Ann, President"), which again cements that it would be reasonable for Big Shoe Co. to think it was making a contract with the *corporation*, and not Ann *individually*. This analysis would be bolstered if Big Shoe Co. knew that A had been signing contracts with ABC, Inc.'s other creditors on ABC, Inc.'s behalf, because it would tend to support the conclusion that A had the authority to bind ABC, Inc.

*Effect of Limited Liability and Veil Piercing*

The same analysis here applies as to the analysis with the Echo loan: this was a contract made with the corporation, so the corporation's shareholders are not personally liable. And for the reasons given above, a court should not allow Big Shoe Co. to pierce the veil as to this debt.

*Effect of Potential Breach of Duty of Care*

An officer owes a duty of care to the corporation to act as an ordinarily prudent person would in like conditions. The officer must employ special competencies they have (e.g., in finance or law) in carrying out that duty. And the fundamental obligation of the officer is to act in the corporation's best interests.

Here, when A entered into a contract without consulting B or C, one could imagine a

breach of a duty of care or some other kind of fiduciary duty that A might have owed to B and C (or to ABC, Inc. generally). But even if that's the case, it's not clear why that would result in a different outcome as to Big Shoe Co. contract. In other words, a breach of loyalty can be the basis for a *shareholder's* derivative suit to recover harms to the corporation. But it's not a basis for a *creditor* to sue. Moreover, it would be odd if Big Shoe Co. could raise such an argument: Big Shoe Co.'s argument would be that it entered into a contract with A where A was purportedly acting on behalf of ABC, Inc., but in reality A didn't have that authority and so Big Shoe Co. should be able to recover from A personally. But Big Shoe Co. entered into a contract with ABC, Inc. *assuming that it was contracting with a limited liability entity*. It thus *never* assumed it could recover from a shareholder personally. So there's no reason why any breach of a duty on the part of ABC, Inc.'s officer should allow for such a recovery.

**Conclusion:** Only ABC, Inc. is liable for the Big Shoe Co. contract.

#### **(d). Damages for P's Injuries.**

##### *Vicarious Liability*

A corporation is liable for the tortious conduct of its employees where performed within the scope of employment. However, it is generally not liable for the conduct of independent contractors.

Start with whether Fred (F) is an independent contractor or an employee. An employee is defined as an agent whose physical conduct of work is subject to the principal's control. Courts consider a variety of factors going to the extent to which the principal can supervise the agent's day-to-day actions, whether the agent is regularly paid by the principal, and so on. Here, F appears to be a relatively permanent agent—he was hired "to work in the store and occasionally pick up inventory." F is not employed for one-off tasks, and he doesn't retain independent control over how he performs work. Rather, when ABC, Inc. tells F to work in the store versus pick up inventory, F appears to have to follow those orders. So F is an employee, not an independent contractor.

The principal is vicariously liable for the negligence of its employee so long as the negligence occurs within the scope of employment. Here, the scope of employment included both working in the store and "occasionally pick[ing] up inventory." F's tortious conduct in injuring Peter (P) was when F was picking up inventory. We don't have any facts about whether F was deviating from the ordinary path necessary to pick up the inventory; if so, we would have to assess whether F was on a "frolic" (a substantial deviation from the ordinary course of business that means the tortious conduct is no longer within scope of employment) versus a "detour" (a de minimis deviation from the ordinary course of business that means the tortious conduct is still within the scope of employment). Absent such facts, we can safely conclude that F was acting in the scope of his employment.

Because F was acting within the scope of his employment as an employee of ABC, Inc., his negligent conduct toward P means F is jointly and severally liable with ABC, Inc., for

P's injuries. (Note that if P chooses to go after F for the damages, there's usually some sort of indemnification agreement that would make ABC, Inc. liable for bill. Moreover, P's incentive is to go after ABC, Inc., which presumably has deeper pockets than F. But as a formal matter, P can certainly go after F and perhaps should go after F because ABC, Inc. is out of money.)

### *Piercing the Veil*

See rules above. As noted, veil piercing is unlikely for contracts on the assumption that the contracting party was aware of and thus assumed the risk of the corporation become insolvent and thereby barring recovery. However, for torts, that assumption doesn't hold. As a result, even though, as explained above, we don't have many facts suggesting ABC, Inc. should have its veil pierced for the aforementioned debts, a court could conclude that P could pierce the veil for his injuries caused by F's tortious conduct.

### **Conclusion:**

ABC, Inc. is jointly and severally liable with F for P's injuries. It follows that, if there's no veil piercing, P can go after either ABC, Inc.'s assets or F's assets (or both). However, as explained, it would be reasonable to pierce the veil here for F's torts, which means P can also go after A, B, and C's assets as the shareholders of ABC, Inc.



**Note:**

This document contains a revised version of essay question 4, with the change clearly marked in red. The revision was identified after the administration of the exam and is being published to ensure accuracy and to serve as a study aid. Please review the question below carefully.

**QUESTION 4**

For 20 years, the number of primary care physicians in State A has declined, adversely affecting the health of those living in low-income and rural communities. To address this problem, the State A legislature enacted a statute creating a Physician Retention Program (PRP) at each of its State's medical schools. The statute authorizes both a tuition waiver and an annual payment of \$10,000 to State A residents who apply to and are admitted into the PRP. In exchange, the PRP participant agrees to work in a targeted low-income or rural community for the first five years after graduation. PRP participants who do not keep their full five-year commitment are required to repay State A for their waived tuition and PRP payments based on the number of months actually worked in low-income and rural communities. The statute does not authorize these incentives for out-of-state residents until they have established residency by living in State A for one year.

The statute also establishes factors for admission into the PRP, including the applicant's undergraduate grade point average, work experience, and race. A further factor is whether the applicant was raised in a targeted low-income or rural community or has lived in such a community for three or more years, on the assumption that such an applicant is more likely to remain there.

Doug has been admitted as a first-year student in a State A medical school. He has lived his entire life in a wealthy community in State B. After Doug's PRP application was denied, he brought suit in Federal Court in State A.

How should the Federal Court rule on Doug's claims that the PRP statute is unconstitutional under:

1. The Due Process Clause of the Fourteenth Amendment? Discuss.
2. The Equal Protection Clause of the Fourteenth Amendment? Discuss.

- |
3. The Privileges ~~and~~or Immunities Clause of the Fourteenth Amendment? Discuss.
  4. The Privileges and Immunities Clause of Article IV, Section 2? Discuss.

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

### **State Action**

The first thing to determine is if State A medical school is a state actor, as Doug may only bring constitutional violation claims against a state actor.

Here, the State A legislature is a state actor and the state A medical school denying Doug access to the physician retention program are also agents of the state who enforce the legislations of state A. Thus, the state action requirement is met.

### **Standing**

Doug must also prove he has standing to bring this case against state A. A plaintiff will have standing when they suffered an actual injury, that was caused by the state, and the court may provide redressability.

### ***Injury in fact***

Here, Doug suffered a concrete and particularized injury as he was denied admission to State A's medical school's physician retention program, and reasonably believes it was in violation of the fourteenth amendment in the constitution. Thus, this element is satisfied.

### ***Causation***

The denial of Doug's admission to the benefits of the physician retention program was caused by the state A legislation.

### ***Repressibility by the court***

The court may provide a remedy by striking down the physician retention program, ("PRP") unconstitutional requirements to allow Doug equal access in his application to medical school benefits in state A.

Thus, Doug has standing to bring this claim.

### **Sovereign Immunity**

Does not apply since Doug is asserting a claim against the state for a constitutional violation.

## **(1) THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT**

### **Substantive due process**

The due process clause of the fourteenth amendment applies to the states and provides that no state shall impose a law that infringes upon the fundamental rights nor deprive persons of life, liberty, or property without a substantial justification. Recognized fundamental rights include the right to interstate travel, the right to vote, and the right to privacy. These fundamental rights will be subject to strict scrutiny, meaning the regulation must be narrowly tailored to serve a compelling state interest. Non-fundamental rights will be subject to rational basis review, meaning the regulation must be rationally related to a legitimate state interest, and it will most likely be upheld.

### Right to interstate travel

Fundamental rights include the right to interstate travel, which encompasses the right to travel from state to state, or to reside in another state. This right entails that states may not impose unreasonable residency requirements that deprive equal access to newcomers of the state to the benefits of the state. However, lengthy residency requirements apply to a newcomer's right to equal access to state benefits for the basic necessities of life. Furthermore, the supreme court has held that states may impose one-year residency requirements to benefits such as in-state tuition.

### *One-year Residency Requirement*

Here, Doug will argue that the PRP requirement that a student reside in State A for at least one year in order to qualify for graduate school tuition waiver benefits infringes on his right to interstate travel and enjoy equal access to the benefits of the state because it makes it difficult for him to pay for and receive an education. However, State A will argue that this regulation does not infringe on his fundamental right to travel as it is not denying him access to a basic necessity because a one-year in-state tuition residency requirement is recognized as constitutional by the supreme court. Thus, the court will apply rational basis review and likely uphold this requirement.

### *Rationally related*

The requirement that someone live in the state for one year in order to enjoy in-state tuition incentives is rationally related to State A's interests of providing these benefits to those who are more likely to remain and benefit the health of low-income communities of state A by looking to who has actually been in the state for at least one year.

### *Legitimate state interest*

Here, state is interested in providing PRP tuition benefits to those who are more likely to remain and benefit the health of low-income communities of state A.

A court will find this is a legitimate state interest as it relates to public health and safety, and uphold this residency requirement as constitutional.

### Right to public education

Doug may also argue that the PRP is depriving him of his right to public education. All states recognize a right to public education. However, this right is not specifically

recognized in the constitution, nor does it extend to the right to higher education. Courts will apply rational basis review to determine whether a regulation to higher education should be upheld, and will give great deference to the state to uphold the law.

Doug will argue that imposing residency, race, and income requirements into the ability to receive in-state tuition benefits from a public university is infringing on his right to receive public education. However, State A will argue that the right to education does not extend to the right to a public higher education in graduate school, but rather, the right to primary school education. A court will likely find that Doug's right to public education has not been infringed upon as the university is a higher education program, which he has no fundamental right to.

In conclusion, as discussed above, the courts will find that State A has a legitimate government interest in limiting its applicants to the PRP program to those who will contribute to certain communities in State A and this PRP is rationally related to that interest and uphold the law as constitutional under the substantive due process clause.

### **Procedural due process**

The due process clause of the fourteenth amendment applies to the states and provides that no state shall deprive a person of life, liberty, or property ("LLP") without due process of law. Due process typically requires notice and a hearing prior to the deprivation of a LLP interest. Courts will first determine whether there is a LLP interest at stake and then determine what type of process is due. Under the *Mathews v. Eldridge* test, courts will consider (1) the liberty interest at stake; (2) the value of the procedural safeguards to that interest to the risk of erroneous deprivation; (3) and the states interest in efficiency.

#### Property Interest: Right to public education

As discussed above, Doug does not have a property interest to the right to public higher education. Thus, the courts will not find great value in admitting a procedural safeguard such as providing notice and a hearing to Doug since it would not be efficient for the state and there is no risk of erroneous deprivation.

#### Liberty Interest: Right to interstate travel

As discussed above, Doug's fundamental right to travel is not being infringed upon since state A is allowed to enforce a one-year residency requirement to receive in-state tuition benefits. Thus, the courts will not find great value in admitting a procedural safeguard such as providing notice and a hearing to Doug since his right to interstate travel is not being infringed upon, nor would it be efficient for the state since there is no risk of erroneous deprivation.

Thus, the federal court should rule that Doug's claims are constitutional under the procedural due process clause of the fourteenth amendment.

## **(2) THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT**

### **Equal protection clause**

The equal protection clause of the fourteenth amendment applies to the states and provides that states may not treat certain classes of people differently unless it meets the applicable standard of review relevant to the type of class (i.e., strict scrutiny, intermediate, and rational basis review).

#### Race: Affirmative action

In this case, state A considers race on its face as a deciding factor in admitting applicants to enjoy the tuition benefits of the PRP program. Strict scrutiny applies to laws that provide different treatment to the classes of race, citizenship, and national origin. If a state or state university enforces a race based affirmative action program, the program must be narrowly tailored to serve a compelling government interest.

#### *Compelling government interest*

Race based affirmative actions will serve as a compelling government interest when the law targets a state's specific past discrimination against race. General racial based affirmative actions are not a compelling government interest.

Here, we are not provided with a specific justification as to why race should be considered as a factor to the benefits in the PRP. Nor are we provided with a specific race that will be favored. State A may argue that they have a compelling government interest in considering the race of individuals who reside within the specific communities to find that they will be more likely to reside in those communities and assist in the health and safety there. Additionally, the state may also argue they consider race as a factor to remedy past racial discrimination and provide them with economic incentives.

However, Doug will argue that State A has not pointed to a specific past discrimination against a racial class that provides a compelling interest in considering race as a factor, rather it is targeted more towards a general bias. Additionally, the court will not find that general health in a low-income community alone rises to a compelling government interest. Thus, there is no compelling government interest here to allow race as a considering factor.

#### *Narrowly tailored*

The PRP is not the least restrictive means possible to remedy the past discrimination against race, nor is it the best way to encourage people to remain in low-income communities to provide medical help. Rather, the State's other requirements such as income status and work requirements within the state for five years after graduation better address their goal of incentivizing physicians to remedy the health of people in the State's low-income communities.

*Conclusion:* Thus, the federal court should find the factor of race as a consideration to be admitted to the PRP as unconstitutional as it violates the equal protection clause of

the fourteenth amendment.

#### Income status/communities: Rational basis review

Regulations that treat classes of people differently based upon their income status and community will be subject to rational basis review as it is not a recognized suspect classification. However, a suspect classification that denies the class the benefits of their fundamental rights will be subject to strict scrutiny.

#### *Rationally related to a legitimate government interest*

In this case, the State has a legitimate government interest in ensuring people who have lived in a low-income community for three or more years will have a greater opportunity to enjoy the benefits of the PRP as they will be more likely to reside in the state and work as physicians within the low-income community to improve the health of those living in those communities. Doug may argue that although income is a suspect class, it is infringing his fundamental right to public education and to interstate travel. However, as discussed above, these arguments will not prevail. Additionally, state A will argue that the three-year residency factor is a preference, and it is not a deciding requirement.

Thus, the federal court should find that considering income as a factor in the PRP does not violate the fourteenth amendment.

#### Grade point average: Rational basis review

Regulations that treat classes of people differently based upon their grade point average will be subject to rational basis review as they are a non-suspect classification.

#### *Rationally related to a legitimate government interest*

As discussed above, courts are very deferential to uphold laws under rational basis review, unless the purpose of the law is to alienate and punish a specific class. Here, the university has a legit interest in ensuring the school admits applicants and provides economic incentives to those who are educationally sound. The PRP is rationally related to that interest as those students with higher GPAs will be likely to pass the program and ultimately will benefit the state and their objectives of remedying low-income community health.

Thus, a court will likely find that considering GPA as a factor does not violate the fourteenth amendment.

#### Work experience

Regulations that treat classes of people differently based upon their work experience will be subject to rational basis review as they are a non-suspect classification.

#### *Rationally related to a legitimate government interest*

As discussed above, courts are very deferential to uphold laws under rational basis

review. Here, the university has a legit interest in ensuring the school admits applicants and provides economic incentives who have adequate work ethic and experience. The PRP is rationally related to that interest as those students with more work ethic will be likely to pass the program and ultimately will benefit the state and their objectives of remedying low-income community health.

Thus, a court will likely find that considering work experience as a factor does not violate the fourteenth amendment.

*Conclusion:* Thus, the federal court should find the factor of race as a consideration to be admitted to the PRP as unconstitutional as it violates the equal protection clause of the fourteenth amendment. The factors considering income, work experience, GPA and communities does not violate the equal protection clause.

### **(3) THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT**

#### **Privileges and immunities clause of the fourteenth amendment**

The privileges and immunities clause of the fourteenth amendment provides that a state cannot deprive national citizens of their fundamental rights. Fundamental rights include the right to interstate travel, right to vote, and right to privacy. This clause is narrow in scope and does not apply to most rights recognized under the bill of rights. Thus, factors including race will be better analyzed under the equal protection and due process clauses above.

#### *Right to interstate travel: residency requirement*

Fundamental rights include the right to interstate travel, which encompasses the right to travel from state to state, or to reside in another state. This right entails that states may not impose residency regulations that deprive equal access to newcomers of the state to the benefits of the state. However, this residency requirement applies to the right to equal access to state benefits for basic necessities of life. The supreme court has held that states may impose one-year residency requirements to benefits such as in-state tuition.

As discussed above, the PRP maintaining a one-year residency requirement to allow in-state tuition benefits does not violate a citizen's right to interstate travel, as in-state tuition is not a basic necessity of life that a newcomer into State A, such as Doug, is entitled to immediately. Rather, State A has an interest in both allowing in-state residents who have resided within a year and paid their state taxes that benefit the school with their ability to fund the PRP to enjoy these tuition benefits.

Thus, a court will find that the regulation does not deprive Doug of his privileges or immunities by creating a one-year residency requirement in State A to benefit from PRP.



#### **(4) THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, SECTION 2**

The comity clause provides that the state/government may not discriminate against out-of-state citizens with respect to fundamental rights and essential commercial activities unless the government has (1) a substantial justification for the differential treatment; (2) and the differential treatment is substantially related to the state's objective. A substantial justification will exist if the out-of-state citizens are a contributing factor to causing a decline in the state's objective within the state.

##### *Right to public education*

Here, Doug may argue that the school is depriving him of his right to public education by limiting his access to the PRP tuition benefits that will further incentivize his chance to become a physician in State A and pursue a commercial career in the state. Additionally, he will argue that State A has not pointed to any specific facts that show out-of-state citizens being educated within the State will contribute to the decline of physicians working within the state.

However, State A will argue that the differential treatment of incentivizing in-state residents within targeted communities is substantially related to the state's objective of fostering specific physicians, who have resided in those communities and will more likely continue to reside and return benefits to the state later on, to enjoy the tuition benefits of PRP. Additionally, State A will argue that out-of-state citizens who use their schools will merely go back to their own states and pursue a career as a physician and contribute to the decline of health within the low-income communities in State A.

A court will likely find that limiting access to the PRP incentives of tuition waivers and annual payments being limited to students who have resided in the low-income communities for at least 3 years as a factor does not deprive out-of-state students of their right to engage in commercial activities within State A, as they are still allowed to pursue an education and ultimately work within State A to make a living once they graduate. Indeed, the right to tuition is too outside of the scope of being denied equal access to make a living within the state.

Thus, a court will likely find that the PRP as applied to the right to public education is constitutional under the privileges and immunities clause of Article IV.

##### *Fundamental right to interstate travel: One-year residency requirement*

Doug may argue the 3-year residency requirement of residing within a specific community of State A violates the one year allowed duration of residency to in-state tuition. However, this is merely a factor in the consideration of approval rather than a requirement to receive state funding for higher education - which as explained above is not a fundamental right nor a basic necessity.

Additionally, as discussed above, a one-year residency requirement to in-state tuition benefits does not deny individuals of their fundamental right to interstate travel, as it is not a basic necessity requirement within the state that newcomers are entitled to.

*Conclusion:* A court will find that the regulation does not deprive Doug of his privileges or immunities by creating a one-year residency requirement, a requirement to reside within State A's specific community for three years in the past, and the fundamental right to public education.

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

### **1. Substantive Due Process and Procedural Due Process**

#### **Substantive Due Process**

Substantive due process applies to the states through the fourteenth amendment and applies to the federal government through the fifth amendment. Substantive due process requires that the government shall not deprive any individual of life, liberty, or property without due process. Furthermore, the government shall not deprive anyone of their fundamental rights. Fundamental rights include: (1) right to vote, (2) right to travel, and (3) right to privacy. If the state deprives an individual of their fundamental rights, then the government must meet the heavy burden of proving strict scrutiny. However, if the state infringes on a non-fundamental right, then it will be subject to rational basis review.

#### **Standing**

In order for a plaintiff to be able to assert that she has been deprived of a constitutional right, she must be able to prove that she has standing. To prove standing, a plaintiff must show: (1) injury in fact, (2) causation, and (3) redressability. Under Article 3, courts only have jurisdiction over cases and controversies.

Here, Doug (D) will argue that he has suffered an injury which is actual (concrete) because he is being deprived of access to the Physician Retention Program (PRP), which the State A legislature has passed, which authorizes both a tuition waiver and an annual payment of \$10,000 to State A residents who apply to and are admitted into the program. D will argue that by not allowing him to receive the same benefits, he has suffered an injury. D will argue that the state denying him access has caused his injuries. Lastly, the court must be able to remedy or prevent the harm and here, D will argue that by bringing this action, he will be given an opportunity for the court to deem the State A statute as unconstitutional, thus providing him with the remedy of having access to the \$10,000 payment and the tuition waiver.

#### **State action**

In order for a plaintiff to assert that her constitutional rights have been violated, the plaintiff must show that the action was performed by the government. Specifically, state action requires that the action be taken by the state, not a private actor. However, the thirteenth amendment does allow the regulation of private actors (which is not seen here).

Here, the state has enacted legislation which is the basis of D's claim. As a state, they are considered a government actor. Thus, there is state action.

#### **Right to travel**

An individual has a fundamental right to travel from state to state or to settle in another

state. However, states are allowed to impose reasonable residency requirements before allowing out-of-state citizens to receive certain benefits. However, the state cannot deny newcomers of their basic necessities of life. As applied to the reasonable residency requirements, this typically lasts for 30-90 days but it cannot last for more than one year unless it has to do with: (1) providing in-state tuition and (2) jurisdiction over a divorce proceeding.

Here, D will argue that State A is depriving him of his right to travel which must be subject to strict scrutiny. D will argue that because he is being deprived of access to the tuition waiver and the annual \$10,000 payment, the state is infringing upon his right to travel. However, this seems like a failing argument. On the other hand, the state will likely argue that D is not being deprived the right to travel. The state will further argue that by not allowing him access to the payment and waiver, it is not depriving him of his right to settle in State A. The state will argue that they are entitled to make reasonable residency requirements for up to one year in order to give priority to the State A residents in allowing access to in-state tuition.

It is likely that the court will find that although the right to travel is a fundamental right, as applied to the facts of the case, D is not being deprived of his fundamental right to travel as states are allowed to create reasonable residency requirements for up to one year for in-state tuition. Thus, rational basis will apply.

### *Rational basis*

The challenger must prove that the law is not rationally related to a legitimate govt. interest. This heavily favors the government and most laws are upheld as constitutional under this test. Here, D will argue that the law is not rationally related to a legitimate govt. interest because out-of-state citizens who come to the State A medical schools will still be able to help the adverse affects of the health of those living in low-income and rural communities. D will argue that he would be able to comply with all of the requirements under the PRP program, which is to commit to working in a targeted low-income or rural community for the first five years after graduation. It is unlikely that D will meet the burden with this argument because the State likely can show that it is rationally related because this program will ensure that State A citizens are remaining in the community. Furthermore, State will continue to argue that by not requiring D to pay a higher tuition fee because he is not receiving the annual payment does not infringe on his fundamental right to travel and that States are allowed to do this.

Thus, under RB, it is unlikely that D will win.

### **Property right**

Under the fourteenth amendment, a plaintiff may have a fundamental right to receive education. A majority of states have held that individuals do have a right to education for kindergarten through the 12th grade, however, there has been no showing of such a right for higher education.

Here, D will argue that the State is depriving him of his right to an education because they are not allowing access to the same pool of funds as State A residents. D may try

to argue that although he has been admitted into the medical school, he may not be able to afford attending the school without the same payment benefits. D will argue that if he does not receive the funds, he may be forced to leave the medical school which would be depriving him of an education. However, this is likely a stretch and a failing argument. The state will counter-argue that they are not depriving him of an education as he has been admitted as a first-year student into the school. Furthermore, the State will argue that there is no such fundamental right as applied to higher level education (which is seen here, as this is applied to medical schools). Furthermore, his argument about potentially being forced to leave the school based on insufficient funds is lacking as the facts indicate that he was raised in a wealthy community.

Thus, there is no property right that is being infringed upon because there is no fundamental right to receive a higher education. In summary, it is likely that D will not have a valid claim under the SDP of the 14th Amendment.

### **Procedural Due process**

Procedural due process of the fourteenth amendment provides that the government shall not deprive anyone of their life, liberty, or property without being given due process. To determine whether someone is being deprived, the court will look to see if the threatened interest is a protected one. If it is, then courts will look to see what due process must be afforded.

#### *Liberty*

Here, D will argue that he is being deprived of his liberty which is his right to travel. As stated above, the right to travel is a fundamental right but as applied to the facts, D is not deprived of his fundamental right to travel because merely being deprived of a state's in-state tuition (which is allowed) does not infringe upon his right to travel. Thus, although this is considered a protected interest, no due process need be afforded because the fundamental right is not being infringed upon.

However, if the court were to decide that a liberty interest were infringed upon, then the court will decide the due process requirements that must be afforded to a plaintiff. Under the Matthews test, the court considers the: (1) individual interests at stake, (2) the value of the procedure that is protecting that interest (the value of additional safeguards) and (3) the governments interest in efficiency.

D will argue that the individual interest at stake is the right to travel. D will argue that his application to the program was denied and he was not afforded any notice or opportunity to be heard. D will argue that he should have been given notice and an opportunity to be heard by a neutral detached and unbiased decision maker. Furthermore, D will argue that the State should have given him an opportunity because it will allow him to plead his case and prove why he may deserve access to the annual payment and waiver.

However, the government will argue that it would be unreasonable to expect the state to allow for a notice and hearing for every student that is denied access because this will cost the state a ton of money. The State will argue that they are allowed to partake in

reasonable residency requirements and by giving every individual an opportunity to be heard on the matter would not make sense because they would not make exceptions for any individuals outside of State A residents.

Thus, it is likely that the State need not provide due process under D's liberty interest.

### *Property*

A cognizable property interest is one where the individual has a legitimate claim of entitlement by virtue of contract, custom, or statute. A mere expectation of employment or benefit is not sufficient. Furthermore, the govt. must intentionally deprive of someone's rights in order to give the individual due process. If the govt. accidentally or negligently takes away someone's property rights, that person will not be afforded due process.

Here, D will argue that he has a legitimate claim of entitlement to the proceeds because he has been admitted into the school. D will argue that he should be given the funds just like every other State A medical student. D will argue that this was an intentional taking away of his property rights as the statute explicitly states that State A residents will only receive these benefits. However, the govt. will argue that D has no such legitimate claim of entitlement. The govt. will argue that just being admitted to the school does not create a legitimate claim of entitlement to the funds as the funds are specifically for the State A residents as well as out-of-state residents once they have established residency by living in the State for one year.

Thus, it is unlikely that the court would find that there was any deprivation of procedural due process rights. In summary, it seems likely that D will not have a valid claim under PDP either.

## 2. Equal protection clause

### **Equal protection clause**

The equal protection clause of the fourteenth amendment states that a state must not treat similarly situated people differently. Specifically, states must not deny access to certain individuals over others, and if they do then they must meet certain requirements which include strict scrutiny (SS), intermediate scrutiny or rational basis. If the state discriminates based on a suspect classification (race, ethnicity, national origin, or citizenship) or deprives an individual of their fundamental rights, then it is subject to SS. If the state discriminates based on a quasi-suspect classification (gender, or children born out of wedlock) then the state is subject to intermediate scrutiny, and any other non-suspect classifications are subject to rational basis.

### *GPA*

The state establishes one of the factors for admission into the PRP as looking at the applicant's undergraduate grade point average. Because this is neither a fundamental right or a suspect class, it is subject to rational basis. D may try to argue that looking to a student's GPA is not rationally related to help low-income or rural communities in

helping them with their health issues. However, because it is such a low burden, D will likely lose here. Govt. will argue that it is rationally related because providing tuition funds and a waiver should be given to students who have performed well in order to make sure that the low-income and rural communities are receiving the best physician care as possible.

Thus, D will not prevail here.

### *Work experience*

The state has established that one of the factors to determine an applicant's admission into the program is based on their work experience. This is neither a fundamental right or a suspect or quasi suspect class, so it is subject to rational basis. D may try to argue that the consideration of a student's work experience has no relation to whether students should be given access to the PRP program. However, the State will likely argue that the PRP participants must agree to work in a targeted low-income or rural community for the first five years after graduation. As such, the State has an interest in ensuring that students have already obtained work experience. The state will argue that they want the students to be able to hit the ground running once they graduate to best help the issues that have been prevalent for the last 20 years in these communities whose health has been affected.

Thus, D will not prevail here.

### *Where the applicant was raised*

D may try to frame this argument that the applicant is treating similarly situated people based on their right to privacy, more specifically where people are allowed to live. D will argue that denying him based on the fact that he has lived his entire life in a wealthy community in a different state deprives him of his fundamental right of privacy. However, this will be failing because that is not what is happening here. The govt. will argue that this is rationally related because whether the applicant was raised in a targeted low-income or rural community or has lived in such a community for three or more years has a bearing on whether such an applicant is more likely to remain there. Furthermore, the PRP participants who do not keep their full five-year commitment are required to pay State A for their waived tuition and PRP payments based on the number of months actually worked in low-income and rural communities. The govt. will use this fact to show that it is rationally related because they really want to ensure and incentivize the students to remain in these areas to help fight the crisis of the low number of primary care physicians in those communities.

Thus, D will not prevail here.

### *Race*

The govt. must not treat similarly situated people differently based on race. If the govt. does discriminate on its face, this proves discriminatory purpose which is required (rather than discriminatory impact or effect). If the govt. does then they have the heavy burden of proving that the law is necessary to achieve a compelling govt interest.

Further, the govt. must show that this is the least restrictive means possible.

Here, the govt. will likely argue that the reason for the race discrimination is based on affirmative action. The govt. will argue that there is a compelling govt. interest to remedy the past horrific effects of race discrimination that has taken place. The govt. will argue that by allowing race to be a factor, they will be able to remedy the past harm that has taken place. However, in attempting to prove that this is narrowly tailored (necessary), they may have a hard time.

Affirmative action are programs that are meant to help ethnic minorities as well as race. However, to be able to use affirmative action to remedy past racial discrimination, it must be shown that the state itself (more specifically, the state medical schools) have engaged in specific past race discrimination and are now trying to remedy the past discrimination. In other words, if the state is only attempting to remedy societal inequalities that have taken place over centuries, it will not meet the burden of strict scrutiny. Here, there are no facts to support that the State has engaged in past discrimination and is now seeking to remedy the harm.

Thus, D will prevail here and will be able to strike this portion of the statute's factor of race as being considered when applying to entry to the program.

### 3. Privileges and immunities clause of the fourteenth amendment

#### **Privileges and immunities**

Privileges and immunities clause of the fourteenth amendment states that States must not deprive out-of-state citizens based on their national citizenship rights (which include the right to travel, right to vote, and right to privacy).

Here, D will argue that by not allowing him access to the annual payments and the tuition waiver, he is being deprived of his national citizenship right which is the right to travel. However, as discussed above, States are allowed to create reasonable residency requirements which deprive individuals of their right to access in-state tuition for at least one year. The rationale behind this is that a State has a clear and evident interest in doing so because they want to ensure priority to their citizens to ensure that they have access to a potentially limited fund of tuition benefits.

Thus, there is likely not a valid claim for D.

### 4. Privileges and immunities of Article 4 Section 2

The comity clause prohibits states from discriminating against out-of-state citizens in allowing them access to the job market as well as civil liberties. Specifically as applied to economic rights, the state must not discriminate in allowing someone to obtain their economic livelihood. The rationale is that states must not protect the local economic interests at the expense of out-of-state competitors. For civil liberties, the state must not discriminate based on right to vote, right to travel, or right to privacy. Lastly, if the state does discriminate, then they must prove that: (1) there is a substantial reason for the discrimination and (2) the discrimination has a substantial relationship to the treatment.



### *Liberty*

Here, D will use the arguments as stated above to show that the State is discriminating against out-of-state citizens in their fundamental right to travel by not giving them access to the funds and tuition. However, because the State is allowed to make reasonable residency requirements for in-state tuition, this argument by D will fail.

### *Economic livelihood*

D may have a stronger argument because he will argue that by not giving him access to these funds, he is being deprived of being able to obtain an economic livelihood. D will argue that this is taking away from his ability to get money to help him with his schooling. D may even try to argue that by requiring students to keep the full five-year commitment, which if they do not, they will have to pay back everything that was not earned, deprives them the right to get an economic livelihood. However, this last argument will be considered a stretch and likely failing.

If the court were to find that the State is discriminating based on economic rights, then the govt. will have to show that there is a substantial reason and substantial relationship to that treatment. Here, the State will continue to argue that a reasonable residency requirement for in-state tuition is substantial because it gives priority to the citizens that have been living in the State to allow them first access to the benefits and enjoyment of the State to a higher education. This shows both the substantial reason and substantial relationship.

Thus, it is unlikely that D will prevail on this matter either, although he does have a stronger claim in this area.

## **QUESTION 5**

As Dan drove home from work, he was blinded by the sun and could not see. At that moment, a five-year-old child ran into the street to retrieve her ball. The child was struck by Dan's car and died. The county prosecutor's office charged Dan with intentional homicide. The judge appointed Linda as Dan's lawyer. Linda is an experienced criminal defense attorney and thinks all her clients should go to trial.

Prosecutor Pat offered to settle the case. If Dan pled guilty to voluntary manslaughter, Pat would recommend a sentence of five years in prison. Dan was depressed over the child's death and told Linda that he wanted to plead guilty. Against Dan's wishes, Linda moved for a continuance to allow her time to have an expert examine the dangerousness of the roadway and the angle of the sun where Dan struck the child. The judge denied Linda's motion for a continuance. Linda asked to be relieved as counsel. The judge granted Linda's motion and relieved her as counsel of record. Without further inquiry, the judge allowed Dan to plead guilty.

After Dan pled guilty, Pat received an accident report concluding that the angle of the sun created an especially dangerous hazard on the day of the collision. Because Dan had already pled guilty, Pat did not produce this report to Linda, nor did he share it with the judge. At sentencing, Pat argued that the evidence of Dan's guilt was consistent with an intentional act. The judge rejected the plea bargain and sentenced Dan to the maximum term of 11 years in prison.

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

Answer according to California and ABA Authorities.

2. What ethical violations, if any, has Pat committed? Discuss.

Answer according to California and ABA Authorities.

3. Did the judge properly:
  - a. accept Dan's guilty plea? Discuss.
  - b. sentence Dan? Discuss.

Answer according to California Law.

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

### **1. Linda's Ethical Violations**

#### **Decision to Plead Guilty**

The first issue is whether Linda (L) committed an ethical violation of the ABA Model Rules (MR) or the California Rules of Professional Conduct and State Bar Act (together the CRPC) by refusing to allow Dan to plead guilty. Under both the MR and the CRPC, clients are understood to have the authority to set the objectives of representation and lawyers have the authority, in reasonable consultation with their client to select the manner and methods to best achieve those objectives. However, a client retains the right to make the ultimate decision about (1) whether to plead guilty, (2) whether to testify and (3) whether to waive fundamental rights (such as a speedy trial right or a jury trial).

Here, L potentially likely committed an ethical violation when she refused to allow Dan to plead guilty despite his wish to do so because that is a fundamental right of a criminal defendant that a lawyer cannot override. Although Linda is an experienced criminal defense attorney and thinks it is strategically beneficial for all of her clients to go to trial, she is not allowed to make the ultimate decision for her client not to move forward with a guilty plea. Additionally, by (1) not informing D of Pat's offer to "settle the case" and (2) seeking a continuance against Dan's wishes she arguably did not make her strategic decisions about how to proceed in reasonable consultation with her client because both of those steps were significant developments that she did not either discuss with D or took despite his wishes to the contrary.

Accordingly, it is likely that L violated the MR and CRPC by overriding her client's right to plead guilty and by failing to reasonably consult with him about the method and means to achieve his objectives.

#### **Duty to Communicate**

The next issue is whether L violated her duty to communicate with D. Under both the MR and the CRPC, a lawyer is required to keep their client reasonably informed of matters in the case and respond to their client's reasonable requests for information. Additionally, the MR require a lawyer to communicate all settlement offers and the CRPC requires a lawyer to communicate all oral settlement offers if they represent a significant development.

L arguably breached this duty first when she failed to communicate P's offer to "settle the case" by allowing him to plead guilty to voluntary manslaughter for five years in prison to D because that represented a significant development in the case. Had D been aware of P's offer to allow him to take the plea, he likely could have discharged L and received a different attorney to represent him in plea negotiations. He potentially could have received a sentence that was six years less than what he ultimately

received. Accordingly, this offer was something that L should have communicated to D under both the MR and CRPC because it was a material development and she breached her duty to communicate by failing to do so.

Additionally, L may have breached this duty when she failed to communicate the consequences of a guilty plea to D. There is no indication that in the course of her representation she outlined the information that would help D make an informed decision despite her experience. She also does not appear to have communicated to D that she was seeking additional evidence that might have been exculpatory and modified his assessment of whether to plead guilty. Accordingly, for those failures to communicate, L likely also breached her duty to communicate under the MR and CRPC.

### Permissive Withdrawal Requirements

The next issue is whether L violated the MR and CRPC by seeking to withdraw as counsel. There are specific circumstances discussed below where permissive withdrawal is permitted. Additionally, in general, under both MR and CRPC the lawyer must obtain permission from the court to withdraw if they are appointed by the court, which L satisfied by receiving the court's permission.

#### *MR Violation*

Under the MR, a lawyer may permissively withdraw as counsel if (1) they can withdraw without materially prejudicing their client, (2) they have a fundamental disagreement with the client or find their course of action repugnant, (3) they reasonably believe the client will commit a crime or fraud using their services, (4) they discover that the client has used their services to commit a crime or fraud, (5) the representation becomes unreasonably financially difficult, (5) the client fails to fulfill a substantial obligation to the lawyer or (6) other good cause exists.

Here, L may have committed a violation under both the MR and the CRPC because none of the above exceptions clearly apply. L might try to argue under the model rules that she could withdraw without materially prejudicing D or because she had a fundamental disagreement with him over his desire not to proceed to trial. However, because L is leaving D in the middle of the criminal proceedings and courts are unlikely to view disagreement over a client's exercise of a fundamental right as sufficient to meet the requirements under either of those exceptions. Additionally, it's unclear how other good cause would exist to withdraw in this circumstance. Accordingly, it is likely that L violated the requirements for permissive withdrawal.

#### *CRPC Violation*

Under the CRPC, a lawyer may withdraw if (A) continued representation will likely violate the CRPC, (B) the client knowingly and freely assents, (C) continued representation will adversely affect the client due to conflicts with co-counsel, (D) the client insists on a course of conduct that will result in a crime or fraud, (E) the lawyer discovers the client has used their services to commit a crime or fraud, (F) the client wishes to assert a claim that is not supported by existing law or a good faith argument

for reversal, (G) the representation will be too difficult due to a health or physical issue, (H) the client breaches a material term (after giving notice of the potential withdrawal) or (I) other good cause exists.

Here, there is no clear basis for L to have withdrawn under the CRPC. D did not assent to this withdrawal knowingly and freely and continued representation isn't a crime or likely to be difficult for L. As discussed above, it is hard to see how other good cause exists here because L's primary disagreement with D is his desire to exercise a fundamental right. Additionally, the CRPC does not allow a lawyer to withdraw simply because it will not materially prejudice the client. Accordingly, L likely breached the CRPC by withdrawing permissively without a proper basis.

### Mandatory Withdrawal Requirements

Under the MR and CRPC, a lawyer is also required to withdraw under certain specific circumstances discussed for each authority below.

#### *MR Violation*

Under the MR, a lawyer must withdraw if (1) the client insists on a course of action that will violate the ethics rules or other law, (2) the lawyer cannot effectively represent the client because their physical or mental health make it unreasonably difficult or (3) they are discharged by the client.

Here, none of these situations apply. There is no indication that L is in bad health or that D's desire to plead guilty violates any law. Accordingly, L has likely violated the MR because there is no basis for her to have claimed her withdrawal was mandatory.

#### *CRPC Violation*

Under the CRPC, a lawyer must withdraw if (1) the client insists on a course of action that the lawyer knows or reasonably should know will violate the CRPC, (2) the lawyer cannot effectively represent the client because their physical or mental health will have a material impact on the representation, (3) the client demands the lawyer assert a claim or defense without probable cause or for the purpose of harassing or maliciously injuring a client or (4) the client discharges them.

Here, none of these situations apply. There is no indication that D's actions will violate the CRPC or that he is asserting any claim without probable cause or to harass someone else. Accordingly, L has likely violated the CRPC by withdrawing without a mandatory basis.

### Procedural Withdrawal Requirements

In addition to the above situational requirements, a lawyer who withdraws must provide their client with adequate notice so that they have a reasonable opportunity to seek new counsel.

Here, D might argue that L did not provide him with adequate notice because there is no indication that she discussed her withdrawal with him prior to her decision to do so

and it is likely he may not have had adequate time given that the withdrawal came immediately after her dismissal as counsel.

However, L might argue that in the court context, D was not prejudiced by her action because the court should have immediately appointed someone else to represent him and it is the court's failure to do so that hurt D. However, this argument is likely to fail because L still could have taken steps to ensure D was adequately prepared for new counsel given her seemingly unstated plan to withdraw.

Accordingly, it is likely that L violated the procedural requirements for withdrawal.

### Duty of Competence

The next issue is whether L violated her general duty of competence to D. Under the MR, a lawyer must provide competent and effective representation to their client. Under the CRPC, a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide competent representation. Competence is defined under the CRPC as the application of the learning and skill and physical, mental and emotional ability necessary to carry out the representation effectively.

Here, L on the one hand was an experienced trial lawyer who did take steps to investigate and advance what she believed to be D's best interest by moving for a continuance to get an expert to look at the roadway for exculpatory evidence. However, the fact that L overrode her client's desire to exercise their fundamental right and did not communicate a settlement offer and withdrew without providing D adequate notice all likely weigh in favor of a finding that she breached her duty of competence. Accordingly, under both the MR and the CRPC, L's conduct likely fell well below the standard of competent representation that is expected by a lawyer.

### Duty of Diligence

The next issue is whether L violated her general duty of diligence to D. Under the MR, a lawyer must act with requisite diligence for the representation. Similarly, under the CRPC, a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to exercise sufficient diligence with respect to the case.

Here, L arguably violated her duty of diligence under both the MR and the CRPC because the only step she took to investigate the case was seeking a motion for continuance. She also did not respond to a settlement offer from the prosecution or investigate the ramifications of her offer with her client before withdrawing. Accordingly, under both standards she likely violated her duty of diligence.

### Duty Not to File Frivolous Claims

Another potential issue is whether L violated her duty not to file frivolous claims or take a frivolous position in litigation. Under both the MR and CRPC, a lawyer is prohibited from raising a frivolous claim or defense unless supported by existing facts and law or a good faith argument to extend, modify, or reverse existing law.

Here, it is possible L's decision to file a motion for continuance when she knew her client wanted to plead guilty and that he was opposed to filing the motion would constitute a frivolous filing and violate her duties because L had no basis other than her independent desire to file the motion and it was in contravention of her client's expressed desires. L might be able to claim that this was a strategic decision that she was permitted to pursue because it might have resulted in evidence that would have altered her client's assessment. On balance, it is a close call but possible that L violated this duty because her client had a no desire to file the motion or proceed in that manner.

## **2. Pat's Ethical Violations**

### Requirements to Bring Case Against Defendant

The first issue is whether Pat breached certain duties that apply to prosecutors. Under the MR and the CRPC, a prosecutor may not bring charges against a criminal defendant unless they have probable cause to do so. Additionally, if a prosecutor must assess whether to withdraw charges if they receive later evidence that shows they lack probable cause to continue the prosecution. Probable cause is not certainty but requires more than a reasonable suspicion that the defendant is guilty of the charged offenses.

#### *Violation at Filing of Charges*

The first question is whether P lacked probable cause at the time he brought the charges. The facts are silent as to what evidence P had, so presumably he had some evidence from the accident. However, it is possible that he did not, given that he received the accident report only after Dan plead guilty. Additionally, D actually did get blinded by the sun so it is hard to see what evidence (apparent from circumstantial evidence) would actually exist to prove that D had the requisite intent to harm the child. To show a violation of this requirement, D would need to establish that the evidence that existed at the time the charges were brought did not rise to the standard of probable cause.

#### *Violation After Dan's Guilty Plea*

The next question is whether P lacked probable cause during the later proceedings. After Dan pled guilty, P received an accident report that showed the angle of the sun created an especially dangerous hazard on that day.

D will argue that P lacked probable cause at that point because he received evidence that was inconsistent with a charge of intentional homicide because it suggested the existence of a condition that could cause someone to have accidentally failed to have seen the child in the street.

P will counter that a single piece of evidence does not necessarily negate the existence of probable cause or against probable cause for bringing some kind of charge (even if an intentional homicide charge is not the best supported charge). The facts are silent as to what other evidence P had but given that D was actually blinded by the sun and there

is no indication of intentional conduct on his part it is very likely a court would find that P lacked probable cause to sustain the charges at this point. Although the probable cause inquiry is primarily concerned with whether a prosecutor should maintain charges during a trial proceeding and here P potentially lacked probable cause after a guilty plea, because D has not yet been sentenced it is possible a court or ethic board would view P's conduct as violating this rule.

Accordingly, it is possible P lacked probable cause at the time of filing the charges depending on what evidence was available and more likely that he lacked probable cause after the guilty plea once in receipt of the accident report.

### Duty to Communicate Exculpatory Evidence

The next issue is whether P violated his duty to communicate exculpatory evidence to D and L. Under both the MR and the CRPC, a prosecutor who becomes aware of potentially exculpatory evidence is required to promptly disclose that evidence to the defense. If the prosecutor becomes aware of the evidence after the defendant has been convicted and the prosecutor serves in the jurisdiction where the defendant was convicted, then the prosecutor also has an obligation to take reasonable steps to provide that exculpatory evidence to the court. Additionally, under *Brady v. Maryland*, a prosecutor has a constitutional obligation to disclose exculpatory evidence that would materially affect a defendant's case and both the MR and CRPC require a lawyer to follow applicable law.

Here, P arguably violated this duty because he did not produce the report to Linda, nor did he share it with the judge. The report contradicts a finding of intentional homicide which is a key element of the crime because it helps establish that there was a basis for D to have accidentally killed the child. Accordingly, P had an obligation to turn this information over to L at all times and because he is a prosecutor in the relevant jurisdiction he had an obligation to turn the information over to the Judge.

Accordingly, P breached this duty (and his related legal obligations) by failing to turn over the report to L and the Judge.

### Duty of Candor

The next issue is whether P violated his duty of candor. The MR and the CRPC impose a general duty on lawyers that prohibits them from making a false statement of law or fact or failing to correct a false statement of material fact. Here, P potentially violated this requirement in two circumstances, first by failing to disclose the report and second by arguing at D's sentencing that the evidence was consistent with an intentional act.

#### *Failure to Communicate the Report's Existence*

Here, P arguably violated his duty of candor to the tribunal when he failed to produce the report showing the angle of the sun on the day of the collision to the tribunal. Although there is no affirmative requirement in general to disclose information that is prejudicial to a client, because prosecutors have an obligation to turn over exculpatory evidence to the defense and to produce such evidence to the court after a defendant



has plead guilty or been convicted, P arguably also breached this specific duty when he concealed the report from the tribunal.

### *Statement that Evidence of Dan's Guilt Consistent with Intentional Act*

Here, P also arguably violated his duty of candor to the tribunal when he stated that there was evidence of Dan's guilt consistent with an intentional act. This statement is directly contradicted by the report that P had access to because the report shows that D could have accidentally run over the child due to being blinded by the sun.

P might counter that his statement is consistent with other evidence showing that D engaged in an intentional act. However, there is no such evidence specified in the facts and it is inconsistent with the facts of what actually occurred given that D actually was blinded by the sun. Additionally, even if he did have other evidence, by not disclosing the facts in the report he was still actively concealing information that was material to the court's inquiry and he did not explain how the other evidence was more probative than the evidence in the report.

Accordingly, P likely violated his duty of candor to the tribunal by making the statement that D's guilt was consistent with an intentional act.

### Duty of Competence

See rule above. Under both the MR and CRPC, P likely breached his duty of competence that he owes to the county prosecutor's office because he failed to satisfy his duty of candor in his communications to the court and because he failed to turn over exculpatory evidence as required by his special duties as a prosecutor.

## **3. Judge's Actions**

### **A. Accepting Dan's Guilty Plea**

#### Requirements for A Guilty Plea

The first issue is whether the Judge violated any California laws by accepting D's guilty plea. In general, a guilty plea is only valid if it is given knowingly and voluntarily. A judge may not accept a defendant's guilty plea unless the Judge conducts a colloquy with the defendant where the Judge either (1) receives voluntary confirmation from the defendant that the defendant and their lawyer have discussed the consequences of pleading guilty and the defendant still wishes to proceed with the guilty plea or (2) the judge discusses those consequences of pleading guilty with the defendant and the defendant still wishes to proceed with the guilty plea. The judge must ensure that the defendant understands they have a right to a jury trial, a right to confront witnesses and a right to testify in their own defense. The judge must also ensure that the defendant is informed of the consequences of pleading guilty, including the potential sentence they may receive and any other penal consequences associated with pleading guilty. Finally, the Judge must also ensure that there is an appropriate factual basis for the claim.

### *Knowing & Voluntary*

Here, the Judge arguably did not properly accept D's guilty plea because there is no indication that he conducted a colloquy with D to determine whether he understood the rights that he had by going to trial or the consequences of his decision to plead guilty. The Judge allowed D to plead guilty without any further inquiry after L made her motion to be relieved as a counsel of record.

The Judge might argue that L should have been responsible for informing D of the potential consequences of pleading guilty but for the reasons discussed above, the Judge has a responsibility to ensure that has occurred on the record and if it hasn't to undertake an inquiry on its own. Additionally, there is no indication that the Judge confirmed that D's plea was even voluntary, meaning that he gave it without any coercion or duress.

Accordingly, the Judge did not properly accept D's guilty plea by failing to ensure it was knowing and voluntary.

### *Factual Basis*

Here, the Judge also did not properly accept D's guilty plea because there is no indication he found an appropriate factual basis for the plea. The Judge should have asked D to confirm the circumstances that lead to his crime and that inquiry might have revealed the fact that D was only pleading guilty because he felt terrible about the accident but not because he intentionally killed the child.

Accordingly, the Judge did not properly accept D's guilty plea by failing to ensure there was a proper factual basis for the plea.

### *Right to Counsel*

Another issue, separate from the Judge's acceptance of the plea, is whether the Judge committed a violation of law by accepting D's plea without appointing new counsel. Under the 6th Amendment (as applied to California through the 14th Amendment), a defendant has a right to counsel at each critical stage of the proceedings. Courts understand critical stages of the proceedings to include both a defendant's guilty plea and sentencing. This right can also be waived if done so knowingly and voluntarily by the defendant.

Here, there is no indication that the Judge appointed a new counsel to represent D after L was relieved as counsel of record. There is also no indication that the Judge received a waiver of the right to counsel from D prior to accepting his guilty plea. Both of these actions prejudiced D's fundamental rights and therefore were improper.

### **Conclusion**

The Judge did not properly accept Dan's guilty plea because (1) he did not ensure it was knowing and voluntary, (2) he did not find an adequate factual basis for the plea and (3) he accepted the plea without appointing new counsel for D or receiving a

knowing and voluntary waiver of that right from D.

## **B. Sentencing Dan**

### Requirements for Sentencing

The next issue is whether the Judge properly sentenced D under California law. A judge has discretion in determining the sentence to apply to a criminal defendant provided that they comply with any statutory minimum or maximum requirements and provide an adequate justification on the record for the defendant's sentence. Additionally, under the 6th Amendment which applies in state court proceedings through the 14th Amendment, a defendant is entitled to counsel at the sentencing because it is a critical stage of the proceeding. A defendant must also be allowed to present mitigating evidence in sentencing and be heard if they wish.

Here, the Judge arguably did not properly sentence D for several reasons. First, while the judge complied with the statutory requirements by only sentencing D to the maximum allowable, the Judge did not make any findings on the record when sentencing D to this term. Second, as discussed above, the Judge did not appear to appoint D a new counsel prior to engaging in the sentencing proceeding. There is no indication that D knowingly and voluntarily waived this requirement so that also constituted a violation of applicable law. Third, there is no indication that the judge allowed D to present any mitigating evidence on his behalf or otherwise provide information at the sentencing stage.

## **Conclusion**

For the above reasons, the judge did not properly sentence D.

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

### **I. LINDA'S ETHICAL VIOLATIONS**

#### **A. Scope of Representation**

Under both the ABA and California's Rules of Professional Conduct (CA RPC), an attorney and her client share different duties and rights during the course of representation. The client will generally have the right over the objectives of litigation, including whether to settle, plead, or etc. In contrast, the lawyer generally has control over the methods to achieve those objectives, such as what witnesses to call, trial strategies, and what motions to file. Such considerations are especially important in the context of a criminal defendant. Under the Sixth Amendment of the United States Constitution, a criminal defendant has the upmost decision in whether or not they will plead guilty, or whether or not they will testify. A criminal defense attorney has an ethical duty to communicate any plea bargain offers to their client, and cannot induce a client to accept or deny that bargain. The decision must be within the sole control of the defendant.

Here, Linda likely acted outside of the scope of representation. Dan is a criminal defendant, and under the Constitution and ethical principles, he has a right to hear every plea bargain that he is offered. Pat offered to settle the case for five years if Dan were to plead guilty to voluntary manslaughter. Linda appears to have brought this bargain to Dan, but upon hearing that he wanted to plead guilty, Linda ignored his requests and instead asked for a continuance. Based on Linda's belief that she thinks all of her clients should go to trial, it appears that Linda went over Dan's head to continue the case due to her personal beliefs on its merits, rather than Dan's wishes. This would be unethical in the context of a civil case, but is especially so in a criminal case.

Thus, Linda likely exceeded the scope of representation, and violated her ethical duties.

#### **B. Duty of Competence**

Under both the ABA and CA RPC, a lawyer must provide competent representation. Under the ABA, this requires a lawyer to act with reasonable skill, preparation, knowledge, and expertise for the specific type of case at hand. Under CA RPC, a lawyer must not act with gross recklessness, negligence, or intentionally in regards to their competence.

Here, Linda is an experienced criminal defense attorney. This suggests that she is more than competent to handle criminal cases in general. However, as an experienced criminal defense attorney, Linda should likely know better than to go over a client's head and continue a case against their wishes. Any reasonably competent attorney would know that a client has the final say on a settlement, and a criminal defense

attorney would especially know that the client has the final say on plea bargains. Additionally, as discussed in more detail below, a competent criminal attorney likely would have communicated to her client the good facts about their case, and also would not have withdrawn purely due to being denied a continuance. Linda likely also could have communicated with the prosecution about how long the deal would remain "open," so as to allow her to seek her desired experts and still honor Dan's wishes.

Thus, Linda likely not only violated her duty of competence under the ABA, but due to her intentional nature in disregarding Dan's desires, she likely also violated her duty of competence under CA RPC.

### **C. Duty to Communicate**

Under both the ABA, a lawyer must communicate with their client about the status of their case. In CA, a lawyer must also communicate with their client about substantial events in their case.

Linda possibly violated her duty to communicate. Dan wanted to plead guilty, and although Linda had a duty to honor that request, she also likely should have communicated to Dan about his chances if he were to go to trial. Dan was blinded by the sun, and could not see when he accidentally hit the child with his car. This is clearly not an intentional homicide, and Linda clearly believed this to be the case. This is evidenced through her seeking experts to examine the dangerousness of the roadway and the angle of the sun. There is no evidence that Linda ever communicated these strategies to Dan, and instead just continued the case without consulting him. It is possible that if Linda had told Dan about the experts, he might have held off on accepting the plea deal on his own. Instead, she unilaterally moved to continue the case. Additionally, Linda (as discussed in more detail below) is required under both CA and the ABA to communicate with her client prior to ending representation. Instead of communicating with Dan, Linda simply withdrew the moment the motion for continuance was denied.

Thus, since Linda did not communicate with Dan about the merits of his case, nor about her withdrawal, Linda likely violated her duty to communicate.

### **D. Duty of Fairness to Opposing Counsel**

A lawyer must act with fairness to opposing counsel. This includes not needlessly delaying litigation, hiding discovery materials, or bringing frivolous claims.

Here, Linda possibly violated her duty of fairness to opposing counsel when she moved to continue the case. Pat offered a plea bargain to Linda, and Dan was willing to take that plea bargain. Allowing Dan to plead guilty would have significantly shortened the case's lifespan, and instead, Linda moved to continue the case without Dan's knowledge. This could be seen as delaying the case in bad-faith, based on Linda's desire to win at trial rather than her belief that the case truly needed to be continued.

However, it is likely not in bad-faith or needlessly delaying to request a continuance in order to find experts for a criminal homicide trial. Since Linda's basis for the

continuance was likely not purely or substantially meant to delay litigation, Linda probably did not violate her duty of fairness to opposing counsel.

### **E. Duty of Loyalty**

A lawyer owes her clients the duty of loyalty. This requires that the lawyer act in the client's best interests, and for the client's objectives and desires rather than her own.

#### ***Conflict of Interest- Lawyer/Client***

A lawyer must not represent a client whose representation will be materially impacted by the lawyer's own personal biases, relationships, or experiences. However, a lawyer could represent such a client if (1) they reasonably believe that they can competently and diligently represent the client, (2) law does not prevent them from representing the client, and (3) the client has given either informed written consent (CA) or informed consent confirmed in writing (ABA) after being informed of the lawyer's personal reasons for bias.

Linda believes that all of her clients should go to trial. Although this is not a typical conflict of interest, it is a personal bias that clearly impacted her ability to represent Dan. A criminal defense attorney inherently needs to be open to allowing her clients to plead guilty, as that is the result for most criminal cases. Linda's personal belief system had the potential to materially impact Dan's representation, and appears to have done so. Instead of listening to Dan's wishes and allowing him to plead guilty, she went over his head to fulfill her own desires about trial. There is also no evidence that she gave Dan full disclosure of her desire to go to trial, or received his consent.

If Linda did not reasonably believe that she could competently or diligently represent Dan despite her belief that all clients should go to trial, she likely violated her duty of loyalty.

### **F. Permissive Withdrawal**

Under both the ABA, a lawyer is permitted to withdraw from representation for any reason, as long as it would not cause material prejudice to the client's case. Under CA law, a lawyer may withdraw for any reason, even if it would materially prejudice the client's case, under certain circumstances. These circumstances include a client becoming unreasonably difficult to represent or the lawyer's fundamental, moral repugnance at the client's desired course of action. In both jurisdictions, upon permissive withdraw, the attorney must notify the client within a reasonable time to allow the client to seek alternative counsel, and return any money or property retained by the lawyer.

First, under the ABA, Linda likely violated her ethical duties by withdrawing when it would be materially prejudicial to the client. Linda appears to have withdrawn at the same hearing that Dan was to plead guilty, without any warning to Dan or preparation for him to get a new attorney. This likely prejudiced his case, and caused him to proceed with his guilty plea without an attorney present.

Additionally, under CA law, Linda likely did not have grounds to permissively withdraw. She will say that Dan's depressive attitude and desire to plead guilty was unreasonably difficult, especially considering the objective merits of his case. She also has a clear desire to take all of her cases to trial, and she could argue that allowing a client to accept an unwise plea deal would go against her fundamental moral beliefs. However, Dan simply wanting to exercise his right to decide to plead guilty is likely not sufficient to rise to the level of unreasonable difficulty. The same could be said about any moral qualms Linda has with the plea deal. There is nothing inherently immoral about Dan's representation, nor has he requested Linda to take any unethical or immoral actions in the course of representation.

Linda also likely did not take the appropriate steps to withdraw. Linda withdrew from Dan's case at seemingly the same hearing as when he would plead guilty, and there is no evidence that she warned him beforehand.

Thus, Linda likely did not ethically withdraw from Dan's case in either CA or ABA jurisdictions.

## **II. PAT'S ETHICAL VIOLATIONS**

### **A. Duty of Candor**

All lawyers owe a duty to the court to refrain from sharing false statements of fact or law, or failing to correct false statements of fact or law.

Here, Pat likely violated his duty of candor by failing to tell the court about the new evidence regarding hazard created by the sun the day of the incident. This information, as discussed in more detail below, likely fundamentally changed the credibility of the charges against Dan. Even though Pat was not asked out-right about the issue, he has an ethical duty to be honest in his representations to the court. This duty includes notifying the court when a lawyer learns that past representations were false.

Thus, Pat likely had a duty to inform the court about the accident report, so as to avoid misleading the court as to a statement of fact. At the least, he had a duty to correct any previous statements regarding Dan's culpability in light of the new evidence.

### **B. Prosecutor's Special Duties**

#### ***Not Bring Charges Without Probable Cause***

A prosecutor must refrain from bringing charges without justifying probable cause. If at any point the prosecution learns that a case, originally brought on probable cause, is no longer supported by such evidence, he must dismiss the charges against the defendant. If new evidence comes to light after a case has been settled, the prosecutor still has a duty to come forth with that new evidence if it would materially change a case's outcome.

Here, Pat likely filed charges against Dan for intentional homicide in good faith. However, once Pat received the accident report, he likely lacked probable cause that Dan committed an intentional homicide. If the sun created an especially dangerous hazard the day of the incident, it is likely that Dan did not see the child in the street. If Dan did not see the child, he not only did not commit an intentional homicide, but he did not commit any homicide at all. Even though Dan had already plead guilty to voluntary manslaughter, Pat should have dismissed the case, or at least told the court, or Dan, about the report.

Additionally, Pat likely did not have probable cause to allow Dan to plea to voluntary manslaughter. Voluntary manslaughter is an intentional killing with adequate provocation, committed in the heat of passion. There is nothing in the facts to suggest that Dan was acting in the heat of passion the day of the incident.

Thus, Pat likely violated his duty to only bring charges for which he has probable cause.

### ***Brady Evidence***

A prosecutor must provide the defendant with any evidence that goes to mitigate or exculpate the defendant.

Here, the accident report clearly goes towards Dan's innocence. Dan is charged with an intentional homicide, and pled guilty to voluntary manslaughter. Voluntary manslaughter still requires that Dan acted intentionally. If Dan was blinded by hazardous sun, there is no way that he could have intended to hit the child with his car. The accident report should have been offered to Dan, so that he could weigh whether he should withdraw his guilty plea and proceed to trial.

By withholding exculpatory evidence, Pat violated his requirements as a prosecutor under *Brady*.

## **III. JUDGE'S ACTIONS**

### **A. Sixth Amendment**

Under the Sixth Amendment, a criminal defendant has multiple rights. These rights include the right to remain silent, the right to confront one's accuser, and most importantly here, the right to counsel. The Sixth Amendment right to counsel attaches once a defendant has been formally charged or indicted, and once formal proceedings have begun. A defendant will then be entitled to counsel at all vital proceedings, including trial, preliminary hearings, and arraignment.

### **B. Dan's Guilty Plea**

Under the Sixth Amendment, a plea hearing is a vital proceeding for which a defendant is entitled to representation of counsel. Once Linda was relieved from Dan's case, Dan pled guilty to intentional homicide without an attorney present.



### ***Proceeding Pro Se***

A previously represented defendant may proceed representing themselves (pro se) if the judge informs the defendant about the inherent pitfalls and difficulties of representing themselves, and obtains the defendant's acknowledgment of these considerations.

The government might argue that once Linda withdrew from Dan's case, that he proceeded pro se for his guilty plea and his sentencing hearing. However, to proceed pro se, the judge should have told Dan about the importance of having an attorney represent him, or in the alternative, allowed for Dan to seek alternative counsel. It is clear that Dan has previously invoked his right to an attorney, since he was appointed Linda in the first place. Accordingly, he should have been given the chance to acquire a new attorney, or given proper procedural safeguards to proceed pro per.

Thus, the judge likely should not have accepted Dan's guilty plea.

### **C. Dan's Sentence**

#### ***Right to Counsel***

Unlike a plea hearing, a sentencing hearing is not a vital proceeding for which a defendant is entitled to representation of counsel. In these hearings, a defendant may have his attorney present, but the hearing will not be invalidated simply due to his lack of representation.

Dan's sentencing hearing occurred without Linda after her withdrawal, and the court did not appoint a new lawyer to represent Dan. However, the Sixth Amendment does not require Dan have an attorney at his sentencing.

Thus, the sentencing is likely not invalidated purely under the Sixth Amendment Right to Counsel.

#### ***8th Amendment - Cruel and Unusual Punishment***

Under the 8th Amendment, the government may not impose cruel and unusual punishments on criminal defendants. What constitutes a "cruel and unusual" punishment is very narrow, and includes application of the death penalty to minors and mentally disabled individuals. It does not include the application of a maximum sentence. If a sentencing scheme gives a minimum and maximum sentence to a crime, a judge has discretion to sentence a criminal defendant within that range.

Here, Dan might argue that the judge should not have sentenced him to the maximum of eleven years. Based on the facts (including the accident report), Dan's conduct does not appear to warrant the application of a maximum sentence. However, a judge has full discretion to sentence a criminal defendant, and as long as eleven years was within the statutorily defined range of sentencing for voluntary manslaughter, the judge did not act erroneously.

Thus, the judge was likely proper in ordering Dan's sentence of eleven years.