



# **California Bar Examination**

## **Essay Questions and Selected Answers**

**October 2020**



## ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2020

### CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the October 2020 California Bar Examination and two selected answers for each question.

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

Question Number	Subject
1.	Professional Responsibility
2.	Business Associations
3.	Real Property
4.	Criminal Law and Procedure
5.	Remedies

## **ESSAY EXAMINATION INSTRUCTIONS**

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

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

If your answer contains only a statement of your conclusions, you will receive little 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 solution of the problem.

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

## QUESTION 1

Mary is a lawyer and represents Peg in a lawsuit alleging sexual harassment against Doug. Doug's lawyer is Len and the case is set for trial in Superior Court. Mary and Len dated and were intimate in the 1990s while in law school. They remain good friends, but are no longer romantically involved. Mary has not told Peg anything about her relationship, past or present, with Len.

Mary has determined that Doug will have to pay Peg damages after trial and that the primary issue in the litigation is the amount of damages. Mary estimates that, at trial, a court could award as little as \$50,000 or as much as \$150,000.

Doug testified in a deposition a month ago that he had never been unfaithful to his wife. Peg confided to Mary that she has solid evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which his wife is unaware. Peg instructed Mary to use the information about the affair as leverage in settlement discussions to get the maximum amount in damages.

Mary agrees that, if she uses the fact of the affair in her negotiations with Len, the case will likely settle for a larger amount to Peg than if she doesn't mention the affair. Mary, however, strongly dislikes the idea of using that information. She is especially uncomfortable using this tactic in a case involving her good friend, Len.

1. What ethical violations, if any, has Mary committed by not telling Peg about her past and present relationship with Len? Discuss.
2. Should Mary use the fact of Doug's affair in settlement negotiations? Discuss.
3. If Peg persists, can Mary ethically withdraw from representing Peg? Discuss.

Answer according to California and ABA authorities.

## QUESTION 1: SELECTED ANSWER A

### I. Mary's Past and Present Relationship with Len

#### Duty of Loyalty

Under both the ABA rules and the California rules, an attorney has a duty of loyalty to her client. This duty includes an obligation to avoid conflicts of interest between current clients, current and former clients, clients and third parties, clients and the attorney herself, and organizational conflicts when representing an entity such as a corporation. There are two duties relevant to Mary's past relationship with opposing counsel. First, an attorney cannot represent a client when one of her personal interests materially conflicts with an interest of the client in a way that could impair the attorney's representation of the client. However, if the attorney reasonably believes -- that is, subjectively believes in an objectively reasonable way -- that she can diligently and competently represent the interests of the client, she can still represent the client as long as she discloses the issue and receives informed consent. Under the ABA, informed consent may be oral and confirmed in writing, while under the California rules there must be written informed consent. Second, there is a specific duty with respect to relationships involving opposing counsel. If the attorney has a close personal relationship with opposing counsel such as a familial relationship or close friendship, the attorney must disclose that potential conflict to the client. As with the general rule, in order to press forward with the representation, the attorney must reasonably believe that she can adequately represent the interests of the client. Under the ABA, the attorney must receive informed consent, while under the California rules the attorney

must provide the client with a written disclosure of her relationship to opposing counsel. Here, Mary previously dated Len and was intimate with him during law school. She also considers him a "good friend." Under both the ABA and California rules, this arguably qualifies as a close personal relationship with opposing counsel akin to a familiar relationship or close friendship. As a result, out of an abundance of caution in attempting to comply with the "close relationship with opposing counsel" rule, Mary should provide Peg with written disclosure of this potential conflict under the California rules and receive informed consent under the ABA rules. Further, even if her former relationship with Len does not constitute a close relationship with opposing counsel (say, because it is less close than a best friend or parent), Mary must still receive informed consent under the broader and more general personal interest rule. Under the broader rule, she must receive informed consent confirmed in writing for the ABA rules, or informed written consent for the California rules.

Another problem worth mentioning is that Mary may not be permitted to represent Peg in this matter whatsoever, as it appears she may not be able to competently and diligently represent Peg. The problem states that Mary is deeply uncomfortable with mentioning Doug's affair even though this maneuver would likely lead to a better settlement award for her client. Specifically, it says she doesn't want to use this tactic against her good friend, Len. This suggests that even if Mary does believe that she can adequately represent Peg, that belief may be objectively unreasonable. Unless she is able to overcome her personal misgivings and zealously represent Peg, then Mary should withdraw from the representation. Further, given that litigation is ongoing, Mary would need to seek approval from the court in order to withdraw from the

representation.

## **II. Using Doug's Affair In Settlement Negotiations**

### *Candor to the Tribunal*

Under both the ABA rules and the California rules, an attorney owes a duty of candor to the tribunal. This means that an attorney may not knowingly offer false evidence and must correct any material misstatements or misrepresentations on the record. While an attorney may offer evidence to the tribunal if they worry, but are not certain, that the evidence may be false, in general an attorney should strive to represent their clients with candor and honesty to the court. That said, an attorney must balance this obligation against a duty to zealously represent the interests of their client within the ethical bounds of the law.

Here, it is possible that Peg's claim about the affair is true. It does not appear that Mary has investigated the truth of this claim. This means that Mary does not know for certain that the evidence is false, and she likely can offer the evidence to the tribunal without violating her duty of candor to the tribunal. That said, some courts interpret the duty of candor to the tribunal to include properly investigating the factual basis for any assertions. If so, Mary would need to look into the validity of Peg's assertion before bringing it up in court in order to comply with her duty of candor to the tribunal.

### *Duty of Fairness*

Under both the ABA rules and the California rules, an attorney owes a duty of fairness to opposing counsel. This means that the attorney may not suppress evidence she is required to disclose, and ought not to lie to opposing counsel or make dishonest

representations to opposing counsel with the goal of misleading opposing counsel.

Here, as mentioned, there is no reason to think that Peg's discussion of Doug's affair is false. As a result, it would not violate the duty of fairness to bring up the affair during settlement negotiations. Thus, discussing the affair during settlement negotiations would not violate the duty of fairness to opposing counsel (unless there is reason to think Peg is lying, or Mary investigates the claim and discovers it is false).

### *Duty of Honesty*

Under both the ABA rules and the California rules, an attorney owes a general duty of honesty to those they interact with in their role as an attorney. This means the attorney must not make material misrepresentations or state falsehoods within the scope of their role as an attorney.

Here, Mary needs to investigate the foundation of Peg's claim that Doug has had an affair. Once she investigates the claim and determines whether it is certainly false or may be true, she can rely on the evidence during settlement negotiations without violating the duty of honesty. But if it turns out that Doug is not having an affair, then Mary could not rely on this assertion without violating the duty of honesty.

### *Duty to Avoid Frivolous Claims*

Under the ABA rules, an attorney ought not press a claim or argument unless there is a good faith basis in the law (or a good faith argument for extending or changing the law) in support of the claim or argument. In contrast, under the California rules an attorney must not press a claim when she lacks probable cause for the claim and has a purpose of harassment for pressing the claim. Part of this duty is investigating claims to ensure

that they have a proper foundation under the law.

As mentioned above, Mary needs to investigate the foundation of Peg's claim about Doug having an affair. If it turns out that the alleged affair is not real and Peg's allegation is false, then pressing this claim in order to increase a potential settlement award would be a frivolous claim or an argument without a good faith basis. That would violate the ABA rules. It may also violate the California rules, if the court believes that Mary lacks probable cause (given that she did not investigate the claim or she did or that she did and it turned out to be false or highly unlikely) and that she had a purpose of harassing opposing counsel in order to raise the settlement award. Thus, Mary needs to investigate the claim and ensure she has a good faith basis and probable cause to support bringing up the alleged affair during settlement negotiations.

### *Duty of Competence*

Under both the ABA rules and California rules, all attorneys have a duty of competence to their clients. This includes having the relevant skills, knowledge, and preparation to adequately represent the client. In California, this also includes having the relevant mental and physical capacity, and an attorney must not recklessly, intentionally, grossly negligent, or repeatedly violate this duty.

Here, the idea that Mary must investigate Peg's claims goes in two directions. If she fails to investigate the claim, then she is not competently representing the client under the ABA rules and she is arguably reckless or grossly negligent with regard to her duty to investigate, and is thereby failing to adequately represent Peg under the California rules as well. On the other hand, if she investigates the claim and it does have a factual foundation in the truth, then Mary would arguably be incompetent if she did not raise

this claim during settlement negotiations as she would be failing to zealously represent the interests of her client within the bounds of the ethical rules. Thus, Mary must investigate Peg's claim and if it is true, she must press the claim in order to avoid violating the duty of competence.

### Scope of Representation

Under both the ABA rules and California rules, an attorney must follow the bounds of the scope of representation. Some issues are solely up to the discretion of the client, including whether to accept a settlement offer, whether to testify, and whether to waive a jury trial right. The client also has full control over the goals and ends of the representation. However, the attorney has control over the means of representation, subject to a duty to consult with the client and communicate with the client about the means of the representation.

Here, whether to bring up the affair during settlement negotiations is arguably a "scope of representation" issue that falls within the means of representation, much like what questions to ask during a deposition and what witnesses to call during a case. However, Mary must consult with Peg and must communicate with Peg about this strategic issue. Thus, in order to comply with her ethical duties, Mary must discuss and consult with Peg regarding this issue.

### Duty of Communication

Under both the ABA rules and the California rules, an attorney has a duty to communicate with the client. This includes keeping the client apprised of any

developments in the case, letting them know about written settlement offers or other major settlement offers, and generally consulting with the client and keeping in regular contact.

Here, Mary must communicate with Peg regarding whether to disclose the affair during settlement negotiations, as this is a strategy that she must discuss with Peg and consult with Peg given her duty of communication.

#### *Duty Involving Leverage in a Civil Case*

Under the California rules, an attorney must not threaten criminal or disciplinary action in order to obtain an advantage or leverage in a civil case. Here, if it is possible that Doug's affair could subject him to disciplinary or criminal risk, then Mary must not leverage that risk in order to obtain a larger settlement award for Peg. On the other hand, if the affair would not subject Doug to criminal or disciplinary risk, then Mary must leverage these facts in order to fulfill her duty to zealously represent her client.

#### *Duty to "Tattle" On Opposing Counsel*

Under the ABA rules, if an attorney has actual knowledge that another attorney has violated the ethical rules or has taken some action that materially reflects poorly on their fitness as an attorney, they must disclose these facts to the state bar association or other ethical authority. In contrast, the California rules do not have a similar provision except that an attorney must disclose certain issues related to their own ethical standing. For example, an attorney must disclose if three or more malpractice suits have been filed against them within one year, or if they have been convicted of fraud or a felony involving moral turpitude.

Here, Mary has not violated the California rule, but she may violate the ABA rule if she thinks that Len allowed his client to knowingly lie during his deposition testimony when he said that he had never been unfaithful to his wife. If Mary knows that Len was aware of Doug's affair, then she also knows that Len violated his duty of candor to the tribunal and his duty of fairness and honesty, and she must disclose that fact to comply with her duty to "snitch" or "tattle" on other attorneys.

### **III. Withdrawal From Representation**

#### *Mandatory Withdrawal*

Under the ABA and California rules, an attorney must withdraw from representation in a few circumstances. First, an attorney must withdraw from representation if their health impairs their ability to represent the client. Under the California rules, that impairment must make the representation "unreasonably difficult," while under the ABA rules it must materially impair the attorney's ability to represent the client. Second, an attorney must withdraw from representation if the representation would necessarily lead to or facilitate a crime or fraud. Third, an attorney must withdraw from representation if the representation would violate an ethical rule (in California) or would violate an ethical rule, a civil law, or a criminal law (under the ABA). Fourth, an attorney must withdraw if they are fired by the client. Finally, an attorney must withdraw if the client is asking them to press a frivolous claim, under the definitions provided above (e.g., probable cause and harassment in California, or lack of good faith under the ABA).

Here, none of the mandatory bases for withdrawal have arisen as of yet unless Mary cannot competently represent Peg given her prior relationship with Len, in which case she must withdraw from representation. Additionally, if Mary investigates Peg's claim

about the affair and it turns out to be false, but Peg insists on raising it during settlement negotiations, then Mary must withdraw if continuing would lead to fraud. She must also withdraw if continuing would violate the duty to avoid frivolous claims, or any other ethical duty (under California rules) or ethical duty, criminal law, or civil law (under the ABA rules). If any of those scenarios occur, then Mary must withdraw from representation.

### *Permissive Withdrawal*

Additionally, there are circumstances where an attorney may withdraw from representation permissively. These include when the client materially violates the retainer agreement and the attorney provides a warning that they will withdraw if the client does not cease their violation, lesser forms of crime or fraud such as if the client is seeking to commit a crime or fraud in the future or if the client is trying to force the attorney to engage in a crime or fraud, if the attorney's health impairs the representation to a lesser degree, if there is good cause shown, if representing the client has become unreasonably difficult (including under the ABA if the client and attorney have a fundamental disagreement), and for a variety of other reasons. Under the ABA, an attorney can withdraw for financial reasons or for any reason that won't materially harm the client, and under the California rules an attorney can withdraw if they have a serious disagreement with co-counsel such that withdrawing is in the best interest of the client, or if the client wants to press an unwarranted claim or argument.

Here, even if the mandatory withdrawal criteria outlined above are not met, Mary could withdraw from representation if she feels too morally conflicted about raising the affair during settlement negotiations, assuming this is a fundamental disagreement (under the

ABA) or means that the client has made representation unreasonably difficult (California rules). She can also withdraw if she investigates the affair claim and believes it does not have a strong basis in the truth and may therefore represent a crime or fraud. If she is so overwhelmed with her own guilt, she might also be able to withdraw permissively if she feels her personal mental health is so affected that her ability to represent Peg has been impaired. She also might be able to withdraw from representation if the court believes that a disagreement on this point with the client represents "good cause." And under the ABA, if she can show that withdrawal would not harm Peg, then she can also permissively withdraw on that basis alone.

### *Steps After Withdrawal*

After withdrawing from representation, an attorney must take four steps under both the ABA rules and the California rules. First, an attorney must return any unearned fees, although in California they may retain any true retainer fees or referral fees. Second, an attorney must return all of the client's personal property and papers, which they must have carefully safeguarded in the meantime. Third, an attorney must mitigate any potential harm to the client. Finally, an attorney must give the client proper notice and a reasonable amount of time to find new counsel.

Further, during ongoing litigation, an attorney must seek leave from the court before withdrawing. If the court denies the request, then the attorney must continue to zealously represent the client.

Here, if Mary does withdraw from representation, then she must comply with these requirements.

## QUESTION 1: SELECTED ANSWER B

### 1. Mary and Len's Relationship

#### Duty of loyalty--conflict of interest in accordance with both the ABA and CA rules

A lawyer owes their client an undivided duty of loyalty. This includes the duty to avoid conflicts of interest. A conflict of interest can be actual or potential, and arises when the representation is directly adverse to the interest of another client whom the lawyer represents in the same or substantially similar matter, or when there is a significant risk that the representation will be materially limited by the lawyer's own personal interests, the interests of a former client, or a third person.

#### Significant risk of material limitation--Mary and Len's Past relationship

Here, the case does not involve a situation where Mary is representing one who has an interest directly adverse to another client of hers, but rather there is a situation where there could be a significant risk of material limitation in Mary's ability to represent Peg due to Mary's own personal interests with having previously been romantically involved with Len.

Because Mary could be inhibited by her prior romance with Len by not representing Peg with the utmost loyalty, and because it could potentially cause issues with Mary's ability to effectively represent Peg, Mary had a duty to disclose the conflict to Peg.

#### Significant risk of material limitation--Mary and Len's current relationship

In addition to the prior romance, there is also likely an actual conflict of interest here and

thus likely an actual significant risk of material limitation in her ability to represent Peg as the facts tell us that despite not being romantically involved anymore, Mary and Len remain "good friends". The facts further evidence this later on by Mary's discomfort in using the facts and tactic that Peg is suggesting (to be discussed further below) due to the case involving her "good friend Len."

Once again, because Mary's relationship with Len is likely impacting her ability to zealously represent Peg and causes her to not have her sole focus and attention on loyally and faithfully representing Peg, Mary had a duty to disclose the conflict to Peg.

#### Waiving the conflict--ABA rules and CA rules

Even though a conflict persists, a lawyer still may be able to represent the client if they take the proper measures in addressing the conflict and waiving it. The lawyer may only continue the representation if: (1) they reasonably believe they can diligently and competently represent both clients; (2) the representation is not prohibited by law; (3) the claims do not involve a direct assertion by one client against the other; and (4) the client gives informed consent, confirmed in writing. The California rules are the same, except that it requires both the disclosure and the consent to be in writing, as opposed to just 'confirmed' in writing like the ABA.

Here, Mary may argue that she was able to diligently represent both clients since she was still assessing the case, determining that Doug would have to pay Peg damages after trial, and that the primary issue was the amount to be given, and was making estimates etc. Although, there is also a counter to this in the sense that Mary was considering how Len would feel when considering tactics to use in settlement negotiations (to be discussed more below.)

Although there are no facts that the representation is prohibited by law, regardless, Mary had a duty to disclose the actual and potential conflicts to Peg and to get her informed consent, confirmed in writing (ABA) or to disclose in writing and get Peg's consent in writing. Mary failed to do this.

### Conclusion

Mary violated the ABA rules and committed an ethical violation when she did not disclose her past and current relationship with Len and did not get Peg's informed consent, confirmed in writing, to continue the representation.

Mary violated the CA rules for not disclosing the same issues, as well as not disclosing in writing and getting Peg's consent in writing.

### California duty to disclose despite no significant risk of material limitation

California has a specific rule that despite when there is no significant risk of material limitation in the representation, the lawyer still must disclose, in writing, to the client, when they or someone at their firm, has a personal, professional, financial or business relationship with another party or witness, or the lawyer of the other party or witness is a family member, spouse, or lives with the lawyer, or the lawyer has an intimate or sexual relationship with the other party or lawyer.

Here, even if Mary wanted to argue that her past or current relationship with Len did not raise any significant risk of material limitation in her representation of Peg, under the CA rules, because Mary has a past and current relationship with Len, this constitutes a 'personal relationship' with the other party, specifically the other party's lawyer, and in addition she had a prior intimate relationship with him.

Thus, regardless of what Mary felt about the risk, she still had a duty to disclose her relationship with Len, in writing, to Peg.

### Conclusion

Because Mary did not disclose her relationship with Len in writing to Peg, she committed an ethical violation of the CA rules.

## **2. Mary's use or non-use of the facts of Doug's affair in settlement negotiations**

### Duty of care/diligence in accordance with both ABA and CA rules

A lawyer has a duty to pursue a case with the care and diligence that one would bring to their own personal matters. This includes the duty to: (1) research facts; (2) investigate matters; and (3) put in the time needed to present an adequate representation of their client's case.

Here, Mary would have a duty to investigate the facts of the evidence that Peg is presenting to her. Mary should not ignore what Peg is saying to her, as discussed below. Mary has a duty to pursue all legally available avenues in the representation, and because Mary has a duty not to present dishonest or frivolous or lies to opposing parties, Mary should look into what Peg is disclosing to her in order to make sure she is doing her due diligence.

Mary agrees that the fact of the affair would help Peg in settlement negotiations, and further, as discussed below, Doug alleged under oath that he has not been unfaithful to his wife which goes directly to the claim of his sexual harassment of Peg because that could be construed as the same thing as him saying he did not sexually harass Peg.

Mary had a duty to research the facts that Peg is presenting to her and investigate it, and take the time needed to adequately prepare the case for Peg.

### Conclusion

Mary should take the care and diligence to pursue the use of the facts of the settlement negotiations, and as long as she has no reason to believe it is something made up by Peg in order to just humiliate and embarrass Doug (something which would be in violation of the professional rules), Mary should use the facts in settlement negotiations.

### Scope of representation

A lawyer has a duty to pursue all legally available avenues in representing the client and defending their case. The client has authority to decide whether or not to accept a settlement, whether or not to take a plea deal in a case, etc. The client controls the objectives of the case, while the lawyer decides the tactics and the strategic moves of the case.

Here, Peg is telling Mary that she has 'solid' evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which his wife is unaware. The facts tell us that this is a claim about sexual harassment by Peg against Doug, and in addition, the facts tell us that Doug testified in a deposition (thus under oath) that he has never been unfaithful to his wife. This statement by Doug goes directly to Peg's allegation because if Doug had never been unfaithful, that means he would have never sexually harassed Peg. Thus, the fact regarding whether or not Doug has been unfaithful to his wife is relevant. Mary has determined that Doug is going to owe Peg damages, but it is just a matter of how much, and agrees that using the facts of the affair in her negotiations with Len will likely result in a larger amount, which as the

lawyer for Peg, should be what Mary wants to pursue.

Further, because the facts are actually relevant to the litigation, it would not be unethical for Mary to use the facts. Doug put it at issue by stating under oath he has not been unfaithful to his wife. Although Mary has the authority to control the tactics for litigation, Peg as the client determines the objectives and the theory of the case and Mary should be pursuing all legally available matters, and it is not a violation to use the facts.

### Conclusion

Mary should use the facts (subject to the above conclusion that she reasonably believes there is some merit to them) since it is a legally available avenue that would help defend her client's case and provide her with the best results in a way that does not violate the rules.

### **3. Mary's ability to withdraw if Peg persists**

#### Withdrawal

One only needs to mandatorily withdraw from representation, in accordance with both ABA and CA rules, if the representation will result in a violation of the ABA or CA rules or statute, if the lawyer's physical or mental ability will impair the representation, or if the lawyer is discharged. In addition, in CA, a lawyer must withdraw if they know the client does not have probable cause for their case and it is solely malicious.

Here, none of those facts are present so we must look to permissive withdrawal.

#### Permissive withdrawal

Under the ABA, a lawyer may withdraw if they reasonably believe the representation will result in an ethical violation, if the client has already used their services to commit a

crime or fraud, if the client has failed to substantially fulfill an obligation to the lawyer, such as pay their fee, if the client is insisting on pursuing a matter in a way the lawyer finds morally repugnant or fundamentally disagrees with, or if they can do so without material adverse effect on the client, or any other good cause.

California is similar except it does not allow withdrawal solely because the lawyer fundamentally disagrees with the way the client wants to pursue the case, or even if they can do so without causing material adverse effect on the client. However, it does allow the lawyer to withdraw for good cause.

Here, Mary agrees the facts would help the settlement negotiations, but she strongly dislikes the idea of using that information, and especially feels uncomfortable because of her relationship with Len. "Strongly disliking" is likely not sufficient under the ABA rules as it has to be a fundamental disagreement or something she finds morally repugnant, and it is certainly not sufficient for withdrawal under CA rules. Further, the fact that she is especially uncomfortable because of her friendship with Len is not grounds under either rule.

There are not a lot of facts about whether Mary can withdraw without causing Peg material adverse effect, which is only allowed under ABA, however, it seems they are already well into litigation and have already taken depositions and Mary has already determined what is needed for the case, it would likely be difficult for Peg to find effective new and efficient representation.

Further there is ultimately no good cause to withdraw at all.

## Conclusion

Mary likely cannot ethically withdraw under either ABA or CA rules as there is no good cause to withdraw under either rule, and Mary disliking a course of representation is not sufficient under the ABA rules.

## QUESTION 2

Acme Inc. is a corporation that has been profitable for several years and now holds \$20 million cash in its treasury.

Acme's board of directors consists of Brown (Acme's Chief Executive Officer), Chase (Acme's Chief Financial Officer), and ten other non-employee ("outside") directors.

Acme's board of directors recently met to consider the best course of action with regard to the cash in its treasury. At this meeting, Brown and Chase strongly recommended that Acme pay a dividend to its shareholders. The board then heard a report from an outside consulting firm regarding the favorable prospects for Acme's expansion into a new line of business. After a lengthy discussion, the ten outside directors voted in favor of a resolution not to declare a dividend and instead to hold the accumulated cash for the corporation's future use. Brown and Chase voted against this resolution. The entire board of directors also voted unanimously to make a \$100,000 cash contribution to a private university. Brown is a graduate of this university and a member of its board of trustees. The other Acme board members knew these facts at the time the board unanimously authorized the contribution.

One of Acme's many shareholders, Davis, is upset about the board's decision not to declare a dividend. He sent a letter to Acme's board demanding inspection of Acme's records relating to this decision.

Another Acme shareholder, Evan, filed a lawsuit against Acme and its board seeking orders that Acme pay a dividend to its shareholders and be enjoined from contributing \$100,000 to the university.

1. Did Acme's outside directors possess the authority to reject Brown's and Chase's recommendation to pay a dividend from cash in the treasury? Discuss.
2. Does Davis have a right to inspect Acme's records relating to the board meeting described above? Discuss.
3. Is Evan likely to prevail in his suit for an order that the corporation pay a dividend? Discuss.
4. Is Evan likely to prevail in his suit to enjoin Acme from paying \$100,000 to the private university? Discuss.

## QUESTION 2: SELECTED ANSWER A

A corporation is an entity distinct from its owners, the shareholders. A corporation can sue or be sued.

Here, Acme Inc. is a corporation and can sue and be sued.

Pay Dividends:

The first issue is whether Acme's outside directors possessed the authority to reject Brown's and Chase's recommendation to pay a dividend from cash in the treasury.

The board of directors in a corporation manages the internal affairs of the corporation. In order to make decisions, the board must either call a meeting with the required quorum and vote on the matter, decide using unanimous written consent, or they must ratify the matter after the fact with proper board approval. A board meeting either occurs annually, at which the time and place and date are set out in the articles or bylaws, or through a special meeting, which requires at least two days' notice stating the time, date, and place of the meeting. A director can be an officer or shareholder, but they are not required to be.

Here, Acme's board of directors recently met to consider what to do with their cash in the treasury. Brown and Chase recommended that Acme pay a dividend to its shareholders, but then ten outside directors voted in favor of a resolution not to declare a dividend instead. It is unclear whether this was an annual meeting or a special meeting, but assuming that the proper notice was given if it was a special meeting, the next issue is whether the decision was properly voted on.

In order for the board to make a valid decision, there must be a quorum. Unless the bylaws or articles of incorporation state otherwise, a quorum is a majority of the directors on the board. In addition, for a proper vote, there must be a majority of the quorum voting in favor of the decision.

Here, there are twelve directors, including Brown and Chase. It appears that all of the directors were present at the meeting, and thus had a proper quorum. Next, ten of the outside directors voted in favor of a resolution to not declare a dividend and instead hold the cash for the corporation's future use. This vote was ten out of twelve directors, and thus was a proper board approval.

Therefore, this decision by the outside directors was proper. The fact that they were outside directors does not affect their ability to vote.

In addition, the decision as to whether or not to declare a dividend is in the complete discretion of the board, subject to limitation rules pertaining to the corporation's solvency. A dividend is a distribution that is given to shareholders who have rights to dividends. The board may not permit a dividend distribution if either the corporation would not be able to pay their debts as they come due, or if the corporation's assets are lower than their liabilities, including the preference payment required to be given to preferred shares upon dissolution.

Here, the board decided to not give dividends out and thus the limitation rules do not apply. The decision to not give dividends was in the board's sole discretion, absent an abuse of discretion. This decision was proper and the directors possessed the authority to reject Brown and Chase's recommendation to pay a dividend from cash in the treasury. Although Acme had \$20 million in its treasury, the board was not required to

give out a dividend.

Davis's inspection Rights:

The next issue is whether Davis has a right to inspect Acme's records.

A shareholder has an unqualified right to inspect the corporation's books and records in regards to the bylaws and articles, the communications that the board has made to the shareholders in the last three years, the annual report that the corporation files in the last three years, the minutes at shareholder meetings, and other ordinary records pertaining to their rights as a shareholder. In addition, a shareholder, with five days written notice, may request to inspect other books and records relating to the finances and other records of the corporation upon a showing of a proper purpose. This proper purpose must be related to their rights and duties as a shareholder. Typically, after showing a proper purpose, the board should approve the request. Either the shareholder may inspect the records or have an attorney inspect the records for them.

Here, Davis is requesting a right to inspect Acme's records relating to the board meeting described above. The board's minutes from the meeting likely relates to Davis' rights as a shareholder, because as described below, Evan may assert that the board violated its fiduciary duties to the corporation in the meeting. A shareholder has a right to bring a derivative suit on behalf of the corporation if they satisfy the required procedures and the court finds that the suit should go forward. Therefore, having these minutes from the board meeting where the board decided to not declare a dividend can be offered as proof that the directors possibly violated their duties as directors. However, shareholders do not have a right to demand a dividend distribution. Therefore, if Davis is simply upset about the dividend distribution, then getting these records may not relate

to his rights as a shareholder. Davis may argue that the board abused its discretion. Nevertheless, if Davis does in fact show a proper purpose then he must make a written demand to the board with five days' notice.

Dividend:

The next issue is whether Evan is likely to prevail in his suit for an order that the corporation pay a dividend.

A shareholder may sue a corporation either in a direct action in order to obtain judgment personally or a derivative suit in which the shareholder sues to vindicate a claim on behalf of the corporation. In a derivative suit, the corporation collects the judgment.

Here, Evan would be suing in a direct action because he is suing on behalf of his right to receive a dividend.

However, as described above, the decision as to whether or not to declare a dividend is in the complete discretion of the board, subject to limitation rules pertaining to the corporation's solvency. The board may not permit a dividend distribution if either 1) the corporation would not be able to pay their debts as they come due, or if 2) the corporation's assets are lower than their liabilities, including the preference payment required to be given to preferred shares upon dissolution.

Here, Acme Inc.'s cash in the treasury amounts to \$20 million. Therefore, Acme Inc. likely would be able to give out a cash dividend to its shareholders. However, as described, this decision is within the board's discretion and the board decided to not make distributions. Therefore, Evan would likely fail in his suit against the corporation for not giving out a distribution.

However, Evan may assert in a derivative action that the directors violated their duty of care in making the decision.

#### Derivative Action:

In order to file a derivative action, the shareholder must be a shareholder at the time of commencement of the suit, and a shareholder at the time of the alleged wrongful conduct or a shareholder by operation of law.

Here, Evan is currently a shareholder. Further, it appears that Evan was a shareholder when the decision was made to not distribute dividends. Therefore, standing is satisfied.

Further, a shareholder must make a written demand on the board to bring suit on behalf of the corporation. The shareholder must then wait 90 days before bringing the suit unless the shareholder can show that the corporation will suffer irreparable injury or the board has already objected to bringing suit. Further, some jurisdictions permit a shareholder to not bring demand if it would be futile. A demand may be futile where the majority of the directors are interested in the transaction.

Here, it is unclear whether Evan made a demand on the corporation. There is no indication that it would be futile to bring a written demand in relation to the dividend distributions because there do not seem to be interested directors in the decision to not declare dividends. Further, there is no indication that the board has objected to bring suit. Further, there likely would not be irreparable injury to the corporation in waiting 90 days to bring suit because the suit is solely based on the decision to not make a dividend distribution, which as described, is in the board's discretion.

Therefore, Evan must first make a written demand and must wait 90 days to bring suit.

## Duty of Care:

Evan may assert that the board breached its duty of care in deciding to not distribute dividends. Each director has a duty of care to act in good faith, act as a reasonably prudent person would under the circumstances, and act in a manner that a reasonable director would believe is in the best interest of the corporation. Where there is no indication that there is a lack of good faith or self-dealing or conflicts of interest, the burden is on the shareholder to prove that this duty was breached. Further, directors are permitted to rely on outside reports in making their decisions where they are prepared by officers of the corporation, attorneys, accountants, or other professionals that the director believes is competent.

Here, Brown and Chase strongly recommended that Acme pay the dividend but the outside directors decided that it was not in the corporation's best interest. While the ten directors did not go with their recommendation, they did not have to. The ten directors made a reasonable inquiry into the decision after hearing a report from an outside consulting firm regarding the favorable prospects for Acme's expansion into a new line of business. Therefore, as long as the directors reasonably believed that the firm was competent, the ten outside directors could reasonably rely on this outside consulting firm in making the reasonable decision that the corporation should instead hold the accumulated cash for the corporation's future use, including expanding to a new line of business. Further, it states that there was a lengthy discussion before the directors decided to not vote in favor of the distribution which indicates reasonable diligence in their decision-making procedures. Further, there is no indication of a lack of good faith. Therefore, the court will defer to the board's decision in the matter based on the

business judgment rule - the board made a reasonably inquiry into the facts related to making the decision to not distribute the funds, there was no bad faith or conflict of interest, or self- dealing. Therefore, the burden was on Evan to prove the duty of care standard was breached. As described above, he likely cannot prove that it was breached, especially because the decision to declare a dividend is in the board's discretion.

Therefore, Evan's suit will likely not succeed against the board for the dividend decision.

Payment to the Private University:

The next issue is whether Evan is likely to prevail in his suit to enjoin Acme from paying \$100,000 to the private university.

As described above, this would be a derivative action in which Evan would be bringing the suit on behalf of the corporation due to the directors' breach of their fiduciary duty. The board makes the managerial decisions as to the internal affairs of the corporation. Therefore, this decision was solely in the board's discretion and Evan does not have a personal direct suit against Acme Inc.

Duty of Loyalty:

Evan may assert that the board breached its duty of loyalty when it decided to give a cash contribution to a private University that Brown graduated from and is a member of the board of trustees.

Each director of the board owes a duty of loyalty to the corporation to act in the corporation's best interests. A breach of the duty of loyalty may occur where a director engages in self- dealing. Self- dealing occurs where the corporation enters into a

transaction where a person or entity on the other side of the transaction is a director, or a director's family member, someone the director has a personal or professional relationship with or an organization in which the director is a director, shareholder, or officer.

Here, the private university that Acme gave the money to was a university in which Brown graduated and is a member of the board of trustees. Therefore, there may be a duty of loyalty violation. Where there is a self-dealing transaction, the director that is interested, here Brown, may satisfy his duty of loyalty by disclosing all material facts fully and adequately to the board and the board votes in a proper board vote to engage in the transaction. The quorum required for the board vote excludes any interested directors and there must be a proper vote based on disinterested directors. In the alternative, the interested director may fully and adequately disclose the information to the shareholders who must conduct a proper vote with the disinterested shareholders voting in favor of the transaction with more votes in favor than against. In the alternative, the terms must be fair to the corporation.

Here, Brown graduated and is a member of the board of trustees and is also on the board of Acme Inc. Therefore, Brown would be considered an interested director. There is no indication that there was a shareholder approval of the decision to make the contribution. However, it states that the Acme board members knew of these facts at the time that the board unanimously authorized the contribution. Therefore, Brown may have fully and adequately disclosed his interests in the contribution before the board voted. However, Brown was not permitted to vote in the transaction because he was an interested director. However, without Brown counted in the quorum or in the vote, the

quorum would have been 11 out of 12 directors for a proper quorum - more than the majority. Further, the vote required would be a majority of the disinterested directors. Here, all 11 of the disinterested directors voted in favor of the contribution. Therefore, there is an adequate vote in favor of the transaction.

In the alternative, the terms of the transaction may be fair to the corporation, even if the decision was not validly disclosed and voted on. The court will consider alternatives, the corporation's assets, the corporation's need to engage in the transaction, and other factors. There are no facts here that indicate that this transaction to the university was not fair to the corporation. A corporation is permitted to make charitable contributions and all of the directors unanimously agreed that the decision was a good decision.

Therefore, if the fact that Brown actually voted in the transaction does not defeat the validity of the vote, the contribution was validly approved. Further, Brown did not violate his duty of loyalty to the corporation because Brown disclosed the facts of his interest and board voted with the proper amount of disinterested votes. Further, the terms appear fair to the corporation.

Therefore, Evan likely will not prevail in a suit against the Acme directors for paying \$100,000 to the private university.

Duty of Care:

Evan may also assert a derivative action on behalf of the corporation alleging that the directors violated their fiduciary duty of care to the corporation in giving the distribution to the university. Using the standard described above, there is no indication that there was a lack of good faith on behalf of the board of directors. Further, the duty of loyalty does not appear to have been breached. Further, under the circumstances it may have

been reasonable to give \$100,000 to the university under the circumstances. This amount of money is not much compared to the \$20 million that Acme has in its treasury. All of the directors voted unanimously which indicates that a director would reasonably believe that this decision was in the best interest of the corporation.

Therefore, the duty of care was likely not breached.

Improper Distribution:

Evan may also assert that the \$100,000 contribution was an improper distribution due to the solvency standards described above. However, as indicated, \$100,000 out of \$20 million in the treasury does not appear to be enough money that would make the corporation unable to pay its debts as they come due. Further, it likely will not make it so the corporation's liabilities outweigh its assets, including the preferences required upon dissolution.

Therefore, Evan likely will not succeed in asserting that the distribution to the corporation was an improper distribution.

## QUESTION 2: SELECTED ANSWER B

1. Did Acme's outside directors possess the authority to reject Brown's and Chase's recommendations to pay dividend?

### The board

In a corporation, the board of directors run the big picture of the corporation. They appoint the officers and managers as well as vote on major corporate transactions. Board of directors can be comprised of two types of directors. Inside directors and outside directors. Outside directors are those who are otherwise disinterested in the day to day operations because their only relationship to the corporation is their board position. Inside directors however are directors that work in the corporation as managers. These are often the CEO and CFO as the case is here with Brown (B) and Chase (C).

### Power of the board

The board of directors votes on major corporate transactions. These include mergers, acquisitions, partial or whole assets sales, dividend distributions, and new large investments. The board of directors, unless specified otherwise in the bylaws, must approve all the matters before it by a majority vote. Inside directors and outside directors votes are equal. In order to have a proper vote, there must be quorum. Quorum requires a majority of disinterested directors. Disinterested directors are those directors that do not have a personal stake in the matter at hand.

## Quorum

Here, Acme has 12 directors. Two inside and two outside directors. The vote at issue is a vote regarding the distribution to pay a dividend. Since all 12 directors voted, we assume that quorum was met as all 12 were present.

## Majority vote

In order to pass a vote, the board must pass it by a majority. 10 voted against the dividend and 2 voted for the dividend. A majority clearly voted against the dividend. Therefore, the dividend was properly rejected. The fact that the outside directors voted is of no consequence. An outside director possesses the same amount of voting power as any inside director.

## Conclusion

The board properly voted on a corporate transaction that was within its power to either institute or reject. The board had quorum to vote on it because all 12 directors were present. Finally, the board rejected it by a majority vote. The fact that dividend was the recommendation of the CEO and CFO means nothing. The entire point of the board is that they are people unrelated with the day to day operations of the corporation that give an outside view. The CEO and CFO salaries may depend on stock price. Issuing a dividend may increase stock price. Therefore, the CEO and CFO have an incentive to increase the stock price via dividend. The board was under no requirement to accept their recommendation and properly rejected it with a majority vote.

2. Does Davis have a right to inspect Acme's records relating to the board meeting described above?

Shareholder inspection rights are a keystone right of shareholders. Shareholders, if certain conditions are met, have the right to inspect the books and records of the corporation including board meeting minutes. In order for a shareholder to have inspection rights, they must show that they are indeed a shareholder and that they have a proper purpose in asking for inspection.

Shareholder

Only a shareholder can inspect a corporation's records. The amount of shares held is irrelevant. The only requirement is that the person is a current shareholder of the corporation. Here, Davis is a shareholder of the corporation. Therefore, this requirement is met.

Proper purpose

A shareholder must have a proper purpose. A proper purpose can be many things including investigating potential fraud, reviewing financial statements, making sure corporate formalities were followed properly. A proper purpose is anything that has to do with a shareholder's interests in the health of the corporation as it relates to their ownership of the corporation. An improper purpose arises when a shareholder is attempting to inspect the records for personal benefit or with the goals to harm the corporation.

Here, Davis is upset about the board's decision not to declare a dividend and wants to inspect the records. Davis will argue that he has a proper purpose because he wants to

know the reasons why a dividend was not declared. Perhaps once he looks at the meeting minutes and realizes that the money was saved for better business opportunities later on he will be satisfied. Also, Davis may argue that he wants to make sure the board was properly informed or had no conflicts. The corporation may argue that Davis is just trying to harass them. However, there is no indication of any ill will on the part of Davis. Davis has a right to understand how and why the board came to its decision. Overall, Davis likely has a proper purpose.

### Conclusion

Davis has a right to inspect the corporation's records. Davis is a shareholder of the corporation and he has a proper purpose related to his interests as to why a dividend was not declared.

### 3. Is Evan likely to prevail in his suit for an order that the corporation pay a dividend?

Evan is suing the corporation in an attempt to order the corporation to pay a dividend. Evan may be able to do this through either a direct suit or a derivative suit.

### Direct suit

In a direct suit, Evan is suing the board of directors himself as a shareholder. A direct suit involves a board infringing on the rights of individual shareholders. Evan will argue that the board is infringing on his right as a shareholder to pay him a dividend. On the other hand, the board will argue that they are under no obligation to pay out dividends. Evan will argue that the corporation has \$20 million in cash reserves and the shareholders are entitled to see some of that profit. The board however will ultimately prevail. The board will be correct in that the board has ultimate power to make decisions

for the corporation. This includes whether to give dividends or not give dividends. The board has complete discretion and Evan's direct suit will fail.

### Derivative suit

A derivative suit is a lawsuit where a shareholder demands that the corporation sue the board of directors directly for some violation. Usually a fiduciary duty violation. Here, Evan may argue that it was a violation of the duty of care not to issue a dividend and improper for the board of directors to use an outside consulting firm and therefore the money should be distributed to shareholders instead of saved for later.

In order to bring a derivative suit, a shareholder must make a demand on the board, be a shareholder at the time of the harm, hold shares throughout the suit, and adequately represent all the shareholders. There is no evidence if demand was made but to proceed it must be made or shown to be futile. Evan was a shareholder at the time of the harm and the assumption is that he will hold throughout the suit. Finally, there is nothing to indicate that Evan does not adequately represent the shareholders.

### Duty of care

The duty of care requires a director to act as a reasonably prudent director under the circumstances. The duty of care requires that a director act with the requisite skill, knowledge, and care of an ordinary director and employ their personal skills in their care. As part of the duty of care, directors must make sure that they are properly informed in regard to the corporate decisions that they make. Evan will argue that the directors violated the duty of care when they followed the recommendation of an outside consulting firm in deciding to save money instead of giving a dividend. The board however will argue that they are entitled to rely on outside sources such as attorneys,

consultants, and accountants in coming to informed decisions. The whole purpose of those outside sources is to provide directors with better knowledge and understanding. Additionally, the directors will stress that they are under no obligation to give the dividend even if using an outside consultant was a violation. Overall, the directors are unlikely to be in violation of the duty of care in this situation.

### Business Judgment Rule

The business judgement rule (BJR), is a presumption that directors acted in an informed matter in the best interests of the corporation. The BJR presumes that directors acted in good faith and protects them from liability for basic corporate decisions. For a shareholder to succeed in arguing the duty of care violation, they must rebut the BJR. The BJR can be rebutted through a showing of bad faith, self-dealing, gross negligence towards their duties, and more. Here, Evan will argue that the BJR should be rebutted because the directors failed to make their own decision and therefore acted in bad faith. The directors on the other hand will argue the opposite that bringing in the consultants was in good faith because it helped them make an informed decision. Overall, the BJR is unlikely to be rebutted here because there is no bad faith.

### Conclusion

Evan is unlikely to succeed in any suit against the corporation. Evan will not succeed in a direct suit because the board is under no obligation to issue a dividend. He will also not succeed in a direct suit because the board acted in good faith and did not breach the duty of care.

4. Is Evan likely to prevail in his suit to enjoin Acme from paying \$100K to the private university?

#### Derivative suit

In this case, Evan will only be suing via derivative suit because he is challenging a corporate transaction that doesn't independently involve shareholders. See rules above for derivative suit. Here once again, Evan held the shares during the harm, will likely hold throughout, and will adequately represent the shareholders. Once again, Evan will have to make a demand on the board or show that demand is futile. We have no evidence that he made demand but to proceed with the suit he will have to.

In the derivative suit, Evan will be alleging that the board violated their duty of care by giving \$100,000 to a university and also the duty of loyalty by giving it to the university of the CEO.

#### Duty of care

See rule above. Evan will argue that the directors failed to act as reasonably prudent directors because they are spending money outside of the company. The \$100,000 could have gone to shareholders but instead it went to a university. Assuming that the university is not within the business ACME runs, Evan will argue that this was equivalent to setting corporate funds on fire. The board will argue that it is well accepted that a corporation may make donations where it sees fit without violating the duty of care. The board will argue that there are a lot of intangible benefits of donating money, especially to a university. It helps with recruiting and getting good new employees. Additionally, public image of being a caring corporation is important. Finally, the board will argue that it has been ruled by courts that general corporate donations purely out of

good will are within the board's discretion. Finally, the board will argue that \$100,000 out of \$20 million is a very small amount that is not going to create a negative financial impact on the corporation. Overall, the board will succeed in arguing that the donation was valid.

### Business judgment rule

See rule above. Evan will argue that the board should not be protected by the business judgment rule because of the conflict of interest since the CEO wanted to give money to his alma mater where he is a member of the board of trustees. The board however will argue that they did not act in bad faith because a majority of disinterested directors approved the transaction. There was no self-dealing here because 11/12 directors who did not go to the school voted in favor of it. Further, 10 of those 12 directors were outside directors. Overall, Evan may have some ground arguing that the business judgment rule should not invoke protection because of the interest of the CEO. However, the board also has a strong argument that they acted in good faith.

### Conclusion

The board likely did not breach the duty of care. Even if Evan can rebut the BJR, Evan is unlikely to show that the actions actually amounted to a duty of care violation given the circumstances.

### Duty of loyalty

Under the duty of loyalty, a director has to act in the best interests of the corporation. Evan will argue that the Brown violated the duty of loyalty by giving money to his own school. Evan will further argue that the board overall violated the duty because money

given outside the corporation and outside their corporate interests is a waste of money. Similar to the discussion above for duty of care, directors had valid, corporate and moral reasons for giving money outside the corporation. The board will argue that the directors were actually acting in the best interests of the corporation by giving money to the university. Overall, the board is unlikely to have failed to act in the best interests of the corporation. However, Brown may have violated the duty of loyalty because of his conflict of interest.

### Conflict of interest

A director may not enter into the transaction that the director has a conflict of interest with. Here, Evan will argue that Brown has a conflict of interest in the transaction and therefore the transaction is improper. The conflict of interest arises because Brown is attempting to give money to an organization that he is not only affiliated with, but that he sits on the board of. Brown will likely concede that this in fact a conflict of interest because Brown sits on one board that is giving money to another board. However, Brown will argue that a safe harbor applies.

### Safe harbor

A conflicted transaction may nonetheless be valid if the conflict is disclosed and either 1) a majority of disinterested shareholders approve 2) majority of disinterested directors approve or if the transaction is fair.

Here, the second two both apply. The fact pattern indicates that the entire board knew of the conflict of interest. The entire board then unanimously voted to approve it. That means that 11 directors voted in favor of it. All those 11 directors are disinterested so the transaction is valid under the safe harbor.

Additionally, Brown is likely to argue that the transaction is fair. A corporation has a lot to gain from donating to universities as discussed above and \$100K for a corporation that has \$20 million in cash reserves is an insignificant amount.

### Conclusion

Evan will likely fail in his suit because the board did not violate any fiduciary duty to the shareholders by giving \$100K to the corporation.

### **QUESTION 3**

Andrew, a widower with three adult children (Bobby, Carol, and Dylan), owned a forty-acre parcel of wooded land called Havenwood. In 1988, Andrew by written deed validly conveyed the north half of Havenwood to his brother Elmo.

In 1989, Andrew died, leaving a valid will that gave “all my real estate to Bobby, Carol, and Dylan as joint tenants with right of survivorship.” Carol and Dylan lived out of state. Bobby lived near Havenwood.

In 1990, without permission from anyone, Bobby cut down some trees and prepared a number of campsites on both the north and south halves of Havenwood. He sometimes used one campsite himself and rented out the other sites during the spring and summer each year. Bobby paid taxes on the entire property using the rental fees he collected, keeping the remaining profits.

In 2017, Dylan asked Bobby about the land and Bobby told Dylan that it was none of his business. Bobby said, “I’ve improved the land and, anyway, I’m the youngest and it will be mine in the end.” Dylan then by written deed validly conveyed his interest in Havenwood to Fred, his friend, as a gift. Dylan told Carol what had happened, and she had a written deed drawn up validly conveying her interest in Havenwood “from Carol as a joint tenant to Carol as a tenant in common.”

In 2018, Bobby died leaving a valid will that gave his entire estate to Sam, his son. Sam continued renting the campsites and paying taxes, keeping the remaining profits, and occasionally using one campsite himself, just as his father had done.

1. What right, title or interest in Havenwood, if any, are currently held by Elmo, Fred, Carol and Sam? Discuss.
2. Are any claims available to or against Sam for payment of taxes or recovery of rental fees? Discuss.

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

### **Will Requirements**

An attested will must be (1) in writing, (2) signed by the testator with testamentary capacity and intent, and (3) jointly witnessed by 2 witnesses who understand the testator's act.

Here, the facts state that A's and B's wills were valid. These requirements are met.

### **Deed Requirements**

To be valid, a deed conveying real property must (1) be in writing, (2) be signed by the grantor, (3) identify the land to be transferred, (4) identify the grantee, (5) contain language of the grantor's present intent to transfer, and (6) be delivered to and accepted by the grantee.

Here, the facts state that all of the deeds at issue were valid, so there is no problem with the above requirements.

### **Adverse Possession (AP)**

An individual may acquire ownership of land through AP if (1) their possession of the land is exclusive; (2) their possession is continuous for the statutory period; (3) their possession is hostile, i.e., under a claim of right; and (4) their possession is open and notorious. These elements are discussed below.

## **1) Interests in Havenwood (H)**

The parties' interests in H changed as a result of several events from 1988 to 2018. Each event is discussed in turn.

### **1988 - Transfer of North Half (North H) to Elmo**

In 1988, A - who appeared to own H in fee simple, executed a written deed validly conveying North H to his brother Elmo.

After this action, A held the southern half of H (South H) in fee simple. Elmo held North H in fee simple.

### **1989 - A's Transfer to Bobby, Carol, and Dylan**

In 1989, A transferred "all of [his] real estate to Bobby, Carol, and Dylan as joint tenants with a right of survivorship."

As discussed above, all A had to transfer was his fee simple interest in South H.

### **Joint Tenancy**

A joint tenancy is a form of joint ownership of property. To create a joint tenancy, the tenants must have the unities of possession, interest, time, and title. The deed conveying the property must also state that it is with the right of survivorship.

Unity of possession exists when all joint tenants have an equal right to possess the land. Here, A's will gave Bobby (B), Carol (C), and Dylan (D) the land and did not indicate that they would have anything but equal possessory rights, so this unity is met.

Unity of interest means that all joint tenants have the same interest in the land. Here, A's will conveyed the land to Bobby, Carol, and Dylan equally so they each have the

same interest in the land as joint tenants.

Unity of time and title require that the joint tenants' interests must have been created at the same time and in the same conveyance. Here, Bobby, Carol, and Dylan all received their interest at the same time via the same conveyance in A's will.

Finally, A's will expressly stated that the joint tenancy would have a right of survivorship. Thus, A's will created a valid joint tenancy.

### Conclusion

At the end of 1989, A had no interest in H. Bobby, Carol, and Dylan held South H as joint tenants.

### **1990 - Bobby's Actions**

In 1990, Bobby cut down some trees and prepared campsites on North H and South H. He sometimes uses one campsite himself and rented out the others during spring and summer.

### North H

As stated above, Elmo owned North H at this time, so Bobby had no right to enter into North H absent an easement (a nonpossessory right to enter property) or profit a prendre (a nonpossessory right to enter property and remove specific natural resources from the land). As discussed below, B's use of the land was thus hostile at this point, which is important for purposes of adverse possession (AP).

### South H

As a joint tenant of South H, B had the right to equal possession of South H. His cutting down the trees and earning rental fees was relevant for purposes of contribution

(discussed in Question #2). But because B's entrance and use of the land was not hostile to Carol and Dylan's rights, it did not have an effect on their rights of possession and ownership.

### **2017 - Bobby's Statement to Dylan**

A joint tenant's use of property, although usually not hostile to the other joint tenants, may become hostile if the joint tenant denies the other joint tenants access to the land. This is called ouster.

Here, one could argue that B's statement to Dylan that the land was "none of his business" and that it would be B's land in the end because he was the youngest was sufficient to make B's use and possession of the land hostile to C and D. But as discussed below, to be hostile, an adverse possessor's possession must be under a claim of right. Here, B was probably just being rude to D by saying the land was "none of his business" and by saying it would eventually be his (which actually did not turn out to be true). B never claimed that South H was his at that time. Thus, B's statements were not sufficiently hostile to put D or C on notice of an AP claim.

### **2017 - D's Conveyance to Fred**

Also in 2017, D conveyed his interest in South H to Fred (F). A joint tenancy is severed as to a joint tenant whenever that joint tenant conveys his interest to a third party. At that point, the third party becomes a tenant in common. A tenancy in common requires only unity of possession. Here, D severed the joint tenancy in South H as to himself when he conveyed his interest in it to Fred.

Thus, at this point, B and C held 2/3 of South H as joint tenants; F held 1/3 of South H

as a tenant in common.

### **2017 - C's Conveyance to Herself**

Finally, in 2017 C conveyed her interest in South H to herself as a tenant in common. Some jurisdictions permit an individual to convey land to themselves via a deed. If so, then C would become a tenant in common under the rules stated above. But if not, the severance was ineffective and the ownership interests remained unchanged. But under the general rule that a property owner may do what they please (subject to some exceptions) with their property interests, C's conveyance was likely valid. This is bolstered by the fact that the facts state that C drew up the deed *validly* conveying her interest as a joint tenant to herself as a tenant in common.

Assuming that C's conveyance was valid, it severed her joint tenancy with B. Thus, at this point, B, C, and F each held a 1/3 interest in South H as tenants in common.

### **2018 - B's Death - North H**

In 2018, B died and left his entire estate to his son Sam (S). Sam continued to rent the campsites and pay taxes, keeping the profits and occasionally using the site himself.

At this point, B had been operating a campsite on North H at least seasonally since 1990, or for 28 years. This raises the issue of whether B had acquired North H through adverse possession. If he did, then his will conveyed that interest to S.

See rule above for adverse possession.

### Exclusive

First, Sam will argue that B's possession was exclusive. To be exclusive, the possession cannot be shared with the rightful owner. Here, there is no evidence that Elmo ever even visited the property or shared possession with B in any way. Elmo will respond that B's possession was not exclusive because he rented out the campsite to other campers. But B did so based on his belief that North H was his exclusively to rent out. Thus, this element is met.

### Continuous

Second, Sam will argue that B's possession was continuous for the statutory period. The facts do not list a statutory AP period, but in most jurisdictions it is between six and twenty years. Here, B's possession was for 28 years, so it probably satisfies this requirement.

If not, S can continue to possess the property under a claim of right via his inheritance from B. Under the rule of "tacking," a court would then "tack" the time of B's possession to S's possession because he was B's successor in interest. The court would then conclude that the continuity element was met if S and B's combined possession satisfied the statutory period.

Elmo may respond that B's possession wasn't actually continuous because B only sometimes used the campsite himself. But courts have held that if a property is of the type that is appropriate for seasonal use, then seasonal use is sufficient to satisfy the continuity requirement. Here a campsite is not something that is used year round. Thus, assuming that B used the campsite seasonally, this requirement is met.

### Hostile

S will next argue that B's possession was hostile. To be hostile, the possession must be made under a claim of right. Here, B used North H like it was his own, cutting down trees, building a campsite, and renting out the site to campers. Thus, B acted as though North H was his and his only. This requirement is met.

### Open and Notorious

Finally, S will claim that B's possession was open and notorious. There is no evidence that B attempted to hide his possession of the land. Elmo will argue that he didn't have notice of the possession. But if Elmo had visited North H, he would have seen the chopped-down trees and the campsite. His failure to visit doesn't make B's possession less open. This element is met.

### Conclusion

B adversely possess North H. He thus obtained Elmo's fee simple interest. After B's death, because B's valid will gave his entire estate to Sam, Sam had a fee simple interest in North H.

### **2018 - B's Death - South H**

As stated above, B had a right to possess South H as a joint tenant and then as a tenant in common, so his use of the property was not exclusive or hostile for AP purposes.

It could be argued that his possession became hostile in 2017, when he told Dylan that the land was none of his business and B would get it anyway in the end. But as discussed above, this statement was not sufficiently hostile to meet the AP

requirements.

Thus, after B's death, his 1/3 interest in South H as a tenant in common will pass to Sam. The right of survivorship that applies to joint tenancies will not preclude this because, as discussed above, the joint tenancy was completely severed before B's death.

## **CONCLUSION**

Based on the above events, Elmo has no interest in Havenwood. Sam owns North H in fee simple. Fred, Carol, and Sam each have a 1/3 interest in South H as tenants in common.

### **(2) Claims Regarding Taxes and Fees**

#### **North H**

As discussed above, S now owns North H in fee simple. Because none of the other parties has no interest in North H, S is not liable to them for any rental fees that B earned. S also cannot seek payment for taxes that B paid on North H.

#### **South H**

South H is different. The parties may have claims against each other based on events during the joint tenancy and during the tenancy in common.

#### **Joint Tenancy**

From 1989 to 2017, B, C, and D held South H as joint tenants. Joint tenants are all responsible for payment of taxes and entitled to the profits on the land they jointly hold. Thus, S can seek reimbursement on behalf of B's estate for the parties' pro rata share of taxes paid. B and C can also seek their pro rata share of the profits that B

earned on South H from 1989 to 2017.

### Tenancy in Common

From 2017 to 2018, F, C, and B held South H as tenants in common. When B died, his tenant in common interest went to S.

A tenant in common is entitled to possession of the premises. However, a tenant in sole possession of the land is required to pay taxes on the land to the extent that the land produces income. Here, B paid taxes on the entire property using the rental fees he collected and kept the remaining profits. Thus, S cannot seek reimbursement from any parties for the taxes B paid.

With respect to the rental profits, F and C can seek contribution from S for a pro rata share of the net profits that B received from 2017 to 2018 as a result of running the campsite on South H.

### **Partition**

If F and C do not wish to be tenants in common with S anymore, they may also seek a partition. This will not require S's consent: any tenant in common may unilaterally partition the property. Courts prefer a partition in kind as opposed to a forced sale of the property.

Here, C lives out of state. Given that D also lives out of state and is friends with F, it is likely that F lives out of state, too. Thus, a court may partition the property to give the campsite portion to B and split the other 2/3 between C and F, since they live out of state and evidently do not wish to use the campsite portion of the land -- or even visit the land.

Upon partition, the court can order S to pay contribution for C and F's pro rata share of B's after-tax profits from the property.

C and F may also argue that B owed them a duty as a tenant in common and seek damages for his renting out their property for their involvement. But given the partition and contribution remedies outlined above, this argument will fail.

### Conclusion

S is probably not entitled to any net payments from C or F because the income B, as sole possessor, derived from the property exceeded the taxes that he paid. However, C and F can seek contribution from S for their pro rata share of B's net profits from renting out the land as a campsite.

## QUESTION 3: SELECTED ANSWER B

### Havenwood Property

A property is held in fee simple absolute if it is fully under the control of an individual, with no interests of reverter or reentry. Property owned in fee simple absolute may be freely transferred according to the wishes of the property owner. A property owner may transfer part of their property pursuant to a valid deed, creating two estates.

Andrew conveyed the northern half of Havenwood, pursuant to a valid deed, to his brother Elmo. Elmo was the owner, in fee simple absolute, of the northern half of the parcel as of 1988.

### Joint Tenancy

Joint tenancy is the holding of a property by multiple parties with equal rights to possession of the entire property and a right of survivorship. Thus, if any of the joint tenants die, their heirs will not receive their share, but instead will go to the surviving joint tenants. A joint tenancy is created by the express intention of the creator in a valid document. Under the common law, devise of property in common ownership was automatically presumed to be a joint tenancy. Under modern law, devise of a property in common ownership is presumed to be a tenancy-in-common unless there is evidence of the grantor's intent to convey a valid joint tenancy. Creation of a right of survivorship alone is usually not enough to show an intent to create a joint tenancy. Instead, the words joint tenancy are usually required. Creation of a joint tenancy requires traditionally the four unities, that of time, title, interest, and possession. First, the joint tenants must take at the same time. Second, the joint tenants must take title through

the same document. Third, the joint tenants must take the same interest in the property. Finally, the tenants must have equal right to possession of the entire property. If a joint tenancy fails the four unities, it will instead be a tenancy-in-common. Any conveyance of an interest in property requires satisfaction of the statute of frauds. A valid written will satisfies the Statute of Frauds, as it requires the signature of the testator (whether attested or holographic).

Andrew created a valid joint tenancy in Bobby, Carol, and Dylan as of 1989. Andrew's express intent was demonstrated in his valid will that gave "all my real estate to Bobby Carol and Dylan as joint tenants with right of survivorship." The use of the term "with right of survivorship" and "as joint tenants" clearly demonstrated this intent. The conveyance met the four unities. The parties took at the same time, at Andrew's death in 1989. The parties took through the same document, the will. The parties took the same interest, an equal third share. Finally, the parties took an equal right to possession of the entirety of the property. Because the joint tenancy met the four unities and was created with the express intent to create a joint tenancy, a valid joint tenancy existed in 1989. There is no issue with the statute of frauds because the will was valid and thus signed by Bobby.

### Ouster

Tenants may commit ouster when they take possession of the entire property that was once in common ownership with an intent to oust the other tenants. Ouster requires notice to the ousted tenants, whether that be constructive or actual notice, and intent to oust the other parties, and the taking of full possession of the property. Once ousted,

the ousted parties may seek to partition the property. The ousted parties also lose their right to possession of the property.

Bobby's actions do not amount to an ouster, as he did not demonstrate a clear intent to oust both Bobby and Carol. While Bobby and Carol may have been put on notice of a potential ouster in 2017, when Bobby told Dylan that Havenwood was none of his business and when Dylan told Carol about the encounter, Bobby did not demonstrate enough of an intent to oust his siblings. He simply stated that the land was none of Dylan's business and that he both improved the land and would eventually get it anyway. These statements are consistent with Bobby simply telling Dylan that, though he is a joint tenant, he has not been around to manage the property and should just trust Bobby. At no point did Bobby exclude either Dylan or Carol from entering the property. As such, he has not met the requirements for ouster.

### Tenancy-in-Common

A joint tenancy is terminated and replaced by a tenancy-in-common upon the severance of the joint-tenancy arrangement, such as by the conveyance of a joint tenant's possession to another. Severance of a joint tenancy does not require the consent of both parties and can be done unilaterally. A tenancy-in-common exists when multiple parties hold equal interests to a property and have the right to possession of the entire property. A tenancy in common gives the right to possession of the entire property but does not include a right of survivorship. The interests can be transferred without breaking the tenancy in common. If a tenant-in-common conveys their interest to another, a new tenancy-in-common is created with the owner of the

conveyance. Creation of a tenancy in common does not require the four unities.

Dylan terminated the joint tenancy by conveying his interest in the property to Fred.

Thus, Fred took a 1/3 interest in the southern half of Havenwood, and Carol and Bobby maintained a joint tenancy for the other 2/3. Carol attempted to also convey her interest but did so to herself. Because severance of a joint tenancy does not require the consent of all parties, and can be done through voluntary acts like conveyance to a third party, Carol likely severed the joint tenancy and took a 1/3 share of the southern half of Havenwood as a tenant in common. She indicated an intent to sever the joint tenancy and did so through a conveyance to herself as a tenant-in-common, which does not require compliance with the four unities. Thus, she now has a 1/3 interest as a tenant in common.

### Adverse Possession

A party may establish adverse possession, in which they obtain legal title to the land of another, when they meet the requirements. First, their possession must be open and notorious. Second, the possession must be hostile. Third, possession must be exclusive. Fourth, they must show continuous use. Finally, possession must meet the statutory period (many states have a 7- year or 10 -year period). The possession period of a predecessor in interest may be tacked onto the claims of a successor in interest to meet this statutory period if there is privity of estate. Some states also require that an adverse possessor pay taxes on the property they claim. If a party can establish the elements of adverse possession, they may obtain title to the entirety of the land they have openly and notoriously possessed through a quiet title action. To adversely

possess land held in common or by joint tenancy, one must first oust the other tenants, otherwise they have not established exclusive possession.

Bobby has not established a claim for adverse possession against his siblings. Because he has not ousted the other siblings (or even if he had ousted in 2017, he would not have met the statutory period starting then), he has no claim of adverse possession for the southern half of Havenwood. However, Sam has likely established a valid claim to adverse possession of the northern half of Havenwood. Sam and Bobby's possession was open and notorious, as Bobby cut down trees and prepared several campsites on the northern half of Havenwood. He also paid taxes on the entire property. Elmo had constructive notice that Bobby was adversely possessing his property and should have discovered it through reasonable inspection. Second, neither Sam nor Bobby received permission to construct campsites and thus possessed with hostile intent. Third, they had exclusive possession because they collected rents from others who used the property, and thus did not allow others to maintain possession without permission and license. Fourth, there are no facts suggesting they did not continuously use the property. In fact, the facts suggest that Sam continued to rent the campsites, use his own, and pay taxes. Finally, their possession would likely meet any statutory period. Sam, as a successor in privity through devise, may tack Bobby's period of possession onto his own. Thus, they have established 28 years of possession, which is enough to meet the statutory period in most states. The facts suggest that Sam and Bobby used the entire northern half of Havenwood. As such, Sam is not only owner of a 1/3 share of the southern half of Havenwood, but also the total owner of the northern half of Havenwood.

### Remaining Interests as of the Present

Because Dylan and Carol severed the joint tenancy in 2017 through their conveyances, Carol maintains a 1/3 interest in the southern half of Havenwood. Dylan validly conveyed his interest to Fred, and thus Fred maintains a 1/3 interest in the southern half of Havenwood. Sam retains the other 1/3 interest in Havenwood through devise from Bobby, using a valid will that conveyed his entire estate. Sam has also established a full claim to the northern half of Havenwood by adverse possession, which he may exercise through quiet title. As such, Elmo has no interest remaining.

### Payment of Taxes or Rental Fees

Joint tenants and tenants in common have an equal right to possession of the entirety of the property. Thus, they are equally responsible for the payment of taxes, maintenance, and other obligations arising from possession of the property. They are also entitled to the profits from the property, including any rental fees accrued. Tenants will not be reimbursed for improvements made to the property, though they may recover the increase in value from those improvements if the property is sold. Tenants may sue for contribution to recover payments they made in excess of their obligations or to recover payments not properly distributed to them.

Sam may seek contribution from Dylan and Carol for the payment of taxes by Bobby for their shared property. Sam may also seek contribution from Fred, as a new tenant-in-common for payment of taxes he made after conveyance of the interest to Fred in 2017. Dylan and Carol may seek contribution from Sam for the profits from the property, namely the rental fees for their period of ownership. Fred may seek payment of rental

fees beginning in 2017, when he took possession.

## QUESTION 4

Needing money and willing to do anything to get it, Don, who is tall, and Al, who is short, set out for Vic's house around midnight to steal from him. On the way, Al said that he did not want to get involved, but Don slapped Al's face and responded: "If you don't come along now, I will break your legs tomorrow." At Vic's house, Don opened the unlocked front door and he and Al went inside. Don took a wallet on a table in the foyer, and he and Al ran away.

Wanda, who happened to be walking in front of Vic's house at the time, caught sight of both men running out of the house. That night, Wanda described the taller man to police as clean-shaven with short hair, but couldn't describe the shorter man.

Don and Al were soon arrested. The next day, a newspaper printed a recent photo of Don, showing him with a large beard and long hair. When Wanda saw the photo in the newspaper, she immediately went to the police station and told Officer Oliver that she was concerned that Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocket when he was arrested. Before Don was arraigned, Officer Oliver arranged for Wanda to view a lineup of six bearded men with long hair, including Don. After viewing the lineup for 20 minutes, Wanda identified Don as one of the men she saw running out of the house. At trial, Al stipulated that he had run out of Vic's house with Don.

1. With what crime or crimes, if any, may Al reasonably be charged; what defenses, if any, may he reasonably assert; and what is the likely outcome? Discuss.
2. Under the Fifth and Fourteenth Amendments of the United States Constitution, on what basis, if any, may Don move to suppress evidence of Wanda's identification at the lineup, and what is the likely outcome? Discuss.

## QUESTION 4: SELECTED ANSWER A

A's (A) crimes

Conspiracy

There is a conspiracy when two or more people agree to commit a crime with the specific intent to commit the crime. Under the common law, there must be bilateral conspiracy, whereby both parties to the agreement specifically intend to commit the crime. There is also no overt act requirement under the common law. However, more recently, the MPC, federal law and majority of jurisdictions all require that there be an overt act in addition to the agreement for a conspiracy to be found. The MPC also allows for there to be unilateral conspiracy, when a party can be guilty of conspiracy for a crime even though the other party did not actually want to commit the act (i.e. in the case of an agreement with an undercover police officer.) Conspiracy does not merge with the actual crime committed -- and thus, even if the substantial crime is performed, a person could also be guilty of conspiracy of that crime.

Here, the facts indicate that D and A intended to commit the crime of stealing from V. D and A agreed to steal from V and "set out for V's house" together at midnight to steal from him. Thus, under the common law, A was guilty of conspiracy for larceny and burglary (the substantive crimes will be analyzed in more detail below), when A agreed with D to steal from V.

Then under the majority/federal/MPC rule, there was also arguably an overt act performed when D and A set out for V's house. A could argue that simply going towards V's house was insufficient to constitute an overt act. A could argue that they didn't have

special equipment or tools on them with the intent to break in. However, here, D and A set out towards V's house around "midnight." Heading to someone's home at midnight (well passed reasonable hours) would probably be sufficient to show that there has been an overt act sufficient to find conspiracy.

### Pinkerton

Under the Pinkerton Rule, all co-conspirators are responsible for all substantive crimes that are committed by co-conspirators that are foreseeable and are in furtherance of the crime.

So, here, A would also be liable for all substantive crimes that D committed in the process of committing the theft crime that they intended to commit together. Therefore, even though it was D who opened the unlocked door and then took the wallet on the table in the foyer, A would also be liable for those crimes, even if A argued that he himself did not commit those crimes. Opening a door and taking a wallet are all foreseeable crimes in furtherance of the crime of stealing from someone's home.

### Accomplice Liability

Accomplice liability will attach when an accomplice aids a principal in performing a crime with the specific intent that the crime be performed. (Note: under the common law, the accomplice needs to only aid intentionally and knowingly.) An accomplice will also be liable for all the substantive crimes that the principal has done.

Here, A may try to argue that he wasn't a principal in the crime because he didn't commit the actus reus for the crimes. However, based on the facts, the court would likely find that he was very much a principal to these crimes -- given that he went to V's

house and also entered the property.

### Larceny

Larceny is the taking and moving of another person's property without their consent with the intent to deprive them of it permanently.

Here, D took and moved the wallet from the table on the foyer, with the intent to deprive V of the wallet permanently. After D took the wallet, both D and A ran from the home.

And there is no indication that D or A intended to return the property. In fact, quite to the contrary, at least D intended to keep the money given that he was in need of money and "willing to do anything to get it."

As such, absent any defenses (discussed below) D and W would both be guilty of larceny here.

### Robbery (no threat of force)

Robbery is larceny from another person's presence or person through threat or intimidation. Though the taking of the wallet happened in the person's home (and maybe arguably in the person's presence if V were there) -- there was no threat or intimidation and thus, there was no robbery here.

### Burglary

Burglary is the breaking and entering into a dwelling at nighttime with the intent to commit a felony inside. The requirements for dwelling and nighttime have been relaxed in many jurisdictions.

Here, D broke and entered into V's home at nighttime with the intent to steal from V. All the elements are met. They "broke" into the house when they unlocked the door. Even

though the door was unlocked, this was not a place open for the public (but someone's home) and thus the court would find that there was a breaking. Then, they entered into the place of the home ("entering"). The building they broke into was indeed V's home (and thus a dwelling). And then broke in with the intent to steal from V (and thus commit a felony inside).

As such, there was burglary here. And thus, A could be charged with burglary.

A's defenses

Withdrawal

A co-conspirator could withdraw from a conspiracy depending on the jurisdiction. Under the common law, a co-conspirator cannot withdraw from a conspiracy because the conspiracy occurs when the agreement is made. However, even under the common law, a co-conspirator could withdraw from the conspiracy even after the agreement is made so as to not be held responsible for future crimes. However, such withdrawal must be made clearly to the other co-conspirator or also typically requires informing the police.

Under the majority rules, a co-conspirator can withdraw from a conspiracy provided that it is before an overt act has taken place -- and the co-conspirator either makes an affirmative declaration of intent to withdraw to the co-conspirator or alternatively, informs the police. Under the MPC/minority rule, a co-conspirator could withdraw even after the overt act, provided that they take actions to thwart the crime.

Here, A would argue that he properly withdrew from the conspiracy. He would argue that he withdrew from the conspiracy when he told D that he did not want to get

involved. However, the court is unlikely to be receptive to his argument in any jurisdiction. Under the common law, he could not withdraw at that point because he had already agreed to the crime with D. And under the majority rule, he had already committed to the overt act of walking to V's home at midnight D and thus could not withdraw at that point. Even under the minority rule, A could not have effectively withdrawn because he did nothing to thwart the crime. Instead, he actually "went inside" the home after D had unlocked the front door.

### Duress

Duress is a defense whereby the defendant argues that they had to commit a crime because they or a third party were under an imminent threat that threatened serious bodily harm or death.

Here, A would argue that he was forced to commit these crimes because of duress. He would argue that D slapped him on the face and told him that he would "break [his] legs" if he didn't come along. However, A is unlikely to win on this defense. For a defense of duress, the threat must be imminent. In this case, D did threaten A but said that D would break his legs tomorrow. Also, there is no indication that A, if he wanted to, couldn't have run away or left the scene after he decided that he did not want to get involved. As a result, the court is unlikely to find for A on his defense for duress.

**For these reasons, A could reasonably be charged with the substantive crimes of larceny and burglary and with conspiracy to commit those crimes. His defenses for duress and withdrawal are unlikely to be successful in any jurisdiction.**

## **Question 2**

### State Action

The 5th and 14th Amendment of the US Constitution protects people against state action. In this case, there is clear state action. The issue here involves police action and thus there is state action.

### Exclusionary Rule

Under the exclusionary rule, all evidence that is obtained in violation of the 4th, 5th, or 6th amendments must be excluded from evidence. There are a few exceptions to the exclusionary rule (i.e. knock and announce, attenuation and the causal chain, etc.) but they are not relevant here.

### Lineup

D's strongest argument would be to move to suppress the evidence of Wanda's (W) identification on the basis that it was impermissibly suggestive. Under the rules concerning lineups, police cannot use lineups that are impermissibly suggestive that have a substantial likelihood of resulting in misidentification.

### Impermissibly Suggestive

D could present a strong argument that the lineup was impermissibly suggestive. He would argue that by the time the W was shown the lineup, she had already seen his picture in the newspaper. Moreover, he would argue the lineup was impermissibly suggestive because when W went to the police after seeing his picture in the newspaper, the police confirmed that they had the correct person because they had found V's wallet on D. As a result, not only had W seen his picture in the newspaper, but

also had confirmation from the police that the person in the picture was the person who had committed the crime.

#### Substantial likelihood of resulting in misidentification

D would then argue that the above caused a substantial likelihood of resulting in misidentification. He would argue that, in fact, had W not seen the picture (and had the picture not been confirmed by Officer Oliver) she would still be looking for a taller man that was "clean-shaven with short hair." He would argue that it was only because she had seen the picture and heard the police officer's statement that she identified him.

In response, the police would argue that they ensured that the lineup was not impermissibly suggestive. They would argue that they purposefully only chose six bearded men with long hair (presumably, all tall too) -- and that they provided W a lot of time to inspect each. Indeed, they would argue that W only identified D after 20 minutes.

Despite the police's efforts, D could probably successfully move to suppress evidence of W's identification at the lineup on the basis that it was impermissibly suggestive. Even though the police had chosen other tall, bearded men -- the police had already prejudiced W by confirming that the person in the newspaper picture was the person who had committed the crime.

## QUESTION 4: SELECTED ANSWER B

### 1. Al's Crimes

#### Crimes

##### *Principal and Accomplice*

Al may be liable for Don's crime as an accomplice to his crimes as the principal. The principal of a crime is the one who performs the actus reus of the crime, the perpetrator of the crime in other words. Here, Don is the one who actually opened the front door and picked up the wallet and took it with him. Therefore, Don is the principal of the crime. An accomplice is one who aids or abets the principal in the completion or cover-up of a crime. An accomplice is liable for all crimes he aided and abetted the principal in. Here Al went along with Don, entered Vic's house, watched Don take the wallet, and ran away with Don. Presumably, Al was serving as a lookout for Don and not merely tagging along. Therefore, to the extent any of Don's actions while Al was there are crimes, as discussed above, Al will be liable for them, unless he can claim withdrawal as discussed below.

##### *Conspiracy*

A conspiracy is an agreement between two or more persons to commit an unlawful act. Although at common law, an overt act was not required for the agreement to be a conspiracy, the modern law also requires an overt act. The agreement for a conspiracy may be written or oral and may be assumed from circumstantial evidence if there is a common plot or scheme among the potential co-conspirators. Here, although the facts are silent as to any written or oral agreement between Al and Don, the evidence

suggests there was a common scheme. Al and Don were both desperate for money and willing to do anything to get it and they set out together to enter Vic's house and steal from him. Therefore, unless Al can argue that he withdrew from the conspiracy, as discussed below, Al will be liable for conspiracy. He will also be liable for the substantive crimes committed in furtherance of the conspiracy and any additional crimes if they were the foreseeable result of the conspiracy under the majority Pinkerton rule.

### *Larceny*

Larceny is the trespassory taking and carrying away of another's personal property with the intent to permanently deprive them of it at the time of the taking. Don likely committed larceny and therefore under accomplice and conspiracy liability, Al will also be guilty of larceny, subject to the defenses below.

### Trespassory

In order to be trespassory, the taking must have been without the owner's permission. Here, Al and Don took Vic's wallet from his house without his knowledge at night. Therefore, it seems very unlikely that they had Vic's permission to take the wallet and no facts suggest that they did. Therefore, this element is met.

### Taking

The taking is any action that removes the personal property from the possession of the owner. Here, the wallet was in Vic's house and therefore in his possession before the time of the taking. When Don picked it up, he satisfied the taking requirement by removing it from the possession of the owner into his own possession. Therefore, this

element is satisfied.

### Carrying

Carrying away is any movement even slight movement away from where the property was taken. Here, this element was clearly met because Don took the wallet and ran out of the house and away from the house.

### Another's Personal Property

The property must also be in the possession of another. Here, the wallet was in Vic's possession before the taking and therefore this element is met.

### Intent to Permanently Deprive

The person committing larceny must have the specific intent at the time of the taking to permanently deprive the owner of the property. Here, Don and Al were desperate for money. Therefore, it is unlikely that Don took the wallet with the intent to give it back to Vic and therefore likely intended to permanently deprive Vic of the property. Therefore, this element and all elements required for larceny have been met.

### *Robbery*

Robbery is larceny from the person of another by force or intimidation. Here Don's actions did not amount to robbery and therefore Al will not be liable for robbery even through accomplice and co-conspirator liability.

### Larceny

As discussed above, larceny has been committed by Don.

### From the Person of Another

Here, the wallet was taken off a table in the foyer not off of Vic's person. There is no evidence that Vic was even aware or present when the wallet was taken and therefore this element is not met.

### By Force or Intimidation

To be a robbery, more force than is necessary to effect the taking is necessary or there must be intimidation through threat of imminent bodily harm. Here, neither of these is met. Don took the wallet off the table with only the force necessary to take the wallet and Vic was nowhere to be found so there was no intimidation through threat.

Therefore, because the taking was not from the person of another or by force or intimidation, Don did not commit robbery and therefore Al cannot be liable for it as an accomplice or co-conspirator.

### *Burglary*

Burglary is the breaking and entering into a dwelling at night with the intent to commit a felony at the time of the entering.

### Breaking

Breaking is use of force, for example breaking a window or kicking down a door. The force used must be more than required to enter. Here, Don opened an unlocked front door. This is sufficient to be considered a breaking because there was more force than necessary to enter, ie the door was not wide open and force was used to open it, however slight.

## Entering

Entering is physically crossing the plane into the dwelling. Here, Don and Al both entered the house by going inside.

## Dwelling

A dwelling is a structure regularly used for habitation. It does not have to be currently inhabited, but it cannot be abandoned. All states have statutes now that expand the common law definition to other structures and buildings and some to cars. Here, this was a dwelling because it was Vic's house. It is unclear whether Vic was home at the time, but he is not required to be at home if it is a place he regularly inhabits. Thus, this element is satisfied.

## Night

Night is the time between sunset and sunrise. Modern statutes eliminate the need for a burglary to be at night but may impose higher penalties when it is at night. Here, Al and Don went at midnight to steal from Vic's house so the nighttime element is clearly met.

## Intent to Commit a Felony

At the time of the breaking and entering, the person must have had the specific intent to commit a felony inside to be a burglary. Here, Al and Don went to Vic's house with the clear purpose of stealing from him. This is a felony and therefore at the time of the entry, they had the requisite intent. Therefore, Don is guilty of burglary and Vic is guilty as his accomplice or co-conspirator unless one of the defenses below applies.

## Defenses

### *Duress*

Duress is an improper threat that meaningfully deprives a person of actual choice. In the criminal context, the threat must be of imminent serious bodily injury or death to the person asserting duress or to another person that the person knows. Here, Al will argue that when Don slapped his face and said "If you don't come along now, I will break your legs tomorrow" that he was deprived of any meaningful choice and can assert the defense of duress. However, the threat to Al was that Don would break his legs *tomorrow* not at the time. Therefore, the threat was not imminent and Al cannot assert duress as a defense. Al will also argue that the fact that Don slapped him was an imminent threat; however, Don slapped him before he made the threat and a slap is not imminent serious bodily injury or death and it was done before the threat so it was not a threat of serious bodily injury or death.

### *Withdrawal as Accomplice*

The common law did not allow any withdrawal when a person had already aided and abetted a principal. The modern law allows withdrawal and therefore relief from liability only when the accomplice clearly states that he does not want to help anymore and attempts to thwart the principal in the commission of the crime. Here, Al will argue that he withdrew from the accomplice liability when he said he did not want to get involved anymore. However, Al still went along with Don and served as a lookout and therefore he cannot escape accomplice liability.

### *Withdrawal from Conspiracy*

Al will also try to argue that he withdrew from the conspiracy. At common law the conspiracy was achieved when there was an agreement to commit a crime without an overt act. Under this standard there is no withdrawal from the conspiracy once the agreement has been made. Here, Al has already set out with Don to steal from Vic so the agreement has already been made. Under the modern law an overt act is required before there is conspiracy liability. An overt act may be lawful or unlawful. Setting out at midnight to go somewhere may be lawful, but in this case it was an overt act in furtherance of the conspiracy to steal from Vic. Therefore, Al had already committed conspiracy before he said he did not want to get involved. In addition, he continued aiding Don and finished carrying out the crime so he will still be liable for conspiracy. A conspirator may be able to escape liability for substantive crimes, but only if he attempts to thwart the success of the conspiracy. Here, Al did not do that so he will also still be liable for the underlying crimes.

### **2. Don's Motion to Suppress**

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, a court will take two steps in deciding whether a police lineup violates the defendant's rights. First, the court will decide whether the lineup was impermissibly suggestive. Second, the court will decide whether even if the lineup was impermissibly suggestive if the identification is still nonetheless reliable.

### Impermissibly Suggestive

A lineup is impermissibly suggestive if the form or substance of the lineup unduly biases the person making the identification. Here, Wanda described to the police that the taller man, presumably Don, was clean-shaven with short hair, but could not describe the shorter man. When Don was arrested with a large beard and long hair, Wanda thought Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocket when he was arrested. Officer Oliver then arranged for a lineup of six bearded men with long hair including Don. After 20 minutes, Wanda identified Don as the man.

Four aspects of this lineup are impermissibly suggestive. First, Wanda saw Don's picture in the newspaper before the lineup. Thus, she already knew that he was the man that the officers thought was the one who came out of the house. Second, Officer Oliver told Wanda that the man they had arrested, Don, had Vic's wallet in his pocket. In addition to having seen the picture in the newspaper, now Wanda has been told Don had the wallet on him. These facts would make Wanda seriously doubt her description the night of the crime that the taller man was clean-shaven and had short hair. Third, the police lineup only included long haired and bearded men. Wanda believed the man she was looking for had short hair and was clean shaven, but Officer Oliver only provided her options with long hair and beards to choose from. As such, Wanda may have felt limited to those choices that were impermissibly suggestive.

### Still Reliable

If it nonetheless is still reliable, then it can be used still. Here, it is likely not reliable because it is inconsistent with what Wanda said when the identification was fresh the night of and because it took her 20 minutes to identify Don.

## **QUESTION 5**

Daniel's house is for sale. In his living room are two valuable original paintings by Artist, one of the California coastline and the other of a field of Golden State wildflowers. Daniel recently refused an offer from Museum to purchase the paintings for \$10,000 each.

Pam went to Daniel's house hoping to buy it before she left on a business trip. As Pam, Daniel and his real estate broker, Bill, inspected the house, Pam noticed the paintings in the living room, commenting that they were beautiful and seemed designed to fit in the house. Pam then offered \$400,000 for the house and another \$50,000 if the sale included the two paintings. Daniel agreed and asked Bill to draft a contract for the sale of the house and the two paintings for \$450,000. Bill promised to have the contract ready before Pam left town the next day.

Bill drafted a written contract, which Daniel signed even though he noticed that Bill had mistakenly omitted from the sale the painting of the California coastline.

Daniel met Pam at the train station, as her train was about to depart. Daniel gave the contract to Pam, telling her, "This is what we agreed to and I've already signed it." Pam's train started to move, so she quickly signed the contract without reading it and jumped on board the train.

When Pam returned from her trip, she was horrified to find that the California coastline painting was not in the house. She immediately telephoned Daniel to ask about the painting, but he told her, "That's what the contract we signed provides," and hung up.

Six months after Pam moved into the house, she noticed in a local newspaper advertisement that Daniel was offering to sell the Artist painting of the California coastline to the highest bidder at an auction two weeks later.

1. What remedy or remedies can Pam reasonably obtain against Daniel? Discuss.
2. What defense or defenses can Daniel reasonably raise? Discuss.

## QUESTION 5: SELECTED ANSWER A

### I. REMEDIES AVAILABLE TO PAM AGAINST DANIEL

In order for Pam successfully to seek a remedy against Daniel, she must first demonstrate that he was in breach of a valid contract.

#### Governing Law

Contracts for goods, that is, tangible moveable items, are governed by Article II of the Uniform Commercial Code. All other contracts, including contracts for the sale of real property, are governed by the common law. Where a contract covers both goods and real property, courts look at the primary purpose of the contract to determine whether the UCC or the common law applies. Here, the primary purpose of the contract was the sale of Daniel's home. Accordingly, this contract will be governed by the common law.

#### Formation

A valid contract requires mutual assent, in the form of an offer and acceptance, and bargained for consideration.

#### Offer

Here, when Pam went to inspect Daniel's home, she offered to purchase Daniel's home for \$400,000 and the paintings for \$50,000. To be valid, an offer must be directed to a particular offeree and contain the essential terms of the deal. Under the common law, the essential terms are the parties, the subject matter, the quantity, and the price. Pam's offer to purchase the home with the paintings at a total of \$450,000 constituted a valid offer because it was made to an identifiable offeree, Daniel, and it contained the

essential terms of the deal, including the subject matter (the home and paintings), price (\$400,000 + \$50,000), parties (Pam and Daniel), and quantity (1 home and 2 paintings).

### Acceptance

A party accepts an offer by objectively manifesting an intent to be bound by the terms of the offer. Here, when Pam made the offer, Daniel agreed to it and asked his real estate broker, Bill, to draft a contract in accordance with the parties' agreement. By taking these actions, Dan manifested intent to be bound by the terms of Pam's offer and, thus, there was an acceptance.

### Consideration

Consideration is bargained for legal benefit or detriment. Courts do not typically look to the value of the consideration. Here, Pam offered consideration in the form of \$450,000: \$400,000 for the home and \$50,000 for the paintings. Daniel offered consideration in the form of conveying Pam the home and the paintings.

Because there was an offer, acceptance, and consideration, the parties formed a contract.

### Terms of the Contract

The issue is what the terms of the contract are. Even though the parties orally agreed that Daniel would provide the home with the two paintings, the written terms of the contract omitted the requirement that Daniel convey the painting of the California Coastline. It is the written contract that the parties signed.

## Remedy for Unilateral Mistake - Reformation of Contract

Where a contract is based on the mistake of one party, sometimes the party may seek reformation of the contract to correct the mistake. Thus, if Pam can demonstrate the required elements of unilateral mistake, then she may seek the remedy of reformation.

To persuade a court to reform a contract based on a unilateral mistake, the plaintiff must show the following: (1) that the plaintiff was mistaken about the terms of the contract; (2) that the mistake went to a material term that was a basic assumption of the contract; (3) that the defendant-party knew of the plaintiff's mistake; and (4) the defendant failed to correct the mistake or even took advantage of the mistake.

### Plaintiff Was Mistaken

Here, Pam mistakenly believed that the written contract conformed to the terms orally agreed to, specifically, that the contract conveyed to Pam both the painting of the California coastline and the painting of the field of Golden State wildflowers.

### Material Term

This mistake was a material term of the contract. To be material, the mistake must be about an issue that affected whether the parties would agree to enter into the contract. Here, Pam made clear that she thought the paintings were beautiful and were a perfect fit for the design of the home. Indeed, she was "horrified," when she saw that the California coastline painting was missing. Moreover, she was willing to pay an extra \$50,000 to have the two paintings. Without the paintings, she would have paid much less for the home. Accordingly, this was a material term.

### Defendant Knew of the Mistake and Took Advantage of It

The next issue is whether Daniel knew of and took advantage of Pam's mistake. Here, the facts show that Dan noticed Bill's drafting mistake. When Dan met Pam at the train station, he assured her that the contract reflected the terms Daniel and Pam had agreed to. Thus, not only was he aware of the mistake, Daniel told Pam that the mistake did not exist. He likely told her this in order to obtain her signature on the contract and avoid having to convey the painting of the coastline. Indeed, Dan took advantage of the fact that Pam was in a hurry to get on a train that was about to depart. The fact that her train was about to depart made Pam feel as though she needed to sign quickly without reading, and Dan took advantage of this situation and told Pam the contract conformed to their oral discussion.

### Conclusion

Because Dan took advantage of Pam's unilateral mistake and that mistake went to a basic assumption of the contract, Pam can seek reformation of the written contract as a remedy.

### Reformation

Reformation is an equitable remedy that courts provide when a party has shown the elements of unilateral mistake. When a party successfully seeks reformation, the court will re-write a contract in order to conform to the parties' intent sans the mistake. Thus, based on the foregoing discussion of unilateral mistake, Pam may seek a court order reforming the contract to convey the house with both paintings.

### Mutual Mistake

It should be briefly noted that Pam would not be able to base a claim on mutual mistake. The elements of a mutual mistake claim are similar to those of a unilateral mistake, except that both parties must be mistaken. Here, the facts make clear that Dan was not mistaken. Accordingly, there was no mutual mistake.

### Fraud

Pam might also be able to show that Dan committed fraud. A party commits fraud when, with scienter, he lies about a material term of a contract in order to induce reliance on that lie. Here, as discussed above, Dan knowingly told Pam that the contract contained the terms in accordance with their oral discussion even though he knew this was not true, and he did so with the intent to induce Pam to sign the written agreement. Accordingly, Pam might succeed in showing that Daniel committed fraud. As discussed above, one remedy for fraud would be reformation.

### Specific Performance

Pam might seek specific performance of her contract with Dan, including that he convey both paintings. To demonstrate entitlement to specific performance, a plaintiff must show as follows: (1) that the subject of the contract is unique; (2) that legal damages would not suffice to remedy any breach of the contract; (3) that the conditions triggering the defendant's performance have been met; (4) that there are no defenses to formation; and (5) that the court can reasonably enforce the order of specific performance.

### Unique Contract Subject Matter

Courts will almost always hold that land sales contracts are unique. The question is whether the paintings are also unique.

Here, the paintings are valuable. Indeed, Daniel recently refused to sell them to a museum at a price of \$10,000 a piece, and Pam valued them at a total cost of \$50,000, or \$25,000 a piece. Moreover, demonstrating their uniqueness, Pam commented on the paintings' beauty and the fact that they seemed as if they were designed to fit in the house. Thus, they provide a unique design fit for the home. Accordingly, the paintings are unique.

### Damages Are Not Sufficient

Next, Pam would need to show that money damages would not suffice to remedy her injury. Given the uniqueness of the paintings and the fact that these paintings seem specifically well-suited for the design of her home, this element is met.

### Conditions for Performance Satisfied

The conditions to require Dan's performance were satisfied. Specifically, the contract was executed and Pam has presumably begun making payments towards the agreed-upon price of \$450,000.

### No Defenses to Formation

Defenses to formation are discussed below, in the answer pertaining to Dan's defenses. For reasons explained below, Dan will not likely succeed on any defenses to formation.

### Court Can Reasonably Enforce Order of Specific Performance

The last factor is whether a court could reasonably enforce an order requiring Dan to specifically perform the contract. Factors courts consider are whether the order would require ongoing supervision and whether it is a subject matter that is complex to oversee.

Here, performance would be simple. All that would be required is that Dan give Pam the painting. Accordingly, this requirement is satisfied.

### Conclusion - Specific Performance

Because the requirements for specific performance have been met, provided that Pam can show that there are no defenses to contract formation (which is discussed in Part II below), Pam could seek specific performance.

### Temporary Restraining Order

Pam found out that Dan is planning to auction off the painting in two weeks. To prevent this from happening, Pam should seek a temporary restraining order ("TRO"). The requirements of a TRO are as follows: (1) the plaintiff must show irreparable harm absent a TRO; (2) the plaintiff must demonstrate a likelihood of success on the merits; (3) the plaintiffs must demonstrate that the equities weigh in her favor against the defendant; and (4) the plaintiff must demonstrate that the TRO is in the public's best interest. A plaintiff should seek to notify the defendant that she is seeking a TRO, rather than proceed ex parte. If the plaintiff cannot reasonably contact the defendant first, she must certify to the court that she has made reasonable efforts to contact the defendant or that she would be injured by contacting the defendant.

### Irreparable Harm

Here, Pam can show irreparable harm because if Daniel auctions the painting to a bona fide purchaser for value, it is unlikely that Pam will ever be able to obtain the painting. And, as described above, this painting is unique.

### Balancing of Equities

Pam can show that the equities weigh in her favor, and not Dan's. Pam signed the contract innocently. Although she should have done her due diligence and read the contract before signing, she signed relying on Dan's representation that the contract conformed to their oral agreement. Dan, on the other hand, caused Pam to be mistaken about a material element of the contract and he took advantage of her mistake. Accordingly, the equities weigh in Pam's favor.

### Likelihood of Success on the Merits

The inquiry of whether a plaintiff is likely to succeed on the merits at the TRO stage is lower than at later stages in the litigation, such as whether she should receive a preliminary injunction. Here, Pam will likely succeed on the merits because, for reasons explained above, she can show that Dan caused a unilateral mistake or even fraudulently induced her to sign the contract.

### Public's Interest

The public has an interest in contracts being enforced fairly and according to the terms that the parties assented to. The public also has an interest in preventing fraud. Accordingly, Pam can meet this element.

### Notice to Defendant

Although, as explained above, it is not always required, Pam should seek to give Dan notice of her application for a TRO so that he can be heard, unless she can show that he might try to get rid of the painting if he is aware of her application for a TRO, which would cause irreparable harm.

### Length of TRO

TRO's typically can only last for fourteen days. The auction is 14 days away. Accordingly, Pam should also seek a preliminary injunction.

### Preliminary Injunction

Pam should seek a preliminary injunction, which can last for the duration of the litigation. The requirements are similar to that of a TRO. The difference is that Dan must be given notice and an opportunity to be heard. For reasons described above, Pam is likely to obtain a preliminary injunction.

### Permanent Injunction

The difference between the requirements for a preliminary injunction and a permanent injunction is that the plaintiff must actually succeed on the merits. Because Pam will likely succeed on her fraud and undue influences, a court should order a permanent injunction against the sale of the painting at an auction.

### Damages

If, for some reason, the court finds that the painting is not unique and that damages would suffice, Pam should seek damages.

### Restitution

One form of damages P could seek is restitution. Restitution gives back a plaintiff the value she conferred on a defendant. Here, that amount is \$25,000, which represents the value of one painting.

### Consequential Damages

In lieu of restitution, she can seek consequential damages.

## **II. DAN'S DEFENSES**

### Statute of Frauds

Under the Common law, contracts for the conveyance of real property must be in writing, signed by the party to be charged, and must contain all essential terms of the deal. If this contract were governed by the UCC, the UCC requires that any conveyance of goods for over \$500 must also satisfy the Statute of Frauds. Here, the paintings were valued by the parties at \$25,000 each. Thus, regardless of the governing law, the contract must satisfy the statute of frauds.

The contract is in writing and signed by the party to be charged, Dan. However, the essential term of the deal at issue here, the conveyance of the coastline painting, is not included. Dan will thus argue that this term does not meet the Statute of Frauds.

### Exceptions to Statute of Frauds - Partial Performance

However, there are some exceptions to the Statute of Frauds. One is partial performance. In a sale of real estate, courts usually require two of the following three types of partial performance: (1) payment for the property; (2) possession of the property; and (3) making improvements to the property. Here, the disputed portion of

the contract pertains to a painting, not real estate. Pam will argue that by paying the price for the paintings, she has fully performed and thus, the exception to the Statute of Frauds has been met. Moreover, she has moved into the house and has taken possession of one of the paintings. However, she has not yet taken possession of the coastline painting. Thus, this is a close call, and a court might find for Dan if it finds that Pam's performance is not sufficient to trigger this exception to the Statute of Frauds.

### Exceptions to the Statute of Frauds - Unique Goods

There is an exception to the Statute of Frauds for unique goods. Here, the paintings were unique and the price paid for the goods supports a reasonable inference that Pam paid for two of the paintings. Moreover, depending on the character of the paintings, it may appear that they were painted as a set that would reasonably be bought and sold together.

However, this exception to the Statute of Frauds typically only applies when the unique goods were manufactured for the buyer. Here, Pam purchased the goods well after the paintings had been created, and this exception is unlikely to apply.

### Parol Evidence Rule

Dan might also argue that the parol evidence rule ("PER") bars any external evidence of the terms of the contract. For the PER to ban all external evidence, there must be a fully integrated writing. Where there is a partially integrated writing, courts will consider external evidence that supplements the contract. Here, it is not clear whether there was a "merger clause" stating that the writing was fully integrated or whether the contract contained all of the necessary terms, which might lead a court to conclude that it was fully integrated.

Pam will argue that the contract was only partially integrated and that the conveyance of the coastline painting is only an additional term that merely supplements the contract. Courts usually make this determination with reference to the four corners of the agreement, asking whether the disputed term is one that would naturally be left out of the agreement. It is unlikely that the conveyance of the coastline painting would naturally be left out of the agreement, as it is a material term. Thus, the contract is likely fully integrated. But, to satisfactorily make this determination, we would need to know more about the contents of the written contract.

However, courts will consider evidence that the parties did not actually make a contract because there was no meeting of the minds, or that the contract as written does not conform to the mutual meeting of the minds. Thus, courts will consider evidence of fraud in the inducement of a contract or unilateral mistake because this is a defense to formation, that is, fraud and unilateral mistake are an argument that the contract is not valid as written because there was no meeting of the minds. Accordingly, a court is likely to hear evidence of the agreement that Daniel convey the painting of the coastline.

### Laches

The defense of laches applies when a plaintiff who seeks relief in equity has delayed bringing her cause of action in such a substantial fashion that it causes prejudice to the defendant.

Here, Pam learned of the fact that Dan kept the coastline payment six months before she saw Dan's newspaper advertisement. Dan will argue that Pam waited so long that he now has relied on her not pursuing an action and has set up an auction in reliance

on that fact.

However, having to cancel an auction is not likely to amount to serious prejudice to Daniel because, if Daniel were to win on the contract claim, he could simply hold an auction later. And while Pam probably should have brought the action sooner, six months is not an unreasonably long time.

Accordingly, Dan's defense of laches will not succeed.

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

### **GOVERNING LAW**

The UCC governs contracts for the sale of goods, while all other contracts are governed by the common law. When a contract is mixed, the law that governs is based on the predominant purpose of the contract. If the predominant purpose of the contract is a sale of property, the common law governs, for example.

Here, the contract between Daniel and Pam included both goods (the paintings) and property (the house). However, it appears that the predominant purpose of the contract was the house, as Pam went to the house with the purpose of buying it and only happened to notice the paintings. Thus, the common law governs this contract.

### **PAM'S REMEDIES**

Pam and Daniel signed a contract which, by its terms, only contained the sale of the house and the artwork of the Golden State wildflowers. Thus, Daniel was bound to deliver possession of those things to Pam. The facts imply that he did so, as Pam was in the house when she discovered the California coastline painting wasn't there.

However, Pam will argue that the contract also included the California coastline painting, even though it was not in the writing. Pam will likely posit two theories as to why the California coastline painting should be included in the contract: mistake and misrepresentation.

## Mistake

Contracting parties can obtain remedies on a contract such as rescission or reformation if they show that the contract as written does not embody the full, actual terms of the agreement. To prevail on mistake, a party must be able to show either a mutual mistake or a unilateral mistake. A mutual mistake occurs when both parties were mistaken as to a material fact of the underlying subject matter of the contract, or the parties themselves. In addition, the party suing on mistake must not have assumed the risk of the mistake. Mistakes as to collateral facts will not support reformation or rescission of a contract.

Here, no mutual mistake was made. Daniel was not mistaken as to the contents of the contract, he knew that the contract did not include the California coastline painting.

Pam, on the other hand, did not. Thus, this is not a mutual mistake.

Traditionally, a unilateral mistake, even to a material term of the contract, did not allow for relief. However, if the other party knew or should have known of the mistake then a unilateral mistake provides sufficient cause for relief--as long as the mistaken party did not assume the risk of mistake. To be clear, if reformation is sought as a remedy, the non-mistaken party must have known that the other side was mistaken; but for rescission, the non-mistaken party can either have known or should have known of the mistake.

Here, there was a unilateral mistake. Pam believed that the contract included the California coastline painting -- a material mistake as to the subject matter of the contract. But, according to the facts, Daniel knew of the mistake but did nothing to

prevent it. Furthermore, nothing in the facts tends to show that Pam assumed the risk of the mistake as that was not bargained for by the parties and she took no other actions showing that she assumed the risk -- her negligence in not reading the contract is not sufficient to show assumption of the risk of mistake (see immediately below).

Additionally, it should be noted most courts will not find that a party's negligence in failing to read a contract will void their argument of unilateral mistake. Thus, the fact that Pam did not read the contract carefully before signing will not affect her argument for mistake.

Given that a sufficient unilateral mistake exists here, one that Daniel **knew** about, Pam will be entitled to multiple remedies such as reformation, rescission, and specific performance.

### Misrepresentation

Contracting parties can also obtain remedies like reformation and rescission where one party made a material misrepresentation to another, such as altering a contract so that it does not contain the same language as was originally agreed upon. Although usually mere nondisclosure of a material fact is not enough to rise to the level of actionable misrepresentation, affirmatively altering a contract and representing it as unaltered is sufficient for actionable misrepresentation.

Here, although the omission of the California coastline painting was originally accidental, Daniel's knowledge of that fact and subsequent representation that nothing had changed in the contract likely rises to the level of an actionable misrepresentation. Daniel's statement that "This is what we agreed to" lends further credence to Pam's

argument that the misrepresentation was intentional and more than just a mere omission.

Thus, although not as clear of a case as the "mistake" analysis above, a court would likely find that Pam could also obtain remedies like reformation, rescission, and specific performance on a misrepresentation theory

### **Preliminary Injunction**

Since Daniel is attempting to sell the California coastline painting in two weeks, Pam should attempt to obtain a preliminary injunction against the sale of the painting.

Preliminary injunctions are meant to keep the status quo in place while the merits of the case are adjudicated. Pam could request a Temporary Restraining Order (TRO) which has the same requirements as the preliminary injunction but can issue quickly and last for two weeks (in federal court). The TRO can be obtained ex parte if the lawyer for Pam shows that he attempted in good faith to notify Daniel of the TRO or that notice wasn't practicable in this case.

To obtain a preliminary injunction, a plaintiff must show (1) irreparable harm if the injunction isn't issued, and (2) a likelihood of success on the merits. Courts usually require the plaintiff to post a bond to cover costs for the defendant if the preliminary injunction was wrongfully issued. Courts will also often balance the hardships between defendant and plaintiff, weighing the costs of the injunction to the defendant and the public, against the benefits of the injunction to the plaintiff.

Here, Pam will likely be able to show irreparable harm since the piece of art she is seeking to obtain from Daniel is unique. The facts aren't too specific on this point,

however the fact that a museum is attempting to buy the two paintings suggests that they in high demand. It is unlikely that just awarding Pam damages will allow her to obtain the painting or a substitute painting, since this painting is an original, as stated in the facts. However, there is a small chance that if Pam was awarded enough damages that she would be able to buy the painting from the person that won it at Daniel's auction. Practically speaking, this is an incredibly small chance as the buyer at the auction is not likely to part with it so soon. On balance, the hardships clearly favor Pam as she will lose the painting if the injunction doesn't issue, while Daniel will only lose the opportunity to sell the painting immediately, as opposed to after the case has been settled.

Pam must also show a likelihood of success on the merits. Here, Pam has a clear argument for mistake and a possible argument for misrepresentation. Either way, she is almost certainly entitled to the painting under the contract. See analysis above. Thus, she is likely to convince a court that she will succeed on the merits in showing that the California coastline painting was part of the original contract.

Thus, if Pam is able to post a bond covering the cost of issuing a mistaken injunction, she will likely prevail in obtaining a preliminary injunction barring Daniel from selling the painting at auction until the merits of the case are resolved.

### Reformation

A contracting party can obtain reformation based on mistake if an enforceable contract existed first, but that did not include the entirety of what the parties agreed to because of a mistake in typing up the contract. Usually a contract is reformed in such cases

when there is a mutual mistake but can be reformed when there is a unilateral mistake that the non-mistaken party **knew** about and did nothing to prevent.

Here, the contract between Pam and Daniel was enforceable as written but did not include the entirety of the bargain. Pam's unilateral mistake as to the California coastline painting is sufficient to allow for reformation of the contract to include the painting since the facts show that the California coastline painting was clearly a part of the original agreement between the parties and was only left out by a mistake in transcribing the contract.

Thus, Pam can reasonably obtain reformation of the contract to include the California Coastline painting.

However, once that is included in the contract, she must be able to claim the property itself. She can do this by either specific performance or replevy.

### **Specific Performance of Reformed Contract**

To obtain specific performance, a contracting party must show five factors: certain, valid and definite terms, the plaintiffs contract conditions are fulfilled, inadequacy of legal remedies, feasibility of enforcement, and lack of defenses.

#### **Certain, Valid and Definite Terms**

To allow for specific performance the court needs to be able to understand the exact terms of the contract in order to be able to issue orders as to how the contract is to be carried out. Thus, the contract must have terms that are more certain than what is required in a case for damages.

Here, the contract between Pam and Daniel, as reformed, clearly states the amount of

consideration, the parties, and the pieces of property at stake, including the California coastline painting. Thus, the court should have no problem in ordering specific performance based on these terms.

#### Plaintiff's contract conditions fulfilled

A plaintiff must show that she is either ready and willing to perform, has already performed, or is excused from performing.

Here, the facts imply that Pam has already tendered her payment since she is in the house that used to be Daniel's. However, even if she has not tendered performance, she is clearly willing and able to do so based on these facts.

#### Inadequacy of Legal Remedies

A plaintiff must show that compensatory damages are not enough to remedy her injury.

Here, since the property -- the painting -- is original and apparently unique, as well as being sought after (as shown by the museum's prior bid to Daniel) it is unlikely that compensatory damages will suffice since it is very unlikely that Pam would be able to take her monetary award and purchase the exact same painting on the market.

#### Feasibility of Enforcement

Although mandatory injunctions, as would be the case here, can present enforcement problems since they are requiring a person to do something, such problems likely won't be present here. Daniel is likely under the personal jurisdiction of a court with contempt power and thus can be forced by the court to transfer the painting to Pam without much effort.

## Defenses

Defenses to specific performance include unclean hands, laches, Statute of Frauds, and hardship/sharp practices. None of these equitable defenses really apply here. The contract is in writing and signed by the party to be charged, as required by the Statute of Frauds. Pam has taken no wrong actions towards Daniel with respect to this transaction as to constitute unclean hands. Pam has not unreasonably delayed in bringing a suit so as to prejudice Daniel and give rise to a claim of laches. Finally, sharp practices and hardship usually require an unconscionable contract coupled with inadequate consideration. Neither of those things are present here.

Thus, given that Pam can easily fulfill all five factors for specific performance, a court will likely grant her specific performance of the reformed contract between her and Daniel, forcing Daniel to transfer Pam the California Coastline painting.

## **DAN'S DEFENSES**

### Pam's Negligence

Dan will likely raise the defense of negligence on the part of Pam for failing to read the contract. He will argue that Pam should be charged with the knowledge of whatever contracts she signs and therefore, her mistake in thinking that the contract included the California coastline painting is only attributable to her own negligence. Additionally, he will argue that Pam was not forced to sign the contract right then as the train was leaving but could have read it and then returned it to him later, and that she was negligent to not do so.

This defense is unlikely to succeed. As mentioned above, most courts find that for

mistakes and misrepresentations entitled to reformation and other remedies, a plaintiff's failure to read the contract does not prevent them from obtaining remedies like reformation.

### Parol Evidence Rule

Daniel will also likely assert the parol evidence rule as a defense. The parol evidence rule bars introduction of evidence of prior or contemporaneous oral or written statements that were not included in a fully integrated contract.

Daniel will argue that the written contract was fully integrated since he told Pam that it included what "we agreed to" and both parties signed it. However, firstly, a court would be unlikely to find that this contract was a fully integrated agreement since it was hastily written down and forced on Pam as she was leaving on a train.

More importantly, however, the parol evidence rule does not apply to cases where a mistake in the transcription of the contract allows for reformation.

Here, the mistake of Bill in transcribing the original agreement between Pam and Daniel -- which included the California coastline painting -- was the sole cause of it not being included in the contract. This allowed for reformation and also precluded the parol evidence rule from applying. If the parol evidence rule was allowed to apply in cases like this, no contracts could ever be modified for mistake or misrepresentation since the parol evidence rule would bar the evidence of the original agreement. Thankfully, this is not how the parol evidence rule is applied by the courts.

Therefore, Daniel's defense of the parol evidence rule will fail here.

Daniel's other possible equitable defenses to specific performance were discussed

above.

Since Daniel has no viable defenses to reformation or to specific performance, a court will most likely reform the written contract between Pam and Daniel to include the California coastline painting, and force Daniel to perform by transferring the painting to Pam.