



California Bar Examination

Essay Questions and Selected Answers

February 2024



ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2024

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2024 California Bar Examination and two selected answers for each question.

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

<u>Question Number</u>	<u>Subject</u>
1.	Community Property
2.	Constitutional Law
3.	Professional Responsibility
4.	Evidence / Criminal Law & Procedure
5.	Contracts

ESSAY QUESTION INSTRUCTIONS

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

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

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

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

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

QUESTION 1

Henry and Wendy married in California in 2012. Henry got a job as an auto mechanic. Wendy's aunt, who owned a house free and clear of any mortgage, gave it to Wendy. Wendy then added Henry on the title document to the house. Wendy and Henry lived in the house. Wendy then began singing with a local band. Some years later, Wendy and the band began traveling and performing across the state. The band was profitable, and Wendy sent money home to Henry and stayed with him periodically.

Henry decided to purchase an auto repair garage and applied for a loan from a bank for that purpose. Because Wendy was on the road with her band, Henry forged Wendy's signature on the loan documents without her knowledge. The bank approved the loan, using the house as collateral. Henry purchased the auto repair garage with the loan funds. Title to the auto repair garage was taken in Henry's and Wendy's names in joint tenancy.

After a while, Wendy told Henry that the marriage was over. She stopped returning home and also stopped sending money to Henry. She began making independent investments with her earnings. Henry was unable to make the loan payments and the bank demanded payment of the loan in full. Shortly thereafter, Wendy filed for dissolution of marriage.

What are Henry's and Wendy's respective rights and liabilities, if any, regarding:

1. The house? Discuss.
2. The bank loan? Discuss.
3. The auto repair garage? Discuss.
4. Wendy's investments? Discuss.

Answer according to California law.

QUESTION 1: SELECTED ANSWER A

1)

California Community Property Presumption

California is a community property state. All property acquired by either spouse during the life of the marital economic community (MEC) is considered the community property (CP) of both spouses. Property acquired by either spouse before marriage or after permanent separation is presumed to be the separate property (SP) of that spouse. Additionally, any property received by one spouse during marriage through gift, bequest, or inheritance is considered the SP of the spouse who acquired it.

Duration of Marital Economic Community

In California, the MEC exists from the time of marriage through the time of permanent separation. When determining whether the spouses have permanently separated, the court will look to whether one spouse evidenced a clear intent to discontinue the marriage. Actions such as leaving the marital home, making independent investment decisions, putting money into a separate bank account, and telling the other spouse that the marriage is over are weighed heavily when determining whether a spouse intends to permanently separate.

Here, Wendy (W) evidenced a clear intent to permanently separate from Henry (H) when she told him that the marriage was over. This clear statement of intent was corroborated by the fact that she stopped returning home to the marital house and stopped sending money to H. Additionally, she began investing her earnings into

independent investments. Accordingly, the court will deem permanent separation to have occurred when W told H that the marriage was over and stopped returning to the marital home.

Rights to the House

Presumption

Property acquired by either spouse during marriage is presumed to be CP. Here, the house was acquired by W during marriage, so it is regrettably presumed to be CP.

Source

Property acquired by a spouse through gift or inheritance is considered the SP of that spouse. This is sufficient to rebut the CP presumption.

Here, W acquired the house from her aunt as a gift. Since the house was acquired through gift from a family member, the court will consider the house to be W's SP. Accordingly, at divorce, the house is considered W's SP, unless the characterization of the house was changed during the marriage.

Change in Character - Transmutation

A spouse may transmute her SP to CP of the MEC by creating a writing, signed by the adversely affected spouse, that clearly evidences that spouse's intent to treat the property as CP. Often, adding one spouse to the title of the property is sufficient to transmute the character of the property from SP to CP.

Here, the facts indicate that W added H to the title document to the house. Since H was

added to the title document, it is presumed that there was a writing (i.e., the title document) and adding H's name to this document is likely sufficient to show that W intended for the house to be treated as CP, since both their names were on the title. However, the facts do not state that W signed the title document. If W did not sign the document, then it would not be a valid transmutation. However, since it appears that W took sufficient steps to formally add H to the title, it is likely that she also signed the document herself. Therefore, there was a valid transmutation of the house from SP to CP.

Conclusion

The house will be treated as CP upon divorce.

Rights to the Bank Loan

Presumption

See rule above. Debts, like property acquired during marriage, are treated as CP debts.

Here, the bank loan was acquired during marriage. Therefore, the debt associated with the loan is presumed to be CP debt.

Source

When a lender relies on both spouses' assets when issuing a loan, the loan is presumed to be the responsibility of the community and is treated as CP debt. However, when the bank relies on only one spouse's SP as collateral for the loan, the loan proceeds and the debt are presumed to belong primarily to the spouse whose collateral

was used.

Here, the facts state that H forged W's signature on the loan application forms and used the marital house as collateral for the loan. Accordingly, it appears that the bank used CP property as collateral for the loan and issued the loan under the presumption that both spouses had signed off on the application. Accordingly, since the source of the loan was CP collateral and both spouses' names were on the application, the loan debt and proceeds are presumed to be CP.

Title

When both spouses' names are signed onto a loan document, the loan is presumed to be taken out in both spouses' names, and the loan debt is treated as CP debt. Here, since both H and W's names are signed to the loan document, the loan debt is presumed to be CP debt.

Breach of Spousal Fiduciary Duties

In California, spouses are held as owing one another the absolute highest duty of good faith and loyalty. This includes accounting to the other spouse for all transactions involving community property and debts. In addition, each spouse is deemed to have equal management and control over the community's assets, so one spouse may not encumber the community property of the MEC without the written consent of the other. Encumbering or otherwise disposing of CP without the written consent of the other spouse is considered a breach of the spousal duty of loyalty and good faith. Such a breach may result in the court voiding the transaction, ordering the offending spouse to

compensate the innocent, non-consenting spouse, granting the non-consenting spouse a greater share of the CP upon dissolution of the marriage, or any other remedy that the court deems just and proper.

Here, H forged W's signature on the loan documents and used the marital house as collateral for a loan. Since H forged W's signature, he breached the duty of good faith by entering into a transaction that impacted the marital community without W's consent. Furthermore, he breached the duty of equal management and control when he used the marital house as collateral for the loan, thus encumbering it without W's knowledge or consent. Accordingly, the court may take any measure that it deems just to remedy the situation. This includes assigning all the debt from the loan to H as his SP (highly likely) and awarding W a greater share in the CP assets upon dissolution, in order to compensate her for H's breach of fiduciary duty.

Conclusion

The loan will be treated as H's SP debt. Additionally, the court will likely break from the standard rule of equal division of CP and award W a greater share of the CP to compensate her for H's breach of marital fiduciary duty.

Rights to the Garage

Presumption

See rule above. Since the garage was acquired during marriage, it is presumed to be the CP of the MEC.

Source

When the source of the funds used to acquire property is CP, the property so acquired is considered to be CP. When the source of the funds used to acquire the property are SP, the property so acquired will likely be considered SP, unless another rule applies.

Here, H will attempt to argue that, if the loan debt is characterized as his SP, then the garage acquired with the loan proceeds should be considered his SP as well. However, this argument will likely fail because, as discussed above, H forged W's signature on the loan documents. H cannot now benefit from his breach of fiduciary duty by claiming that the fruits of his breach belong solely to him. As a result, the loan proceeds will likely be considered CP, and the garage that was purchased with the loan proceeds will be considered CP as well. This is further supported by the fact that the loan was issued with the house as collateral. Since the house is considered CP (see above), the proceeds from the loan should also be considered CP. Accordingly, the source of the funds used to purchase the garage can be traced back to CP, so the garage will most likely be considered CP.

Title

Property held in joint tenancy between the spouses is considered the CP of the MEC upon divorce.

Here, H took title to the garage in both his and W's names as joint tenants. Since title to the garage was held as joint tenants, the garage is presumed to be CP upon dissolution of the marriage.

Conclusion

Given the above, the garage will be considered CP of the MEC.

Rights to Investments Made By W

Presumption

See rule above. Whether the investments are characterized as CP or SP likely depends on whether they were made before or after permanent separation. If they were made after permanent separation, then they will likely be considered SP.

Permanent Separation

As discussed above, permanent separation occurs when one spouse evidences a clear intent to dissolve the marriage and takes action consistent with that intent. Here, W showed a clear intent to end the marriage when she told H "that the marriage was over." Thereafter, she took action consistent with that intent by choosing not to return to the marital home and not to continue sending H money. While H may argue that her failing to return to the home is not conclusive, because she had consistently been on the road with her band during marriage, H's argument will likely fail. That is because previously, W had always returned home at least somewhat frequently and, when she had not, she at least continued to send him money. Accordingly, W's clear statement of intent combined with her actions will be deemed sufficient to conclude that the marital community had ended.

Since the investments were made after permanent separation, then they will be

presumed to be W's SP.

Source

See rule above. Here, the facts are ambiguous as to whether W used earnings she had made before or after permanent separation to purchase the investments. If she used earnings made before permanent separation, those earnings would be considered CP, and any investment purchased with them would be considered CP as well. On the other hand, if she used earnings she made after permanent separation, then those earnings would be considered her SP, and any investments she purchased with them would be considered SP as well.

Since it appears from the most likely interpretation of the facts that W used earnings acquired after permanent separation to purchase the investments, then the court will hold that the investments are her SP.

Conclusion

The court is most likely to find that the investments are W's SP, provided that she used her earnings acquired after permanent separation to purchase them. To the extent that she used any of her earnings acquired before separation, which would be considered CP, to purchase the investments, the MEC would be entitled to a pro rata share of the investments based on the amount of CP used.

QUESTION 1: SELECTED ANSWER B

1)

California is a separate property state. In California, there is a presumption that property acquired during the marriage is community property. Community property often includes salaries and wages earned during the marriage. Property acquired before the marriage and after separation is presumptively separate property. Additionally, property acquired by one spouse during the marriage by gift, will or inheritance, is separate property. To determine the character of an asset, a court will trace back to the source of the funds used to acquire the property. Upon divorce, community property will be divided equally in kind. Each spouse is presumed to have a one-half interest in each community property item. Also upon divorce, one spouse's separate property will remain their separate property.

House

The issue here is whether the house is community property, to be divided equally in kind upon divorce, or whether the house is Wendy's separate property.

Generally, property acquired during the marriage is presumed to be community property. However, as noted above, property acquired during the marriage acquired by gift, will or inheritance will be that spouse's separate property. However, during the marriage, spouses are able to retain the character of an asset either from separate property to community property, or from community property to separate property. If done during the marriage, changing the character of an asset is done by transmutation.

If done prior to 1985, a transmutation did not require a writing. However, after 1985, a transmutation will require a writing, clearly indicating and expressing that a change in the nature of the property is being affected, and the writing must be signed by the spouse whose rights are being affected. The transmutation writing requirement, however, does not apply to exchanges of personal property during the marriage, like gifts, that are relatively insubstantial in value when examining the entire marital economic community. Additionally, there is a presumption that property held in joint and equal form during the marriage is community property.

Here, Wendy's aunt owned a house free and clear of any mortgage. Wendy's aunt gave the house to Wendy. Therefore, the house at that time would be presumptively Wendy's separate property.

However, it is possible that Henry and Wendy decided to change the character of the house from Wendy's separate property to community property. Here, after receiving the house as a gift, Wendy then added Henry on the title document to the house. It is possible that adding Henry to the title document changed the character of this asset. Because adding Henry to the title occurred after the spouses were married in 2012, a written transmutation would be required to change the character of the property. Here, there is a writing - the title document. The facts do not clearly provide whether the title document clearly stated that the spouses intended to change the character of the asset to community property. Additionally, it is not clear whether Wendy executed the title document when she added Henry to the document. Wendy's signature would be required because since the house was initially her separate property, her rights are being affected by the change in the asset's character. Though not dispositive, because

it is not one of the transmutation writing requirements, the fact that Wendy and Henry lived in the home together, and Henry continued to live there even while Wendy traveled with her band, is some indication that the parties may have intended to change the character of the asset from Wendy's separate property to the marriage's community when Wendy added Henry on the title document to the house.

If the title document did satisfy the requirements for a written transmutation, the house would then become community property, subject to equal division in kind upon divorce.

Bank Loan

The issue here is whether the bank loan is Henry's separate obligation, or whether the bank loan is a community obligation.

Generally, credit obtained during the marriage is considered to be marital credit. When examining whether a loan is community property or separate property, the analysis requires looking at the intent of the lender. If the lender provided the loan based in substantial part on one (or both) spouse's credit scores or earning capabilities, the loan would be community property, because credit earned during the marriage, and a spouse's salaries and wages earned during the marriage, are considered to be community property. However, if the lender is looking to one spouse's separate property to secure the loan, the loan is likely going to be considered that spouse's separate obligation.

Here, Henry decided to purchase an auto repair garage and applied for a loan from a bank for that purpose. Just because Henry applied to the bank for the loan for his

business purposes, does not automatically make the loan Henry's separate obligation. The bank here approved the loan, using the house as collateral. There is a discussion above of whether the house is considered community property or Wendy's separate property; however, here the house will likely be considered community property. If a creditor looks to community property for the securing of the loan, the loan is likely to be considered a marital obligation.

However, an important aspect of Henry's behavior regarding the bank loan is the fact that due to the nature of the confidential relationship of a marriage, spouses owe each other fiduciary duties. Each spouse owes the other the duty of the highest good faith and fair dealing in their management and control of community property. Additionally, spouses generally have the right to act alone regarding community property, because each spouse has an equal right to manage and control community property. However, there are certain acts and decisions involving marital property that require that the acting spouse either get consent from, or consult with, the other spouse. These situations include, in part, when one spouse is making a gift of community property, or where one spouse intends to sell, convey, lease, or encumber community real property.

Here, Henry forged Wendy's signature on the loan documents without her knowledge. Henry's forging of Wendy's signature, without her knowledge, is a violation of the fiduciary duties that spouses owe to each other. Forging a spouse's signature without their knowledge is certainly not consistent with the requirement to act with the highest good faith and utmost fair dealing. Thus, Henry's forging of Wendy's signature is a violation of the spousal fiduciary duties. Additionally, if Henry was seeking to encumber the home, Henry would need to get Wendy's consent to this encumbrance on

community property (even if the home was separate property, Henry would then certainly not have the authority to encumber the property himself). Henry may try to argue that he only forged Wendy's signature because she was on the road with her band, and that Wendy would have consented and signed the documents if she had been around. However, this would likely not be a successful argument for Henry as there is no evidence of Wendy's consent. It is especially damaging that Henry did this without Wendy having any knowledge. Henry may also try to argue that he was using community funds to pay for the loan, so the loan should be community property. There are facts that indicate that Wendy sent money home to Henry; however, this argument likely will not help Henry because of his unethical behavior regarding the loan documents. As a result of Henry's actions, if Wendy were to learn of the forging of her signature, Wendy could bring an action to have herself removed as a signatory to the loan documents, and have the loan be entirely Henry's separate obligation, which would remain his separate obligation upon the dissolution of the marriage.

Auto Repair Garage

The issue here is whether the auto repair garage is Henry's separate property, or whether the auto repair garage is community property subject to equal division in kind upon divorce.

To determine the character of an asset, a court will trace back to the source of the funds used to acquire the property. If an asset was acquired through community funds, or from a loan secured by community property, the asset is likely to be characterized as community property. If the asset was acquired by separate funds or separate property,

the asset will likely be characterized as separate property. Even property acquired during the marriage, if acquired through separate funds, will be considered separate property. Additionally, there is a presumption that property held in joint and equal form during marriage is community property. An example of property held in joint and equal form is when both spouses' names appear on the title document.

Here, Henry purchased the auto repair garage with the loan funds. Importantly, title to the auto repair garage was taken in Henry's and Wendy's names in joint tenancy. Since both names appear on the title document, the property was taken in joint and equal form and is presumably community property. The source of funds must also be considered, and could be used to rebut this presumption. Here, Henry purchased the auto repair garage with the loan funds. As discussed above, the loan funds were forged with Wendy's signature and secured by the house as collateral. Setting aside Henry's marital fiduciary duty violation (which is discussed above), it is important that the loan is secured by the house as collateral. If the house is community property, then this loan is secured by community property, and the funds obtained from the loan would be community property. However, Henry may try to argue that the auto repair garage should be separate property, because there are some facts that indicate that Henry was the only one paying the loan. Henry may try to argue that he was paying the loan out of earnings from the garage, which would be his property. However, as noted previously, salaries and wages earned during the marriage, which would include Henry's earnings from his auto repair business, are considered community property. Thus, because the tracing back would show that the source of the funds for the auto repair garage was community funds/property, the auto repair garage would be community property, subject

to equal division in kind upon divorce.

Wendy's Investments

The issue here is whether Wendy's investments are community property, to be divided equally in kind upon divorce, or whether Wendy's investments are her separate property.

Generally, community property can only be acquired or accumulated during the marital economic community. The marital economic community ends either upon the date of one spouse's death, or on the date of separation. The date of separation is determined by the date where one spouse (or both, but only one is required) forms the intent not to resume the marital relation, and acts in a manner consistent with that intention.

Additionally, salaries or wages earned during the marriage are presumptively community property. If such salaries or wages are used to invest in other property, such other investments or property would also be community property.

Here, Wendy told Henry that the marriage was over. This is likely the date when Wendy formed an intent not to resume the marital relation. Wendy then stopped returning home and also stopped sending money to Henry. Both Wendy's actions of not returning home, and no longer sending money to Henry, are actions consistent with her intent not to resume the marital relation. Thus, the date of separation has occurred, and there will no longer be an acquiring of community property because the marital economic community has ended. Even though Wendy later filed for dissolution of the marriage, the marital economic ended when Wendy told Henry the marriage was over and acted consistent with that intent by not returning home nor sending Henry money.

Here, after Wendy ended the marital economic community, she began making independent investments with her earnings. If Wendy was using earnings that she had earned since the date that the marital economic community ended, both the earnings and the subsequent investments would be Wendy's separate property. However, Wendy's earnings that she accrued during the marriage are community property. Therefore, upon divorce, those earnings would be subject to an equal division in kind. Therefore, if Wendy was using the earnings that she earned during the marriage, those earnings would be subject to community property division. Consequently, the investments that Wendy made could also be subject to community property division because the investments were the fruit of community property funds. However, the facts seem to provide that Wendy ended the marital economic community, and then subsequently made investments with her earnings accrued after the date of separation. Therefore, if a court were to find that Wendy used her earnings earned after the date that the marital economic community ended to make the investments, the investments would be separate property. Wendy's investments being separate property would mean that the investments remain her property upon the dissolution of marriage.

QUESTION 2

State X has many small farms selling organic produce, which is grown without the use of any chemical fertilizers or pesticides. Instead of using chemical fertilizers or pesticides, these farms organically enrich their soil with animal manure products from State X's large livestock industry.

Recently, State X enacted the Organic Farming Act (Organic Act). Section 1 of the Organic Act bans the sale and use of chemical fertilizers and pesticides in State X and also bans the sale of any produce grown with, or treated by, chemical fertilizers and pesticides. Section 2 of the Organic Act requires that all publicly funded State X institutions only buy organic produce grown in State X.

In the absence of any federal law, the State X legislature passed the Organic Act after concluding that the use of chemical fertilizers and pesticides contributed to measurable environmental harm. It further found an increased threat to the health of farmers using chemical fertilizers and pesticides, as well as to the health of consumers of the farmers' produce. The State X legislature also declared that it wanted to preserve the existence of small farms and to "protect" those farmers' "way of life."

State X has no significant chemical fertilizer or pesticide industry. Chemco, Inc., in nearby State Y, is a chemical fertilizer and pesticide manufacturer that has always had a significant portion of its revenue come from sales in State X.

A&L Berries is a partnership that grows and sells organic strawberries in State Y. A&L Berries sells some of their strawberries directly to consumers in State X. However, most of their sales are to Organic Produce, Inc., a State Y wholesaler. Both A&L Berries and Organic Produce, Inc. have publicly-funded State X customers who now refuse to do business with them because of the Organic Act.

Chemco, Inc., A&L Berries and Organic Produce, Inc. have now filed lawsuits in Federal Court in State X.

1. What claims can Chemco, Inc. make under the United States Constitution and how should the court rule? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. What claims can A&L Berries make under the United States Constitution and how should the court rule? Discuss.
3. What claims can Organic Produce, Inc. make under the United States Constitution and how should the Court rule? Discuss.

QUESTION 2: SELECTED ANSWER A

1. What claims can Chemco, Inc. make under the US Constitution and how should the court rule?

Standing

In order to bring a claim under the constitution, the individual, corporation, third party or organization must have standing. In order to have standing, there must be a case or controversy and (i) injury, (ii) causation, (iii) redressability, (iv) the claim must be ripe for adjudication and (v) the claim must not be moot.

(i) Injury

Here, Chemco's injury is that they are not able to sell their product (chemical fertilizer and pesticides) in State X due to the Organic Act.

(ii) Causation

Causation can be shown by a direct link between the defendant's actions and the plaintiff's harm. Here, Chemco can show causation because their ability to not sell their product in State X is due to the Organic Act.

(iii) Redressability

Redressability can be shown by establishing that there is an adequate remedy at law or in equity to address the harm suffered by the plaintiff. Here, Chemco can show redressability by asking for an injunction or having the state struck down as unconstitutional.

(iv) Ripeness

Ripeness can be established by showing that the plaintiff's harm is ongoing and the claim is ripe for adjudication. Here, we are told that State X recently passed the Organic Act and thus the harm being suffered by Chemco is ongoing and the claim is ripe for adjudication.

(v) Mootness

A case or controversy is deemed moot if while the plaintiff's suit is pending or ongoing, something takes place that either makes the harm disappear altogether or the plaintiff's injury no longer exists. Mootness can be rebutted if it can be shown the harm is repetitive and capable of evading review. Here, the Organic Act is still being enforced and Chemco is still suffering harm, so the case is not moot.

11th Amendment - Suits against a State

The 11th Amendment states that a state cannot be sued by its own citizens or the citizens of another state unless the suit consents to such lawsuit. Exceptions to this rule are lawsuits between states, the federal government suing the state and lawsuits against state officers. Here, State X is being sued by Chemco, Inc., a State Y corporation, A&L Berries, a State X partnership and Organic Produce, Inc., a State Y wholesaler. If the court determines that the Chemco, A&L Berries and Organic Produce, Inc., are considered "citizens" for purposes of the 11th Amendment, they may be barred from bringing their respective lawsuits. We will continue the analysis on the assumption that their claims are not barred by the 11th Amendment.

State Action

In order to bring a claim under the constitution, the claim the plaintiff is bringing must be committed by a state actor. Here, State X passed the legislation harming Chemco, Inc., and thus state action is satisfied.

Commerce Clause

The United States congress has the power to regulate interstate commerce, intrastate commerce, and commerce between the United States and foreign nations. This power includes regulating the instrumentalities of interstate commerce (cars, boats, trucks), (ii) the channels of interstate commerce (rivers, roads, bridges), (iii) people involved in interstate commerce and (iv) any thing that has a substantial effect on interstate commerce. Congress can even regulate local acts by individuals that in the aggregate have a substantial effect on interstate commerce.

The commerce clause does not apply here since this regulation was promulgated by a state government and therefore the Dormant Commerce Clause will govern the legislation at play here.

Dormant Commerce Clause ("DCC")/State Police Power

1. DCC

The DCC says that states are prohibited from passing laws that either (i) discriminate against interstate commerce or (ii) unduly burden interstate commerce. If the regulation discriminates against interstate commerce on its face, the regulation must pass strict scrutiny and the state has the burden to prove that such regulation is necessary to achieve a compelling government interest, the regulation was passed for another reason besides commerce and the regulation is the least restrictive way possible to regulate such commerce. Regulations that are discriminatory on their face are a *per se* violation of the DCC. If the regulation unduly burdens interstate commerce, the state

must show that the regulation is related to a legitimate government interest.

Here, we are told that State X enacted the Organic Farming Act (Organic Act). **Section 1** of the Act bans the sale and use of chemical fertilizers and pesticides in State X and also bans the sale of any produce grown with, or treated by, chemical fertilizers and pesticides. Chemco, Inc., a chemical fertilizer and pesticide manufacturer located in State Y, has always had a significant portion of its revenue come from sales in State X. Chemco, Inc. will argue that both Section 1 of the Organic Act is facially discriminatory against interstate commerce because it bans the sale of all chemical fertilizers and pesticides in the State and therefore out-of-state corporations will not be allowed to sell their products in State Y. State X will then argue that (i) the statute is even-handed in that it discriminates against both out-of-state and in-state commerce equally, (ii) the statute was passed to prevent environmental harm to its consumers and farmers, and (iii) the statute was passed to preserve the existence of small farms and to protect those farmers' way of life.

Conclusion: State X will be able to prove that the Organic Act is in adherence with the DCC since the law applies to in-state and out-of-state manufacturers equally, the statute was passed to protect the health of citizens and farmers and the Organic Act was the least restrictive means possible to regulate this type of commerce.

2. State Police Power

Under the 10th Amendment, states are able to pass laws in adherence with their police power to protect the health and welfare of their citizens.

Here, we are told that State X found that chemical fertilizers and pesticides contributed to: (i) measurable environmental harm and (ii) threat to the health of State X farmers and citizens. Therefore, in addition to its arguments under the DCC, State X may also be able to rely on the state police power to provide evidence that the Organic Act is constitutional.

Privileges and Immunities Clause

The Privileges and Immunities Clause applies to the states through the 14th Amendment. The Privileges and Immunities Clause forbids states from discriminating against out-of-staters in connection with rights that are fundamental to national unity. Rights that have been considered fundamental to national unity are the right to have a job, the right to run a business and other economic rights. The Privileges and Immunities Clause does not apply to corporations or aliens.

Conclusion: Here, Chemco, Inc. will argue that it is being discriminated against by State X. The issue with Chemco's argument is that since Chemco is a corporation it is not protected by the Privileges and Immunities Clause and therefore this argument will fail.

Equal Protection Clause

The Equal Protection Clause applies to the states through the 14th Amendment. Equal protection challenges arise when similarly situated people are treated differently. Equal Protection challenges fall into three different standards of review: (i) strict scrutiny, (ii) intermediate scrutiny and (iii) rational basis. Strict scrutiny applies to regulations that

discriminate based on race, alienage or national origin. The burden is on the government to show that the regulation is necessary to achieve a compelling government interest. Intermediate Scrutiny applies to regulations that discriminate based on gender or illegitimacy. The government has the burden to show that the regulation is substantially related to an important government interest. Rational Basis applies to regulations that discriminate based on characteristics not covered by strict or intermediate scrutiny or economic regulations. The plaintiff/challenger has the burden to show that the regulation is not rationally related to a legitimate government interest.

Here, the Organic Act is an economic regulation and thus rational basis applies. Chemco must show that the Organic Act is not rationally related to a government interest. Chemco could argue that State X is trying to punish chemical and fertilizer manufacturers since their products have been shown to cause harm or that there is another irrational reason for the regulation. State X will argue that the regulation was passed to protect the environment, State X farmers and consumers, and to preserve the existence of small farms and farmers' way of life. These health related arguments can establish that the regulation was rationally related to a legitimate government interest (i.e., the health and wellbeing of State X citizens) and therefore should be able to survive rational basis review.

2. What claims can A&L Berries make under the US Constitution and how should the court rule?

Standing

The rules for standing are set forth above. A&L Berries has standing to sue because

they have an injury (cannot sell to consumers in State X or through Organic Produce, Inc., to State X publicly funded customers), causation (injury can be traced back to the Organic Act) and redressability (injunction or have statute struck down).

Dormant Commerce Clause

The rules for the Dormant Commerce Clause are set forth above. A&L Berries challenge to the Organic Act will fall under Section 2 of the Act which states that all publicly funded State X institutions only buy organic produce grown in State X. This portion of the Organic Act facially discriminates against interstate commerce because it forces publicly funded State X institutions to only buy organic produce grown in State X. A&L Berries has a strong argument here since this portion of the Organic Act does not apply even handedly to out-of-state and in-state organic producers. State X will argue that the law is necessary to achieve the compelling interest of ensuring that its citizens only eat organic produce grown in the State which is deemed to not have been grown with the use of chemical fertilizers or pesticides. This Section of the Organic Act may survive this DCC review, but only because the interest the state is protecting (environment and health of citizens of farmers) outweighs the burden on interstate commerce. If the court hearing this case is more economic and market friendly and rules in favor of A&L Berries, then State X may need to rely on an exception to the DCC, the market participant exception.

Market Participant Exception

The Market Participant Exception is an exception to the DCC which allows states to regulate interstate commerce if they are acting as a market participant instead of as a

legislator. Market Participation analysis is a fact intensive review in which the state must show they are solely acting in a business capacity and the actions of the government are as market participant, not for legislative purposes.

Here, State X will argue that it is acting as a market participant by limiting customers that it funds to only buy organic produce grown in State X. Section 2 of the Organic Act only applies to state-funded customers, not all customers in State X. A&L Berries may argue that the Organic Act should be read as a whole and since only one portion of the legislation applies to State X publicly funded customers, then State X is acting in a legislative capacity. In conclusion, a court would likely rule that the Market Participant Exception applies because this portion of the Organic Act only applies to publicly funded customers, not all State X customers.

Privileges and Immunities Clause

The rules for the Privileges and Immunities clause are set forth above. A&L Berries may have a claim under the Privileges and Immunities Clause if the court does not recognize a partnership as a corporation for purposes of the Privileges and Immunities Clause. If A&L Berries is considered a corporation, then they are in the same situation as Chemco and are not protected by the Privileges and Immunities Clause.

Equal Protection Clause

Same analysis as for Chemco.

3. What claims can Organic Produce, Inc. make under the US Constitution and how should the court rule?

Standing

Same analysis as for A&L Berries, except that the injury for Organic Produce is not being able to sell to publicly-funded customers in State X.

Dormant Commerce Clause

Same analysis as for A&L Berries since they are affected the same way by the Organic Act.

Privileges and Immunities

Same analysis as for Chemco since Organic Produce, Inc., is a corporation.

Equal Protection Clause

Same analysis as for Chemco.

QUESTION 2: SELECTED ANSWER B

1) Claims by Chemco, Inc.

Dormant Commerce Clause

The negative implications of the commerce clause prevent a state from regulating interstate commerce in certain circumstances. First, if a state is determined to be discriminating against out of state individuals for the benefit of in-state individuals, the regulation must be strict scrutiny. Second, if no discriminatory intent is found, the regulation can still be found unconstitutional if the burdens caused by the regulations substantially outweigh the benefits.

Not discriminatory

Strict scrutiny places the burden on the state to prove that the regulation is necessary to achieve a compelling government purpose. And, that the regulation is the least restrictive alternative.

Here, the law is not facially discriminatory because the act bans the sale and use of *all* chemical fertilizers and pesticides in State X. It also bans the sale of any produce grown with, or treated by, chemical fertilizers and pesticides. It does not ban chemical pesticides or fertilizers made in State Y or another state so that State X's interest will be achieved.

Chemco may try to argue that the act has discriminatory intent. This is because the State had protectionist interests because State X has many small farms selling organic produce. State X does not have a significant chemical fertilizer industry. That legislators for State X wanted to "preserve the existence of small farms and to 'protect' those farmers' 'way of life.'" However, there is no actual evidence that the act has been applied discriminatorily. Therefore, Strict Scrutiny will not apply.

Do the burdens on interstate commerce substantially outweigh the benefits

Because strict scrutiny does not apply, the court will look at whether the burdens of the regulation of interstate commerce substantially outweigh the benefits. Here, Chemco receives a significant portion of its revenue from State X. Chemco will attempt to argue that this regulation in effect will prevent any out-of-state competition and that the regulation will serve to protect the economic interests of those who sell animal manure products from the State's large livestock industry. Specifically, to protect those farmers' way of life.

However, it will be difficult for Chemco to make a successful argument. The state has a strong interest in protecting the State's environment. Specifically, the state concluded that the use of chemicals and fertilizers and pesticides contributed to measurable environmental harm. It found an increased threat to the health of farmers using chemical fertilizers and pesticides, as well as to the health of consumers of the farmers' produce. The fact that a regulation benefits some in state farmers, without more, is insufficient to show that the burdens outweigh the benefits of the regulation. Additionally, organic suppliers such as A&L Berries can still sell in the state, so long as they meet the standards of the Act. Therefore, Chemco will likely be unsuccessful in its claim.

Privileges or Immunities Clause

The privileges or immunities clause prevents States from treating out of state residents differently than in-state residents. Additionally, corporations are not protected under the clause. Therefore, it does not apply.

Preemption

Additionally, Chemco cannot argue the legislation was preempted because the facts state there is no federal law on point.

Substantive Due Process

The due process clause prevents States from depriving citizens of fundamental rights. Here, there is not fundamental right involved, so therefore, Chemco will not be able to make out a claim that the government action was arbitrary.

2) A&L Berries

Dormant Commerce Clause

Strict Scrutiny

The regulation provides that all publicly funded State X institutions only buy organic produce grown in State X. On its face, this section is discriminatory because it requires the state to purchase from in state supplies over out-of-state suppliers. A&L Berries has publicly funded state X customers who now refuse to do business with them because of the Organic Act.

However, the Market Participant exception to the dormant commerce clause provides that a state, if it is acting as a participant in the market, may discriminate against out-of-state suppliers to the benefit of in-state parties. If this exception is met, the regulation is upheld unless it is arbitrary, which requires the plaintiff to show that the regulation is not rationally related to a legitimate government purpose.

Here, the market participant exception applies because the regulation only applies to "publicly funded State X institutions". Therefore, A&L Berries will have to show the regulation is arbitrary, which it cannot do because there are conceivable reasons why the State may want to only purchase from in-state-supplies, such as ensuring the produce comes from the nearest source and supporting the local economy.

Equal Protection

Equal Protection prevents the State from treating similarly situated people dissimilarly. If the state is regulating a suspect classification, strict scrutiny will apply. If the state is discriminating against a quasi-suspect classification, intermediate scrutiny applies, and the government must show that the regulation is necessary to achieve an important government purpose. If neither applies, the plaintiff must show under a rational basis standard that the regulation is arbitrary.

Here, the state is treating out of state suppliers differently than in-state suppliers. However, there is no suspect or quasi suspect classification in this scenario. Therefore, the plaintiff, as similarly discussed above, will not be able to show that the regulation is arbitrary. The court will rule against this claim.

Privileges or Immunities

The privileges or immunities clause prevents States from treating out of state residents differently than in-state residents. Here, A&L berries is a partnership. A general partnership is a collection of individuals. And therefore, A&L will likely be able to make claim under this clause. If the state is treating out-of-state residents differently than in-state, strict scrutiny applies.

Here, the government will not be able to show that it has a compelling purpose in the economic protection of state industry. Also, a blanket ban on the purchase from out-of-state suppliers is not the least restrictive alternative. Therefore, the court will strike down the act under this clause.

3) Organic Produce

Dormant Commerce Clause

Strict Scrutiny

The regulation provides that all publicly funded State X institutions only buy organic produce grown in State X. On its face, this section is discriminatory because it requires the state to purchase from in state supplies over out-of-state suppliers. Organic Produce has publicly funded State X customers who now refuse to do business with them because of the Organic Act.

However, as discussed above, the State is acting as a market participant. If this exception is met, the regulation is upheld unless it is arbitrary, which requires the plaintiff to show that the regulation is not rationally related to a legitimate government purpose. There is an exception to the market participant that, if the regulation is an attempt to regulate the downstream effects of interstate commerce, it will still need to meet strict scrutiny.

However, it will be difficult to show that the state is attempting to regulate downstream commerce. Organic Produce will try to argue that it will stop purchasing entirely from State Y growers and solely purchase from State X growers so that it does not have to distinguish goods when it sells to State Institutions, as compared to private clients where regulation 2 does not apply. The state will argue that this is a blanket regulation, and that on its face, there is no attempt to regulate the downstream effects. Therefore, similar to A&L Berries, Organic will not be able to show the regulation is not rationally related to a legitimate government purpose.

Equal Protection

Similar to A&L Berries, there is no suspect or quasi suspect classification that applies. Therefore, they will not be able to make out a successful claim because the regulation is not arbitrary.

Privileges or Immunities

Organic Produce is a corporation, and therefore, cannot seek relief under the privileges and

immunities clause of the U.S. constitution.

QUESTION 3

Allison, a criminal defense attorney, represented Davos, a professional athlete, through a valid written retainer agreement. Davos was charged with assaulting Caren at a restaurant. Allison asked Davos to gift her season tickets to Davos' games if she prevailed in the criminal case. At trial, the prosecution presented the restaurant's surveillance videotape as evidence which showed the assault, along with a video surveillance expert, who identified Davos in the video.

Allison presented the testimony of two witnesses: (1) Wilfred, who was waiting tables at the restaurant, and saw an argument between Davos and Caren but did not see an altercation; and (2) Eileen, an experienced video technician, who testified that, in her opinion, there was no assault based on the poor quality of the video. When Allison and Eileen had previously watched the video together, they both agreed that the video showed strong evidence of the assault.

Allison agreed to pay Wilfred an hourly fee, roughly equal to his hourly wages and tips at the restaurant, for his time in testifying *and* for an entire day of preparation, but only if Wilfred refused to meet with the prosecution before trial.

Once Eileen agreed to change her opinion and testify that there was no assault based on the quality of the video, Allison agreed to pay Eileen \$500 per hour for testifying at the trial. In her closing argument, Allison argued that the video showed that there was no assault, and that in her own opinion, after considering the evidence, Davos was not guilty.

What ethical violations, if any, has Allison committed with respect to:

- A. Request for season tickets to Davos' games? Discuss.
- B. Payments to Wilfred? Discuss.
- C. Payment to Eileen? Discuss.
- D. Presentation of Eileen's expert opinion? Discuss.
- E. Allison's statements in closing argument? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

A. Request for season tickets to Davo's game?

Fee Agreements

Lawyers have a duty to the clients to avoid fee misunderstandings. That is why it is imperative lawyers follow the rules regarding fee agreements. Under the ABA, the fee must not be unreasonable, while under CA, the fee must not be unconscionable. Here, we are told that L executed a valid fee agreement with D, thus so long as the fee is not unreasonable nor unconscionable, the fee agreement was proper.

Additionally, in CA, fee agreements over \$1000 must be in writing and satisfy other requirements. Since this case is for a criminal assault, it is likely the fee was over \$1000, although it appears the agreement was valid thus we will presume all requirements were met.

Gifts

A lawyer may not solicit or procure gifts from clients, unless the client is their relative. California carves out an additional exception which allows a lawyer to accept a gift from a client if the client provides a certificate of independent review by another L and no undue influence occurred.

Here, L would be in violation of the ABA as she has solicited D to provide her with season tickets to his sports team and she is not related to D. This is a clear violation as L asked D to give her tickets, he never offered them, and there are additional violations

discussed below for attaching the gift request to her outcome on the case. Under CA, D has not provided a certificate of independent review and L has used her position to pressure D into agreeing (undue influence) by linking the gift to the outcome of the case. D likely felt pressure that if he wanted L to do a good job he must provide the tickets, and thus this was improper.

Thus, L is subject to discipline for soliciting a gift from D under the ABA and CA.

Contingency Fees

Additionally, a contingency fee agreement is not allowed for criminal or family law cases, both under the ABA and CA. This gift could arguably be a contingency fee, since it is dependent on the outcome of D's trial. Thus, this was improper.

Conflicts of Interest

A lawyer owes a duty to avoid conflicts of interest, and provide unfettered loyalty to their client. A conflict can arise between current clients, a former client, a third party, or the lawyer's own personal interests. A current conflict exists when one of those other interests creates a substantial risk that the client's representation will be materially limited due to the conflict. Here, L may have a personal conflict of interest, since L now has a personal interest in the outcome of the case. L may be distracted with trying to win the case and create a risk of a mistrial or otherwise prejudice D's trial. Additionally, as mentioned above, L has exerted undue influence on D, and has placed her own interest in the tickets above D's wellbeing. This was inappropriate.

L should be subject to discipline under CA and ABA for creating this personal conflict of

interest.

Competence

A lawyer owes a client a duty to provide competent representation, which under the ABA, includes using reasonable skill and knowledge necessary to represent the client. Under CA, the duty of competence requires the lawyer not intentionally, repeatedly, or recklessly fail to apply diligent and competent representation.

Here, L may have violated this duty as she has become invested in the case personally and may use inappropriate means (as discussed below) to achieve her desired outcome of the case. Thus, it is not a clear violation yet but likely will be.

B. Payments to Wilfred?

Payments to Witnesses

Under the ABA and CA, a lawyer may not give anything of value to anyone for acting as a witness in a trial, this is to avoid any impropriety that could exist. The only exception to this is actual expenses incurred to testify at trial. Importantly, the fees for testifying must not be contingent on the content of the testimony.

Here, L has asked W to testify at trial to what he witnessed. L has offered to pay W's hourly fee he would be getting if working (plus tips) for the time W spends testifying and preparing the day before. L can pay W's hourly fee plus tips for time spent actually testifying, but L may not pay for the day before preparation. W has only one thing to offer during the trial, that he saw the argument before the altercation. There should be

no reason that W needs a full day of preparation, and even if he did. Unless L can show good reason that W needs a full day of prepping, it appears this is more of a payment to testify rather than a reimbursement for costs incurred by a witness. Thus the payment for W's testimony is likely not a violation under CA or ABA but could be if the prep day before is pre-textual to actually pay for testimony.

Additionally, under the ABA L should have gotten D's consent, and in CA their written consent to pay the witness. Absent any information showing D was informed and consented, this is a separate violation under CA and ABA.

Duty of Fairness to Opposing Counsel and the Tribunal

A lawyer has a duty to be fair with opposing counsel, to have integrity with the court and pursue justice. While L also owes D a duty to be a zealous advocate, this cannot come at the extreme cost of withholding witnesses from opposing counsel. L has absolutely breached her duty to not only opposing counsel but to the tribunal, by acting with dishonesty, unfairness, and disregard for justice. L is subject to discipline.

Additionally, W did not actually see the altercation take place. It may not be proper for her to call W as a witness as his testimony may not be helpful for the jury. So long as L had a good faith basis and strategy that was relevant to D's defense, it was likely not a violation to call W to the stand even though he had limited information to provide upon his testimony.

Duty of Competence

See rule above.

L is likely acting incompetently by hiding W as a witness. The whole case could be set as a mistrial, and D would have to go through this entire process again, if L's actions are found out. This is not how a competent attorney acts, and it is not in D's best interest. L has failed to act with reasonable skill and knowledge to properly handle this case and is subject to discipline under ABA. Additionally, L's actions are intentional and recklessly disregard the risk to D's case, thus L is subject to discipline under CA.

C. Payment to Eileen?

Paying Witnesses

See rule above for paying witnesses.

Here, E originally believed that she could see an assault on the video, and only after L offered her \$500 per hour did E agree to change her opinion and testify that there was no assault based on the quality of the video. It is not clear what E's fee was before, but it is clear that the fee was adjusted based on E's agreement to change her testimony. Thus, L is paying E based on the content of the testimony, and this is a bribe. This is a violation of ABA and CA rules and L is subject to discipline.

Additionally, under the ABA L should have gotten D's consent, and in CA their written consent to hire the expert. Absent any information showing D was informed and consented, this is a separate violation under CA and ABA.

Duty of Competence

See rule above. L has acted without proper skill, reasonableness, and knowledge that a

prudent attorney would. Her conduct puts her client at serious risk of prejudicing his case, risking a mistrial, and increasing D's cost of litigation and time. Thus violating ABA rules. L has acted intentionally to violate the rules of ethics and the law (by facilitating perjury), and thus L has violated CA rules.

D. Presentation of Eileen's expert opinion?

Facilitating Perjury

A lawyer has a duty to present evidence in good faith of its truth to the tribunal, and to prevent witnesses from testifying with false testimony when the L knows or reasonably believes the testimony is false. Here, not only does L know the testimony is false, L solicited the false testimony by increasing E's fee based on the fact that E was willing to change her testimony. E and L both "agreed that the video showed strong evidence of the assault". L should not have allowed E to testify, let alone bribed her to, thus this is a clear violation of both the ABA and CA rules.

Competence

See rule above.

Additionally, E is testifying as to a legal conclusion "there was no assault". This is a question for the jury to decide and L should have used the proper skill and knowledge to properly prepare E to testify in correct fashion. This is a violation under ABA. Since this only occurred one time and it is not clear that L intentionally prepared E to testify in this fashion it is likely not a violation under CA.

E. Allison's statements in closing argument?

Ratifying E's perjury

L has a duty of candor and fairness to opposing counsel and the tribunal. A lawyer may not put on a witness that intends to commit perjury, and when it does occur, the L must seek to rectify the injustice with the court. L did the opposite. L ratified E's testimony by addressing it in her closing argument and stating that the video showed no assault. L knew this was false, she procured E's false testimony, and then she ratified it in her closing argument. L should have made a statement clarifying the perjury, she should have spoken to the court about the perjury, or something to rectify the perjury. She did not and she furthered the perjury. All of this was improper and L is subject to discipline under ABA and CA.

L Testifying as a Witness

A lawyer may not testify as a witness in their own action. Here, in L's closing argument L stated "in her opinion, after considering the evidence, D was not guilty". This was improper as L was acting as a witness. The L may summarize the evidence presented but may not offer opinions as if L is a witness. This was improper under ABA and CA and L is subject to discipline.

QUESTION 3: SELECTED ANSWER B

Request For Season Tickets

Under both California and the ABA model rules, an attorney is prohibited from soliciting substantial gifts from a client or prospective client. Season tickets to professional sporting events are an expensive, significant gift and it would be a violation to solicit such a gift. Allison might argue that she was not soliciting a gift, but making a contingency fee arrangement, as she would only receive the tickets if she won. An attorney may accept an interest in property or other forms of non-cash compensation, provided that such an interest does not result in a conflict of interest. But there are several issues with this argument. First, we are told that she asked for a "gift" which presumably means that she did in fact characterize it in that manner. Second, we are told that she had a valid written retainer agreement for the representation, but the implication is that this request for tickets is outside of the scope of that retainer. A retainer agreement must clearly explain what compensation is to be paid under it and how it will be calculated (including, in California, which expenses will be paid by the client in a contingency fee arrangement). So, for the retainer fee to be valid it would have to clearly identify the compensation scheme, including the tickets, but here it appears that they were not included. Finally, even if the tickets were identified as contingent compensation in the retainer agreement, contingency fees are prohibited, both in California and under the ABA rules, for criminal representations. Here, Allison was representing him in a criminal prosecution for assault, and thus she could not agree to accept a form of contingent fee.

Payments to Wilfred

An attorney may reasonably reimburse a lay witness for their time and expense in preparing to testify and testifying. Here, Wilfred is a lay witness and Allison has offered to pay him an hourly fee roughly equal to his salary and tips (i.e. lost earnings) for the time he would spend testifying. This is a reasonable amount to reimburse Wilfred, provided that it is reasonable for him to prepare for an entire day. But based on the simple nature of his testimony, i.e. that he witnessed a brief argument and did not even witness the altercation, a full day of preparation does not seem reasonably necessary, so she committed an ethical violation by agreeing to compensate him above a reasonable reimbursement.

There is a further issue of whether she committed an ethical violation by conditioning payment of the fee on refusing to meet with the prosecution before trial. An attorney has an ethical duty to opposing counsel not to obstruct them from conducting necessary discovery, including not procuring the unavailability of witnesses with relevant testimony. Conditioning payment of the reimbursement for the witnesses' expenses on their refusing to meet would count as procuring the unavailability of that witness or preventing the opposing counsel from conducting discovery of relevant testimony of that witness who has relevant testimony to offer. Here, Wilfred has information about an argument between Allison's client and the alleged victim, which is relevant to a charge that Davos then assaulted Caren as it goes to motive and intent. Thus, Allison has committed an ethical violation by conditioning her payment to Wilfred in a manner designed to prevent opposing counsel from conducting relevant discovery.

Payment to Eileen

An attorney may pay an expert witness a reasonable fee for their preparation of a report and testimony at trial. However, they may not pay a witness to procure false testimony from that witness. Here, Eileen is an expert video technician witness, so it is acceptable for Eileen to pay her a fee for her testimony. It is not clear whether \$500 an hour is a reasonable fee for such expert testimony. Regardless of what would be a reasonable fee, however, it appears that the fee was, in part or in whole, paid to induce Eileen to give false testimony. When Eileen and Allison first watched the video together, they both agreed that it showed "strong evidence of the assault," which would be very damaging for Allison's client. Allison then agreed to pay the hourly fee only after Eileen agreed to change her opinion with no apparent basis for that change of opinion. This supports a clear inference that the fee was offered as an incentive to produce false testimony. Thus, Allison committed a breach by offering Eileen a payment for an improper purpose.

Presentation of Eileen's Expert Opinion

An attorney owes a duty of candor towards the tribunal under both California and ABA rules. They are obligated not to knowingly allow the presentation of false evidence to the court. While they cannot prevent their client from taking the stand in their own defense, they can refuse to bring to the stand a witness which they know or reasonably suspect will offer false testimony. Where they know that a witness has offered false testimony, or learn that they have later, they are under a duty to disclose this to the court. An attorney may offer opinion testimony from an expert witness where that

testimony is reasonably calculated to be helpful to the fact finder, the expert is reasonably certain of the opinion, the opinion is supported by facts and produced via a reliable methodology. The judge will determine whether the methodology used is reliable. In California, the only factor relevant to the determination is whether the methodology is generally accepted in the field; under the ABA other factors can be considered, such as whether it has been tested and peer reviewed and the potential error rate. Here, there is no information on the methodology, but the issue is the factual support underlying the opinion, or lack thereof and the general relevance of the testimony to begin with.

Eileen is a video technician hired to give expert testimony concerning a video of the event. Eileen and Allison discussed their respective opinions of the video and both agreed that it showed clear evidence of the assault, but Eileen later agreed to change her opinion. There is zero evidence that Eileen had any factual basis on which to change her expert testimony and in fact Allison knew that Eileen's opinion based on the video was that the assault happened. Thus, by bringing Eileen to the stand to testify that in her opinion there was no assault when she knew that her true opinion was the opposite, and by failing to prevent the false testimony or get the witness to correct it on the stand, and failing to bring it to the attention of the court, Allison has committed an ethical violation and is subject to discipline.

Allison's Closing Arguments

There are two separate issues with Allison's closing arguments. First, whether she committed an ethical violation by arguing that the video showed there was no

assault. Second, whether she committed an ethical violation by giving her opinion that, considering the evidence, her client was not guilty.

As part of an attorney's duty of candor, they must not make false statements or advance baseless arguments. They can advance any good faith argument that their client is not guilty, but where they know the argument to be baseless, they are obligated not to make it. An attorney generally can rely on the opinions of their expert witnesses in advancing an argument, but cannot do so where they know the expert opinion to be false or baseless. Here, as noted above, Allison believed that the video showed that there was an assault. She might still have advanced the argument that it didn't if she had a valid expert opinion to the contrary, but the expert opinion here was baseless and she knew it to be baseless, thus she could not advance an argument that the video showed no assault when she had no basis to do so. Therefore, she committed an ethical violation by advancing such a baseless argument in her closing testimony.

Under the ABA, an attorney is prohibited from offering in court their personal opinion as to the guilt or innocence of their client (engaging in "chicanery") but under the California rules there is no such prohibition, provided that the opinion is genuine and legally supportable. Here, Allison said in court, in her closing argument, that in her opinion her client was not guilty. Under the ABA rules, this is a clear violation of the prohibition on Chicanery regardless of the underpinnings of the opinion. Under the California rules, she has not made a violation merely by offering her opinion. However, knowing that her true opinion is that the video shows an assault by her client, and in the absence of any other exculpatory evidence, she has made a false statement because she claims that her opinion is that he is not guilty "considering the evidence" yet the only evidence

offered that directly goes to guilt or innocence (the video, the prosecution's witness, and the false opinion testimony of her expert) all either indicates her client's guilt or is known to her to be false, thus she cannot even make a good faith claim that her opinion is that he is not guilty based on the evidence. By offering this false statement, she has made yet another ethical violation, both under California and the ABA rules.

QUESTION 4

Acme Bank (Bank) was robbed in December 2022. On January 15, 2023, Dan was charged with robbing Bank. In April 2023, Officer Pat showed Tessa, the teller who was robbed, photographs of six men, each of whom were the same race, approximate age, and had blond hair and a mustache like Dan. Tessa immediately selected the photograph of Dan, saying he was the robber, and signed her name on it.

Before trial in the Superior Court, Dan moved to suppress the photograph under the Sixth Amendment to the United States Constitution, claiming that it should be suppressed because his attorney was not present when Tessa was shown the photographs. The motion was denied.

At trial, the parties stipulated that the photograph Tessa had selected was neither a business record nor an official record. The prosecutor called Tessa, who in court identified Dan as the robber. On cross-examination, defense counsel asked Tessa whether she had made a statement to the defense investigator in February 2023, that the robber had black hair and no mustache. Tessa admitted to having made the statement, but testified that it was incorrect because the robber did have blond hair and a mustache. On redirect, Tessa again identified the photograph of Dan as the robber. This was the same photograph Tessa had signed previously. The photograph was admitted into evidence.

In the defense case, Dan testified that he was not the robber and that he had been visiting his mother in Alaska for three weeks, including one week before and two weeks after the robbery.

In rebuttal, the prosecutor called Chet, the custodian of records from Credco, a credit union. Chet identified records from a Credco automated teller machine (ATM) located down the street from Bank. Chet testified that the ATM records were created as part of Credco's regular course of business. Chet further testified that the records reflect a withdrawal was made from Dan's account the day before the robbery, using a personal identification number (PIN) assigned to Dan's account.

1. Did the court properly deny Dan's motion to suppress the photograph? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Assuming all reasonable objections were timely made, did the court properly admit under the California Evidence Code:
 - a) Tessa's testimony about her statement to the defense investigator? Discuss.
 - b) The photograph with Tessa's signature? Discuss.
 - c) The ATM records? Discuss.

QUESTION 4: SELECTED ANSWER A

Under Proposition 8 of the California Constitution any relevant evidence is admissible in a criminal case. However, Prop 8 includes exceptions for balancing under California Evidence Code (CEC) 523, which allows the court to exclude relevant evidence if its probative value is substantially outweighed by its risk of unfair prejudice, misleading the jury, or confusing the issues. Since this is a criminal matter, Prop 8 will apply.

1) DAN'S (D) MOTION TO SUPPRESS

6th Amendment Right to Counsel

The Sixth Amendment provides criminal defendants with a right to counsel at all critical states of a criminal prosecution. That right attaches automatically after the commencement of formal proceedings, such as a formal charge.

Here, Dan's Sixth Amendment right to counsel attached when he was charged, on January 15, 2023. The photo line up took place after that. However, unlike in person line ups, photo array line ups are not considered a critical stage at which the Sixth Amendment Right to Counsel attaches. Therefore, Dan's Sixth Amendment Right to Counsel was not violated by the absence of his attorney at the photo line up, even though it took place after Dan's Sixth Amendment Right had already attached.

Impermissibly Suggestive Line Ups

Although it is not clear if Dan raised the issue, he may have also argued that the photo identification should be excluded because the identification procedure was impermissibly suggestive. In order to succeed on that argument, he would have to

establish that the procedures were impermissibly suggestive and that they created a substantial risk of misidentification.

Here, all of the individuals in the lineup were of the same race, approximate age, and had blonde hair and a mustache like D. Additionally, since Tessa (T) was the teller who was actually robbed, she would have had a good opportunity to view the suspect. And it is important that she immediately identified D in the photo line up. All of those facts suggest that T's photo identification was reliable. The fact that approximately four months had passed between the robbery and the photo identification would support D's likely argument that the lineup was not reliable. But on balance, the court properly determined that the lineup was not impermissibly suggestive.

2.a.) TESSA'S (T) TESTIMONY RE HER STATEMENT TO DEFENSE INVESTIGATOR

Logical Relevance

Evidence is logically relevant if it has a tendency to prove or disprove any disputed of fact that is of consequence in determination of the action. Here, T's statement to investigators that the robbery suspect had black hair and no mustache is relevant because it tends to prove that D, who does not have those features, did not commit the robbery. The evidence also calls into question T's credibility, which is important because she is a witness at trial who identified Dan as the robber. The evidence is logically relevant.

Legal Relevance

The court to exclude relevant evidence if its probative value is substantially outweighed

by its risk of unfair prejudice, misleading the jury, or confusing the issues. Here, the probative value is very high because the evidence tends to prove that D did not commit the crime. It also impeaches T's credibility. There does not appear to be any risk of unfair prejudice, misleading the issues, or confusing the jury. The evidence is legally relevant.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. T's statement to the defense investigator was made outside of the court room (and in fact before trial had even started). It is therefore an out of court statement. However, D will argue that the statement is not being offered for the truth of the matter asserted because it is a prior inconsistent statement and a prior statement of identification.

Prior Inconsistent Statement

A prior inconsistent statement is not excluded as hearsay. In California, the prior statement need not be sworn. And it can be used both for impeachment and for the truth of the matter asserted (as substantive evidence). Here, T identified D in court. But she previously said that the robber had black hair and a mustache. Because that prior statement was inconsistent with T's in-court statement and identification, it is admissible.

The court properly admitted this evidence.

Impeachment

A witness who takes the stand is subject to impeachment. T's prior statement to the defense investigator can also be used for impeachment based on the inconsistency and T's apparent ability to accurately perceive the robber.

Again, the court properly admitted this evidence.

2.b.) PHOTOGRAPH WITH T'S SIGNATURE

Logical Relevance

See rule above. The evidence tends to prove that D robbed the bank. That is a disputed fact. Thus, the evidence is logically relevant.

Legal Relevance

See rule above. The probative value is high because the evidence tends to establish D's guilt of the crime charged. The risk of prejudice is high. But it would be *unfair* prejudice for the jury to convict D because they believe he actually committed the crime. Rather, evidence causes unfair prejudice when it leads a jury to make a decision based on improper considerations, such as emotion or anger at the defendant. The evidence is legally relevant.

Authentication

A party offering a document or physical item into evidence must authenticate it by establishing that the item or thing is actually what the party claims it to be. Assuming T testified that the photo was a photograph she had previously viewed and signed, it was properly authenticated.

Hearsay

See rule above. The photo itself is not a statement, but T's signature is. Additionally, T signed the photo out of court, so it is an out of court statement. And the prosecution is offering the signed photo to prove that D is the person who robbed the bank. Therefore, it is being offered for the truth of the matter asserted. Consequently, the signed photo is inadmissible hearsay unless an exception applies.

Prior Statement of Identification

Prior statements of identification are excepted from the rule against hearsay. While this rule operates as an exclusion from the definition of hearsay under the Federal Rules of Evidence, it is an exception to the rule against hearsay under the CEC.

T signed the photo during the lineup (before trial) to communicate that she was identifying D as the robber. Thus, the signed photo is a prior statement of identification.

Prior Consistent Statement

Prior consistent statements are also excluded from the rule against hearsay if the statement was made before the motive to fabricate arose and is offered only after the witness's veracity has been challenged in court. Here, the prosecution offered the photo after the defense team questioned the veracity of T's in court identification of D.

However, because T had told the defense investigator that the suspect did not look like D before she identified D to Officer Pat, D would have a good argument that she had a motive to fabricate at the time she made the identification to officer Pat. The facts are not entirely clear as to if and when T had a motivation to lie. A court could rule either

way on this. But as explained above, the evidence was properly admitted as a prior statement of identification.

Confrontation Clause

The Confrontation Clause of the United States Constitution prohibits the government from admitting testimonial out of court statements against a criminal defendant unless the defendant had an opportunity to cross examine the witness. Disputes in this area often concern whether the out of court statement was testimonial. An out of court statement is testimonial if the witness could reasonably foresee that it would be available for trial. A photo identification satisfies that standard. However, in this case, T showed up at trial and took the stand. She was subject to cross-examination by D's attorney. Thus, the Confrontation Clause did not preclude her prior out of court statement from being entered into evidence.

The court properly admitted this evidence.

2.c.) ATM RECORDS

Logical Relevance

See rule above. The ATM records contradict D's alibi for the crime. Thus, they are relevant.

Legal Relevance

See rule above. The ATM records suggest that D is lying about his alibi. Thus, the probative value is high. The risk of unfair prejudice could be significant if, for example,

someone else had access to D's ATM card such that the records could be used to wrongfully implicate D. On balance, the court properly admitted the evidence.

Hearsay within Hearsay

See rule re hearsay above. When there are multiple levels of hearsay, each level must fall within an exception to be admissible. D likely argued that both the receipt and the information on it were hearsay. However, the receipt itself is a statement generated by a machine, and there is thus a strong argument that it is not hearsay.

Business records

Even if the receipt was hearsay, it would fall within the business record exception. That exception applies to records of regularly conducted business activities that were created by or with information transmitted by, someone with knowledge. Unless the record is certified, the custodian of records must lay the foundation. And in California, the proponent of the evidence also must establish that it is otherwise trustworthy. That standard is satisfied here by Chet's testimony at the trial.

Authentication

See rule above. Chet's testimony regarding the ATM record properly authenticated it.

Opposing Party Statement

An opposing party's statement is also excepted from the rule against hearsay. D's entry of his ATM pin code in the ATM was an out of court statement that was captured in the ATM record that was offered into evidence. However, the proponent of the evidence is

the prosecution. And the prosecution is offering D's statement to use against him.

Therefore, D's statement within the ATM record is admissible as a statement of a party opponent.

The court properly admitted this evidence.

QUESTION 4: SELECTED ANSWER B

1.Motion to Suppress Photograph

Exclusionary Rule

Under the exclusionary rule, evidence obtained in violation of the 4th, 5th, or 6th Amendments may be suppressed. Here, whether the court properly denied Dan's motion to suppress the photograph depends on whether the photograph was obtained in violation of Dan's rights under either the 4th, 5th, or 6th Amendments.

Sixth Amendment Right to Counsel

The Sixth Amendment provides a defendant with the right to counsel at all critical stages of the proceedings against him. The right to counsel attaches when formal charges are filed. Critical stages of the proceedings include hearings, arraignments, post-indictment lineups, and trial, but do not include post-indictment photo arrays.

Here, Dan's right to counsel under the 6th Amendment attached on January 15, 2023 when he was charged with robbing Bank. The issue is that the photograph signed and selected by Tessa was obtained during a post-indictment photo array, which is not a critical stage of the proceeding. Thus, the fact that his attorney was not present when the photos were presented to Tessa does not trigger a 6th Amendment violation, and thus, is not suppressible under the exclusionary rule.

Suggestive Arrays

A defendant may also move to exclude evidence of an identification made by a witness

through a photo array if the photo array was unduly suggestive. Here, Dan could not argue that the photo array presented to Tess was unduly suggestive because each of the photographs were of men who were the same race and approximate age as Dan, and who had blonde hair and a mustache like Dan. Thus, the photo array was not suggestive.

Conclusion

The court did not err in denying Dan's motion to suppress.

2. California Constitution Proposition 8

Under Proposition 8 of the California Constitution all relevant evidence is admissible in a criminal case. Proposition 8, however, makes exceptions for evidence under the rules for hearsay, character evidence, exclusionary rule, Best Evidence Rule, and discretionary balancing under California Evidence Code 352, which allows a court to exclude relevant evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence. This is a criminal case, so Proposition 8 applies.

2a. Tessa's Testimony

Logical Relevance

Evidence is relevant if it tends to make any disputed fact more or less likely. The identity of the robber is a fact that is in dispute in this case because the prosecution asserts that Dan was the robber and Dan asserts that he was not the robber. Tessa's prior testimony

to a defense investigator in which she stated that the robber had black hair and no mustache--features that are inconsistent with Dan's features, who has blonde hair and a mustache, tend to prove Dan's claim that he was not the robber. As explained below, Tessa's prior statements also tend to rebut the credibility of her identification of Dan as the robber as part of a photo array, months after having made a contrary statement to the defense investigator. The relevant is very relevant.

Legal Relevance

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence. Here, Tessa's prior statement is highly probative of a key fact in dispute--the identity of the robber, and there are no facts to indicate that the prior statement is unduly prejudicial or carries some other risk outweighing its relevance. The evidence is also legally relevant.

Impeachment Prior Inconsistent Statement

When a witness testifies, she puts her credibility at issue, and thus, opposing counsel is permitted to impeach a witness's testimony, including by prior inconsistent statements. Under the CEC, prior inconsistent statements may be used both to impeach and for their truth regardless of whether they were made under oath. Here, on direct examination, Tessa identified Dan as the robber in court. Thus, on cross examination, defense counsel was permitted to impeach her testimony (identifying Dan as the robber) through her prior inconsistent statement to the defense investigator in 2023. Defense counsel may use her admitting the prior statement both to impeach the credibility of her

testimony as well as for its truth--to show that Dan was not the robber.

Impeachment for Truthfulness

When a witness testifies, she puts her credibility at issue, and thus, opposing counsel is permitted to impeach a witness's testimony, including by opinion or reputation evidence of a witness' character for truthfulness or untruthfulness. On cross examination in a criminal case, an attorney may also ask about specific acts of untruthfulness.

Alternatively, even if Tessa had not identified Dan as the robber during her direct exam, defense counsel was permitted to inquire into a specific act--Tessa's statements to the investigator--that goes to her character for truthfulness or untruthfulness. The fact that Tessa admitted that her prior statement to the investigator was not correct might tend to rebut her credibility for truthfulness with respect to the identification.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. Here, Tessa's prior statements to the defense investigator are out of court statements and defense counsel is likely introducing them for their truth--that the person who robbed the bank has black hair and no mustache, such that Dan is not the robber. Defense counsel may argue that the statement is being used only to impeach the credibility of Tessa's in court identification of Dan as the robber (as discussed above), but given that Dan's identity as the robber is in dispute, defense counsel likely seeks to introduce the evidence for its truth. Thus, the statement is inadmissible, unless it falls under an exception to hearsay.

Prior Inconsistent Statement

Under the CEC, prior inconsistent statements, whether made under oath or not, are admissible as an exception to hearsay because they can be used either to impeach or for their substantive truth. Thus, because the evidence at issue concerns Tessa's prior inconsistent statement to the defense investigator, it is admissible under this exception.

Prior Statement of Identification

A prior statement of identification is also admissible as an exception to hearsay, so long as the witness who made the identification testifies that the identification was made while the matter was fresh in their memory and that the prior identification was accurate at the time it was made. Here, the statement would not be admissible under this exception because while the prior identification to the defense investigator was made just a few months after the event, Tess specifically testified that the prior identification was not accurate at the time.

Conclusion

The court properly admitted Tessa's testimony.

2b. Photograph

Logical Relevance

See rule above. As Dan's identity as the robber is in dispute, Tessa's prior identification of Dan as the robber when showed a photo array makes it more likely that Dan was the robber. The evidence is logically relevant.

Legal Relevance

See rule above. The photo is extremely probative of whether or not Dan was the robber which is the central issue in the case and presents no apparent issues of countervailing undue prejudice or other concerns. The evidence is legally relevant.

Rehabilitation--Prior Consistent Statement

If a witness is impeached on cross examination, a lawyer can attempt to rehabilitate a witness through various means, including by introducing evidence of a prior consistent statement. Here, as discussed above, defense counsel attempted to impeach the credibility of Tessa's identification of Dan as the robber with a prior inconsistent statement she made to the defense investigator. Thus, on redirect, the prosecution was entitled to rehabilitate the credibility of Tessa's in court identification by introducing evidence of a prior consistent statement she made--namely her identification of Dan in a photo array.

Authentication

All tangible evidence must be authenticated by the proponent prior to it being offered into evidence. The proponent must demonstrate through sufficient evidence that the document is what he claims it to be. Here, the prior photograph was identified by Tessa as the photograph she had previously signed when she selected Dan from a photo array. She is also competent to recognize and verify her own signature on the photograph. Thus, the photograph was properly authenticated by Tessa.

Hearsay

See rule above. The prior photograph with Tessa's signature on it can be construed as an out of court statement (that Dan is the robber) offered for its truth (that Dan is the robber). While the prosecution may claim that the photograph was merely used to rehabilitate Tessa's credibility, rather than for its truth, because Dan's identity as the robber is in dispute, the prosecution is likely offering the photo as proof for its truth that Dan was the robber. It must thus be subject to an exception to be admitted.

Prior Statement of Identification

See rule above. Here, the signed photograph, which asserts a statement that Dan is the robber, is a prior statement of identification made by Tessa. However, to be admissible under this exception, Tessa must testify that the events were fresh in her mind at the time she made the identification and that the identification of Dan in the photo array was accurate at the time she made it. There is no indication she made such testimony prior to its admittance into evidence. Thus, this exception does not apply.

Confrontation Clause

Under the confrontation clause, out-of-court testimonial evidence is inadmissible against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to examine the declarant. Testimonial evidence is any statement made by a declarant under circumstances in which a reasonable person would expect that the statement might be used at a later trial. Here, even if the photograph is admissible under the CEC, it should likely have been excluded on confrontation clause grounds. The photograph is an out of court statement made by Tessa, as discussed above. It is also testimonial because it was made to police as part of a photo array meant to identify

a potential suspect. A reasonable person should expect that if they identify a suspect as part of a photo array, that the statement could likely be used at trial. Further, Tessa is not unavailable--indeed she has testified in court. Thus, the photograph is likely barred under the confrontation clause.

Conclusion

The court erred in admitting the photo.

2c. ATM Records

Logical Relevance

See rule above. Once again, Dan's identity as the robber is a fact in dispute in this case. The ATM records which show that a withdrawal was made from Dan's account the day before the robbery, using a PIN assigned to Dan's account, tends to make it more likely that Dan was the robber, because it rebuts Dan's alibi that he was not present in the state the week before and during the robbery. The records are logically relevant.

Legal Relevance

See rule above. As explained above, the records are extremely probative of the central issue of the robber's identity in this case and present no apparent countervailing issues of undue prejudice. The evidence is legally relevant as well.

Authentication

See rule above. Here, the ATM records were properly authenticated by the custodian of records for the company that maintains the ATM records.

Hearsay

See rule above. The ATM records are an out of court statement. It can be argued that the records are being asserted for its truth, that Dan did in fact withdraw the stated amounts from the ATM because the government is attempting to prove Dan was the robber.

Offered for Other Purpose

The government may argue that the records are not being offered for their truth, that Dan withdrew the specific stated amounts from the ATM, but rather as circumstantial evidence of Dan's location prior to the robbery and to impeach Dan's alibi. The government will likely succeed in arguing that the records are not hearsay because they are not being offered for their truth.

Business Records

A record that (1) records an event at or near the time of the event it records; (2) is prepared by a person with knowledge of the event or with a duty to report the event; and (3) that is kept in the regularly conducted course of business at a business, is admissible under the business records exception to hearsay. Alternatively, even if the ATM records are construed as hearsay, they likely fall under the business records exception. First, the ATM records record withdrawals and deposits at or near the time such events occur. Second, the ATM records are prepared by a custodian of records at Credco, who is under a duty to report the withdrawals and deposits made at the ATM. Finally, the ATM records are kept in the regularly conducted course of business at

Credco. Thus, the statement would be admissible under this exception even if it were construed as hearsay.

Conclusion

The court did not err in admitting the ATM records.

QUESTION 5

Brian, owner of a commercial bakery, and Sam, owner of a bakery supply business, met for the first time and discussed Brian's inability to find a reliable source of maple topping. When Sam told Brian he could supply the maple topping, they orally agreed that Sam would immediately ship 500 gallons of topping at \$20 per gallon. Sam then added that he did not want to ship without something in writing, and Brian replied: "I will send written confirmation tomorrow."

For the next three weeks, Brian was busy negotiating a conference center catering contract and forgot to send Sam the confirmation. The catering contract obligated Brian to provide large quantities of pastries with maple topping. Brian then recalled his promise to Sam and sent him a purchase order on his standard form for 5,000 gallons of maple topping at \$20 per gallon, to be delivered to Brian's place of business in two weeks.

Sam received Brian's purchase order but did not notice the change in gallonage. He saw the delivery date, but in light of Brian's delay in sending the confirmation, he did not believe it was firm. That same day, Sam sent a signed acknowledgment restating Brian's purchase order items and then left on a four-week vacation to a remote locale.

Upon his return, Sam shipped 500 gallons of maple topping to Brian. By that time, Brian was in default of the catering contract due to lack of maple topping. Brian had tried but had been unable to reach Sam while he was on vacation. Because Brian had been unsuccessful in obtaining an alternate source of maple topping, the conference center canceled its contract, resulting in \$100,000 in lost profits.

Brian refused delivery of the 500 gallons of maple topping and sued for breach of contract, seeking the \$100,000 in lost profits.

1. Is there an enforceable contract between Brian and Sam? If so, what are the terms? Discuss.
2. Is Brian likely to prevail on his claim against Sam? If so, what damages is he likely to recover? Discuss.

QUESTION 5: SELECTED ANSWER A

1. ENFORCEABLE CONTRACT

Governing Law

Contracts for the sale of goods are governed by the UCC. This is true regardless of whether the contract is between merchants. All other contracts, including contracts for personal services, are governed by the common law. If the contract has a mixed purpose, then the question is whether the predominant purpose of the contract is for the conveyance of the goods or for the service.

Sam and Brian are attempting to contract for the sale of maple topping ("the topping"), which is a good. The agreement also involves the shipment of goods. In theory, that could be construed as a service, but it's a standard part of goods contracts. Moreover, the predominant purpose was clearly the sale of the topping, and the delivery is just incidental.

The UCC thus governs.

Merchants

Some of the terms in the UCC vary depending on whether one or both of the contract parties are merchants. A party is a merchant if they are a professional seller of the goods in question or if they are a commercial entity engaging in the purchase of goods.

Brian is the owner of a commercial bakery, purchasing maple topping, thus he is a merchant with regard to the contract over the sale of topping. And Sam is the owner of a bakery supply business, and thus he is a merchant in maple topping.

Thus, this is a contract between two merchants.

Oral Agreement

A contract is a legally enforceable promise. A contract requires offer, acceptance, and consideration. An offer is an expression of present intent to enter into a contract that creates in the offeree the power of acceptance. The offer must generally contain the material terms of the contract. Under the UCC, the material terms are the parties, the quantity, and the goods--the UCC is able to gap fill the rest of the terms with UCC defaults. (That is different from common law, where price is a key term that must be specified--under the UCC, market price can be a gap filler.) An acceptance must follow the terms specified by the offer and it must be communicated to the offeror. Consideration is the requirement that a contract be a bargained for exchange in which both parties alter their legal positions.

The facts state that Brian and Sam reached an oral agreement. Thus, it is presumed that there was an offer and acceptance. The material terms are present: 500 gallons of topping is the quantity and the good, and Brian and Sam are the parties. There are also other terms, such as the immediate shipment, and the contract price of \$20 per gallon. And there was bargained for consideration: Sam is giving up product, and Brian is giving up money. Thus, at this point there was a legally binding contract for the sale of the goods on those terms, unless a defense applies.

Sam's Request for Written Confirmation

Under the common law, a contract cannot be modified unless there is new consideration given for the contract modification. However, under the UCC, a contract can be modified as long as the parties modify it in good faith.

Here, the agreement had already been formed by the time Sam added that he wanted the written confirmation to be a condition of Sam sending the maple topping. That would be a condition precedent--the confirmation is a condition that must occur before Sam is obligated to perform by sending the topping. However, he said this in good faith, and Brian seemed to agree

to it by saying that he would send written confirmation tomorrow. Thus, the condition of written confirmation would likely be seen as binding. Thus, even if the oral agreement was binding, Sam had no obligation to send the maple syrup until he received at least some writing, since the condition precedent had not occurred.

State of Frauds

Applicability

To be valid, a certain subset of contracts must satisfy the statute of frauds. Those contracts include marriage contracts, suretyship contracts, contracts for services that by their terms cannot be performed in less than one year, contracts for the sale of real estate and--relevant here--contracts for the sale of goods that are worth more than \$500.

The contract was for 500 gallons of topping at \$20 per gallon. That means that the total value of the contract is 500×20 , which is 10,000--well over the limit for the statute of frauds to apply.

Satisfying

In order to satisfy the statute of frauds, a contract must typically be in writing, with all material terms in writing, and signed by the party to be charged. There are a few exceptions for goods contracts, including full or partial performance. The final exception is a merchant's confirmatory memo, which, if sent a reasonable time after the conclusion of the deal and signed by the merchant, can also satisfy the statute of frauds.

There was no contract in writing at the time of the agreement. And there is no indication that Brian or Sam fully or partially performed on the contract until much later--at least seven weeks after the oral agreement and three weeks after Brian's purchase order. Thus, that does not satisfy the statute of frauds.

Brian may try to argue that the purchase order three weeks later constituted a merchant's confirmatory memo. As noted, Brian is a merchant, and the contract is between merchants. However, there are a few problems. First, the memo was not sent a reasonable time after the deal was agreed to. Brian said he would send it tomorrow, but instead, he sent it three weeks later. Thus, it cannot make the oral agreement satisfy the statute of frauds. Second, the memo did not contain the same terms as the oral agreement: (1) it provided for the shipment to be delivered to Brian's place of business, where the oral contract was a shipment contract (that may not be a material term, but it shows a difference), (2) the writing provided for the topping to be shipped two weeks from that date, five weeks after the initial agreement would have provided, and (3) it had a different quantity term, 5000 instead of 500, and quantity is always a significant material term in a goods contract.

Thus, the memo cannot operate as a confirmation and bring the initial oral agreement into compliance with the statute of frauds. The oral agreement is thus invalid. And the memo will operate instead as an offer or invitation to deal in a new bargaining process.

Purchase Order

See rule above for offers.

The purchase order can be understood as a new offer to Sam to enter into a contract for the sale of topping. The signed purchase order stated the material term--quantity, and a number of new terms. It creates in Sam the power to accept by agreeing to those terms and create a valid binding contract.

The purchase order could also be understood as an acceptance--if the initial oral conversation is seen as an offer that remained on the table. However, offers can terminate after the reasonable passage of time. Since the contract was for the immediate shipment of goods, and

there was a promise to send written confirmation the next day. Thus, by the time two weeks had passed, it was no longer reasonable to accept the offer, as it had terminated by then.

Signed Acknowledgment

See rule above for acceptances.

Sam's acknowledgement constituted an acceptance of the offer from Brian that was contained in the purchase order, this was Sam's confirmatory memo.

Statute of Frauds (Purchase Order + Acknowledgement)

The contract is now confirmed by Sam's written signed acknowledgement, signed by the party to be charged in the action in Question 2 (Sam), so the statute of frauds is satisfied.

Additionally, the statute of frauds can be satisfied by partial performance, but only for the amount already performed. After Sam sent the 500 gallons of maple topping, that would be enough to satisfy the statute of frauds at least for that amount.

Mirror Image Rule vs. UCC

At common law, when an acceptance contained terms that were different from the offer, there was no contract--they had to be the mirror image of one another. However, the UCC is more forgiving of conflicting terms. Where an offer and an acceptance contain different terms, the court will find that there was still a contract, and it will just knock out the conflicting terms and gap fill them. Moreover, if the acceptance contains additional terms to the offer, those terms will generally enter the contract, unless the offer was conditional on no additional terms being added or the additional terms go to the basis of the bargain.

If the initial agreement is understood as an offer, and Brian's memo is understood as the

acceptance, then there cannot be a contract, because there is no agreement on the key term: quantity. However, if there were a contract, the terms of the acceptance would govern, because the offer was not made conditional on no additional terms.

If the initial agreement is not a valid contract, nor a valid persisting offer (as discussed above), then the purchase order is its own offer. Sam's signed acknowledgement constituted an acceptance--it was sent to Brian, and restated the items in Brian's purchase order, including the new price term. There is no indication of any conflicting or additional terms. Thus, the purchase order terms govern.

Objective Manifestations

Sam may try to argue that he did not know that the contract term was 5,000 and so there was no meeting of the minds on the quantity term. He did not notice the change in gallonage, which suggests that he was still thinking about the oral agreement from two weeks prior. However, mutual assent is based on the outward manifestations of assent--not the inward thoughts of the parties. Outwardly, Sam received a purchase form for 5,000 gallons, and he sent a note acknowledging that same quantity term, repeating it. Moreover, he should have noticed that many other terms were changed, as described above--that would have put a reasonable person on notice about the changed quantity term. Thus, there was mutual assent.

The same is true of the delivery date. Despite not personally believing that it was a firm date, Sam still repeated it in his signed acknowledgement, which is an objective manifestation of his intent to be bound to the terms.

However, Sam could try to argue unilateral or mutual mistake as a defense to formation (see below).

Terms

Thus, the terms of the contract are for the provision of 5,000 gallons of maple syrup, at \$20 per gallon, to be delivered to Brian's place of business, and in two weeks.

Defenses (Mistake)

However, a contract that is otherwise valid may be deemed not to have been validly formed if a defense to formation applies. The defenses to formation are mistake, misrepresentation, incapacity, and the statute of frauds. The statute of frauds has already been discussed, and there are no facts indicating incapacity or misrepresentations.

Mutual Mistake

A mutual mistake happens when both parties are mistaken regarding a key term in the contract. They can seek judicial reformation of the contract to reflect their true intentions.

But it does not seem like Brian was mistaken. He sent the purchase form after spending three weeks negotiating a contract for a big new catering deal that required large quantities of topping. Thus, it seems likely that he intended for the purchase order to state 5,000. Although it seems like Sam was mistaken, since he did not notice the change and then did ship only 500 gallons, there was no mutual mistake.

A similar analysis applies to the delivery date. It also seems likely that Brian intended the date, in light of his new contract. However, Sam has even less of a case for being mistaken about this term because he actually saw it and recognized it, he just did not think that it mattered.

Unilateral Mistake

A contract may be rescinded for unilateral mistake where one party is mistaken about a key term in the contract that goes to the basis of the bargain, and the other party either knew of the mistake and failed to correct it or caused the mistake, and where the mistaken party is not

responsible for the mistake.

Sam may try to argue that Brian caused the mistake because he represented that it was for 500 gallons then delayed sending the confirmation and increased the price term without calling sufficient attention to it. But Brian did not have reason to know that Sam did not process the increase in gallons or that Sam would infer from their prior conversation that all the terms were the same. Ultimately, it was Sam's responsibility to read the contract, and to process the terms when he repeated them in acknowledgement. Thus, the contract is not voidable for unilateral mistake.

Similarly, by not following up with Brian about the date, and confirming it despite having no intention of meeting it, that mistake was also Sam's fault, and he cannot void the contract on that basis.

2. BRIAN VS. SAM -- WINNER + DAMAGES

Contract

See above regarding contract formation and contract terms.

Breach

Under the UCC, the seller has an obligation of perfect tender. That means both perfect goods and perfect delivery.

The goods were not perfect, because, as discussed above, the contract was for the shipment of 5,000 gallons of maple topping instead of 500 gallons. This was not an installment contract, so the special rules for partial performance do not apply. And the time for delivery has already passed, thus there is no opportunity to cure owed to Sam. Thus, Brian is entitled to reject the maple syrup and sue for breach, as he did.

There was also not perfect delivery. The maple topping was delivered two weeks late. There was no time is of the essence clause, but that does not excuse late performance under the UCC where a delivery date is specified. And this was not just a little bit late--it was double the time given. There is an exception for imperfect tender for nonconforming goods when the seller has reason to believe that the buyer would accept the replacement goods, and Sam may say that given the delay with the writing follow up, he thought Brian would accept the late delivery--but this is late delivery, not imperfect goods, so that exception does not apply. Thus, again, Brian is entitled to reject the maple syrup and sue for breach.

Thus, Brian is likely to succeed in his lawsuit.

Damages

Expectation Damages

The standard form of contract damages is expectation damages. Expectation damages are designed to make the nonbreaching party in the same position that they would have been had the contract been performed according to its terms. That is typically calculated by the difference between the contract price and the cover price. But it might also be the difference between the contract price and the market price. However, Brian was not able to cover as he was unable to find a replacement supplier.

Incidental Damages

Consequential damages are costs incurred while trying to remedy the breach. Brian spent time and effort trying to contact Sam while he was away and trying to find a new supplier of maple topping. He could receive those damages.

Consequential Damages

Consequential damages are those other than expectation damages that are caused by the breach. Here, Sam lost out in a 100,000 dollar profit on the catering contract. And he did so because he could not provide pastries with maple topping.

However, there are limitations on consequential damages. They must be reasonably foreseeable at the time of the contract--either as a natural and probable consequence of the breach, or discussed by the parties at the time of contracting.

It is reasonably foreseeable that Dan would lose a business if not able to sell maple topping pastries--since he runs a commercial bakery. However, Sam was not aware of the large lucrative contract. Dan may argue that the 5,000 term plus the two weeks made it foreseeable that there was a big contract on the horizon--but it really only makes it foreseeable that he wants to sell a large number of baked goods, not that there's an immediate demand for them in a contract that might get cancelled if he's in default in a matter of weeks. Thus, Dan can get his likely standard lost profits for inability to meet standard demand for the goods with the maple topping, but he cannot get the full 100,000.

Duty to Mitigate

Dan satisfied his duty to mitigate damages by his efforts to find an alternate supplier.

QUESTION 5: SELECTED ANSWER B

Applicable Law

Contracts for services and real property are governed by common law. Contracts for goods is governed by the UCC.

Here, Brian (B) and Sam (S) are dealing with the purchase and sale of maple topping, goods, and thus the applicable law is the UCC.

Merchants

Merchants are business persons who are in the business of dealing with a certain good or service. A party is a merchant for the purposes of an agreement if the agreement relates to the item such business person regularly deals in.

B is a merchant as an owner of a commercial bakery and S is a merchant as an owner of a bakery supply business. S is selling B baked goods (maple toppings) which B is using for his bakery catering.

Statute of Frauds

Statue of Frauds (SOF) applies for contracts of goods over \$500, that which cannot by its terms be completed in less than 1 year, regarding real property. If the SOF applies, contracts must be in writing and be signed by the party enforcement is being sought against. Between merchants, if they have an oral agreement, it can be confirmed by a written confirmation thereafter.

Here, the parties were contracting for goods over \$500 and thus would be subject to the

SOF. They initially had an oral 'agreement' but also agreed that it would be memorialized in writing. See analysis below for the different writing components, but generally parties did have writings so eventually this was met and the SOF was satisfied.

Enforceable Contract between B&S

In order to have a valid, enforceable agreement, there has to be offer, acceptance and consideration. An offer is an objective expression of an offer with the intention to be bound. An acceptance is an objective expression of confirmation of acceptance of the terms of the offer. Consideration is typically sufficient with legal detriment (i.e., a party incurring a detriment by forgoing a legal right) but generally the idea is the agreement is a bargained for exchange.

At common law, the material terms have to be set out in the agreement: parties, price, quantity, etc. However, the UCC only requires the quantity term for an enforceable contract, where the rest will be gap-filled per UCC rules.

Oral Agreement

B & S orally agreed that S would immediately ship 500 gallons of topping at \$20 per gallon. However, S said he did not want to ship without writing and B replied that he would send written confirmation the next day. Without further detail, it's hard to ascertain whether the parties had reached meeting of the minds in advance of deciding they would have written confirmation or afterwards, after agreeing to paper the understanding. Regardless, in order to satisfy the SOF, because the amount would be

over \$500, the sale of goods had to be in writing. Thus, at this point, there is not an enforceable agreement. Had Brian sent the written confirmation the next day, perhaps this would be the enforceable agreement given merchants exception to signed writing by two parties (i.e., a confirmation memo would suffice).

B's Purchase Order - Offer - Battle of the Forms

Common law mirror image rule requires the offer and the acceptance to match (i.e., mirror each other); otherwise, a purported acceptance with different terms will be considered a rejection and simultaneously as a new offer. UCC 2-207: when there are two merchants who send form agreements back and forth, as long as the material terms are the same, additional and / or different terms do not cause there to be no agreement. Additional terms become part of the agreement unless it materially changes the terms of the agreement, or the offer explicitly conditioned acceptance to be on the exact terms of the offer.

B did not send the written confirmation for three weeks. Thereafter, he sent a purchase order on his standard form, but instead of the amount orally discussed with S (500), B's form was for 5,000 gallons of maple topping. This change is a material difference from the amount discussed (10x greater) and goes to a vital part of the agreement, i.e., the quantity term. Given the delay in sending the confirmation, and also the material difference, this likely cannot be a merchant memo confirmation of the oral agreement. Rather, this is more likely to be an offer by B to purchase from S 5,000 gallons of the topping.

S's Signed Acknowledgement - Acceptance

S sent a signed acknowledgement restating B's PO terms. However, he did not notice the change in gallonage. Thus, assuming S restated B's terms exactly, S agreed to 5,000 gallons of maple topping. Because S did not object to any of the terms, he accepted B's offer.

Thus, the enforceable agreement terms: S to ship to B 5,000 gallons of maple topping at \$20 per gallon, to be delivered to B's place of business in two weeks.

Defenses - Unilateral Mistake

If both parties are mistaken as to a material item in / underlying the agreement, they can ask the court to revise the contract to reflect their understanding. If only one party is mistaken as to a material item regarding a contract, he can try to have rescission of the contract. The mistake must be reasonable. If the counterparty knew of the party's mistake (or actively caused the mistake) then this is even more likely.

S may try to argue that he made a mistake--he thought they had agreed to 500 and did not clearly read that the PO was for 5,000 gallons. While he genuinely was mistaken, given the unambiguous nature of 5,000 gallons and that B did not know about S's mistake (or cause such mistake), it's probably unlikely that a court would rescind / modify the contract.

B's claim against S

B refused delivery from S of 500 gallons of maple topping and is bringing suit against S for breach of contract.

Performance / Breach

Under common law, parties to an agreement have to substantially perform their obligations under a contract. Material breaches excuse the counterparty from its obligation to perform. If a party substantially completes performance, it has fulfilled sufficiently to demand the counterparty's action and minor failings are considered minor breaches where the counterparty can seek damages for (but such counterparty's performance is not excused). The UCC however, requires perfect tender--this means perfect goods and perfect delivery. If the seller provides non-conforming goods, the buyer can reject the goods; if there is still time under the contract, the seller can resend conforming goods and not be in breach.

Perfect tender required S to send B 5,000 gallons of topping in two weeks. S sent 500 gallons after 4 weeks--because this is not perfect goods & perfect delivery, B can reject the goods and S is in material breach of the contract.

Time of the Essence

Typically, unless parties expressly provide for time being of the essence, courts do not find that timing deadlines are firm.

Under the agreement, S was to send B 5,000 gallons of topping in two weeks. S knew those were the terms but did not know about the underlying agreement B had which created the need for so many gallons of topping in the two week time frame. Absent express agreement, courts would be unlikely to find time being of the essence.

However, even if the courts did not find the two week deadline to be firm, S delivered

only 500 gallons of topping four weeks later. S did not deliver on the 5,000 gallons and thus B is permitted to reject delivery and S is in material breach.

As discussed above, it's unlikely that S can claim mistake as an excuse to his performance.

Accordingly, S is in breach of the contract with B, and B likely can recover damages.

Damages / Remedies

Expectation Damages / Incidental Damages

When a contract has been materially breached, the injured party can sue for expectation damages, which are those which put the party in the position s/he would have been had the counterparty fully performed. With respect to goods, typically this is calculated as either $(\text{market price} - \text{contract price}) \times (\# \text{ of goods})$, or, if the injured party covered, $(\text{cover price} - \text{contract price}) \times (\# \text{ of goods})$.

If the injured party covers, (e.g., went into the market to buy replacement / substitute goods or sold to an alternate buyer), such party can also recover for any incidental damages which includes costs incidental to do that which the party expected (alternate buy or sell). These include expedited shipping costs, storage costs, etc.

Here, B was entitled to 5,000 gallons of topping at \$20 per topping. It appears that B was unsuccessful in obtaining an alternate source of maple topping. Thus, B's expectation damages would be the difference between the market price of the topping and the contract price of \$20, multiplied by 5,000. No incidental damages given no

cover.

Consequential Damages

Consequential damages are those that flow as a result of a party's breach. The injured party can recover consequential damages if the losses arise out of the breach of the contract and are foreseeable and reasonably certain.

Here, B is in default of his catering contract due to the lack of maple topping. He tried to reach S but S was out on vacation and unreachable. B was unsuccessful in finding a substitute. His losses were directly caused by S's breach. The losses are reasonably certain given B had a contract under which he would've obtained \$100,000 in profits. However, it's not clear that this harm is foreseeable to S. B did not tell S about the contract in advance of their agreement. Furthermore, given the original quantity they'd discussed is 500 gallons, it would be unforeseeable to S that suddenly B would have such a high resultant amount of damages. B would argue that S was on notice when B sent S a PO for 5,000 gallons that it reasonably follows that B has business that requires high amounts of topping and accordingly the resultant damage is foreseeable.

Given the magnitude of the losses, it seems unlikely that a court would find the damages foreseeable; B is unlikely to get consequential damages.

Duty to Mitigate Losses

The injured party in a breach of contract has a duty to mitigate his/her losses (e.g., finding an alternate seller or buying).

Here, it seems that B did try to find an alternate but was unsuccessful.