This book is provided for the exclusive use of:

This Registered Celebration Bar Review Student

And may not be used by any other person without written permission of Celebration Bar Review. No Resale Permitted.
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CIVIL PROCEDURE ESSAYS</td>
<td>4</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED CIVIL PROCEDURE QUESTIONS</td>
<td>16</td>
</tr>
<tr>
<td>CONSTITUTIONAL LAW ESSAYS</td>
<td>38</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED CONSTITUTIONAL LAW QUESTIONS</td>
<td>50</td>
</tr>
<tr>
<td>CONTRACTS/REMEDIES ESSAYS</td>
<td>67</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED CONTRACTS/REMEDIES QUESTIONS</td>
<td>82</td>
</tr>
<tr>
<td>COMMUNITY PROPERTY ESSAYS</td>
<td>111</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED COMMUNITY PROPERTY QUESTIONS</td>
<td>125</td>
</tr>
<tr>
<td>CRIMINAL LAW ESSAYS</td>
<td>143</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED CRIMINAL LAW QUESTIONS</td>
<td>155</td>
</tr>
<tr>
<td>CORPORATIONS ESSAYS</td>
<td>174</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED CORPORATIONS QUESTIONS</td>
<td>187</td>
</tr>
<tr>
<td>EVIDENCE ESSAYS</td>
<td>209</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED EVIDENCE QUESTIONS</td>
<td>223</td>
</tr>
<tr>
<td>PROFESSIONAL RESPONSIBILITY ESSAYS</td>
<td>244</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED PROF. RESPONSIBILITY QUESTIONS</td>
<td>249</td>
</tr>
<tr>
<td>REAL PROPERTY ESSAYS</td>
<td>258</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED REAL PROPERTY QUESTIONS</td>
<td>268</td>
</tr>
<tr>
<td>TORTS/REMEDIES ESSAYS</td>
<td>286</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED TORTS/REMEDIES QUESTIONS</td>
<td>298</td>
</tr>
<tr>
<td>TRUSTS ESSAYS</td>
<td>324</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED TRUSTS QUESTIONS</td>
<td>328</td>
</tr>
<tr>
<td>WILLS ESSAYS</td>
<td>334</td>
</tr>
<tr>
<td>ANSWERS TO SELECTED WILLS QUESTIONS</td>
<td>342</td>
</tr>
</tbody>
</table>
CIVIL PROCEDURE ESSAYS

Note, that starting with July 2007 exam, the scope of the Civil Procedure subject includes the California Code of Civil Procedure. Calif. Civil Procedure is contained in the materials. We suggest that you try to incorporate some California Rules in to your practice answers.

QUESTION #1

Ten college students in State X filed a class action in federal court asking that certain state officials, named as defendants, be enjoined from enforcing the state's flag desecration statute which was alleged to be unconstitutional. The class was claimed to consist of all college students in the state.

The defendants filed four motions that

1. the complaint be dismissed on the grounds that the court lacked jurisdiction because the requisite jurisdictional amount was not present;
2. the complaint be dismissed on the grounds that even if the court had jurisdiction, it should abstain from exercising it;
3. the court deny certification of the claimed class;
4. if the court retained jurisdiction and certified the class, plaintiffs be required to serve personal notice on individual members of the class.

The court reserved decision on the four motions.

Defendants then moved for summary judgment on the ground that they do not intend to enforce the flag desecration statute. In support of the motion, defendants filed affidavits denying any intent to prosecute plaintiffs for violation of the statute. Plaintiffs filed counter-affidavits of former state employees who claimed to have heard the defendants assert their extreme displeasure with certain acts of flag desecration on college campuses in the state.

A. How should the court rule on each of the first four motions? Discuss.
B. How should the court rule on the motion for summary judgment? Discuss.
C. If the court denies class action status, will that order be immediately appealable? Discuss.

QUESTION #2

Paul, a resident of the State of Calvada, purchased a box of breakfast cereal at a grocery store in Calvada. There was a certificate in the box which stated that by sending "the certificate and one dollar to Glassco, Box 145, Central City, State of Black, USA," the sender would receive by return mail six cocktail glasses. Paul sent in the certificate and one dollar and thereafter received the glasses. While he was washing them for the first time, one shattered in his hand, cutting the tendons and permanently injuring Paul.
Paul sued Glassco for $100,000 in Calvada state court, basing jurisdiction on a Calvada statute giving its courts jurisdiction over "any person who commits a tortious act in this state with respect to any cause of action arising out of such act." The statute further provided that in such cases, process could be served on a foreign corporation by mailing a copy of the summons and complaint by registered mail, return receipt requested, to the corporation at its "place of business outside the state." Glassco was incorporated in and had its principal place of business in the State of White.

Copies of the summons and complaint were mailed by registered mail, return receipt requested, addressed to "Glassco, Box 145, Central City, State of Black, USA" and were returned with the notation "not accepted by addressee."

After the statutory time for appearance had expired, the default of Glassco was entered and the case heard as a default matter. Other than medical testimony, the only evidence received was Paul's testimony concerning the manner in which he obtained the glasses and the fact that while he was carefully washing one glass it shattered in his hand. Judgment was granted in Paul's favor for $25,000.

A. Is the Calvada judgment a valid judgment? Discuss.

B. Assuming it is a valid judgment, may Glassco nevertheless have it set aside and, if so, on what grounds? Discuss.

C. Assuming the judgment is set aside, and a new trial is held, is Paul likely to prevail if the only evidence offered by him is the same as that presented at the hearing at which the default judgment was granted? Discuss.

QUESTION #3

Peter is a resident of State Red. Stanford James is a resident of State White. On August 20, 1989, in State White, Peter was injured when the car he was driving collided with a car owned and driven by Stanford James. The applicable statutes of limitations in both States Red and White are two years.

On August 16, 1991, Peter filed suit in the State Red court for damages for his personal injuries received in that collision. The complaint set forth the correct date and place of the collision, but erroneously named the defendant as James Stanford.

On August 30, 1991, while Stanford James was in State Red at the invitation of Peter to discuss the settlement of Peter's claim, he was served with the summons and complaint. Thereafter, the following occurred.

Stanford James filed a motion to quash service of process on him or, in the alternative, to dismiss the action on the ground of forum non conveniens. Both motions were denied.

Peter then moved to amend his complaint to name Stanford James as defendant in place of James Stanford. The motion was granted.

Stanford James filed an answer which, among other matters, alleged that Peter's claim was barred by the statute of limitations and then moved for a judgment on the pleadings on that ground. The motion was granted.

Assuming all appropriate grounds were urged in support of and in opposition to each of the motions mentioned, was the trial court correct in its rulings on the motions:

A. to quash service of process? Discuss.
QUESTION #4 (DISCUSSED IN LECTURE)

Pete, a resident of State A, saw an advertisement in a newspaper published in adjoining State B. It described a new chemical process just developed by Devco, a State C corporation, with its principal office in State C. The advertisement claimed that the new process would revolutionize the industrial dye industry and urged readers to purchase stock in Devco. Pete wrote Devco requesting more information about the new process. Devco sent Pete promotional brochures which directed persons interested in buying Devco stock to consult Bull, a stockbroker.

Bull is a State A resident, but his brokerage office is in State B. Most of Bull's business has been selling Devco stock, for which Devco has paid him a commission. Devco did no business in either State A or State B. Pete purchased 20,000 shares of Devco stock through Bull. Pete is the only Devco shareholder residing in State A.

Shortly after Pete purchased his stock, it was found that the new chemical process developed by Devco had no commercial value. As a result, the value of Pete's Devco stock declined.

Pete sued Devco in United States District Court in State A, alleging jurisdiction based on diversity of citizenship. The complaint purported to state a claim for relief based solely on common law fraud and contained a demand for a jury trial.

Devco then moved for dismissal of the complaint on the ground that the court lacked personal jurisdiction over it. Under State A law a court has jurisdiction over a foreign corporation only if the corporation is doing business in the state. The motion was denied, the district court holding that it had jurisdiction to the full extent permitted by Fifth Amendment due process.

Devco moved to have Bull joined as a party defendant. The motion was granted.

Bull then moved for dismissal of the action as to him on the ground that the district court in State A lacked subject matter jurisdiction. The motion was granted.

Devco answered the complaint and moved to strike Pete's demand for jury trial on the ground that factual issues in the case involved very complex scientific matters that were beyond the intellectual capabilities of the average juror, and therefore it had no adequate remedy at law. The district court struck Pete's jury trial demand and set the case for a nonjury trial.

A. Did the district court in State A have personal jurisdiction over Devco? Discuss.

B. Was the district court correct in ordering Bull joined as a party defendant? Discuss.

C. Did the district court in State A have subject matter jurisdiction over the action against Bull? Discuss.

D. Did the district court err in striking Pete's demand for a jury trial? Discuss.
QUESTION #5

Able went from his home in State A to conduct political demonstrations in State B. While Able was demonstrating in State B, Baker, a plainclothes officer in State B, shoved Able and told him to move on. In response, Able hit Baker. Baker then beat Able with the butt of Baker's revolver and arrested Able for assaulting an officer.

At Able's criminal trial in a state court in State B, Able defended on the ground that he had acted in self-defense. As a witness at Able's trial, Baker's testimony controverted this defense. If believed by the jury, Able's defense would have been sufficient for acquittal. The jury found Able guilty. Judgment on the verdict is now final.

Thereafter, Able filed a complaint in a state court in State A seeking relief against Baker for $50,000 for deprivation of Able's civil rights under an applicable statute for the beating Baker had inflicted on Able. Baker, a resident of State B, has never been in State A. However, Baker is the holder of commercial paper worth $20,000, presently due and payable, issued by the Union Corporation, incorporated in State B. Union is registered to do business in State A.

In the State A court action, Able caused to be issued and served on an officer of Union Corporation in State A a writ attaching Union's debt to Baker. Able also caused summons and copies of the complaint and writ of attachment to be personally served on Baker in State B. Baker did not appear in the action in State A, and the court rendered a default judgment against Baker in favor of Able for $50,000.

A. Is Able's judgment enforceable against Baker, and, if so, to what extent? Discuss.

B. If Baker had appeared in the action in the State A court and asserted the judgment in the State B criminal prosecution as a defense, what effect, if any, should the State A court have given the State B judgment? Discuss.

QUESTION #6 (DISCUSSED IN LECTURE)

Paul, a resident of state X, brought suit against Dave, a resident of state Y, in the U.S. District Court in state Y for property damage caused to Paul's car when Dave's car ran into it in state Y. Jurisdiction was based on diversity of citizenship. The action was filed two weeks before the expiration of the period of state Y's one-year statute of limitation for negligent torts.

One month later, Paul filed an amended complaint that added a claim for personal injury arising out of the car accident. Dave moved to dismiss the personal injury claim. Because state Y had no rule allowing an amendment to relate back to the time of the original pleading under any circumstances, the district court granted Dave's motion, holding that the personal injury claim was barred by the state statute of limitation.

Dave next filed a third-party complaint impleading Insco, which he alleged to be his auto insurer. Dave claimed Insco owed him the duty to defend against Paul's suit and to reimburse any loss. Insco, a state Y corporation, moved to dismiss the third-party complaint on the following grounds: a) the third-party complaint was not authorized under the Federal Rules of Civil Procedure; b) the court lacked subject matter jurisdiction; c) the insurance policy had been fraudulently obtained. The district court dismissed Dave's third-party complaint.

At trial, over objection, the district court admitted the testimony of Dave's witness, Wit. Wit had not been listed by Dave in the pre-trial order prepared pursuant to the Federal Rules of Civil Procedure. Though Dave could not demonstrate a valid reason why he had not included Wit in the pre-trial order, the court was of the view that no prejudice had resulted to Paul, since he had been aware of Wit's existence.
Did the district court err in:

A. Granting Dave's motion to dismiss the personal injury claim?  Discuss.

B. Dismissing Dave's third-party complaint impleading Insco?  Discuss.

C. Admitting the testimony of Wit?  Discuss.

**QUESTION #7 (DISCUSSED IN LECTURE)**

APOW owns and operates a nuclear power plant. For one hour on each of three successive days, the plant emitted heavy radiation over the surrounding area which has a population of 10,000 persons. Several individuals injured by the radiation emitted on the third day brought a class action for damages in an appropriate federal district court against APOW on behalf of all those injured on one or more of the three days. After describing the relevant facts, the complaint alleged only that APOW was responsible for "wrongful conduct." Jurisdiction was based properly and exclusively on diversity of citizenship.

A. APOW moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The motion was denied.

B. APOW then opposed plaintiff's motion to certify the class, arguing that there was no common issue and that plaintiff's claims were not typical of the class. Certification was granted.

C. During discovery, plaintiffs requested that APOW produce a memorandum concerning possible legal liability for nuclear power accidents, prepared by APOW's legal staff prior to the accident but following minor accidents at another company's nuclear power plant. APOW objected. The state in which the action was brought had abolished its own work product doctrine a year earlier. The court held that the memorandum could be discovered.

Was each of the court's rulings correct?  Discuss.

**QUESTION #8 (DISCUSSED IN LECTURE)**

Daw had just spent five days on vacation in east coast State X and was on his way home to west coast State A when his car collided with a car driven by Paul. The collision occurred in State Y, ten miles beyond the State X border.

Paul, a citizen of State X, filed an action against Daw in a State X state court. Paul alleged that he had suffered $700 in property damage when his car was struck by Daw's car. Daw was served at his home in State A and moved to quash service of process on the ground that the court lacked personal jurisdiction over him. The motion was denied.

Daw then filed an answer that denied negligence on his part and alleged contributory negligence.

Paul served interrogatories on Daw which requested the substance of a conversation that Daw had with his wife and his attorney's investigator soon after the accident. When Daw refused to answer those interrogatories, Paul moved to compel answers, and the court granted the motion. A $700 default judgment was entered against Daw when he refused to comply with the discovery order. State X follows the Federal Rules of Civil Procedure with regard to discovery sanctions. Daw did not appeal the judgment, which then became final.
Paul filed a complaint against Daw in the United States District Court in State X for $75,000 for personal injuries arising out of the same accident. In his answer, Daw denied negligence and alleged contributory negligence. He also counterclaimed for damages for personal injuries resulting from the accident.

Both Paul and Daw moved for summary judgment based on res judicata and collateral estoppel.

A. Was the State X court correct in denying Daw's motion to quash? Discuss.

B. Was the State X court correct in granting a default judgment against Daw? Discuss.

C. How should the United States District Court rule on:
   1. Paul's motion for summary judgment on his complaint and on Daw's counterclaim? Discuss.

**QUESTION #9 (DISCUSSED IN LECTURE)**

Owner was the driver and Rider a passenger in Owner's expensive auto when it collided on a State X highway with a pick-up truck driven by Trucker, a citizen of adjoining State Y. Both vehicles were damaged. Rider, Trucker, and Owner were injured.

Owner, a citizen of State X, sued Trucker in a federal district court in State X, claiming $20,000 in property damage to his auto. In his answer, Trucker denied negligence and asserted contributory negligence. After a non-jury trial, the court expressly found that Trucker was not negligent. Judgment was entered for Trucker and has become final.

Subsequently, Rider, commenced a $400,000 personal injury suit against Owner in an appropriate State X court. State X has adopted the Federal Rules of Civil Procedure. Prior to trial, Owner timely moved that the suit be dismissed on the ground that Trucker was an indispensable party and had not been named a defendant. After a hearing, the court denied Owner's motion.

Before trial, Trucker timely petitioned to intervene as a plaintiff and, over Owner's objection, the court granted the petition. Trucker's complaint in intervention sought $200,000 for personal injury and property damage against Owner, who counterclaimed for $150,000 in personal injury damages. Rider, over Trucker's objection, was permitted to assert a $400,000 cross-complaint against Trucker.

None of the claims asserted is barred by a statute of limitations.

A. In the State X court action, did the court correctly rule that:
   1. Trucker was not an indispensable party?
   2. Trucker could intervene?
   3. Rider could cross-complaint against Trucker?

Discuss.

B. In the State X court action, what effect, if any, should the federal district court action have on:
   1. Rider's claim against Owner?
2. Rider's cross-complaint against Trucker?

3. Trucker's claim against Owner?

4. Owner's counterclaim against Trucker?

Discuss.

**QUESTION #10**

On March 1, 1986, Paul, a citizen of State X, was involved in a three-car accident in State Y with Dave and Al, both of whom are State Y citizens. Wilma, Paul's wife, was a passenger in his car. Immediately after the accident, Wilma obtained signed statements from two witnesses. Later, Paul employed Len, a lawyer, to study the statements and advise him. Len made some handwritten notes on the statements and placed them in his files.

On February 15, 1987, Paul filed a complaint against Dave in the United States District Court for State Y. All allegations of the complaint and the prayer for relief are set forth below:

“1. Plaintiff is a citizen of State X. Defendant is a citizen of State Y. The amount in controversy, exclusive of interest and costs, exceeds $50,000.

2. On March 1, 1986, Defendant negligently operated his automobile and collided with Plaintiff's automobile.

3. As a result, Plaintiff suffered personal injuries, pain of body and mind, and incurred medical expenses in the sum of $25,000.

Wherefore, Plaintiff prays for a judgment against Defendant in the sum of $250,000.”

Dave timely answered Paul's complaint as follows:

“Defendant neither admits nor denies the allegations of Plaintiff's complaint but demands strict proof of each and every allegation.”

Paul did not amend his complaint but moved for judgment on the pleadings. Dave countered with his own motion for judgment on the pleadings. The court denied both motions.

On May 1, 1987, Paul successfully moved to amend his complaint, adding Al as an additional defendant. After being properly served with a copy of the amended complaint, Al moved to dismiss on the ground that the applicable one-year statute of limitations for personal injury actions had expired at the time the amendment was filed and before he had any notice of Paul's action. A statute of Y provides:

If an action is filed within the limitations period provided by law, a new defendant added after the running of that period shall not be entitled to dismissal on the ground that the period has run if the claim against the new defendant arises out of the same occurrence as the original claim. In the belief that this statute was controlling, the district court denied Al's motion.

Thereafter, Al served an interrogatory on Paul asking whether Paul took "the statement of any witnesses to the accident" and requesting the submission of "copies of any such statements." Paul asserted that the interrogatory was "objectionable on grounds of work product" and refused to provide any
answer or produce any documents. Al moved for an order compelling (1) an answer to the interrogatory and (2) the production of the requested documents. The motion was granted.

Did the court rule correctly on:

A. the motions for judgment on the pleadings? Discuss.
B. Al's motion to dismiss? Discuss.
C. Al's motion to compel an answer to his interrogatory and the production of documents? Discuss.

QUESTION #11

Seler, a citizen of State S, and Byer, a citizen of State B, met in State B and signed a written contract by which Seler agreed to sell Whiteacre, located in State W, to Byer. The contract as written provided that the purchase price of Whiteacre was $80,000. Seler returned to State S and sent Byer a deed conveying good title to Whiteacre.

Byer did not send Seler any money, but brought an action against Seler for reformation of the contract to correct an alleged error in the contract price. Byer alleged that the agreed price was $25,000 and that the $80,000 figure in the contract was a typographical error. The action was brought in a federal district court in State B. Subject matter jurisdiction was based on diversity. Personal jurisdiction over Seler was based on service of process under State B's long-arm statute.

1. Seler moved to dismiss the action, alleging lack of both personal and subject matter jurisdiction. The motion was denied.

2. Seler then filed an answer asserting that the written contract accurately stated the agreed price. In addition, he counterclaimed for the $80,000 purchase price set forth in the contract and demanded a jury trial. Byer answered the counterclaim and moved to strike the demand for jury trial. The motion was denied.

3. Seler then served Byer with interrogatories demanding responses to the following questions: "(a) Have you ever had Whiteacre appraised? (b) If so, state by who, state the appraised value or values, and attach copies of all written reports received from all appraisers." Over Byer's timely objections to the interrogatories, the court ordered disclosure only of the identity of appraisers and their appraised values.

4. At trial, Byer testified that the agreed price was $25,000 and that the $80,000 figure in the written contract was a typographical error. An appraiser testified on behalf of Byer that the value of Whiteacre when the contract was signed was, at most, $30,000. Byer rested his case. Seler testified that the agreed price was $80,000. The jury returned a verdict for Seler for $80,000, and judgment was entered accordingly. Byer promptly moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. The court granted the motion for judgment notwithstanding the verdict. No other motions were made during or after the trial.

A. Did the court rule correctly on the motion to dismiss? Discuss.
B. Did the court rule correctly on the motion to strike the demand for the jury trial? Discuss.
C. Did the court rule correctly on the objection to the interrogatories? Discuss.
D. Was the evidence admitted at trial such that the court was correct in granting the motion for a judgment notwithstanding the verdict? Discuss.

E. What procedural argument or arguments should Seler have made in opposition to the motion for a judgment notwithstanding the verdict? Discuss.

QUESTION #12

Pat, a resident of State X, was involved in an automobile accident in State Y with Dan. Pat sued Dan in a State X municipal court alleging personal injury damages of $200,000. Dan was served with process in State Y in the manner authorized by the State X "long arm statute" which provides that the courts of State X "may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States." Although he is a resident of State Y, Dan spends approximately six weekends a year in State X at a small vacation cabin in which he has a one-eighth ownership interest.

Dan moved for dismissal on the ground that the municipal court lacked personal jurisdiction over him. The motion was denied. Dan filed an answer asserting that Pat's negligence caused the accident, and the case proceeded to trial. The jury returned a verdict in favor of Pat in the amount of $100,000. Both State X and Y have rules making contributory negligence a complete defense in a negligence suit.

Dan appealed on the grounds that 1) the municipal court lacked personal jurisdiction over him; and 2) the municipal court lacked jurisdiction to hear controversies exceeding $10,000. Although the jurisdictional limit for municipal court was $10,000, the appellate court ruled that Dan had waived his right to contest both personal jurisdiction over him in municipal court and the municipal court's subject matter jurisdiction to hear the case. The appellate court affirmed the judgment and it became final.

Subsequently, Bob, a bystander who had been slightly injured in the collision, filed a complaint in State X municipal court against Dan and Pat for damages of $10,000, alleging negligence. Pat answered and filed a cross-complaint against Dan for damages to Pat's car arising from the collision.

Based upon the above facts, the following motions were made: Bob moved for summary judgment against Dan on the issue of negligence; Pat moved for summary judgment against Dan on the issue of negligence and for summary judgment against Bob; Dan moved for a summary judgment against Pat.

1. Was the municipal court correct when it ruled it had personal jurisdiction over Dan? Discuss.

2. Was the appellate court correct when it ruled Dan had waived his right to contest the municipal court's personal jurisdiction over him and the municipal court's subject matter jurisdiction to hear controversies exceeding $10,000? Discuss.


4. Should Pat's motion for summary judgment against Dan be granted? Discuss.

5. Should Pat's motion for summary judgment against Bob be granted? Discuss.


QUESTION #13
Salesco, a State X corporation, commenced an action in a State X federal district court alleging $100,000 in damages for a breach of contract by Parts, Inc. (Parts) to sell and deliver four shipments of parts to Salesco. The complaint alleged that each shipment would have produced a profit of $25,000 to Salesco. Parts does business in all 50 states. It is incorporated and has its corporate headquarters in State A.

In its original complaint, Salesco named "Subparts, Inc." (Subparts) as the defendant, but served Parts. Subparts is an unincorporated division of Parts. Salesco thereafter filed and served an amended complaint alleging the same action but naming Parts as the defendant. However, the amended complaint was neither filed nor served on Parts until after the relevant State X statute of limitations had expired.

Parts timely moved to dismiss Salesco's action on the following grounds: (1) the claim was barred by the statute of limitations; (2) under no circumstances could damages be more than $40,000; and (3) there was no diversity between the parties. The court denied Parts' motion.

Thereafter, Parts filed a third party complaint seeking indemnification against Distribco, a company incorporated in State X. Distribco timely moved to dismiss the third party complaint on grounds of lack of diversity jurisdiction over it. The court denied Distribco's motion.

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

2. Did the court properly deny Distribco's motion to dismiss? Discuss.

**QUESTION #14**

Pat was living in State X when he was arrested and charged with violating a State X criminal statute. Because of overcrowding in State X Penitentiary, however, Pat was forced to await trial while incarcerated in the security wing of Delta Hospital (D), a private hospital for persons with psychiatric disorders, located and incorporated in the neighboring state of Y.

Pat filed a class action complaint against D in a federal district court in State X on behalf of himself, on behalf of 25 similarly situated inmates who were incarcerated at D awaiting trial in State X and on behalf of all such future inmates. The complaint alleged violations of the State Y Prisoners’ Rights Act, which guarantees prisoners, inter alia, the right to safe food. The complaint alleged that the food served at D was often spoiled and contaminated with vermin droppings and that, as a result, he suffered continual gastrointestinal disorders. Pat requested $70,000 in damages and an injunction prohibiting D from serving tainted food. D was properly served with a copy of the complaint.

Before D responded to the civil complaint, Pat’s brother paid Pat’s bail. As a result, Pat is no longer detained at D and has returned to State X.

The federal district court:

1. Denied a motion by D to dismiss for lack of jurisdiction;
2. Declined to certify the class on the ground that the class was not large enough;
3. Denied a motion by D to change venue to a federal district court in State Y; and
4. Granted a motion by D to dismiss the action as moot.

Was each of the rulings correct? Discuss.
QUESTION #15

Bigcorp is incorporated and headquartered in State B. While in State B, Paul, a citizen of State A, was severely injured by a defective power saw he had purchased at a store owned by Bigcorp in State B. Paul brought a products liability action for $100,000 against Bigcorp in a federal district court in State B, based on diversity of citizenship.

As discovery proceeded, Bigcorp disclosed that, although it manufactures its own power saws, the particular power saw that allegedly injured Paul had been manufactured in State A by Amcorp, which is incorporated and headquartered in State A. Amcorp and Bigcorp generally conduct business solely in their respective states, but sell surplus goods to each other twice a year.

Paul sought leave to amend his federal court complaint to name Amcorp as a defendant. Bigcorp opposed the motion, claiming that such a joinder would defeat diversity, and moved for the dismissal of the action because of the impossibility of proper joinder of Amcorp. The federal court dismissed Paul’s complaint.

Paul then filed suit against Bigcorp and Amcorp in state court in State B. Amcorp filed a motion to quash service of summons contesting personal jurisdiction over it. The State B court determined that it lacked personal jurisdiction over Amcorp and dismissed it from the action. Paul voluntarily dismissed his action against Bigcorp without prejudice.

Paul then brought his products liability action in state court in State A, naming Amcorp and Bigcorp as defendants. Bigcorp moved for dismissal of Bigcorp from the action on the ground of res judicata, and the State A court granted the motion.

1. Was the federal court correct in dismissing the action on the ground of the impossibility of proper joinder of Amcorp? Discuss.

2. Was the state court in State B correct in dismissing Amcorp from the action on the ground that it lacked personal jurisdiction over Amcorp? Discuss.

3. Was the state court in State A correct in dismissing Bigcorp from the State A action on the ground of res judicata? Discuss.

QUESTION #16

Danco is a manufacturer incorporated and headquartered in State Y. Pat, a State X resident, had been employed as Danco's State X salesperson from 1985 to 1995. In 1994 Tom, a State Y resident, was hired as Danco's sales manager. Tom works at the Danco headquarters in State Y.

In 1995, Tom increased sales quotas and exerted pressure to reduce lead-times from initial contact to final sale. Pat's protests that this would ruin long-standing customer relationships were ignored. Despite several warnings to increase sales, Pat failed to meet the new quota and was fired on his 50th birthday.

At the time of termination, Pat had several large deals pending and Tom promised Pat he would receive his standard commission for those sales if they were completed. Danco, however, ceased doing business in State X due to that state's unfavorable business climate, and the sales were never completed.

After fruitless attempts to find another job, Pat sued Danco in State X federal district court for breach of a federal age discrimination statute and breach of contract based on failure to pay $30,000 of anticipated commissions. The district court granted Danco's motion for summary judgment on the age discrimination claim and dismissed the breach-of-contract claim for lack of subject matter jurisdiction.
Pat then learned that two prospective State X employers had refused to hire him because of negative references provided by Tom. Pat sued both Danco and Tom in an appropriate State X court for age discrimination under State X law, breach of contract (unpaid anticipated commissions), and defamation.

Both Tom and Danco appeared specially and moved to quash service. The court denied the motions. The defendants answered and filed motions for summary judgment, claiming the federal judgment was a bar to Pat's claim. The court denied these motions.

State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States."

1. Assuming the defendants were properly served, did the state court properly assert personal jurisdiction over each defendant? Discuss.

2. Is the federal court judgment a bar to any of Pat's claims against either defendant? Discuss.

**QUESTION #17**

Debbie purchased an ocean front vacation house located on Lot #1. Shortly thereafter Peter purchased the ocean front house located on adjoining Lot #2. The houses and lots are comparable in size, value and age.

After his purchase, Peter hired a surveyor to lay out the boundaries of Lot #2. The surveyor reported that a portion of the porch of Debbie’s house is on Peter’s property. In particular, her 10-foot wide porch extends laterally 7 feet onto Peter’s property. The encroachment was made by the original developer 25 years before Debbie and Peter purchased the properties.

Six months after learning of the encroachment, Peter commenced an action to compel Debbie to remove the porch from his property.

1) How should the trial court rule on the merits of Peter’s action? Discuss.

2) If the trial court issues a mandatory injunction requiring Debbie to have the porch removed within 30 days, but Debbie does not comply, what procedural steps should Peter take to make her comply and what should be the result? Discuss.

3) If the trial court concludes that Debbie willfully disobeyed the injunction and fines her $1,000, but on Debbie’s appeal the appellate court concludes that the injunction should not have issued, how should the appellate court rule on whether Debbie must pay the $1,000 fine? Discuss.

4) If Peter had not commenced his action until one year after his discovery of the encroachment and Debbie had moved to dismiss the action because of this delay, how should the trial court rule? Discuss.
ANSWERS TO SELECTED CIVIL PROCEDURE QUESTIONS

ANSWER TO QUESTION #1

A. 1. The motion requesting that the complaint be dismissed on the ground that the court lacked jurisdiction due to a failure to meet jurisdictional amount should be denied. There is no amount in controversy requirement in federal question cases, such as there is in diversity cases. Thus, a federal court has jurisdiction over a case based on a constitutional claim, such as this, regardless of how much and indeed whether the plaintiffs claim anything in damages.

2. As to whether the court should abstain, there is some room for debate, but the better answer is that it should not. Abstention is the process whereby a court holds on to a case awaiting a decision of another court. There are different theories under which a federal court might abstain from hearing a case.

First, under the Pullman doctrine, a federal court will abstain from hearing a case if (1) the claim rests on the interpretation of a state statute which is ambiguous and (2) one of the possible interpretations of the statute will render the federal case moot. The party asking for abstention has the burden of proof on both points. In this case, the defendants have not shown that the statute is ambiguous. Even a federal court need not abstain if the state statute cannot be construed in such a way that it can survive constitutional attack. Kusper v. Pontikes, 414 U.S. 51 (1973). The U.S. Supreme Court has consistently found that state statutes prohibiting desecration or improper display of the American flag are unconstitutional insofar as they interfere with an individual's right to freedom of expression. See Spence v. Washington, 418 U.S. 405 (1974); Street v. New York, 394 U.S. 576 (1969). A flag cannot be accorded special treatment as a result of its symbolic value. Rather, individuals have a right to use that symbol to communicate their own ideas and opinions. Thus, to the extent that the statute treats flags specially, it is unconstitutional. As that appears to be the intent of this statute, it is probably wholly unconstitutional and the federal court need not wait for a state court to construe the statute.

Under the Burford abstention doctrine, a federal court should abstain if the issue before the court is a part of a complex administrative procedure which is not yet complete. There is no such administrative procedure involved in the present case and so Burford does not apply.

A federal court will also abstain if there is a prior state court proceeding on the same issue. That is not the case here. Plaintiffs fear a state criminal proceeding, but none has yet been filed.

Generally, a federal court will hear a case such as this where (1) there is a real threat of prosecution and (2) the plaintiffs can show that the statute chills their exercise of their constitutional rights. Whether the plaintiffs can meet this standard is discussed below in regard to the defendants' motion for summary judgment.

3. While it is arguable, the court should deny certification of the class. In order to achieve certification as a class action, the named plaintiffs must show four elements - commonality, adequacy, numerosity and typicality - and one of the three additional elements under Rule 23(b).

The commonality requirement is not the issue. The named plaintiffs have sufficient issues of law or fact in common with the class: namely, the unconstitutionality of the statute and its chilling effect on their First Amendment rights.
The second requirement for certification of a class is that of adequacy: that the named plaintiffs can adequately represent the claims of the class. There are no facts to aid us in deciding this issue. A good answer would mention that the plaintiffs will have to show that they have hired competent attorneys, can afford to pursue this case appropriately, and so on.

The numerosity requirement is easily met in this case. Assuming for the moment that all college students in the state can raise the claim presented by the plaintiffs, they are probably far too numerous to be joined in one action by name.

The typicality requirement is the real issue in this case. There is no showing and no reason to assume that the named plaintiffs' fears of prosecution under the statute are typical of the concerns of all of the state's college students. At least some college students presumably support the statute and have no fear of being prosecuted for flag desecration.

Thus, this case should only be allowed to proceed as a class action if the class is amended to include only college students who fear prosecution under the statute. (Of course, if that class of persons is small enough to be joined as named plaintiffs, then this action will not be certified as a class action due to a failure to satisfy the numerosity requirement.)

If the typicality requirement is satisfied, then the class action can be certified under Rule 23(b)(2) since the defendants' actions will affect the whole class and only injunctive relief or a declaratory judgment is sought.

4. Individual notice to each class member is only required in Rule 23(b)(3) class actions, involving common question actions where money damages are sought. Rule 23(c)(2). In a Rule 23(b)(2) case, where only injunctive or declaratory relief is sought, the court may determine what sort of notice to class members is appropriate, if any.

B. The U.S. Constitution requires that there be a "case or controversy" before a case can be heard in federal court. The mere existence of a criminal statute does not create a case or controversy. There must be a real threat of prosecution under the statute. See Poe v. Ullman, 367 U.S. 497 (1961). While it is arguable, the better answer is that there does not appear to be any real threat of prosecution under the statute. The defendants have signed affidavits stating that they do not intend to enforce the statute. All the plaintiffs can offer is proof that the defendants have expressed a personal dislike for acts of flag desecration. This is a far sight short of threatening prosecution under the statute. Thus, there does not appear to be a genuine issue of material fact as to whether the defendants intend to enforce the statute, and summary judgment should be awarded to the defendants.

C. Generally, only a "final" order of a court is appealable. Denial of class action certification does not settle the dispute between the parties and so is not final. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

ANSWER TO QUESTION #2

A. The validity of the default judgment issued by the Calvada state court depends upon three points: subject matter jurisdiction, personal jurisdiction and adequate notice.

Subject Matter Jurisdiction - State courts, unlike federal courts, are usually courts of general jurisdiction. Therefore, the absence of information in the fact pattern regarding the authority of the Calvada court is not fatal. Since the Calvada court's jurisdiction was not limited in the facts, it is safe to conclude that it had jurisdiction to hear the claim.
Personal Jurisdiction - Paul claims to have obtained personal jurisdiction over Glassco on the basis of a long-arm statute described in the facts. The court will need to apply a two-part test to determine whether the trial court had personal jurisdiction under the statute.

The Statute - The first issue is whether Glassco committed an act that was described in the statute. Under the statute, a plaintiff can obtain personal jurisdiction if the defendant committed a tortious act in Calvada. In a majority of jurisdictions, a tortious act is that last action which was necessary to create liability; that means, usually, where the last act occurred. The last act here was the glass breaking, which occurred in Calvada. In a minority of jurisdictions, the court looks to where the tortious act originated; for example, when the claim arises out of defective manufacturing or design, the last act is where the manufacturing or design took place. Here, that could be either Black or White. There is no way - absent further facts, such as case law - to conclusively determine whether Calvada follows either approach, but the majority approach seems to be more likely. Because the tortious act occurred in Calvada and the cause of action arose out of that tortious act, the activity falls within the category of actions to which the long-arm statute applies.

The court must then consider whether the application of this statute here satisfies due process.

Minimum contacts - The court must look to see if Glassco had enough "minimum contacts" with Calvada, so that application of the statute will not violate the traditional notions of fair play and substantial justice as described in International Shoe. Glassco advertised its offer on the back of a cereal box which was sent to Calvada and, in response to Paul's request, it sent the glasses to his home address in Calvada. Therefore, it seems likely that there are sufficient minimum contacts with the forum.

Purposefulness - The court must also look to see if Glassco purposefully availed itself of the privilege of conducting activities in Calvada. Glassco advertised its offer on the back of a cereal box which was sent to Calvada, so it seems safe to conclude that Glassco intended to avail itself of the privilege of conducting business in Calvada. Glassco also purposefully availed itself of the forum's benefits when it sent the glasses to Paul's home address.

Along the same lines, the court must also consider whether it was more than merely foreseeable that Glassco would cause harm in Calvada, such that Glassco would have reasonably expected to have to defend itself in a Calvada state court. Glassco apparently did conduct a nationwide campaign when it used the cereal boxes as the medium to transmit the offer and it did specifically send glasses to Calvada, so it seems more than foreseeable, on the nature and quality of the conduct, that Glassco could reasonably have anticipated being hailed into a Calvada state court.

The Calvada state court, by applying the two-part test, could properly conclude that it had jurisdiction over Glassco when it issued the default judgment. Therefore, if Glassco's claim for relief from judgment is that the judgment was void for lack of personal jurisdiction, the claim will be denied.

Notice - In analyzing the adequacy of notice, the court must consider whether the notice was sufficient under the Constitution and whether the notice was properly made under applicable state law.

Notice is constitutionally sufficient if it was reasonable for a plaintiff, who genuinely wanted to inform a defendant, to use such a method under the circumstances. Although the facts are not clear about how diligent Paul was in finding out where to send notice to Glassco, Paul did have an address - where he sent the request for the glasses - and he used that address, since it had produced results for him before. Therefore, in the absence of facts which indicate that a better address was available, Paul's notice was constitutionally sufficient.

The Calvada state notice statute required Paul to serve a foreign corporation by mailing a copy of the complaint and a summons, return receipt requested. Paul did that, even though the defendant refused to accept the summons. There is no requirement under the Constitution that the defendant actually receive the
notice, since this would encourage deceit on the defendant's part and unreasonably burden the plaintiff. The issue, then, is whether Paul faces a greater burden because notice was refused. It seems unlikely that Paul should have a greater duty, because it was the action of the defendant - in refusing to accept the notice - that brought about the lack of notice.

The court must finally consider whether Paul fulfilled the requirement of the statute which requires that notice be sent to the defendant's "place of business outside the state." The facts indicate that Glassco was incorporated and had its principal place of business in the State of White but that the glass offer was made from Central City, in the State of Black. It seems likely that Glassco was doing business in Black when it mailed out the glasses in response to Paul's request, so the court could conclude that the notice was properly sent to a place of business outside of the state. Facts to the contrary could alter the result of this analysis, but it seems likely that Glassco had a place of business in Black.

In conclusion, the judgment rendered by the Calvada state court seems to be valid because there was subject matter and personal jurisdiction, and statutorily and constitutionally adequate notice.

B. Even if the judgment is valid, Glassco can challenge it by filing a motion for relief from judgment.

Paul's judgment was issued by default, pursuant to Rule 55. Rule 60 allows for relief from judgments for clerical errors as well as for other specific grounds. While there do not seem to be such clerical errors present, Glassco may be able to present evidence of specific grounds, if it can show that:

a. there are listed grounds for doing so;
b. the Rule 60 motion is made within a reasonable time;
c. there is some indication - such as the presence of a valid defense - to indicate that there will be a different result if the case is reopened.

One ground for relief under Rule 60 - (b)(4) - is for when the judgment is void. Glassco will argue that the judgment is void because of lack of personal jurisdiction and insufficient notice. Therefore, Glassco satisfies the first requirement and can move for relief from the judgment, even if he won't be successful on the merits in attempting to have the prior judgment declared void.

Rule 60 provides that a reasonable time is usually one year, but this time limit does not apply to Rule 60(b)(4) motions. Beyond that, reasonableness is evaluated in light of the defendant's actions upon learning of the availability of relief and whether the plaintiff has substantially changed his or her position after getting the default judgment. Glassco can satisfy this standard if it can show that it sought Rule 60 relief as soon as possible.

As to the last element, if a defendant's motion is based upon the fact that the judgment was void, then there is no need to show a valid defense. Glassco will prevail on its motion to reopen the matter. Given the arguments described above, however, Glassco will not prevail on its motion for relief from judgment because of lack of personal jurisdiction.

C. If the judgment is set aside, then it is unlikely that Paul will prevail at a new trial if the only evidence he offers is the evidence which he presented at the earlier trial.

When a court is prepared to issue a default judgment, the liability of a defendant is assumed. What the court must determine is whether there was sufficient proof of damages to justify the amount for which the judgment is ultimately issued. If the matter is reconsidered, however, the plaintiff will then have to provide evidence sufficient to prove liability, and the evidence presented here is insufficient.

Paul could seek relief under four different theories.
Negligence - The evidence is insufficient to establish a claim of negligence. Paul did not offer evidence showing defective design, but only that the glass shattered. Furthermore, Paul offered no evidence on causation, that but for Glassco's actions, the glass would not have shattered.

Strict Liability - Nor was the evidence sufficient to make out a claim under strict liability. While Paul has no obligation to prove a breach of a duty by the manufacturer, he does have to show that a defect did exist in the glass which brought about the injury.

Express Warranty - Paul would not prevail on a breach of warranty theory because he offered no evidence that Glassco made statements that were misrepresentations of material fact on which Paul actually relied when obtaining the glass.

Implied Warranty - Nor would Paul prevail on a breach of an implied warranty of fitness or merchantability because he offered no evidence showing that the glasses were not fit for the ordinary purpose for which they were intended.

Paul will need to offer more evidence if he is to prevail in proving Glassco's liability.

ANSWER TO QUESTION #3

A. The motion to quash service of process should be granted.

Peter used the service of process to obtain personal jurisdiction in the State of Red over Stanford James; James had no other contact with Red beyond going to Red to discuss settlement of Peter's claim. While personal service within the jurisdiction is usually sufficient to support personal jurisdiction, there are two reasons why, on the basis of these facts, the motion should be granted.

First, it is common practice in many states to invalidate service of process if a nonresident is lured into a state under false pretenses. The goal behind the policy is that courts do not want to encourage suits where parties have used fraud to obtain jurisdiction over an opponent. It is not necessarily clear, however, that Peter's intentions in having Stanford come to State Red were to fraudulently obtain jurisdiction over Stanford. Regardless, if the court were to condone such service, it would tend to discourage out-of-state residents from coming to State Red to discuss settlement and so ultimately, it is likely that this reason alone provides sufficient grounds to quash the process.

Second, most states provide immunity from service of process for a nonresident who is voluntarily in the state to participate in a legal proceeding. For the same reasons stated above, State Red would have a policy interest in encouraging out-of-state residents to appear, since a State Red subpoena to appear as a witness is ineffective outside of the jurisdiction. Allowing Peter to obtain personal jurisdiction over Stanford in this instance would work against this goal.

Of course, these arguments are moot if Stanford brought this motion after filing a responsive pleading or otherwise subjected himself to the jurisdiction of the court without preserving his objection to the court's jurisdiction.

B. On the basis of the following three grounds, it is unlikely that an appellate court would reverse the trial court's decision to deny the motion to dismiss for forum non conveniens.

First, there has to be an alternative forum available for the court to permit a dismissal on the basis of forum non conveniens. Since both Red and White have a two year statute of limitations on such actions, White is effectively foreclosed from being considered as an alternative forum because the White statute of limitations had run by the time the motion to dismiss was heard. Of course, the Red state court could grant the motion on the condition that Stanford will not raise the statute of limitations in the action commenced in White, since the statute of limitations is an affirmative defense which Stanford can waive.
Second, there is a general policy among courts not to disturb the plaintiff's selection of a forum.

Third, granting or denying such a motion is within the trial court's discretion. Therefore, defendant has to satisfy a high burden of proof for an appellate court to overrule such a determination.

In evaluating the trial court's determination, the court will look to the public factors: if the quality of justice is superior in one state's courts or the other's, whether there were any local connections justifying the choice of the Red state court, and whether foreign law will be applied and if so, how difficult it would be for the Red state court to apply. The facts do not indicate that the quality of justice would necessarily be superior in either Red or White. There is a local connection justifying the use of the Red state court: Peter is domiciled in Red. It is true that the Red state court will need to apply White state law, but the facts do not indicate how difficult that will be. The public factors do not call for a dismissal of the case.

The court will also look to the private factors: whether both parties will be better served by hearing the case in Red as opposed to White, the convenience of getting witnesses and looking at the accident site when the trial is held in Red, and whether there would be interpleader or impleader of other claims or parties. These factors, when analyzed, favor having the case in White.

However, since it appears that Peter cannot bring his claim in a White court because of the expiration of the White statute of limitations, it is likely that the appellate court will not reverse the trial court's decision to deny the motion to dismiss for forum non conveniens.

C. The trial court correctly allowed Peter's motion to amend the complaint substituting Stanford James as defendant in place of James Stanford.

Rule 15(c) deals with Peter's motion. Under the Rule, a motion to amend to change the name of a party (or add a new party) after the statute of limitations has run will relate back to the date of filing the complaint so long as the defendant (1) had notice of the suit within the statutory limitations period or within 120 days after the filing of a timely complaint, (2) knew or should have known that the suit should have been brought against him, and (3) will not be prejudiced in his defense by the delay. Since Stanford James was served within 120 days after the filing of a timely complaint and clearly should have known from the recital of facts that he (not some person named James Stanford) should have been the defendant, he cannot now complain of prejudice. Therefore, the motion to amend was properly granted.

D. Rule 3 of the Federal Rules of Civil Procedure provides that an action is commenced when the complaint is filed. Therefore, the statute of limitations would be tolled by Peter's timely filing of a complaint and this suit would not be barred by the statute of limitations as long as the defendant was served within 120 days after the filing of the complaint, which he was. Therefore, it was improper for the court to enter judgment on the pleadings on the basis of the statute of limitations.

ANSWER TO QUESTION #5

A. Able's judgment is not enforceable against Baker because the court did not have personal jurisdiction over Baker.

The State A court used quasi in rem jurisdiction to try to obtain personal jurisdiction over Baker. With quasi in rem jurisdiction, the court attaches the property that a defendant has in the state and uses its jurisdiction over that property to enforce a judgment against the out-of-state defendant. The sweep of this jurisdiction, however, is limited to the amount of the property attached. Therefore, although Able obtained a judgment of $50,000 against Baker, Able can enforce that judgment only to the extent of the value of the property seized: $20,000.
Also, the Supreme Court, in *Shaffer v. Heitner*, made the exercise of quasi in rem jurisdiction subject to the due process requirement of International Shoe, meaning that the defendant must still have minimum contacts with the jurisdiction. Baker's contacts with State A are through Union Corporation, a corporation incorporated in State B which is registered to do business in State A. It is unlikely, given the quality of this single contact, that it is sufficient to satisfy the minimum contacts requirement of International Shoe. Therefore, the court in State A had no personal jurisdiction over Baker, and the judgment is void.

B. Assuming that Baker were to come to State A to defend himself in Able's action, it is possible that collateral estoppel would prevent Able from prevailing in a civil action. The result depends upon what type of collateral estoppel is practiced in State A.

Collateral estoppel deals with issue preclusion: whether an issue in a second suit was addressed in an earlier suit. Two different approaches exist towards applying this doctrine. Under the traditional approach, there must be:

1. the same parties, or parties in privity;
2. different causes of action;
3. actual litigation; and
4. a necessary determination of the issue sought to be precluded in the second suit.

Collateral estoppel would not apply here, at least under the traditional approach, because the parties in the first, criminal action were the State of B and Able, and in the second, civil action, Able and Baker. Was Baker in privity with State B for purposes of collateral estoppel? No - a party is in privity if that person controlled the first suit, even if that person was not a named party, and criminal prosecutions are controlled by district attorneys, not arresting officers. Therefore, the mere fact that Baker testified on behalf of State B does not put him in privity with State B for purposes of collateral estoppel.

The modern approach differs from the traditional approach only in the first element, substituting instead the "against whom" rule. That rule looks instead to see that the party against whom collateral estoppel is being applied - here, Able - had a full and fair opportunity to litigate the issue at the earlier trial. The facts do not indicate the nature or quality of the defense put forth by Able at the criminal trial so the point can be argued both ways. But, if the court in the second trial were to conclude that Able did fully and fairly litigate the issue of self-defense in the first trial and that the issue also arises in Able's action for violation of civil liberties by Baker, then Able will be precluded from relitigating that particular issue.

**ANSWER TO QUESTION #8**

Note that this answer has been drafted in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar.” You may use this answer to help you visualize the structure and writing approach. Also note that the amount in controversy was amended in the question to conform to current guidelines in order to retain the Examiners’ original intent.

**I. Daw’s motion to Quash**

Daw was on vacation in State X. He was involved in a collision involving Paul in State Y, 10 miles from State X. Daw lives in State A and Paul lives in State X. Paul filed suit in State X court and Daw alleges State X lack personal jurisdiction over him.
Daw will argue that he was merely vacationing in State X, has no residence there, no domicile or business in that state. Furthermore, Daw did not purposefully avail himself of conducting activities or business in State X. He was there for only 5 days. He will rely on the law that in order for a court to have personal jurisdiction over an individual defendant, the defendant must have certain minimum contacts with State X in order to not violate traditional notions of fair play and substantial justice as described in the International Shoe case. Paul will argue that since the accident occurred only 10 miles away from state X in State Y and State Y could be a likely forum because it is where the cause of action arose, then the action should be in State X.

Paul’s argument will likely be unsuccessful. Since Daw’s ties to State X are remote and not related to the accident, State X cannot assert personal jurisdiction over Daw. Therefore, Daw’s motion to quash should have been granted, and the State X court was incorrect in denying Daw’s motion to quash.

II. Default Judgment against Daw

Daws refused to respond to Paul’s interrogatories and after he was ordered to comply with a discovery order, a default judgment was entered against him. Paul filed a motion to compel which the court granted and ordered Daw to answer. Daw thereafter still refused to comply with the discovery order.

Paul will argue that Daw’s failure to respond to the discovery order merits a default judgment be entered. A default judgment may be entered if a party answers a complaint but then fails or refuses to comply with litigation obligations such as discovery orders. Furthermore, a court may not enter an amount on a default judgment greater than what was originally sought in the complaint. Daw will reply that the requested interrogatories sought information that was privileged and work product, and therefore immune from discovery. A party may make a motion (must be within one year) to set the default judgment aside based on privilege and work product immunity.

In this case, the court rightfully entered a default judgment for $700 which was the amount Paul alleged as damages in his complaint. The default judgment as a sanction is appropriate and procedurally correct, however, Daw, for good cause shown may set aside the default judgment.

A. Discovery of Daw’s communication with his wife

Daw and his wife had a conversation soon after the accident. Paul has served interrogatory requests for the substance of that conversation.

Daw will argue that his conversations with his wife were privileged and not subject to discovery by Paul. Paul may argue that the conversations are relevant to facts specific to the accident and cannot be discovered in any other way. Parties may obtain discovery regarding any matter not privileged which is relevant to a claim or defense of any party. A matter is privileged and not discoverable if it would be privileged at trial under the applicable rules of evidence. Confidential communications between spouses is privileged and thus not discoverable.

In this case, the substance of the conversation between Daw and his wife will be considered confidential and cannot be discoverable by Paul. Thus, the default judgment against Daw should be set aside.
B. Discovery of Daw’s conversation with his attorney’s investigator

Daw and his attorney’s investigator had a conversation after the accident. Paul has served interrogatory requests for the substance of that conversation.

Daw will argue that his conversations with the investigator working for his attorney are privileged and not discoverable. Generally, materials prepared in anticipation for litigation are not discoverable unless the discovering party has a substantial need for the materials and he cannot otherwise obtain them without undue hardship. Paul will argue that there is no attorney-client privilege between Daw and his attorney’s investigator, so the conversation should be discoverable.

The court should rule that the conversation with the investigator would not be discoverable under the work-product immunity, which now extends beyond attorneys to investigators. If the investigator, in speaking to Daw, prepared notes or documents relative to their conversation and those notes were prepared in anticipation for litigation, then they are not discoverable and Daw may have his default judgment set aside. Furthermore, Paul may get this information by either taking the deposition of Daw or the investigator. This way he can get the investigator’s findings as to the cause of the accident without obtaining the investigator’s notes regarding his conversation with Daw.

III. US District Court rulings

A. Paul’s motion for summary judgment on his complaint

Paul obtained a final judgment against Daw in the amount of $700 for property damage sustained to his car. Later Paul filed a claim for personal injuries arising out of the same accident and filed a motion for summary judgment.

Daw will argue that Paul’s new claim and motion for summary judgment should be denied because it has already been litigated. Res judicata applies if a valid final judgment has been rendered on the merits of a claim, then the claim cannot be relitigated. Paul would assert collateral estoppel and argue that summary judgment is appropriate because Daw lost the first suit and should be estopped from relitigating in the second personal injury suit. Collateral estoppel prevents a party from relitigating an issue that has been decided in a previous lawsuit.

Res judicata would prevent Paul from reasserting his own claim. Paul’s collateral estoppel argument would not succeed because, as Daw would successfully assert, even though the first suit resulted in a judgment, there was no actual litigation on the merits of the case. The question of negligence was never litigated and decided because there was a default judgment. Therefore, Paul’s motion for summary judgment based on collateral estoppel would be denied.

B. Paul’s motion for summary judgment on Daw’s counterclaim

In response to Paul’s personal injury claim, Daw counterclaimed for personal injuries arising out of the same accident. He did not file a counterclaim in the first lawsuit.

Paul will argue that because Daw did not raise the counterclaim in the first property damage suit he is therefore barred from raising it in Paul’s personal injury suit. A compulsory counterclaim is a counterclaim that arises out of the same transaction or occurrence. It must be raised by the defendant or otherwise he is barred from raising it in a later action.
Since Daw did not raise the counterclaim originally, Paul’s motion for summary judgment on Daw’s counterclaim should be granted.

C. Daw’s motion for summary judgment on Paul’s complaint

Paul filed two complaints. In the first he received a $700 judgment and the second complaint was for personal injuries based on the same accident.

Daw will argue that Paul’s claims of property damage and personal injury arise from the same cause of action and cannot be split into two separate complaints. Paul’s property damage and personal injury claims arise from the same transaction or occurrence, so they are considered part of the same cause of action. Furthermore, if proof of the two claims would require essentially the same evidence, then they are part of the same cause of action. Res judicata prohibits the splitting of a cause of action. A judgment for the plaintiff merges all claims against the defendant that are part of the same cause of action or occurrence even if some of the claims were not actually litigated.

The two claims arise from the same accident. While Paul could try to assert that the question of damages would be different, the problems of negligence and contributory negligence would be proven and disputed by the same evidence. Accordingly Daw’s motion for summary judgment should be granted.

ANSWER TO QUESTION #10

A. Motions for Judgment on the Pleadings

A motion for judgment on the pleadings is an attack on the legal sufficiency of the opponent's pleadings filed after all the pleadings are in.

1. Paul's Motion

The defendant is required to admit or deny the averments on which the plaintiff relies. Here, Dave neither admitted nor denied any of Paul's allegations, and thus the answer was technically defective and all the facts alleged in Paul's complaint (except for the amount of damages, which need not be specifically denied) could be deemed to have been admitted. Most likely, however, the answer will be treated as a general denial.

Denials must fairly meet the substance of the plaintiff’s pleadings. While a defendant may deny facts when he is without knowledge or information sufficient to form a belief as to their truth, a general denial is inappropriate in federal courts unless the defendant has a good-faith intent to contest every allegation in the plaintiff's pleadings. Since it would appear that there is no legitimate basis for contesting jurisdiction, Dave's answer would thus be improper even if it is construed as a general denial.

It might be worth noting that federal pleading rules are designed to achieve the goal of having each case determined on its merits rather than on procedural technicalities. As such, the court will normally enter a judgment on the pleadings only if there is no possible way that the non-moving party could succeed on the basis of properly drawn pleadings; instead, it will ordinarily allow deficient pleadings to be cured by amendment. Therefore, the court should not have granted Paul's motion if Dave had offered to cure the defect by filing a more specific answer.

2. Dave's Motion
The federal courts use notice, rather than code, pleadings. Under such a system, the complaint is sufficient so long as it contains a short, plain statement of the facts of the case showing that the plaintiff is entitled to relief. In addition, the pleadings must contain a demand for appropriate relief and, when the action is brought in federal court, the basis of the court's jurisdiction.

Paul's complaint gives Dave fair notice of what his claim is about and the grounds upon which it rests — it indicates that the suit is premised on negligence and specifies the time and place of the allegedly negligent acts. Dave can use the discovery process if he needs additional details, but he cannot attack the complaint as defective for not indicating a specific cause of action and alleging the specific elements thereof.

Since the complaint clearly includes a prayer for relief to which Paul would be entitled should his action be successful, the only remaining issue is whether Paul properly stated the basis of the federal court's jurisdiction. While it is true that Paul did not explicitly state that he was asserting the court's diversity jurisdiction, he did allege all of the facts necessary to do so - that the plaintiff and defendant were residents of different states and that there was more than $50,000 in controversy (the jurisdictional amount requirement at that time). Venue and personal jurisdiction need not be asserted (and if they were pleaded improperly, the court would probably grant leave to amend rather than awarding a judgment on the pleadings). Thus, Dave's motion was properly denied.

B. Al's Motion to Dismiss

Whether or not Al's motion should have been granted depends upon whether the court should have applied the state rule governing the relation-back of the amendment or the corresponding federal rule. When federal jurisdiction is premised on diversity of citizenship, the Erie doctrine requires that the court apply the substantive law of the forum, although procedural matters are generally governed by federal law.

Ordinarily, when the Federal Rules of Civil Procedure (FRCP) or the Federal Rules of Evidence (FRE) specifically cover the issue, the matter is deemed to be procedural and the federal rule will apply. Rule 15(c) of the FRCP provides that an amendment which adds a new party will relate back to the date of the original complaint (and thus will fall within the limitations period) if the new defendant (a) had notice of the institution of the action before the statutory period had run and (b) he knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. Under this test, the amendment would not relate back, and Al's motion should have been granted, because there is no indication that Al was aware of Paul's suit against Dave and, in any case, Dave was not mistakenly named in place of Al (their respective liabilities are not dependent on the fault of the other).

Paul no doubt argued, however, that Rule 15(c) was not intended to preclude the application of more liberal state rules and thus the issue should be governed by the outcome-determinative test. Under this rule, the federal court must apply the law of the forum if state and federal laws would lead to substantially different results (at least so long as this would not interfere with countervailing strong federal policy). Since Paul's action against Al would be completely barred under federal law but permitted under State Y law (since Paul's claim against Al clearly arose out of the same occurrence as the action against Dave), the issue is outcome-determinative and thus state law should be applied.

Alternatively, Paul may have convinced the court that while Erie requires the court to apply the substantive law of the forum, it only permits the application of federal law to procedural issues. Since the purpose of Erie is to discourage forum shopping by prohibiting the plaintiff from suing in federal courts simply because he would obtain a more favorable result under federal law, federal law should not be applied here because it provides him with lesser rights than does the law of the forum. Since it appears that the purposes of Erie are best served by applying State Y law in this case, the court's ruling was correct under this analysis.
C. **Al's Motion to Compel Discovery**

1. **Answer to Interrogatory**

   In general, all non-privileged information is subject to discovery if it is relevant to the case or reasonably calculated to lead to the discovery of admissible evidence. Even if there is some basis for denying discovery of the statements themselves (see below), whether or not such statements exist is not privileged nor protected by the work-product rule. Therefore, the ruling on this point was correct.

2. **Production of Documents**

   a. **Privilege**

      Confidential communications between a client and his attorney are privileged and are not subject to discovery. Normally, the privilege only covers communications to or from an attorney and the contents of documents do not become privileged simply by being turned over to a lawyer. If Wilma had been acting upon the instructions of Len, she could have been construed as an extension of him and the statements would be privileged. Here, however, she acted on her own and this theory would not apply. Thus, the rule of attorney-client privilege would not prevent the production of the statements.

   b. **Work-Product**

      The work-product rule generally prohibits the discovery of documents and tangible things prepared in anticipation of litigation or trial. This rule is not necessarily limited to items prepared by attorneys or their representatives; thus, the statement of the witnesses would seem to be protected since it appears that Wilma was acting in anticipation of litigation even though Paul had not yet hired an attorney.

      The work-product rule will not protect information which cannot otherwise be obtained. Here, however, there is no indication that Al could not find witnesses through the use of ordinary investigation techniques or discovery proceedings and then get his own statements. Thus, denial of discovery would not impose an undue hardship on Al.

      Finally, the mental impressions, conclusions, opinions or legal theories of an attorney are absolutely immune from discovery. Therefore, even in the unlikely event that the statements themselves would have to be turned over to Al, Paul would be allowed to excise Len's marginal notes as they no doubt contain his personal view of the case.

**ANSWER TO QUESTION #11**

A. **Subject Matter Jurisdiction.** As no federal question is involved in this case, federal jurisdiction is appropriate only if there is diversity jurisdiction. As there is diversity between the plaintiff and the defendant, the only issue is whether the monetary requirement for diversity jurisdiction (i.e., more than $75,000) is met.

   It is arguable whether the statutory amount-in-controversy requirement is met. On the one hand, the plaintiff (Byer) will argue that, if he loses, he will be liable to the defendant (Seler) in the amount of $80,000, which satisfies the jurisdictional requirement. The defendant will argue, on the other hand, that the plaintiff has already admitted to owing $25,000, so the only amount truly in controversy is the remainder, $55,000 ($80,000 claimed by Seler minus $25,000 admitted to be owing by Byer = $55,000 claimed by Seler but refused by Byer), which fails to meet the jurisdictional requirement.
Personal Jurisdiction. The State B federal court has personal jurisdiction over Seler if a State B state court would have jurisdiction over Seler. The service of process on Seler was accomplished in compliance with the state's long-arm statute, so there appears to be no question that an assertion of personal jurisdiction over Seler is at least authorized by statute.

The issue, then, is whether personal jurisdiction in this case is permitted by the appropriate constitutional standards. It is well-settled that State B may assert jurisdiction over the defendant, Seler, if he has sufficient minimum contacts with the state. While Seler does not appear to have any ongoing contacts with State B, personal jurisdiction may be found from even a single contact with the state so long as that contact is the basis of the suit in question. That is the case here, where Seler is being sued on a contract executed in State B with a citizen of State B. Seler may argue that his contact with State B is not purposeful, as required by *Hanson v. Denckla*, since it does not appear that he actively sought to sell the property in State B, but may have merely signed the contract in State B as a matter of convenience. However, this argument is likely to fail because Seler's contact was at least knowledgeable, and it cannot be said that State B's assertion of personal jurisdiction over Seler offends traditional notions of fair play.

Thus, the court's decision to deny the motion to dismiss on the basis of lack of personal jurisdiction was correct.

B. A jury trial is proper only in regard to legal claims at issue. The plaintiff's cause of action is for reformation, an equitable claim. The nature of the defendant's claim is more difficult to ascertain. It can be characterized as either a claim for breach of contract (a legal claim) or a claim for specific performance (an equitable claim). Strictly speaking, Seler's counterclaim is more properly construed as a claim for specific performance, since he seeks only specific enforcement of the debt owed to him. He apparently does not seek damages, which would be the appropriate relief on a claim for breach of contract. However, it can be said that Seler's claim for specific performance is based on a legal claim for breach of contract, and so he has a right to a jury trial in regard to his claim. Thus, the court was correct in denying the motion to strike the demand for a jury trial.

C. Federal Rule 26(b)(4)(A) provides that an opponent may discover the identity and substance of the opinion of any expert expected to testify at the trial. Therefore, the court order to disclose the identity of the appraisers and their appraised values was proper if Byer intended to produce the appraisers as expert witnesses at the trial.

If, however, Byer hired the appraisers in anticipation of litigation but did not intend to use them as expert witnesses at the trial, the appraisers' opinions (i.e., the appraisals) would constitute work product, which is discoverable only upon a showing of exceptional circumstance making it difficult for the opponent to obtain similar opinions from others. Since Seler can hire his own appraisers, he cannot meet this standard. Thus, in that case, it was improper for the court to order disclosure of the appraisals.

If the appraisals were not done in anticipation of litigation and the appraisers are not expected to testify at the trial, the information in question is not privileged and is fully discoverable. Thus, in that instance, the court should have ordered release of the appraisers' written opinions.

Finally, Byer might raise the additional argument that the information sought is not discoverable because it is not relevant. However, this objection will fail, since the standards for relevance are very broad and evidence on the appraised value may be relevant to show that there was a typographical error in the execution of the contract.

D. A judgment as a matter of law is appropriate only where there is no substantial evidence supporting the verdict. A judgment as a matter of law is not appropriate where there is room for a reasonable difference of opinion as to the verdict.
Since, in this case, there is little corroborating evidence to support the opponents' testimony, a verdict can only be reached on the basis of a subjective judgment of which party is more credible. Thus, there can be a reasonable difference of opinion on who should prevail and there is "substantial" evidence supporting either party. In such a situation, a judgment as a matter of law is not appropriate.

E. Byer failed to move for a judgment as a matter of law at the end of the trial. Therefore, he is not permitted to renew the motion under F.R.C.P. 50(b).

ANSWER TO QUESTION #12

1. Personal Jurisdiction

In order for a state court to assert personal jurisdiction over an out-of-state defendant, there must be notice and compliance with the Due Process Clause of the Fourteenth Amendment. While the first requirement is clearly met (Dan has received notice through being served with process), it is questionable as to whether Dan has sufficient "minimum contacts" with State X such that it would not offend traditional notions of fair play and substantial justice if he were required to defend an action in that state.

In determining whether Dan had minimum contacts with State X, one must consider (1) the quantity and quality of contacts between Dan and State X, (2) the extent to which he has purposely availed himself of the protections of State X, (3) the relationship between the above and the present matter, and (4) the foreseeability that he might be called upon to defend an action in State X. While Dan clearly has some contacts with State X (his interest in the cabin and the 12 days or so that he spends there each year), these do not appear to be significant in quantity or quality, and they have absolutely nothing to do with the accident in question. Similarly, while he has availed himself of the protections of State X with regard to ownership and use of the cabin, this too has no connection with Pat's suit. Finally, it is not foreseeable that his act of driving his car in State Y would result in him being sued in State X. As a result, the court acted improperly in denying Dan's motion to dismiss.

2. Waiver of Objections to Jurisdiction

a. Personal Jurisdiction

In most states, a defendant does not waive his objections to personal jurisdiction by making a special appearance - i.e., coming to the state solely to litigate the issue of jurisdiction. Once the issue is resolved adversely to him, however, there is a split of authority. In states which allow immediate review of such a ruling, a decision to forego that route and defend the case on its merits constitutes a waiver of the lack of personal jurisdiction. In most states, however, interlocutory review is not available and the defendant is thus free to defend on the merits and still raise a lack of personal jurisdiction on a general appeal.

b. Subject Matter Jurisdiction

It is well established that a decision rendered by a court without valid subject matter jurisdiction is void for all purposes. In other words, a lack of subject matter jurisdiction can never be waived and may properly be raised for the first time on appeal. Thus, the appellate court was clearly incorrect in affirming the trial court judgment.

Since the prior judgment was void due to a lack of subject matter jurisdiction, it can have no res judicata or collateral estoppel effect. Nevertheless, it is necessary to assume that this is not the case in order to resolve the remaining issues raised by the question.

3. Bob's Motion Against Dan
Since Bob was not a party to the prior action nor was he in privity with a party, his motion could not be based on res judicata. At least some jurisdictions allow the related doctrine of collateral estoppel to be used by a person who was not a party in the prior action, however.

Under a strict application of the doctrine of mutuality, Bob could not use collateral estoppel against Dan if Dan could not use it against Bob. As will be discussed in Part 5, Bob, as a non-party, could not have his rights adversely affected by collateral estoppel and thus Bob's motion would have to be denied.

Many states, however, reject the mutuality rule and allow non-parties to utilize collateral estoppel against a party who had a full and fair opportunity to litigate the issue and the incentive to do so. Here, Dan clearly litigated the issue of his negligence and had the incentive to do so fully; obviously, if it is worth Dan's time to litigate the issue in a claim by Bob for $10,000, he must have had adequate incentive to litigate the issue when Pat sought $200,000 in damages, 20 times the amount of Bob's claim.

Assuming that Bob can use collateral estoppel at all, Dan would be prohibited from relitigating issues of fact which were actually litigated so long as their direct resolution was essential to the prior verdict. The issue of Dan's negligence was obviously litigated and necessarily resolved against Dan, since negligence appears to be the only possible theory upon which Pat could have prevailed. However, under the Cardozo view of duty as stated in Palsgraf, there would be no negligence toward Bob, even if Dan breached a duty to Pat, unless Bob was in the foreseeable zone of danger at the time of Dan's unsafe act. Furthermore, even if Dan breached his duty of due care to Bob as well as Pat (either because the Andrews view of Palsgraf is followed under governing law or Bob was clearly in the zone of danger), other issues (e.g., damages, causation, and possible defenses) would still have to be litigated. In short, Bob is at best entitled to a partial summary judgment.

4. Pat's Motion Against Dan

Pat's motion is also based on the doctrine of collateral estoppel. The central issues of Dan's negligence and Pat's lack of contributory negligence have obviously and necessarily been resolved in Pat's favor in the prior action. Therefore, collateral estoppel would require the court to grant Pat's motion as to the issue of liability (although damages would still have to be proven) unless Pat's cross-claim is barred by res judicata (see answer to Part 6).

5. Pat's Motion Against Bob

While some jurisdictions will allow collateral estoppel to be used offensively by a non-party, due process prohibits use of the doctrines of former adjudication against a person who was not a party, nor in privity with a party. To do otherwise would deny Bob the opportunity to prove his case. After all, the mere fact that Dan was unable to prove that Pat had acted negligently does not mean that Bob could not prove negligence. This is particularly true since facts could be imagined which would indicate that Pat breached his duty of due care to Bob even though he did not, at the same time, breach his duty to Dan. This motion must be denied.

6. Dan's Motion Against Pat

Under the doctrine of res judicata, a judgment for the plaintiff merges all claims against the defendant which are part of the same cause of action even if some of the claims were never actually litigated; this prevents a plaintiff from splitting his cause of action. Therefore, if Pat's personal injuries and the damage to his car are part of the same cause of action, Dan's motion for summary judgment must be granted.

There are a variety of tests used to determine whether two or more claims arise from the same cause of action. Ultimately, the result will depend upon which of these tests is used in the jurisdiction.
Probably the predominant test is whether the claims arise from the same transaction or occurrence; if so, they are part of the same cause of action. Obviously, both of Pat's claims arise from the same automobile accident and thus this test would require the court to grant Dan's motion.

A second test is whether proof of the two claims would require essentially the same evidence. While damage issues would be different, the core issues of negligence and contributory negligence would be proved or disproved by the same evidence. This test also would require the court to grant Dan's motion.

Some courts, however, say that claims arise from the same cause of action only if the same primary rights are involved. Since injury to property and personal injury relate to different rights, this test would require the court to deny Dan's motion.

**ANSWER TO QUESTION #13**

**I. DID THE COURT PROPERLY DENY PARTS' MOTION TO DISMISS?**

A. Statute of Limitations

1. Erie Doctrine

When a federal court has jurisdiction over a matter based on diversity, the Erie Doctrine applies. The Erie Doctrine provides that even though the matter is being brought in federal court, pursuant to federal procedural law, the federal court must apply the state's substantive law. The reasons behind the Erie Doctrine are to discourage forum shopping and to avoid inconsistent results depending on where a plaintiff happens to file suit.

In this case, the state law that we are dealing with is a statute of limitations. The United States Supreme Court has held that statutes of limitations are considered “substantive” law. Thus, State X's federal district court must apply State X's statute of limitations to this case.

2. Timely Complaint/Relation - Back Rule

A complaint must be filed within the time period recognized in the applicable statute of limitations. Under these facts, Salesco filed its complaint before the statutory period expired; however, the complaint named "Subparts" rather than Parts as the defendant, and was therefore filed against and served upon the wrong party.

By the time Salesco amended the complaint to name "Parts" as the defendant, the statute had expired. Generally, this would bar Salesco's claim; however, if applicable, the relation back rule will change this result. Under this rule, if a plaintiff files an amended complaint in order to add a new party after the statute of limitations has expired, the filing of the amended complaint will "relate back" to the filing of the original complaint.

In order for the relation-back rule to apply, the following requirements must be met:

a. Same transaction/occurrence

The complaint and amended complaint must involve the same transaction or occurrence. The plaintiff cannot completely change the cause of action and expect the amended complaint to relate-back to the original complaint. In our case this requirement is met, because both the complaint and the amended complaint concerned the same breach of contract action. The body of the original complaint was accurate. Salesco only named the wrong defendant.
b. **Added party knew or should have known of the mistake**

To relate back, the new defendant must have known or should have known that but for a mistake it would have been named as the defendant in the original complaint.

Here, Salesco will argue that Parts should have known that it was supposed to be named as the defendant. The original complaint was served on Parts, and it described the contract between Salesco and Parts. In addition, Subparts, the party that was named in the original complaint, is an unincorporated division of Parts. As soon as Parts received the complaint that named Subparts as the defendant, it should have known that Salesco had made a mistake, and that the complaint was meant for Parts.

c. **Notice Within 120 Days**

In order for the date of the amended complaint to relate-back to the original complaint, Parts must receive prompt notice of the case. Here, Parts had actual notice of the case, because Parts was served with the original complaint. Also, Parts was served with the amended complaint naming Parts as the defendant. Therefore, Parts knew of the mistake within the 120 day service limit.

d. **No prejudice to defendant**

Most courts will only allow the amended complaint to relate-back if the defendant is not prejudiced. There is no evidence of prejudice to Parts, i.e., no lost evidence, no dead witnesses, etc.

Thus, the court's denial of Parts' motion based on the statute of limitations was proper.

B. **Amount in Controversy - Good Faith Estimate**

Parts moved to dismiss Salesco's suit for lack of subject matter jurisdiction. Specifically, Parts argues that Salesco has not met the “amount in controversy” requirement, because the damages could not exceed $40,000. In diversity cases, the amount in controversy must be greater than $50,000. A plaintiff will meet this requirement as long as the plaintiff approximates the amount in good faith to be over $50,000.

For a dismissal on the grounds of failure to meet the jurisdictional amount to be successful, Parts would have to show that there was no way - to a legal certainty - that Salesco could collect over $50,000. Here, Salesco will argue that the benefit it expected to receive on the contract was a total of $100,000. Parts could argue that this claim is not based on good faith, but there are no facts to evidence bad faith.

In addition, if there is a single plaintiff against a single defendant, the plaintiff is allowed to aggregate all of its claims against the defendant. Here, Salesco would be allowed to add up all of its claims against Parts in order to satisfy the amount in controversy requirement.

Therefore, the court was correct to deny Part’s motion to dismiss based on the grounds of failure to satisfy the jurisdictional amount.

C. **Diversity Between the Parties**

Finally, the court properly denied Parts' motion to dismiss because of lack of diversity, subject matter jurisdiction.

A federal court only has subject matter jurisdiction over a case if there is a federal question involved or if there is diversity of citizenship. Here there is no federal question involved, because Salesco is not claiming any federal rights. Therefore, in order to be in federal court, there must be diversity jurisdiction.
The requirement of diversity has been interpreted to mean complete diversity, i.e., no plaintiff can be of the same state as any defendant. Here, the parties are both corporations, and a corporations' citizenship is determined by its principal place of business and the state of its incorporation.

The principal place of business is determined either by the corporation's nerve center or muscle center. The nerve center is where the business decisions are made. The muscle center is where the majority of the work is carried out.

Parts is incorporated and has its principal place of business, its headquarters, in State A. Parts could try to argue that its principal place of business is in another state but because its decisions are made in State A, that is the location. Parts is therefore a resident of State A.

Salesco is incorporated in State X, but it is unclear where its principal place of business is. If that is in State A, there will be a lack of complete diversity because the two corporations will be residents of the same state.

If Salesco has its principal place of business anywhere besides State A, there will be complete diversity. The fact that Parts does business in all 50 states will not defeat this diversity. In this situation, the court will have ruled properly.

II. DID THE COURT PROPERLY DENY DISTRIBCO'S MOTION TO DISMISS?

Parts has joined Distribco by impleader. Impleader is an appropriate action for a defendant to take in order to protect its rights through indemnification. Here, joinder of Distribco has destroyed complete diversity jurisdiction, because Salesco and Distribco are residents of the same state. The court no longer has diversity jurisdiction, nor does it have federal question jurisdiction, because the case regarding Distribco does not involve a matter of federal law.

The court, however, properly denied Distribco's motion to dismiss, because the court has supplemental jurisdiction over the claim by Parts against Distribco.

A. Supplemental Jurisdiction

Historically, courts have exercised ancillary jurisdiction over third-party (impleaded) defendants. Now, ancillary (& pendent) jurisdiction have been codified under the supplemental jurisdiction statute.

This statute allows a federal court to exercise jurisdiction over a claim that it doesn't otherwise have jurisdiction over; in other words, where there is no independent diversity or federal question jurisdiction.

1. Requirements of Supplemental Jurisdiction

a. Case Controversy - Common Nucleus Operative Fact

Supplemental jurisdiction exists when a claim arises out of the same transaction or occurrence/same nucleus of facts as the underlying claim. A court has discretion whether or not to allow supplemental jurisdiction. Here, the claim of indemnification does arise out of the same transaction or occurrence. Parts is seeking indemnification from Distribco for any potential damages it owes to Salesco on the contract.

Federal courts have liberal views for joinder of parties, because all claims and rights should be decided within a single lawsuit. It is in the interests of judicial economy to hear all related claims at the same time.
Here, it would save time and resources to join Distribco in the case, because Parts will not be forced to bring a second action in order to recover.

Distribco could argue it is not related to the underlying transaction between Parts and Salesco, but there are no facts to support this position. In fact, there are no facts given describing Parts alleged basis for indemnification from Distribco.

It is within the judge’s discretion to determine if supplemental jurisdiction exists. If the judge determined the indemnification claim arose out of the same transaction as the underlying claim and it serves judicial interests, the court properly denied D's motion.

It should be noted; however, that the supplemental jurisdiction statute would preclude any direct action by Salesco, as plaintiff, against Distribco, the third-party defendant. This restriction is imposed to prevent plaintiffs from avoiding the complete diversity rule.

In any event, as stated above, there is supplemental jurisdiction over Distribco, so its motion was properly denied.

**ANSWER TO QUESTION #14**

1. D’s Motion to dismiss for lack of jurisdiction

In order for a federal district court to hear a lawsuit, it must have both subject matter jurisdiction over the claim and personal jurisdiction over the defendant.

**Subject Matter Jurisdiction**

Subject matter jurisdiction in the federal courts is either diversity jurisdiction or federal question jurisdiction. In this case, Pat’s claims are based on a State Y law, and do not present a federal question. Whether or not a federal claim such as under the Eighth Amendment to the United States Constitution could have been raised on these facts, it seems the plaintiff has not done so. The basis of jurisdiction in this case must therefore be diversity jurisdiction.

In order for a federal court to assert diversity jurisdiction, there must be complete diversity of citizenship between the parties to the action. Here, the plaintiff, Pat, could be either a resident of State X or State Y. He was living in State X prior to his arrest, but then lived in State Y in D hospital. The test for individual citizenship is place of residence with intent to stay. Here Pat did not voluntarily move to State Y and has no intent to stay in State Y; in fact he has already returned to State X. Therefore it appears that Pat is a citizen of State X.

On the other side, a corporation is the defendant. Corporate citizenship is both (1) the place of incorporation; and (2) the principal place of business. Here D is incorporated in State Y and located and doing business in State Y, so its citizenship is State Y.

It therefore seems that we have diversity of citizenship because P is a citizen of X and D is a citizen of Y. D may try to argue that since this is a class action, complete diversity requires checking the citizenship of all class members. This argument will fail because class action diversity is determined only by looking to the class representative. Here P is the representative, so there is complete diversity.

Another requirement for diversity jurisdiction is that the dispute involve more than $75,000. Here Pat is seeking $70,000 in damages and an injunction. Looking only at Pat's damages request, it would seem to fail the amount in controversy requirement. However, when injunctions are sought, a monetary value is assigned to that remedy and added to the damages. The amount is usually decided by looking to
the value of an injunction to the plaintiff. Here that value is likely to be high enough to meet the amount in controversy requirement when added to the damage claim.

The court could properly assert diversity jurisdiction.

**Personal Jurisdiction**

D will argue that even if there is subject matter jurisdiction, D is not subject to suit in State X because it is resident in State Y. Federal courts can assert personal jurisdiction over defendants to the same extent as state courts in the state can. This is generally governed by the state long-arm statute, subject to a constitutional analysis. Because the facts do not provide a state statute, the constitutional analysis should suffice.

Personal jurisdiction is proper where a defendant has such minimum contacts with the state so as not to offend notions of fair play and substantial justice by holding D for trial in that state. Here D satisfies these tests.

D had minimum contacts with State X because they accepted State X’s prison overflow. D therefore purposefully availed itself of State X’s laws. Also it was foreseeable that D could get sued based on this conduct because they assumed a duty of care over the prisoners. D therefore had the requisite minimum contacts with State X to satisfy constitutional due process requirements.

These contacts also satisfy the fair play test because the suit at issue is directly related to D’s contacts. The court properly denied D’s motion because there is both SMJ and PJ.

2. **Certifying the Class**

Class action certification requires the following elements: (1) the number of plaintiffs makes joinder impractical; (2) there are common claims for all members; (3) representatives have claims typical of the class members; and (4) there is adequate representation.

Here the first element, numerous plaintiffs, is at issue. The potential class is only 25, and it would not seem to be unduly burdensome to join these 25 in a non-class action. However, the class also is designed to include all future inmates of D. This could make the class much more numerous. Joinder of such future plaintiffs is impractical, so that should satisfy the first requirement. The common claims and adequate representation requirements appear to be met.

The court erred in denying certification on the ground of the number of potential plaintiffs.

3. **Motion to Change Venue**

The Federal Rules state that venue in a diversity action shall be: (1) where the events occurred; (2) where defendant resides; or, if neither of these applies, (3) where any defendant is subject to personal jurisdiction. If venue is not properly placed originally, a court may either dismiss the case or transfer it to a new venue in the interests of convenience and justice.

Here the selected venue, State X, does not satisfy either of the first two requirements. The events at issue occurred in State Y and the defendant resides in State Y. It therefore seems that venue should have been in State Y. D is also subject to personal jurisdiction in State X because it is incorporated there, so venue would be proper in State X if there’s a reason why venue is unavailable or unsatisfactory in State Y.

Here, however, the interests of the parties and the respective states indicate that venue is more proper in State Y. The law at issue is a State Y law which State Y has a much stronger interest in
interpreting. Also, the hospital, all the evidence and witnesses are in State Y, making State Y a convenient forum. There are, nevertheless, some interests in State X. State X has an interest in protecting its citizens such as P. However, this is not strong enough to overcome the factors in favor of State Y.

The court should have granted D’s motion to change venue because it should have been filed in State Y initially and the interests of justice so require.

4. Motion to Dismiss for Mootness

The Constitution limits federal courts to hearing only actual cases and controversies. One of the requirements for a valid case or controversy is that the claim not be moot. Here P has posted bail and been released from D’s custody, so D argues that the case is moot.

This argument will fail for several reasons. First, P has claimed damages against D. Those injuries have not been made whole simply by releasing P. P is still entitled to recovery for those injuries. Therefore, P’s damage claim is not moot.

Second, even P’s injunction claim is probably not moot. When a class action is asserted, mootness of the representative’s claim does not moot the entire claim if there are members who still have live claims. Here there are at least 25 other plaintiffs who still have viable claims for injunctive relief. Therefore, the mootness claim should fail.

The court erred in granting dismissal for mootness.

ANSWER TO QUESTION #15

1. Joinder of Amcorp in Federal Court

Diversity jurisdiction in federal court requires a $75,000 amount in controversy, which is met here, and complete diversity, namely, none of the parties on one side of the action may have the same citizenship as any of the parties on the other side of the action. Paul is a citizen of State A and sought to join Amcorp, a corporate citizen of State A, as a defendant. This move would defeat the diversity jurisdiction of the court, and there appears to be no federal claim that would allow the court to exercise ancillary jurisdiction over Amcorp on a federal question basis. However, whether dismissal was proper depends on whether joinder of Amcorp was necessary, i.e., whether the action could have proceeded without Amcorp or Amcorp was indispensable.

Joinder is permitted when the claims against a party involve the same transaction or occurrence as claims against other parties and also involve the same questions of law and fact. Here the same transaction – the purchase of the chainsaw – might result in liability for both Amcorp and Bigcorp. Common issues include whether the product was defective, whether it caused Paul’s injuries, and the extent of damages. Therefore, the court could have permitted joinder of A if it hadn’t been for the jurisdictional problem.

Because of the jurisdictional problem, the action must be dismissed if joinder was required and the party is considered “indispensable” to the action. A person who is subject to service of process must be joined as a party in an action if without that party complete relief could not be awarded the existing parties to the action or such parties might be subjected to a substantial risk of incurring multiple or inconsistent liabilities by reason of the third party’s interest or claim, or if disposition of the action might impair the third party’s interest or claim. If the absent person cannot be made a party, the court must decide whether or not to dismiss the action, considering the possible prejudice to the missing party and the adequacy of the judgment and remedies available to the existing parties.
It seems that Amcorp was a necessary party here. Bigcorp did not manufacture the saw that harmed Paul, yet certain issues might be decided such as defectiveness of the saw and a causal relationship between the defect and Paul’s injury that could affect Amcorp’s liability. Amcorp could be materially prejudiced without having a chance to defend itself. Amcorp might later be sued both by Paul and by Bigcorp for contribution, potentially subjecting it to multiple liabilities.

Nevertheless, Amcorp was probably not indispensable. Paul can receive complete relief against either the retailer or the manufacturer, and the court can award full damages against Bigcorp. Amcorp can raise its own defenses when it gets its day in court if sued by Paul or Bigcorp. Collateral estoppel should not bar Amcorp from litigating essential issues since it was not a party in the former action. Thus, dismissal for failure to Amcorp was incorrect.

2. **Dismissal of Action Against Amcorp in State B for Lack of Personal Jurisdiction**

A state may exercise personal jurisdiction over an out-of-court defendant to the extent authorized by its legislature under the state’s long-arm statute, or as permitted by the courts within the limits of due process, which requires that the defendant had minimum contacts with the forum state and receive adequate notice of the action. Since we do not know what State B’s statutes permit, the court’s action should be examined under the constitutional due process limits. State B could decline to exercise its jurisdictional powers to the full extent of the law, and Paul could not complain that the dismissal was a denial of his rights, but nevertheless we can examine whether such dismissal was required.

The first requirement for minimum contacts is that the defendant have purposefully availed itself of the benefits of the forum such that it is fair to require it to answer to process there. Apparently, Amcorp’s only regular dealings in State B involved the twice-yearly sales of surplus saws to Bigcorp. That should be sufficient to allow Amcorp to anticipate being hauled into court in State B on issues related to the manufacture of the saws that Amcorp deliberately distributed there. It does not appear that dismissal by the State B court was required.

3. **Dismissal of Action Against Bigcorp in State A for Res Judicata**

Dismissal on the ground of res judicata is proper where there has previously been an adjudication on the merits. Paul has attempted to sue Bigcorp twice. However, dismissal for nonjoinder is not an adjudication on the merits and is without prejudice. Paul voluntarily dismissed his action against Bigcorp in State B without prejudice, also not an adjudication on the merits. There is no res judicata effect from either of these actions.
QUESTION #1

A statute in State A levies an "obscene publication tax" of one dollar a copy "on the publication of each copy of any lewd, lascivious, or obscene material." The publisher must pay the tax within 30 days of publication. If the tax has not been paid, any State A revenue agent finding such material in State A may seize and destroy it.

Price is a book publisher in State B. Price published 1,000 copies of a book of questionable taste and sold half of them to independent "adult bookstores" in State A. Price had received the orders for the books by telephone and had shipped the books by parcel service.

Price has not paid any "obscene publication tax" to State A.

A. Is the statute valid? Discuss.

B. Assuming the statute is valid, may State A collect from Price the tax on the books published by Price and shipped to State A? Discuss.

C. May State A revenue agents seize and destroy copies of the books in State A? Discuss.

QUESTION #2

On January 15th, Dan, 15 years old, received the following notice from the juvenile court of State X:

"You have been charged by Police Officer A. Smith as being within the jurisdiction of this Court, which extends to any person under 17 who has violated a state law. Officer Smith charges that you have violated section 2705 of the Criminal Code of State X which provides: "No person shall conduct himself in a public street in a manner annoying to persons passing by." The consequences of a finding that you are within this court's jurisdiction range from a simple warning against future misconduct to placement in a state institution. You are entitled to contest the charges and to have them established by clear and convincing evidence. You also are entitled to be represented by counsel, to be confronted by the witnesses against you, and to compulsory process for obtaining favorable witnesses. Cases are ordinarily tried before a judge, but a jury trial will be provided at your expense. Your trial date is February 15th, at which time you may either admit the charges or contest them."

The procedures set forth in the notice are those provided for in the juvenile court law of State X.

Dan was represented by counsel at all proceedings.

At the juvenile court hearing, evidence was received that Dan constantly used a bicycle horn with a loud and raucous sound and the juvenile court so found and concluded such conduct violated the cited provisions of section 2705. The court further found, however, that because petitions charging Dan with more serious misconduct had been sustained by the juvenile court on five prior occasions, Dan was not amenable to further treatment within juvenile court facilities. The court, in accordance with the law of State X, thereupon referred the matter to the local prosecutor. Dan has now been formally charged in the municipal court with a criminal violation of section 2705 of the Criminal Code of State X.
A. What objections, based on the United States Constitution, might have been made on behalf of Dan prior to or at the juvenile court hearing, and how should they have been decided? Discuss.

B. What further objections, based on the United States Constitution, might be made on behalf of Dan prior to or at the municipal court trial, and how should they be decided? Discuss.

QUESTION #3

Doug was convicted of robbery in a State X court. He was sentenced to prison, execution of sentence was suspended, and probation was granted. While on probation he appeared before a State X grand jury in compliance with a subpoena to answer questions concerning a homicide. He refused to answer one question at the hearing, claiming that the answer would tend to incriminate him. He then was granted statutory immunity from prosecution for any crime that would be revealed directly or indirectly by his testimony. Doug continued to refuse to answer, however, stating that such immunity did not protect him from prosecution by federal authorities and that his answer would tend to incriminate him under federal law.

In accord with statutory procedures, Doug was then taken before a State X trial court and there was instructed by the court to answer the question asked at the grand jury hearing. Doug repeated the statements he had made at the grand jury hearing and again refused to answer the question. He was thereupon cited by the court for contempt. Doug demanded, but was refused, a jury trial on the contempt citation. Doug's motions for a hearing before another judge and for a continuance to obtain counsel were denied. The court thereupon found Doug guilty of contempt of court and sentenced him to imprisonment for a term of two months.

Subsequently, the trial court which had granted Doug probation held a hearing to determine whether his probation should be revoked due to the contempt conviction. After establishing his indigency Doug requested that counsel be appointed to represent him. The court refused to appoint counsel and, after the prosecutor introduced the record of the contempt hearing, found that Doug had violated the conditions of his probation by disobeying a court order and being adjudged guilty of contempt of court. The court then revoked Doug's probation and ordered execution of the suspended sentence imposed on the robbery conviction.

Doug has appealed from the order revoking probation. You represent Doug on appeal. What issues might you reasonably raise to secure Doug's release and how should the court rule on each issue? Discuss.

QUESTION #4 (DISCUSSED IN LECTURE)

A State X statute provided that local school boards could permit the use of the facilities of public schools by private groups or individuals for "educational programs," for a rental equal to the costs of light, heat, and maintenance for the period of such use.

Tom, a citizen and taxpayer of State X applied to his local school board for permission to rent the auditorium of a public school in which to present a lecture, open to the public, proving that "the earth is flat." The school board refused to make the auditorium available to Tom on the ground that the proposed lecture program was "not educational." Later, the school board rented the same school auditorium on a day different from the day requested by Tom, to members of the Modern Church, a local religious organization, for the members to use in presenting a lecture entitled, "The Principles and Practices of the Modern Church." According to the application, the lecture was to be open to the public free of charge and would provide information about the Modern Church and its doctrines. The school board required that the written rental agreement with the Modern Church members contain a provision prohibiting the members from engaging in "religious advocacy or observance" during the lecture.
Before the date he had scheduled for his lecture, and prior to the date set for the Modern Church lecture, Tom brought suit in State X court against the school board, in which Tom sought injunctive relief (1) requiring the school board to rent the auditorium to him for his lecture, and (2) prohibiting the board from renting the auditorium to the Modern Church members. The trial court denied any injunctive relief to Tom and dismissed his suit. The judgment was affirmed by the State X appellate court, and is now before the U.S. Supreme Court for review.

What rights arising under the U.S. Constitution should be raised by each party and how should the court decide them? Discuss.

QUESTION #5

The State X legislature authorized one of its committees to hold hearings to investigate the causes of violent labor disputes in State X. Doe, an official of a labor union in State X, appeared as a witness at one of the hearings. Under oath, Doe testified that the disputes were caused by "communist infiltration of unions." While he could not identify any communists in unions in State X, Doe referred to "known communists" in unions elsewhere, specifically mentioning Jones, a federal employee and an official of the local of a federal employee's union in State Y.

While Jones was visiting friends in State X, the committee subpoenaed him to appear as a witness. When Jones appeared pursuant the subpoena, the committee did not say anything to him about any rights he had to legal counsel, and Jones did not ask to be counseled by an attorney. After Jones was sworn as a witness, the staff counsel for the committee told Jones of Doe's testimony, and asked him if Doe's statement that Jones was a communist was true. Jones expressed bewilderment about being called as a witness, stating he had never previously visited State X and knew no labor union officials there. The staff counsel did not explain why Jones had been subpoenaed, and demanded that Jones answer his question. Jones replied: "Although I have done nothing wrong, I will refuse to answer a question that violates my constitutional rights." The committee cited Jones for contempt on the basis of his continued refusal to answer the question. Subsequently, Jones was tried for and convicted of contempt of the committee in a State X court. Jones was represented at the trial by legal counsel of his own choice.

Later, a federal investigation revealed that Jones was a member of the Communist Party and had been a member when he had sworn under oath, as required of all federal employees, that he was "not a knowing member of the Communist Party." A federal grand jury indicted Jones for perjury, and he was convicted of that crime after trial in the United States District Court, on proof that he knowingly lied in swearing to the oath.

Both convictions are now before the United States Supreme Court for review.

What rights arising under or protected by the United States Constitution should Jones urge for reversal of each conviction, and what result should follow in each case? Discuss.

QUESTION #6 (DISCUSSED IN LECTURE)

The legislature of State A passed a new law requiring drivers of trucks carrying explosives on roads in State A to have "Special Driving Permits." These permits are to be issued only after very rigorous physical examinations and driving tests. The State A law also provides that only permits issued by State A are acceptable for truck drivers using roads in State A; permits issued by certain other states, all of which have less stringent requirements, are not acceptable. Under the State A law, such permits cannot be issued to persons under 30 or over 60 years of age, because statistical studies have shown that drivers in these categories have higher accident frequencies.
Assume that a federal law prohibits employers from discriminating against employees on the basis of age.

Ned, who is 62 years old, is a driver for Ajax, a truck company engaged in the interstate transportation of dynamite for construction projects in various states, including State A. Ned would normally be assigned to drive dynamite shipments from Ajax's headquarters, in State B, into State A, but he cannot obtain a Special Driving Permit from State A. Ned would be able to satisfy both the physical examination and driving test requirements of the State A law, but is barred solely because of his age. Ned has a driver's permit issued by State B qualifying him to drive trucks carrying explosives.

Ajax and Ned have brought suit in the United States District Court in State A against State A officials seeking to have the State A law declared invalid. The defendants have moved to have the case dismissed on the ground that the State A courts have not yet ruled upon the validity of the State A law.

A. How should the court rule on the motion for dismissal? Discuss.

B. Assume the motion to dismiss is denied. What rights arising under and protected by the U.S. Constitution should Ajax and Ned urge in support of their claims that the State A law is invalid, and what results should follow? Discuss.

QUESTION #7 (DISCUSSED IN LECTURE)

Paul was born in the United States. After voluntarily serving in the Canadian Army for several years, he returned to his home state and became employed as a meter reader by the Water Department of City, a municipal agency. In the performance of his job, Paul enters private residences and commercial buildings in City to read water meters.

No regulations governing the dress or appearance of Water Department employees existed when Paul was hired. After his employment had begun, City enacted a dress code ordinance which stated: "All City Water Department employees shall wear a uniform supplied by City when engaged in their employment, and no such employee may wear a beard while so engaged." Paul wore a beard when first employed. Although requested by the head of the Water Department to shave off his beard and wear the uniform provided, Paul refused to do either.

Shortly thereafter, a City election occurred. The incumbent Water Department head was replaced. Paul was a registered voter in the same political party as the unsuccessful incumbent but took no active part in the election campaign. Immediately upon taking office, the newly elected Water Department head, who was a member of a different political party, notified Paul that he was "terminated, because you are registered in the wrong political party and for several other reasons."

After unsuccessfully appealing his dismissal in administrative proceedings with the Water Department and City, Paul filed suit in state court against City, asking for a judgment ordering that his discharge be declared void and that he be reinstated in his job. City's answer alleged that the termination of Paul's employment was proper because (1) Paul had violated City's dress code ordinance for Water Department employees, and (2) a state statute required that "all state and municipal employees must be citizens of the United States" and a federal statute provided that the United States citizenship of any person who voluntarily serves in the armed forces of a foreign country would be deemed surrendered.

What issues under the U.S. Constitution are raised by Paul's suit against City and City's defenses thereto, and how should each of them be decided? Discuss.
QUESTION #8 (DISCUSSED IN LECTURE)

City, a municipality of State X, has a permit ordinance that prohibits making speeches in the City-owned city park without first obtaining a permit from City's police chief. The ordinance authorizes the police chief to establish permit application procedures, and to grant or deny permits based upon the chief's "overall assessment of the good of the community." The ordinance also provides that denial of a permit may be appealed to the city council.

On Tuesday, Tom applied to Dan, City's police chief, for a permit to speak in the city park the following Saturday. Tom gave Dan his name and local address, but Dan denied Tom's application for a permit because Tom refused Dan's request for a summary of what he intended to say in his speech. When Tom told Dan that he intended to make his speech anyway, Dan gave Tom's name and address to the city attorney of City.

The city attorney did nothing about the matter until the following Friday when, without notice to Tom, he made application on behalf of City to a State X court of general jurisdiction for a temporary restraining order preventing Tom from speaking in the city park without a permit. The State X court issued an ex parte temporary restraining order and an order to show cause returnable in five days, directed to Tom. The orders were served on Tom in the city park on Saturday as he was about to speak. Despite the temporary restraining order, Tom spoke to about twenty mildly interested persons who were then in the park for various other reasons.

The essence of Tom's speech was that the federal government, "aided and abetted" by City's government, was "leading America to destruction," and that "those who would survive will eventually have to fight in the streets of the City to regain their liberties." Tom urged the audience to "stockpile weapons" and to "start thinking about forming guerrilla units to take back freedom from the government."

Tom was arrested and charged in the State X court which had issued the temporary restraining order with (a) speaking in the city park without a permit, a misdemeanor, (b) contempt of court for violating the temporary restraining order, and (c) violation of the State X criminal advocacy statute prohibiting "advocating insurrection against local, state, or the federal governments," a felony.

Five years ago, the State X supreme court construed the criminal advocacy statute as applying only to advocacy that is not protected by the United States Constitution.

A week after Tom's speech, in a case unrelated to the charges against Tom, the State X supreme court construed City's permit ordinance as authorizing the City police chief to consider "only the time, place, and manner of the proposed speech, and not its content" in passing upon permit applications.

What rights guaranteed by the United States Constitution should Tom assert in defense to the charges brought against him, and how should the court rule? Discuss.

QUESTION #9

On October 3, 1988, City adopted a municipal ordinance prohibiting the placing of "commercial" signs on rooftops within city limits, with the stated purpose of "... improving the quality of life within City by emphasizing and protecting esthetic values." The ordinance also provided that all signs in place on the date of its adoption, in violation of its terms, must be removed within five years of that date.

In September, 1990, Rugged Cross Church (Church), with its church building situated within City's limits, placed a 20-foot blue neon-lighted sign in the shape of a cross on its church roof, with the message "Join and Support Our Church" in white neon lights inside the blue neon borders of the cross.
After the Church sign was in place, various citizens of the City urged that the City sign ordinance be amended to include all rooftop signs in City. Other citizens complained to City officials that Church's sign was "an eyesore."

Effective October 1, 1990, City amended its sign ordinance by deleting the word "commercial." City then notified Church that its entire neon rooftop sign would have to be removed within five years.

Church has brought suit against City in a state trial court of proper jurisdiction, claiming that the amended City sign ordinance is invalid under the United States Constitution, both (1) by its terms and general application, and (2) as City seeks to apply it to Church.

How should the court rule on each of the Church's claims? Discuss.

QUESTION #10

Acme Brothers (Acme) operates a men's clothing store in a shopping center it owns in City, State X. Acme embarked on an advertising campaign that has been criticized as sexist. In its store windows Acme has life-size posters of a young woman wearing a bikini. The posters' captions portray her as saying such things as "I like to be treated rough by a man in an Acme suit." It is conceded that the posters are not legally obscene.

Members of a feminist coalition in City attempted to picket on the privately owned sidewalk in front of the Acme store to protest these posters, but were told by Acme's private security guards that the shopping center was private property and that the pickets were trespassing. Acme's security guards then physically removed all pickets from the shopping center premises.

The Acme store is part of a sixteen-store chain of Acme outlets located in four states. Acme's advertising campaigns are planned in the home office in another state, and are sent to stores such as that in City. The stores have no choice under company policy but to use the advertising.

After removal of the pickets, the city council of City adopted an ordinance that provides in part:

"It shall be unlawful to display for commercial purposes any picture or to use any other advertising material that portrays any individual in a demeaning or sexist fashion."

Violation of this section of the ordinance is a misdemeanor punishable by a fine of up to $500.

The ordinance also provides:

"The right to picket peacefully, with due regard to pedestrian and vehicular traffic and the rights of all other citizens, shall remain inviolate. Such right shall extend to shopping centers and other areas where the title to sidewalks is privately owned but open to the public for access to retail sales outlets."

Since the adoption of the City ordinance, pickets have appeared in front of the Acme store during business hours. When asked to leave by the Acme store manager, the pickets have shown him a copy of the City ordinance, and have threatened to sue Acme if its security guards attempt to remove them physically.

City has filed a criminal complaint in the appropriate State X court charging that Acme's continuing display of the posters constitutes a violation of the "sexist advertising" section of the ordinance. Acme has also filed suit in State X court against City seeking a declaratory judgment that the picketing section of the ordinance is unconstitutional.
What issues arising under the United States Constitution are raised by City's prosecution of Acme under the ordinance, and by Acme's action against City for declaratory relief, and how should each be decided? Discuss.

QUESTION #11

The Mayo Christian Church (Church) is located in the city of Mayo, State X. The governing body of Church established the Lawyers Society (Society) as a State X nonprofit corporation, to increase the participation of Church in Mayo's community problems. Society is composed exclusively of Church members who are lawyers licensed to practice in State X, all of whom have agreed to work for Society without compensation. Society offers free legal services by its lawyer members to residents of Mayo who are "victims of racial or religious discrimination." Society is financially supported both by Church funds and by a grant of funds from Agency, which administers a State X program providing public funds to legal aid organizations.

Soon after its establishment, Society "targeted" certain apparent instances of discrimination in Mayo as appropriate objectives for its services. Society members have directly approached various Mayo residents who appeared to be victims of discrimination, met with them, explained their legal rights, and then offered them free legal assistance in commencing litigation in State X courts aimed at redressing the apparent instances of discrimination.

However, Society has begun to have legal problems of its own:

A. An organization called "Mayo Taxpayers for Separation of Church and State" (Taxpayers), consisting of State X taxpayers who are residents of Mayo, has brought an action in federal court in State X against Church, Society, and Agency. The complaint challenges the propriety of the use of public funds by a church-sponsored organization and seeks a judgment prohibiting Agency from granting funds to Society.

B. Jay, a lawyer admitted to practice in State X, volunteered to join and work for Society without compensation. He was rejected because he was not a Church member. Jay has brought an action in federal court in State X against Church, Society, and Agency, seeking a judgment requiring Society to admit him to membership. He alleges that his exclusion from membership in Society as an organization supported by public funds constitutes an unlawful discrimination in violation of the United States Constitution.

C. The State X Bar Association (Bar), which is responsible for the enforcement of State X law regulating the practice of law, has charged that the solicitation practices of Society's members violate the State X attorneys' professional disciplinary code, which prohibits "direct solicitation" of clients and legal work by lawyers. Bar has instituted an action in State X court against Society and its members, seeking an injunction prohibiting any further "solicitation" activity by Society members.

What issues arising under the United States Constitution are involved in these three cases, and how should each issue be decided? Discuss.

QUESTION #12 (DISCUSSED IN LECTURE)

County School Board (Board) canceled the remedial reading program in County's public schools. At the same time, Board increased funding for drama arts workshops provided for seniors in the public high schools of County. Such increased funding is about 15% of the cost of the remedial reading program.

Racial minorities comprise 10% of the County population and 50% of the students enrolled in the remedial reading program. "AB" is an organization of the parents of these minority students.
Some students are enrolled in the remedial reading program because of learning disabilities or other handicaps adversely affecting reading skills. "CD" is an organization of the parents of these students.

AB objected to the cancellation of the remedial reading program on the ground that the program's termination would disproportionately affect their children adversely. CD objected to the program's termination on the ground that such action would effectively end public education for their children.

In recommending termination of the program, the Board's director had stated: "This action is a necessary economy measure. We have other educational programs, such as pre-college math, which are educationally more important. Handicapped students will simply have to be served sometime in the future when we again have sufficient financial resources. And we will, even then, have to target the program so that it helps handicapped children, not children of racial minorities who just need to improve their skills in the English language." Board's actions were based on its director's recommendations.

AB and CD filed suit against Board in federal court, asserting that termination of the remedial reading program violated the constitutional rights of the parents and the children represented by those organizations, and asking that Board be ordered to reinstate the program. While the suit was pending, Congress enacted a federal statute requiring school boards of all state political subdivisions to provide remedial reading courses. In passing this legislation, Congress relied upon the findings of congressional hearings that adults without reading skills inhibit production, sales, and travel in interstate commerce.

Assume that both AB and CD have standing to assert their claims.

A. Is the federal statute constitutional? Discuss.

B. If the court rules that the federal statute is unconstitutional:

1. What issues under the U.S. Constitution should AB raise against the actions of the Board? How should they be decided? Discuss.

2. What issues under the U.S. Constitution should CD raise against the actions of the Board? How should they be decided? Discuss.

**QUESTION #13**

The County Board of Education (Board) seeks your advice as Board's legal counsel regarding two current problems:

A. The public high school in the County District has scheduled graduation ceremonies for a Saturday morning, as has been the custom for all schools in the District. This year's senior class valedictorian, Val, holds religious beliefs that prevent her from attending the graduation ceremony because Saturday is the Sabbath day observed by her religion. Val has demanded that the Board reschedule the graduation so she can attend and deliver the traditional valedictory address.

B. Board has had a policy of permitting community groups to use the high school auditorium for evening and weekend meetings at a modest rental fee. Now NFO, a local organization which advocates racial and religious discrimination, has applied for use of the auditorium for a major recruiting meeting on April 20. Persons and groups opposed to what they characterize as the "extremist" views of NFO are demanding that Board reject the application "out of hand, without giving it or even appearing to give it serious consideration." The local police chief also opposes the application on the basis of "hard intelligence" that some militant "anti-fascists" plan to remove NFO members from the school auditorium by physical force if the meeting takes place.
Both Val and NFO have delivered letters to the Board invoking "rights under the U.S. Constitution" in support of their respective demand and application.

What issues arising under the U.S. Constitution are presented by:

A. the demand of Val? Discuss.

B. the application of NFO? Discuss.

QUESTION #14

SADS, a national college student organization, decided to conduct a campaign protesting government defense spending. SADS members at a university in City planned to distribute campaign literature within City to motorists stopped at major intersections and to patrons at a shopping center owned by Owen.

For years, community service organizations have distributed literature in City to motorists stopped at intersections. There were several accidents causing serious injuries to persons engaged in such practices. For that reason, the City council had been considering for several months a proposed ordinance that would prohibit pedestrians from approaching motorists stopped at intersections within City. Immediately after the SADS distribution plan was publicly announced, the proposed ordinance was passed out of committee and unanimously enacted by the City council. SADS members have not yet attempted to deliver literature to motorists.

City has a municipal ordinance making it a misdemeanor to trespass on private property, including shopping centers. Owen's shopping center is posted with signs stating that no tenant or visitor may distribute on the premises literature not directly related to the commercial purposes of businesses in the center, and that violators are subject to removal by the center's security guards and prosecution under the anti-trespass ordinance.

SADS has filed two actions in the appropriate federal district court.

One action is against City, seeking a declaratory judgment that the recently enacted ordinance violates the rights of SADS members under the United States Constitution.

The other action is against Owen, seeking a declaratory judgment that any action by Owen or his employees to stop SADS members from distributing campaign literature at his shopping center would violate the rights of free speech of SADS members under the United States Constitution.

No SADS campaign literature has yet been distributed at Owen's shopping center, and no threat has been made to remove SADS members from the center or to have them prosecuted under the anti-trespassing ordinance should they attempt to distribute their literature on the center premises.

City has filed its answer to the complaint in the first action and that case is set for trial.

Owen has moved to dismiss the second action on the grounds that (a) the action is not ripe, and (b) the complaint fails to state a claim for relief because SADS members have no constitutionally protected right to distribute the campaign literature on private property.

A. What arguments should SADS make in support of its claim against City, and how should the court decide that claim? Discuss.

B. How should the court rule on Owen's motions? Discuss.
QUESTION #15

The Pacific State Legislature has enacted the "Pacific Home Television Movie Control Act" in response to numerous demands by parents of young children. The Act provides:

1. It is unlawful for any person or enterprise to transmit motion pictures via a cable television system to a home television receiver in Pacific in violation of this Act.

2. No motion picture rated by the National Movie Rating Board as "R" (restricted, to be viewed when accompanied by an adult only) or "X" (adults only) shall be transmitted to any household in Pacific so as to be received except between 12:01 a.m. and 4:30 a.m. local time.

3. Any person or enterprise that violates this Act is subject to a fine of not less than $100 nor more than $500 per household in Pacific that subscribes to that violator's transmission system.

4. This Act does not apply to any cable television system owned and operated by a governmental subdivision of Pacific.

The president of Microsystem (Micro), a company which owns and operates a cable television system in Pacific, has retained you to consider bringing a suit challenging the validity of the Act. She claims that enforcement of the Act by Pacific will bankrupt her company. Both market studies and practical experience in the cable television industry have confirmed that "R" and "X" rated movies are a significant revenue source for Micro in Pacific. Micro shows "R" rated motion pictures starting at 8:00 p.m. and shows "X" rated motion pictures starting at 10:00 p.m. "R" and "X" rated motion pictures were described as "lewd" and "violent" by some legislators as reason for adoption of the Act. Micro has successfully marketed its cable television motion picture service to over 20,000 subscribers in households in Pacific, most of who subscribe to Micro's special "R" and "X" channel at an additional charge of $10 per month per household.

You contemplate filing an action for declaratory relief for Micro as the plaintiff in federal court in Pacific against the Pacific Department of Justice (DJ), which is charged under state law with enforcement of the Act, as the defendant.

What arguments under the United States Constitution should you make against the validity of the Act, what defenses would you expect DJ to assert as to each argument, and how should the federal court decide these contentions? Discuss.

QUESTION #16 (FEBRUARY 2002 EXAM)

The growth of City has recently accelerated, putting stress on municipal infrastructure. City’s water supply, roads, sewers, and schools are all operating in excess of designed capacity.

The Assembly of Future Life was organized in City not long ago. Its members adhere to certain unpopular religious beliefs. City gave the Assembly preliminary zoning approval for plans to build a worship center on a one-acre parcel of real property the Assembly owned within City’s borders. The Assembly’s plans incorporated a dwelling for its minister. Soon after the preliminary zoning approval, newspapers in City featured articles about the Assembly and its members’ beliefs.

After these newspaper articles appeared, City adopted a “slow growth” ordinance providing for an annual lottery to allocate up to 50 building permits, with applicants for certain “priority status” dwellings entitled to participate first. Priority status dwellings were defined as: (1) affordable housing; (2) housing on five-acre lots with available sewer and water connections; or (3) housing with final zoning approval as of the date the ordinance was adopted. Only after all applicants for
priority status dwellings had received permits in the lottery could other applicants participate.

Over 500 applicants for priority status dwellings participated in the first annual lottery. Realizing that its opportunity to participate in a lottery could be years away, the Assembly submitted an application for retroactive final zoning approval and a building permit. City denied the application.

The Assembly brought suit in federal district court against City, alleging that:
(1) City’s ordinance was invalid under the due process, equal protection, and takings clauses of the U.S. Constitution; and (2) City’s denial of the Assembly’s application was invalid under the due process clause of the U.S. Constitution.

What arguments can the Assembly reasonably make in support of its allegations and is each argument likely to succeed? Discuss.

QUESTION #17

Because teenage pregnancies have increased the number of school dropouts, the Board of Education of City (Board) adopted an "Alternative Education Program" (AEP) for unmarried students under age eighteen who become pregnant. All such students must participate. AEP offers a special core educational curriculum supplemented with personal counseling and instruction on prenatal and infant care designed to alleviate the educational, emotional, social, and health problems confronting unmarried teenage mothers. Once placed in AEP, the student remains a participant through the term of her pregnancy and until the end of the school year in which her pregnancy terminates.

Pam, an unmarried sixteen year old eleventh grader at City High School, is pregnant. She wants to remain in her regular classes at City High School but has been assigned to AEP. She has sued the Board in federal district court for declaratory and injunctive relief, seeking return to her regular classes. Pam's complaint argues that being assigned to AEP violates her right to equal protection of the law guaranteed by the United States Constitution and penalizes her for exercising a fundamental right protected by the substantive due process provision of the Constitution.

Shortly after Pam's suit was filed, the school year ended and during the summer Pam suffered a miscarriage. The Board has transferred Pam back to her regular high school classes and has moved to dismiss her complaint on the grounds that: (1) the action is moot; and (2) the complaint fails to state a claim for relief under the Constitution.

How should the court rule on the issues raised by the Board's motion? Discuss.

QUESTION #18

State law makes it a felony either to promote a dogfight or knowingly attend a dogfight where admission is charged. Ruth, a reporter for the Dispatch, City's only newspaper, observed a staged dogfight by posing as a patron and paying the admission fee. She took over 30 photographs of the event with a concealed camera. Later, she wrote an article about the event in the Dispatch that did not identify anyone else present, but which was accompanied by one of her photographs showing two dogs in bloody mortal combat.

The City police then asked Ruth if she knew the names of any persons at the illegal dogfight and requested all of her unpublished photographs in order to try to identify the fight promoters and attendees. With the backing of the Dispatch, Ruth flatly refused the police requests.

When Ruth’s refusal came to the attention of the city council, several councilmembers stated publicly that the Dispatch was guilty of “bad citizenship.” The council then unanimously enacted an ordinance.
banning all coin-operated news racks from City’s public sidewalks and any other public property in order to “improve public safety.” The ordinance left unaffected those other news racks on public property, far fewer in number, which dispensed several kinds of free publications (commercial, political, religious, etc.).

The state prosecutor in City commenced a grand jury investigation of illegal dogfighting in City. The grand jury subpoenaed Ruth to testify and answer questions about the dogfight she had attended and to produce all her unpublished photos of the event. Ruth brought an appropriate action in state court seeking an order quashing the grand jury subpoena.

The Dispatch sells about half of its daily editions from coin-operated news racks located on City’s sidewalks. The Dispatch commenced an action against the city council in the local federal district court, seeking a declaration that the ordinance banning coin-operated news racks violates rights guaranteed under the U.S. Constitution.

1. What arguments based on rights guaranteed by the U.S. Constitution could Ruth reasonably make in support of her action for an order quashing the grand jury subpoena, and how should the court rule on each? Discuss.

2. What arguments could the Dispatch reasonably make in support of its claim that the city ordinance violates rights guaranteed under the U.S. Constitution, and how should the court rule on each? Discuss.

**QUESTION #19**

To lessen the exposure of children to lead poisoning, Congress passed the Lead Poisoning Prevention Act (LPPA), to be administered by the federal Housing and Urban Development Agency (HUD). LPPA requires owners of residential housing, including all state and municipal owners of public housing, built before 1965, when lead-based paint was banned, to test all such dwellings for the presence of lead-based paint. The owner must then record the results of the test with the county recorder. If the presence of lead-based paint is found, LPPA requires the owner at the owner’s expense to take remedial steps within 18 months to remove all traces of lead.

LPPA requires each state to designate a state agency to enforce LPPA within that state. LPPA also authorizes private enforcement by a suit in a federal district or state court, including: a) injunctive actions by lawful residents of affected dwellings, and b) compensatory damage actions by anyone proximately injured by a failure to comply with LPPA.

After passage of LPPA, State X, through its attorney general, filed suit in federal court in State X against HUD contesting the validity of LPPA under the U.S. Constitution. The suit alleges that Congress lacks authority: (a) to enact such regulatory legislation; (b) in any event, to require individual states to enforce the LPPA; and (c) to regulate through such legislation state or municipally owned housing.

Ida is a wealthy investor living in State X who owns no residential buildings, but claims to be planning to buy several apartment buildings built before 1965. Ida claims that LPPA imposes such extraordinary liability risks on owners of affected residential properties as to constitute an unlawful confiscation. Ida has filed a motion to intervene as an additional plaintiff in the State X attorney general’s pending suit to contest the constitutionality of LPPA as applied to her. HUD opposes Ida’s motion to intervene, claiming that she lacks standing.

1. How should the federal court rule on the following arguments of the State X attorney general? a. That Congress lacks authority to enact such regulatory legislation. Discuss.
b. That Congress lacks authority to require the individual states to enforce the LPPA. Discuss.

c. That Congress lacks authority to regulate state and municipally owned housing through such legislation. Discuss.

2. How should Ida’s motion to intervene be decided? Discuss.

ANSWERS TO SELECTED CONSTITUTIONAL LAW QUESTIONS

ANSWER TO QUESTION #1

A. The statute is unconstitutional because it does not comply with the Miller test for obscenity, and the statute provides no procedure by which a determination of obscenity can be made.

The Miller test defines obscenity as work which (1) appeals to prurient interest, (2) is patently offensive, and (3) taken as a whole lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15 (1973). If the statute at issue defined obscenity in keeping with the Miller test and Price's publication was adjudicated "obscene" under the test's criteria, then the publication is not protected speech and the state may prohibit it or confiscate it. However, the language of the statute does not incorporate the Miller standard. The statute levies a tax on "any lewd, lascivious, or obscene material," thereby making the statute susceptible to overbroad application. For example, "lewd" or "lascivious" material is not necessarily obscene, and the effect of the statutory language is to chill protected speech under the First Amendment. Therefore, the statute gives state agents unconstitutional discretion in enforcement.
The statute can also be challenged on a "vagueness" ground. People of common intelligence would differ as to its application to various publications, and therefore the statute violates the Due Process Clause which requires that people know from the language of a statute what act is prohibited by it.

The purpose of the tax imposed by the statute is confiscatory, but if the tax reaches protected speech as well as obscene speech the state has improperly imposed the tax. Here, for the reasons described above, the tax may be interpreted to apply to both protected and obscene material, and therefore the tax is unconstitutional.

B. State A may not collect the tax from Price because there is no nexus between Price's publication and State A, the taxing state.

Due process requires that there is a sufficient presence of the taxpayer in the taxing state to give the state jurisdiction over him. Here, Price does not do business in the state. He receives interstate telephone orders and ships goods interstate, but this is not a sufficient nexus to subject him to the jurisdiction of State A. Therefore, even if the tax imposed by the statute is valid, it cannot be applied to Price.

C. The tax statute is unconstitutional because it violates the First Amendment, and therefore State A revenue agents may not seize Price's books. Further, seizure without a hearing constitutes prior restraint and violates due process. However, if Price's books were adjudicated obscene under a valid statute, the state could exercise its police power to confiscate and destroy the obscene material, that is, speech unprotected by the First Amendment.

The state may also use reasonable powers to collect a tax, including seizure and sale. However, if the state takes material which it is not authorized to seize, then the seizure is a taking without justification under the Fifth Amendment. Here, the state may not use its confiscatory authority under its taxing power because the tax as applied to Price is invalid.

**ANSWER TO QUESTION #2**

A. (1) The statute under which Dan was charged could have been challenged as unconstitutional because it is vague and overbroad and thereby violates the First Amendment.

The statute punishes people for conducting themselves in an "annoying" manner. When a statute is designed to curb potentially free speech, it must give notice to a potential speaker regarding what is and what is not prohibited. The statute at issue regulates the manner of speech, but it does not precisely state the standard by which people can be charged with violating the regulation. The language used, "annoying," does not provide an objective standard which would put people on notice of the activity prohibited, and therefore the statute is unconstitutionally vague. Further, a statute must not give undue discretion to the authorities enforcing the statute. Here, the police may apply their subjective interpretation of "annoying" behavior to charge people under the statute, and therefore its enforcement is unconstitutional.

Due process also requires that in the case of a criminal statute, a person must be able to determine from the language of the statute what is prohibited so that he will not unknowingly violate it. Here, Dan could not have known that blowing his bicycle horn violated the statute. Lack of notice renders the statute unconstitutional.

The statute is also unconstitutional on the ground of overbreadth because the imprecision of its language prohibits potentially free speech as well as speech that may be prohibited by the state.

(2) The juvenile proceedings could have been challenged on the grounds that the improper standard of proof for a finding of guilt was applied and that Dan was denied his constitutional right to a
jury trial. Therefore, Dan's Fifth Amendment due process rights, as applied to the states through the Fourteenth Amendment, have been violated.

A person tried in a juvenile proceeding has the right to compulsory process, to confront witnesses against him, and to contest the charges against him. Where the threat of incarceration exists, he also has the same right to counsel as a person tried in a criminal proceeding. See In re Gault, 387 U.S. 1 (1967). Here, §2705 properly delineates these constitutional rights. However, due process also requires that the standard of proof in juvenile proceedings be the same as in criminal trials, that is, proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Section §2705 sets a standard of proof by "clear and convincing" evidence, which is lower than the standard required by Winship; therefore, the standard is unconstitutional.

A jury trial may not be denied to an accused facing a sentence of more than six months imprisonment. While §2705 does not deny Dan his constitutional right to a jury trial, it does predicate that right on Dan's ability to pay for the trial. The requirement that defendants pay trial expenses is a violation of equal protection, and therefore is unconstitutional.

B. The charge against Dan in municipal court should be challenged as an unconstitutional subjection to double jeopardy.

The juvenile court has found Dan delinquent at the juvenile level. The state now seeks to try Dan at the municipal court level for the same violation of §2705. Thus, Dan may assert a defense of double jeopardy at the second trial. The municipal court trial must be dismissed because Dan has already stood in jeopardy for the same charge.

ANSWER TO QUESTION #3

(a) Contempt proceeding. Doug's contempt citation should be reversed because he was denied the assistance of counsel.

If the accused may be incarcerated for any length time, he is entitled to counsel at his prosecution. Argersinger v. Hamlin, 407 U.S. 25 (1972). At the contempt proceeding, Doug faced a possible jail sentence, and the court's refusal to appoint counsel was a violation of Doug's Sixth Amendment right to counsel. Therefore, the contempt citation is subject to automatic reversal.

It could also be argued that the judge improperly denied Doug the right to a jury trial. An accused is entitled to a jury trial if he faces potential imprisonment of more than six months. Frank v. United States, 395 U.S. 147 (1969). This right extends to contempt proceedings. Bloom v. Illinois, 391 U.S. 194 (1968). Even though Doug was sentenced to only two months, it can be argued that a revocation of probation proceeding is likely to flow from the contempt citation and Doug could be imprisoned for a substantial period of time for his robbery conviction. Therefore, he was entitled to a jury trial at the contempt proceeding, and his citation must be reversed. This argument is not as persuasive as the argument that Doug was denied the assistance of counsel.

Finally, it could be argued that the contempt proceeding should have been separated from the proceeding in which Doug was instructed to answer the question previously asked at the grand jury hearing. In general, a judge may impose a summary contempt citation when the action for which the accused is cited takes place in the presence of the judge; if the action does not take place in the judge's presence, the accused is entitled to a hearing before another judge. Here, Doug declined to answer the question in the presence of the judge, and therefore his argument for a separate hearing will probably fail.

(b) Revocation proceeding. The revocation of Doug's probation should be reversed because he was denied his right to counsel.
Due process requires more than a summary hearing when a defendant faces revocation of probation because of the liberty interest at stake. The defendant has a right to retain counsel; however, he has no right to have counsel appointed for him unless the proceeding involves complex issues which require the assistance of counsel. Here, the issues are substantial enough to require appointment of counsel: (1) the unconstitutionality of the contempt citation and (2) the abuse by Doug of his constitutional privilege against self-incrimination. Doug's initial refusal to answer the question prior to his citation for contempt was wrong because he had been granted transactional immunity, which protected him from both state and federal prosecution for any crime which would be revealed directly or indirectly by his testimony. See Murphy v. Waterfront Commission, 378 U.S. 52 (1964). Therefore, his testimony could be compelled, and he had no right to invoke his Fifth Amendment privilege against self-incrimination. This issue, along with the constitutional flaw in the contempt proceeding, requires the assistance of sophisticated counsel; therefore, the revocation of probation must be reversed and counsel appointed to represent Doug.

**ANSWER TO QUESTION #5**

(a)  **Contempt conviction.** The conviction should be reversed because Jones properly invoked his Fifth Amendment privilege against self-incrimination and the legislative committee had no right to force him to answer the question absent a grant of immunity.

In invoking his Fifth Amendment right, Jones said he had "done nothing wrong" and would not "answer a question that violates my constitutional rights." While the invocation was proper, the language he used regarding his innocence could - and did - lead to a chain of events which would incriminate him. He should have invoked the right more precisely for his own protection. Nevertheless, Jones had a right to claim his Fifth Amendment privilege because the hearing before which he appeared could ultimately lead to a criminal investigation. Therefore, the committee could not force him to respond, and the subsequent contempt citation and conviction were unconstitutional.

Jones could also argue that he was entitled to assistance of counsel at the committee hearing; however, that argument would fail because Jones had no entitlement to counsel (although he could have hired private counsel) in a non-criminal proceeding, and the committee was not required to tell him he could have counsel present. Likewise, an argument that the State X committee lacked jurisdiction over him would fail because Jones was subpoenaed while physically present in State X.

(b)  **Perjury conviction.** Jones' perjury conviction must be overturned because the loyalty oath he took, and which he was convicted of lying under, was unconstitutional.

Jones lied under oath about his Communist Party affiliation. However, a federal employee may not be required to take an oath as a condition of employment unless (1) he is an active member of a subversive group, (2) he knows the group is engaged in illegal acts, and (3) he has a specific intent to further those illegal acts. See Elfbrandt v. Russell, 384 U.S. 11 (1966). Thus, the oath Jones took violated his First Amendment rights. Jones did not object to the oath when he took it, and therefore he did perjure himself. However, the oath itself was unconstitutional, and therefore Jones' conviction must be reversed.

**ANSWER TO QUESTION #9**

(1) The ordinance by its terms and general application is constitutional because City had the authority to adopt it under City's police power, the prohibition of existing signs does not constitute a taking under the Fifth Amendment, and the ordinance is a valid regulation of the time, place, and manner of speech.

Municipalities have the authority under their police power to adopt zoning ordinances for aesthetic reasons. Here, City has adopted the rooftop sign ordinance for the purpose of improving the quality of life within the city limits, and therefore the ordinance is constitutional.
The ordinance requires removal of existing signs within five years. The removal requirement is not an unconstitutional taking if the ordinance provides a reasonable period of time during which the nonconforming use may remain. Here, the five-year period is a reasonable time in which to permit continued use of a sign, based on the reasonable life of a sign. Thus, there has been no violation of the Fifth Amendment.

The ordinance prohibits the placement of all rooftop signs, and therefore it is a content-neutral regulation of speech. The ordinance does regulate the time, place and manner of speech, but such regulation is constitutionally permissible if it is narrowly drawn and furthers reasonable community goals. Here, no free speech has been prohibited by City's exercise of its police power to improve the appearance of City. The court should uphold the constitutionality of the ordinance.

(2) The ordinance as applied to Church is also constitutional because it neither causes an establishment of religion nor infringes on the free exercise of religion.

If the purpose or effect of the ordinance was to advance or inhibit religion or a particular religious denomination, the ordinance would violate the Establishment Clause of the First Amendment. However, City's ordinance is neutral, applying to all rooftop signs whether secular or religious. Thus, an Establishment Clause argument must fail.

Similarly, the First Amendment right to free exercise of religion is not violated here because there is nothing in the facts to indicate that Church's rooftop sign is anything other than a mere advertisement for new members. If the sign conveyed a message that was an integral part of Church's denominational beliefs, the ordinance would infringe on Church's rights under the Free Exercise Clause. Here, the sign contains no religious significance, and therefore no infringement has occurred.

The court should find the ordinance applicable to Church.

**ANSWER TO QUESTION #10**

(a) **Criminal complaint.** City's complaint against Acme should be dismissed because the ordinance unconstitutionally regulates protected commercial speech and is vague and overbroad.

Commercial speech enjoys limited protection under the First Amendment, and it may not be prohibited unless it is false, misleading or deceptive, or has an illegal purpose. Here, Acme's advertisement does not fall within any of the categories of commercial speech which are unprotected. While the advertisement may be offensive to some viewers, it is "not legally obscene" according to the facts. There is likewise no evidence the speech is untruthful or misleading. Therefore, the ordinance unconstitutionally regulates protected speech.

The ordinance prohibits commercial speech which is "demeaning and sexist," but does not define those terms clearly enough so that reasonable persons would agree as to their meaning. Further, because the ordinance imposes a criminal penalty, any person charged under the ordinance has a due process right to know from the language of the ordinance whether his activity is going to violate it. Here, the language of the ordinance as applied to Acme's advertisement is open to subjective interpretations, and therefore the ordinance is unconstitutionally vague.

The ordinance is also unconstitutionally overbroad because it prohibits protected as well as unprotected speech, that is, some protected advertising labeled "demeaning" or "sexist" by the ordinance.

(b) **Declaratory judgment.** The court will dismiss Acme's action for declaratory relief if the State X constitution affords its citizens First Amendment protections in private shopping centers.
Acme has standing to bring the action because it is harmed by the ordinance; a concrete dispute between Acme and City exists, and; the issue is ripe because pickets have entered Acme's property. Acme will prevail in its action only if Acme has the power to restrict access to its property on the basis of the content of the speech people want to exercise on the property. Private shopping centers may restrict access on the basis of content. Hudgens v. NLRB, 424 U.S. 507 (1976). However, a state may, under its constitution, provide that private shopping centers are public forums for First Amendment purposes. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). Thus, if State X has such a constitutional provision, City's ordinance will be upheld and Acme will be required to give the pickets access to Acme's property.

**ANSWER TO QUESTION #11**

A. Taxpayers have standing to bring the suit, but they will lose on the merits because the expenditure of funds at issue does not constitute an establishment of religion.

Taxpayers are challenging a state spending statute (administered by Agency), and therefore they have standing to sue. Federal taxpayer standing is not at issue here, but even if the Flast rules were applied to this situation, standing would probably be found: The challenge is to an expenditure alleged to be illegal because it violates the First Amendment prohibition against the establishment of religion; therefore, there is a logical nexus between Taxpayers' status as taxpayers and the claim sought to be adjudicated. See Flast v. Cohen, 392 U.S. 83 (1968). A concrete case exists because the money has been spent.

Taxpayers will not win on the merits, however, because the activity funded by the government does not constitute an establishment of religion by its purpose, effect, or entanglement with Church. The expenditure of funds is for a secular rather than a religious purpose, that is, to provide legal services for the public benefit. The effect of the funding is to aid victims of discrimination. There is no primary benefit to Church or any other religious organization. There is likewise no excessive entanglement between Church and State X because the funding program does not require substantial supervision by Agency to ensure the program does not have the effect of supporting Church.

B. Jay will prevail only if he can prove Society is performing a state function in providing legal services.

If Society were acting as if it were a state, state action would be found and Society's exclusion of Jay on the basis of religious affiliation would violate the Equal Protection Clause of the Fourteenth Amendment. A state violates that clause when no compelling state need can be found for basing employment on a suspect criterion. However, it is unlikely state action will be found here because Society is not performing a public function and State X's involvement in the activity is not significant. Therefore, there is no reason for Society to conform to the rules required of public entities, and Jay may not compel Society to include him.

C. Bar's action will be dismissed because Society's advertising is truthful and serves a significant public purpose.

Lawyers have the right to advertise about specific legal problems faced by potential clients as long as the advertisement is not untruthful or misleading. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985). However, in-person solicitation may be barred because of the pressure inflicted on a potential client who does not want legal services. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). Here, the court is likely to view Society's solicitation of victims of discrimination as a noble cause and see little danger of potential overreaching. Therefore, the court will deny Bar's request for injunctive relief.
ANSWER TO QUESTION #13

A. If challenged in court, the Saturday graduation date will be upheld because the state's interest in providing regularity in scheduling to accommodate the majority of its citizens outweighs Val's interest in exercising her religion, and the scheduling does not restrict Val's right to free speech.

The county, by scheduling graduation ceremonies on Val's Sabbath, is not forcing Val to give her valedictory speech on that date. If she was forced to speak, Val's right to free exercise of religion would be violated. However, the scheduling only incidentally affects Val's exercise of religion. A regulation which denies a person rights or benefits because of religious affiliation is unconstitutional if the state can show no compelling need to justify the regulation. Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits). However, the regulation will be upheld even if it adversely affects members of specific religious denominations as long as the state's interest justifies the hardship. For example, in the case of Sunday closing laws the Court upheld the laws based on the state's interest in providing a common day of rest even though persons who observed their Sabbath on Saturday thereby suffered economic hardship. Braunfeld v. Brown, 366 U.S. 599 (1961). Here, the county appears to have scheduled the graduation ceremony on a reasonable basis based on accommodating the greatest number of people. The court is likely to view the facts as paralleling those in the Braunfeld case and find a substantial state need in uniformity rendering the scheduling constitutional.

Similarly, a suit by Val charging her right to free speech is violated by the scheduling would fail because no infringement of her First Amendment rights has occurred. She may choose to go to the ceremony on Saturday and give her speech. The county has not restricted her right to do so.

B. The Board should permit NFO to meet because the high school auditorium is a public forum and the Board cannot deny access to NFO on the basis of the content of NFO's meeting.

The Board has a policy of permitting use of the auditorium as a public forum. The Board may issue reasonable time, place, and manner restrictions on speech in the forum, but it may not deny NFO access because of NFO's allegedly "extremist" views. Such a content-based restriction is unconstitutional. Likewise, the police chief's opposition to access by NFO because of potential hostile activity cannot justify exclusion of NFO. The only justification for regulating the content of a meeting on the basis of a hostile audience is when the hostility is unexpected and the danger is imminent. However, under circumstances where it is known "anti-fascists" plan to disrupt a meeting, the Board may charge NFO for additional police to maintain order.

ANSWER TO QUESTION #14

A. SADS could argue that the ordinance is an unreasonable time, place, and manner regulation of protected political speech and that the timing of the passage of the ordinance was an unconstitutional action designed to silence the content of SADS' message; however, it is likely the constitutionality of the ordinance will be upheld.

A reasonable regulation of the time, place, or manner of protected speech is constitutional. Here, the ordinance is content-neutral, applying to all pedestrians approaching motorists at City intersections, and the time, place, and manner regulation is reasonable because it addresses a valid public safety problem. Therefore, the only basis on which SADS can prevail is by proving the ban on distributions at intersections was purposely designed to thwart SADS in particular, as evidenced by passage of the ordinance immediately after SADS made its distribution plan public. However, this argument would be difficult to prove because, despite the timing, the ban applies to all pedestrians, and the public safety purpose of the ordinance is based on statistical proof of motor vehicle accidents caused by the prohibited behavior.
B. The court should find the action is not ripe. No concrete case or controversy exists at this time. SADS members have not attempted to distribute literature on Owen's property, nor have they asserted plans to do so at a particular time. There is likewise no reason to try the case on the ground SADS members face significant harm, because the penalty for violation of the ordinance is not substantial. The action should be dismissed.

The court should dismiss the action because of lack of ripeness. However, if the court reaches the merits, Owen will prevail because as the owner of private property, he has the right to discriminate against speakers seeking to disseminate political - or any other protected - information. Private shopping centers may discriminate on the basis of content unless the state constitution requires such centers to operate as public forums. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). There is nothing in the facts indicating the state has extended First Amendment rights of free speech to privately owned property. Therefore, Hudgens applies and Owen may exclude SADS members. See Hudgens v. NLRB, 424 U.S. 507 (1976).

ANSWER TO QUESTION #15

I. Availability of Judicial Review

While Micro clearly has standing to attack the statute since it has a direct and substantial interest in the outcome, DJ might argue that the case cannot be properly decided by a federal court based on the following concepts:

A. Ripeness

The doctrine of ripeness prevents a federal court from considering a case prematurely (i.e., before the facts are sufficiently developed). Here, DJ might argue, there has been no attempt to enforce the statute nor is there any immediate threat that DJ will do so. When the plaintiff's attack alleges that a statute unduly chills free speech, however, the threat need not be as immediate as it is in other cases, especially when, as here, the plaintiff will allege facial invalidity. The size of the fine is so great (see the discussion below) that one could not fairly expect Micro to violate the statute and then seek to have it declared unconstitutional, since an adverse ruling at that time would almost certainly result in the bankruptcy of the company. DJ's argument on this issue will fail.

B. Abstention

Ordinarily, a federal court will abstain from ruling on the constitutionality of a state statute until the state court has had an opportunity to interpret that legislation in a way that would eliminate potential constitutional infirmities. Abstention is a largely discretionary matter, however, and the court is unlikely to abstain since Micro is seeking declaratory relief based on facial invalidity which does not appear to be curable by a narrowing construction of the statute by the state court.

DJ might also point out that the doctrine of Younger v. Harris provides that federal courts are generally prohibited from enjoining state criminal proceedings. This restriction does not apply, however, when no state prosecution has yet begun and the action is seeking declaratory relief, which is exactly the case here.

C. Eleventh Amendment

DJ might argue that the Eleventh Amendment prohibits a citizen from suing a state agency in a federal court. While this is generally true, this limitation does not apply when the plaintiff seeks declaratory or injunctive relief barring a state officer from enforcing a statute which is attacked as being violative of the United States Constitution.
II. The Merits: Parts 1 and 2 of the Statute

A. Freedom of Speech

1. Regulation of Speech Content

The First Amendment guarantee of freedom of speech, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, prohibits the regulation of the content of speech unless the speech in issue falls within a specific class of speech which is not entitled to the protection of the Constitution.

DJ would be expected to argue that the statute is a regulation of obscene speech, which lies outside the protection of the First Amendment. The movies in question would be obscene only if an average person, applying contemporary community standards, would find that the works, taken as a whole (a) appeal to the prurient interest, (b) depict or describe specifically defined sexual activity in a patently offensive way, and (c) lack any serious literary, artistic, political or scientific value.

While some, or even all X-rated movies might fit this standard, certainly many R-rated movies have significant artistic value and have little or no appeal to the prurient interest (foul language and violence can justify an R rating); thus, this statute is clearly unconstitutionally overbroad as it unnecessarily prohibits protected as well as unprotected speech. In addition, this statute does not specifically define the prohibited activities. Even if the court somehow read the words "lewd" and "violent" into the statute (which seems highly unlikely), speech has not yet been held to be unprotected merely because it is violent and both terms are unduly vague, as a person of ordinary intelligence would have to guess as to what kinds of activities are prohibited.

2. Regulation of Time, Place and Manner

DJ would undoubtedly argue that the statute is merely a time, place and manner regulation in that it only bars R- and X-rated movies during certain hours. Even if this is true, the regulation is not content-neutral (i.e., it applies to only certain types of speech) and the statute can therefore be upheld only if it is necessary to satisfy a compelling state interest (i.e., strict scrutiny applies). The courts have consistently held that the states can limit the distribution of sexually explicit materials, even if they are not technically obscene, to ensure that they do not come into the hands of minors. This is particularly true with regard to distribution via the electronic media, although the traditional bases for cases of this type (the limited number of slots available for broadcasting and the intrusive nature of such broadcasts) are seriously undercut when, as here, a cable system is involved (because such systems can carry a huge number of stations and the speech is available only to the homes of persons who have specifically chosen to have access to these broadcasts). While this interest is strong, it is questionable as to whether this statutory scheme is the least intrusive alternative for protecting minors (e.g., requiring the use of lock boxes or permitting R- and X-rated movies only after 10:00 pm might be equally effective methods of protecting children and yet impinge on the rights of adults to see such movies to a much lesser extent).

3. Prior Restraint

To the extent that the statute might be construed to require movies to be submitted to the National Movie Rating Board for rating, the regulation might be construed to constitute a prior restraint in that certain films cannot be shown during specified times unless they first receive a favorable rating from the board. Prior restraints are presumptively invalid and there is no government interest here which is sufficient to override that presumption.

B. Preemption and Supremacy
Communication over the airwaves is a matter heavily regulated by the Federal Communications Commission, an agency of the federal government. If the regulations of that agency are sufficiently broad, the entire field would be preempted and any regulation by the states would be prohibited by the Supremacy Clause of the Constitution. Here, however, the statute is only applicable to cable television systems. Cable companies tend to have limited regional distribution and there does not appear to be a need for "national uniformity" in this area, particularly with regard to sexually explicit material (since "obscenity" is determined by "contemporary community standards"); indeed, cable television has historically been regulated by local authorities, and thus an attack on these grounds is unlikely to succeed.

C. Improper Delegation

To the extent that a non-governmental body (the National Movie Ratings Board) is making decisions which form the basis of criminal penalties, the legislation may constitute a delegation of governmental functions to a non-governmental body. This is generally prohibited by the Due Process Clauses of the Fifth and Fourteenth Amendments.

D. Interference with Interstate Commerce

To the extent that these regulations affect interstate commerce, they would be invalid if they discriminated against interstate commerce or placed an undue burden on commerce across state lines. Presumably, Micro does not simultaneously send its signals to more than one state at a time, but it is possible that specific channels (e.g., HBO and other "movie stations") could not operate with such a burden placed on the rebroadcast of their programs. It is unlikely that Micro has standing to raise this objection, however.

III. The Merits: Part 3 of the Statute

A. Taking

The facts imply that Micro will be put out of business if the massive fines permitted by Part 3 of the statute are imposed. At some point, regulation can be as extensive as to constitute a "taking," which is permissible under the Fifth and Fourteenth Amendments only if the action is consistent with due process (which would require a hearing at which Micro is given proper notice and an opportunity to be heard) and just compensation. Here, however, the size of the penalty will not, by itself, invalidate the statute or require the state to pay for the destruction of Micro's business.

B. Substantive Due Process

Micro would attack Part 3 of the act as violative of substantive due process. While this doctrine is of reduced importance today, it may still be applied to invalidate economic regulations that are arbitrary or capricious. Here, Micro could be subject to a fine in the neighborhood of $2,000,000 to $10,000,000 per movie, while revenues from the R- and X-rated channel total no more than $200,000 per month. This fine seems to be as grossly disproportionate to legitimate governmental interests as to be totally irrational, especially given the adverse effect on free speech interests.

IV. The Merits: Part 4 of the Statute

A. Equal Protection

Part 4 of the statute will clearly be challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment in that different rules are applicable to privately owned and government-owned systems. While DJ would argue that this is essentially an economic regulation governed by the rational
basis standard of review, Micro could successfully counter this contention by showing that the regulation interferes with the First Amendment right to freedom of speech, a fundamental right, and thus the appropriate test is strict scrutiny.

If the purpose of the statute was to give government-owned cable companies a competitive advantage over privately owned operators (or drive them out of business so that the state agencies and subdivisions could move in on their territories), this part of the legislation would fail even under the rational basis test as it is arbitrary and capricious. More likely, DJ would argue that the exemption is justified by the fact that the government-owned cable systems could be expected to exercise self-censorship and broadcast only those movies that would not violate appropriate standards of “decency.” Even if it could be shown that this would indeed happen, there is no showing that privately owned companies would not do likewise. Thus, it is unlikely that DJ could prove that the statute was supported by a compelling state interest.

B. Substantive Due Process

If DJ’s argument is premised on a notion of self-censorship as discussed above, Micro could also argue that the statute establishes an arbitrary and capricious irrebuttable presumption (that government-owned companies can and will appropriately self-censor and that privately owned companies cannot or will not). There is no apparent basis for making such a presumption and thus Part 4 of the statute would be unconstitutional on substantive due process grounds.

ANSWER TO QUESTION #16

“Model Answer”

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law nor are the writer’s conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing essay. Also, another answer could have a totally different analysis and conclusions and still be considered an acceptable passing essay.

I. Assembly v. City- Validity of City Ordinance

A. Standing

Assembly is an unpopular religious organization located in City. It received preliminary zoning approval to build a worship center. Thereafter, City adopted an ordinance whereby there would be a lottery for allocating building permits. Only those with priority status could participate in the lottery. Assembly’s building plans are not priority, and therefore cannot participate in the lottery. Assembly sues City in Federal Court alleging that the ordinance is invalid.

Assembly will first assert that it has standing to bring its claim. Standing exists if the plaintiff can show that it has, in fact, been injured by the defendant’s action and that the injury can be redressed by the court. Assembly will argue that it clearly cannot build its worship center because of City’s ordinance. Since Assembly had preliminary zoning approval, it would have likely gotten final approval had City not enacted the ordinance. If the court struck down the ordinance, then these priority status applicants would not exist, and Assembly could get final
approval to build. City will argue in response that Assembly does not have standing because it has not suffered actual loss. That is, Assembly has not received final zoning approval and cannot build its worship center at the present time anyway. Final zoning approval would not even be guaranteed even if the ordinance were found to be invalid. Furthermore, City can try to assert that standing does not exist because there is no harm to any of the plaintiffs individually, just a group as a whole. There must be an allegation of harm to plaintiffs personally for there to be standing. Assembly would counter that argument by first stating that Plaintiff need only show potential harm, not actual loss. Although Assembly has not lost anything as of yet, potentially, it could lose the opportunity to build a worship center. Second, the injury to Assembly as a whole would clearly affect the individual members of the church, as they all individually adhere to certain religious beliefs and would benefit from the worship center building.

Assembly will prevail and it has standing to sue City in Federal Court. Assembly as a whole group, along with its individual members have suffered an actual injury as well as potential harm by not being allowed to build its worship center which had already received preliminary zoning approvals.

B. Substantive Due Process

City enacted an ordinance to slow down development in City. Assembly can no longer obtain final zoning approval to build its worship center under City’s new ordinance. Assembly sues City claiming the ordinance violates its right to practice religion.

Assembly will argue if City enacts the statute, Assembly will no longer be able to exercise its fundamental right of members to practice their religious beliefs. When a law unfairly impinges on a fundamental right, the law should receive the strict scrutiny standard of review, and should only be upheld if the law is narrowly tailored to achieve a compelling governmental interest and no less restrictive means to achieve the statute’s goals is possible. On the other hand, City will argue that the ordinance does not prohibit Assembly or its members from practicing their religion. Assembly can still meet outside, in someone’s home or may even rent space from a school or other building. It just cannot build its worship center because under the ordinance, it does not meet priority status. Under the rational basis review, an ordinance will be upheld so long as it is rationally related to a legitimate governmental interest, such as curbing development.

In this case, the ordinance will be analyzed under the rational basis review because the law does not prohibit Assembly or its members from exercising its fundamental right of religion. Even though Assembly will not have its desired worship center, it can still assemble someplace else and practice its religion.

C. Rational Basis Review

City enacted the “slow growth” ordinance because it wanted to slow down development.

The City will argue that the law should be upheld because it is rationally related to achieve a legitimate government interest. In this case, City has a legitimate interest in preventing overdevelopment of City. By limiting the number of building permits to 50 per year, the growth in City’s roads, schools and overall infrastructure will slow down. Thus, City’s resources will not be so burdened. If an ordinance’s means are rationally related to a legitimate purpose, then it will be upheld under the rational basis test. Assembly could attempt to argue that awarding 50 permits a year would not create less of a burden on the infrastructure. More facts are necessary regarding City’s population, and past number of permits issued to determine if this is a viable argument.
City will prevail and the ordinance will be upheld under the rational basis review level of scrutiny. The law is rationally related to City’s goal of controlling overdevelopment because building permits are limited to necessary housing (affordable) and housing on 5 acres, so there are no big crowded developments. Clearly this would help ease stress on City’s infrastructure.

D. Equal Protection

Assembly claims that City’s ordinance violates the Equal Protection Clause because the law discriminates against it due to its unpopular religious beliefs.

Assembly will argue that even though the law on its face looks as though it classifies between types of housing, it has a discriminatory intent and impact on religious groups. If a statute does not discriminate on its face, then Assembly must show that it has a discriminatory effect and intent. In this case, Assembly would point to the fact that soon after newspaper articles were published about its members’ beliefs, that is when the City adopted the ordinance which would prevent Assembly from building its worship center. The timing of the passage of the ordinance is evidence enough that City’s intent was to prevent final zoning approval for Assembly. City would respond by pointing to the overdevelopment of City, the crowded schools and infrastructure. The law was strictly for the purpose of preventing overcrowding and that it was just coincidence that it was enacted after the newspaper article and preliminary zoning approval. Therefore, the law did not intend to discriminate against Assembly. Nor is its effect discriminatory since Assembly can still practice its religion.

City will prevail. The facts seem to indicate that the primary purpose of City’s ordinance was to prevent further overdevelopment of City. Therefore, since the ordinance has no discriminatory effect or intent, the level of review to determine its validity is the rational basis test. City’s ordinance would likely pass this level of review and the statute will be held valid under the Equal Protection Clause.

E. Takings Clause

Assembly had received preliminary zoning approval to build its worship center. City’s ordinance was passed after preliminary approval and now Assembly will not receive final zoning approval under the new ordinance. Assembly contends that the change in the permit approval process is a violation of the Takings Clause.

Assembly will argue that the change in the permit approval process constitutes a taking of its property without just compensation in violation of the 5th Amendment’s Takings Clause. The government may take private property for public use if it pays compensation. City will argue that it is not taking Assembly’s property because Assembly still owns the parcel. However, Assembly will further assert that City’s ordinance constitutes a per se taking because it denies it of any economic viable use of the property. A law which limits all economic or productive use of property is considered a regulatory taking. Assembly will contend that the only reason it bought the property was to build a worship center for its members. Also, the worship center will bring in revenue from its members who will support the minister and other employees and activities within the church. City will argue that the ordinance does not deprive Assembly of every reasonable use of the property. It can still use the property for other purposes. Namely, Assembly could sell the parcel and decide to buy land just outside City where the ordinance does not affect and build its worship center.

City will prevail. Its ordinance does not violate a Taking under the 5th amendment because (1) there was no government confiscation or physical occupation of Assembly’s property and (2) City’s ordinance did not leave Assembly’s property with no reasonable economically viable use.
The property is still owned by Assembly and there are no facts indicating that the property lost considerable value due to the ordinance.

II. Assembly v. City- Denial of Application for Retroactive Zoning Approval and Building Permit.

Assembly submitted an application to City for retroactive final zoning approval and a building permit to build its worship center. The city denied the application. Assembly now contends that the denial of the application violated the due process clause.

Assembly will assert that City violated its right to procedural due process by denying its retroactive zoning application. A government must not deprive individuals of life, liberty or property without due process of law, which usually includes a hearing. A deprivation of property occurs if there is an entitlement and that entitlement is not fulfilled. A deprivation of liberty occurs if there is the loss of a significant freedom provided by the constitution or statute. Assembly will first argue that it was already approved for a preliminary zoning and in all likelihood, it would have gotten final approval. Therefore, it will try to argue that it was entitled to the final zoning approval. City will argue that the zoning approval process was not yet complete and it was entitled to nothing. There was no entitlement, no zoning approval, therefore no property right and thus no procedural due process is required. Assembly will then assert that it lost its freedom to practice its religion by denying the retroactive zoning application. Because it cannot build its worship center, its members will not be able to practice their religious beliefs. City will argue in response that Assembly is free to continue to practice its religion and assemble in other locations. Therefore, there is no liberty deprived.

City will likely prevail. No procedural due process was required by City for denying Assembly’s application because Assembly had no entitlement or property right. A preliminary zoning approval is not a property right. Further, City had not deprived Assembly of any liberty to practice its religion by denying the application. As stated, Assembly is free to practice its religious beliefs elsewhere.

ANSWER TO QUESTION #17

1. Is the case Moot?

   The Board has moved to dismiss the case as moot. Under Article III, a federal court will only hear justiciable cases and controversies brought by a plaintiff with standing, whose claim is ripe for review and not moot.

   A case must still be live, or not moot, as a court will not render an advisory opinion. Here, Pam is no longer pregnant, and she has been transferred back to her regular classes. Thus, the Board is correct in its assertion there is no live case here.

   The court, however, will still hear a case that seems moot if the wrong is capable of repetition yet evading review. So if the wrong is possible to reoccur to this plaintiff but can't be litigated because, like a finite 9 month pregnancy, the problem moves faster than the courts, the matter can be litigated.

   Pam is 16 years-old and about to enter 12th grade. She could easily get pregnant again before she turns 18, the cut-off age for AEP. And, as the AEP placement begins as soon as she becomes pregnant and is mandatory, it seems she could be put into AEP in 12th grade. Yet, the courts will take too long to solve the case, and she'll be not pregnant anymore or graduated before the matter is resolved. Thus, this alleged wrong is capable of repetition for Pam and evading review because of its short duration.
Accordingly, the case is not moot and the court should deny this part of the motion to dismiss.

As noted, a court will not hear a case unless the plaintiff has standing, an actual injury in fact which is caused by the defendant and redressable by the court. Here, Pam alleges removal from her regular classes, which is an injury. Further, she is asking the court to redress this wrong by suing for an order against the causes of the problem, the Board, to cease. Thus, she has standing.

A case must not only be live, not moot, but also ripe for review. This is an important consideration in suits for declaratory relief like this one. Courts look to the completeness of the record and the necessity for fact-finding in such cases. Here, Pam's request for declaratory relief raises questions of law about the constitutionality of the mandatory AEP. There is no need for much factual development and the record seems sufficient for adjudication. This case appears to be ripe for review.

2. Has Pam failed to state a claim?

Pam has alleged violations of her right to equal protection and substantive due process. The Board asserts she has failed to state a cause of action under the Constitution.

A. Equal Protection Analysis

The equal protection clause is in the 14th Amendment of the Constitution and as such, it applies only to the states. However, it has been applied to the federal government by way of the due process clause in the 5th Amendment.

The equal protection clause is designed to protect certain individuals from being singled out for unfair treatment. The courts apply different levels of scrutiny depending on the class the individual belongs to.

In order for the 14th Amendment to be asserted, there must be first being some sort of state action. The 14th Amendment does not redress private wrongs. Here, an agent of the City is involved. The Board will be considered an agent of the City and as such, the court will find that there is state action.

The second step in an equal protection analysis is to determine whether the plaintiff is a member of a protected class. The courts will apply strict scrutiny to those who are being singled out because of their race, national origin, and in some cases, because of their alienage. Here, AEP does not appear to single out any of these protected groups, so strict scrutiny should not be the applicable standard.

An intermediate level of scrutiny (i.e., it must serve an important or substantial government interest that is substantially related to the regulation) will be applied if individuals are singled out because of their gender or because of their illegitimacy. Here, only women are being singled out for the AEP program, so the program passes the intermediate scrutiny test.

Here, the Board will assert that it has an important interest in ensuring that pregnant mothers do not drop out of school and that the AEP program is the best way of ensuring that these children stay in school. Pam may argue that she had no intention of dropping out of school and that the AEP program is preventing her from attending her regular classes. Thus, she will argue that the purpose of the program (to keep pregnant girls in school) doesn't apply in her case and that AEP is actually preventing her from attending school. Pam may also argue that there are other ways to achieve the purpose of the program without forcing all pregnant mothers into the AEP program.

AEP probably would not meet the intermediate scrutiny standard and Pam would satisfy this requirement to pursue an equal protection claim.

The third step in an equal protection claim is to inquire whether any fundamental rights are involved. The equal protection clause will also be evaluated under a strict scrutiny analysis (i.e., the regulation must
be necessary to serve a compelling government interest) if there are fundamental rights involved. Fundamental rights include such things as (1) the right to vote, (2) the right to travel, and (3) the right to privacy. If these rights are involved, a strict scrutiny test will be applied.

The right to privacy seems applicable in this case. Generally, the right to privacy includes the right to marry, use contraceptives and have an abortion. Arguably, in this case the privacy right of procreation is implicated because those who become pregnant are being singled out by the program.

The government’s burden in those cases is very difficult to meet. The interest to be protected must be compelling. In this case the interest is apparently to keep kids in school, but whether that reason is compelling enough to meet a strict scrutiny standard seems doubtful.

However, if the court determines that the right to procreate is not involved here, the Board would only have to meet the rational basis test and this it could do since there is no fundamental right to education and, thus, the Board would only have to have a legitimate state interest that is rationally related. The burden would be on Pam and here, she would lose. There is a rational basis here for AEP which is to keep children in school.

B. Substantive Due Process

Substantive due process is also found in the 14th Amendment and is applied to the federal government via the 5th Amendment. It is invoked when a person's life, liberty, or property interests are being intruded upon. Here, it can apply to everybody and still be violated so long as a fundamental right is involved.

When fundamental rights are restricted (as discussed above) the restriction must meet the strict scrutiny test. If Pam is able to successfully assert that her right to procreate is invoked here, she will be able to prevail because the government will not be able to meet the strict scrutiny test. However, if she is not able to successfully assert this, since there is no fundamental right to education, she will probably lose since there is a rational reason for the AEP to program, namely to keep pregnant girls in school and decrease the drop-out rate. But, even if Pam will have to rely on the rational basis test, she will have a claim under which relief can be granted.

ANSWER TO QUESTION #18

1. Ruth’s Arguments in Support of her Action to Quash the Subpoena

Ruth’s primary argument is that the grand jury subpoena ordering her to produce her unpublished photographs violates her Fifth Amendment right against self-incrimination, which is available in grand jury proceedings. Ruth may argue that forcing her to testify about her own attendance at the dogfight would put her at risk of prosecution under the state law which makes it a felony to knowingly attend a dogfight where admission is charged. Her attendance was “knowing” even though she went there for professional reasons, so she could be prosecuted. She might also try to raise a First Amendment argument that freedom of the press would be abridged by forcing her to reveal the information she gathered while attending the dogfight in preparation to write her article.

The prosecution will argue that Ruth must appear at the grand jury proceeding and claim the Fifth Amendment at that point, rather than by quashing the subpoena. If the prosecutor offers Ruth immunity from prosecution for her testimony, Ruth would be required to testify in exchange for such immunity. The prosecutor will also argue that there is no First Amendment privilege for journalists to violate a law while investigating a story.

The court should not quash the subpoena but should require Ruth to appear and invoke the Fifth Amendment or testify under immunity from use of her testimony. The court should also require Ruth to
produce the requested photographs because these are not testimonial evidence and thus their production
does not violate Ruth’s Fifth Amendment rights. The U.S. Supreme Court has held that journalists do not
have a First Amendment privilege not to reveal their sources and other information when requested as part
of a legitimate grand jury investigation.

2. Arguments by the Dispatch that the City Ordinance is Unconstitutional

The Dispatch may raise arguments against the constitutionality of the city ordinance based on the First
Amendment to the United States Constitution, the Due Process Clause, and the Equal Protection Clause.

**The First Amendment Freedom of the Press**

The Dispatch will argue that the ban on coin-operated news racks on public property is state action
that unconstitutionally violates the freedom of the press guaranteed by the First Amendment. The paper
will argue that strict scrutiny should be applied because the ordinance was adopted with intent to target the
Dispatch and interfere with the public distribution of this publication.

The City will argue that the ordinance is a valid restriction on the time, place and manner of
expression and is content-neutral, and thus the court does not need to apply strict scrutiny review.

The court should find a violation of the First Amendment here because the regulation is not narrowly
tailored; it bans all coin-operated news racks without distinguishing among them on the basis of their
propensity to harm the public. It unduly restricts the flow of free speech and free press without a
compelling governmental need for the regulation.

**Due Process and Equal Protection**

The Dispatch can argue under the Due Process and Equal Protection clauses that the city ordinance is
arbitrary and discriminatory in its intent and effect. The Dispatch may argue that the goal of promoting
public safety is not furthered by the means of banning all coin-operated news racks. City justifies the ban
on the basis of public safety. However, there is no evidence of a relationship between coin-operated news
racks and the public safety. There is no apparent reason why coin-operated newsstands should be a danger
to the public while other types of news racks are still permitted. Thus, at best, the ordinance is arbitrary
and irrational. The Dispatch will further argue that in fact the regulation was passed with discriminatory
intent. Although on its face the ordinance only distinguishes between news racks that are coin-operated and
those that are not, apparently the Dispatch, as City’s only newspaper, operates the only coin news racks.
Although no suspect class is involved, the Dispatch may argue that the exercise of a fundamental right
(freedom of the press) is involved, and thus the burden should be on City to prove that there was no
discriminatory intent and there is a compelling need for the classification.

City argues that the ordinance should be evaluated under a rational basis standard because it is only an
economic regulation or was intended to promote the social welfare. If City can articulate its reasoning on
the public safety argument, the regulation may be upheld as a reasonable exercise of the police power. City
may argue that the ordinance does not prohibit the Dispatch from publishing and distributing its publication
by other means.

The court should review this ordinance under a strict scrutiny standard because a fundamental right is
involved, and under this standard the ordinance should be found unconstitutional. If the Dispatch succeeds
in convincing the court that it was the target of City’s retaliatory intent, this would also be a violation of the
Equal Protection clause even though the Dispatch is the only member of the class affected.
CONTRACTS/REMEDIES ESSAYS

Note: Question #s 10, 12 and 24 contain a “model” answer prepared by a CBR editor in the FLA writing style taught in the Essay Writing Workshop.

QUESTION #1 (DISCUSSED IN LECTURE)

In 1980, at the wedding of Tom and Mary, Tom's father, Frank, told them that he wanted them to live with and care for him for the rest of his life. He said, "If you agree to do this, I will deliver to you, within a year, a deed to my home." Tom and Mary told Frank that they accepted his offer and promised to look after Frank with loving care in Frank's home. They immediately moved in with him.

Soon after moving into Frank's home, using their own money, Tom and Mary added a new wing to the house, paid the outstanding property taxes, and paid off an existing mortgage of $25,000.

One year after Tom and Mary moved into the home, Tom reminded Frank of his promise to convey the property to them. Frank became angry, refused to execute the deed, and ordered Tom and Mary to leave the premises.

Tom and Mary consult you concerning their rights and the remedies that may be available to them.

How would you advise them? Discuss.

QUESTION #2 (DISCUSSED IN LECTURE)

On Son's twenty-first birthday, his father, Vendor, gave him a house and lot to which Vendor had a good record title. The gift was made orally and Vendor gave Son the keys to the house. Son promptly took possession and occupied the premises for the next six years. During this time, he made substantial improvements to the house at considerable expense. At the end of the six years, Son's business required him to move to another city, and he listed the property with a local real estate agent for sale or for rent.

After the premises were vacated by Son, Vendor, without Son's knowledge, entered into a contract in writing to sell the house and lot to Purchaser, with transfer of title and possession to take place in sixty days. Purchaser paid one-half of the purchase price to Vendor when they signed the contract. When Vendor and Purchaser were negotiating the sale, Purchaser stated that it was his intent to raze the building and to erect a commercial structure on the land, and Purchaser signed the contract after he had ascertained that the intended improvement would not be in conflict with the local zoning ordinance. When Purchaser inspected the premises at the time of the contract, Son was not in possession and there were no sale or rental signs or other indications of Son's interest. A preliminary title insurance report obtained by Purchaser disclosed no such interest.

Two days before the scheduled transfer, the house was destroyed by fire through no fault of Vendor. Purchaser, having meanwhile discovered another lot better suited to his purposes and having learned that Son claimed title to the premises, notified Vendor that he considered the contract terminated. Purchaser demanded the return of his payment.

What are the rights and obligations of Vendor, Son, and Purchaser, if any, and to what relief, if any, is each entitled? Discuss.
QUESTION #3 (DISCUSSED IN LECTURE)

Buyer, a builder of industrial plants, requested Seller, one of his regular suppliers, to submit a proposal for supplying a turbine for a plant Buyer was building for Carlson. Several days later, Seller phoned Buyer and offered to produce and install a turbine, pursuant to the specifications Buyer had supplied, at a price to be agreed upon at a later time when all of Seller's costs were known. During this telephone conversation, Buyer accepted this offer, "so long as the price does not exceed $400,000," and emphasized that delivery by February 15th was essential, since the turbine was vital to Buyer's completion of the plant. Seller assented to Buyer's response.

The next day, Buyer sent Seller a written confirmation that referred to the specifications Buyer had given Seller, stated the price as "not to exceed $400,000," required delivery by February 15th, provided for damages of $1,000 per day for any delay in delivery, specified "the usual warranties," and stated that "any changes in the terms of this agreement must be in writing." Shortly after receiving this confirmation, Seller began producing the turbine.

On January 15th, Buyer received a letter from Seller requesting a one-month delay in the delivery date. Buyer phoned Seller and, after hearing Seller's reasons for the request, said that a one-month delay in delivery would be acceptable.

On February 20th, Buyer learned from a reliable source that Seller had completed the turbine and was about to sell and deliver it to Ted, another builder, for $430,000.

What are Buyer's rights, and to what relief and remedies, if any, is he entitled? Discuss.

QUESTION #4 (DISCUSSED IN LECTURE)

Owner (O) wished to build a summer house on his mountain lot. He retained Architect (A) to draw the plans and specifications and to supervise the construction of the house. The contract between O and A stated, in part: "The total fee for Architect's work herein promised is $4,000 payable on completion of the construction; provided, that no amount shall be due Architect if the plans and construction fail to meet the personal satisfaction of Owner."

Plans and specifications were prepared for O by A and were approved by O. O then entered into a contract with Contractor (C) to build the home for $45,000 payable on completion. This contract incorporated the plans and specifications as an exhibit and contained the following provisions:

"The architect shall be, in the first instance, the interpreter of the conditions of this contract and the judge of its performance.

"The $45,000 shall be due and payable when O receives from A a certificate stating that the work provided for in this contract has been completed and is accepted by A."

O did not see the house during construction. C finished the work under the contract and requested A's certificate. When A and O visited the site, O noticed that the siding was of a different kind than that specified and gave an appearance to the exterior different from that which O had desired. A refused to issue his certificate of completion.

C refused to remove and replace the siding. C explained that a severe shortage in the supply of the lumber specified had increased its cost to the extent that he could not afford to use it, and that the lumber substituted was at least equal in quality and durability. These matters were confirmed by A.
A demanded payment of his fee. O wouldn't pay him and stated: "The plans for the house were great, but I hate the siding. I'm personally dissatisfied with the construction."

O then wrote C: "Although I do not owe you anything, in view of the effort and money you have expended, I am giving you $35,000." O enclosed a check for $35,000 with these words on the back: "Accepted in full settlement of all claims to date."

C endorsed and cashed the check and has now demanded that O pay him the balance of $10,000 on the contract price.

What are C's rights against O? Discuss.

What are A's rights against O? Discuss.

**QUESTION #5 (DISCUSSED IN LECTURE)**

On January 3, Seller and Buyer had the following conversation. Seller said, "After much thought I have decided to sell my remaining bees and hives. I need to do this in the next 20 days. Since you are also in the bee business and have bought bees and hives from me in the past, I'm asking only $3,000 with the date of transfer of possession negotiable. If you'll pay me $100 in 10 days, I'll give you first chance." Buyer responded, "I'll let you know," and Seller said "Okay."

On January 10, Buyer mailed Seller the following letter: "In confirmation of our January 3 conversation I accept, but I think you ought to reduce the price to $2,500 because the hives are in terrible shape. Possession to be transferred upon payment. /S/Buyer."

Upon reading in the local newspaper on January 11 that Seller was going to offer the bees and hives for sale at public auction on January 24, and having decided to purchase the bees and hives for quick resale profit, Buyer went to Seller's place of business at 11:00 a.m. on January 13. Before Seller opened Buyer's letter of January 10, which had arrived in the morning mail, Buyer handed Seller $100 in cash and said, "Forget that letter. Here's the hundred dollars." When Seller made no reply, Buyer departed, leaving the $100 on Seller's desk.

A week before the public auction, Buyer deposited $3,000 in cash in Seller's checking account, as had been Buyer's custom in prior transactions with Seller. At the same time, Buyer assigned to HON-E-BEE, a honey producer, the rights to receive the bees and hives from Seller. Buyer gave instructions to Seller to deliver the bees and hives to HON-E-BEE.

Seller refused to deliver the bees and hives to either HON-E-BEE or Buyer and returned the $3,000 to Buyer. The auction is scheduled to take place next week.

A. What are Buyer's rights against Seller and what remedies, if any, are available to him? Discuss.

B. What are HON-E-BEE's rights against Seller, and what remedies, if any, are available to it? Discuss.

**QUESTION #6 (DISCUSSED IN LECTURE)**

On October 15, 1980, Coll, a collector of art, telephoned Art, a well-known painter, and said, "Last February I saw your painting of sunflowers. Is it still available and, if so, how much do you want for it?" Art responded, "You can have it for $25,000 and I can deliver it on November 1, but I want a clause stating
that if either of us decides not to go through with the deal, the other party is entitled to $5,000." Coll replied, "You've got a deal. Draw up the papers and mail them to me."

The painting which Coll had in mind was entitled "Sunflowers." In July 1980, unknown to Coll, Art had painted another picture of sunflowers which he had entitled "Sunflowers II."

Art prepared, signed, and mailed to Coll a document stating: "October 16, 1980. I hereby sell to Coll my sunflower painting for $26,000, the price to be paid and the painting to be picked up by Coll on November 1. In the event either party fails to perform, it is agreed that, because of the difficulty of proving how much damages have been sustained by the non-breaching party, the non-breaching party shall be entitled to damages in the sum of $5,000."

Coll received the document on October 17. He telephoned Art that day and said, "I accept your offer and will pick up the painting on November 1." Coll did not sign the writing or return it to Art. The $26,000 figure in the writing was a typographical error made by Art's secretary. Neither Art nor Coll had noticed that the figure was $26,000, rather than the $25,000 they had specified in their October 15 telephone conversation.

On October 25, the directors of Museum expressed great interest in "Sunflowers." Flattered by their attention, Art delivered "Sunflowers" to Museum as a gift that same day.

On November 1, when Coll tendered $25,000, Art tendered to Coll the painting entitled "Sunflowers II." Coll refused to accept "Sunflowers II" and, at the same time, learned that "Sunflowers" had been donated to Museum.

What are Col's rights and remedies, if any, against: (1) Art? Discuss; (2) Museum? Discuss.

**QUESTION #7 (DISCUSSED IN LECTURE)**

On January 15, 1983, Jones agreed with Motors in a writing signed by both to supply Motors with 10,000 pounds of specifically described bolts each month, for a period of ten months, beginning March 1, 1983. The stated price was $.85 per pound. On February 1, 1983, Jones, in good faith, notified Motors that he could not afford to sell the bolts at the agreed price. He said he would charge $.90 per pound. Motors orally agreed to the increase in price to begin with the first installment.

In a written confirmation, signed only by Jones and delivered to Motors, Jones' secretary mistakenly typed the new price as "$.91 per pound" rather than "$.90 per pound." Motors received the confirmation but did not read it and did not reply to it.

Prior to March 1, 1983, Jones notified Motors that he would deliver no bolts because he had just contracted to sell his entire output to Ted at $1.10 per pound.

Despite diligent efforts, Motors was unable to buy bolts from a new supplier until May 1. The price charged by the new supplier was $1.00 per pound.

Because of the 60-day delay in obtaining a new source of supply, Motors was delayed in delivering motors to Electric, a company with which Motors had a contract that contained a valid liquidated damages clause providing for damages of $10,000 a day for delay in delivery of motors.

Although Jones knew that Motors sold motors, he did not know specifically, nor did he have reason to know, that Motors had a contract with Electric or that that contract contained a liquidated damages clause.

In a suit by Motors against Jones commenced on October 1, 1983, Motors prays for the following damages.
Count 1: $15,000, being the difference between the price paid by Motors ($1.00) and the original contract price ($0.85) for 100,000 pounds;

Count 2: $600,000, being the amount Motors had to pay Electric in liquidated damages;

Count 3: $1,000,000 as punitive damages, alleging that Jones' breach was malicious.

In his answer to the complaint, Jones denies liability for damages, and contends that if he should be found liable under count 1, his liability would be limited to $9,000, being the difference between the price paid by Motors ($1.00) and the modified price in the written confirmation ($0.91).

What result on each count, and what amount of damages, if any, should be awarded? Discuss.

**QUESTION #8 (DISCUSSED IN LECTURE)**

Fred is the owner of Fieldacre, a farm and residence located in State F valued at $200,000. Sam, Fred's son, is owner of Snowacre, undeveloped pasture land in State S valued at $25,000.

Fred asked Sam if Snowacre had access to water. Sam replied that he believed there was an underground water source which could be developed. Fred said that, in such event, he could use Snowacre to pasture cattle and that he wanted Sam to have Fieldacre so Sam could raise Fred's grandchildren on a farm.

On May 1, 1984, Fred offered in writing to deliver to Sam a deed to Fieldacre in exchange for Sam's delivery to Fred of a deed to Snowacre. The offer concluded with the statement: "This offer will remain open until June 1, 1984," and was signed by Fred.

On May 10, 1984, Sam refused an offer from Rob to purchase Snowacre for $35,000. On May 25, 1984, Fred withdrew the offer he had made to Sam, stating that he had discovered there was no water source accessible to Snowacre. On May 28, 1984, Sam delivered to Fred a written acceptance of Fred's offer, together with a deed conveying Snowacre to Fred.

Sam brought suit in State S alleging a contract for the exchange of Snowacre for Fieldacre and his timely delivery to Fred of a deed to Snowacre. He seeks specific performance of Fred's promise to deliver a deed to Fieldacre. Fred made a general appearance in the State S action.

A. Does the State S court have jurisdiction to grant the relief requested? Discuss.

B. What other issues should Fred raise in defending the action and how should the court rule on each of them? Discuss.

**QUESTION #9 (DISCUSSED IN LECTURE)**

Art and Betty own adjoining farms in County, an area where all agriculture requires irrigation. Art bought a well-drilling rig and drilled a 400-foot well from which he drew drinking water. Betty needed no additional irrigation water, but in January 1985, she asked Art on what terms he would drill a well near her house to supply better tasting drinking water than the County water she has been using for years. Art said that because he had never before drilled a well for hire, he would charge Betty only $10 per foot, about $1 more than his expected cost. Art said that he would drill to a maximum depth of 600 feet, which is the deepest his rig could reach. Betty said, "OK, if you guarantee June 1 completion." Art agreed and asked
for $3,500 in advance, with any additional further payment or refund to be made on completion. Betty said, "OK," and paid Art $3,500.

Art started to drill on May 1. He had reached a depth of 200 feet on May 10 when his drill struck rock and broke, plugging the hole. The accident was unavoidable. It had cost Art $12 per foot to drill this 200 feet. Art said he would not charge Betty for drilling the useless hole, but he would have to start a new well close by, and could not promise its completion before July 1.

Betty, annoyed by Art's failure, refused to let Art start another well and on June 1, she contracted with Carlos to drill a well. Carlos agreed to drill to a maximum depth of 350 feet for $4,500, which Betty also paid in advance, but Carlos could not start drilling until October 1. He completed drilling and struck water at 300 feet on October 30.

In July, Betty sued Art seeking to recover her $3,500, plus the $4,500 paid to Carlos.

On August 1, County's dam failed, thus reducing the amount of water available for irrigation. Betty lost her apple crop worth $15,000. The loss could have been avoided by pumping from Betty's well if it had been operational by August 1. Betty amended her complaint to add the $15,000 loss.

In her suit against Art, what are Betty's rights and what damages, if any, will she recover? Discuss.

QUESTION #10 (DISCUSSED IN LECTURE)

Expo, a promoter of musical performances, contracted with Rock, a little-known music group, to play a concert at College Center for a fee of $5,000. Subsequently, Rock released a record which was a commercial success and has resulted in a high demand for the group. Rock thereafter indicated to Expo that it would abide by the contract, and advance sales have been heavy.

Two weeks before the scheduled concert, Rock notified Expo by letter that it would not perform the scheduled concert. In explanation, it enclosed a copy of a letter from Magnus urging Rock to break its contract with Expo and to perform for Magnus on the scheduled date in nearby City for a fee of $50,000. Magnus is now advertising the Rock performance in City.

Expo cannot now obtain another act which can successfully compete for an audience with the City concert. Expo is also faced with the necessity of refunding money received from advance ticket sales, loss of $3,500 spent in preparation for the Rock performance, loss of an estimated $15,000 net profit based on an anticipated capacity audience, and loss of goodwill which could destroy its business.

Magnus will net $75,000 from the City concert.

To what relief, if any, is Expo entitled:

A. Against Rock? Discuss.

B. Against Magnus? Discuss.

QUESTION #11

In March, Owner wrote Builder asking for a bid on a contract to build a home on Owner's lot. Builder replied in a letter as follows:
"I am happy to quote you my price of $60,000 to complete the house according to the specifications you supplied. Please let me know immediately if you accept. Payment of $10,000 must be made when building begins. The remainder is due when the house is complete."

Owner wrote back:

"I accept your offer, provided you can guarantee completion by November 1st or forfeit $100 per day for each day after November 1st."

Builder, after further oral discussions with Owner about the specifications for the house, began work on June 1, at which time Owner paid Builder $10,000. One fourth of the work was completed by the end of June. In July and August, there was a strike by all carpenters and bricklayers, and no work on the house was accomplished during that time. The strikers returned to work on September 1, and on September 2 Builder notified Owner that he would be unable to complete the house before January 15 without considerable overtime work. Builder asked that Owner agree that no damages for delay would be deducted or charged to Builder and stated that if such an agreement was not immediately forthcoming, Builder would abandon the contract and move his men to another project.

Owner consults you on September 2. He tells you that he need not vacate his old home until mid-January, but that he has ordered furniture for delivery on December 15, which will have to be stored at great expense as well as be moved a second time from storage to the new home if the new home is not ready on time.

Advise Owner of his rights as of September 2 and of his eventual liability or recovery, if any, if:

A. He agrees to Builder's request. Discuss.

B. He does not agree to Builder's request. Discuss.

**QUESTION #12 (FEBRUARY 2005 EXAM)**

PC manufactures computers. Mart operates electronics stores.

On August 1, after some preliminary discussions, PC sent a fax on PC letterhead to Mart stating:

We agree to fill any orders during the next six months for our Model X computer (maximum of 4,000 units) at $1,500 each.

On August 10, Mart responded with a fax stating:

We're pleased to accept your proposal. Our stores will conduct an advertising campaign to introduce the Model X computer to our customers.

On September 10, Mart mailed an order to PC for 1,000 Model X computers. PC subsequently delivered them. Mart arranged with local newspapers for advertisements touting the Model X. The advertising was effective, and the 1,000 units were sold by the end of October.

On November 2, Mart mailed a letter to PC stating:

Business is excellent. Pursuant to our agreement, we order 2,000 more units.
On November 3, before receiving Mart’s November 2 letter, PC sent the following fax to Mart:

We have named Wholesaler as our exclusive distributor. All orders must now be negotiated through Wholesaler.

After Mart received the fax from PC, it contacted Wholesaler to determine the status of its order. Wholesaler responded that it would supply Mart with all the Model X computers that Mart wanted, but at a price of $1,700 each.

On November 15, Mart sent a fax to PC stating:

We insist on delivery of our November 2 order for 2,000 units of Model X at the contract price of $1,500 each. We also hereby exercise our right to purchase the remaining 1,000 units of Model X at that contract price.

PC continues to insist that all orders must be negotiated through Wholesaler, which still refuses to sell the Model X computers for less than $1,700 each.

1. If Mart buys the 2,000 Model X computers ordered on November 2 from Wholesaler for $1,700 each, can it recover the $200 per unit price differential from PC? Discuss.

2. Is Mart entitled to buy the 1,000 Model X computers ordered on November 15 for $1,500 each? Discuss.

**QUESTION #13**

Katy and Mike operated a motorcycle dealership under the name K&M. In May 1991, Cycles orally agreed to supply motorcycles to K&M for resale at a price 5% less than Cycles' factory list prices. The term of the agreement was for the succeeding five-year period but could be terminated at any time by either party. Cycles immediately sent a written, signed confirmation of the agreement which, however, omitted the 5% discount provision. K&M never received the written confirmation.

In November 1991, Katy and Mike terminated their business relationship. They executed a document by which Mike assigned all his rights in K&M contracts to Katy, and by which Katy agreed to be solely liable for all of K&M's business obligations. A copy of the signed document was delivered to Cycles. Cycles continued to ship motorcycles to K&M.

A year after receiving the copy of the document, Cycles sent Katy a statement for $40,000, the factory list price for the latest shipment of motorcycles accepted by Katy. Katy sent Cycles a check for $30,000 with a letter stating that the check was sent in full payment of the statement because Cycles had billed her at prices which were too high. Cycles deposited the check and immediately sent protest letters to Katy and Mike demanding payment of $10,000 and canceling the agreement to supply motorcycles on the ground that the agreement was not binding and, alternatively, that it was invalidated because Mike had left the dealership.

A. To what relief, if any, is Katy entitled against Cycles? Discuss.

B. To what relief, if any, is Cycles entitled against:


QUESTION #14

In January 1993, Owner contracted in a signed writing to sell Greenacre, a 50-acre square parcel of unimproved realty, to Byer for $50,000. Byer was to pay $5,000 on March 1. The remainder of the purchase price and the deed were to be exchanged on April 1.

On February 1, in a signed writing, Byer assigned to Ellis all his rights under the contract, and Ellis, also in a signed writing, agreed with Byer to pay the contract price to Owner. Byer then notified Owner that he had assigned the contract to Ellis, which Ellis had agreed to pay the contract price, and that, therefore, Byer considered himself "free and clear of any further obligations under the contract." Owner received, but did not reply to, this communication.

On March 1, Owner accepted the $5,000 installment paid to him by Ellis. On March 15, Owner notified Byer and Ellis that he had just discovered that he did not own a strip three feet wide along the western edge of Greenacre.

On April 1, Owner tendered to Byer and Ellis a deed to Greenacre, excluding from the description of the property the three-foot strip. Both Byer and Ellis refused to accept the deed or to pay the remaining $45,000. Owner thereupon commenced a suit for specific performance against both Byer and Ellis. Ellis cross-complained against Owner for restitution of the $5,000 installment he had paid to Owner.

A. What result in Owner's suit against Byer? Discuss.

B. What result in Owner's suit against Ellis and Ellis' cross-complaint against Owner? Discuss.

QUESTION #15

In January, 1991, Mr. and Mrs. Brown learned of a rustic, but very popular, summer lodge called Mountain Pines, located in a remote section of wilderness in the mountains of a distant state. Mr. Brown wrote to Mountain Pines, describing both him and Mrs. Brown as "city folks" who had never before been in the woods and requesting a reservation for a double room for June 1 - 8, of the following year, 1992. He enclosed a $100 check as a deposit.

Mountain Pines confirmed the room reservation with an unsigned postal card bearing its name in print, stated a total price of $500 and acknowledged receipt of the deposit.

The Browns arrived at the lodge in the early afternoon of June 1, 1992, only to be informed by the apologetic manager that he could not honor their reservations because all rooms would be occupied until the following evening. The manager suggested as an alternative arrangement that the Browns could stay overnight in a tent in a forested area adjacent to the lodge for only a third of the price of the room. The Browns reluctantly agreed, saying that they would do it only because they had no other choice. They paid the cost of the tent accommodations.

During the night a bear entered the tent and attacked the Browns. They suffered severe injuries, requiring $10,000 in medical expenditures. The Browns also lost $2,000 in income and incurred $1,000 additional travel expenses from Mountain Pines back to their home. The manager knew when he rented the tent to the Browns that a bear had attacked a guest at a tent in Mountain Pines during the summer of 1991.

What claims for relief may Mr. and Mrs. Brown assert against Mountain Pines? What damages will they recover if they prevail? Discuss.
QUESTION #16

Buyco, a conglomerate, wished to purchase a Model X generator of unique design, recently introduced to the market. Demand for the generator was high. Buyco was unable to locate a seller who would guarantee delivery within six months.

Buyco receive a letter from Sellco stating: "Sellco can obtain a new Model X generator and hereby offers to sell the generator to Buyco for one million dollars. Sellco promises delivery within three months from acceptance. This offer will be held open for one month."

Sellco has dealt regularly with one of the subsidiaries of Buyco, but Sellco does not in the normal course of business sell generators. Knowing of Buyco's urgent need for the generator, Sellco believed that it could increase its goodwill by selling it to Buyco.

Buyco responded immediately in writing to Sellco's letter, stating: "We are delighted that you can furnish the Model X generator in time to fill our needs. We will begin immediately to construct facilities to house the generator, but in the meantime we will continue to shop around. We wish to hold your offer under advisement for a couple of weeks to see if we can get a better price." Sellco wrote back saying: "We acknowledge your letter."

It soon became apparent to Buyco that the price of Model X generators had increased dramatically and that none could be purchased for less than $1,200,000, regardless of delivery date. In the meantime, Buyco expended $100,000 on facilities to house the generator. Ten days after receipt of the initial letter from Sellco, Buyco decided to accept Sellco's offer. On that same day Buyco received a letter from Sellco stating: "Because of the dramatic increase in the market price of the generator, we hereby revoke our offer."

Buyco learned that Sellco had obtained the generator and was about to sell the generator to Thirdco for $1,300,000, and that Thirdco, aware of the existence of Sellco's offer to Buyco, had persuaded Sellco to revoke it.

A. What are Buyco's rights, if any, against Sellco and to what relief, if any, is Buyco entitled? Discuss.

B. What are Buyco's rights, if any, against Thirdco and to what relief, if any, is Buyco entitled? Discuss.

QUESTION #17

Sam owned Blackacre and Whiteacre, two unimproved vacant tracts of land. The county assessor's records listed each tract as containing 10 acres. Without having seen either tract, but having checked the assessor's records, Bob telephoned Sam and said, "I offer to buy Blackacre and Whiteacre for $20,000, $10,000 now and another $10,000 in one year." Sam responded, "O.K., I'll have the papers ready tomorrow." The following day Bob paid Sam $10,000, and the parties signed a land sale contract prepared by Sam's lawyer. The contract described the property as "Blackacre, containing 20 acres, more or less," and did not mention Whiteacre. The contract was otherwise consistent with oral communications between Bob and Sam.

The contract did not contain language making time of the essence.

During the next months the following events occurred:

A. Bob sold his interest in the contract to Cal for $10,000. Cal notified Sam of his purchase.
B. The announcement of a proposed freeway increased land values in the area from $1,000 per acre to $3,000 per acre.

C. Bob, Sam and Cal each learned that while Blackacre contained 10 acres, Whiteacre contained only 7 acres.

On the date the final payment was due, Cal tendered $7,000 to Sam and demanded deeds to Blackacre and Whiteacre. Sam rejected the tender and two days later notified Cal that the purchaser's interest in the contract was "terminated because of non-payment."

Land values in the area are continuing to increase rapidly.
What rights and remedies, if any, does Cal have? Discuss.

**QUESTION #18**

Clark is a wholesale distributor of office supplies. Jones operates a novelty supply company. On May 1, Clark received a written order from Jones for 30,000 pens at 50 cents each, the price listed in Clark's catalogue. The order from Jones stated that the pens were to be specially imprinted by Jones with a political slogan and were being purchased for resale by Jones to Davis, a candidate for the United States Senate. The order specified for delivery of half of the pens by August 1 and the remainder by October 1.

On May 5, Clark sent to Jones a written confirmation which acknowledged the quantity, price, delivery dates, and purpose of the purchase. Both the order and the confirmation were on forms containing a number of printed clauses. The printed clauses were substantially the same on both forms, except that Clark's confirmation included an additional clause stating that all disputes about the transaction were to be resolved by arbitration.

On June 30, Jones telephoned Clark and told him that another distributor had offered Jones the same pens at 45 cents each and that Jones intended to switch his order to the other distributor unless Clark agreed to lower his price. Rather than lose the sale, Clark grudgingly agreed to lower the price to 45 cents for Jones' order.

On July 30, Clark shipped the first 15,000 pens and, on August 2, Clark accepted Jones' payment for them at 45 cents each. On August 10, Jones wrote to Clark cancelling the second half of the order because Davis had withdrawn from the senatorial race due to poor health. When he received the letter of cancellation, Clark had not yet ordered the second shipment of pens from the manufacturer.

Clark sued Jones for breach of contract in state court, seeking damages based on the original 50 cent price for the remaining 15,000 pens.

What arguments should each party make, and how should the case be decided? Discuss.

**QUESTION #19**

Al planned to build a large shopping center in a suburban area. Betty agreed in writing to sell Al her 100-acre farm located in the center of the proposed development. Al deposited with Betty a portion of the purchase price, the balance to be paid upon delivery of the deed by Betty. At the time their written contract was entered into, Al told Betty only that he was buying her land and 200 acres from other local farmers for a "big project."
Relying on Betty's agreement, Al purchased the surrounding 200 acres from other farmers. He paid them the same price he had contracted to pay Betty $1,000 an acre. This price was $200 an acre over market value.

Claude, hoping to build his own shopping center on other nearby land, paid Betty $100,000 to refuse to convey her property to Al. Betty falsely notified Al that she could not complete the sale because she had discovered a defect in her title. Al reluctantly accepted return of his deposit. Without Betty's land, Al could not develop the shopping center as planned, and he has offered his 200 acres for sale.

Claude purchased the land for his shopping center from local farmers for $500 an acre, $300 below the former market value, because land values in the entire area plummeted once Al offered his 200 acres for sale. Claude's shopping center is nearing completion.

Al has recently learned of Claude's arrangements with Betty.

What legal and equitable remedies does Al have:
A. against Betty? Discuss.
B. against Claude? Discuss.

**QUESTION #20**

Neptune is an upscale seafood restaurant that opened in a convenient downtown location six months ago. It has become well known for the quality of its food and service. It has several dishes featuring salmon that are particularly popular with patrons.

Neptune entered into a valid written contract with Seafood Uptown Providers (SUP) under which SUP agreed to supply Neptune with 250 pounds per week of fresh Pacific salmon at $4.00 per pound for the next year.

Three months after the making of the contract, a large widely publicized oil spill occurred in Pacific coast waters. The spill greatly reduced the catch of salmon. Salmon began selling on the open market for at least $5.00 per pound. SUP then told Neptune that it would supply salmon only at a price of $6.00 per pound. Neptune refused to pay more than the contract price. In fact, SUP has found a new customer willing to pay $6.00 per pound, and it is selling its entire supply (about 450 pounds of salmon per week) to that customer.

Neptune, faced with the prospect of having to obtain salmon for its daily restaurant menu and also for special events that it caters, found a supplier willing to meet about one-half of Neptune’s weekly requirement for salmon at $5.00 per pound. With further effort, Neptune might have filled a portion of the remaining weekly requirement for salmon at $6.00 per pound, but was uncertain to what extent salmon would continue to be obtainable and how high the market price might go. Neptune decided instead to reduce its menu offerings of salmon and to cancel several catering contracts.

Within a month after reducing its menu offerings of salmon, Neptune experienced a 25% decline in its restaurant business from the previous month. It also had a 75% decline in new bookings for catering jobs.

Neptune still has the immediate and long-term problem of how to obtain a reliable source of salmon, and wants to sue SUP.

What rights and remedies does Neptune have against SUP, what damages, if any, might Neptune recover, and what defenses, if any, should SUP assert? Discuss.
QUESTION #21

Susan is the Chief Operating Officer of WestTel, a telecommunications company. Felix is the Chief Executive Officer of CodeCo, a software company. About a year ago, Susan and Felix negotiated and signed a valid written contract under which WestTel purchased from CodeCo a license to use and sell software that prevents interception of telephone communications during transmission. Susan was assisted in the negotiations by Larry, an in-house attorney then employed by WestTel.

Throughout the negotiations, WestTel insisted that the license from CodeCo be an exclusive license for WestTel to use and sell the software in the national cellular telephone market. The only language bearing on the subject in the contract stated that “WestTel shall have the use” of the software. The contract contained a clause stating that the written contract represented the entire agreement of the parties.

Susan was given oral assurances by Felix that the language quoted above would be interpreted by CodeCo to mean that WestTel was granted the exclusive license and that CodeCo would not license the software to others in the national cellular telephone market. Larry advised Susan that he was satisfied with Felix’s oral assurances.

Last week, Susan saw an ad in a trade journal announcing that NewCom, a competitor of WestTel, was marketing a new national cellular phone service using the same anti-interception software produced by CodeCo. She immediately called Felix to inquire about the NewCom ad and remind him of WestTel’s exclusive license. Felix confirmed that CodeCo had licensed the same software to NewCom and denied that WestTel had an exclusive license.

Susan then called NewCom and informed its chief executive officer that WestTel had the exclusive license for the use of the software and that, if NewCom went forward with its plan to use the software in the national market, WestTel would sue NewCom. She was told that if she wanted to discuss it further, she should talk to Larry, NewCom’s in-house attorney who had negotiated the NewCom/CodeCo contract.

It turns out that at the time Larry was assisting Susan with the WestTel/CodeCo negotiations, NewCom had contacted Larry and offered him a job. NewCom knew when it offered him the job that Larry was participating in the WestTel/CodeCo negotiations. Larry quit WestTel about six months ago and joined NewCom’s legal staff.

When Susan confronted Larry and reminded him of his advice about the exclusivity of the WestTel/CodeCo deal, Larry responded only with, “Well, you signed it.”

1. What theories, if any, might WestTel reasonably assert against CodeCo to establish and enforce a right to an exclusive license, and what is the likely outcome on each theory? Discuss.

2. Should WestTel prevail in actions for tortious interference with the WestTel/CodeCo contract against:

   c. Larry? Discuss.

3. What, if any, ethical duties has Larry breached? Discuss.
QUESTION #22

Owens, a homeowner, approached Carter, a licensed contractor, to discuss construction of a new garage attached to Owens’ home. After several meetings, Owens and Carter signed the following contract.

Carter will build a two-car garage, with overall dimensions of 30’ (width) by 25’ (depth). Included within the overall dimensions will be a storage area at the rear. Storage area to be 30’ by 4’, and divided from the remainder of the garage by a wall containing a door. Wooden siding, paint, and roof will be matched to Owens’ home. Carter will commence work on March 15 and will complete job no later than April 30. Owens agrees to pay $8,500 upon completion. The time for performance of these obligations shall be of the essence.

The contract was signed on January 15, and Carter arrived on the job site on March 15 to begin work. Several weeks later, Carter learned that roofing shingles of the exact type and color used on Owens’ home were difficult to obtain. Therefore, he used shingles made of other material which were of even higher quality than those originally planned but which, although very close, did not precisely match those on the roof of Owens’ home.

Carter completed the garage on May 10 and presented Owens with a bill in the amount of $8,500. Later on the same evening, Owens placed his car in the garage only to learn that the length of his car did not permit the garage door to close. Upon closer inspection he discovered that the storeroom at the back of the garage was 30’ by 6’, two feet deeper than planned. As a result, the garage parking area was only 19’ in depth. While this would be sufficient for most automobiles, it was several inches too short to accommodate Owens’ large car.

The cost of removing and relocating the dividing wall would be $800. The cost of removing and replacing the shingles with others matching Owens’ home would be $2,200. Owens has refused to pay any part of Carter’s bill, citing as reasons Carter’s failure to (1) complete the job by April 30; (2) use matching shingles; and (3) build a garage and storeroom of the dimensions called for by the contract.

What are Carter’s rights and liabilities? Discuss.

QUESTION #23

On June 1, 1994, Owner signed a contract with Ace Painting to paint the exterior of Owner's house by Sept. 1, 1994, for a contract price of $4,700. On July 1, Owner called Ace by telephone and told Ace that it was particularly important that the house be painted by Sept. 1 because his employer had transferred him and he was putting the house up for sale.

The weather was unusually rainy, and Ace fell behind on all of its painting jobs. Ace could have hired additional painters or subcontracted out some of its jobs to stay on schedule, but Ace would have lost money on several jobs. Ace did not finish painting Owner's house until Sept. 20. As a consequence, Owner did not list the house for sale until Sept. 21.

The house stood empty, and Owner made no effort to rent or otherwise make use of it, until it was finally sold in May 1995. Most realtors in the area agree, and would testify, that the "selling season" in the area runs from May 1 to Oct. 1 and that Owner's house would have been more likely to be sold in 1994 if it had been painted and ready to show by Sept. 1.
Owner has refused to pay Ace for the work. Ace has sued Owner for $4,700. Owner denies liability and counterclaims against Ace for $6,000, asserting that the delay in Ace's completion was the cause of his missing the "selling season." The interest payments on the mortgage on Owner's house from October 1994 to May 1995 totaled $6,000.

What claims and defenses may Owner and Ace reasonably assert against each other, and what is the likelihood of success on each? Discuss.

QUESTION #24

Betty had long dreamed of building a home on top of a hill on Sam's farm, but she could afford neither the land nor the cost of building on the steep terrain. In 1986, however, her Aunt Kate's lawyer told Betty that Kate had named Betty the sole legatee of Kate's large estate. Kate was then 94 years old and very ill.

Sam and Betty thereafter negotiated for and signed the following document: "Sam offers to sell Betty one acre, to be selected by her on the hilltop on Sam's farm, for $10,000 cash. Betty agrees to make the selection within six months after the death of Betty's Aunt Kate."

Sam died in 1989, survived by Aunt Kate. Carla, Sam's sole heir, having been told that Sam's death revoked his offer to Betty, sold the farm to Wilma for $100,000 in cash.

Kate died January 1, 1990. Betty received the legacy she had expected, but not until seven months after Kate's death. As soon as she received the legacy, she tendered $10,000 first to Carla and then to Wilma, demanding from each a deed to one acre which Betty said she would now select on the hilltop. Both Carla and Wilma rejected the tender and refused to deliver a deed.

To what relief, if any, is Betty entitled:

A. Against Carla? Discuss.

B. Against Wilma? Discuss.
ANSWERS TO SELECTED CONTRACTS/ REMEDIES QUESTIONS

“MODEL” ANSWER TO QUESTION #10

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and fact, law, application methodology taught in the Essay Writing Workshop. Keep in mind that this answer is merely an acceptable passing answer and does not cover everything that is discussed in the lecture.

I. Expo v. Rock

A. Out of Pocket Expenses

Expo and Rock had a valid contract wherein Rock would play a concert at College Center. Expo spent $3500 to prepare for Rock’s concert. Rock informed Expo two weeks prior to its scheduled performance that it would not perform. Instead, it will be performing for Magnus in nearby City. There is no controversy over the existence of a contract, nor any question about anticipatory repudiation of the contract.

Expo will assert that he is entitled to recover $3500 that he spent preparing for the concert. This amount, known as reliance damages, may be sought when the non-breaching party (here, Expo) has incurred expenses in relation to the contract. Although Rock could try to respond by arguing facts that this amount is too much or spent too soon and that Expo could have mitigated this amount spent, this argument will likely be useless and fail.

Expo would prevail. Since Expo spent $3500 to promote the concert in reliance on Rock’s promise to perform, Rock would be liable for this amount.

B. Lost Profits

Rock was to perform at College Center for $5000. Rock cancelled the performance. Expo expects that his net profit would have been $15000.

Expo will argue that, had Rock gone through with the concert, he expected to earn $15000 net profit and should be compensated for this amount. Generally, a non-breaching party is allowed to recover the amount that would put him in the position he would have been in had the contract been performed. Rock will assert in response that this amount claimed by Expo is too speculative because there is no way Expo can estimate his net profit until the time when the concert actually happens and ticket sales are final. In this case, there are some advance ticket sales, but there is nothing in the facts, nor does Expo allege that the concert was sold out.

Expo will prevail and he would be entitled to his lost net profits that he would have made had Rock performed. Generally, for a non-breaching party to recover lost profits, or expectancy damages, he must be able to prove the dollar amount with reasonable certainty. Given the fact that there were advance ticket sales and that Rock had developed great commercial success, it would have been feasible to assume that the concert would sell out. Basing the amount of profit on audience capacity as Expo did seems to be a fair and certain way of estimating his profit that he would have earned.
C. Damages to Reputation (Goodwill)

Expo claims that due to Rock’s breach of contract, his reputation and business are destroyed and he wants to be compensated for such.

Expo will argue that due to Rock’s breach, his reputation and job as a promoter of musical performances could likely end because venues will not be hiring him to find performers due to his alleged inability to sustain and keep a performer. He has lost his advantage that he previously had due to his name, reputation and success and therefore entitled to be compensated for this. Generally, a business may be compensated for loss of goodwill provided it could be proven.

Rock will argue in response that this element of damages is much too uncertain and speculative and therefore Rock should not be responsible to compensate Expo. Rock will also assert that the cancellation of only one concert will not be sufficient to put Expo out of business.

Expo could possibly prevail and recover damages for loss of goodwill provided he can prove them with reasonable certainty. An expert may be required to testify about Expo’s past and future profits and the court would likely have to come up with a formula to measure the damages. If they cannot be reasonably proven, then Expo will not be entitled to these damages. Generally, this element of damages, which is very uncertain, is difficult to recover.

D. Specific Performance

Rock breached its contract to perform and Expo cannot obtain another act.

Expo will argue that it is 2 weeks prior to the concert, and he cannot get another performer and certainly cannot get one that would be able to compete with Rock’s performance in nearby City. Therefore, Expo will assert that Rock must be ordered to specifically perform in accordance with their contract. Generally, a court will award specific performance when damages cannot be proven with certainly and substitute performance cannot be procured. However, Rock will argue in response that even if damages are inadequate, Rock cannot be forced to perform because this is a personal services contract that cannot be adequately supervised by the court. Specific performance will not be granted where the court cannot supervise enforcement. Furthermore, courts usually do not grant specific performance for personal services contracts.

Specific performance will not be granted in this case and Rock will not be ordered to perform at College Center because court supervision is not realistic. However, it is possible that the court may grant an injunction to prevent Rock from performing its other concert in City on the same day it was to perform for Expo.
II. Expo v. Magnus

A. Punitive Damages for Intentional Interference with Contract

Expo and Rock’s contract was for a $5,000 fee. Magnus, by letter to Rock, urged Rock to break its contract with Expo and to perform in City for $50,000. Subsequently, Rock broke its contract with Expo.

Expo will argue that Magnus acted maliciously when it urged Rock to break its contract. Magnus intentionally wrote a letter to Rock stating that it should break the contract, and then advertised the Rock performance in City. Therefore, Expo will assert that he is entitled to punitive damages for Magnus’s intentional interference with contractual relations. This is a tort action wherein punitive damages may be recovered when malice is proved. Punitive damages are awarded to punish the defendant rather than to compensate the defendant. Magnus will assert that punitive damages are not appropriate here because he was not acting with malice but was acting out of his best business interests and for the benefit of City and Rock’s music career.

Whether Magnus is liable for punitive damages depends on whether the fact finder determines that he acted with malice in interfering with the Rock-Expo contract. The facts seem clear that Magnus knew about the Rock-Expo contract and he wrote a letter urging Rock to break the contract. Magnus knew that Rock would be breaching a binding contract. Accordingly, Magnus committed the tort of intentionally interfering with an existing contract and likely would be liable to Expo for punitive damages. His claim that he was acting without malice but to better his and Rock’s businesses would likely fail as merely a poor excuse for his actions.

ANSWER TO QUESTION #11

A. If Owner agrees to Builder's request, then Builder's obligation to perform is extended to January 15 and there has been no breach of contract as of September 2.

The parties formed a valid contract in March. Owner's letter to Builder at that time was a request for an offer. Builder's written reply was an offer containing definite language and sufficient terms to communicate to Owner his power to conclude a contract by accepting. Owner's acceptance of the offer changed the terms of the offer by adding a liquidated damages provision, and therefore Owner's acceptance was, in fact, a counteroffer. The counteroffer was accepted by the original offeror, Builder, when he had further discussions with Owner about specifications, began work on June 1, and accepted $10,000 as a down payment. Therefore, as of June 1, Builder was obligated to complete the house by November 1 for $60,000, and he was subject to a $100 per day liquidated damages provision.

If Owner agrees to give Builder more time to perform, there is no breach of contract as of September 2. The extension of the time for performance, however, is valid only if there has been a valid modification of the contract. If Owner and Builder agreed to the modification and Owner's new promise was supported by new consideration, the modification is valid. However, if Builder provides no new consideration for Owner's promise to extend the time for performance, then under the preexisting duty rule Owner's promise to extend is not enforceable and Owner may sue Builder for breach of the original agreement. Here, Builder has not provided consideration for Owner's promise to extend. Builder has merely promised to complete the house, an obligation he was already under a legal duty to perform. Therefore, it appears the modification is invalid.

However, there are two situations in which the court may find a valid modification without consideration in this case. If the court finds the parties' actions at the time they agreed to a modification indicate the parties agreed to a rescission of the original contract and the entering into of a new contract
with new promises and new consideration, then the court will enforce the modification. Similarly, if unforeseen hardship has made it difficult for Builder to complete the contract, the court may enforce the modification. Here, it can be argued that the labor strike was an unforeseen hardship. Therefore, the modification of the contract is enforceable, and Owner cannot sue Builder on September 2. Owner must now wait until January 15 to sue Builder if Builder fails to perform.

B. If Owner does not agree to Builder's request, Owner may sue Builder for breach of contract as of September 2. However, the court may relieve Builder of his obligation to perform by November 1 on the basis of impossibility of performance.

Builder has asked for an extension of the time for performance without the liquidated damages provision. Generally, a breach of contract does not occur until the date set for completion of performance, here, November 1. However, under the doctrine of anticipatory repudiation, a promisee such as Owner can treat the promise as breached on a date earlier than the date set for performance if the promisor indicates through unequivocal language or action that the promisor does not intend to perform. Here, Builder, the promisor, has told Owner unequivocally that unless Owner agrees to the modification, Builder will walk off the job. Owner has no obligation to vary the terms of the agreement, and therefore Builder's communication establishes a breach of contract on September 2.

Upon breach of the contract, Owner may sue for damages immediately. Damages would equal the cost of completion of the house. Owner would also be able to recover the cost of storage of his furniture. However, Builder may raise the claim of impossibility of performance. He would argue that an event subsequent to the making of the contract, here, the labor strike, has made the contract impossible to perform by November 1. If the strike was not Builder's fault, and the strike imposed substantial additional burdens on him, the court may relieve Builder of the obligation to perform by November 1 on the ground of temporary impossibility. If Owner then refused to allow an extension, Builder would be relieved of liability. However, Owner would still be able to sue for all or part of his $10,000 down payment in restitution on the basis of unjust enrichment. The restitution to Owner would be offset by any benefit Owner received through the work Builder has already completed on the house.

“MODEL” ANSWER TO QUESTION #12

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law, and the writer’s analysis and conclusions are not the only way to approach this essay.

I. Mart v. PC for $200 per unit for the 2000 units ordered on Nov. 2nd.

A. Existence of contract between Mart and PC for 2000 units at $1500 each.

After discussions, on August 1st, PC agreed to fill Mart’s orders for the next 6 months for its Model X computer at $1500 each, maximum 4000 units. Mart agreed on August 10th and stated they would advertise the computer to their customers. On September 10th, Mart ordered 1000 units from PC and they were sold. On November 2nd, Mart mailed a letter to PC and ordered 2000 more units. However, on November 3rd, before the letter was received, PC sent a fax to
Mart naming Wholesaler as the exclusive distributor. Wholesaler will only supply the computers at $1700 each.

PC will argue that there is no valid contract because its August 1\textsuperscript{st} fax was not specific enough regarding time frame and terms. Generally, an offer must contain all necessary and specific terms so the parties know exactly what is being contracted and there is an exact meeting of the minds. In response, Mart will assert that PC’s fax agreed to fill any orders at a price of $1500 each within 6 months up to 4000 computers. This statement demonstrates present intent to be bound and recites and exact price thereby constituting a valid offer and acceptance. Just because the faxed letter did not specify the exact amount of computers to be purchased, it did state a maximum amount (4000) that is sufficient for an offer. Also, Mart will rely on the rule that since this is a contract for the sale of goods governed by the UCC and the parties are both merchants, the contract terms and details do not have to be as specific as with other types of services contracts. In the alternative, PC will argue that if its offer is valid, there is still no contract because Mart was not obligated to buy any computers, therefore did not provide any consideration for their agreement to be considered an enforceable contract. For a contract to be binding each party must provide consideration; that is each party must promise to do something. Mart will respond by first stating that it promised to provide an advertising campaign and 2\textsuperscript{nd} that as of September 10\textsuperscript{th}, its promise was to purchase 1000 computers.

Mart will prevail with respect to whether a contract existed because PC’s fax of August 1\textsuperscript{st} constituted a valid offer with all essential terms. Also, since Mart stated that its store would advertise the computers, valid consideration was given since Mart had no legal obligation to conduct such an advertising campaign. Even if the promise to advertise was simply gratuitous in nature, the fact that Mart ordered 1000 units on September 10\textsuperscript{th}, made a binding contract as of that date.

B. Was there a Breach of the PC-Mart Contract?

Mart mailed an order for 2000 units to PC on November 2\textsuperscript{nd}. On November 3\textsuperscript{rd}, PC faxed a letter instructing Mart to negotiate orders through Wholesaler. Soon after, Wholesaler stated it would supply the computers at $1700 each, not $1500 each.

Mart will argue that PC breached its contract by not filling Mart’s November 2\textsuperscript{nd} order of 2000 units at $1500 per unit because the letter was sent before any attempted revocation or modification of the contract was received. Under the Mailbox Rule, Mart’s order is effective when mailed. Also, when one party fails to complete its promise and there is no agreed modification or proper termination of the contract, that party is in breach of contract. PC will try to assert that its November 3\textsuperscript{rd} letter terminates their original agreement and thus discharges PC’s obligation to sell Mart up to 4000 computers before the 6 month period expires. Moreover, because it now has a distributor working on PC’s behalf, it had to make some changes to all its original agreements. Under the UCC, contracts for the sale of goods may be modified between merchants provided they do so in good faith observing reasonable commercial standards.

Mart will prevail and PC has breached its contract. Mart’s order of 2000 units was effective on November 2\textsuperscript{nd}, when mailed. Mart’s order took place one day before PC’s attempted revocation or modification (Nov 3\textsuperscript{rd}). Therefore, PC is obligated to sell Mart the 2000 Model X units ordered on November 2\textsuperscript{nd} at $1500 per unit.

C. Appropriate Remedy
It has been established that PC breached its contract with Mart to sell 2000 Model X computers at $1500 per unit. Mart bought 2000 units from Wholesaler for $1700 each and wants to collect $200 per unit from PC.

Mart will successfully assert that it is entitled to the difference between the agreed contract price of $1500 per unit and the price it is forced to pay now, $1700 or $200 per unit. The non-breaching party is entitled to expectancy damages; that is to be put in the same position he would have been in had the contract been performed. PC could try to argue that Mart should collect from Wholesaler, but Mart and Wholesaler never had a contract, so this is undoubtedly a weak argument.

Since no other damages have been alleged by Mart, it is entitled to payment of $200 per unit for the 2000 units ordered on November 2nd.

II. Mart v PC for $200 per unit for 1000 units ordered on November 15th

On November 3rd, Mart received a fax from PC indicating that Mart is to negotiate sales through Wholesaler. On November 15th, Mart, by fax, ordered the remaining 1000 units at $1500 each from PC. PC insists on going through Wholesaler who refuses to sell the computers at less than $1700 each.

PC will argue that there no longer an enforceable contract for the sale of the 1000 computers Mart ordered on November 15th because Mart knew of the modification (making wholesaler its distributor) before that date. The modification was commercially and reasonably necessary because of the increased sales of the computer. Because Wholesaler also had to be compensated for its distribution work, it was necessary for the price to be increased. Generally, contracts for the sale of goods between merchants may be modified without consideration if modified in good faith and commercially reasonable. Also, as Mart may assert, this was not a requirements contract because Mart never promised to buy all the goods from PC. The consideration required in a requirements contract is the buyer’s implied promise not to purchase from another. Mart never made such a promise in this case. Mart will argue that even if there is no enforceable contract, it relied on PC’s promise to sell up to 4000 units at $1500 each and because of that reliance, Mart conducted and paid for an extensive advertising campaign. Under the theory of quasi-contract, a promise is implied and the defendant is ordered to pay money as restitution for any benefit the plaintiff has conferred upon the defendant.

PC will prevail in regards to the fact that there is no enforceable contract for the sale of the 1000 units ordered on November 15th because this was not a requirements contract and PC was allowed to modify in good faith, which is did here. On the other hand, Mart may be entitled to restitution damages because PC has been unjustly enriched by Mart’s advertising campaign.

ANSWER TO QUESTION #13

A. Katy v. Cycles

An enforceable agreement between Cycles and K&M exists, and Katy may sue for specific enforcement of the contract as the assignee.

The agreement is a valid requirements contract to supply K&M with the motorcycles the partnership needs for a period of five years. However, both parties may terminate the agreement at will, and therefore Cycles may raise the defense that the agreement is unenforceable because it is not supported by consideration. Even though the agreement appears to be an illusory promise, however, the court will probably imply a good faith provision which will constitute consideration by Cycles and K&M.
Cycles may also defend on the ground that no quantity term is stated in the contract. Even if an agreement is too indefinite to enforce, however, the court will imply the purchase of requirements or impose a best efforts term, under which K&M must use their best efforts to sell motorcycles. Thus, the court would supply the open quantity term by finding the quantity was a "reasonable" number of motorcycles.

A third defense Cycles could raise is the statute of frauds. The agreement between the parties was oral, but under §2-401 of the U.C.C. the statute of frauds is satisfied if a memorandum evidencing the agreement exists, contains a quantity term, and is signed by the party to charged. The signed, written confirmation sent by Cycles satisfies the statute (the court will imply a "reasonable" quantity term), and therefore Cycles' argument will fail. The fact that the confirmation never reached K&M is irrelevant because the partnership (or Katy as assignee) need only prove its existence, not its receipt, to satisfy the statute of frauds. Similarly, the fact that the confirmation does not mention the price of 5% below factory list price is irrelevant because the statute of frauds does not require a price term in the writing, and the parties may introduce other evidence to prove the price. Cycles could argue further, however, that because the written confirmation did not include the orally agreed upon price term, the confirmation changed the terms of the oral agreement and amounted to a new offer to modify the agreement so that the price was for 5% more than was previously agreed. Because Katy continued to deal with Cycles after assignment of the contract to her, Cycles would argue that Katy agreed to the contract as modified. Katy would counter-argue that under §2-207 of the U.C.C. a written confirmation which varies the terms of the original agreement does not bind the other party unless she assents to those terms. Here, K&M never received the confirmation and was never made aware of the variance from the 5% discount. Therefore, the partnership never assented to the modification, and there was no agreement to eliminate the discount.

Katy, as the assignee of the partnership's contract, acquired the rights and obligations of the partnership, including the right to a 5% discounted price. Cycles, as the promisor, is obligated to Katy as the assignee of the contract rights. Even if Cycles did not agree to the assignment, it had notice of the assignment and continued to deal with Katy individually. Therefore, Katy has an argument for enforcement under an estoppel theory.

The court will probably specifically enforce the contract because in requirements contracts the remedy at law is inadequate. However, if the court denies Katy's request for specific performance, her remedy is cover damages (cost of cover less the contract price plus any consequential damages) or, alternatively, lost profits.

B. 1. Cycles v. Katy

Cycles seeks to recover $10,000 from Katy; however, Cycles is entitled to only $8,000.

Assuming the agreement is valid, as discussed above, Cycles cannot unilaterally terminate it. However, Cycles can argue that if the 5% discount is a valid price term, Katy should have paid Cycles $38,000 ($40,000 x .95 = $38,000) for the latest shipment rather than $30,000. The facts indicate $40,000 was the list price of the goods. Therefore, Katy was entitled to only a 5% discount, and it appears she had no ground to arrive at the $30,000 figure she paid. Thus, Katy has breached this installment of the continuing contract to purchase motorcycles.

Katy may argue that Cycles accepted the $30,000 payment in settlement of a claim, but this defense will fail because there is no evidence the parties agreed to a modification of the 5% discount price term and Katy was not acting in good faith. Cycles immediately sent a protest letter to Katy when she sent payment, and therefore Cycles did not agree to Katy's reduction of the agreed price. Katy acted in bad faith because she had no basis on which to arrive at the $30,000 figure she paid. Therefore, Katy must pay an additional $8,000 to Cycles pursuant to the price term in the agreement.
2. **Cycles v. Mike**

If Mike signed the original agreement personally rather than as a partner, he remains liable on the contract even though it was assigned unless he was relieved by a novation. However, the facts indicate Katy and Mike as partners and as individuals never signed an agreement with Cycles. K&M's subsequent conduct with Cycles formed a contract by conduct enforceable against the partnership. When Mike left the partnership, he caused its dissolution. As a partner, Mike was liable for partnership debts only up to the time of dissolution, except in the case of a creditor who has no knowledge of Mike's change in status. Cycles had notice of Mike's written assignment of his K&M rights and obligations to Katy, and therefore Mike is not liable for the $40,000 debt incurred by Katy after dissolution, and Cycles has no recourse against him.

**ANSWER TO QUESTION #14**

A. **Owner v. Byer**

Owner may enforce the agreement against Byer and sue for specific performance. Alternatively, Owner may sue for damages with an abatement of the price to reflect the decrease in value of the land caused by Owner's inability to convey the three-foot strip.

The January 1993 agreement between Owner and Byer contained the essential terms necessary to form a valid contract, that is, the signed writing described the land and included the purchase price. If the original agreement was valid, then the assignment of Byer's contract rights and obligations to Ellis was valid and gave Ellis the right to buy Greenacre and an enforceable delegated duty to pay Owner. Under a third party beneficiary theory, Owner has rights against Byer, because under Byer's delegation of duty, Byer as the original debtor is not relieved of his obligations to Owner, except in the case of a novation. Therefore, both Byer and Ellis are potentially liable to Owner.

Owner, as the creditor beneficiary, may sue either the original debtor, Byer, or the promisor, Ellis. However, Owner has a claim only if Byer and Ellis have breached the contract. Owner will have no recourse if the error in the acreage relieves Byer and Ellis of the duty to perform. The court will look to the contract of sale to determine whether the sale was for Greenacre "in gross" or for specific acreage. If the sale was "in gross" and the error is minor in relation to the total sale, the court will enforce the contract and Byer and Ellis cannot claim a failure to deliver the full amount of the land. However, the court will abate the price to reflect a decrease in the value of the land. If the sale was not "in gross" or the error in acreage is substantial, Owner cannot tender the land he agreed to deliver and therefore he cannot enforce the contract.

B. **Owner v. Ellis**

As the promisor of the contract, Ellis has the same rights and obligations as Byer, and therefore Ellis is liable to Owner under a third party beneficiary theory. If the error in acreage is minor, Owner can enforce the contract of sale against Ellis. Owner's remedies are specific enforcement or damages with an abatement in price to reflect the error.

If Ellis is not liable because the error is substantial, Ellis is relieved from his obligation on the contract and may sue Owner for unjust enrichment to recover the $5,000 down payment.

**ANSWER TO QUESTION #15**

The Browns have claims for breach of contract and in tort against Mountain Pines.
1. **Contract**

   a. **Existence**

   The Browns may pursue remedies under the contract but, first, they will need to establish that a contract existed between themselves and Mountain Pines. They will state that the request for a reservation and check for $100 was an offer, since it gave Mountain Pines the power to conclude a contract. They will then note that Mountain Pines acknowledged receipt of the request and exercised the offer's power when it mailed the return post card - which offered the remaining necessary term of the contract by including the price of the room - so that a contract was formed. The Browns will prove a breach by showing that when they appeared on June 1, Mountain Pines failed to provide them with a room.

   In its defense, Mountain Pines might maintain that there was an accord and satisfaction with the Browns which relieved it from its liability for a breach. An accord and satisfaction results where a party with a claim forbears from pursuing that claim because the party against whom the claim would run has offered an alternative, which the party with the claim accepted. Here, the Browns had a right to a room at Mountain Pines - regardless of the fact that they couldn't get such a room - yet agreed to accept alternative accommodations for that evening at a reduced price. Mountain Pines' argument will not succeed, however, because it is unclear that it was the intention of the Browns to release Mountain Pines from its obligation when they accepted the alternative accommodations. More importantly, however, is that an accord and satisfaction - which is a contract not to enforce a contract - must be supported by consideration. The facts offer no evidence that the Browns received consideration in exchange for their promise not to sue (such as Mountain Pines refunding their money for that night's accommodations and allowing them to sleep in the tent without charge). Therefore, no successor contract, in the form of an accord and satisfaction, arose.

   b. **Statute of Frauds**

   While Mountain Pines may contend that no contract arose due to the Statute of Frauds, it is unlikely that this defense will prevail. The Masons contacted Mountain Pines in 1991 to secure a room over a year later, in 1992; therefore, the contract could not be performed in a year and must conform to the Statute of Frauds. It seems fairly clear, however, that the postcard from Mountain Pines, acknowledging the Masons' request for a room, receipt of a deposit, and stating the room's price, satisfied the memorandum requirement of the Statute of Frauds. The writing identified the subject matter of the contract, is sufficient to indicate that a contract arose, and stated with reasonable certainty the essential terms and conditions of the contract. Although Mountain Pines is physically incapable of signing the postcard, sending a card having its name in print was sufficient to constitute a signature.

   c. **Damages**

   When there is a breach of contract, the non-breaching party is entitled to the expectancy value of the contract as damages. In this case, that value might be difficult to assess. While the value might appear to be the difference in price between a night's accommodations at Mountain Pines and the cost of sleeping in a tent, the value of staying at Mountain Pines was worth more than the price of reservation because the lodge was full.

   The Browns may also obtain those damages, described below, for the personal injuries they sustained so long as they establish that those damages were a reasonably foreseeable consequence of Mountain Pines' breach. While it might be difficult for the Browns to show that it was foreseeable that they would be mauled if they were forced to sleep outdoors if they did not get the room they reserved, their burden is lightened because Mountain Pines and its employee, the manager, knew that a former guest had been mauled while camping outdoors just the year before. Therefore, the damages the Browns suffered were not so unusual or unexpected that it would be inappropriate for Mountain Pines to make good on the harm the
Browns suffered by paying for those expenses incurred as a result of accepting the offered alternative accommodations.

2. Tort
   
   a. Negligence
      
      i. Duty; Breach

      The Mountain Pines had a duty to see that the Browns had adequate housing for the evening of June 1, 1992, because the Browns were, as customers, business invitees; therefore, Mountain Pines owed them an affirmative duty to protect them not only against defects that Mountain Pines knew of, but from defects that Mountain Pines could have discovered in the exercise of ordinary care. The facts indicate that a former guest had been mauled by a bear while staying in a tent, so Mountain Pines and its employee, the manager, were aware that bears roamed the property, but the manager still allowed the Browns to stay outside in a tent.

      The facts seem to indicate that the manager was acting within the scope of employment when arranging with the Browns for their alternative accommodations. Since the manager failed to warn the Browns about the prior attack and since the Browns informed Mountain Pines that they were "city folk" and so, lacked the experienced to question the appropriateness of the tent, Mountain Pines is liable to the Browns for negligence - on a theory of respondeat superior, for the conduct of its employee - because it failed to properly protect the Browns from the defect on its property.

      ii. Damages

         (a) General

         The Browns are entitled to the general damages arising from the harm suffered because of Mountain Pines' actions. Those damages, which clearly arise from the nature of the injury itself, would include their medical expenses of $10,000, diminution of earning capacity, and for the pain and suffering that they endured.

         (b) Special

         The Browns would also be entitled to special damages, for those losses which they sustained which were peculiar to the injury they suffered. Those damages would include the lost earnings of $2,000 and the additional $1,000 in travel expenses that they incurred. Note, however, that since special damages are separate and distinct from general damages, that they must be specifically plead and proven at trial to have arisen proximately from the injury which gave rise to the general damages.

         (c) Punitive

         Since the Browns will be able to prove that they suffered damages, they might also seek punitive damages from Mountain Pines. Generally, an employer is not liable for punitive damages for the acts of an employee under a theory of respondeat superior unless the employer (1) knew of or should have known of an employee's unfitness, or (2) ratified or authorized the employee's acts. Thus, it seems unlikely that Mountain Pines will be liable for punitive damages to the Browns unless they can show that Mountain Pines instructed its manager to provide whatever alternative accommodations were available, regardless of the risk to the Browns.

   b. Loss of Consortium
The Browns may each have claims against Mountain Pines for loss of consortium, the loss of the traditional and economic aspects of support and services expected of a spouse. It should not be difficult for them to prove causation, since the effects of the attack are easy to establish, but they will need to show that but for the negligence of Mountain Pines, they would not have suffered injury.

Because loss of consortium is not necessarily the kind of loss which arises from personal injury, damages for loss of consortium will have to be separately plead and specifically proven at trial.

c. Negligent Infliction of Emotional Distress

The Browns can each pursue claims based upon negligent infliction of emotional distress, so long as they can show that they were related to one another, that each suffered emotional distress, and that each claimant's distress manifested itself by some physical effect on himself or herself. Each claimant would then be entitled to consequential damages.

ANSWER TO QUESTION #16

A. Buyco v. Sellco

1. Formation of Contract

a. Offer; Acceptance

If Buyco is to prevail against Sellco on a contract, it needs to prove that it accepted Sellco's offer. Sellco's letter was an offer, because it gave Buyco the power to complete a contract when it stated the price for the generator and its duration. Buyco's response, however, is not as clear.

A counteroffer is a rejection of the original offer and an counterproposal to the original answer. Buyco's response was probably a counteroffer, because it did not outright state its acceptance and because it asked for more time to look for another generator at a lower price. It would be difficult for Buyco to construe its response as merely an inquiry or request for different terms, for while the response stated that Buyco was preparing facilities for the new generator, it would reject Sellco's offer if it found a better deal. Therefore, Buyco's response was a counteroffer.

It is likely that Sellco's response, acknowledging Buyco's counteroffer, was an acceptance. Had Sellco not wished to assent to the counteroffer, it should have been clearer in its objection.

If Buyco's response was not a counteroffer, then Sellco's revocation on the day Buyco sought to accept was not valid. Under the common law, Sellco's revocation was valid because it came before Buyco could accept. Since the offer was for a sale of goods, the Uniform Commercial Code applies.

Under UCC §2-205, an offer is firm if it was sent in writing, signed by a merchant and contained assurances that it will remain open for a reasonable amount of time (anywhere from thirty days to three months). Since the offer was in writing, the revocation will not be valid if Buyco can prove that Sellco was a merchant.

Under the UCC, a merchant is someone who deals in the particular goods or represents to the buying public that he or she possesses special knowledge regarding the object being sold. While Sellco does not sell generators in the course of normal business, the facts do indicate that there is a high demand for the generators and that Sellco does have knowledge or skill peculiar to the goods involved. §2-104(1). Therefore, Sellco could be considered to be a merchant within the scope of the UCC. Since Sellco was a merchant, the offer was irrevocable; Buyco accepted within the specified time, so a contract was formed.
b. Promissory Estoppel

In the alternative, Buyco could argue under a theory of promissory estoppel that the offer remained open. While Buyco's response could reasonably be construed to be a refusal, Buyco also stated that it was building facilities to accommodate the generator and asked that the offer be left open while it shopped around; Sellco acknowledged receipt of the request, thereby making a secondary promise that it would not revoke the offer until the end of the months’ time. Because of that acknowledgment, Buyco could argue that it detrimentally relied on Sellco's permission, by not completing the contract when it had a suitable generator and by building the facilities. So long as Buyco can show that it reasonably relied on Sellco's response, thereby providing a basis to enforce the secondary promise of Sellco not to revoke, the court should conclude that the offer was not revoked.

Sellco will argue that there is no detrimental reliance because it was not reasonable for Buyco to expect Sellco to keep its offer open when the demand was so high and the price was so low. On these facts, it is difficult to determine how this issue should be resolved.

If Buyco prevails on this theory, Sellco should argue that the remedy for breach based on such reliance should be limited as justice requires. Sellco will argue that Buyco's damages are negligible, since all that it did in reliance of the offer was to build a facility that Buyco would have had to build in any case, to house the generator.

2. Remedies

a. Damages

Buyco's remedy under the contract should be its expectancy damages: the cost of securing the kind of generator described in the contract. That figure would be the difference between the market value and the price that it intended to pay: $300,000. Buyco would also be entitled to those damages which were reasonably foreseeable to arise from the breach, such as lost profits or for damages incurred for contracts that Buyco breached because it did not have the generator it needed.

b. Equity

Buyco could seek an equitable, rather than a substitutional, remedy. It could argue that since the generator is unique and that the demand for a replacement is very high, it should have specific performance under the contract. What tends to be unique under the common law is a rather narrow category of items (i.e., a piece of land), but under the UCC, §2-716 provides specific performance where the item is unique, or in other proper circumstances, as where it would be difficult to find a reasonable substitution. If Buyco can obtain specific performance, it would also be entitled to a temporary restraining order against Sellco and Thirdco to prevent their intended sale of the generator.

B. Buyco v. Thirdco

1. Tort

If Buyco can establish the existence of a contract, then it could have an action against Thirdco for interference with contractual relations. Buyco then must prove that Thirdco knew that a contract existed between Buyco and Sellco and that Thirdco intended to interfere with that contractual relationship. On the facts presented, it does not seem that Thirdco was aware of any contract existing between Buyco and Sellco, particularly since it is an open question whether a contract existed.

In the alternative, Thirdco could claim that it was privileged to enter into the contract with Sellco, claiming that the offer was terminable at will and that it bargained with Sellco in the belief that the
arrangement was terminable. This is a slim argument, however, since the contract, and not the offer, has to be terminable at will.

2. Remedy

If the court finds that a contract existed and that Thirdco tortiously interfered with the contract, then Buyco might be able to pursue two kinds of relief. The first would be for the loss of expectancy under the contract; that would be the expense which Buyco did or would have to incur but for the interference by Thirdco: the additional $300,000 necessary to secure another generator. If Buyco can prove that the generator is unique and that it would be difficult to secure a replacement on the open market, then the second could be equitable relief in the form of an injunction, to prevent Thirdco's unjust enrichment by halting the sale between Thirdco and Sellco.

ANSWER TO QUESTION #17

I. Cal v. Sam

Assuming a valid assignment contract between Cal and Bob, Cal would stand in Bob's shoes in any dispute with Sam. All contracts are presumptively assignable, and none of the exceptions are applicable here (since the balance due is to be paid in full on the date set for final conveyance, any difference in the credit-worthiness of Bob and Cal is irrelevant).

A. Validity and Terms of the Contracts

The initial telephone conversation established the basic requirements for a contract - mutuality of assent (an agreement as to the terms binding and/or benefiting each party) and consideration (an exchange of legal benefits and/or detriments). Nevertheless, that agreement was unenforceable because the Statute of Frauds requires that transfers of an interest in land be evidenced by a writing signed by the party to be charged.

The subsequent writing satisfies the Statute of Frauds, and thus is the basis for Cal's claims against Sam, but it raises other significant problems.

1. Error in Draftsmanship

The facts indicate that Bob and Sam had orally agreed to a conveyance of both Blackacre and Whiteacre, totaling 20 acres, for $20,000, but that the written contract calls only for the sale of Blackacre, described as containing "20 acres, more or less," for the same price as was to be paid for both parcels.

The parol evidence rule generally prevents the introduction of evidence of prior or contemporaneous agreements to vary or contradict the terms of an unambiguous agreement intended to be the complete and final version of the contract. However, this rule does not apply in an action to remedy errors or mistakes and will not prevent Cal from proving the actual agreement.

In addition, while some states only allow parol evidence to be used to clarify patent ambiguities (those appearing on the face of the contract), most jurisdictions allow parol evidence to show (and resolve) latent ambiguities as well. Once it is shown that Blackacre does not contain "20 acres, more or less," external evidence might be admissible to show that "Blackacre" means both parcels.

Thus, assuming that Cal can sustain his burden of proof, the contract should be read as covering both parcels.
2. Interpretation of Price Term

Cal might also try to argue that the price term should be interpreted as providing that the buyer is to pay $1,000 per acre for "20 acres, more or less." This does not appear to be a reasonable interpretation of the contract language, however. Furthermore, there does not appear to be any error in draftsmanship as to this term since the facts indicate that the original parties had initially agreed on a total price for both parcels and never discussed a per-acre price or indicated that the lump sum was computed on such a basis. Thus, Cal is obligated to pay the full $20,000 (assuming no other defenses exist).

B. Discharge

1. Improper Tender

Sam will argue that Cal's tender of $7,000 (instead of $10,000 as required by the contract) was a major breach of the concurrent condition to his obligation to convey Blackacre and Whiteacre. If this is so, Sam's obligations would be totally discharged and Cal would have no remedies against Sam whatsoever.

First, it is not clear that Cal's tender was wrongful at all. While it no doubt would have been more appropriate for Cal to discuss the matter with Sam prior to tendering only $7,000, as discussed above, Cal might have been entitled to a partial abatement due to the disparity in acreage from what was contracted for and what actually existed.

Furthermore, since time is not normally of the essence in contracts for the sale of land and there was no contrary provision in the Bob-Sam contract, even a defective tender would not constitute a major breach if Cal could remedy the defect within a reasonable time and Sam would not be injured thereby. Sam did not allow Cal to cure, probably because he was looking for a way to avoid the contract so that he could sell at the new, higher value. This ought to defeat Sam's defense of discharge.

2. Change in Market Price

Sam might argue that the dramatic, unforeseeable change in market price resulting from governmental action constitutes a discharge. While it is true that an intervening governmental prohibition of certain uses of the land could raise the defenses of impossibility and/or frustration of purpose, a change in value, whether the result of governmental action or otherwise, is simply not grounds for discharge. A change in market conditions is a risk impliedly assumed by both parties and thus such an argument is totally without merit.

C. Remedies

1. Reformation

When a written contract fails to conform to the actual agreement of the parties, the contract is subject to the equitable remedy of reformation. For the reasons stated above, the contract will be "rewritten" to include both Blackacre and Whiteacre, but, since there was no error in draftsmanship as to the price term, the $20,000 lump sum price will stand.

2. Rescission by Cal

Rescission, a cancellation of the contract, is a possible remedy when a contract is tainted by material mistake or fraud. Given the fact that the value of the land is so much greater than the contract price, Cal would be foolish to seek rescission. Nevertheless, the facts seem to invite some discussion of this remedy.

a. Mistake
Most jurisdictions will grant rescission due to mistake only if both parties shared the same mistake or one party knew or should have known of the other's error. The facts indicate that Bob genuinely thought that Whiteacre contained 10 acres (and this mistake would appear to be reasonable since most people would assume that the official county records are accurate) and that Sam "learned that ... Whiteacre contained only 7 acres" after the contract was signed; thus, there appears to be mutual mistake. If Sam was not mistaken, he probably would be held to know of Bob's mistake since the contract referred to 20 acres, more or less. Furthermore, the facts indicate that the contract was prepared by Sam's attorney, and thus Sam is at least partially responsible for Bob's mistake.

As to whether the mistake was material, one might argue that the exact size of the multi-acre plot of land is not critical, especially in view of the language of the contract ("20 acres, more or less"). Here, however, a 3-acre difference on a 20-acre purchase does not appear to be a de minimis deviation. Whether this variation is sufficiently material to justify rescission might ultimately depend on the uses contemplated by Bob.

b. Fraud

If Sam is held to have been actually aware that the combined size of Blackacre and Whiteacre was only 17 acres (there is a presumption that a landowner knows the extent of his property), the court might find that he acted fraudulently in having the contract drafted in such a way as to indicate that the parcels were significantly larger than they really are. However, as mentioned above, the actual acreage of that parcel might not be material and the fact that Bob had made his offer prior to any representations being made by Sam indicates that reliance, a necessary element for fraud, was clearly missing.
3. **Rescission by Sam**

The court is unlikely to allow Sam to rescind the contract on the grounds of mistake, because the mistake did not have a serious, adverse effect on his rights (indeed, the contract would have been less favorable to Sam had the true facts been known).

4. **Specific Performance**

Cal should seek specific performance, an order requiring Sam to perform the contract under threat of contempt. This equitable remedy requires: (a) a valid contract with definite terms, (b) an inadequate remedy at law, (c) a careful balancing of the competing equities, and (d) a consideration of any enforcement problems and/or special equitable defenses.

While there is some difficulty in determining the precise terms of the contract as discussed above, a modern equity court would be able to resolve any disputes sufficiently to be able to properly enforce its order. The second issue is also easily resolved, as all land is considered unique and the legal remedy is always inadequate when there is a breach of a land sale contract by the seller.

Balancing the equities is somewhat more difficult. While contract law generally protects the benefit of the bargain so that a mere change in property values will not prevent specific performance, the jump in value is so dramatic that a court of conscience and fairness might be hesitant to give Cal such a windfall - $51,000 worth of land for only $20,000. On the other hand, specific performance does not impose any undue hardship on Sam as he was perfectly willing to sell the land for $20,000 when he made the contract, accepting the risk that the value might rise while protecting him from a possible decline in prices.

While there would be no special problems with fashioning or enforcing the court's decree, Sam would be expected to raise the defense of unclean hands, arguing that if Cal has acted inequitably, he is not entitled to equitable relief. The only arguably improper act by Cal was his tender of only $7,000. As discussed above, this may not have been improper at all and, in any case, would probably not be a sufficient act of misconduct to bar equitable remedies. Furthermore, Cal would argue that under the doctrine of in pari delicto his own wrongful conduct, if any, was more than matched by wrongful conduct on Sam's part - the improperly motivated refusal of tender and/or refusal to allow Cal to cure any defect. On balance, Sam's defense should fail.

Ultimately, the court would probably grant specific performance, although it might construe the contract to Sam's advantage so that a fair compromise is reached (e.g., since Cal is already reaping a significant windfall, the court might deny him any right to a partial abatement of the purchase price).

5. **Damages**

Even if Cal is eligible to receive equitable relief, the court is not required to grant it. If the court refuses to grant specific performance, Cal would be entitled to money damages measured by the current value of the land ($3,000 per acre), not the value at the time the contract was entered.
II. Cal v. Bob

In order for Cal to have any rights against Bob, he must prove that he had a valid contract with Bob which Bob breached.

A. Valid Contract

While the facts are not entirely clear, it seems fair to assume that the language "Bob sold his interest in the contract to Cal for $10,000" indicates that there was mutuality of assent and consideration. While the Statute of Frauds would apply since the contract was an assignment of a contract transferring an interest in land, full performance of his obligations by Cal would make the contract enforceable even if there was no written evidence of the Cal-Bob contract.

B. Breach

As to breach, the issue is whether Bob had a valid contract with Sam to assign. If there was a valid contract conforming to all representations made by Bob to Cal, Cal has no rights against Bob even if Sam refuses to perform. If, on the other hand, there was no valid contract to assign, Cal would have to prove that Bob breached some express or implied term of the contract.

While the UCC implies a warranty of title in all contracts for the sale of goods, this is not applicable here since the contract was for land. As a matter of the law of real property, warranties of title are normally not implied, but must be expressly stated in the deed. Here, however, Bob was not yet the legal owner of the property since the Bob-Sam contract had not been performed, and thus the normal property rule cannot apply. Ultimately, then, Cal would have to convince the court that there was a mutual mistake as to the validity of that agreement and/or an implied condition that the Bob-Sam contract was valid. If he can do so, as is likely, Cal would be entitled to the return of the $10,000 that he paid to Bob.

ANSWER TO QUESTION #18

Initially, it should be noted that the contract between Clark and Jones involved a transaction in goods since the items identified by the agreement (pens) are movable chattels. As such, the matter is governed by Article 2 of the UCC.

1. Formation and the Arbitration Clause

While the parties agreed on the basic terms of price, quantity, and time of delivery, there are two formation issues: (a) when, if at all, was the contract formed and (b) assuming that there is a contract, whether the arbitration clause is enforceable.

a. Formation

Jones might argue that Clark's catalog amounted to an offer and that his order form was an acceptance; if this is so, the confirmation sent by Clark would be of no legal effect and the arbitration clause would not be part of the contract. This argument is unlikely to succeed, however, since advertisements and catalogs are generally held to be mere invitations to negotiate, not offers which will form the basis of a contract upon an expression of a willingness to be bound. Therefore, Jones' order form would be considered the offer and the issue becomes whether Clark's form, which contained an additional term, constituted an acceptance of the offer.

At common law, a purported acceptance that differed in terms from the offer in any way was treated as a counteroffer which did not form an enforceable agreement (indeed, it was considered a rejection which terminated the initial offer). Unfortunately for Jones, however, the UCC has changed this rule when the
contract deals with a sale of goods and provides that a definite and reasonable expression of acceptance operates as an acceptance even if it contains additional or different terms (unless acceptance is expressly made conditional on assent to the new terms). Since Clark's letter indicated a clear willingness to be bound and was not expressly conditioned on Jones' acceptance of the arbitration clause, a valid contract was formed when Clark placed his form in the mail. Under the mailbox rule, acceptance is effective when posted if use of the mails is authorized; under the UCC, acceptance by mail is valid so long as it is a reasonable manner of acceptance and, even at common law, acceptance by mail was considered appropriate whenever the offer was sent by mail.

b. The Arbitration Clause

Ordinarily, new terms become part of the contract under the UCC only if they are assented to by the original offeror (in this case, Jones). When the contract is between merchants, however, the additional term becomes a part of the agreement unless the initial offer was expressly limited to its stated terms, the new term materially alters the agreement, or the original offeror promptly objects to the added provision.

Here, both parties are merchants because they regularly sell goods of this kind. Since there is no indication that Jones' order form restricted acceptance to the terms of that form or that Jones promptly objected to the arbitration clause, the party seeking to avoid that clause would have to argue that it "materially" alters the contract. The addition of an arbitration provision has been held to be material in some cases, although a contrary result might be expected if arbitration is shown to be common in this industry.

2. Modification
   a. Consideration

At common law, a modification of an enforceable contract was valid only if the modification was supported by some new consideration. Under the UCC, however, modifications are enforceable without consideration so long as they are made in good faith (defined as honest in fact). While Jones acted in good faith in the sense that he disclosed his true reasons for threatening to breach the contract, as a merchant, he is also required to act in a commercially reasonable manner. If Jones knew or should have known that Clark would have no real choice but to accept the reduced price, his conduct would not satisfy this standard.

b. Oral Modification

Oral modifications are generally enforceable unless (1) a written contract provides that it can only be modified by a signed writing or (2) the contract, as modified, is subject to the Statute of Frauds. While there is no indication that either form contained a "no modification unless in writing clause," the contract would be within the Statute of Frauds since it involved the sale of goods having a price of $500 or more (30,000 pens @ $.45 each = $13,500). There are two possible ways for Jones to get over this requirement, however.

Jones will argue that part performance will take the modification outside the Statute of Frauds and that such part performance is present because Clark accepted $.45 apiece for the first 15,000 pens. However, this argument is inconsistent with the UCC, for the Code provides that part performance satisfies the Statute of Frauds only to the extent of performance. Thus, the fact that Clark accepted $.45 for each of the first 15,000 pens would not prevent him from insisting on $.50 apiece for the second batch.

In addition, Jones could argue that a writing is excused under the doctrine of waiver. UCC expressly provides that the requirement of a writing can be waived, but it is unclear as to how this might be accomplished. Therefore, it is impossible to determine the likelihood of success on this ground.
3. **Discharge by Frustration of Purpose**

The obligation of the parties may be discharged by frustration of purpose if an unforeseeable event destroys the underlying reason for the contract as contemplated by both parties. Given the fact that Jones explained why he needed the pens in his order form, it is fair to say that his special purpose was known and contemplated by Clark. The real problem is in determining whether it was reasonably foreseeable that Davis would withdraw from the race. While it is far from clear, withdrawal from a political campaign for health reasons (unlike being defeated in a primary or simply being unable to muster sufficient support to justify continuance) would appear to be unforeseeable; consequently, Jones’ obligations would be discharged by frustration of purpose. (If the withdrawal is held to be foreseeable, the court would have to determine which of the parties assumed the risk of such an event.)

4. **Remedies**

Since Clark does not yet have the second batch of pens (nor is he legally obligated to buy them from the manufacturer), the remedy of resale is not available to him (and given his obligation to act in a commercially reasonable manner to limit his damages, it is unlikely that he could buy the pens and then measure his damages by the resale price). Therefore, Clark would normally be entitled to the difference between the contract price of either $7,500 or $6,750 (depending on whether the modification is valid) and the current market price plus any incidental damages.

If, however, the above remedy is inadequate to put Clark in as good a position as performance, he is entitled to the profit, including reasonable overhead, which he would have made on the order. Here, it would appear that Clark has a virtually inexhaustible supply of pens available to him so that damages measured by an actual or potential sale of the pens to someone else does not make him whole (because he presumably would have sold that quantity of pens to the "replacement" buyer even if Jones had performed). Thus, Clark is a "lost volume" seller and is entitled to his lost profits (essentially, the difference between his cost and the contract price).

**ANSWER TO QUESTION #19**

A. **Remedies against Betty**

1. **Liability in Contract.** Betty could be liable for breach of contract. While the parties may technically have rescinded the contract by mutual consent, Al's consent was induced by Betty's fraud. As such, her failure to convey her farm at the agreed-upon price was not excusable.

   **Money Damages.** The damage remedy is designed to put the aggrieved party in the same position that he would have been in had there been full performance. More specifically, Al could recover the difference between the contract price and the fair market value of Betty's farm plus any incidental and consequential damages.

   Since, at the time of the breach, the value of the land was worth less than the contract price, Al will be able to obtain the benefit of his bargain only if he can prove that the cost of the other land that he purchased in reliance on his contract with Betty (or at least the diminished value of that land) and his lost future profits are compensable consequential damages. Consequential damages may be recovered if they are the foreseeable result of the breach and their amount can be proven with reasonable certainty.

   While it is easy to measure the amount expended by Al in reliance on the contract (the cost of purchasing the land surrounding Betty's farm) and the drop in the value of this land, such damages are not a "natural and probable" consequence of Betty's breach. While this is not required if Betty had actually foreseen that her breach would cause Al to suffer losses of this type, the fact that she was aware that her contract with Al was part of a "big project" is probably not enough to establish this.
Similarly, it would be hard to conclude that lost profits would be a foreseeable result of Betty's breach (she did not know that Al was going to erect a shopping center). Furthermore, it is impossible to calculate the lost profits from a business that has not yet been established with the requisite certainty. Therefore, these damages are not compensable.

**Specific Performance of Land Sale Contract.** Specific performance is usually available in regard to contracts for the sale of land because it is assumed that every piece of land is unique and, accordingly, any remedy at law will be inadequate. To obtain specific enforcement, Al must show that (1) he had an agreement to buy the land; (2) he is ready and willing to perform; (3) the terms of the contract are sufficiently definite to enable the court to specifically enforce the agreement; (4) the terms of the contract are reasonable and supported by adequate consideration; and (5) Betty either has a mutual remedy or Al can assure his own future performance. It is quite clear that Al's case meets all these requirements.

It does not appear from the facts given that Betty has any effective defense against this remedy. There is no wrongdoing on Al's part. The contract is manifestly fair as to Betty, since she was to receive more than market value. There is no evidence of undue delay (laches). However, without an injunction that would close down Claude's shopping center project, Al will not want to complete his deal with Betty. Under the contract, Al agreed to pay $1,000 an acre for land now worth only $500 an acre.

**Restitution.** Restitution is available when the defendant has been unjustly enriched, at the plaintiff's expense, through mistake or fraud. The $100,000 obtained by Betty as a result of her fraud on Al should be conveyed to Al.

More specifically, a constructive trust could be established, under which Betty would be designated "trustee" of the $100,000 and, as trustee, be required to convey title to Al. The requirements for imposing a constructive trust have been met: Betty has title to the money; Al's remedy at law, discussed above, is inadequate; and allowing Betty to retain the money will unjustly enrich her.

2. **Liability in Tort.** Betty might also be liable to Al under the tort of deceit. She apparently knew that she had marketable title, a material issue, and lied about this fact with the intent to induce Al's reliance. Al did rely on this misstatement to his detriment, and, while it could be argued that he should have independently checked the marketability of Betty's title, this reliance appears reasonable. Therefore, an action in deceit should succeed.

**Compensatory Damages.** In tort, the plaintiff is entitled to recover for any damages caused by the defendant's conduct so long as these damages can be proven with reasonable certainty. Obviously, Betty's conduct was the cause in fact of Al's injuries (he would not have been injured "but for" Betty's misconduct), but issues remain as to proximate cause and proof of damages.

With regard to the diminished value of the other land purchased by Al, Betty would argue that the drop in price was primarily caused by Al's intervening act of suddenly dumping the 200 acres on the market. However, even if this is true, Betty's tortious behavior would still be a proximate cause of Al's injuries so long as his acts, whether reasonable or not, were foreseeable. While the issue is not without doubt, proximate cause is construed quite broadly in the case of intentional torts and thus it is likely that Betty will be liable for this injury.

Insofar as Al's lost profits are concerned, causation is not a problem since Al's injuries flowed directly from Betty's tortious conduct (i.e., there are no intervening causes). As a result, proximate cause is present whether or not Betty actually foresaw, or reasonably could have foreseen, the possibility of such damages. Nevertheless, as discussed in the Contracts section of this answer, these damages are not recoverable because they cannot be proven with sufficient certainty.
Punitive Damages. Punitive damages are available in tort when the defendant acts fraudulently, oppressively, or maliciously. In assessing the amount of punitive damages, the courts would normally consider the outrageousness of the defendant's conduct, her wealth, and, in many jurisdictions, the amount of the plaintiff's actual injuries. Here, it is likely that Betty's misconduct would be held to be sufficiently culpable and that Al would be awarded punitive damages at least equal to the $100,000 that Betty received from Claude.

B. Remedies Against Claude. Al's claim against Claude would be based on the tort of intentional interference with contractual relations. Claude was in fact aware of the contract between Al and Betty and induced Betty to breach this contract without any valid justification. As such, Claude has clearly committed this tort.

Damages. Claude's liability in damages would be essential the same as Betty's. In addition, as the instigator of the entire affair, he is even more likely to be held liable for punitive damages.

Restitution. Claude's wrongful activities caused the land values to drop by $300 per acre. Since Claude was able to purchase the land needed for his shopping center at this deflated price, he was unjustly enriched. As a result, the court would award the amount of this profit ($300 per acre times the number of acres purchased by Claude) to Al.

Injunction. Al would no doubt like an order requiring Claude to tear down his shopping center so that Al can complete his plans without competition. The equitable remedy of an injunction could accomplish this result.

An injunction is available only when the legal remedy (money damages) is inadequate. As stated above, it would be impossible to determine the amount of lost profits Al would suffer; an inability to measure the extent of the plaintiff's loss establishes inadequacy.

Before granting injunctive relief, however, the court must carefully balance the equities. While Claude is a knowing wrongdoer and Al has acted properly in all respects, equity must also consider whether the hardships that would be imposed on Claude would be disproportionate to the corresponding benefits that Al would realize. Here, Claude's shopping center was almost completed, no doubt at considerable expense. On the other hand, it is far from certain that Al would profit from his own shopping center even if competition from Claude is eliminated. Thus, on balance, an order requiring that Claude return his land to its unimproved state would impose an undue burden amounting to waste. Therefore, the injunction will be denied.

ANSWER TO QUESTION #20

I. Rights and Remedies of Neptune

From the facts provided, Neptune and Seafood Uptown Providers (SUP) appear to have a valid contract. The contract between them is a transaction for the sale of goods and, as such, governed by article 2 of the Uniform Commercial Code (UCC). The UCC generally imposes a higher standard of conduct on merchants who regularly deal in the goods of the kind sold, and by their business hold themselves out as having superior knowledge of such goods. Because SUP is in the business of supplying salmon, it is likely considered a merchant.

SUP's notification to Neptune that it would no longer supply salmon to Neptune at $4.00 per pound probably constitutes an anticipatory repudiation. An anticipatory repudiation requires an unequivocal indication to a party that the other party shall not perform. This requires conduct that induces more than mere nervousness on the part of the non-breaching party. Here, SUP, advised Neptune that it will not perform under the contract, and has also contracted with another party to sell its entire supply of salmon.
Under the circumstances, SUP no longer has any salmon supply available to Neptune. SUP’s communication to Neptune is unequivocal, and therefore constitutes an anticipatory repudiation.

Upon an anticipatory repudiation, the non-breaching party may urge performance; treat the anticipatory repudiation as an offer to rescind and treat the contract as discharged; wait until the time for performance (suspending its own performance) and sue for breach at that time; or treat the contract as in breach and sue immediately.

Here, it's impractical to urge SUP to perform because it has committed its entire salmon supply, and Neptune does not want to treat the contract as discharged. If Neptune waits to sue, it still has the present problem of meeting its need for a salmon supply. Neptune's best remedy is to sue immediately for breach as discussed below.

The issue is whether SUP is in breach of its salmon contract and therefore giving rise to Neptune to exercise its remedies. Where a party has an absolute duty of performance and all conditions have been either satisfied or excused, the failure to perform that duty constitutes a breach. SUP's duty to supply Neptune with salmon on a monthly basis is absolute and has not been discharged; therefore, SUP is in breach of its contractual duties, and Neptune is entitled to exercise its remedies.

The remedies available to Neptune for SUP's breach of the salmon contract generally include damages, restitution, rescission, reformation, and specific performance.

II. Damages Recoverable by Neptune

Damages give the non-breaching party the benefit of its bargain by assuring its expectancy had the other party performed. Damages may be compensatory, consequential or punitive. Punitive damages are generally unavailable. Specific performance may be available.

Damages that are awarded must be foreseeable, unavoidable, causal, certain and definite. Neptune will urge that it is entitled to damages for finding a replacement supply, for losing its catering contracts, and for lost profits attributable to its restaurant and catering services. It will argue that the damages were a foreseeable result of its loss of supply of salmon; that the loss was unavoidable because Neptune was not at fault for SUP's breach; that the loss was a direct and proximate result of SUP's breach; and that the amount can be determined by reference to past business profits and costs for replacement supply.

Neptune may also seek expectancy damages. The purpose of expectation damages is to put the aggrieved party in the same position it would have occupied had the contract been performed. Here the contract price was $4.00 a lb. for salmon. The current market price is between $5.00 to $6.00 per pound. Neptune will argue that $6.00 is the true market price because that is what both SUP and another supplier are selling it for. Therefore Neptune can recover the difference between the contract price of $4.00 and the fair market price of $6.00.

To be entitled to specific performance, Neptune must show that damages are inadequate, the terms of the contract are sufficiently definite for specific performance, enforcement is feasible, enforcement is mutual (not mutuality of remedy), and no defenses are available. Damages are inadequate in this case because the goods are difficult to replace although common. This usually applies to unique goods, but because of the oil spill, the salmon supply is greatly diminished. Neptune will likely prevail on the argument that damages are inadequate, and may thus be entitled to specific performance of the contract.

III. SUP's Defenses

SUP's defenses are that damages in this case were not unavoidable and are insufficiently certain. It will also argue that it was not reasonably foreseeable that its breach would result in Neptune's loss of existing catering contracts, of which it was probably unaware, and in its overall loss of business. It may also assert the defenses of impossibility and impracticability, but with less success.
SUP will argue that Neptune's losses were avoidable because it had the opportunity to contract with other vendors to replace the balance of its salmon supply at $6.00 per pound but failed to do so. Had Neptune contracted to acquire an additional 125 pounds of salmon a week for $6.00 per pound, it would not have suffered loss of contracts or loss of business based on its revised menu. Therefore, a portion of Neptune's damages were avoidable.

SUP will also argue that Neptune's lost business profits are insufficiently certain to be compensable. Neptune is a new business, less than a year old and without enough history to determine business throughout an entire year. SUP can argue that its lost profits may be attributable to other factors. SUP will likely prevail on this argument.

The defense of impossibility is determined by an objective standard. It must have been impossible for any party to perform under the circumstances. Here, impossibility (the oil spill) did not preclude SUP from performing because another supplier could have performed.

In contrast, the defense of impracticality is determined by a subjective standard. The oil spill must have been unforeseeable, making performance much more burdensome. Generally, an increase in price is not a basis to assert the defense of impracticality and this defense is probably unavailable to SUP.

ANSWER TO QUESTION #21

1. THEORIES FOR ENFORCEMENT OF THE EXCLUSIVE LICENSE CLAUSE

   If WestTel wishes to enforce a right to an exclusive license under the CodeCo contract, first WestTel must successfully argue for incorporation of the exclusive license term into the contract. The agreement between WestTel and CodeCom was in writing and the writing contained an integration (“entire agreement”) clause. Where there is an integration clause, the parol evidence rule blocks evidence of the oral understandings that conflict with the writing. Here there were oral assurances that WestTel’s license was to be exclusive, but the language “WestTel shall have the use” of the software does not reflect a right to exclusive use. If the court permits parol evidence to include the assurances of WestTel’s exclusive license, then WestTel can seek specific performance of the contract. If not, WestTel might attempt to reform the contract to reflect the parties’ mutual understanding.

   Parol Evidence Rule. The parol evidence rule prevents the introduction of extrinsic evidence to prove additional or inconsistent prior or contemporaneous oral terms if the contract is in writing and fully integrated. However, even in a fully integrated contract, evidence of oral contemporaneous discussion may be offered to explain ambiguous terms.

   Here, WestTel can argue that the language in the contract “WestTel shall have the use” of the software is ambiguous with respect to its exclusivity. CodeCo will argue that the meaning of the clause is plain on its face. The court may consider evidence of industry custom and practice in interpreting this clause. Since the facts indicate that WestTel is a company in the telecommunications industry and that this is a national market, the court might determine that an exclusive license is the industry standard. Furthermore, the court will consider whether the price paid by WestTel for the license is commensurate with an exclusive national license or a nonexclusive license. If the court determines that the term is ambiguous, it will admit the oral evidence of its meaning.

   Authority of Agent. WestTel must show that Felix had actual or apparent authority to make statements in this negotiation that are binding on the principal, CodeCo. Since Felix was the CEO, it seems clear that he had apparent authority to bind the corporation, if not actual authority.
Reformation. A party may seek reformation of a contract if its terms do not reflect the original intent of the parties, either because of a mistake of law or fact material to the contract or because of fraud. The facts are not sufficient to establish a case for reformation conclusively. However, Susan may argue that she intended all along to negotiate for an exclusive national license, that she made this intention clear, and thus the contract should be reformed to include the terms necessary to create an exclusive national license.

Additionally, the facts indicate the possibility that the contract was induced by fraud or at least bad faith on the part of Larry, NewCom and CodeCo. Apparently Larry and NewCom had engaged in discussions at the time the CodeCo/WestTel contract was negotiated. If Susan can establish that WestTel knew that Susan wanted a national exclusive license but wrongfully induced her to execute the contract without adequate language, Susan will have grounds to reform the contract.

Rescission of the contract would also be available if WestTel could prove fraud. However, rescission would cancel the contract entirely. Since WestTel wants to enforce the agreement, this is not a desirable approach.

Specific Performance. If WestTel establishes the national exclusive license, it may seek specific performance of the contract. Specific performance requires a showing that the remedy at law is inadequate, that the terms are definite and certain, that an order would be feasible, that there is mutuality, and that there are no effective defenses.

Here, WestTel will be able to establish a case for specific performance. The remedy at law is inadequate because damages will not fully compensate WestTel as it will allow its competitor to compete more effectively and it may lose market share. Susan will argue that part of what WestTel bargained for was the security that its competitors would not have the technology. The terms of the court’s order could be definite, certain, and feasible to enforce if the court should order CodeCo to deny a license to NewCom. The mutuality rule is satisfied because both WestTel and CodeCo have specific performance available to them. Finally, CodeCo has no equitable defenses.

2. TORTIOUS INTERFERENCE

A claim for tortious interference must establish that the defendant wrongfully interfered with an existing contract with a third party. It is not enough to show that a competitor merely engaged in competitive acts.

a. Claim Against Codeco. WestTel does not have a claim against CodeCo for tortious interference because CodeCo was the other party to the contract. This would be breach of contract, not interference with contract by a third party. The facts do not indicate that CodeCo interfered with a contract between WestTel and some other party, and the issue is the WestTel/CodeCo contract. In fact, the facts indicate that WestTel may have attempted to interfere with CodeCo’s contract with NewCom. Therefore WestTel will not prevail on this cause of action against CodeCo.

b. Claim Against Newcom. The facts are not sufficient to resolve whether NewCom is liable to WestTel for this tort. The tort of interference with contract requires some intentional act of interference. Here, the facts indicate that NewCom engaged in communications with Larry, WestTel’s counsel, that it subsequently hired Larry, and that it sought and obtained a license from CodeCo. Susan will argue that the acts were wrongful and will assert that NewCom knew about the negotiations with CodeCo and that even though she successfully executed a contract with CodeCo that contract was insufficient because NewCom actively solicited Larry’s help to ensure that the contract with CodeCo would not be exclusive. If she can prove these assertions she may prevail. NewCom will argue that its conduct was merely competitive and not wrongful. If it can show that it did not attempt to interfere with the negotiations between CodeCo and WestTel, NewCom will prevail on this claim.
c. **Claim Against Larry.** WestTel’s claim against Larry is stronger. The facts indicate that Larry was aware of the negotiations with CodeCo and that he was simultaneously communicating, in breach of his ethical duty of loyalty to his client, with NewCom. These facts strongly suggest that he falsely advised Susan with respect to the sufficiency of the language in the contract and therefore that Larry wrongfully interfered in her negotiations of WestTel’s contract with CodeCo.
3. **LARRY’S ETHICAL BREACHES**

**Duty of Competency.** An attorney owes a duty of competency to his or her client. This duty requires that an attorney exercise the standard of care of a competent attorney in the field. Here, Larry gave advice concerning the WestTel/CodeCo contract and breached his duty of care by advising Susan that the clause would be effective to confer an exclusive license. The language of the contract is unclear at best on the subject of exclusivity. Given the absolute clarity of Susan’s intent with regard to an exclusive license and the likelihood that such a provision would be litigated, Larry is liable to Susan because a competent lawyer would have advised her to make the language clearer by including at least the word “exclusive” and would have advised her about the effects of the parol evidence rule.

**Duty of Confidentiality.** A lawyer owes a duty to keep any communications with his client in absolute confidence unless the communications involve a future crime or fraud or unless they relate to a malpractice claim. None of the exceptions apply in this situation. The facts indicate that Larry may have disclosed information to NewCom about the contract negotiations. Such a disclosure would subject Larry to discipline.

Furthermore, Larry owed WestTel a continuing duty not to disclose confidential information even after he began to work for NewCom. Therefore, he will be liable to WestTel and subject to discipline for any disclosure after working for NewCom.

**Duty of Loyalty.** An attorney owes a duty of loyalty to his client. An attorney must not assume a position adverse to a client or former client. Here, the facts indicate that Larry went to work for NewCom. While working for NewCom, his ongoing duty of loyalty prevents him from working on a project that is adverse to WestTel, his former employer. A new negotiation with CodeCo would qualify if it involved any confidential information that Larry acquired while working at WestTel.

**Imputed Disqualification.** Additionally, an attorney’s disqualification will be imputed to all other attorneys working at that attorney’s law firm. Whereas here, the firm is not a law firm, a disqualification will be imputed where the lawyers share office space and resources. Therefore, here Larry’s disqualification would be imputed to any other lawyer working for NewCom under these conditions.

**Fraud.** The facts do not clearly indicate that Larry was involved in a fraudulent attempt to misadvise Susan with respect to the contract. However, if he was involved in a fraud, it would be an ethical violation in addition to a tort and possibly a crime.

**ANSWER TO QUESTION #22**

This question involves issues of performance of a contract. In addition to the timing of Carter’s performance, there are two issues with respect to his compliance with specifications in the contract regarding the matching shingles and the dimensions of the garage and storeroom. If Carter committed a material breach, substantially impairing the value of his performance to Owens, Owens could withhold payment. It does not appear that these breaches were material, however.

1) **Completion by April 30.**

The contractor, Carter, agreed to construct a new garage for Owens’ home no later than April 30. Owens’ obligation was to pay $8,500 at the time of completion. Time was stated to be of the essence for both obligations. Although Carter began work at the specified time, March 15, he was ten days late in completing the project. Although this might or might not be a material breach under all the circumstances, the court might strictly construe the time-of-the-essence clause and hold Carter in breach. Nevertheless, not paying Carter for his work at all would impose an unjust result, so Owens should be required to pay the contract price minus any damages caused by the delay.
2) Matching Shingles.

Carter’s failure to match the shingles to the house is a breach, since the requirement was expressly stated in the contract, but is probably a minor breach. The difference in the shingles will not justify Owens’ withholding of the price for the house because it is not a material breach. An exact match of the roof to the house is not essential to the functioning or use of the house, so Carter should only be liable for the difference in value to Owen. Replacement cost would seem to be an excessive measure here. The shingles Carter used were in fact of better quality material than planned and they were a very close match even if not perfect. It would be wasteful for a court to order replacement of shingles that would probably be completely acceptable to any other homeowner.

3) Dimensions of Garage and Storeroom.

The dimensions of the garage and storeroom were expressly stated in the contract, and Carter is in breach of this provision as well. Although the breach would not have impaired the use of the garage by vehicles of the usual size, Owens’ vehicle had particular needs, and Owens’ size requirements were included in the contract. However, despite his breach Carter is still entitled to the contract price because he substantially performed. However, Owens can offset the cost of removing the wall so his car will fit in the garage. The cost of moving the dividing wall ($800) is not very expensive compared to the utility of permitting Owens’ car to fit, so the court would likely require Carter to do this as a condition of receiving payment, or else permit Owens to offset the cost against the amount due.

“MODEL” ANSWER TO QUESTION # 24

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law, and the writer’s analysis and conclusions are not the only way to approach this essay.

I. Betty vs. Carla

A. Existence of a Contract

Sam and Betty signed a document wherein Sam offered to sell Betty one acre of his farm for $10,000 and Betty agreed to select the acre within 6 months of her Aunt Kate’s death. Thereafter Sam dies before Aunt Kate. Carla, Sam’s sole heir, sold the farm to Wilma. Aunt Kate dies and 7 months after, Betty tenders the $10,000 to Carla and Wilma demanding the deed to the one-acre that she would now select.

Carla will argue that there is no binding contract between Betty and Sam because Sam only offered to sell one acre when Aunt Kate dies. Further, Betty was only bound to act when Kate died, so there was no valid consideration. Generally, contracts will not be enforced unless they are supported by consideration or some kind of legal detriment given for the promise. That is, Betty was not legally giving up anything as is required for a contract. Betty will argue in response that the signed document between Sam and her constitutes a binding contract. Sam’s “offer” to sell and she “agreeing” to make the selection when Kate dies equates to an offer and acceptance, both
requirements of a valid contract. A contract requires mutual assent or meeting of the minds, which is what happened here between Sam and Betty. The fact that Betty did not have to act until a condition is performed (Kate dying) does not make the contract non-binding. A contract containing a condition may be perfectly valid.

Betty will prevail because the contract between her and Sam was a valid contract with all essential terms. Betty and Sam intended to form the agreement wherein he would sell and she would buy his land for a set price. The condition that Betty make the selection when Aunt Kate dies makes it a valid contract subject to a condition (Aunt Kate’s death.)

B. Was there a breach of the Betty-Sam contract?

Despite the Sam-Betty contract, after Sam died, Carla conveyed the farm to Wilma.

Carla will argue that despite there being a valid contract, Betty has no action against her because Betty breached the contract by not making her acre selection until 7 months after Aunt Kate’s death. Since the contract was clear as to its terms to make the selection within 6 months and Betty did not abide by the terms, she allegedly breached the agreement. Generally, when one party does not live up to their terms of the agreement she is deemed to have breached the contract and thus has no action against the other party involved. On the other hand, Betty will assert that she did not obtain her inheritance until 7 months after Aunt Kate died through no fault of her own. This only amounted to a one-month delay and she still acted within a reasonable amount of time. She will rely on the rule stating that normally, contracts that are only minimally breached will be enforced by the courts if, as here, it would make no difference to the actions of the parties. Carla will respond that Betty still could have come to make her selection within the 6-month period even if she hadn’t received the money yet from the estate.

Betty will prevail and a court will likely find that the 6-month timing restriction should not be strictly applied. Betty will be allowed a reasonable amount of time to pay the $10,000 and 7 months is considered a reasonable amount of time in this case. Moreover, the facts are not totally clear, but it is likely that Carla sold the farm to Wilma soon after Sam’s death, possibly even before Kate’s death, and very likely before the 6-month period would have run out anyway. Therefore, the fact that Betty waited 7 months to make the selection would have had no bearing on the outcome. Even if she had adhered strictly to the time limit, the farm would have been already sold. Finally, the fact that Carla was told that Sam’s death revoked his office also has no bearing on this case because it has already been established that Sam and Betty had a binding contract. Thus, Carla is in breach of contract.

C. Remedies

Betty wants delivery of the deed from Carla or Wilma after she tenders $10,000, however both refuse.

Betty will assert that since she dreamed of this farmland for a long time and there is no replacement for the uniqueness of this land, she is entitled to specific performance of the contract. Normally, contracts for the sale of land are specifically enforced in favor of the buyer. Carla will argue that since the land has been transferred to Wilma, it is not possible for Betty to specifically enforce this agreement. Normally, when land is transferred to a bonafide purchaser for value, that contract cannot be undone.

Betty will be unable to obtain specific performance of the contract because the land has been sold to Wilma. The facts make no mention as to whether Wilma knew of the Betty-Sam agreement, so
she is likely a bonafide purchaser. Therefore, Betty has no choice but to accept some kind of money damages from Carla as determined by the Court.

II. Betty vs. Wilma

After Sam’s death, Carla sold the farm to Wilma for $100,000.

Since it has been established that Wilma is a bonafide purchaser for value and there are no facts to indicate otherwise, she will assert that Betty has no viable action against her. If Wilma is, in fact, a bonafide purchaser, then Betty’s equitable interest to the farm was cut off when the farm was conveyed from Carla to Wilma. Betty could try to claim that the value paid for the farm ($100,000) is much too low and she did not pay value, but this argument will likely fail absent any evidence to the contrary. If Betty could establish that Wilma was not a bonafide purchaser, then Betty would be entitled to a conveyance of the land (1 acre) via a constructive trust, but it would be in the court’s discretion to impose this remedy.

Wilma would prevail because she was a bonafide purchaser for value when she purchased the land from Carla. There is no evidence or facts indicating that Wilma knew of the prior contract between Sam and Betty. Therefore, Betty has no viable action against Wilma and is limited to collecting damages from Carla.
COMMUNITY PROPERTY ESSAYS

QUESTION #1 (FEBRUARY 2000 EXAM)

H and W were married in 1985 in Franklin, a non-community property state. H worked as an engineer for Texaco beginning in 1975. W worked as a bookkeeper. During his employment with Texaco, H received annual bonuses in the form of Texaco stock. By 1990, H owned 1,000 shares of Texaco.

In 1990, H accepted a job offer from Calco, a California-based engineering firm, and H and W moved to California. In 1991, H and W purchased a condominium for $200,000, taking title as “H and W, husband and wife, as joint tenants with right of survivorship.” W paid the $50,000 down payment with money she had recently inherited, and H and W obtained a $150,000 loan secured by a deed of trust for the balance of the purchase price. H made the monthly principal and interest payments on the loan out of his Calco earnings.

In 1999, W, who had found a bookkeeping job shortly after moving to California, was charged with embezzling $50,000 from that employer. W admitted spending the $50,000 on cocaine. W retained Lawyer, who negotiated a plea bargain pursuant to which W pled guilty, was placed on three years’ probation, and was ordered to make full restitution. W also underwent treatment at DrugStop, a drug treatment facility, at a cost of $10,000. Lawyer charged W $5,000 to handle her case.

H had no knowledge of either W’s embezzlement or cocaine habit until her arrest. H has filed for dissolution of the marriage. The condominium is currently valued at $300,000 with a $50,000 balance on the mortgage.

What are H and W’s respective rights and liabilities with regard to:

1. The 1,000 shares of Texaco stock? Discuss.
2. The condominium? Discuss.
3. The attorney’s fee, restitution, and expenses for the DrugStop treatment? Discuss.

Answer according to California law.

QUESTION #2

Hal, a widower with two adult children, Debbie and Sam, was a resident of State A, a separate property state. In 1970, he inherited all the capital stock of Sunco, a corporation which owned and operated Sunland Ranch in State A. At that time, the stock was worth $200,000.

In 1971, Hal married Wendy in State A, where they resided until 1980. During this period, Hal managed Sunland Ranch. As ranch manager, Hal was paid an annual salary of $24,000, which he deposited in a commercial checking account in his name only, in a State A bank. Living expenses of Hal and Wendy were paid from this account.
During this same period, Hal received $50,000 in dividends on his Sunco stock, all of which he deposited in savings accounts in his name only.

In 1980 when Sunco's only asset was the ranch, Hal sold his Sunco stock for $400,000 to a developer who planned to transform the ranch into a condominium development.

Hal and Wendy moved to California in 1981. The checking and savings accounts were transferred to Cal Bank in California.

In 1981, Hal purchased a farm in California for $550,000 using $350,000 net remaining after taxes from the sale of Sunco stock, as down payment. The $200,000 balance was obtained by Hal through a loan to him from Cal Bank, evidenced by a note signed by Hal only, and secured by a deed of trust on the property. For six years Hal operated the farm. The net income from the farm was $50,000 a year; $25,000 was deposited in Hal's checking account at Cal Bank and used by Hal for Hal and Wendy's living expenses, and $25,000 was paid on the balance due on the promissory note.

Hal died in 1986 in California. His will confirmed in Wendy her one-half interest in their community property. The will further provided that all property over which he had the power of testamentary disposition be distributed one-third to his daughter, Debbie, and two-thirds to his son, Sam. The only witnesses to the will were the drafting attorney and Sam.

After payment of taxes and expenses the property subject to administration in Hal's estate, including Wendy's community property interest, consisted of:

1. The California farm, subject to the deed of trust securing the balance of $50,000 due on Hal's note.

2. Hal's $75,000 savings account at Cal Bank, consisting of the original $50,000 in Sunco dividends and accumulated interest.

3. Hal's commercial account at Cal Bank with a balance of $10,000.

How should the property be distributed? Discuss.

Who is liable for the balance on the note to the bank? Discuss.

Answer according to California law.

**QUESTION #3**

In 1973, Howard, a resident of State A, a separate property state, divorced Janet and was ordered to pay her $200 per month alimony for 15 years.

In 1977, Howard purchased and paid $50,000 for 20 acres of unimproved real property in State A. In 1978 he purchased and paid $10,000 for stock of ABC, a large public utility.

In 1980, Howard married Wilma in State A.

In 1981, Howard sold his ABC stock for $15,000. He then borrowed $15,000 from Karl on a personal note and, utilizing the $15,000 from the sale of his ABC stock and the loan, he purchased a building equipped for a dry cleaning business in State A for $30,000. Howard leased the building to George, who thereafter operated a dry cleaning business in the building. George made all rental payments directly to Karl to be applied to Howard's note.
In 1982, Howard and Wilma moved to California. Howard then sold the 20 acres of unimproved property in State A for $55,000. He deposited $5,000 of the sale proceeds in their joint checking account. He used the balance to make a $50,000 down payment on the purchase of Greenacre, a $250,000 residence in California. Howard and Wilma took title to Greenacre as joint tenants. The monthly payments on Greenacre, and their other living expenses, were made from the joint checking account, into which Howard regularly deposited his paycheck from employment in California. From that account Howard also paid $15,000 to Janet as alimony.

In 1989, Howard and Wilma separated and filed for dissolution of marriage in California. At the date of separation, there were $10,000 in community obligations to Creditor. By the time the dissolution proceeding came to trial, Howard had paid $4,000 of those obligations from his salary and Wilma had incurred an additional $7,000 in obligations to Creditor.

A. What are the respective interests of Howard and Wilma in the following property:

1. The Greenacre residence, now valued at $300,000;
2. The building and dry cleaning equipment, now valued at $60,000?

B. What are the rights and obligations of Howard and Wilma with respect to:

1. The $15,000 paid as alimony to Janet from the joint checking account;
2. The debt to Creditor at the date of separation;
3. The debt to Creditor incurred by Wilma after the date of separation?

Answer and discuss according to California law. Ignore any tax consequences.

QUESTION #4

All the following events occurred in California.

In 1984, Hal borrowed $10,000 from Pete, executing a promissory note payable January 1990. He lost the money gambling. Hal and Wanda were both penniless when they married in 1986. Wanda became a lawyer and worked for a law firm for a year. She then used savings from her earnings to establish an unincorporated sole practitioner's law office.

Wanda's practice was successful. By June 1989 she had purchased with $20,000 of her earnings the following: desk, file cabinet, computerized typewriter, and law library books. She had also invested $3,000 of her earnings in ABC Inc. stock. In July 1989 Hal and Wanda permanently separated.

In 1990 Hal, while unemployed, defaulted on the promissory note and was sued by Pete. Although Pete served Hal with process and notified Wanda of the suit, neither Hal nor Wanda defended. Pete obtained judgment against Hal for $10,000. Pete told Hal he would accept a computerized typewriter as part payment of the debt. Without Wanda's knowledge Hal removed the computerized typewriter from Wanda's office and delivered it to Pete.

Pete obtained a levy of execution on the ABC stock worth $3,000 and a personal bank account in Wanda's name containing $5,000 of income earned by Wanda after separation. Wanda took appropriate legal steps to resist the levies; she also sued Pete to recover the typewriter worth $4,000.
The marriage has not been dissolved.

A. What are Wanda's rights as to

1. the typewriter
2. the bank account,
3. the ABC Stock?

Discuss.

B. Would Wanda's rights differ if it were determined that the marriage was invalid because, unknown to Wanda and Hal, Wanda's divorce in 1983 from a prior husband was void? Discuss.

Answer according to California law.

QUESTION #5

In 1978, Hal contracted with Apex Press that Hal would write and Apex publish a book on solar energy. The contract assured Hal a royalty of $5 per book sold. It stated that "no person other than author Hal shall have any interest in such royalties."

When Hal married Wanda two months later in 1978, he had written the first half of the book. Two months after his marriage he completed the book. Sales of the book began early in 1979. Pursuant to the contract with Apex, Hal registered the federal copyright in his name. Wanda was unaware of the terms of Hal's contract.

In December, 1979, after quarreling with Wanda, Hal asked Apex to amend their contract so that 10% of all royalties would be held in an interest-bearing "Death Benefits Account" payable at Hal's death to his sister. The contract was so amended without Wanda's knowledge.

In mid-1980 Hal and Wanda separated and dissolution proceedings were commenced.

In the last chapter of Hal's book Pat was defamed. Shortly after Hal and Wanda's dissolution became final, Pat commenced a suit for libel. Although she served both Hal and Wanda as defendants, Pat obtained a judgment against Hal only.

Wanda has on hand assets owned by her before marrying Hal, her half of the community property acquired during their brief marriage, and savings from post-separation earnings. The dissolution decree made no provision for responsibility for tort liabilities of either Hal or Wanda.

A copyright owner, under federal copyright law, is "the author," who may transfer the interest in writing; but if the copyright "has not been previously transferred voluntarily by that individual author, no action by any governmental body . . . purporting to . . . transfer it is effective."

A. How should the court in the dissolution proceedings have characterized, as separate or community, the following assets:

1. funds on hand paid as royalties before the amendment to Hal's contract,
2. funds in the "Death Benefits Account,"
3. royalties received by Hal after the separation, and

4. the copyright?

Discuss.

B. Which of Wanda's assets, if any, can be reached by Pat in satisfaction of her judgment? Discuss.

Answer according to California Law.

QUESTION #6

Hal and Wilma, husband and wife, were married in 1955 and have always resided in State Green. In 1960, Hal's parents made a gift by deed of unimproved land in State Green, granting it "to Hal and his wife Wilma." The deed was delivered to Hal and Wilma and was promptly recorded.

In 1961, unknown to Wilma and in consideration of $10,000 paid to him, Hal conveyed the land to Bess. Bess promptly recorded her deed. She did not search title and did not know Hal was married.

Bess immediately built a house on the land, spending $20,000. She has been the exclusive occupant of the land since 1962 and has paid all real property taxes owing on it since then (total: $7,500). The land alone is now worth $60,000, and the replacement value of the house is $140,000.

In 1990 Bess discovered Wilma's record title and brought an action to quiet title, or in the alternative, for partition. The limitations statute requires suits to recover land to be commenced within seven years against a possessor having color of title and twenty years against other possessors.

General principles of law apply in State Green with the exception of its decisional and statutory community property law which is identical to that of California.

What result? Discuss.

QUESTION #7

For twenty years prior to his marriage, Harvey was employed in the housing business by Corp, located in Wyoming, a non-community property state. George owned all the outstanding shares of Corp. In April of 1988, George contracted with Harvey to sell him all outstanding shares of Corp for a $200,000 promissory note in favor of George. The contract provided that all shares were to be pledged by Harvey as security for payment of the note. The terms of the contract also limited Harvey's salary as president of Corp to $3,000 per month and required that he work full time for Corp.

In June 1988, Harvey married Wilma in Wyoming. In July 1988, Harvey executed and delivered the $200,000 note and the security instrument to George who transferred his Corp stock to Harvey. Harvey assumed full control of Corp. His salary was fixed at $3,000 per month.

In November 1988, oil was discovered on property immediately adjacent to vacant property owned by Corp. The value of Corp's land increased greatly. Harvey caused Corp to sell all its assets and to be dissolved. Harvey realized a $900,000 profit after paying his debt to George. Harvey used the $900,000 to purchase ABC stock, which he caused to be registered in his name alone.
Harvey and Wilma moved to California in January 1989. In July 1990, Wilma inherited a five-unit apartment house in California worth $200,000, subject to a $40,000 mortgage.

After moving to California, Wilma put her salary as a security analyst in a joint savings account with Harvey. When she inherited the apartment house, Wilma closed that savings account. She used the money ($50,000) to pay off the $40,000 mortgage and to make $10,000 worth of improvements to the apartment house. Since 1990, Wilma has managed the apartment house. Her duties required an average of 10 hours a month. She placed the net income from the apartment rentals into a savings account in her name alone. The account has a balance of $9,000.

Wilma and Harvey have decided to dissolve their marriage.

What are their respective property rights in the ABC stock, the apartment house and the $9,000 savings account? Discuss. Answer according to California law.

**QUESTION #8**

The following events took place in State Green.

Hal married Wanda in 1985. In 1989, Hal arranged to purchase an unimproved lot for $40,000. He paid $10,000 cash, all of the couple's community savings, as a down payment. In addition, Hal and Wanda signed a promissory note for $30,000 in favor of Vendor, the seller.

Vendor executed a deed to "Hal and Wanda Smith, in joint tenancy with right of survivorship." Wanda read the deed. Hal told Wanda that the lot would be co-owned by them. Although Wanda did not understand the legal implications of the joint tenancy language, she made no comment.

Thereafter, unknown to Hal, Wanda executed an instrument purporting to "give to ABC Co. for five years the nonexclusive right to maintain an advertising billboard" on the lot. ABC recorded the instrument and placed a billboard on the property. The billboard is portable and can readily be removed.

Later Hal and Wanda separated. She consulted Attorney who explained the legal effect of a joint tenancy. Wanda decided to sell her interest in the lot to Jane. Attorney prepared a contract which provided for $20,000, Jane would buy from Wanda a half interest in the lot. Wanda and Jane executed the contract.

Before a deed from Wanda to Jane was executed, Hal died. His will left "all my estate to my brother Bob."

With the exception of its decisional and statutory community property law, which is identical to that of California, general principles of law apply in State Green.

A. Was ABC's entry a trespass? Discuss.

B. What are Wanda's, Jane's, and Bob's rights, if any, to the lot? Discuss.

**QUESTION #9**

Hal Jones and Wilma Smith, both in the U.S. Navy, and both California domiciliaries, were married in 1966. At that time, Wilma obtained a Military Group Life Insurance (MGLI) policy, issued by a federal agency. She designated Hal as beneficiary. Premiums were paid through salary deductions. In October 1974, both were discharged from the Navy.
The following month, Hal's mother gave them a single-family residence located in California. The deed named as grantees "Hal Jones and Wilma Jones." They moved into the house, and in January 1975, Wilma gave birth to twins. Soon afterwards, Hal and Wilma became employed as engineers. They deposited their salaries into a joint checking account, from which their living expenses, including the premiums on Wilma's insurance, were paid.

On February 1, 1983, Hal and Wilma had an argument and Hal moved into a motel. He told Wilma he wanted to "think things over." One week later, while in a bakery, Wilma was injured when she slipped and fell.

Wilma later decided to dissolve the marriage. She made an appointment with Attorney for the following week. Wilma cashed in her MGLI policy, receiving $3,000. She deposited the entire sum in a savings account which she opened in her own name. The following day, Wilma accepted $4,000 as a settlement from the bakery's insurer, which she deposited in the savings account.

When Wilma met with Attorney, she stated that she wished to continue living in the house with the children. Wilma also showed Attorney her copy of a joint will which she and Hal had executed a year before. The will recited that all property owned by the parties is community property, and each left everything to the survivor. The only checking account has a nominal balance in it.

All events took place in California.

Upon dissolution, what will be Wilma's rights in:

A. the savings account? Discuss.

B. the residence? Discuss.

Answer according to California Law.

QUESTION #10

All of the following events occurred in California.

Shortly before H's marriage to W in 1980, he and his father commenced a construction business, XYZ Corporation. H invested $10,000 saved from his prior earnings, for which he was issued 200 shares of XYZ stock. His father invested $10,000 in the corporation, for which he was issued 200 shares of XYZ stock. XYZ has issued no other stock.

After his marriage, H worked full time managing the corporation and received a salary of $2,500 per month. His father did not work for XYZ and received no salary. No dividends have been paid on the XYZ stock. At the present time, the assets of XYZ exceed its liabilities by $1,000,000.

Since 1979, W has worked full time as a medical technician for Hospital. She has never worked for XYZ.

In 1987, H used funds saved from his salary during marriage to purchase a house and lot. Because of his potential personal liabilities in connection with the construction business, H arranged for title to the house and lot to be taken in W's name alone. Since the purchase, H and W have occupied the house as their home, and the house and lot are now worth $100,000.

In 1988, W inherited a mountain parcel improved with a cabin. At that time, the property had a market value of $20,000 but was subject to a $4,000 mortgage and liens for unpaid taxes totaling $2,000. W used funds saved from her salary during the preceding four years to satisfy both the mortgage and the
tax liens. Rentals received by W from the mountain property have been used to maintain the property and pay the taxes on it. The mountain property now has a market value of $130,000.

W has commenced an action for dissolution of the marriage.

How should the following property be distributed on dissolution?

A. XYZ Corporation stock? Discuss.

B. the house and lot? Discuss.

C. the mountain parcel and cabin? Discuss.

Answer according to California law.

QUESTION #11

Husband (H) and Wife (W), California domiciliaries, were married in January 1982. They immediately opened a joint checking account, into which they deposited their salary earnings, and from which they paid their living expenses and made the expenditures set forth below.

In April 1982, H's aunt died and left him desert land in California. The property was worth $30,000 but was subject to a purchase money encumbrance with an unpaid balance of $10,000, payable at the rate of $200 per month, including principal and interest. Between 1982 and 1987, H paid off the encumbrance with 60 monthly payments. H and W never discussed ownership of the land. The land remained unimproved.

In January 1990, H, without prior notice to W, purchased a sports car. The purchase price was $22,000, payable $3,000 down, the deferred balance, including interest, payable at $1,000 per month for 24 months.

In September 1990, W obtained a judgment for $25,000 general damages plus $5,000 punitive damages against a driver who injured her in a 1988 automobile accident. The judgment was paid to W's attorney, who deducted the agreed fee of one third and remitted the remaining $20,000 to W; she deposited the $20,000 into the joint checking account.

In December 1990, H's brother, X, who was unemployed and unable to obtain further credit, asked H for a $5,000 loan to pay existing creditors. X promised to repay the loan within six months, with interest at the maximum lawful rate. Despite W's strenuous objections, H made the loan.

In January 1991, H and W separated; H moved out and took the sports car with him; W filed for dissolution of marriage and W immediately obtained a temporary restraining order, which froze the bank account until trial. There was $20,000 in the account at the time, the lowest balance in the account since W made the $20,000 deposit.

Thereafter, X was declared bankrupt and all his debts were discharged. X never repaid any part of the loan.

In the dissolution proceeding, the trial judge made the following rulings:

A. The parties stipulated that the land was worth $45,000 at the time of trial. The land was confirmed to H as his separate property.
B. The parties stipulated that the sports car was worth $15,000 at the time of trial. The sports car was awarded to H. H was ordered to pay W $7,500 for her share at the rate of $2,500 per year, payable on the first day of each of the next three years. H's request that he be reimbursed for the payments he had made on the sports car after the parties separated was denied.

C. W was awarded the $20,000 in the joint account.

D. W's request that H be required to reimburse her the $5,000 lost on the loan to X was denied.

Was the court correct in each of its rulings? Discuss, applying California law.

**QUESTION #12**

The following events occurred in California.

Husband (H), a carpenter, and Wife (W), a nurse, were married in 1965. In 1966, W contracted to buy a small office building. She paid the purchase price in installments by withdrawals from a joint bank account into which H and W deposited their earnings. In 1970, W paid the last installment and received a deed conveying the building to "W, a married woman." H knew W was buying the building and made no objection. He did not know how title to the building was taken.

In 1980, H's aged uncle, Ted (T), promised H and W that if they would move into his home, maintain it in good repair, and care for him for the remainder of his life, he would will his house and furniture to H. H and W moved in with T, cared for him, and maintained his home in good repair until his death in 1985. T left a valid will giving his house and furniture to H.

H and W continued to live in the house. Returning home one day, W discovered to her surprise that all the furniture had been removed. H confessed that he had sold the furniture and used the proceeds to pay gambling losses he had secretly incurred.

In a dissolution of marriage proceeding now pending, what are W's and H's rights, if any, with respect to the following:

A. The office building?
B. The house?
C. The furniture or its value?

Discuss.

Answer according to California law.

**QUESTION #13**

In 1980, Harry and Wendy, a married couple, moved to California from State X, where they had resided since their marriage in 1960. Under the laws of State X, a spouse's earnings are his or her separate property.

While married and residing in State X, Harry's accumulated earnings were used to purchase stock in Harry's name only and a residence in Harry's and Wendy's names as joint tenants. The residence was sold in 1980 and the proceeds of the sale were used to buy a California condominium, free and clear of indebtedness, in Harry's and Wendy's names as joint tenants.

Upon arriving in California, Harry purchased an auto repair business, using funds he had inherited. Each month, Harry withdrew from the proceeds of his repair business an amount equal to what he had been
paid in his previous employment as an auto mechanic. He deposited the money in a checking account held jointly with Wendy. This account was used to meet all their monthly living expenses.

In 1982, Wendy was injured in a car accident caused by the negligence of Harry. Wendy used the insurance settlement she received for her injury to purchase savings bonds in her name.

In April 1985, Harry executed a will with a provision declaring the auto repair business to be community property.

In January 1987, Victor obtained a judgment against Wendy for an injury he suffered when she struck him during a heated argument at a condominium association meeting the prior year. Wendy's attendance at the meeting had been over Harry's strenuous objection.

Which of the following properties will be subject to execution in satisfaction of Victor's judgment against Wendy, and to what extent?

1. The savings bonds? Discuss.
2. The stock portfolio? Discuss.
3. The condominium? Discuss.

QUESTION #14

All the following events occurred in California.

H, an engineer, married W, a dentist, in 1984. Before marriage they orally agreed that the earnings of W after marriage would be her separate property. Later W told friends in H's presence that she would have refused to marry H had he not agreed to this. After marriage W deposited her earnings in her separate bank account.

Beginning in 1985, without H's knowledge, W used withdrawals from the account to buy common stocks in her name. By 1993 she had accumulated a valuable portfolio.

In 1985, H and W purchased a single family residence as their home. The deed conveyed the property to "H and W in joint tenancy with right of survivorship." H made the down payment from separate earnings accumulated before the marriage. H and W signed a note and trust deed for the balance of the purchase price. H made monthly payments on the note from his current earnings until 1991, when he was disabled in an accident caused by the negligence of X. Thereafter, W made the payments from her current earnings.

H settled his damages claim against X for $200,000, and over W's strenuous objection used the money to build a vacation cottage on land he had inherited. Due to market conditions, the value of the land and improvement is increasing rapidly.

In 1993 H died, leaving a properly executed will made a few weeks before death. The will included an accurate description of the family residence and a devise of "one-half interest in said property" to S, an adult son from an earlier marriage. The will also provided that all other assets were left to S.

What are S's and W's rights, if any, with respect to the following properties:

A. the stock portfolios Discuss.
B. the family residence? Discuss.
C. the vacation cottage? Discuss.

Answer according to California law.

**QUESTION #15**

The following events occurred in California.

Hal and Wilma were married in 1978. At the time of their marriage, Wilma owned a small apartment building she had inherited from her father. The apartment building was encumbered by a purchase money deed of trust, which her father had executed to secure his purchase money note. Upon her father's death, Wilma had assumed the obligation of the note, and the encumbrance of the deed of trust had continued. At the time of Wilma's marriage to Hal, the fair market value of the apartment building was $200,000, and the balance due on the note was $160,000.

In 1979, Hal bought a house, paying the full purchase price in cash from his separate property. He caused title to be taken in his and Wilma's names as joint tenants. He and Wilma thereafter used the house as their residence.

In 1980, Hal purchased a tavern for $100,000, paying $30,000 in cash from his separate property. The balance was paid by a promissory note in the amount of $70,000 executed by him and secured by a deed of trust on land he owned before his marriage to Wilma.

Hal died in 1987, survived by Wilma and Sam, Hal's child by an earlier marriage. His valid will, in pertinent part, left "all my property" in a trust from which Wilma was to receive the income for life. At her death, trust assets were to be distributed to Sam. The will did not purport to make disposition of Wilma's community property interests, if any.

At Hal's death, the value of the apartment building was $300,000. The unpaid balance on the note secured by the deed of trust on the apartment building was $100,000. During their marriage, Hal and Wilma paid one half the principal and interest on the apartment note from earnings from the apartment operations and one half from Wilma's earnings as a real estate broker.

The current value of the tavern is $150,000, and the unpaid balance on the note executed by Hal in part payment of the tavern is $50,000. The principal and interest on the tavern note were paid by Hal from his separate property. While Hal owned the tavern, he worked full time as manager and bartender.

The current value of the residence is $320,000.

What are the rights, if any, of Wilma in the apartment building, the tavern, and the residence? Discuss.

Answer according to California law.

**QUESTION #16**

In January 1992, Mike and Flo, who were not married but were living together in California, signed an agreement stating they would "share" subsequent acquisitions and disbursements "just as if we were married." Shortly thereafter Flo was seriously injured and she had to quit her job.
The pair lived on Mike's wages as a bartender, from which he paid $500 a month in support to his children from a prior marriage. In January 1993 Mike inherited $20,000, which he put into a savings account in his name alone.

Flo received $400,000 in settlement of her personal injury claims. Flo invested half of her settlement in diamonds and half in bonds in her name alone.

Recently Mike took the diamonds and sold them to Bud for $100,000. Mike soon lost this money while gambling in Las Vegas. Flo was unaware of the removal and sale of the diamonds or of the gambling losses.

Mike has left Flo and has sued her to enforce their agreement. Flo has denied the validity of the agreement and has also asserted appropriate counterclaims. Flo has cross-complained against Bud seeking recovery of the diamonds.

The bonds Flo bought are still worth $200,000, and Mike's savings account contains $20,000. During the time Mike and Flo lived together, Mike paid $18,000 from his wages in child support.

On what theory or theories may:

1. Flo assert rights against Mike because of his child support payments? Discuss.
2. Flo assert rights in or to the $20,000 savings account? Discuss.
3. Mike assert rights in or to the bonds? Discuss.
4. Flo assert rights against Mike as a result of the taking and sale of the diamonds? Discuss.
5. Flo assert rights against Bud arising out of his acquisition of the diamonds? Discuss.

Answer according to California law.

**QUESTION #17**

In 1980, Herb married Wanda, and the couple took up residence in a California home which Herb had purchased in 1979.

Herb had bought the home for $50,000 by making a $5,000 down payment and signing a promissory note for the balance. At the time of the marriage, the outstanding balance on this note was $44,000. During the next 20 years, the couple paid off the note by making payments from their combined salaries. The home now has a fair market value of $200,000.

In 1985, Wanda sold for $10,000 a watercolor she had painted that year. She and Herb orally agreed that the $10,000 would be her sole and separate property. Wanda invested the $10,000 in a mutual fund in her name alone. The current value of the mutual fund is $45,000.

In 1995, Herb and Wanda bought a vacation cabin on the California coast for $75,000. They made a down payment of $25,000 with community property funds, and both signed a note secured by a deed of trust on the cabin for the balance. Title to the cabin was taken in the names of both Herb and Wanda “as joint tenants.”

Shortly afterward, Herb inherited a large sum of money from his mother and used $50,000 of his inheritance to pay off the note on the cabin. In 2000, Herb and Wanda added a room to the cabin at a cost
of $20,000, which Herb paid out of the funds he had inherited. The current fair market value of the cabin is $150,000.

In 2001, Wanda instituted a dissolution proceeding. What are Herb’s and Wanda’s respective rights to:

1. The home? Discuss.
2. The mutual fund? Discuss.
3. The cabin? Discuss.

Answer according to California law.

**QUESTION #18**

Hank and Wilma were married in California in June of 1981. In the fall of 1981, Hank entered law school. Until Hank's graduation from law school and admission to the bar in 1984, Wilma was the sole provider of their family, working as a school teacher and contributing all her earnings to support Hank and herself. These earnings aggregated $80,000, about half of which went to pay Hank's law school expenses.

After his admission to the bar, Hank opened his own law practice, and Wilma left the work force to become a full-time homemaker. Each month Hank deposited his net earnings from his practice in a bank account, which stood in the names of Hank and Wilma as "joint tenants." Wilma has made no deposit into his account. The couple paid all their living expenses from his account.

In 1991, Hank bought a one-acre parcel of undeveloped land as an investment for $25,000, which he withdrew from the joint bank account. Hank took record title to the parcel in his name alone.

In 1992, Hank's mother died and left him $500,000. Hank deposited this money in the joint bank account.

In November of 1995, Hank and Wilma separated, and Hank sold the one-acre parcel to Paul for its fair market value, which was then $50,000. Hank represented to Paul that he had never been married. He delivered to Paul a deed which only Hank had signed. Paul immediately recorded the deed. Hank used the proceeds of this sale to pay off a recent gambling debt that he incurred in December of 1995.

In January of 1996, Wilma sued to dissolve her marriage and to obtain a settlement of property. The current balance in the joint account is $750,000.

1. Is Wilma entitled to compensation for her contributions to Hank's education? Discuss.
2. Is Wilma entitled to any portion of the funds in the joint account? Discuss.
3. What rights, if any, does Wilma have arising out of the sale of the one-acre parcel sold to Paul? Discuss.
4. What rights, is any, does Wilma have arising out of Hank's payment of his gambling debt? Discuss.

Answer according to California Law.

**QUESTION #19**
In 1974, Hugh (H), a resident of Iowa, a non-community property state, began working there for Apex. Apex has an employee retirement plan which gives to each employee who retires after 20 years of continuous employment with the company the option of receiving either a lifetime monthly pension payment or an actuarially equivalent single lump sum payment. H eventually retired from Apex in 1994.

In 1977, H obtained a credit card which carried with it, free of extra charge, a $200,000 travel accident life insurance benefit on each commercial aviation flight ticket purchased with the credit card. The annual charge for the credit card was paid each year by H from his Apex salary and, after his retirement in 1994, from wages of a part-time job he held.

In 1983, H married Wendy (W) in Iowa, and H and W went to California on their honeymoon. While there, they visited a television studio where W appeared on a quiz show and won a condominium in California worth $100,000. W took title to the condominium in her name alone. After their return to Iowa, H and W decided to move to California and live in the condominium. Apex had offices in California, and H arranged to be transferred there. H and W moved into the condominium in 1984.

In 1989, H received a sizeable bonus from Apex in recognition of his extraordinary work for the firm in 1989. Unknown to W, H used the bonus as a down payment on the purchase of an office building in California, taking title in his name alone. In November 1994, he sold the building for a small profit to a purchaser who paid full value and who was aware that H was married. The building has since increased substantially in value because of the announcement of the construction of a new shopping center nearby.

When H retired from Apex in 1994, he chose the lump sum payment option available under his retirement plan and received $200,000 in cash which he used to buy U.S. Savings Bonds. He had the bonds registered, “H, Pay on Death to George.” Under the applicable federal statute, such designation means that H is owner of the bond, but it is “payable on death” of H to George (G), who is H’s brother.

In January 1995, H was killed on a flight to visit G. The credit card company’s insurance carrier paid $200,000 to H’s estate. H’s will confirmed to W her interest in their community and quasi-community property and gave all property over which he had power of testamentary disposition to G.

What are the rights of W and G to each of the following properties?

1. The condominium? Discuss.
2. The office building? Discuss.
3. The bonds? Discuss.
4. The life insurance proceeds? Discuss.

Answer according to California law.
AN ANSWERS TO SELECTED COMMUNITY PROPERTY QUESTIONS

“MODEL” ANSWER TO QUESTION #1

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law nor are the writer’s conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing essay.

I. The Texaco Stock


H will assert that the Texaco stock should not be divided with W because it was acquired in a non-community property state. Generally, H’s Texaco property would be considered separate property and would belong solely to H if they were still living in Franklin. However, W will argue that the stock acquired after their 1985 marriage is clearly considered community property because under California law, community property includes all property acquired during the marriage and is to be divided 50-50. Furthermore, W will contend that the Texaco stock was acquired while living outside California and therefore, is considered quasi–community property. Quasi-community property is treated as community property in divorce proceedings.

H and W’s assets is to be treated as community property in their California divorce proceeding to the extent that it would be considered community property if acquired in California. In this case, the portion of H’s Texaco stock that he acquired from 1975 to 1985 (date of marriage) in Franklin is considered H’s separate property because it was obviously not acquired during the marriage. The stock H acquired during the marriage, from 1985 – 1990 (job ended) is community property and is to be divided equally between H and W upon their divorce.

II. The Condominium

In 1991, H and W purchased a condominium in California for $200,000. W paid $50,000 with money she inherited and they mortgaged the remaining $150,000. H paid the monthly mortgage payments out of his Calco earnings. The condo is now worth $300,000 with $50,000 remaining on the mortgage.

H will argue that the condominium is community property because H and W took title as joint tenants with right of survivorship. Taking title as joint tenants with right of survivorship creates a strong presumption that the condo was intended to be community property. On the other hand, W will argue that the $50,000 used for the down payment was from her inheritance and is considered her separate property. Under California law, if the source of funds used to acquire the property was from separate property, then that amount is considered separate. Thus, all property acquired by either spouse by bequest, devise or descent is considered that spouse’s separate
property. With respect to the mortgage payments, H will assert that since he paid the $150,000 mortgage with his Calco earnings, that equity build up is his separate property. W will assert that earnings acquired during marriage are considered community property. Also property acquired from the proceeds of a loan received during marriage is considered community property unless the creditor or bank relied solely on separate property assets when extending the loan. The facts do not indicate that the mortgage company relied on H’s earnings, but clearly relied on the creditworthiness of both H and W together.

The $50,000 that W contributed is her separate property because it is from an inheritance. The $150,000 loan is a community contribution and since H’s earnings are community property, those community funds used to pay the loan is considered community. Therefore, the condo is considered community property but since W’s $50,000 is considered separate property, she is entitled to reimbursement of this amount. The equity in the condo is $250,000 ($300,000 value - $50,000 balance on loan.) After accounting for W’s $50,000 contribution, the $200,000 equity will be split evenly, $100,000 each.

III. Attorney’s fees, Restitution and Drug Treatment costs

A. $5,000 Lawyer’s Fee

W, a bookkeeper, was charged with embezzlement. She hired a lawyer and his fee was $5,000.

With respect to the lawyer’s fee incurred by W, H will argue that he is not responsible for W’s attorney fees because he did not commit the crime nor did he have anything to do with W’s actions or have any knowledge of her wrongdoing. Normally, the client is solely responsible to pay his or her attorney. However, W will assert that this debt or contract between the attorney and W was acquired during the marriage and therefore community property is charged for paying the attorney. Generally, contracts entered into during the marriage, like debts, are considered community property.

W will prevail. Community property will be used to pay the attorney fees since it is considered a contractual debt chargeable to the community. Whether or not H knew of W’s crime is not relevant. However, should the community property be exhausted, W’s separate property will be liable for any deficiency.

B. $50,000 Restitution Amount

The lawyer hired by W negotiated a plea agreement wherein W pled guilty and was ordered to make full restitution.

With regard to the restitution, W will assert that community property is responsible for the restitution amount because generally, like the attorney fee, community property can be used to pay restitution of a crime or tort committed by one spouse. However, as H will argue, community property is to be used to pay the restitution only if that spouse was committing a crime or tort for the benefit of the community. He will contend that W was clearly acting for her own benefit only, not for H’s benefit, in order to support her cocaine habit.

H’s argument will prevail. Since W was clearly acting only on her own behalf by embezzling her employer’s funds to support her cocaine habit, community property will not be used to pay the $50,000 restitution amount. W’s separate property will be liable to pay this amount and if there is a deficiency, then the community property may be reached.

C. $10,000 Drug Treatment Cost
W used the amount she embezzled to buy cocaine. She underwent drug treatment at a drug treatment facility that cost $10,000.

With regard to drug treatment, W will argue that the community property is responsible for this cost because it is considered a contract for necessaries. Generally, if one spouse enters into a contract for necessaries, such as medical treatment, community property can be reached to pay this bill. H will try to assert W’s separate property should bear this cost because drug treatment, unlike medical treatment, should not be included in this “necessary” category because W purposefully used drugs and should be responsible for her own actions and consequences from the decision to do so.

The drug rehabilitation cost of $10,000, is considered a necessary since drug addiction is considered a treatable medical condition. Therefore, since one spouse is liable for the other spouse’s contract for necessaries, such as medical treatment, community property will be liable to pay this cost. Furthermore, H’s separate property can even be reached to pay for the drug program if the community property is exhausted.

**ANSWER TO QUESTION #2**

(a) **Validity of will.** To determine the proper distribution of the property, the validity of H’s will must be determined. Hal had the capacity to make a will, and the drafting attorney was a proper witness. Sam was also a witness, however, and under California law there is a presumption of fraud or undue influence when a beneficiary is also a witness. If the presumption is not overcome, the two-thirds testamentary disposition to Sam is invalid and he takes only what he would take under the intestacy statute, that is, one-third.

(b) **Distribution of the property.** Wendy will take her one-half interest in the community estate. Debbie will take her one-third disposition, Sam will take one-third, and the one-third Sam loses because of the presumption of fraud will be distributed in one-ninths each to Sam, Debbie and Wendy.

California law provides that any real or personal property acquired by either spouse while domiciled outside California which would have been community property had the spouse been domiciled in California at the time of acquisition is quasi-community property. In order to determine Wendy's community interest, the spouses' property must be characterized as separate property, community property or quasi-community property:

**Farm.** The farm in California is Hal's separate property because he acquired it with funds from the sale of inherited stock. Hal owned the original business, Sunland Ranch, as his separate property prior to marriage. A percentage of the appreciation of the ranch may be community property despite the ranch's separate character. Under the Van Camp formula, the reasonable value of services rendered by the operating spouse to the business will be treated as community property, where his capital contribution is greater than the value of his services. Under the Pereira formula, which is applied when the value of the owning spouse's services is greater than the value of his capital contribution, any amount by which the value of the business exceeds a reasonable rate of return on the original investment without that spouse's services is community property. Here, it appears that the appreciation in value of the ranch was largely due to the land itself rather than Hal's labors on it. The developer who purchased the ranch wanted the land itself and not the business Hal operated. During the time Hal managed the ranch, the community was paid for his services valued at $24,000 per year. Thus, the Van Camp rule applies because the appreciation in value of the separate property occurred with little labor involved. The reasonable value of the services provided by Hal have been paid to the community through the checking account out of which living
expenses were paid. Therefore, the $400,000 from the sale of the ranch is Hal's separate property and his investment in the California farm is also his separate property, up to the $350,000 used as a down payment.

Savings account. The $75,000 in Hal's account consists of the original $50,000 in dividends from the stock and $25,000 in interest. Because the stock is separate property, the dividends and interest derived from it are also separate and will be part of the testamentary disposition.

Checking account. Although the account was in Hal's name only, it was set up in State A, and later in California, for the benefit of the community. As discussed above, the initial funds in the account represented the reasonable value of Hal's services on the ranch and were a quasi-community asset. Therefore, Wendy is entitled to her one-half community interest of $5,000, and the remaining $5,000 is part of the estate.

(c) Liability on note. The estate must discharge the $50,000 debt. When Hal borrowed the $200,000, it was evidenced by a note signed by Hal alone and secured by property owned by Hal separately. Over six years, Hal managed the farm and divided the earnings of his separate property equitably between the separate and the community estates, with $25,000 per year going to community living expenses and $25,000 per year going to repayment of his separate debt on the farm. Thus, to the extent the loan was paid down by $150,000, the appreciation in value of the separate property is Hal's separate property. The creditor intended to look to Hal's separate property to satisfy the debt, the farm is Hal's separate property, and therefore Hal's estate must pay off the note.

ANSWER TO QUESTION #3

A. 1. Howard and Wilma hold Greenacre as joint tenants. Howard may be entitled to reimbursement for his $50,000 contribution to the acquisition of the property if he can show that it was not a gift to the community.

The acquisition of the property occurred during marriage, and therefore under California law the property is presumed to be community property unless the title or a written agreement of the parties clearly indicates otherwise. §4800.1. Here, the title indicates Howard and Wilma hold the property as joint tenants. Property taken in joint ownership is presumed community property at the time of divorce. Under current law, Howard's contribution is not presumed to be a gift, and he is entitled to reimbursement for the $50,000 down payment he made with his separate funds (from the sale of his separate land). §4800.2.

Note: This situation is distinct from one in which the community contributes to acquisition of separate property and thereby acquires a pro rata interest in the appreciated value of the separate property.

2. The building and dry cleaning business are Howard's separate property because they were acquired with $15,000 from the sale of Howard's ABC stock and $15,000 from a personal loan. However, if the loan was in fact viewed as a community obligation by Karl, the creditor, then the community holds a one-half interest in the value of the property and a one-half interest in its appreciation.

Generally, a loan incurred during marriage is presumed to be a community obligation. However, if the creditor intended to look to the separate property of one spouse for repayment, the presumption is rebutted. Here, Howard signed a personal note, and Karl was repaid with rental payments made directly by George, Howard's tenant. Rental profits from separate property are separate property. If Karl believed the building and business were Howard's separate property, then he looked to separate rentals for repayment of the loan.

However, if the presumption of a community obligation is not rebutted, the community contributed one half of the payments toward acquisition of the property, or $15,000. Therefore, the community also holds an interest in 50% of the appreciated value of the property, or $15,000.
B. 1. The community is liable for spousal support obligations of a prior marriage of one of the spouses. The community is entitled to reimbursement if the obligor spouse had separate property available to pay the debt. Upon divorce, the support obligation is confirmed without offset to the spouse who incurred the debt.

Here, $15,000 in alimony was paid to Jane before dissolution. Payments were made out of community funds over the years. At the time Howard made the payments from the joint account, he held separate property out of which he could have satisfied his obligation. Therefore, the community is entitled to reimbursement to the extent Howard's separate property is available. However, the right of reimbursement must be asserted within three years after the nonobligor spouse has actual knowledge of the use of community funds to satisfy a separate obligation. Cal. Civ. Code §5120.210(c). Wilma had knowledge of the payments made from community funds from 1982 onward, and the court may view the use of the funds as a gift to the separate property of Howard and refuse to apply the above statute. It is unlikely the community will obtain reimbursement under these facts.

2. Howard is entitled to reimbursement of one half the payments he made on the community obligation to Creditor. Howard paid $4,000 of the debt out of his salary, which was his separate property because it was earned after separation. Under Epstein, a spouse's separate payment of community debts after separation to preserve community credit standing or community assets does not constitute a gift to the community, and the spouse is entitled to reimbursement. Of the $4,000 paid by Howard, his share of the community debt was $2,000, and therefore he should be reimbursed for the other $2,000. However, under Epstein, if Howard had the use of community assets on which the debt was due and the use value of assets equaled or exceeded the payments on the debt, Howard would not be entitled to reimbursement. Similarly, if Howard made the payments in lieu of a support obligation to Wilma, he would not be entitled to reimbursement.

The remaining $6,000 in unpaid pre-separation community obligations will be allocated to the spouses in an equitable manner by the court under §4800(c).

3. The $7,000 debt incurred by Wilma after separation is her separate debt unless it was incurred for common necessaries. A common necessary is only that which is necessary to sustain life, and does not apply to such conveniences as cars. Debts incurred for common necessaries after separation are a community obligation, and the court confirms the obligation to either spouse depending on ability to pay. In all other cases, the debt is confirmed to the spouse who incurred the debt, in this case Wilma. Cal. Civ. Code §4800(c).

**ANSWER TO QUESTION #4**

A. 1. Wanda has a right to reimbursement or return of the typewriter because Hal's taking of the office equipment was wrongful. Wanda purchased the typewriter with her earnings, and therefore it was community property. However, the typewriter was part of the equipment in Wanda's professional law practice, and as such was under Wanda's sole right of possession. Hal, as the non-controlling spouse, could not unilaterally remove the typewriter to liquidate his separate debt incurred before marriage. Because of his bad faith, Hal must account for the total value of the typewriter by returning it to Wanda's law practice or reimbursing her for its full value.

2. Wanda's post-separation earnings are not liable for Hal's separate debt. The earnings of a spouse during marriage are not liable for her spouse's premarital debts. Here, Wanda held her earnings in a separate bank account and did not commingle the earnings with community property. Therefore, Hal's creditors cannot reach her earnings.
3. Wanda's community property, other than her earnings, can be reached to satisfy a premarital debt of Hal. Therefore, Pete may levy execution on Wanda's stock. However, Wanda has a right to reimbursement from Hal's separate property.

B. If Hal and Wanda's marriage was void, they would still have a putative marriage if they had a good faith belief they were married. The effect of putative marriage is to treat property acquired during the relationship as quasi-marital property. If the court found Hal and Wanda's relationship had putative status, the same results would occur as discussed above regarding the typewriter, bank account, and stock. Hal's debt would remain a separate debt, Wanda would retain sole possessory rights in her typewriter used in her professional practice, her earnings would be quasi-marital property not subject to Hal's pre-marital debt, and Wanda's quasi-marital property other than earnings could be used to satisfy Hal's debt, subject to reimbursement.

ANSWER TO QUESTION #6

(a) Set aside of unauthorized transaction. If the land is community property, Wilma will be able to claim reimbursement of 50% of the sale price for her one-half interest.

The land was a gift to both Hal and Wilma, and record title was in their names. There is no evidence the spouses intended by agreement or by deed to hold the property other than as community property. Therefore, the land is presumed to be community property. Therefore, at the time of conveyance to Bess, joint execution of the instrument of conveyance by Hal and Wilma was required. Wilma had no knowledge of the conveyance, Hal did not act by power of attorney, and therefore the transaction was unauthorized as to Wilma.

If Wilma had acted within one year after Bess' recording of title, Wilma could have had the transaction set aside. Bess was not a bona fide purchaser because she had a duty to search the title, and record title in Hal and Wilma's names served as constructive notice of the community status of the property. Thus, Wilma could have recovered her one-half interest in the land. However, it is now 29 years after the conveyance. Although she can no longer reacquire the land itself, Wilma may still be reimbursed for her loss under the theory of Hal's unauthorized conveyance of her one-half community interest. Hal's conveyance of his one-half interest would remain valid.

(b) Adverse possession. Bess may be able to assert a claim to all the property under an adverse possession theory. Bess is unlikely to win a suit based on contract theory because she is not a bona fide purchaser, as discussed above. However, Bess is an adverse possessor who has displayed an open, hostile and notorious use of the property since 1962 when she built and occupied the house. She gave clear notice to Wilma of her hostile use by constructing the house and paying taxes on the property. Thus, Bess can claim a right to the entire property by color of title because the seven-year statute of limitations has run (1962-1969) and Wilma's right to recover the land has been extinguished. Alternatively, if Wilma was deemed to have required constructive notice of the adverse possession (e.g., payment of taxes), then under the 20-year statute Bess would have acquired a valid claim to the land in 1982.

ANSWER TO QUESTION #7

To determine the characterization of the spouses' property as community or separate, the fiction of quasi-community property must be applied, that is, all personal or real property, wherever situated, acquired by Harvey or Wilma while not domiciled in California which would have been community property had Harvey or Wilma been domiciled in California is quasi-community property.

(a) ABC stock. The stock is Harvey's separate property because it was acquired from the sale of a separately owned business. Harvey's acquisition of Corp began before marriage, and although the
transaction was completed after marriage, the time of inception of the deal governs the characterization of the property. Therefore, Corp was Harvey's separate property.

After marriage, the value of Corp land increased dramatically due to the natural enhancement of the property caused by the discovery of oil nearby. The increase in value was not due to the services of Harvey, and therefore the community is not entitled to a share in the profits and appreciation of his separate property. However, the community may be reimbursed for the reasonable value of Harvey's services as president of Corp. Under the *Van Camp* formula, if $3,000 per month represents reasonable compensation for the type of work Harvey performed, then the community is not entitled to any reimbursement because it has already received its share for its contributions to services through Harvey's salary.

The community may also be entitled to reimbursement for business expenses of Corp, such as debt payments, paid out of community funds. Here, the debt was secured before marriage, and therefore the creditor, George, intended to look to Harvey's separate property to satisfy the debt. After marriage, there is no evidence Harvey intended to transmute the assets of Corp from separate to community property. Harvey's $900,000 profit upon sale of Corp was his separate property, and the ABC stock he purchased with the funds was also his separate property. Registering the stock in his own name is further evidence he had no donative intent regarding the community.

(b) Apartment house. The house is Wilma's separate property because it was acquired by inheritance. However, the community has made payments toward acquisition and has acquired a percentage interest in the property. Under the Moore formula, the community paid down the principal of $40,000, and therefore the community holds a 20% interest in the property ($40,000 divided by $200,000 = .20), and Wilma holds an 80% separate interest.

The community is entitled to reimbursement of the $10,000 in Wilma's earnings she spent on improvements, because when a managing spouse expends community property to improve her separate property the community has a right of reimbursement of the amount expended or value added.

The community may also be entitled to reimbursement for the value of services Wilma performed at the house. If 10 hours per month represents 100% of the services required to run the house, then the community is entitled to compensation for contributing to the improvement of separate property. Conversely, if Wilma's 10 hours of work per month represented only a small percentage of the actual work required, and another person was hired to perform most of the work, Wilma's contribution would not constitute an improvement to separate property requiring reimbursement to the community.

(c) Savings account. Wilma has an 80% interest in the funds on account, and the community has a 20% interest. The funds are rental profits from separate property. The value of the apartment house has been apportioned 80% to separate property and 20% to the community, and therefore the rentals which issued from the property should be apportioned in the same way.

Alternatively, it can be argued that if Wilma, as manager of the apartment house, did not earn a salary, which should have been paid to her out of rental profits as the fair market value of her services, then she was working on behalf of her separate property and the community is entitled to reimbursement.

**ANSWER TO QUESTION #8**

A. ABC's entry was not a trespass because ABC had at least a qualified privilege to enter the land.

ABC's right to enter the land depends on whether ABC had a good faith belief in Wanda's authority to convey an interest or bestow a license on ABC. The interest Wanda gave to ABC can be construed as an easement or a license. If the land is community property and the interest conveyed is an easement, agreement in writing and joinder of both spouses are required. Cal. Civ. Code §5127. While both spouses
have equal management and control of community property, Wanda could not unilaterally convey an easement right to ABC. However, if ABC relied in good faith on the instrument conveyed by Wanda, even if it was conveyed wrongfully, ABC cannot be guilty of trespass because ABC's presence is not an unprivileged interference with property. Despite Wanda's lack of authority, the instrument gives ABC at least a qualified privilege to enter the land. If the land is community property and the "interest" conveyed is a license, joinder is not required because a license is a mere nonexclusive right to use the land of another. It is likely Wanda gave ABC a license because the instrument states the right is "nonexclusive," and the sign is portable (i.e., easily removable) should Wanda revoke the right.

If the land is a joint tenancy, Wanda did not have the authority to grant an easement in the property to ABC without the agreement of Hal. However, ABC's good faith belief in her authority would again give ABC the qualified privilege to place its billboard on the property. If the instrument is characterized as a license, Wanda was not required to obtain agreement from her cotenant Hal as long as an ouster of Hal did not result.

B. The parties' rights depend upon whether the property is characterized as a joint tenancy or community property, and whether a severance of the property occurred when Wanda conveyed her interest to Jane. Under current law, property held in joint tenancy form is presumed to be community property unless one spouse can show a contrary intent by deed or agreement. §4800.1.

A joint tenant may unilaterally sever the tenancy by conveying her interest to a third party, and therefore Wanda's conveyance to Jane (which has not yet occurred) can be specifically performed. If Wanda's severance is valid, then Hal has the testamentary right to devise his one-half interest to Bob, who would hold the property as a tenant in common with Jane.

If the land were characterized as joint tenancy community property (i.e., acquired during marriage), and the severance was valid, Wanda's one-half community interest could be partitioned and conveyed to Jane. Hal's one-half community interest would become part of his estate. If, for the sake of argument, the severance did not occur, the joint tenancy would remain in effect and the entire property would pass to Wanda by right of survivorship.

ANSWER TO QUESTION #10

A. The XYZ Corporation stock is the separate property of H because it was acquired before marriage. Therefore, the corporation represented by the stock is H's separate business. However, a portion of the appreciation in value of the stock may be awarded to the community if H's services rendered during marriage significantly contributed to the increase in value.

Applying the Van Camp formula, the court will determine whether the original capital contribution of $10,000 was responsible for the large increase in net equity of XYZ Corporation rather than H's services. If the court finds H's investment of time as opposed to capital was de minimis, the court will assign a reasonable value to H's services and treat the value of services rendered as a community asset. The remaining value of the business is H's separate property.

Conversely, if the court finds H's services contributed substantially to the profitability of the corporation, the court may apply the Pereira formula by which the separate property owner is awarded his original investment plus a reasonable rate of return, and the community receives the remaining value exceeding the normal return on H's 50% of the business.

Under either formula, it must be determined whether H's $2,500 per month salary constitutes reasonable value for services rendered. If the sum represents a reasonable amount in a comparable business, then the community has been reimbursed through H's earnings. See Van Camp. However, if H's compensation was inadequate, the community was not benefiting from the reasonable value of H's services,

132
but rather the services were contributing to the increase in equity of the corporation. Therefore, the Pereira rule should apply, and the community should receive the greater share of the asset. H would argue for the application of Van Camp, attributing the increase in equity to the investment itself and its appreciation over time. H could reinforce this argument by pointing out that his father passively invested in the corporation and took no part in operations but shared in the appreciation over time. Conversely, W would argue that F's investment, occurring close to the time of marriage, could be construed as a loan to the community, and therefore the business had substantial community character. The court will apply the facts of the case to the Van Camp and Pereira theories and in its discretion apply the formula which will achieve substantial justice to the parties. In this case, where XYZ is a close corporation and H has devoted most of his time to managing it, it is likely the court will find Pereira applicable.

B. The house and lot are presumed to be community property because they were purchased during marriage with community funds, despite the fact that the title is in W's name alone.

If W now claims the house and lot were a gift to her, H can argue there was no donative intent despite the fact that title is in W's name. In fact, H's intent was to evade potential creditors of XYZ Corporation, not to confer a separate benefit on W. Further, H and W used the house as their joint residence. However, W could seek to prove the parties agreed to a transmutation of community property to separate status, if there is a writing to that effect. (There is no evidence in the facts to suggest such a transaction occurred.)

C. The mountain parcel and cabin are W's separate property because they were acquired by inheritance. However, the community paid down the $4,000 mortgage, and therefore the community has a 20% interest in the appreciation of the property ($4,000 pay down divided by $20,000 purchase price = .20). W holds an 80% separate interest. W will retain management and control of the property. The rents received take on the same character as the property, and therefore rents will be allocated in the ratio of 80% (separate) to 20% (community).

The community will be reimbursed for the community funds used to satisfy the $2,000 lien because the community was not liable for the debt. A claim for reimbursement must be made within three years.

ANSWER TO QUESTION #11

A. The court's ruling on the land was incorrect because the appreciation in the value of the property should have been divided proportionately between the separate and community estates. The community is entitled to reimbursement for payments of principal and any contributions to the preservation or improvement of separate property, as well as a percentage of appreciation.

The land is H's separate property acquired by inheritance. The community paid down the mortgage in the amount of $10,000, and therefore the community has a 33 1/3% interest in the property and its appreciation ($10,000 pay down divided by $30,000 purchase price = 33 1/3%). The parties stipulated the current value of the land is $45,000. The community is entitled to one-third of the appreciation of $15,000, or $5,000. Therefore, upon dissolution the community is entitled to reimbursement of the $10,000 pay down of principal plus $5,000 in appreciation for a total of $15,000. The court was in error.

B. The court's ruling on the sports car was correct if the reasonable value of the use of the vehicle was the $1,000 per month H was paying on the loan during the year of separation.

The car is presumed to be community property because it was purchased with community funds. Even though W had no knowledge of the purchase, H had the right to incur the obligation and bind the community. The community is entitled to the net value of the asset upon dissolution.

There is a question whether H may be reimbursed for his post-separation payments on the car, where the payments were made with his post-separation (i.e., separate) earnings. Under an Epstein analysis, a
spouse is entitled to reimbursement for separate funds used to make payments on pre-existing community obligations. However, reimbursement will be denied if the expectation of reimbursement is unreasonable, for example, where the spouse is using the asset and the amount of his payment on it approximates the value of its use. Thus, if the value of H's use of the car was $1,000 per month and his payments were also $1,000 per month, then H is not entitled to reimbursement. However, if the value of the use is substantially less than the amount paid out by H, he is entitled to reimbursement of that amount paid out which constitutes W's one-half community share of the debt. For example, if H paid out $12,000 but the use value was $6,000, then H is entitled to reimbursement from the community for 50% of the value he preserved in the community asset beyond the use value, i.e., 50% x $6,000 = $3,000.

C. The court may, in its discretion, award all of the personal injury damages to W as the injured spouse and need not offset the award with an award of property to the non-injured spouse even though the damages are community property. The court may also award the non-injured spouse up to one half of the damages in the interest of fairness.

There is a question whether the punitive damages must be divided equally between the spouses, as the unequal division exception applies specifically to personal injury damages only. Further, there is a question whether the attorney's fees are a community obligation and whether the fees should be apportioned between the punitive and personal injury portions of the award. Here, the $10,000 fee is an obligation of the community because W's contract with the attorney was made during marriage. It can be argued that the fees were more necessary to obtain the punitive damages, and thus the community debt should be deducted from that award first, and then from the first sixth of the personal injury damages ($30,000 - ($5,000 + $5,000)), for a net of $20,000. Conversely, the court may decide to take all the expenses incurred by the community for both the personal injury and punitive damages and deduct them from the personal injury award because of the unequal division exception permitting the court to give the injured spouse a greater share of the community award. In that case, W would receive $15,000 in personal injury damages ($25,000 award - $10,000 attorney's fees) plus $2,500 in punitive damages ($5,000 award - H's one-half community interest).

Therefore, depending on how the court chose to apportion or deduct the attorney's fees, the net award could be distributed up to a maximum of $20,000 to W alone or to both H and W in smaller percentages. Here, there was no evidence the $20,000 in the account had been commingled with community property, and the court had discretion to award the full amount to W.

D. The court's ruling on reimbursement on the loan was correct provided the loan was bona fide and not intended as a gift by H.

Each spouse has management and control over community property and may make a loan of community funds to third persons. H had the authority to make the loan to X, and the community suffers the loss if X is discharged in bankruptcy. Even if X obtained the loan fraudulently and the community had the transaction set aside, the community would not recover because X is apparently judgment-proof.

If H knew X was in financial trouble and intended the loan as a gift, then W may seek reimbursement from H within three years of the use of the community funds for the loan or upon dissolution. W could also claim reimbursement under the theory of misappropriation if she can show H used the loan as a device to secrete community funds. However, the facts indicate no donative intent or secretiveness on H's part: X approached H for the money rather than vice versa; the loan agreement was in writing, and; interest was charged at the maximum rate. Thus, the court's ruling was not in error.

ANSWER TO QUESTION #13

A. Victor's Rights in General
If Wendy's tort was committed while she was acting for the benefit of the community, Victor's judgment must first be satisfied from community (and quasi-community) property and then from Wendy's separate property; otherwise, community (and quasi-community) funds may be reached only if Wendy's separate property is insufficient to satisfy the judgment. In either case, Harry's separate property is not liable to Victor.

While Wendy's tortious conduct obviously did not enrich the community in any way, the act would most likely be considered "for the benefit of the community" if she attended the meeting for a community purpose. On one hand, the fact that Harry strenuously objected to Wendy's attendance at the meeting would tend to indicate that she was acting on her own, not for the benefit of the community. On the other hand, the condominium association meeting was related to the marital domicile and the community obviously had a stake in decisions made by that association. While the issue is not without doubt, it would seem that this was a "community tort" so long as the dispute between Wendy and Victor related to association business (as opposed to being a purely personal argument, such as a disagreement over the relative merits of Victor's and Wendy's favorite football teams).

B. Classification of Property

In California, separate property is property acquired before marriage and any property acquired during the marriage by gift, bequest, devise or descent and the rents, issues and profits thereof. Community property is defined as California realty and all personal property, regardless of where situated, which is acquired by a married person while domiciled in California and which is not separate property as defined above.

1. The Savings Bonds

The characterization of property is generally determined by the source of the funds used to acquire that asset. As a result, the savings bonds, which were acquired from funds obtained from an insurance settlement, will have the same status as that recovery.

Ordinarily, the characterization of personal injury recoveries is dependent on when the cause of action arose (i.e., they are community property if, but only if, the injury occurred during the marriage and while the parties were living together). When the recovery is from the other spouse, however, it is classified as the separate property of the recovering party regardless of when the tort occurred. Even though the settlement was actually paid by an insurance company, this recovery was from Harry in the legal sense and would thus be Wendy's separate property and, therefore, so are the savings bonds.

If these were United States Savings Bonds, the Supremacy Clause would require that ownership be determined by the federal government's rules and regulations rather than by the California classification scheme. If, as one would expect, the bonds simply listed Wendy as the holder, they would be her separate property.

2. The Stock Portfolio

The stock was acquired from Harry's earnings during the marriage and would have been classified as community property had the parties been domiciled in California at the time; under the California classification scheme, it is quasi-community property. When the parties are living in California, quasi-community property is treated the same as community property insofar as liability for debts and most other issues are concerned.

3. The Condominium
The condominium was acquired with the proceeds of the sale of the State X residence, which was acquired with quasi-community property funds as discussed above. As a result, the condominium would be considered to be quasi-community property under ordinary tracing principles.

Alternatively, one could apply the general presumption that all real property acquired in California by a married couple is presumed to be community property. While the manner in which title is held is generally controlling when the issue is disposition upon death, all jointly owned California real property is treated as community property for purposes of divorce, legal separation, or liability for debts unless the deed or a written agreement between the parties provides otherwise.

4. The Auto Repair Business

Since the funds used to purchase the auto repair business came from an inheritance (which would be Harry's separate property even if received during the marriage), the business itself is Harry's separate property. When a separate property asset generates income during the marriage due to the efforts of a spouse, however, the community is entitled to a share of that income. While the facts could be clearer on this point, this answer will proceed on the assumption that Harry acted as the mechanic and manager of the business.

In determining the precise value of the community's interest, the court will use one of two tests. Under the Pereira test, the court would hold that Harry is entitled to a reasonable rate of return as his separate property, but that any excess in appreciation is allocated to community property. Under the Van Camp test, the court would place a value on Harry's efforts and award that amount to the community and the remainder to his separate property. The court will utilize the test which results in "substantial justice."

Here, the facts indicate that Harry had withdrawn a "salary" from the business which he had used for the benefit of the community (e.g., he used these funds to pay for ordinary living expenses); thus, the community has already been compensated to this extent. Since this is the way efforts are evaluated under Van Camp, it would seem appropriate to use that test here. It might be noted that while the amount withdrawn was apparently a fair salary for a mechanic (it was the sum he received for such work from another), it may not have been adequate compensation given that he presumably also acted as the manager of the business. If this is the case, the community would be entitled to some additional payment from Harry's separate property.

**ANSWER TO QUESTION #14**

H's will purports to leave all of H's assets, in addition to his one-half interest in the family residence, to S. It must be determined whether H indeed has a one-half interest in the family residence which he can devise to S. It must also be determined whether W has a community property interest in any of the other assets, or whether such assets are separate property. S can be devised one-half of such assets if community property, all of such assets if H's separate property, and none of such assets if W's separate property.

A. The Stock Portfolio

The stock portfolio was purchased with funds from a bank account into which W had deposited only her earnings. Her earnings before marriage are her separate property, but her earnings after marriage are community property. The initial question of proof would involve the time the funds were earned. However, commingling her separate earnings with community earnings would cause all funds in the account to be deemed community property unless W can clearly identify the amount of separate property deposited. If the funds are community property, the spouses have equal rights of management and control, so W's purchase of stock would not have required H's knowledge or consent. The stock would be community property, however, if purchased with community funds.
In this case, the normal community property rules may have been changed by a premarital agreement between H and W regarding W's earnings. California statute now requires that all premarital agreements be in a signed writing, but oral agreements may still be enforced if they were fully executed (i.e., they have affirmed the agreement by subsequent conduct). The fact that W notified friends of the agreement in H's presence and the fact that she continued to deposit her earnings without any claim on them by H before his death would support a finding that the oral agreement had been fully performed. H's will does not specifically purport to devise the stock portfolio, so even by the will he does not expressly claim any interest. Therefore, the stock portfolio should be found to be W's separate property in which S can receive no interest.

B. The Family Residence

The issue with regard to the residence is whether it in fact is joint tenancy property. If held in joint tenancy, as the deed states, W would automatically obtain sole ownership upon H's death, due to the right of survivorship, and H could devise nothing to S. There is a presumption that spouses intend to hold their property in the manner specified in the deed. (The presumption that joint tenancy property should be treated as community property applies only on divorce.) We have no facts indicating a contrary agreement between the parties.

The note signed by H and W together would make the loan proceeds community property, and the current earnings of either H or W would also be community property. H's down payment from separate funds would give him a separate interest in the house to that extent, if the house were community property. However, the source of funds does not change the title presumption in the absence of an agreement, so the house appears to be joint tenancy property and S takes nothing.

C. The Vacation Cottage

The land on which the cottage was built is H's separate property, since he inherited it. The personal injury award H used to build the cottage was community property, however, because the cause of action arose during the marriage. In effect, then, H's separate property (the land) was improved by a community contribution (the personal injury award used to build the cottage). W's "strenuous objection" makes it clear that she was making a gift of her community property to H. The community has a right of reimbursement for the contribution to the extent of the amount expended or the value added, whichever is greater. S should inherit the cottage and land but should be required to reimburse W for one-half of the amount due the community.

ANSWER TO QUESTION #15

I. Classification of Property

The nature of Wilma's interests is dependent on the classification of each item of property according to California law. Separate property is property acquired before marriage and any property acquired during the marriage by gift, bequest, devise or descent and the rents, issues and profits thereof. Community property is defined as California realty and all personal property, regardless of where situated, which is acquired by a married person while domiciled in this state and which is not separate property as defined above.

A. The Apartment Building

Since Wilma owned the apartment building prior to the marriage, her interest was initially her separate property as defined above. Since the building was subject to a mortgage, however, the community would have some stake in this asset if community property was used to pay off the mortgage (which, in essence, is acquiring ownership).
The facts indicate that one half of the mortgage payments were made from the earnings generated by the apartment building itself. Since the earnings of a separate property asset are also separate property, at least this portion of the mortgage payments is not a payment with community property funds. This assumes that these profits were not in part due to Wilma's efforts. Since Wilma was a real estate broker, it is quite possible that she "managed" the building; if this is so, she expended community efforts to appreciate a separate property asset and a portion of this half of the payments would be considered community property (as determined by the Van Camp/Pereira analysis discussed below in connection with the tavern) and the community would have some interest in the building's value under the rules discussed immediately below.

The other half of the mortgage payments were made from Wilma's earnings during the marriage, which are clearly community property. As a consequence, while the building itself remains Wilma's separate property, the community has a claim against the property to the extent that community funds were used to reduce the principal of the loan. More specifically, the community's interest in the apartment building is determined by the amount of community funds allocated to the reduction of the principal of the loan plus the percentage of appreciation determined by the amount paid with community property funds on account of principal, divided by the original cost. Here, the principal of the loan was reduced from $160,000 at the time of the marriage to $100,000 when Hal died. Half of this $60,000 reduction was due to the payment of community property funds; therefore, the community has a $30,000 interest in the property. In addition, the building has appreciated from $200,000 to $300,000 during the marriage; the community interest in the appreciation is determined by the ratio between the community contribution ($30,000) and the value of the property at the time of marriage ($200,000). Thus, the community also has a 15% interest ($30,000 divided by $200,000) in the $100,000 appreciation of the building, or $15,000. Altogether, therefore, the community has a $45,000 claim against the apartment building. In addition, the community is entitled to reimbursement for any community property funds that were used to pay real estate taxes on that property and interest on the mortgage.

B. The Residence

Since the house was acquired with separate property funds, it would ordinarily be considered Hal's separate property. Here, however, title was taken in joint tenancy. When the issue is disposition upon death (as here), it is presumed that property is held in the manner described in the documents of title. Thus, in the absence of evidence of a contrary intent or agreement, the separate property was transmuted into a joint tenancy (i.e., it is neither community property nor Hal's separate property).

C. The Tavern

While the down payment for the tavern was made with separate property funds, the community would have an interest in the property if the loan was given on the strength of community assets (as determined by the intent of the lender) or, as discussed above, the loan was paid back with community property funds. Here, however, the loan was secured by property owned by Hal prior to the marriage (Hal's separate property), so it can be assumed that the lender did not rely on community property when extending the loan. In addition, the facts indicate that the loan payments were paid entirely with Hal's separate property funds. Thus, the community has no interest in the original value of the tavern.

When a separate property asset appreciates during the marriage due to the efforts of a spouse, however, the community is entitled to a share of the appreciation. The tavern was worth $100,000 when acquired and $150,000 at the time of Hal's death. Since Hal had worked full time as the manager and bartender of the tavern, it would appear that his efforts did indeed contribute to $50,000 appreciation.

In determining the precise value of the community's interest, the court will use one of two tests.
Under the *Pereira* test, the court would hold that Hal is entitled to a reasonable rate of return as his separate property, but that any excess in appreciation is allocated to community property. Here, the value of the business had only increased by 50% in seven years, which, with compounding, is approximately 6% a year (less than the typical legal interest rate). Therefore, the community would probably have no interest in the tavern under this test.

Under the *Van Camp* test, the court would place a value on Hal's efforts and award that amount to the community and the remainder to his separate property. Here, the court would determine the value of Hal's services by looking at the salary that would normally be paid to a manager and a bartender of a tavern of the type operated by Hal.

The court will utilize the test which results in "substantial justice." Given the low rate of return and Hal's active involvement with the tavern, the court ought to apply the *Van Camp* rule. (Note, however, that if Hal had withdrawn a "salary" from the business which he had used for the benefit of the community e.g., he used these funds to pay for ordinary living expenses, the community would already have been compensated. In such a case, the community would not be entitled to any interest in the business unless the amounts withdrawn were less than what Hal would have had to pay to outsiders.)

II. Distribution

A. The Apartment Building

The apartment building itself was Wilma's separate property and is not subject to Hal's will. Hal's estate does include one half of the community's claim against the apartment building, however, and this becomes a part of the corpus of the testamentary trust; under the terms of the trust, Wilma is entitled to interest on this amount for life, with the remainder to Sam. The other half of the community's interest became Wilma's sole property by operation of law upon Hal's death.

B. The Residence

Since the residence was owned in joint tenancy, ordinary rules of real property, not the special community property principles, govern. Upon the death of one joint tenant, his interest automatically passes to the remaining tenant by operation of law. Thus, Wilma owns this property outright.

C. The Tavern

The tavern itself plus one half of that portion of the appreciation of the business which was allocated to the community (if any) become part of the trust corpus. Wilma is absolutely entitled to the other half of the community's interest in the appreciation.

**ANSWER TO QUESTION #16**

Generally, all property acquired during marriage by a spouse while domiciled in California is community property except as otherwise provided. In this case, a major issue is whether a couple who are not ever married can choose to opt into the California community property system.

Mike and Flo were never married but were living together. They signed a written agreement in which each promised to share subsequent acquisitions "as if (they) were married." Therefore, this agreement can either be viewed as a "prenuptial agreement" by a couple that never married or as a simple contract affecting property characterization.

If the agreement is seen as a pure prenuptial agreement, it is likely to pass judicial scrutiny. It is in writing, signed by the parties and presumably made after full disclosure. Even though the parties were
never married, a court is likely to view it as in contemplation of marriage and therefore enforceable to create community property characteristics of subsequent acquisitions and dispositions.

If on the other hand the court views the agreement as a pure contract, it is also likely to be valid, binding and enforceable. Like a prenuptial agreement it is in writing and signed, apparently has been based on a valid offer and acceptance and in addition (and unlike a prenuptial agreement) is supported by consideration since each party is giving up the right to characterize property in a non-community property manner in order to opt into the community property system.

Under the assumption that the parties have validly opted into the CP system the analysis of the questions presented are offered below.

1. **Child Support**

   Generally past debt obligations are the responsibility of the debtor spouse. The debt is timed from the occurrence of the obligation. Child support payments, however, are a special category. Usually, child support payments are a valid community property expense. Flo may attempt to demand reimbursement to the community of the $18,000 in child support. This type of reimbursement will only be allowed if there was sufficient separate property of the debtor at the time of payment. Mike paid $500 a month from his earnings from January 1992 on. From January 1992 - January 1993, it seems that there was no separate property available to Mike from which to pay the child support. However, in January 1993, Mike inherited $20,000 which is a separate property asset he could have used.

   Therefore, the community would be entitled to reimbursement of child payments from January 1993 forward in the amount of $12,000, so Flo would be entitled to half or $6,000.

2. **$20,000 Savings Account**

   All property acquired by gift, bequest or devise under a CP system is characterized in California as Separate Property (SP). As such, Mike's inheritance of $20,000 which he placed into an account solely in his name is his SP. Inheritance is always a SP, and there is no evidence that he intended to transmute the funds (which would require a writing by Mike stating that he wished the funds to be CP) or that he commingled them with other CP funds. Flo should have no rights in the savings account.

3. **Rights to the Bonds**

   Under the CP system, when one party is injured during marriage, the personal injury recovery is classified as CP. Since Flo was injured after the parties’ agreement, the $400K settlement of Flo's tort claim will be characterized as CP. The facts tell us that Flo invested $200,000 of the settlement in bonds in her name alone. The fact that she put a community asset into her name, however, does not change their character.

   California CP law has a provision where all (or at least half depending on equity) personal injury recoveries are to go to the injured spouse upon dissolution of the their marriage, regardless of their CP characterization. Equity would not seem to require a distribution to Mike, as he is healthy, and has sufficient separate property to support him. Therefore, all of the bonds should be awarded to Flo. It should be noted however, where the form of such recovery has changed from mere cash to purchase of bonds, the court may characterize the bonds as CP as discussed above. As such, the bonds would be divided equally and Mike would be entitled to $100,000 of the bonds.

4. **Taking and Sale of the Diamonds**
As discussed above, the $400,000 of personal injury recovery is classified as CP. As such, Flo's purchase of $200,000 in diamonds is merely a change in form of property but not characterization since tracing allows the source characterization to flow to the property. Unlike the bonds, however, the CP diamonds themselves are "sold" by Mike who may give right to a claim by Flo.

Originally, the diamonds were purchased for $200,000 and Mike "sold" them thereafter for only $100,000. If this price was indeed their FMV, Flo will be stuck with the loss since CP allows for disposition by either spouse under joint management and control doctrines.

The most likely scenario, however, is that Mike did not "sell" the diamonds but mishandled them by passing them to Bud for 1/2 their price and ultimately used the money to gamble. He may therefore be liable to Flo for breaching his duty of management of the CP. Mike is likely to argue that he has a right to convey personal property since each spouse has power of management and control, but the court is likely to characterize his actions as intentional dissipation of CP. As such, Flo has a right to have the community reimbursed for Mike's dissipation to the community (1/2 of the $100,000).

5. Rights Against Bud

Flo may assert that Bud failed to pay adequate consideration for the CP diamonds, and therefore that she should be able to recover her CP share of $100,000. Because CP law grants spouses equal management and control over CP assets, Flo may attempt to void the conveyance entirely. She may also assert that the $100,000 less than fair market value constitutes a gift from the community property, and demand her share of that unauthorized gift.

Bud will assert that he was a bona fide purchaser for value, and was unaware of the property’s characterization when he took it.

Flo may attempt to bring a criminal charge against Bud for receipt of stolen property, but she would have to show that he had knowledge that the diamonds were not Mike's lawful property. The more likely result, however, is that Flo will be able to re-obtain the diamonds. The combination of Bud’s payment of half the diamonds’ value plus the strong public policy interest in keeping CP within the CP system when it has been intentionally dissipated will probably keep Bud from claiming title as a BFP.

Flo is likely to re-obtain the diamonds as CP (and she will get 1/2 at splitting with Mike) although she will have to pay Bud his $100,000 back as restitution.

ANSWER TO QUESTION #17

California is a community property state, which means that all property acquired during marriage by a spouse’s labor or skill belongs to the community. Separate property includes property earned or acquired by one spouse before marriage or after separation, or acquired by devise or inheritance at any time.

1. Rights in the Home

When a home is purchased with both separate and community funds, the separate and community estates each receive a pro rata share of the home’s value at dissolution unless other ownership presumptions apply. Under the 1980 Lucas case, a gift to the community was presumed if a spouse used separate property to help purchase a community asset, but in 1987, “anti-Lucas” legislation was passed, providing that at time of dissolution of marriage, any separate funds used for the down payment, improvements or payment of principal on community property should be reimbursed.

The calculation is as follows: Herb expended $6,000 of his separate property on the home prior to his marriage. The purchase price was $50,000, so his interest in the sales proceeds should be 6/50 or 12% of
the $150,000 appreciation in value of the home, plus reimbursement of his initial $6,000. This would give him $24,000 for his separate interest.

The community is entitled to reimbursement of its contribution of $44,000 to the cost of acquisition of the asset, plus 88% of the appreciation ($132,000). This would total $176,000, which should be split 50/50, giving Herb $88,000 plus $24,000, or $112,000. Wanda will receive the remaining $88,000.

2. Rights in the Mutual Fund

In characterizing an asset as separate or community, a court will trace the present form of the property back to its source. The source of the money invested in the mutual fund was the $10,000 that Wanda earned for the sale of her painting. Since this was a result of her labor and skill expended during the marriage, it is community property.

Prior to 1985, the parties to a marriage could transmute or transform the character of property by oral agreement, but since 1985, all agreements between spouses to change the character of property from community to separate or vice versa must be in writing and clearly express such intent. Herb and Wanda’s oral agreement in 1985 had no effect on its original characterization as community property, nor did the fact that Wanda invested the money in a mutual fund in her name alone. Therefore, the entire $45,000 amount should be split in half, with each party receiving $22,500.

3. Rights in the Cabin

Because Herb and Wanda bought the cabin during their marriage and both signed the note, it is likely the lender extended credit relying on both of them, thus making the asset a community asset. When they took title as “joint tenants,” courts will presume that to mean they intended the property to be community property. However, Herb’s separate property is entitled to reimbursement for his contributions of $20,000 for improvements from his separate property and $50,000 of his inheritance, also separate, to pay off the remaining balance on the note. The remaining $80,000 is community property which Herb and Wanda will split in half.
CRIMINAL LAW ESSAYS

QUESTION #1 (JULY 2004 EXAM)

On August 1, 2002, Dan, Art, and Bert entered Vince’s Convenience Store. Dan and Art
pointed guns at Vince as Bert removed $750 from the cash register. As Dan, Art, and Bert were running
toward Bert’s car, Vince came out of the store with a gun, called to them to stop, and when they did not do
so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert’s car and fled.

Dan and Bert drove to Chuck’s house where they decided to divide the $750. When Chuck said he would
tell the police about the robbery if they did not give him part of the money, Bert gave him $150. Dan asked
Bert for $300 of the remaining $600, but Bert claimed he, Bert, should get $500 because his car had been
used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the
remaining $600 for himself and removed the money from Bert’s pocket.

On August 1, 2002, Dan was arrested, formally charged with murder and robbery,
arraigned, and denied bail. Subsequently, the court denied Dan’s request that trial be set
for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3,
2003, the court granted, over Dan’s objection, the prosecutor’s request to continue the trial to September 1,
2003, because the prosecutor had scheduled a vacation cruise, a
statewide meeting of prosecuting attorneys, and several legal education courses. On
September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the
United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if
so, on what theory or theories, for:

a. The death of Art? Discuss.

b. The death of Bert? Discuss.

2. May Chuck properly be convicted of any crimes, and, if so, of what crime or crimes?

Discuss.

3. How should the court rule on Dan’s motion to dismiss? Discuss.

QUESTION #2

Just before closing time Mike and Dan entered the Shorecliff Pharmacy to steal money and narcotics.
While Mike ransacked the store, Dan took the proprietor, Fred, outside. As Dan pistol-whipped Fred to
learn the location of valuables, his gun accidentally discharged, wounding Fred. Dan fled. Mike came out
and saw Fred's bleeding body. Thinking Fred was dying, Mike pushed him over a nearby cliff, and drove
away at high speed. Fred's gunshot wound was not serious, but he died from injuries sustained in the fall.
A neighbor called the police and reported that he had heard a gunshot and had seen a car speed away from
the pharmacy.

Police immediately set up a roadblock at which Mike's car was stopped. When an officer asked Mike
to leave the car, Mike hesitated. The officer then reached into Mike's bulging pocket and pulled out a gun.
Mike was given Miranda advice and taken to the police station. The next day, Mike's car was towed to the
station and searched. Under the front seat, police found a "Shorecliff" envelope filled with drugs. When
they showed the envelope to Mike he immediately blurted out: "Dan was the one who shot the guy who was bleeding to death."

Mike and Dan were indicted for the murder of Fred. Separate trials were ordered at the request of each defendant.

A. On appropriate motion, which of the following items of evidence should be excluded or suppressed at the trial of Dan?

   1. the gun taken from Mike's pocket;
   2. the Shorecliff envelope and contents taken from Mike's car;
   3. Mike's extrajudicial statement?

Discuss.

B. Assuming all the facts stated are proven by proper evidence, may Mike properly be convicted of the murder of Fred, and, if so, in what degree? Discuss.

C. Assuming all the facts stated are proven by proper evidence, may Dan properly be convicted of the murder of Fred, and, if so, in what degree? Discuss.

**QUESTION #3 (DISCUSSED ON LECTURE)**

Police officers, believing Charlie's apartment to be a heroin distribution center, began surveillance of the apartment. Watching with the aid of binoculars from an apartment they had rented nearby, they observed the following events one night: Bart and Ned broke into Charlie's apartment and began to search it. Ned found a small box which he placed in a briefcase he had brought with him when he entered. Charlie then entered the apartment. Ned shot at Charlie who returned the fire, killing Bart.

The watching officers apprehended Ned as he left the apartment carrying the briefcase. They seized the briefcase from Ned and forced the lock. The only object found in the briefcase was the box they had seen Ned place in the briefcase. The box contained heroin.

When Charlie later surrendered himself at the police station, he was charged with possession of heroin.

Ned was charged with four offenses: first degree murder, burglary, theft, and possession of heroin.

At the separate trials of Ned and Charlie, testimony of the foregoing events was received in evidence. The heroin found in the briefcase was received after appropriate motions to exclude it had been denied. The testimony of the police officers regarding their observations during surveillance of Charlie's apartment was also admitted over appropriate objections.

Based on the above evidence, Ned was convicted of first degree murder, burglary, theft, and possession of heroin, and Charlie was convicted of possession of heroin. Each has appealed. What arguments should be made on behalf of Ned and on behalf of Charlie on each of their appeals, and how should the court rule on each argument? Discuss.
QUESTION #4

The Rural Fire Department extinguished a small hay fire in a barn at 11:00 p.m. At 11:15 p.m. Rural Sheriff's Deputy Carr walked through the barn and detected the odor of gasoline.

Carr stopped a speeding truck on a nearby road at 11:45 p.m. While stopping, David, the driver of the truck, bent down twice toward the floor. Carr walked to the truck and ordered David to get out. David complied and closed the car door behind him. Carr then wrote a traffic citation, handed it to David, and told David he could leave.

As David reopened the truck door, Carr saw a red gasoline can on the floor. He thereupon arrested David for transporting gasoline in a vehicle's interior, promptly read him the Miranda warnings, and asked if he would waive his rights. David shrugged his shoulders. Carr then commented: "I guess some people don't know much about setting a good fire." David stated: "I didn't try to burn the barn." Carr seized the can, told David he was a suspect in an arson investigation and removed him to the county jail.

Later, authorities learned that David owned the barn and nearby farmhouse, and had leased the house and barn to a tenant who had fallen behind in rent payments. The tenant said that David had told him a few days before the fire that a "disaster" would occur if he did not pay his back rent promptly.

David was charged with arson and attempted extortion. Evidence of the above facts, including the testimony of the tenant about David's statement to him, was admitted at trial over appropriate objections. David was convicted of both offenses.

As David's attorney, what issues should you raise on appeal, and how should the court rule on each? Discuss.

QUESTION #5 (DISCUSSED ON LECTURE)

Doug was watching television on his ground floor apartment. When outside noise made it difficult to hear the sound, he looked out and saw a party in progress on the lawn. Doug yelled at the party-goers to be quiet and threw an empty bottle at them. The bottle hit a woman on the leg. Her boyfriend, Tom, ran to Doug's apartment, broke down the door, and approached Doug shaking his fist. Doug, who had been drinking heavily, reached into a drawer, removed a pistol, and immediately shot and killed Tom.

Doug fled, but was stopped the next day at the boarding gate of a publicly operated inter-city bus terminal when the pistol, which was in his pocket, activated a metal detector. The privately owned bus company had instituted the boarding procedure because it had been the object of several bomb threats in the preceding weeks.

Security personnel of the bus company detained Doug. Because they had read of Tom's death, and the pistol Doug was carrying was of the same caliber as that believed to have been used in the homicide, they seized the pistol. They released Doug. Later that day, they took the pistol to the police and told the police why they had taken it from Doug.

Thereafter, Doug was arrested on a city street by police officers on a charge of carrying a concealed weapon. The arresting officers told him that ballistics tests had proved his pistol had fired the bullets which killed Tom. Doug then blurted out, "I shot Tom in self-defense."

Doug has been charged with murder.
QUESTION #6 (DISCUSSED ON LECTURE)

Police detective Smart set up an officially authorized "fencing" operation, which purported to buy and sell stolen goods under the cover of an import-export business. He quickly filled a warehouse with stolen property which he purchased from thieves.

Dan, who had prior convictions for burglary and larceny, posed as a customer and looked over the operation intending to burglarize the warehouse. Smart recognized Dan and hoped to arrest him for receiving stolen property. Smart told Dan that he was working for Thug, and that the "merchandise" was stolen property. He said that the two of them could make some money if Dan were to enter the warehouse, making it appear that a burglary had occurred, take the merchandise, sell it elsewhere, and divide the receipts between them. Dan agreed.

Late that night Dan entered the warehouse through a skylight which Smart had left unlocked. Bob, a uniformed police officer, unaware of Smart's plan, saw Dan and entered the warehouse to make an arrest. Dan attempted to flee. Bob fired at Dan but missed; Dan fired back, killing Bob. Dan dropped his gun and fled, but was quickly captured and immediately brought back to the warehouse where investigating officers truthfully told him the gun had been identified as his. Dan then blurted out a confession, was given his "Miranda rights," and confessed again.

Dan has been charged with murder, burglary, and attempted receipt of stolen property.

A. What objections based on the United States Constitution should Dan make to the admission of Dan's confessions at trial? Discuss.

B. Should Dan prevail on an entrapment defense to the charge of attempted receipt of stolen property? Discuss.

C. If Dan's confessions are excluded, but the remaining facts described above are proved by competent evidence, is that evidence sufficient to sustain a conviction for:

1. burglary? Discuss.

2. first or second degree murder, or manslaughter, and, if so, on what theories? Discuss.

QUESTION #7

Dave suffers from a disease which sometimes causes seizures during which he is not aware of his actions and sometimes physically attacks other persons. Dave has been convicted of aggravated assault twice within the last three years.

Dave's doctor has repeatedly instructed him to avoid alcoholic beverages because of a connection between Dave's seizures and consumption of alcohol. The assaults that led to Dave's convictions occurred after Dave had consumed alcohol.
Valerie visited Dave at his apartment. Dave gave Valerie a beer and poured one for him. In an hour, Dave consumed four bottles of beer. An argument with Valerie ensued. When Dave became irritated and his speech slurred, Valerie decided he was intoxicated and she left the apartment. Dave grabbed a fireplace poker, followed Valerie into the hall, and struck her on the head from behind. He then returned to his apartment.

Dave's first recollection after his argument with Valerie is looking out his window and seeing an emergency squad removing a motionless Valerie from the apartment building.

Dave immediately called Perry, his attorney. Perry's secretary put the call through to Perry, but, pursuant to Perry's general instructions, listened to the conversation. Dave told Perry all that he could recall about the incident and that he thought Valerie was dead. Then Dave said: "The poker has blood on it. Should I get rid of it?"

Perry replied, "Leave everything as it is."

Valerie survived the attack, but could not positively identify Dave as her assailant.

Dave was charged with attempted murder. He pleaded not guilty and not guilty by reason of insanity. At trial, during the People's case-in-chief, Valerie testified that Dave had consumed four bottles of beer in a one-hour period, and that he appeared to be intoxicated when she left his apartment. Over Dave's objections, the court admitted evidence of Dave's prior assault convictions, and admitted the testimony of Perry's secretary about the conversation between Perry and Dave.

Dave testified that he had had a seizure and that he could not remember anything after his argument with Valerie. Dave's physician testified regarding the relationship of Dave's seizures to consumption of alcohol.

The trial court refused to give instructions requested by Dave on diminished capacity and insanity.

A. Did the trial court err in admitting:
   1. the evidence of prior convictions? Discuss.
   2. the testimony of Perry's secretary? Discuss.

B. Did the trial court err in refusing to instruct the jury on:
   1. diminished capacity? Discuss.
   2. insanity? Discuss.

QUESTION #8

Fred, a federal customs inspector, saw Dan speak to Anon as Dan and Anon walked across the international border into the United States. Fred recognized Anon as a person who had been convicted of smuggling narcotics. Over Dan's protest, Fred searched luggage carried by Dan and Anon. Fred found a packet of glassine envelopes and some dextrose powder in Dan's suitcase and a large quantity of heroin in the lining of the suitcase carried by Anon.

Fred knew that dextrose powder is used to dilute heroin, and that heroin is sold in envelopes like those carried by Dan. Fred then ordered that Dan be searched in private by a physician who found a small
quantity of heroin on Dan in a body cavity. Dan was thereupon arrested on a federal charge of importing narcotics without a permit.

Fred notified state narcotics agents of the arrest. Olson, a state agent, located Dan's car parked legally on a street in the United States near the border crossing. Olson impounded the car and, during a search of the car on the following day, discovered a large quantity of heroin. Dan was then charged with violation of a state statute prohibiting possession of narcotics for sale.

At a pre-trial bail hearing, Dan argued that he is entitled to have bail fixed, or, because he is indigent, to be released on his own recognizance. A state statute permits denial of pre-trial bail when a defendant poses too great a risk to society to remain free pending trial.

A. How should the federal court rule on Dan's motion to exclude the heroin found on his person from evidence at the federal trial? Discuss.

B. How should the state court rule on Dan's motion to exclude the heroin found in his car from evidence at the state trial? Discuss.

C. How should the state court rule on Dan's claim that he is entitled to have bail fixed or to be released pending trial on the state charge? Discuss.

**QUESTION #9 (DISCUSSED ON AUDIO)**

Dan proposed to his friend Paul that the two rob the First National Bank (Bank). Paul, thinking that Dan was joking, replied: "Sure, why not?" Dan then produced three pistols and three stocking masks and said: "Okay, let's go." Paul thought that it would be dangerous to back out at that point. He therefore took a pistol, but he secretly resolved to try to thwart the robbery.

On the way to the Bank, Dan announced: "We need someone else." Dan then approached passerby Mike, pointed a pistol at Mike, and said: "We are going to rob Bank, and you are going to help us or we will kill you." Mike gulped, accepted a mask and an unloaded pistol, and proceeded with Dan and Paul to Bank, doing so only because he reasonably believed the threat was real.

When the three arrived at Bank, Dan assigned Paul to act as lookout. Dan instructed Mike to approach the teller with the pistol and to demand all the teller's cash. Dan then stood back to cover everyone in Bank, including Mike. Dan whispered to Paul: "We will kill anybody who gives us trouble." Paul said nothing.

Immediately thereafter Fred, a stranger to Dan, Paul, and Mike, entered Bank. Dan thereupon shot and severely wounded Fred. Fred was a federal bank examiner conducting an audit of Bank's accounts.

Based on properly admitted evidence which established the above facts, Dan and Paul were convicted in a federal court of violation of, and conspiracy to violate, a federal statute providing: "Whoever assaults with a deadly weapon any federal officer engaged in the performance of his duties is guilty of a felony." Dan and Paul have appealed, arguing that the evidence does not support the convictions of either for violation of the federal assault statute or conspiracy to violate that statute.

Eight months after the robbery attempt, Fred died of his wounds. Dan, Paul and Mike are on trial in a state court on charges of assault with a deadly weapon on, and murder of, Fred. Dan and Paul filed timely motions to dismiss both the assault and the murder charges on the ground that the prosecution subjects them to double jeopardy. The motions were denied.
Evidence identical to that admitted in the federal court was then received in the state court trial. Mike filed a timely motion for a directed verdict of acquittal on the ground that the evidence established duress as a matter of law.

A. How should the federal appeal court rule? Discuss.

B. Was the state trial court's denial of the motions to dismiss correct? Discuss.

C. How should the state trial court rule on Mike's motion for a directed verdict? Discuss.

**QUESTION #10 (DISCUSSED ON LECTURE)**

Ace and Bert needed cash quickly. They offered to sell Chuck a watch which Bert told Chuck was worth $250 but was stolen and therefore would be sold for only $25. Chuck believed Bert, gave him the $25, and received the watch. Both Ace and Bert knew that the watch was not stolen and that its retail value was $25.

Chuck found out that the watch was worth only $25 and reported the incident to the police. The police obtained arrest warrants and arrested Ace, Bert, and Chuck. Each was advised at the time of his arrest that: "Anything you say can and will be used against you in court; you have the right to consult with counsel prior to questioning; and if you are unable to afford counsel, a lawyer will be appointed for you." None of the three made any statement at the time of arrest. Later, at the police station, when the booking officer, a neighbor of Ace, asked Ace why he was there, Ace stated that he and Bert had "conned" Chuck into buying a watch by telling Chuck that because the watch was stolen, Ace and Bert were selling it to him "cheap."

Ace and Bert were charged with theft. Chuck was charged with attempt to receive stolen property. The three were tried together after the court denied motions by each for severance. Ace's statement was admitted at trial over the objections of each defendant, and each was convicted as charged.

A. Did the court err in admitting Ace's statement:
   1. against Ace? Discuss.
   2. against Bert? Discuss.
   3. against Chuck? Discuss.

2. Would proof of the conduct described above be sufficient to sustain the convictions of:
   a. Ace and Bert for theft? Discuss.
   b. Chuck for attempt to receive stolen property? Discuss.

**QUESTION #11**

Al and Bill offered Clara, whom they had just met in a bar, a ride to her home when the bar closed. She accepted, but the two men instead drove her to a remote area where first Bill, and then Al, forcibly raped her. When Clara attempted to push Al away, he subdued her by choking her. Bill watched, but took no part in Al's activities. Clara died as a result of the choking.
Al and Bill were arrested. After receiving proper notice of their Miranda rights, which they waived, each admitted raping Clara. Al denied having intent to kill when he choked Clara, and Bill denied having either an intent that she be killed or knowledge that Al would use deadly force in raping her.

At their joint trial on charges of felony murder and rape, evidence of these events and of the defendants' statements was admitted. The court, over defendants' objections: (1) excused for cause, on the prosecutor's motion, three jurors who expressed unqualified opposition to the death penalty; (2) excluded, at both the guilt and penalty phases of the trial, evidence proffered by Bill that he was mentally retarded; and (3) admitted at the penalty phase of the trial evidence offered by the prosecutor regarding the emotional impact of Clara's death on her family. The jury convicted both defendants of first degree felony murder in the commission of the rape and returned penalty verdicts of death for each defendant.

In a post-trial hearing, the defendants moved to vacate the verdicts on the basis of juror misconduct. The court refused to admit the affidavit of juror X that juror Y was intoxicated during one afternoon of the guilt phase trial. The motion to vacate the verdicts was denied and the court sentenced Al and Bill to death.

In defendants' appeals from the judgments of death, how should the court rule on arguments that:

1. the evidence was insufficient to support the conviction of Bill for first degree felony murder? Discuss.

2. the court erred in excusing the three jurors? Discuss.

3. the court erred in excluding the evidence of Bill's retardation? Discuss.

4. the court erred in excluding the evidence of juror intoxication and denying the motion to vacate? Discuss.

5. the court erred in admitting the evidence of the impact of Clara's death on her family? Discuss.

6. imposition of the death penalty on Al, assuming he had no intent to kill, and on Bill, assuming he neither intended to kill nor participated in the killing, violates the Eighth Amendment prohibition of cruel and unusual punishment? Discuss.

**QUESTION #12**

Detective Trace received a telephone call from an informant who had given reliable information to Trace on several prior occasions. The informant truthfully told Trace that "David is planning to sell stolen silicon chips to Vic and probably will deliver the chips to Vic within the next two weeks. David usually rents a room at the Savoy Hotel to use when he makes his sales." Trace immediately prepared an affidavit detailing the informant's past reliability and reciting the quoted statement of the informant. On the basis of the affidavit, a magistrate issued a warrant authorizing a search for silicon chips in any Savoy Hotel room rented by David in the two weeks following the date of the affidavit.

One week later Trace learned from the hotel manager that David had rented a room at the Savoy Hotel. Armed with the warrant, Trace went to the hotel room intending to search the room in David's absence. As he listened at the door to determine if the room was occupied, however, he overheard David offering to sell silicon chips to Vic. He then heard the two men arguing, the sounds of a struggle, a crash, and silence. Trace knocked on the door, announced "police with a search warrant - open the door," and entered when David opened the door. Seeing Vic unconscious and apparently injured on the floor, Trace drew his gun and asked David what he had done. David replied: "I pushed him and he hit his head against a table." Trace summoned an ambulance but Vic died of head injuries before it arrived.
David has been charged with murder and offering to sell stolen property, both of which are felonies. David moved to exclude testimony by Trace regarding his observations in the hotel room, all evidence found in the hotel room, and the statement made by David to Trace, on the ground that the evidence had been obtained in violation of David's rights under the Fourth and Fifth Amendments to the United States Constitution. The trial court denied the motion.

A. Was the trial court correct in denying the motion? Discuss.

B. Is the evidence sufficient to sustain a conviction of David for murder or any lesser included offense and, if so, on what theory or theories might guilt be predicated? Discuss.

QUESTION #13

Late at night Officer Jones observed a red sports car with one headlight out, a violation of a traffic law. Jones stopped the car, approached the driver to issue a citation and, following standard police procedure, asked the driver for his license and registration. The license identified the driver as Dan Deft. As Deft handed the license and registration to Jones, Deft said that he "could make life very unpleasant" for Jones if she “messed” with him.

As Jones was writing a citation, she heard a police all-points bulletin to be on the alert for a red sports car driven by a male, about 5'8" tall, 150 pounds, clean-shaven, with dark hair, and wearing glasses, dark pants with a pink puff-sleeved shirt unbuttoned down to the navel. This person was wanted for robbery of Smith, whose purse had just been taken. Deft was actually 5'9" tall, 160 pounds, clean-shaven, with dark hair, and wore glasses, blue trousers and a rose-colored, puff-sleeved shirt buttoned up to the neck.

Jones placed Deft under arrest for robbery and read him Miranda warnings. Deft invoked his rights to remain silent and to counsel. Jones turned Deft over to other police officers who had arrived at the scene. She then searched Deft’s car and discovered a purse under the seat.

One hour after Deft was arrested, Smith identified Deft as the robber in a one-on-one confrontation at the police station. She said that she was positive in her identification. She also identified the purse found in Deft's car as hers. Deft was again given Miranda warnings. This time he waived his rights and confessed to the robbery. Deft was then formally charged with robbery and is awaiting trial.

1. How should the court rule on Deft's pretrial motions, all based on the United States Constitution, to exclude the following evidence at trial:

   a. His statement to Officer Jones at the scene of the arrest, a motion based on asserted violations of his rights under the Fourth, Fifth and Sixth Amendments? Discuss.

   b. The purse seized from Deft's car, a motion based upon asserted violations of his rights under the Fourth Amendment? Discuss.

   c. The identification of Deft by Smith at the police station, a motion based on asserted violations of Deft's rights under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment? Discuss.

   d. His confession at the police station, a motion based on asserted violations of Deft’s rights under the Fifth Amendment? Discuss.

2. If Deft's confession is ruled inadmissible at trial because of a violation of the Fifth Amendment, and he testifies at trial, will the Fifth Amendment violation preclude use of the confession to impeach the testimony that Deft gave on either direct or cross-examination? Discuss.
QUESTION #14

Al, Bob, and Charlie planned to bring 50 cases of whiskey ashore from a ship anchored in the harbor near their town and sell it to a local bar owner. They believed the whiskey had been produced abroad and was subject to a federal import duty. They also knew that smuggling items into this country without paying duty required by the Tariff Act is a crime. In fact, however, the whiskey in this shipment had been produced in the United States.

The three met at Al’s house on Monday and agreed to bring the whiskey ashore by row-boat on Friday night. On Wednesday, however, Bob called Al to say that he and his wife were going to visit relatives that weekend and Bob would not be able to help bring the whiskey ashore. Al said that was all right, that he and Charlie could handle the boat and the whiskey, but that Bob would naturally be cut out of the profits on this job.

When Charlie learned from Al that there would be just the two of them, he became apprehensive, but he was afraid of what Al might do to him if he tried to back out. Therefore, on Thursday, Charlie informed the police of Al’s plan and did not show up on Friday night. Al was arrested on Friday night as he came ashore, alone, with the whiskey and was loading it into a truck he had stolen from a nearby Coast Guard parking lot.

Al, Bob, and Charlie have been charged with theft of the truck and conspiracy to import dutiable goods without payment of duty.

Al has also been charged with attempt to import dutiable goods without payment of duty. He has told Len, his attorney, who he plans to testify that he knew all along that the whiskey was produced in the United States.

Based on the above facts:

1. Should Al, Bob or Charlie be convicted of:
   (a) Conspiracy to violate the Tariff Act? Discuss.
   (b) Theft of the truck? Discuss.

2. Should Al be convicted of attempt to import dutiable goods without payment of duty in violation of the Tariff Act? Discuss.

3. If Al insists on testifying that he knew the whiskey was produced in the United States, what, if anything, should Len do? Discuss.

QUESTION #15

Duce and Cody were arrested for an armed robbery. Duce was taken to the police station, where she was interrogated without Miranda warnings. After three hours of questioning, a police officer asked Duce if she would consent to a search of her automobile. Duce consented, and a search of her car revealed a handgun and items stolen in the robbery, which were seized by the officers. When told what the officers found, Duce confessed to driving the getaway car in the robbery.

Cody, who did not know that Duce had confessed, then confessed and named Duce as the driver of the getaway car.
At their joint trial on a charge of robbery, Duce moved to exclude her confession from evidence based solely on the failure of the police to give her Miranda warnings. Based only on that violation, the court granted the motion to exclude her confession.

Duce also moved to exclude from evidence the handgun and the stolen items seized from her automobile, claiming that she was not aware that she had a right to refuse consent to search. The prosecutor conceded that the police had no authority to search the car absent consent, but asserted that Duce’s consent was obtained without coercion. The court denied the motion, finding that the consent was voluntary.

The handgun and the stolen items seized from Duce’s car were admitted into evidence at the joint trial of Duce and Cody over objections by each defendant. Cody’s confession, redacted to eliminate any reference to Duce, was admitted into evidence against Cody.

At trial Duce testified, denying that she drove the getaway car and that she knew the handgun or the stolen items were in her car. She testified that she had loaned her car to Cody on the day of the robbery. In rebuttal the prosecutor called a police officer who testified, over objection by Duce, to the contents of Duce’s confession and to the contents of Cody’s complete un-redacted confession implicating Duce as the driver of the getaway car.

Assume that in each instance all appropriate constitutional and evidentiary objections were made.

1. Did the court err in admitting the handgun and the stolen items seized from Duce’s car against Duce and Cody? Discuss.

2. Did the court err in admitting the police officer’s testimony about Duce’s confession? Discuss.

3. Did the court err in admitting the police officer’s testimony about Cody’s complete un-redacted confession? Discuss.

QUESTION #16

Art and Bill agreed to kidnap Vickie and to make a ransom demand of her parents. Because he knew that Art had been convicted of a forcible sexual offense in the past, Bill insisted that Art agree that no harm would be inflicted on Vickie. Art assured Bill that he would not harm her.

Art and Bill kidnapped Vickie, locked her in a room in Art's home, and communicated a $100,000 ransom demand to Vickie's parents. Her parents promptly contacted the police, who were unsuccessful in efforts to locate and rescue Vickie.

Several days after the kidnapping, Art raped Vickie. Despondent over the confinement and mortified by the rape, Vickie killed herself only hours after the rape. Bill was not present and had no knowledge of the rape or suicide until Art told him that Vickie had killed herself shortly after Art had raped her. Art also told Bill that he was going to dispose of Vickie's body. Bill immediately turned himself in to the police. He then told the police: a) about the kidnapping in detail; b) what Art had said about the rape and suicide; and c) that Art had said he was going to dispose of Vickie's body.

Police arrested Bill, went to Art's home where they found Vickie's body, and arrested Art.

Based on the above facts:
1. On what theory or theories of liability might Bill be convicted of rape? Discuss.

2. Are Art and Bill, or either of them, guilty of the murder of Vickie? If so, is the offense first or second degree murder? Discuss.

3. Is Bill's statement to the police, or any part of it, admissible at a joint trial of Bill and Art if neither testifies? Assume all proper objections are made. Discuss.

**QUESTION #17**

Dan owns and operates a service which uses bicycle messengers to deliver small packages. Dan also deals in heroin. Some packages delivered by his service contain heroin that Dan has sold to the recipients.

Dan currently employs three messengers, Al, Bill and Craig.
Al has worked for Dan for several months. He has never discussed the heroin sales with Dan, but has covertly inspected some packages and knows that many of them contain heroin. Dan suspects that Al is aware of the heroin and to keep him loyal pays him substantially more than standard messenger wages.

Bill does not know that the packages contain heroin. He suspects that they do, but is indifferent to the content of the packages he delivers. Dan pays Bill standard messenger wages.

Craig is newly hired and does not suspect any illegality. He is also paid the standard messenger wages.

Eventually, worried about his involvement, Bill took a suspicious package to Lex, his family lawyer. Bill did not examine the contents. Instead, he gave the package to Lex and asked Lex to do so. Lex found heroin in the package and resealed it. Without telling Bill what was in the package, Lex gave it back to Bill stating only: "What you don’t know can’t hurt you."

Dan’s scheme was discovered when Craig had an accident and a package containing heroin broke open. Dan, Al, Bill and Craig have been charged with sales and transportation of heroin and conspiracy to transport heroin.

1. As to which, if any, of the defendants would the above facts support conviction of the charged offenses, and on what theory or theories? Discuss.

2. Has Lex violated any rules of professional conduct? Discuss.
ANSWERS TO SELECTED CRIMINAL LAW QUESTIONS

“MODEL” ANSWER TO QUESTION #1

I. Dan’s potential crimes

A. Death of Art

Dan, Art and Bert all robbed Vince at his convenience store using guns. They received $750 from the cash register and fled. Once they were out of the store, Vince came after them, told them to stop, and fired a shot, which hit and killed Art. Dan and Bert got into Bert’s car and fled.

In arguing against his potential convictions for first-degree and second-degree murder, Dan will first point out that he did not kill Art. However, the State will assert the principle of felony murder, where a co-conspirator in a serious felony is held liable for any murders that occur in the course of the felony and were reasonably foreseeable. In other words, the State will argue that by participating in the felony with the others, Dan accepted the risk that someone would be killed and he would be held accountable for that death. Robbery, or larceny by violence or intimidation, is one of the common law felonies covered by the felony murder rule. Dan will argue that he should not be on the hook for first- or second-degree murder because he didn’t have a specific intent to kill or cause serious bodily harm to Art. The State, however, will point out that felony murder is treated like strict liability in that no mens rea is required as to the murder; it is only required as to the underlying felony. The State will have to prove Dan’s intent to commit robbery. Dan will then point out that in most jurisdictions there is an exception to the felony murder rule for the death of a co-conspirator. When someone aiding the side of justice, such as a police officer or victim, kills a perpetrator during a felony the homicide was justified and therefore there is no underlying murder of which to convict the co-conspirators. However, in this case the State could make the argument that Vince’s killing of Art was not a justified killing falling within the exception. The State will say there was certainly no self-defense since the felons were already out of the store when Vince chased them down and called for them to stop before shooting at them. Dan will say that Art’s death was justifiable homicide because the victim was preventing their escape by shooting at them.

Dan could probably be convicted of either first- or second-degree murder depending on which category the jurisdiction chooses to include felony murder in. The main difference between the two degrees is that first-degree murder involves premeditation and deliberation. Obviously, Dan cannot have done either with regard to a felony murder, which is why such crimes are legislatively placed in a category. Dan knowingly and willingly participated in a serious felony during which there was a foreseeable death (since death by gunshot is always foreseeable during a robbery, especially one at gunpoint). If Vince’s actions constituted murder or voluntary manslaughter and not justifiable homicide, Dan would be liable for felony murder for the death of Art.

B. Death of Bert

Dan and Bert disagreed about how much money Dan should get from the robbery. After giving $150 to Chuck, whose house they used as a hide out after the robbery, Bert wanted to give Dan $100 instead of the $300 Dan requested. Dan got angry and shot and killed Bert. He then took the remaining $600.

The State will argue that Dan should be convicted of first-degree murder for the death of Bert because Dan shot him in cold blood during an argument about money. First-degree murder is generally murder committed with premeditation and deliberation. The State will attempt to show that Dan premeditated and deliberated the act because he thought about how he wanted half the money, was entitled to half the money, and that it was unfair that Bert was keeping almost all of it. They will also try to get the jury to make an inference that Dan reasoned in those last seconds that if he killed Bert he, Dan, would get to keep all $600
for himself, which is why after killing Bert, Dan reached into the dead man’s pocket and took the cash. Dan will argue that he did not act with such a mens rea, in which case the State could allege it was second-degree murder, which is murder without premeditation and deliberation. But Dan may assert that his act was voluntary manslaughter because he was acting in the heat of passion. He will argue that he shot Bert out of anger and only decided to take the money after Bert was already dead. Certain events are deemed to be so inflammatory that they act as mitigating factors for homicide. However, the State will point out, refusal to split the proceeds from your felony is not one of those events. It is judged to be very different from events such as catching your spouse in an adulterous act or finding out your child has been assaulted.

Although Dan had the intent to kill Bert, there is little to no evidence that the act was premeditated or that he deliberated. Dan would therefore properly be convicted of second-degree murder. The desire to get more money from someone or anger at feeling cheated by them is not a sufficient provocation to reduce Dan’s crime to voluntary manslaughter.

II. Chuck’s potential crimes

A. Accessory after the fact

When Dan and Bert left the convenience store they went to Chuck’s house. Instead of notifying the authorities, Chuck allowed the men to hide out there in exchange for $150.

Although Chuck was not present at the scene of the robbery and nothing indicates he knew of the plan before Dan and Bert showed up at his door, the State could try Chuck for being an accessory to the robbery after the fact. To be an accessory after the fact a completed felony must have been committed, Chuck must have known of its commission, and he must have given aid to the felons personally for the purpose of hindering their apprehension, conviction, or punishment. The State will point to the fact that Chuck threatened Dan and Bert with calling the police to prove he knew of the crime. The State will also assert that Chuck provided a place for the co-felons to hide from the police. Chuck will have to argue that his purpose in letting Dan and Bert stay at his home was for a reason other than hindering their apprehension, such as to spend time with friends.

Chuck could certainly be convicted as an accessory after the fact. He learned of the felony, aided the co-felons in finishing up their job, provided them with a place to hide out for a short period of time, and took some of the stolen money in exchange.

B. Conspiracy

Chuck was not present when Dan and Bert robbed Vince’s convenience store, but the duo went to Chuck’s house immediately after the commission of the crime to evade the police.

The State may try to argue that Chuck participated in a conspiracy to rob Vince’s convenience store. A conspiracy is a combination for an unlawful purpose. Chuck will claim, however, that there was no combination because he was unaware of Dan and Bert’s plan to rob the store and did not even know they had committed a crime until they showed up at his door. Therefore, he will say, he and the robbers had no agreement or tacit understanding regarding the crime. Chuck will also assert that he didn’t know Dan was going to shoot Bert. The State will have to present some evidence that when Dan and Bert arrived at Chuck’s house it was part of a plan they concocted with Chuck and not a spur-of-the-moment decision.

Chuck should not be convicted for a conspiracy to either rob Vince’s convenience store or kill Bert. There is no evidence that Chuck knew about the robbery beforehand, which would be required for a conspiracy charge. As to the shooting of Bert, not only did Chuck appear to lack foreknowledge, but Dan seems to have acted unilaterally and impulsively in carrying out the murder.

III. Dan’s motion to dismiss

Dan was arrested August 2, 2002 and requested a trial date of October 15, 2002. He received an actual trial date of January 5, 2003, but on January 3, over Dan’s objections, the court granted a continuance until September 1, 2003 due to the prosecutor’s vacation, meeting, and legal education courses schedule. On
September 2, 2003, Dan moved to dismiss the charges against him under the theory that he had been denied the right to a speedy trial.

Dan will argue that there were unreasonable delays over a significant period of time that deprived him of the right to a speedy trial. The Sixth Amendment guarantees the accused in a criminal case the right to a trial within a reasonable time. There are four factors to be assessed when determining whether a defendant has been deprived of a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his right to a speedy trial; and (4) prejudice to the defendant. The State will assert that they only requested one delay and that it was reasonable given that Dan’s trial was for murder and the prosecution is allowed enough time to prepare for such an involved trial. However, Dan will point out that the State waited until two days before the start of trial to request a continuance. This, he will argue, unfairly prejudiced him from effectively defending himself and was not a diligent, good faith effort on the State’s part to bring him to trial. The State will respond that the delay it requested was for good cause and for less than nine months from the set trial date. Dan will dispute that the trial delay was for good cause, contending that things such as a cruise, a meeting, and education courses pale in comparison to a denial of his constitutional right to a speedy trial. He will also assert that being forced to wait 13 months for his trial was unconstitutional.

Dan has a strong argument that the basis for the delay was not reasonable and the timing of the State’s request—two days before trial—prejudiced his ability to effectively defend himself. Given that despite his objections, Dan waited over a year for his trial just so that the prosecutor could attend various meetings and take a vacation, the court should grant Dan’s motion to dismiss.

ANSWER TO QUESTION #2

A. Dan does not have standing to exclude or suppress any of the items of evidence because his Fourth Amendment rights have not been violated. A defendant cannot raise the constitutional rights of his co-defendant, and here Dan seeks to exclude evidence which was obtained by a violation of Mike's constitutional right against unreasonable searches and seizures. The gun was Mike's, the envelope was found in Mike's car, and the incriminating statement was made by Mike. Therefore, the right to constitutionally challenge the introduction of the evidence is personal to Mike, and Dan may not use Mike's standing to make similar challenges at Dan's trial. However, assuming Dan has standing, the motions will be decided in the following manner at Dan's trial:

1. The gun. The motion to exclude the gun will be denied because the police lawfully stopped Mike's car at the roadblock and had a right to search Mike to find weapons when Mike acted in a suspicious manner.

   The police had probable cause to set up a roadblock and stop people for questioning when the police were informed of gunfire and a speeding car leaving the pharmacy. When there is probable cause that a crime has been committed, individuals may be subjected to a "stop" short of full custodial arrest. An individual who is stopped may also be subjected to a frisk if the officer has a reasonable suspicion that the person is armed and poses a danger to the officer and others. Terry v. Ohio, 392 U.S. 1 (1968). Here, Mike was stopped in the vicinity of the crime and he hesitated when he was told to leave his car. Therefore, the officer acted reasonably in taking Mike's gun when he saw it in Mike's pocket. The gun is admissible evidence.

2. The envelope and its contents. The evidence found in Mike's car is admissible because it was found pursuant to a lawful inventory search, and the motion to exclude the evidence will be denied.

   The police may make warrantless inventory searches of vehicles which are lawfully within police custody in order to protect themselves from claims. Here, the police had legal custody of Mike's car after arresting him on suspicion of a crime, and therefore they had a right to conduct a routine inventory search. However, if the police used the inventory search as a means to find incriminating evidence and the
envelope was not in plain view (it is unclear from the facts whether the envelope was visible under the front seat), the evidence is inadmissible.

It could also be argued that the envelope was found during a search incident to an arrest. If Mike was, in fact, arrested at the scene for possession of the gun or suspicion of criminal activity, the police had the right to conduct a warrantless search of the entire vehicle, including all compartments and containers within it. Such a search is valid as long as it is conducted promptly after the arrest. However, under these facts, where the car was towed to the station the next day and searched, it appears the search was an inventory search rather than a search incident to an arrest.

(3) Mike’s statement. The extrajudicial statement will be excluded from Dan’s trial because it is hearsay.

It can be argued that Mike’s statement is not admissible against Mike because it was the product of custodial interrogation and the police did not rewarn Mike of his Miranda rights before eliciting the statement from him. Mike was given his Miranda warnings the day before he made the statement. The officers’ action in showing Mike the Shorecliff envelope was interrogation because they knew it was likely to elicit an incriminating response from Mike. See Rhode Island v. Innis, 446 U.S. 291 (1980). Therefore, Mike can attempt to argue he did not waive his Miranda rights when the officers surprised him with the envelope, and the statement cannot be used to incriminate him.

However, as to Dan’s trial, the statement is clearly inadmissible against Dan. The statement was not made in Dan’s presence; it was not made as part of a conspiracy because the conspiracy, if any, had ended, and; it is an out-of-court statement offered for its truth. Therefore, Mike could testify at Dan’s trial, but the extrajudicial statement itself is inadmissible hearsay.

B. Mike will most probably be convicted of felony murder. Fred died during the commission of the inherently dangerous felony of robbery. As a co-conspirator in the crime, Mike is liable for any offense committed by Dan, even if Mike did not participate in the offense. Here, every act which led to Fred’s death took place in the course of the felony, and therefore the acts of each co-conspirator are imputed to the other and both are guilty of first degree murder. Mike would be guilty of felony murder even if Dan’s gunshot had killed Fred outright.

Alternatively, Mike could be found guilty of deliberate, premeditated murder because he knew Fred was alive when he threw him off the cliff and he knew there was a likelihood of serious bodily injury or death from that action. Even if premeditation is not found, there is sufficient evidence to sustain a conviction of second degree murder on the basis of Mike’s intent to do great bodily harm to Fred.

C. Dan is also likely to be convicted of felony murder. Dan’s flight before Fred’s death does not absolve him of the murder charge because Dan did not notify his co-conspirator Mike of his abandonment of the conspiracy. Therefore, Mike’s offenses against Fred are imputed to Dan, and Dan is guilty of first degree murder during the commission of a felony.

It could be argued alternatively that because Dan intended to do great bodily harm to Fred by pistol-whipping him, and Dan’s action led to Fred’s subsequent death, Dan is guilty of second degree murder. This conviction would be more difficult to sustain because Dan could argue that it was not within the scope of causation that Fred would suffer further injuries and die, that is, Dan could not have anticipated another person would find Fred and throw him off a cliff.

**ANSWER TO QUESTION #4**

(a) Warrantless search of barn. David may claim Carr unlawfully entered the barn without a warrant. However, any evidence obtained at the fire scene will probably not be suppressed because Carr
had a right to be in the barn. Government officials such as deputy sheriffs have a right to search for the cause of a fire without a warrant if a crime is suspected. See Michigan v. Tyler, 436 U.S. 499 (1978). A search made immediately after or within several hours of the fire is permissible. Here, Carr examined the crime scene within fifteen minutes of the fire. Therefore, he was not required to obtain a warrant, and any evidence he obtained at the scene is admissible.

(b) Stop of truck. David may argue that Carr had no right to stop David's truck; however, the stop appears valid because David was speeding. Carr also had the right to order David to leave the truck when David acted suspiciously by bending down. At this time, Carr could have subjected David to a search, but he did not do so. Carr's subsequent sighting of the gasoline can occurred after Carr told David he was free to go. However, Carr's seizure of the can and arrest of David did not violate David's Fourth Amendment rights because under the plain view doctrine Carr could seize the can upon discovering it inadvertently subsequent to his intrusion while conducting the stop. Therefore, the gasoline can seized as a result of the stop will not be suppressed, and David's arrest was lawful based on David's violation of a state law against transporting gasoline in a vehicle's interior.

c) Custodial interrogation. David may argue his statement, "I didn't try to burn the barn," was the product of a custodial interrogation which violated his Miranda rights. Miranda is applicable because David was in custody; however, it is unclear whether Carr's comment about people not knowing how to set a fire was designed to elicit an incriminating response from David. If not, Carr's words do not constitute interrogation, and Miranda does not apply. See Rhode Island v. Innis, 446 U.S. 291 (1980). David's statement, therefore, is admissible as an admission. Alternatively, if Miranda is found to apply, David's statement is admissible on the ground he waived his Miranda rights by shrugging when Carr asked him if he waived them. However, if the appeals court finds David's shrugging was not an intelligent and knowing waiver, the statement should have been suppressed at trial. The trial court admission of evidence in violation of David's Miranda rights will only result in a reversal on appeal, however, if no other corroborative evidence of guilt was presented at trial; otherwise, the admission of the statement was harmless error.

(d) Arson conviction. David's conviction may be overturned because an essential element of the crime of arson has not been proved. Under common law, burning of the structure itself, not merely chattels inside, must occur to sustain an arson conviction. Here, the hay in the barn burned, but there is no indication the barn itself was on fire. Therefore, there has been no arson as a matter of law.

Arson is the malicious burning of the dwelling of another, and therefore David may also argue that he cannot be convicted of burning his own building. However, a landlord such as David can be found guilty of arson of his own building if a tenant has possessory rights in the premises. Even if this argument fails, a conviction cannot be sustained under common law because of the lack of combustion of the building itself.

(e) Extortion conviction. David may have the conviction overturned if he can prove he did not intend a fire to be the "disaster" with which he threatened his tenant. Extortion is the threat of future harm in order to obtain or attempt to obtain the property of another. It is a question for the jury whether David intended to use illegal means to obtain rent legally owed to him. If, from all the circumstances, the jury could have inferred that David intended to coerce payment by setting fire to the barn, a conviction of attempted extortion will be affirmed. However, if David can prove his threat of disaster meant an intent to use legal means to remove the tenant from the premises, he is guilty of neither attempted extortion nor extortion.

ANSWER TO QUESTION #7

A. (1) Prior convictions. The trial court erred in admitting evidence of Dave's prior convictions because the prosecution offered the evidence to show Dave's character, and evidence offered for that reason against a criminal defendant is inadmissible under FRE 404(b).
Prior convictions offered as substantive evidence of character to show the defendant is the kind of person who would have committed the crime with which he is presently charged are not admissible under the Federal Rules of Evidence. Dave's prior convictions were offered by the prosecution during the People's case-in-chief, and at this point in the trial the only purposes for which the convictions could be offered were as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, or lack of mistake or accident. For example, if Dave's identity was at issue, the prior convictions could be introduced to show a peculiar method common to the present crime and the prior crimes. The prosecution could have introduced the convictions after Dave testified to impeach his credibility. FRE 609. However, the evidence was inadmissible at the time it was introduced.

(2) Secretary's testimony. The testimony of Perry's secretary was inadmissible because she was subject to the attorney-client privilege against disclosure, and therefore the trial court erred in permitting her to testify.

Under Rule 503 of the Proposed Federal Rules of Evidence, communications between an attorney and a person who has consulted the attorney in his professional capacity for the purpose of legal advice may not be disclosed by the attorney, his representatives, or other third parties if the communications were intended to be confidential. Dave consulted Perry about his criminal liability, and therefore Dave is Perry's client. As a client, Dave holds the privilege against disclosure of confidential communications between Dave and Perry. The secretary listened to the phone conversation in her capacity as a representative of Perry engaged in aiding him to provide legal services. As a representative of Perry, she may not disclose anything she heard on the phone, and her presence on the phone line did not destroy the confidentiality of the communications Dave thought he was making to Perry alone.

The attorney-client privilege does not arise if the attorney gives the client advice on how to cover up the crime or condones the client's intention to destroy evidence. Here, Perry encouraged Dave to "leave everything as it is" when Dave asked Perry if he should get rid of the poker. Therefore, their communication was not for the purpose of planning or perpetrating a future criminal or fraudulent act, and the conversation was privileged. Thus, the secretary's testimony is not admissible under an exception to the attorney-client privilege.

B. (1) Diminished capacity. The trial court erred in refusing to instruct the jury on diminished capacity because Dave was charged with a specific intent crime and his ability to form the intent to commit it is relevant to his guilt.

Dave was charged with attempted murder. An attempt is defined as a substantial step toward the commission of a crime coupled with the intent to commit it and the ability to complete it. If Dave did not have the ability to form an intent to kill Valerie because of his intoxication or his seizures, he cannot be found guilty of attempted murder. Voluntary intoxication is a defense to a specific intent crime if the defendant can show his incapacity negated a specific element of the crime. Here, Dave became intoxicated voluntarily, and he knew the effect of intoxication would be involuntary seizures during which he was unaware of his actions. Thus, while it can be argued that Dave's intoxication negated any intent he may have had to murder Valerie, the jury could find that Dave's knowledge of the effect of alcohol on his system and his voluntary consumption of alcohol in this instance constitute the intent necessary for a finding of guilt for the crime charged. Therefore, even if Dave could not successfully argue a diminished capacity defense, the judge should have instructed the jury on the defense and permitted the jury to decide the issue of intent.

(2) Insanity. The jury should have been instructed on the insanity defense because Dave's capacity to control his actions based on his mental disease, if any, is relevant to his guilt.

If Dave does, in fact, have a mental disease which causes his seizures, he can be found not guilty of attempted murder based on his inability to control his actions. However, it is a jury question whether
Dave's incapacity was self-induced by alcohol or whether his seizure disease is a defense despite the causal connection between his intoxication and the onset of seizures. Therefore, the jury should have been instructed under the relevant insanity test in the jurisdiction. For example, if the M'Naghten test applies, the jury should have been instructed that Dave could not be found guilty if he had such a defect of reason from a disease of the mind at the time he struck Valerie that he did not know the nature and quality of his act or he did not understand the legal wrongfulness of it. Under the irresistible impulse test, Dave cannot be found guilty if he lacked the ability to control his actions because of a mental disease. Under the Model Penal Code test, insanity is a defense if Dave lacked the substantial capacity to appreciate the criminality of his conduct or to conform his actions to the requirements of the law. Because the jury was not instructed on the insanity defense under any of these tests, the trial court erred.

**ANSWER TO QUESTION #8**

A. The federal court should deny Dan's motion to exclude the heroin found in his body cavity because the customs inspector had a clear indication Dan possessed contraband after making a routine search of Dan at an international border. Dan's Fourth Amendment right against unreasonable searches and seizures has not been violated.

Fred had a right to perform a routine search of Dan's person and effects because customs agents may make such searches without probable cause as an incident to the protection of the international border. Fred also had the right to order a more embarrassing search of Dan's person given the circumstances surrounding Dan's travel and the discovery of heroin paraphernalia. Dan's traveling with Anon, a known drug smuggler, Dan's crossing of the international border, and the finding of glassine envelopes and dextrose powder in Dan's suitcase and heroin in Anon's suitcase were factors which led Fred to the reasonable conclusion that Dan was concealing drugs on his person. Therefore, Fred's order of a full body search by a physician in a private room was a permissible procedure, and the evidence obtained in the search is admissible.

B. The motion to exclude the heroin found in Dan's car should be granted because the state agent seized the car without a warrant and had no other lawful ground on which to impound the car.

Olson could have obtained a warrant to search the car on the grounds that Dan had been arrested at the international border in the company of a drug smuggler and drugs and drug paraphernalia had been found in Dan's possession. Olson's failure to secure a warrant rendered the search invalid. A warrantless search is constitutional only if the search is performed incident to an arrest or is an inventory search made while a vehicle is lawfully within police custody. Here, the search was not incident to an arrest because Dan was not arrested near his car, and the arresting agent, Fred, could search only Dan and the immediate physical surroundings deemed under his control without a warrant. See *Chimel v. California*, 395 U.S. 752 (1969). Olson, the state agent, could not search Dan's car without a warrant after being informed of Dan's arrest by Fred. The search was not a valid inventory search because the car was not seized in violation of any law. See *South Dakota v. Opperman*, 428 U.S. 364 (1976). The car was parked legally on the street, and therefore Olson had no power to impound it. Olson could argue the evidence was seized under the plain view exception to the warrant requirement; however, the facts do not indicate the heroin was situated in the car in such a manner that it could be seen by an agent standing at a legal vantage point. Therefore, the heroin is inadmissible evidence obtained in violation of Dan's Fourth Amendment rights.

C. The state court should deny Dan's claim that he is entitled to be released on his own recognizance if bail is not fixed, because the state has a right to deny bail or to require sufficient bail to secure Dan's presence at trial.

The Eighth Amendment states that "excessive bail shall not be required." The Supreme Court has not articulated constitutional standards for application of the Eighth Amendment rules of bail to the states under the Due Process Clause. However, bail may be denied in capital cases, and the states have the power to set
substantial bail if the amount is reasonably calculated to assure the defendant's presence at all court proceedings. The purpose of bail is to ensure the defendant's appearance, and the amount of bail is set depending on such factors as the nature and circumstances of the crime, the ties the defendant has to the community, and the likelihood the defendant will flee. The state may legitimately consider the reasonableness of the bail amount required to secure the defendant's appearance and whether the defendant poses too great a risk to society to be released regardless of his ability or inability to post bail. Indigence in itself is irrelevant to the setting of bail. Dan will not be released on his own recognizance if the state disbelieves his promise to appear. Under the circumstances of this case, the state has the right to set substantial bail: Dan is a heroin distributor who poses a risk to society if he is released on bail; he has no ties to the community in the jurisdiction in which he is held, and; there is a likelihood he will flee the jurisdiction if released on personal recognizance. Therefore, Dan's claim for release on the ground of indigence will be denied.

ANSWER TO QUESTION #11

I. Insufficiency of Evidence

   A. Level of Homicide

       Murder is killing with malice aforethought. Malice aforethought is found if the defendant had any one of four states of mind - intent to kill, intent to inflict serious bodily harm, willful and wanton disregard of the risks to human life, or intent to commit a felony. Murder is in the first degree if the defendant acted with premeditation or the death occurred during the commission of an inherently dangerous felony. The jury could properly have found that Al was guilty of first degree murder, even if he had no intent to kill or acted without premeditation, because the death occurred while he was perpetrating a forcible rape, an inherently dangerous felony.

   B. Vicarious Liability

       Even though Bill did not personally kill Clara, he would be liable to the same degree as Al if (1) Bill was Al's accomplice and the death of Clara was a "natural and probable consequence" of Al's crime or (2) Al and Bill had entered into a conspiracy to rape Clara and her death was a crime within the scope of the conspiracy.

           1. Accomplice Liability (Aiding and Abetting)

               An accomplice is one who aids, agrees to aid, or attempts to aid another person in planning or committing a crime with the purpose of promoting or facilitating the offense. Here, it appears that Bill did not intend to promote or facilitate the death of Clara, but he did intentionally aid Al in the commission of the rape. Accomplice liability extends not only to the crime which the accomplice specifically intended to aid but to acts of the principal which are a "natural and probable consequence" of those crimes as well. The death of a victim of forcible rape is sufficiently foreseeable that it is a "natural and probable consequence" of the rape and Bill could therefore be properly convicted of first degree murder under this theory.

           2. Conspiracy

               Under a conspiracy analysis, Bill could be liable for all crimes that were within the planned scope of the conspiracy or which were foreseeable given the nature of the illegal agreement. Since it is always foreseeable that a dangerous felony (such as forcible rape) may result in death, Bill could properly be convicted of first degree murder if he had entered into a conspiracy with Al to commit the rape.

               A conspiracy is a combination for an unlawful purpose. More specifically, it is an agreement by two or more persons to commit an illegal act or a legal act in an illegal manner. While the facts do not indicate
that there was any express agreement to rape Clara, the fact that Al and Bill acted in concert would be sufficient to establish an implied agreement to commit that crime.

Conspiracy is a specific intent crime, however, and if Bill's mental retardation prevented him from forming the necessary intent, he could not be guilty of conspiracy or vicariously liable for the crimes of Al under a conspiracy theory.

II. Exclusion of Jurors

The Supreme Court has ruled that a juror can be excused for cause if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his oath and the court's instructions to the jury. The facts indicate that the three jurors who were excused "expressed unqualified objection to the death penalty"; this would seem to indicate that they might well allow their personal views to override the court's instructions and thus the court acted properly.

III. Evidence of Bill's Retardation

As indicated in Part 1, Bill could not be found guilty of first degree murder under a conspiracy theory if his mental retardation prevented him from forming the specific intent necessary for conspiracy. To be liable as an accomplice, however, Bill need only have the capacity to form the required mental state of the underlying crime (here, rape). Since rape is a general intent crime, the retardation would have to be so severe that it prevented him from recognizing that he was engaging in intercourse with Clara without her consent. While it is unlikely that this is the case, the court should have allowed Bill to introduce evidence on this issue.

Furthermore, the retardation is clearly relevant in determining whether the death penalty is appropriate as it has a direct bearing on Bill's culpability. Thus, the evidence should have been admitted at the penalty phase of the trial even if Bill's mental deficiency was not severe enough to negate his liability for the murder.

IV. Juror Misconduct

As a general rule, a jury verdict may not be impeached by a member of the panel (unless, in some jurisdictions, a foundation for the attack has first been established by an external source). To do otherwise, so the theory goes, would encourage unsuccessful parties to harass jurors and/or destroy the frankness and freedom of discussion which is necessary if the jury is to operate as it should.

While there are exceptions to this rule when the misconduct goes to the very essence of the verdict (as when the verdict is determined by lot) or when the jury receives extra-judicial evidence, it would appear that allegations that a juror was intoxicated is an attack on his mental processes, which is not permitted in most states. However, it would not be unreasonable to require a consideration of the affidavit of juror X in this case because fairness of the proceedings is especially critical in death penalty cases.

V. Impact on Clara's Family

The purpose of the penalty phase of a bifurcated trial is to determine what punishment is most appropriate under the circumstances. While the past record of the defendant, the seriousness of the current crime, and his culpability with regard to this crime are highly relevant, the Supreme Court has ruled that evidence as to the "worth" of the victim clouds, rather than clarifies the issue (i.e., the defendant's need for punishment is not reduced if the victim was an orphan who would not be missed nor should it be increased simply because a grieving family is left behind). Here, evidence as to the effect of Clara's death on her family injected irrelevant and prejudicial factors into the sentencing process and created an unacceptable
risk that the death penalty would be arbitrarily and capriciously imposed. Admission of this evidence, therefore, was clearly erroneous.

VI. Death Penalty

The Eighth Amendment prohibition of cruel and unusual punishment has been interpreted as permitting a sentence of death only if there are aggravating circumstances. The felony-murder rule, by itself, does not constitute an aggravating factor justifying the imposition of capital punishment and no other special factors appear to be present. Thus, the death sentences of both defendants was improper.

In addition, capital punishment may be imposed only if the defendant is permitted to introduce mitigating evidence. Bill could not be sentenced to death here because the court refused to allow him to introduce evidence of his retardation, an extenuating factor.

Finally, the Supreme Court has ruled that a felony-murder death sentence may be imposed on a person who did not kill or intend to kill the victim only if he had a major, personal involvement in the felony and he showed reckless indifference to human life. Bill's active participation in the rape might be sufficient to meet the first criterion (even though he did not participate in the choking of Clara), although it is somewhat problematical as to whether he showed a willful disregard of Clara's life.

ANSWER TO QUESTION #12

A. Motion to Exclude Evidence

1. Trace's Observations While in the Hotel Room
   and the Evidence Found Therein

   The gist of David's motion is that there was a violation of the Fourth Amendment prohibition of unreasonable searches and seizures, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. If this is so, this evidence would be inadmissible under Mapp v. Ohio.

   David had a reasonable expectation of privacy in the hotel room even though he was not the owner thereof. When Trace entered that room, there was a search and Fourth Amendment protections clearly came into play.

   a. The Warrant

   A search which is made pursuant to a valid warrant is not unreasonable. To be valid, a warrant must be issued by a neutral and detached magistrate, supported by probable cause, and particularly describe the time, place and subject matter of the warrant. There is no indication that the magistrate here was not "neutral and detached" (i.e., that he is part of the prosecutorial arm of the government or has some personal stake in the matter), and so the first significant issue is whether probable cause was properly established.

   When the warrant is based entirely upon information provided by a hearsay declarant (i.e., someone other than the officer-affiant), the sufficiency of the information is measured by a "totality of the circumstances" approach, which requires a consideration of the credibility of the informant in general and the reliability of the specific information provided by him. The fact that the unknown declarant has provided reliable information on several prior occasions is enough to establish his general trustworthiness and the specificity of the information given to Trace tends to indicate that he had personal knowledge of the facts, a strong factor in establishing reliability of the information. When taken together, it appears that it is more likely than not that David will be in possession of contraband (in this case, stolen silicon chips) and thus probable cause was properly shown.
The most difficult problem here is whether the warrant was sufficiently specific to pass constitutional muster. While it properly specifies the items to be seized, the warrant fails to specify which room of the hotel is to be searched and when such a search can take place. While the prosecution no doubt argued that the warrant set proper parameters and Trace's post-warrant investigation dissipated the likelihood that an improper search would be made, the Fourth Amendment requires that the determination of probable cause be made by the magistrate. Since, in this case, the warrant left it up to the police officer to decide exactly where and when the indicated items would probably be found, it was defective.

b. "Good Faith" Exception

In United States v. Leon (1984) and its companion case of Massachusetts v. Sheppard, the Supreme Court ruled that the exclusionary rule does not apply when a search is made by officers in good-faith reliance on a facially valid warrant issued by a neutral magistrate, even though the warrant is technically defective. Since there is no indication that Trace was aware of the warrant's invalidity or that his own misconduct improperly tainted the warrant (i.e., he did not knowingly provide false information in his application for the warrant), David's motion should have been denied.

c. Exigent Circumstances

An entry is not unreasonable, even if there is no warrant at all, when the police officer has probable cause to believe that immediate action is necessary to prevent an imminent injury (i.e., there are exigent circumstances). Under the plain view doctrine, the argument, struggle, fall and subsequent silence were not the result of a "search" because Trace was lawfully in a public place when he perceived them. As a result, they may be considered when determining whether or not Trace had probable cause to immediately enter the hotel room. These occurrences would seem to indicate that it was more likely than not that the safety of David or someone else was in immediate jeopardy, especially in light of the information supplied by the informant (and Trace's personal sensing of an offer to sell silicon chips which corroborated that information) which indicated that at least one of the parties to the argument was a criminal. Therefore, the entry was justified here on this basis as well.

Once the entry is found to be lawful, any items incidentally seen by Trace would fall within the plain view doctrine and, if Trace had probable cause to believe that they were evidence of a crime or contraband, they would be subject to seizure without a warrant.

2. David's Statement

a. Fruit of the Poisonous Tree

If David's statements were the result of an illegal search or seizure, they would be excluded as the fruits of the poisonous tree. As indicated above, however, Trace's entry and observations were not illegal, and thus some other potential ground for exclusion must be found.

b. Miranda

The Miranda rule, which is premised on the Fifth Amendment privilege against self-incrimination, provides that whenever a suspect is subject to custodial interrogation, he must be warned that (1) he has the right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present during interrogation, and (4) a lawyer will be appointed for him if he is indigent. Obviously, no such warnings were given here and thus David's statements must be excluded if they were the product of custodial interrogation.

"Custodial interrogation" is found whenever the suspect is deprived by a police officer of his freedom to leave (even if he was not yet technically placed under arrest) and the officer makes any communication
(no matter how phrased) which is designed to elicit a statement from the accused. David was obviously in custody when he admitted that he pushed Vic, since a reasonable person in David's position would not feel free to leave when faced with a police officer who is pointing a gun at him. In addition, Trace's question as to what happened certainly was intended to prompt a response from David. Therefore, the statement: "I pushed him and he hit his head," was obtained in violation of Miranda and is inadmissible.

The state might have argued that Miranda warnings were excused by the "public safety" exception. Under this rule, a failure to give Miranda warnings will not require the suppression of statements when the police officer reasonably believed that an immediate answer to his questions is necessary to protect the officer or members of the public. Here, however, Vic was already lying unconscious on the floor and Trace's question was designed to find out the cause of those injuries, not to discover how he (Trace) could prevent a threatened future injury to Vic or anyone else.

B. Specific Crimes

1. Degree of Homicide

   a. Murder

   Murder is killing with malice aforethought. Malice aforethought is found if the defendant had any one of four states of mind - intent to kill, intent to inflict serious bodily harm, willful and wanton disregard of the risks to human life, or intent to commit a felony. The facts given do not indicate that David had the intent to kill or commit serious bodily harm and an ordinary push would not indicate wanton disregard of human life. The death did occur during the perpetration of a felony (the offer to sell stolen property), but most jurisdictions limit the felony-murder rule to deaths arising from inherently dangerous felonies; an offer to sell stolen property would not meet this requirement. Thus, a conviction for murder would be inappropriate.

   b. Manslaughter

   David could be convicted of involuntary manslaughter if he acted in a criminally negligent manner (i.e., his conduct created a high degree of risk of death or serious injury). His act of pushing Vic might be considered so unreasonable as to justify this result, but this is far from certain.

   Alternatively, he could be guilty of involuntary manslaughter under the unlawful act doctrine (often called the "misdemeanor-manslaughter rule") if the death arose out of the commission of a malum in se offense (a crime that is wrong in itself). Selling stolen property would seem to outrage public decency and good morals and would thus appear to satisfy this test.

2. Causation

   The facts indicate that Vic died from striking his head on a table, thus implying that his death was unforeseeable. Nevertheless, David's act was the cause-in-fact of Vic's death (Vic would not have died but for David's act) and there are no unforeseeable intervening causes which would break the chain of proximate cause. Therefore, David may be guilty of homicide even if it could not reasonably be anticipated that his shove could result in death.

3. Self Defense

   If Vic had been the first party to use or threaten unjustifiable force, David's act might be privileged as an act of self-defense. Since a shove would not be considered the use of deadly force (force either intended or likely to cause death), this is true even if Vic had used non-deadly force. The fact that David was attempting to sell stolen property does not make him the initial aggressor or otherwise justify Vic in precipitating a physical conflict.
ANSWER TO QUESTION #13

1(a). Motion to Exclude Deft's Statements at Scene of Arrest

4th Amendment.

Deft's 4th Amendment challenge to the admissibility of this statement rests on a contention that the traffic stop was invalid and therefore all statements and evidence obtained as a result should be excluded as fruit of the poisonous tree (the exclusionary rule). The Fourth Amendment to the Constitution, which has been held to apply to the states through the Fourteenth Amendment's requirement of due process, protects people against unreasonable searches and seizures. This standard imposes a basic requirement that searches not be conducted without a warrant, unless one of the several narrow exceptions applies.

Police are not allowed to randomly stop automobiles in order to check for valid license and registration. Where an officer has probable cause to stop an auto or where a traffic violation has been committed in the officer's presence, however, there is a legitimate reason to stop the car. Here, Jones observed a traffic violation on Deft's car because one headlight was out and had reason to perform a routine stop and cite Deft for the violation. Nothing in the facts states that Jones had an improper motive for stopping Deft.

Thus, the 4th Amendment will not preclude the state from introducing Deft's statements at the scene of arrest.

5th Amendment

Deft's 5th Amendment challenge to the statements will rest on an assertion that Jones should have advised him of his Miranda rights when she stopped him and therefore the statements he made were obtained in violation of Miranda.

This contention will fail, because Miranda must be observed in connection with custodial interrogation by police. Custodial interrogation is deemed to exist where the person is not free to leave and the officer makes statements or engages in conduct which is likely to elicit an incriminating response.

Here, even though Deft was clearly obligated to stop the car and submit to the routine check of license and registration, this does not qualify as custody. First, he likely had not been "arrested." Although he had been stopped by the police, it was a routine traffic stop that could not give rise to a custodial arrest without more evidence. Second, Miranda only applies when a suspect is in custody. Being the subject of a citation and release traffic stop does not constitute custody. Deft will argue that he did not feel free to leave and thus the stop was custodial. While he may prevail on this point, he faces the additional hurdle that a statement must be the result of police interrogation in order to violate Miranda. Interrogation has been interpreted to occur when a statement is made in response to questions reasonably calculated to elicit incriminating statements. Here, Deft's statement was spontaneous and in response to a normal, non-threatening request.

Because the statement was not in response to custodial interrogation, and because none of the coercion and pressure that Miranda was designed to prevent was present, this statement was not a violation of the Fifth Amendment and thus should not be excluded.

6th Amendment

Deft may assert that he had a right to counsel at the traffic stop and the failure to have counsel present makes his statements inadmissible. This will fail because the 6th Amendment right attaches at post-charge
critical stages of a criminal proceeding. Here, Deft was merely going to be cited for a traffic violation and was not charged with any crime. His 6th Amendment rights were not implicated.

1(b). Challenge to Seizure of the Purse

Deft will argue that the search and seizure of the purse from his car was a violation of the 4th Amendment guarantee against unreasonable searches and seizures. In order for Deft to make such an assertion, he must have had a reasonable expectation of privacy in the place searched and the search must have been accomplished by government agents. Deft probably has a reasonable expectation of privacy in his car to some degree; however, the Court has held that automobiles are subject to much less privacy protections than a home. Because Deft owns the car, he probably has some level of expectation of privacy. In addition, the search was conducted by official police so the government agency requirement is met.

Deft's contention will probably center on the fact that no warrant was obtained to search the car. Although a warrant based on probable cause is a requirement for many searches, there are exceptions to this rule. First, the state can probably establish that the search was conducted incident to Jones's lawful arrest of Deft. Probable cause to arrest Deft arose when a description which nearly exactly described Deft and his car was received by Jones during the routine traffic stop. When a proper arrest is performed, it is lawful for the arresting officer to search the person and the surrounding area where the suspect might reach for weapons or to conceal evidence. While Deft may argue that he had been taken into custody and could not have reached into the car for anything when Jones searched it, the scope of a search incident to lawful arrest has been held to extend to the entire passenger compartment of the suspect's automobile at the time the suspect is taken into custody. Thus, the search which revealed the purse was proper.

The warrantless search of the auto is probably also justified under the auto exception, which states that once police have probable cause to stop a car suspected of being involved in a crime, the mobility of the vehicle creates an exigent circumstance which gives them the right to search it for weapons or contraband suspected of being in the car. Once Jones had probable cause to believe Deft was involved in a crime, she was authorized to search the car for any fruit or instrumentality of that crime. Thus, the seizure of the purse from the car was proper under the 4th Amendment.

1(c). The Identification of Deft by Smith

6th Amendment

Deft challenges the identification of him made by the robbery victim at the police station as violations of the due process clause and the Sixth Amendment.

Although a line-up or show-up identification is considered a critical stage for 6th Amendment purposes, and a suspect is entitled to the representation of counsel, Deft's 6th Amendment rights had probably not attached. The show-up occurred one-hour after he arrived at the police station. It is unclear from the facts whether formal charges had yet been filed. If not, he did not have a right to the presence of counsel. If, however, Deft had already been charged, the right to have counsel present would attach. In addition, a face to face identification by the victim has been held to be a critical stage at which defendants have a right to have counsel present. In addition, Deft had already invoked his 5th Amendment right to counsel, which would effectively rebut any assertion that he waived his right to have an attorney at the lineup.

Due Process

Deft may have a due process claim, although it is weak. To challenge an out-of-court identification under the due process clause of the 14th Amendment, a suspect must show that the line-up procedure was unreasonably suggestive to the point of calling into question the results obtained. Deft may argue that
because the victim was not shown any other suspects at the same time, Smith might have been mistaken in her identification. Showups, however, are generally constitutional and thus this will be a difficult argument for Deft.

l(d). **Motion to Exclude Confession**

This motion will encompass Deft's rights under the 5th Amendment and violations of his *Miranda* rights to remain silent and to have counsel present at custodial interrogation by police.

Here, because Deft invoked his right to remain silent and his right to counsel at the scene of his arrest, the police were precluded from attempting to question him without having counsel present. The facts here suggest that the police attempted to do this because they re-Mirandized Deft after the show-up identification by the victim. This was improper without counsel present. Thus, the confession obtained at this stage will be excluded.

2. **Use of Confession at Trial for Impeachment Purposes**

Even though the confession was obtained in violation of Deft's 5th Amendment rights and therefore cannot be used to prove his guilt, improperly obtained confessions can be used as impeachment at trial. Therefore, if Deft testifies that he did not commit the crime or gives an alibi, the prosecution can on cross-examination question Deft about the invalid confession in order to damage his credibility. The improper confession operates as a prior inconsistent statement in order to suggest that Deft has told a different version of the story before and therefore shouldn't be believed.

The state cannot force Deft to testify in order to question him about the confession, however, because this would violate his 5th Amendment right against compelled testimony which would be self-incriminating.

**ANSWER TO QUESTION #14**

1. **Al, Bob, and Charlie’s Crimes**
   a) **Crime of Conspiracy**

   For Al, Bob, and Charlie to be convicted of conspiracy, the requisite elements must be met: (1) two or more people with (2) intent to agree and (3) intent to commit a crime. Furthermore, in most jurisdictions, an overt act is also required for the crime of conspiracy.

   The first element is met because the initial agreement was between three people - A, B, and C. Whether B and C withdrew and whether their withdrawal could preclude A from being convicted of conspiracy as well will be discussed below.

   The second element, intent to agree, has also been met. A, B, and C planned to bring 50 cases of whiskey ashore when the three met at A’s house on Monday. The facts explicitly state that they all agreed to bring the whiskey ashore, so this element is met. The third element, intent to commit a crime, is also met. A, B, C agreed to bring ashore 50 cases of whiskey that they believed were produced abroad and subject to a federal import duty. Furthermore, they knew that smuggling items into the country without paying the duty required by the Tariff Act was a crime. Thus, they all intended to commit a crime and it would appear all are guilty of conspiracy. However, A, B and C were mistaken about the origin of the goods. The whiskey was not produced abroad but rather was produced in the U.S., so the whiskey was not subject to a federal import duty. Because of their mistake of fact, A, B, and C were conspiring to commit an act that was not in fact a crime. For purposes of conspiracy, however, impossibility or mistake is not a
sufficient defense. Had the whiskey been produced abroad as they believed, smuggling it in without paying a duty would have been a crime, and the belief that they were committing a crime is sufficient for a conspiracy conviction.

For conspiracy in most jurisdictions, an overt act in furtherance of the conspiracy is required. This element was met when A stole the trucks from the parking lot to load the whiskey. Thus, all three could be convicted of conspiracy unless any of them withdrew before the overt act was committed.

**Withdrawal as a Defense for B and C**

Once a conspiracy is established, a conspirator cannot withdraw from the conspiracy itself under the majority rule, but can effectuate withdrawal from future crimes committed. B and C both attempted to withdraw from the conspiracy and whether or not they successfully withdrew determines whether they can be convicted of the theft of the truck, as discussed below.

However, their attempts at withdrawal took place after the three requisite elements of conspiracy were met if it is enough in this jurisdiction that the three met at A’s house to make plans and agreed to do an act they thought was illegal without an overt act. In such a jurisdiction, A, B, and C can all be convicted of conspiracy. If this jurisdiction requires an overt act in furtherance of the conspiracy, there are two questions here: (1) what overt act was committed and when did it occur, and (2) was there sufficient communication of withdrawal.

On these facts, it seems clear that the theft of the truck would be an overt act in furtherance of the conspiracy, and there is no clear indication that other preparatory acts were taken. The facts do not state exactly when A stole the truck, but if he stole it on Friday just before loading the whiskey, then that is the time of the overt act, which will also be important to the issue of B and C’s withdrawal and liability for substantive crimes committed in furtherance of the conspiracy.

The manner in which B and C attempted to withdraw is particularly important if the jurisdiction follows the Model Penal Code rule, which does allow withdrawal as a defense to conspiracy if it manifests a complete and voluntary renunciation of the criminal purpose. C may have withdrawn on Thursday when he affirmatively renounced the plan by informing the police, but he did not inform A of his intention to do so. Communicating the withdrawal to all members of the conspiracy is generally required in order to give them an opportunity to abandon it. B may have tried to communicate his intention not to participate on Wednesday, but his withdrawal was not unequivocal because he did not renounce their criminal purpose. Presumably, A and C could have thought that B might still cancel his other plans and work with them in order to share in the profits from their scheme.

B and C are guilty of conspiracy once the conspiracy was formed, under the majority rule, or if their withdrawals were insufficient to manifest a complete and voluntary renunciation of the criminal purpose under the Model Penal Code rule. If both B and C are not guilty of conspiracy, then A cannot be convicted alone. A could be convicted under the Model Penal Code rule if the trier of fact finds that either B or C did not effectively withdraw.

b) **Theft of the truck**

Co-conspirators are liable for the acts committed by other co-conspirators if the acts were foreseeably committed in furtherance of the conspiracy.

Here, A stole the truck because it was needed to load the whiskey once brought to shore. If C and B were still involved at that time, each could be convicted of theft. However, if B and C had effectively withdrawn, as discussed above, before A stole the truck, then B and C could not be convicted of the theft.
There is no evidence that C or B aided and abetted A’s commission of this offense. A alone could and should be held criminally responsible for the theft.

Merger

Conspiracy does not merge with any substantive offense, so A could be liable for both conspiracy and theft.

2. Conviction of A for attempt to import dutiable goods without payment of duty in violation of the Tariff Act

A can be charged with attempt here. An attempt is a substantial step in the direction of committing a crime, coupled with an intention to commit that crime and the apparent ability to complete the crime.

Intent. Attempt requires that A specifically intended to commit the crime attempted. A believed the whiskey was produced abroad and intended to smuggle it in without paying a duty. Thus A had specific intent to violate the Tariff Act.

Potential Defense: Impossibility. A person cannot be convicted of an act that is not a crime. However, that person may be convicted of attempt to commit the crime if the reason it was not a crime is factual impossibility or mistake of fact. A believed the goods were produced abroad and therefore subject to a duty, the failure to pay such duty (if applicable) constituting a crime. A was correct in all his beliefs except for the fact that the goods were produced in the U.S. and, therefore, not subject to the federal duty. This was a mistake of fact. While A couldn’t be convicted of the crime of not paying the duty, he can be convicted of attempt to violate the tariff law since he intended to do so.

Substantial Step. A committed an act in furtherance of the crime. He stole a truck, went to the ship and brought back the whiskey, thus had the apparent ability to complete the act of smuggling.

Merger. Under the Model Penal Code rule, one cannot be convicted of more than one inchoate crime, e.g., conspiracy and attempt, aimed at the commission of the same underlying offense, so A could not be convicted of an attempt to violate the Tariff Act if he were convicted of conspiracy to do so, discussed above. However, California does not follow the Model Penal Code rule, so conviction of both is possible here.

3. Len’s ethical duty

As an attorney, Len is subject to ethical duties toward both his client and the court.

Len has a duty of candor and truthfulness to the court, which requires that he not assist in putting false evidence or testimony before the court.

Furthermore, L cannot assist in another’s commission of a crime. Perjury is a crime, and L must not aid A in committing perjury.

L’s duties toward his client include the duty of confidentiality. There is a conflict here between his duty not to tell the true facts as he learned them from A and his duty of candor toward the tribunal. Therefore L should counsel A that if A testifies, A must tell the truth. He should advise A of his Fifth Amendment right against self-incrimination but should A insist on testifying, which is the client’s decision, L must advise him to tell the truth.
If A refuses to take L’s advice, L’s options depend on whether he is subject to California rules of ethics governing the legal profession or the ABA’s Model Rules. The Model Rules allow L to tell the judge about his client’s intent to commit perjury. L can violate his client’s confidentiality to prevent the perjury. In California, however, L cannot tell the judge but is required not to help A in his perjury. Thus L can allow A to take the stand but cannot ask A questions to help A’s perjury. This procedure may alert the court that something is wrong with A’s testimony without violating A’s confidences in L.

ANSWER TO QUESTION #15

1. Admission of Handgun and Stolen Items Against Duce and Cody

   Standing. To challenge a search and seizure, a defendant must have had a reasonable expectation of privacy in the area searched or the items seized. Duce had a reasonable expectation of privacy here because it was her automobile that was searched. Cody does not have standing to challenge the search because the automobile was not his, and he was not present at the time of the search so he was not personally subjected to it.

   Warrant Requirement. Because the police did not obtain a warrant to search Duce’s car, Duce can challenge the search unless it falls under a recognized exception to the search warrant requirement. The usual exceptions the prosecution might argue in support of the search are consent, the automobile exception and search incident to arrest. The facts indicate, however, that the prosecutor has conceded that this search could have been authorized only by consent.

   Consent. A warrantless search is valid if consent is given voluntarily and knowingly by someone with apparent authority to give consent. Although Duce had authority to give consent as to the search of her own car, she might argue that her consent was not knowing and voluntary because she was not informed that she had a right to refuse consent. However, the Miranda case requires warnings before police interrogations, not searches. A suspect need not be informed of her right to refuse consent; knowledge of this right is assumed. The court must look at the totality of circumstances to determine whether Duce voluntarily consented. An appellate court should not overrule the trial court’s finding of voluntariness unless it finds manifest error.

   Duce may argue that three hours of custodial questioning constituted coercion so that her consent was not voluntary. This may be a close question, but there is insufficient evidence of coercion to overrule the trial court’s decision permitting the items found in the car to be admitted against Duce as well as Cody.

2. Admission of Police Officer’s Testimony about Duce’s Confession

   The Fifth Amendment protects individuals from being forced to incriminate themselves. The protection attaches when the suspect is in custody and is beginning to undergo custodial interrogation. The police must give Miranda warnings of the accused’s right to remain silent and to obtain an attorney before commencing such interrogation. Duce was under arrest and in custody at the time of her interrogation, but was not given Miranda warnings. Therefore, the interrogation violated her Fifth Amendment right to remain silent unless the police can argue that her confession was not the result of interrogation. The police might successfully argue that the interrogation stopped while the search of the car was being conducted, and Duce confessed as a result of the findings of the consensual search, rather than as a result of the interrogation.

   Even if the confession was obtained in violation of Duce’s Fifth Amendment rights, it could still be admitted as a prior inconsistent statement to impeach her denial on the stand that she was driving the car or knew that the items were in the car. Since the prosecutor has called the police officer in rebuttal of her
statements on the stand, the court did not err in admitting this testimony for this purpose even if its substantive admission was not permissible under the theory discussed above.

3. **Admission of Officer’s Testimony about Cody’s Confession**

The court did err in admitting evidence of Cody’s un-redacted confession. This evidence violated Duce’s Sixth Amendment right to cross-examine the witnesses against him, in this case, his co-defendant, Cody. The confession of a co-defendant in a criminal trial who declines to take the stand who declines is admissible only if statements that inculpate the other defendant are redacted. Unlike the indirect use of Duce’s confession for impeachment, Cody’s confession cannot be admitted for purposes of impeaching Duce. Because Cody’s confession is inadmissible under the Sixth Amendment, the possibility of its admissibility under the hearsay rules is irrelevant.
CORPORATIONS ESSAYS

Please note that Essays 1-7 are discussed in the Corporations Essays lecture. Sample answers are also provided for all the Corporations questions except #s 2, 5, 6, and 7.

QUESTION #1

The directors of Motive, a corporation, mailed a notice of the annual shareholders' meeting specifying the order of business as "(1) Election of directors, and (2) such further business as may come before the meeting" together with proxy materials soliciting authorization for Scripps, the corporation's Secretary, to act as proxy at the meeting.

Motive manufactures combustion engines for power equipment. Its stock is not listed on any stock exchange. Its 2 million outstanding shares are held by about 300 shareholders. A quorum of shareholders consists of a majority of the outstanding shares, present by proxy or in person.

Only Char, the chairperson of the board of directors, owning 10,000 shares, Scripps owning 5,000 shares, Mr. Gad owning 1,000 shares and Mrs. Gad owning 1 share, were present in person at the meeting. Scripps held sufficient proxies, however, to establish a quorum. Gad had signed and mailed a proxy to Scripps covering his 1,000 shares; however, he announced at the meeting that he intended to vote his 1,000 shares in person.

At the meeting, after the election of directors was completed, Char, the duly elected chairperson of the meeting, asked if there was any further business to come before the meeting. Gad then made the following motion, duly seconded by Mrs. Gad:

"Resolved, that one-half of the firm's profits for the next year be devoted to research and development of pollution-free engines."

After the motion was made and seconded, and before any vote upon it, Scripps left the meeting. Immediately after Scripps left, Char unilaterally adjourned the meeting and left. Nevertheless, Mr. and Mrs. Gad remained, and both voted in favor of the motion.

Applicable state statutes allow the voting shares by proxy and provide that at annual meetings directors may be elected and "any other business may be transacted which is within the powers of the shareholders." There are no other relevant statutory, charter or bylaw provisions.

Is the board of directors required to follow the Gad resolution. What result? Discuss.

QUESTION #2

Hal owns 40% of the outstanding stock in Parco; the remaining 60% is owned by approximately 25 people, none of whom owns more than 6% of such stock. Hal has working control of Parco, and at each annual shareholders' meeting has been able to assure the election of himself, Art, and Bill, to the board of directors. For the past six years, Art and Bill have delegated their powers as directors to Hal through the annual execution of a "directors’ agreement," which each year has been approved by the majority vote of Parco's shareholders.

A number of Parco's minority shareholders are concerned about Hal's domination of the corporation, and have made known their intention to attempt to gain control from Hal, at the next annual shareholders'
meeting. Hal countered by causing the 5-man board of directors to (a) redeem 12% of the outstanding stock from Fred, the most vocal dissident shareholder, and (b) issue to Hal at the existing market price, sufficient previously-authorized but unissued shares to assure him of ownership of 51% of the authorized shares.

With control of Parco thus acquired, Hal subsequently entered into a contract to sell all of his stock in Parco to Curt, who owns no Parco stock, at a price approximately twice that of the market price at the time the contract was made with Curt.

Decide and discuss the following:

A. Is the "directors’ agreement," between Hal, Art, and Bill, valid?

B. Was the redemption of 12% of Parco's stock from Fred a lawful act?

C. Was the sale of additional Parco stock to Hal a lawful act?

D. May Hal retain the entire proceeds of the sale of his stock to Curt? If not, how should the proceeds be distributed.

**QUESTION #3**

The following actions were taken pursuant to the unanimous vote of the directors of Ajax, a corporation:

1. In an effort to prevent a minority shareholder from acquiring control, Ajax purchased shares from three shareholders at their asking price of $80 per share. At the time, Ajax's shares had a book value of $92 and a market value of $75 per share.

2. After it was announced that Bob, the long-time treasurer for Ajax, was retiring, Ajax agreed to pay Bob $5,000 annually during his lifetime.

3. Ajax agreed to pay the legal fees and costs of Curt, a vice-president, who was being sued in a shareholders' derivative action for making political contributions from corporate funds to foreign corporations with whom Ajax did business.

4. Ajax adopted a stock option plan for all officers and directors, and issued the first set of options.

Pat owns 100 Ajax shares which he acquired before the above events took place. He purchased 50 additional shares two months ago, but has been unable to have the shares transferred to his name because, according to the corporate secretary, the shares are subject to a restrictive shareholders' agreement preventing the transfer. No such restriction appears upon the Ajax stock certificates, including those in Pat's name representing his earlier shareholdings.

Pat feels that all the above described actions by Ajax and its directors have violated his rights as a shareholder and damaged him. He also wants to know if he is entitled to have the additional 50 shares of Ajax stock registered in his name.

A. Does Pat have any claim for relief with respect to each of the above described actions taken by Ajax? Discuss.

B. Does Pat have a right to have the 50 shares of Ajax stock registered in his name? Discuss.
QUESTION #4

Dynamics, Inc., was incorporated two years ago, with an initial authorized capitalization of 10,000 shares of $100 par value common stock. Ames had subscribed to 100 shares prior to incorporation; later, still before Dynamics was incorporated, Ames had threatened to withdraw his stock subscription unless he was issued an additional 10 shares as a "bonus." Because Ames's subscription was needed for initial operating capital, the promoters for Dynamics had agreed with Ames to issue him bonus shares, and following incorporation Ames paid $10,000 to Dynamics for which 110 shares marked "Fully Paid" were issued to him.

Soon after Dynamics was incorporated, Bates was issued 1,000 shares of stock for transferring to Dynamics his title to Blackacre, which Bates had purchased a year earlier for $55,000.

After issuing a total of 7,500 shares, including those issued to Ames and Bates, Dynamics could find no other purchasers for its stock.

Last year, its first fiscal year of operations, Dynamics had net losses of $50,000. However, at the end of the year, the board of directors determined that Blackacre was worth $160,000, and by resolution directed that its book value be increased to that amount. The board then declared a $2 cash dividend on the 7,500 shares then outstanding.

Last month, without first offering the stock to any other shareholder, Dynamics issued 500 shares of stock to Carl in return for Carl's transfer of title to Greenacre, which the corporation wants for a future plant site.

Paul, a shareholder, gave Fox, vice-president of Dynamics, an "irrevocable" proxy to vote Paul's shares. When Paul later sought to revoke the proxy, Fox told him the proxy could not be revoked during Paul's lifetime, so long as Paul owned the Dynamics stock.

A. Are Ames and Bates liable to Dynamics for any additional money in connection with the issuances of shares to them? Discuss.

B. Was the declaration of the $2 cash dividend proper? Discuss.

C. Was the transaction with Carl valid? Discuss.

D. Does Paul have the right to vote his Dynamics stock? Discuss.

QUESTION #5

Jetco, a corporation whose stock is traded on a national stock exchange, has 200,000 shares of $25 par value common stock outstanding. It has a seven-person board of directors.

Dan, who owned 100 shares of Jetco stock, was both a director and vice-president of Jetco. On September 5, 1979, Dan learned of a secret new invention developed by Jetco to convert organic waste to commercial fuel and that a public announcement of the invention was soon to be made. Dan immediately wrote to three of Jetco's shareholders who, Dan knew, were dissatisfied with the corporation and had previously announced their willingness to sell their shares for $22 a share, a price that was $3 a share above book value. Dan offered them $25 per share for their Jetco stock. They accepted his offer, and sold a total of 4,200 shares to Dan. At the same time, Dan also exercised his stock option rights which he owned as a
director to purchase an additional 1,000 authorized but unissued shares from Jetco, for which he paid the option price of $21 per share.

Later in October, 1979, Jetco's president and board chairman, Wood, learned that Dan had acquired 4,200 shares from the three dissatisfied shareholders at $25 per share. When Dan refused Wood's demand that he resign as a director, the board at its November meeting declared Dan's board seat vacant, although his term of office would not expire for another six months. A week later, the invention was announced and the market value of Jetco stock rose substantially.

On December 17, 1979, Dan sold for $50 per share the 4,200 shares he had acquired from the three dissatisfied shareholders.

A. Does Dan have the right to remain on the board of directors for the balance of his unexpired term? Discuss.

B. What are Dan's potential liabilities, and to whom, as a result of the above transactions? Discuss.

QUESTION #6

Art, Bob and Carl were the three shareholders of Getco, a State X corporation, each owning one-third of the shares issued. They were also the three directors of the corporation. In consideration of mutual promises contained in a written "Shareholder Agreement" executed by each of them, they each granted a right of first refusal in acquiring his shares to the other two shareholders, equally, "should such shareholder seek to sell his shares to anyone other than Getco. Such agreement also required a "90% majority vote for all shareholder or director action, including the election of directors," and further required each shareholder to cast his vote for the election of the other shareholders as directors of Getco.

A State X statute provides as follows:

"Unless otherwise provided in the certificate of incorporation, if a corporation has an even number of directors who are equally divided respecting the management of its affairs, or if the votes of its shareholders are so divided that they cannot elect a board of directors, the holders of one-half of the shares of stock of the corporation entitled to vote at an election of directors may present a verified petition for the involuntary dissolution of the corporation, as provided in this Chapter."

Carl died and, under the terms of his will, his shares of stock in Getco were bequeathed to Doris, his niece. Although Art and Bob claimed they had the right to purchase Carl's shares upon his death, the probate court ruled that under applicable state law it had no jurisdiction to decide those claims. The decree of distribution in the probate of Carl's estate distributed his shares in Getco to Doris.

Art and Bob have refused to elect Doris to the Getco board of directors, asserting that they are Getco's only valid shareholders. Art and Bob have held over in office as directors for two years since Carl's death, as no one claiming shareholder status has been able to muster a 90% vote to elect directors. The board of directors has taken no action during the same period. No dividends have been declared or paid since Carl's death.

Doris seeks your advice on how she can regain shareholder benefits and some voice in the management of Getco, or, in the alternative, have Getco dissolved and its assets distributed.

What advice would you give her? Discuss.
QUESTION #7

In January 1979, Able and Baker decided to establish Zeeco to manufacture electronic devices. They signed articles of incorporation and established themselves as a two-man board of directors. Each paid $10,000 in cash for 100 shares of the $100 par value common stock of the corporation.

In mid-June 1979, Able and Baker met Charlie, a business consultant who advised them on Zeeco business matters. In July 1979, Charlie filed Zeeco's articles of incorporation with the Secretary of State. Immediately thereafter, Charlie was issued 100 shares of Zeeco common stock: 10 shares in return for services rendered, 40 shares in return for services to be rendered in the future, and 50 shares in return for his personal note for $5,000. Charlie became the third member of the board of directors and was elected treasurer.

In August 1979, Charlie discharged his $5,000 note obligation by transferring to Zeeco office equipment appraised at $6,500 by an independent appraiser, but which Charlie had purchased at auction in May 1979 for $1,000.

In March 1980, Zeeco received $10,000 in cash from each of two investors, David, a local banker, and Edwards. Zeeco issued to each investor 100 shares of common stock.

By late 1981, Zeeco was in financial difficulty. When Charlie heard of a developmental opportunity in a field directly related to Zeeco operations, he did not advise the other directors because Zeeco did not have sufficient assets to exploit the opportunity. Instead, Charlie, David and several of David's banker friends formed a partnership which invested in and made considerable profit on the new business opportunity.

Early in 1982, Zeeco's assets were insufficient to discharge its liabilities. Its creditors, many with claims dating back to the beginning of 1979, commenced an action against Zeeco and all five shareholders. Edwards cross-complained against the other four shareholders.

A. What are the liabilities of Able, Baker, Charlie, David, and Edwards to Zeeco's creditors? Discuss.

B. What are the liabilities of Able, Baker, Charlie and David to Edwards? Discuss.

QUESTION #8 (FEBRUARY 2002 EXAM)

Acme Corporation was a publicly traded corporation that operated shopping malls. Because of an economic slowdown, many of Acme’s malls contained unrented commercial space. Additionally, the existence of surplus retail space located near many of Acme’s malls prevented Acme from raising rents despite increasing costs incurred by Acme.

In June 2001, Sally, president and sole owner of Bigco, approached Paul, Acme’s president. She proposed a cash-out merger, in which Bigco would purchase for cash all shares of Acme, and Acme would merge into Bigco. Sally offered $100 for each outstanding share of Acme’s stock even though Acme’s stock was then currently trading at $50 per share and historically had never traded higher than $60 per share.

Paul, concerned about Acme’s future, decided in good faith to pursue the merger. In July 2001, before discussing the deal with anyone, Paul telephoned his broker and purchased 5000 shares of Acme at $50 per share. Paul then presented the proposed merger to Acme’s board of directors and urged them to approve it. The board met, discussed the difference between the current market share price and the offered price, and, without commissioning a corporate valuation study, voted to submit the proposed deal to a shareholder vote. The shareholders overwhelmingly approved the
deal because of the immediate profit they would realize on their shares. Based solely on shareholder approval, the board unanimously approved the merger, and all shareholders received cash for their shares.

In December 2001, shortly after completing the merger, Bigeo closed most of the Acme malls and sold the properties at a substantial profit to a developer who intended to develop it for light industrial use.

1. Did Paul violate any federal securities laws? Discuss.

2. Did Paul breach any duties to Acme and/or its shareholders? Discuss.

3. Did the board breach any duties to Acme and/or its shareholders? Discuss.

**QUESTION #9**

Paul owns 250 of the 1,000 issued and authorized shares of Durco, a State X close corporation. The Durco directors are Al, who owns 650 shares, and Baker and Carr, each of whom owns 50 shares of Durco stock. Al has offered to buy the shares of Durco stock owned by Paul at a price substantially less than that paid to Paul to acquire the stock. Paul has refused Al's offer, claiming the offered price was "unfair."

Paul has brought an action in State X court against Durco and its three directors. His complaint alleges:

(A) The directors have acted unreasonably in failing to have Durco distribute as cash dividends approximately $5 million of accumulated earnings;

(B) The distribution is being arbitrarily withheld for the benefit of Al;

(C) There is an "invalid" agreement between the individual defendants as Durco shareholders, the purpose of which is to maintain Al in office as "managing director" to "supervise and direct operations and management" of all Durco's business;

(D) Paul has been consistently denied the right to inspect Durco's corporate records during regular working hours or at any other time.

By way of relief, the complaint asks that: (1) Al be removed as a director for misconduct; (2) the shareholders' agreement be found invalid; (3) the directors declare and pay a substantial cash dividend; and (4) Paul be permitted to inspect Durco's records during normal business hours.

In their answer, the defendants allege that Paul's action should be considered a derivative action, and admit the existence and terms of the shareholders' agreement, the withholding of accumulated earnings of approximately $5 million, and the denial of access by Paul to Durco's records. They then allege by way of affirmative defense that: (1) the discretion of the directors to declare dividends has been properly exercised; (2) the shareholders' agreement is valid and therefore Al cannot be removed as director, even for cause; and (3) the requested inspection should be denied because Paul only wants to inspect the corporate records for the "improper purpose" of bringing a "strike suit."

The defendants have moved for an order requiring Paul to post security for costs in the pending action.
State X law grants an unqualified right to shareholders of State X corporations to inspect corporate books and records, and requires plaintiffs in shareholder derivative actions to provide security for costs.

A. How should the court rule on defendants' motion for security for costs? Discuss.

B. How should the court rule on each of Paul's requests for relief? Discuss.

QUESTION #10

Corp, Inc., (Corp) has 200,000 authorized shares of $1 par value stock. Andy, Ben, Carl, and Dave each purchased at par and continue to hold 50,000 shares of Corp. Corp's articles prohibit incurring any single debt in excess of $75,000 and require a vote representing 80% of outstanding shares to amend the articles. The articles also provide for preemptive rights, cumulative voting, and a board of four directors. Each of the four shareholders has elected himself director at annual shareholder meetings during each year of corporate existence.

Corp's board unanimously decided to borrow $100,000 from Lender. Lender took Corp's ten-year note, bearing interest at 20% per annum, payable in monthly interest installments. Corp has the option to pay off the note at any time, without penalty. Later, Lender needed funds and approached Andy, who serves as Corp's treasurer. Lender offered to sell the note for $90,000 and Andy, without consulting with Ben, Carl, or Dave, purchased the note on his own account.

The week following the purchase of the note by Andy, Rich asked to subscribe to 100,000 shares of Corp stock at $1 per share. Ben, Carl, and Dave approved Rich's proposal, but at the annual shareholders' meeting Andy voted against and thus defeated a proposed amendment of the articles authorizing additional shares free from preemptive rights. Because of the note's high interest, Andy did not want it paid off. The other directors, hoping to use Rich's investment to pay the note and now aware of Andy's acquisition of it, were angered and caused Corp to cease paying the monthly interest installments.

Rich then caused the incorporation of Endrun, Inc., and subscribed to 100,000 of its shares for $100,000. Rich proposes that Corp be merged into Endrun, that each Corp share be converted into an Endrun share, and that Endrun pay the Lender note now held by Andy. Corp's board has approved the merger three to one, Andy dissenting.

Assume that the interest rate is not usurious.

A. Did Andy breach any duty to Corp or to fellow shareholders in voting against the proposal to issue 100,000 shares to Rich? Discuss.

B. Can Andy obtain an injunction to prevent the Corp-Endrun merger? Discuss.

C. Can Andy collect interest payments on Corp's note? Discuss.

QUESTION #11

Starco, stockbrokers, in attempting to market 1,000,000 common shares to be issued by Durmac, offered 500,000 shares to the Ennis Corp. at $50 per share. Already the owner of a substantial interest in Durmac, Ennis' financial condition was such as to make desirable a large immediate acquisition of additional shares of Durmac.

Ennis' by-laws provided that a quorum consisted of five out of its seven directors. After due notice to the four resident directors, but without notice to the three non-resident directors, a special emergency board of directors' meeting was held. Resident directors Almon, Barnes, and Chester with a proxy executed by
Grabe, the fourth resident director, attended the meeting. Also present was Webster, a non-resident director. The directors present unanimously voted to purchase 400,000 of the new Durmac shares. Upon conclusion of the meeting, Webster signed a waiver of notice.

Immediately following the meeting, Ennis purchased and paid for in full 400,000 Durmac shares.

At their next regular meeting, attended by all directors, the board voted unanimously to ratify the action taken at the special emergency meeting.

Before the actual offering of Durmac shares to Ennis, Starco had offered to a select few, for one day only, a few thousand of the new common Durmac shares at $42 per share, cash. Among the offerees was Almon, who purchased a total of 2,000 shares for his own account. Almon subsequently disposed of these shares at a substantial profit. However, by the time the Ennis shareholders became aware of the foregoing facts, the market price of Durmac shares had declined sharply.

A. Was the acquisition of Durmac shares by Ennis a proper corporate action? Discuss.

B. Are any of the directors liable to Ennis for the decline in value of Durmac shares? Discuss.

C. What, if any, is the liability of Almon to Ennis for profits he made on his purchase and sale of the Durmac shares? Discuss.

Do not discuss federal statutory securities issues.

**QUESTION #12**

Since 1981, Art has been president of Exec, a publicly held corporation with net assets of approximately $50 million. Exec manufactures computers. In 1985, Art negotiated an agreement for the purchase by Exec of all outstanding shares of Yang, Inc., a privately held maker of computer components, for $5 million cash. The purchase was made in early 1986. At the time, other members of Art's immediate family were holders of the outstanding shares of Yang. This information was not known except to Art, Yang's management, and Bob, an Exec director.

Art negotiated Exco's purchase of Yang stock and executed the purchase agreement on behalf of Exec, relying on his authority as its president. Before the purchase documents were signed, however, Art discussed the proposed acquisition individually with Bob, Curt, and Don. Curt and Don are Exec directors who, with Art and Bob, comprise a majority of Exco's seven-person board of directors. Bob, Curt, and Don each individually told Art that he approved the transaction.

After the purchase of Yang stock by Exco, at the next regular meeting of Exco's board in June 1986, Art informed all directors of the acquisition. While some questions were asked, there was no vote on the acquisition at the meeting. Except for Bob and Art, no other Exec director was informed of the previous ownership of Yang stock by Art's family members. Because Bob believed the acquisition was beneficial to Exec, he has never mentioned to any other Exec director his knowledge of the prior ownership of Yang stock by members of Art's family. The existence of such prior ownership could, however, have been discovered by a review of Yang's corporate records.

Since the purchase of its stock by Exec, Yang has been consistently and increasingly unprofitable. At the annual Exec shareholders' meeting in November 1987, Art, Bob, Curt, and Don were not re-elected as directors. In December 1987, the new Exec board replaced Art as president. Three months later, the new Exec president asks you the following:

2. Can Exec recover damages for Yang's unprofitability from any or all of the following:
   a. Art? Discuss.
   c. Curt and Don? Discuss.

QUESTION #13

The by-laws of Dixie, a publicly held corporation, provide, "The number of directors of the corporation shall be five." Insofar as pertinent, Dixie's articles of incorporation state that the number "constituting the initial board of directors" is five and provide for annual election of directors.

Since its incorporation five years ago, Dixie has been very profitable. Anticipating a hostile takeover attempt, the board voted to increase its size to nine and to stagger the terms of directors so that only three would stand for election each year.

Stan, owner of 29% of Dixie's voting stock, demanded that the board call a special meeting of shareholders to disapprove the board's action and to remove the president from office. The board refused to call a meeting for those purposes. It filled the newly created board positions with persons who were experienced in business and were close friends of the original board members. The new board entered into transactions that harmed Dixie financially but which made the corporation a less attractive target for takeover.

When Stan filed a derivative suit against Dixie and the directors challenging the board's conduct, the board appointed the new members as a "special litigation committee." Thereafter, the board moved to dismiss the suit because "based upon the recommendation of the special litigation committee, the board has concluded the suit is not in the best interests of Dixie."

1. Did the board act lawfully:
   A. in increasing its size to nine members without a shareholder vote? Discuss.
   B. in staggering the terms of board members without a shareholder vote? Discuss.
   C. in refusing to call a special meeting of shareholders? Discuss.
   D. in filling the newly created board positions without a shareholder vote? Discuss.

2. Should the court grant the board's motion to dismiss? Discuss.

Do not discuss federal securities law issues.

QUESTION #14

In 1982, Ida bought 50,000 shares of Martco. In 1985, Martco contracted with Buildco for the construction of four new stores for $4 million. At the Martco board meeting at which the Buildco contract was to be considered, Chare, Martco's chairman, revealed that he had been a director of Buildco since 1982 but that he had not participated as a member of the Buildco board in approving this contract. Chare, believing it to be a fair contract, joined the other four Martco directors in voting to approve the contract. In
fact, subsequent investigation revealed that the price charged by Buildco under the contract was excessive and unfair to Martco.

In 1986, Ida died, leaving her stock to her son Sol. Unhappy about Chare's leadership, Sol asked Chare for Martco's shareholder list to solicit proxies to unseat Chare at the 1988 annual meeting. Chare, fearing Sol's success, refused, and Sol was unable to gain a seat on the board. Later, Sol learned that Waters, another shareholder, would have given Sol his proxy. Between the two, they owned sufficient shares to elect one director under Martco's cumulative voting rule.

At the September 30, 1988 director's meeting, Chare announced that Martco had suffered a $10 million loss during the last fiscal year and that this information would be released to the public on October 15. He tendered his resignation, which was accepted effective immediately.

Between October 5 and October 10, Chare sold 100,000 shares of Martco stock, his entire holdings, for $25 per share, the current market price. After the loss announcement on October 15, Martco stock dropped to $10 per share. Sol asked the remaining directors to bring suit against Chare but they refused.

Assume no federal security laws are applicable.

1. What, if any, is Chare's personal liability to Sol? Discuss.

2. Assuming Sol brings a shareholder's derivative action against Chare, what is the probable success of such suit in connection with each of the above transactions? Discuss.

**QUESTION #15**

Dan is the president of Exco, a closely held corporation. He is also a member of its board of directors and a 10% shareholder of the corporation. For the past five years, Exco has averaged annual net pre-tax earnings of 50% of its gross sales. During this period, Exco has not paid a dividend or made any other distribution to its shareholders. This was planned so that Exco will have substantial retained earnings to enhance the chances of its sale to another company.

With the approval of his fellow directors, Dan has just started negotiations with officers of Morcorp to sell Exco to Morcorp. Dan wants to complete arrangements for the sale of Exco to Morcorp on an expedited basis within the next 45 days, because he believes that a brief, present high demand for Exco's products will increase Exco's sale price. He has neither submitted the plan to Exco's shareholders for approval, nor has he obtained a review of the proposed terms of sale by outside consultants.

After the negotiations started, Dan was interviewed by a reporter for *The Stock Market Times*, a financial newspaper with nationwide circulation, about persistent rumors that Exco is for sale at a price which exceeds the book value of its stock. Dan is accurately quoted in *The Stock Market Times* as saying "There are no pending discussions regarding the sale or merger of Exco."

Polly owns 5% of Exco's shares. Polly is concerned that she has received no dividends on her Exco stock despite Exco's recent earnings. Polly has commenced a lawsuit against Dan and the other Exco board members seeking a decree compelling the defendants to declare and Exco to pay a dividend on its stock. In response to Polly's suit, Dan and the other directors voted to have Exco indemnify them for costs of defense. While her suit is pending, Polly has learned of the recent negotiations for sale of Exco to Morcorp. She has amended her complaint to enjoin the sale and obtain damages from Dan and the other directors for alleged breaches of fiduciary duty in the negotiations for an expedited sale and for Dan's false assertion reported in *The Stock Market Times* that Exco was not for sale.

1. How should Polly's attempt to compel payment of a dividend be decided? Discuss.
2. Can Exco lawfully provide indemnity to Dan and the other Exco directors for their legal costs incurred in defending Polly's suit? Discuss.

3. Are Dan and the other Exco directors liable to Polly because of Dan's statement quoted in *The Stock Market Times* and if so, to what relief is Polly entitled? Discuss.

4. What responsibilities do Dan and the other Exco directors have in seeking to affect the expedited sale of Exco to Morcorp, and have they fulfilled those responsibilities? Discuss.

**QUESTION #16**

Sally is vice president for research at Chipco Corporation (Chipco), a microchip manufacturer. Chipco’s stock is traded on a national stock exchange. During the course of her work for Chipco, Sally’s research team developed technology that could reduce microchip production costs by 75%. However, Sally knew that additional testing was necessary to ensure commercial viability of the technology.

Chipco retained lawyer Laura to advise it on patenting the new technology. On March 12, 1998, Laura arranged a conference call with Sally and other Chipco personnel, who explained the new technology to Laura. This information was personally as well as professionally interesting to Laura because she already owned 12% of Chipco’s outstanding stock as part of her personal investment portfolio. On March 16, 1998, Laura telephoned attorney Arnold, an opposing counsel in an unrelated matter, and mentioned that her client Chipco might soon become a major competitor in the microchip business because of new breakthrough technology. Shortly thereafter, Sally, Laura and Arnold each telephoned a broker and purchased shares of Chipco stock at $10.00 per share.

On April 10, 1998, a financial newspaper reported a rumor that Chipco had developed new breakthrough technology. Within the next 2 days, Chipco stock increased to $20.00 per share. Chipco had been purchasing large blocks of its own shares and it became fearful of continued price escalation of its shares. Therefore, Chipco promptly responded to questions from the press about the rumor by issuing a release which stated, “Chipco has not developed new commercially viable technology at this time.” As soon as the statement was reported by the press, the price of Chipco shares fell to $11.00 per share.

On August 20, 1998, after successfully testing for commercial viability, Chipco publicly announced its new technology, and Chipco shares again rose to $20.00 per share. By September 5, 1998, Sally, Laura and Arnold had each sold all their shares of Chipco stock at the higher price.

Has there been any violation of federal securities laws by:

1. Sally? Discuss.
2. Laura? Discuss.

**QUESTION #17**

Adam owns 100% of the stock of Sellco, a corporation that sells houses. Sellco’s board of directors consists of Adam and his wife Betty.

Sellco owns 90% of the stock of Buildco, another corporation. Pat owns the remaining 10% of Buildco’s stock. Buildco’s business is home construction. Buildco’s board of directors consists of Adam,
Betty and Evan. Betty is the president of Buildco and, as such, is a salaried employee. Neither Adam nor Evan is an officer or employee of Buildco.

Adam urged Buildco’s other directors (Betty and Evan) to approve an arrangement whereby Buildco would build houses and sell them to Sellco at cost. Sellco, in turn, would sell the homes for a profit. Based solely upon Adam’s representation that the arrangement “made sense,” Buildco’s board unanimously approved this arrangement. Buildco thereafter commenced constructing homes exclusively for the purpose of selling them to Sellco. Buildco sold the houses at cost to Sellco, and Sellco sold the houses for a considerable profit.

Pat objects to this arrangement because it deprives Buildco of the only source of money with which to pay dividends.

What personal and/or derivative claims can Pat reasonably assert against Sellco, Adam, Betty and/or Evan, and is he likely to succeed on each claim? Discuss.

**QUESTION #18**

Art, Bob and Cora each signed a pre-incorporation share subscription agreement to incorporate Widgco. The agreement provided that: (1) there would be a total of 3,000 authorized shares having a par value of $10 per share; (2) Art would receive 1,000 shares to be paid for by Art's future services to Widgco; (3) Bob would purchase 500 shares at $20 per share; (4) Cora would purchase the remaining 1,500 shares at $20 per share; (5) no shareholder could, without the consent of the other two shareholders, sell Widgco shares to anyone but Widgco; and (6) the redemption price to be paid Widgco was $20 per share.

Prior to Widgco’s incorporation, Art contracted to supply 10,000 widgets per year to Salesco. He signed the contract with Salesco, "Art, on behalf of Widgco." Bob and Cora knew of the widgets contract but never approved it.

Upon incorporation, the three shareholders elected themselves directors and officers of Widgco. The corporation flourished financially, in part because management found a buyer of widgets at a higher price than Salesco's and repudiated the Salesco contract before beginning performance.

Art has provided hundreds of hours of service to Widgco and has received his 1,000 shares of stock. Cora has paid for her shares at the price agreed upon in the pre-incorporation subscription agreement. Bob, however, has refused to pay for his shares, stating that he does not have the money but that he is willing to give the corporation an unsecured promissory note payable without interest at $2,000 a year.

Cora attempted to sell her shares to Dan for the $30 a share price offered by Dan, but Art has demanded that any sale be to Widgco at $20 a share. Cora thereupon refused to allow the corporation to take any action against Bob unless Art allowed her to sell her shares to Dan and threatened that, if Art persisted in his refusal, she would cause the dissolution of Widgco.

1. What, if any, are Salesco's rights and remedies? Discuss.

2. What, if any, are Widgco’s rights and remedies against Bob? Discuss.

3. What, if any, are Cora's rights and remedies? Discuss.
QUESTION #19

Graphic, Inc. (Graphic), is a California corporation that sells office copying equipment. Its Articles of incorporation prohibit Graphic’s sale of paper products. Graphic’s common stock is registered for trading on a stock exchange. Frank, Graphic’s president, recently signed a contract with Papco on behalf of Graphic to buy a paper mill owned by Papco. Frank intends to reveal the contract for the first time at a Board of Directors meeting next week.

Frank recently received a letter from Alice, who owns 9.2% of Graphic’s common stock. Alice has asked to “look at a list of Graphic’s shareholders and all contracts signed by Graphic in the past three months.” Frank directed the corporate secretary to write to Alice denying her request, which was done.

Graphic’s accountants advised Frank that Graphic will report a $5 million loss for its current fiscal year, which will be the only loss in its twenty year history. Frank then sold 100,000 shares of his Graphic common stock through his broker for $25 per share. The sale included 20,000 shares he had purchased two months ago by exercising a stock option at $22 per share.

Frank called a press conference at which he stated that “Graphic has signed a major contract and will have other news to announce after its Board of Directors meeting.” Alice heard about the press conference and purchased 5,000 additional shares of Graphic common stock at $28 per share through her broker. When the news of Graphic’s fiscal year loss became public, the price of Graphic stock declined to $20 per share.

Alice wishes (1) to compel Graphic to make available for her inspection the shareholders’ list and all contracts signed in the last three months, (2) to recover her loss on her recent stock purchase, (3) to force Frank to disgorge the profits on his stock sale, (4) and to have the Papco contract declared invalid.

What are Alice’s rights and remedies, if any, with regard to (1) through (4) above? Discuss.
ANSWERS TO SELECTED CORPORATIONS QUESTIONS

ANSWER TO QUESTION #1

The board is not required to follow the Gad resolution because the resolution regarding the use of corporate profits was not within the shareholders' power, and even if it was within the Gads' power it was adopted improperly and is not binding.

The meeting at which the resolution was passed was valid because there was a quorum. The majority needed to establish a quorum is one million and one of the two million outstanding shares. There were 16,001 shares present held by Char, Scripps, and Mr. and Mrs. Gad, but the facts also indicate Scripps held sufficient proxies to establish a quorum. Therefore, Scripp's participation was necessary in order to hold a valid meeting. However, when Scripps left the meeting he did not destroy the quorum. The general rule is that once a quorum has been established, it is not destroyed by a walkout of a group of shares, and the meeting may proceed even though the remaining shareholders do not constitute a quorum. Therefore, Char was not required to adjourn the meeting when Scripps left. Char may have had the right under the bylaws to unilaterally adjourn the meeting; however, it is probable he had no such unilateral right once the meeting was validly established.

Gad, as one of the two remaining shareholders at the meeting, had the right to vote despite the proxy he signed and delivered to Scripps. Gad had the power to revoke the proxy as long as it was not irrevocable. Here, the proxy was revocable because it was not coupled with an interest such as a loan agreement, a shareholder voting agreement, or an employment contract. Therefore, Gad's attendance at the meeting and his statement that he intended to vote his shares were sufficient actions to revoke the proxy.

The resolution Mr. and Mrs. Gad passed concerned the disposition of corporate profits. Generally, management of the corporation is vested in the board of directors which makes the basic policy decisions of the corporation. Therefore, an argument can be made that decisions about how profits should be spent should be within the board's discretion, and a resolution regarding profit expenditure is not within the powers of the shareholders. Thus, the Motive board is not required to follow the Gad resolution. However, if the Gads want to pursue the issue further, they should seek the election of directors who espouse the Gads' position at the next annual meeting.

Even if the court finds the Gads have a right to express their desires concerning corporate policy by resolution, the resolution was not adopted properly. A resolution of this type is binding only if it is adopted by a majority of shares present at a lawful meeting. In this case, the Gads' 1,001 votes probably fall far short of the required number.

ANSWER TO QUESTION #3

A. (1) Stock repurchase. Pat has a claim for relief only if the corporation lacked sufficient surplus, the corporation was insolvent or rendered insolvent by the repurchase, or the directors breached their fiduciary duty to the corporation. There are no facts which indicate whether the corporation had sufficient surplus or was solvent.

However, Pat will have a claim for relief if he can show the directors' goal in repurchasing the stock was not related to a proper business purpose and the directors thereby breached their fiduciary duties of due care and loyalty. For example, if the three shareholders were singled out for better treatment because of their relationship with board members, then the repurchase was improper. However, if the three shareholders planned to gain control of the corporation and loot it, then the directors acted reasonably in
buying them out to remove the threat. If the directors' action was reasonable, then setting a price between book value and market value was also reasonable to prevent a takeover by the minority shareholders. The court will look to whether the three shareholders are willing sellers, shareholders being squeezed out of the corporation, or corporate looters to determine if a breach of the directors' fiduciary duty has occurred.

(2) $5,000 annual payments. The payments to Bob for life represent corporate waste because the corporation is receiving no consideration in return, and the payments can be enjoined.

The payments do not constitute compensation because Bob no longer works for Ajax. If the payments were made to convince Bob to continue as an employee of Ajax, then there would be consideration. Here, however, the payments are a gift, and the board of directors has no power to give corporate funds to former employees. The corporate waste can be enjoined.

(3) Indemnification. Ajax must indemnify Curt only if he has successfully defended the case on the merits.

Indemnification of an officer is mandatory only when the officer is successful on the merits of the action. If the officer is unsuccessful, indemnification is discretionary where the officer proves he acted in good faith, in the best interests of the corporation, and in a non-negligent manner.

The facts in the present case are unclear as to whether Curt has already been found guilty under a corruption statute or whether a shareholder has brought a derivative suit on behalf of the corporation charging the officer with corruption. Even if Curt is liable to the corporation, he may still be indemnified if he acted in good faith. However, if the agreement merely promises to indemnify Curt if he is successful on the merits, the agreement is valid because it promises the protection from personal liability granted to Curt by law.

(4) Stock option plan. Compensation to officers and directors in the form of a stock option plan is permissible as long as the value of the plan is reasonable. Pat will have no claim for relief unless he can prove the value of the plan is excessive and constitutes corporate waste.

B. Pat has a right to have the 50 shares registered in his name because the stock transfer restriction is not binding on him.

A stock transfer restriction must appear on the stock certificate or a notation on the certificate must indicate where the shareholder may obtain the full text of the restriction. A purchaser of the stock who buys without notice of the restriction and in good faith takes free of the restriction. Here, Pat had no knowledge of the restrictive shareholders' agreement when he acquired the shares because the restriction was not noted on any Ajax stock certificates, including Pat's prior holdings. Therefore, Pat was a bona fide purchaser who is not bound by the restriction.

ANSWER TO QUESTION #4

A. Ames is liable to the corporation for $100 per share for the 10 "bonus shares." Bates is not liable to Dynamics for any amount provided the valuation of Blackacre at the time of transfer of the stock was not fraudulent.

In his subscription agreement, Ames contracted to buy 100 shares at $100 per share. He is bound by the agreement and may not receive 10 additional shares because he has offered no new consideration for the 10 shares. His stock is watered even though it is marked "fully paid" because it has been issued for a cash amount that is less than the value of the shares. Therefore, Ames must pay $100 per share for the additional shares or return the bonus shares to the corporation.
When property is exchanged for stock, the board places a cash value on the property so that full consideration is paid for the stock. Blackacre was worth $55,000 a year before Bates' purchase of stock, but the facts do not indicate the land's value at the time of the stock transfer. However, it is probable the value of the property increased, and unless the value placed on Blackacre was fraudulent, the value of the property equaled the value of the shares and Bates does not hold watered stock.

B. The distribution was improper because Dynamics had no retained earnings out of which to pay the dividend and the reevaluation of Blackacre was invalid under California law.

A corporation may declare and pay a dividend only out of retained earnings. Dividends may also be paid out if after payment the assets of the corporation are equal to at least 125% of its liabilities. Here, Dynamics had no retained earnings and attempted to reevaluate Blackacre so that the corporation's assets would outweigh its liabilities in the proper proportion. However, California, like the majority of states, does not permit reevaluation of corporate assets, and therefore the distribution was not proper.

C. The transaction with Carl was valid as long as the valuation of the land was not fraudulent and the directors entered the transaction for a legitimate business purpose.

The directors' action will be upheld unless they breached their fiduciary duty to the corporation. For example, if they singled out Carl for special treatment as a shareholder without a proper business purpose justifying the unequal treatment, they have acted improperly. However, it appears the transaction involved a legitimate business purpose because Carl owned land the corporation needed for expansion. Carl is not an officer or director of Dynamics, so no duty of loyalty is at issue. The exchange of stock for Greenacre was valid, provided full agreed consideration was paid.

D. Paul has a right to vote unless the proxy is coupled with an interest and is therefore irrevocable. There is no evidence the proxy Paul gave to Fox was given as part of the consideration for a loan, a shareholder voting agreement, an employment contract, or some other interest. Therefore, no consideration has been granted for the irrevocability of the proxy, and Paul may revoke the proxy and vote his shares.
ANSWER TO QUESTION #8

“Model Answer”

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law nor are the writer’s conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing essay. Also, another answer could have a totally different analysis and conclusions and still be considered an acceptable passing essay.

I. Paul’s possible federal securities laws violations

A. Rule 10b-5 violation

Bigco proposed a merger and buyout of Acme stock at $100 per share when its current selling price is $50 per share. Paul, Acme’s president, purchased 5000 shares of Acme stock at $50 a share prior to Acme’s merger with Bigco.

The board of directors and shareholders will bring an action against Paul asserting that he violated rule 10b-5 by engaging in insider trading practices. Rule 10b-5 makes it illegal for someone who owes a fiduciary duty to a corporation and possesses inside information about a corporation, to use that information to buy or sell a corporation’s stock. Paul is Acme’s president and therefore, as an officer of the corporation, he was clearly a person who owed Acme a fiduciary duty and thus must refrain from insider trading. Furthermore, Paul used information that a reasonable trader would want to know before buying or selling a stock. Any person who was thinking of buying or selling Acme stock would want to know that it would soon be purchased at $100 a share by Bigco, twice its current selling price. Paul will argue that he did not violate 10b-5 because he did not intend to harm the company. In order to be liable under 10b-5, a person must engage in the trade with the knowledge that he is doing something wrong. Paul will assert that he pursued the Acme-Bigco merger in good faith and disclosed the merger to the board of directors. Moreover, he will argue that he traded the stock before the merger was officially approved, so he did not know that the board would want to go through with the deal. If they hadn’t approved the merger, than he would not have made any money on the trade.

Paul will be unsuccessful in his arguments and liable for violation of Rule 10b-5, because under the rule, Paul must either abstain from trading or disclose the proposed merger to the board and the shareholders. Although Paul did eventually disclose the Bigco offer, he knowingly traded on the information prior to disclosing. Paul took advantage of the low $50 purchase price of Acme stock by purchasing it before the disclosure of the merger deal. Accordingly, Paul is in violation of Rule 10b-5 and in addition to any criminal penalties, will be forced to pay back his profits to the corporation.

B. Section 16(b) violation

On July 1, 2001, Paul purchased 5000 shares of Acme stock at $50/share. The Acme-Bigco merger was completed in December 2001 when all the shareholders received cash for their shares.
In addition to violating Rule 10b-5, the Acme board and shareholders will assert that Paul also violated Section 16(b) of the Securities and Exchange Act because he purchased company stock within 6 months of the merger transaction. Under 16(b), any corporate officer, director or shareholder of a publicly traded company owning 10% or more of the outstanding stock is strictly liable if he or she buys and sells or sells and buys company stock within 6 months of each transaction. In this case, Paul bought 5000 shares at $50 a share in July 2001. All the shareholders, including Paul, received cash for their shares prior to December 2001, five months after Paul made his purchase. Paul will argue that although intent is irrelevant and the transactions did take place within 6 months of each other, he would not be liable under 16(b) because this was an involuntary sale and involuntary sales are not included under rule 16(b). Paul will assert that he received cash for his stock due to the merger with Bigco and not due to a sale transaction, which he initiated.

Paul will prevail. Because he did not sell his shares but was given cash for them due to the merger and buyout, he is not liable under 16(b). A cash buyout due to a merger is considered an involuntary sale and therefore Paul would not be liable for accepting the money for the shares.

II. Paul’s breach of duties to Acme and Shareholders

A. Duty of Care

Paul, in good faith, and because he was concerned about Acme’s future pursued the merger with Bigco.

The corporation and shareholders will argue that Paul breached the duty of care owed to Acme because he did not act in the Company’s best interest. Generally, a corporate president must act as a reasonably prudent person and must act in good faith in what the officer honestly believe is in the corporation’s best interest. Acme and its shareholders will argue that Paul breached this duty owed by pursuing Bigco’s offer without making further inquiries as to why Bigco was offering such a high price for the shares. Bigco offered $100 per share when Acme never traded above $60 per share, and at the time, the market was depressed and Acme was in financial trouble. A reasonable prudent person would have realized that something was peculiar with the entire transaction. Paul will argue that he did not violate the duty of care because he thought he was acting in the Company’s best interests. He will rely on the protection of the business judgment rule which provides that when an officer or director acts in a way motivated by a good faith belief to act on behalf of the corporation’s best interests and that judgment turns out to be in error in hindsight, the officer/director will not be held liable.

Paul will lose and he likely will not be protected by the business judgment rule in this case. Even though he pursued the merger in good faith believing he was looking out for Acme’s best interest, the failure to inquire into the basis of the merger and the very high offering price was a violation of the duty of care.

B. Duty of Loyalty

Paul bought 5000 shares of Acme stock at $50 share prior to discussing the merger with the board. He knew that Sally from Bigco was offering $100 a share to buyout Acme.

Acme and its shareholders will argue that Paul breached his duty of loyalty to the corporation because he engaged in a transaction to his personal benefit. As an officer of Acme, Paul owes a duty of loyalty to the corporation and not promote his own interests in a manner that would injure the company. The duty of loyalty prohibits officers and directors from benefiting from a
corporate opportunity unless the corporation is first given the chance to pursue the opportunity. Paul spent $250,000 on Acme’s stock before disclosing the merger proposal to the board. Paul could not have acted impartially or unbiased in the merger discussions because by purchasing the stock prior to the meeting, he stood to realize a huge profit. Paul could argue that his purchasing the stock had nothing to do with whether the merger would take place and assert that it was a good corporate opportunity for all the board and shareholders involved and they all made a substantial profit on their stock.

Paul will lose. The facts are clear that he put his own interest ahead of the corporation’s interest by purchasing Acme stock prior to presenting the merger idea to the board. Therefore, Paul breached his duty of loyalty to the Acme board and its shareholders.

III. The Board’s breach of duties to Acme and Shareholders

A. Duty of Care

After Paul presented the merger proposal to the board, the board met and discussed the deal, and they voted to submit the proposed merger to a shareholder vote. The shareholders voted in favor of the deal because of the immediate profit they’d make on their shares. Thereafter, Bigco closed most of the Acme malls and sold the properties at a substantial profit.

The shareholders will argue that the board breached its duty of care to the corporation by failing to obtain a corporate valuation study of the proposed merger. Generally, the board of directors of a corporation must perform its duties in good faith and in a manner reasonably believed to be in the best interests of the corporation and with such care, as an ordinarily prudent person would use under similar circumstances. Acme is a publicly traded corporation that operates shopping malls, so the board members are presumed to be experienced, skilled and sophisticated in handling business and financial dealings. In this case they only relied on Paul’s recommendation and based its decision on price only. Had they obtained a valuation, the stock purchase price may have been substantially greater. The board will argue that it based its decisions on the recommendation of employees or other people with relevant information. Paul is the president of Acme and strongly encouraged the merger, so the board will argue that they rightfully relied on his recommendation. The board did discuss the price differences and determined that the profit made would be a great deal for the shareholders. If they had decided against the merger, then Acme’s financial situation would have hurt them more and they could have lost all their money. The board will contend that they are protected by the business judgment rule even if it was not the best deal in hindsight. As a final argument, the board could claim that since the shareholders approved the merger the board is not liable. However, the shareholders are permitted to rely on the board’s recommendation as they did here.

The shareholders will prevail. The board should have obtained a corporate valuation study done before approving the merger and recommending it to the shareholders. The reliance on Paul’s recommendation is no defense here because there are no facts indicating that Paul did any investigation regarding the merger proposal. The only basis of the decision was price and while this is important, more investigation would have been proper and that possibly would have revealed Bigco’s motive in the deal. Thus, the board breached its duty of care to the corporation and shareholders and is not protected by the business judgment rule.

B. Duty of Loyalty

The board of directors approved the merger and approved submitting the merger proposal to a shareholder vote.
The shareholders may argue that the Acme board also breached its duty of loyalty. The duty of officers, directors and employees requires that they be loyal to the corporation and not promote their own interests in a manner that would injure the corporation. Here, the board owes the same duty of loyalty that Paul, as president, owes. By recommending the merger to the shareholders, this duty of loyalty was breached. However, as the board would argue, there is no evidence in this situation of any interest on part of the directors. They were not promoting their own interests here, but were promoting the interests of the shareholders. The board was not taking advantage of a corporate opportunity ahead of the shareholders. By merely recommending the merger does not mean they breached a duty of loyalty because there is no indication here that the directors had any special interest in recommending the merger.

The board of directors will prevail. There is no indication that the board breached any duty of loyalty to the corporation because in recommending the merger, the board was not necessarily promoting their own interests.

**ANSWER TO QUESTION #9**

A. The court should deny the defendants' motion for security for costs because Paul's action is a direct action for which he is not required by statute to post bond.

State X law specifically requires plaintiffs in derivative actions to provide security for costs. Therefore, Paul is required to post bond if his complaint brings a derivative action. However, it appears that each of the claims in Paul's complaint states a direct cause of action, that is, each claim seeks to redress an injury suffered by Paul as a shareholder rather than an injury suffered by the corporation. The claim that the directors failed to pay a dividend is a direct action because the money at issue will be paid to the injured shareholder, not to the corporation. The claim that Paul was denied his right of inspection of corporate records is a direct action because the right is personal to Paul as a shareholder. The claim that the shareholder voting agreement is invalid is likewise a direct action because the agreement burdens Paul's personal voting rights. State X has no statute requiring the posting of a bond as security for costs in a direct action, and therefore the defendants' motion must be denied.

B. 1. Declaration of dividend. Generally, the board of directors has discretion to decide whether to declare a dividend. If the board has a legitimate business purpose in refusing to declare a dividend, for example, because available funds are being saved to expand the business, then the court will not compel a distribution. However, if the board abuses its discretion or refuses to declare a dividend in bad faith or based on fraud, the court will intervene. Here, the $5 million in accumulated earnings is strong evidence of an abuse of discretion; however, if the board can prove the accumulation is reasonable, the court will not intervene. For example, if the money is to be used for a major expansion of the business, no abuse of discretion has occurred. However, if the accumulation of earnings was solely for the benefit of Al as majority shareholder, that purpose was not a legitimate business purpose, and the court may compel a distribution. Similarly, if the purpose of the refusal to pay dividends was to harass Paul because he was considered a troublemaking shareholder, the court will intervene.

2. Validity of shareholder voting agreement. Shareholder agreements designed to ensure shareholders will vote as a block on specific issues are valid to the extent they are not fraudulent or otherwise illegal. One valid purpose of such an agreement is to ensure the election of specific directors. Therefore, the Durco shareholder agreement is valid to the extent it ensures Al's position on the board of directors. Paul could argue the shareholder agreement is in essence a director agreement because the shareholders who have made the agreement (Al, Baker, and Carr) are all directors of Durco. Such an agreement would be invalid; however, the corporation in this case is close (four shareholders), and it is probable that the agreement would be found valid as long as it was not merely a director agreement.
3. Right of inspection. The court will deny Paul's request to inspect corporate records only if Paul's purpose in obtaining the records is unrelated to the protection of his interests as a shareholder of the corporation. For example, if Paul sought the shareholder list so that he could sell it, his purpose in seeking inspection would be improper. However, it appears that Paul's intent was to explore the possibility of a derivative action, and his right to inspect records for that purpose cannot be denied. The defendants' argument that Paul intends to bring a "strike suit" fails because Paul's ownership of stock was contemporaneous with the alleged misconduct of the directors, and a strike suit involves a shareholder who buys a small portion of stock after the alleged misconduct and threatens a derivative action in order to settle privately with management.

**ANSWER TO QUESTION #10**

A. Andy breached his duty of loyalty to the corporation because he voted to protect his self-interest rather than the interests of the corporation.

If Rich bought the 100,000 shares, Andy's note would be repaid. Because of the high interest rate on the note, it was to Andy's advantage that the note remain unpaid. Therefore, when he voted against Rich's stock purchase, Andy made a corporate decision based on the consequences to himself rather than to the corporation. A director breaches his duty of loyalty when he promotes his own interests in a manner injurious to the corporation. Here, the other board members saw Rich's investment as an opportunity to pay the note and retire a corporate debt. Andy prevented the transaction and thereby breached his fiduciary duty as a director to vote for decisions which are just and reasonable for the corporation.

B. Andy cannot enjoin the merger of Corp and Endrun because the votes necessary to approve the merger exist.

The proper procedure for a merger is the adoption of a plan of merger by the board of directors of each corporation and shareholder approval of the plan. Here, a majority of the directors of Corp approve the merger, and Endrun directors are also in favor of the plan. As long as the statutory procedure is followed and the merger is fair to both corporations, Andy may not thwart the merger. However, Andy may have a dissenter's appraisal rights if he can prove his rights as a shareholder are adversely affected by the merger plan.

C. Andy cannot collect interest on the note because he breached his fiduciary duty of loyalty to the corporation when he bought the note, and he should be appointed constructive trustee of the note for the benefit of the corporation.

When Lender offered the discounted note to Andy, Andy had a duty to disclose the offer to the other board members because the offer was a business opportunity which belonged to Corp. Instead, Andy took advantage of the corporate opportunity for his personal benefit. The transaction was unfair to the corporation because the board members would have been interested in the discounted note if they had had knowledge of it, and Andy became aware of the opportunity while acting in his capacity as treasurer of Corp. If Andy had disclosed the opportunity and the other board members had rejected it, Andy could have entered the transaction without breaching his fiduciary duty. Here, however, he has usurped a corporate opportunity, and the remedy is to have the court designate Andy the constructive trustee of the note on behalf of Corp.

**ANSWER TO QUESTION #11**

A. The acquisition of the Durmac shares was proper because the unanimous vote by Ennis board members at the next regular meeting ratified the action taken at the special meeting.
The special meeting at which the stock purchase was initially approved was invalid because (1) there was not adequate notice to the directors, (2) there was no quorum, and (3) one director voted by proxy. Special meetings may be held only upon notice, and the meeting at issue was held without notice to three of the seven directors (although Webster's waiver of notice at the end of the meeting was valid). The Ennis bylaws provide that a quorum consists of five of the seven directors, but only four directors were in attendance. Finally, directors may not vote by proxy, and therefore Chester's exercise of the proxy given to him by Grabe was ineffective. However, a court would not invalidate the vote taken at the special meeting because the subsequent unanimous vote of the seven directors at the regular meeting cured the deficiencies of the first meeting.

B. The directors are not liable to Ennis for the decline in stock value unless they breached their duty of care to the corporation in buying the stock.

Applying the prudent person standard, a court would examine whether the directors acted in good faith and in a reasonable manner when they voted to make the stock purchase. If the directors were well-informed and relied on proper corporate information or advisers to make their decision, the directors have not breached their duty of care. Directors are not required to guarantee the success of every business transaction, but rather to exercise due care. Here, the facts do not indicate any reason for the decline in stock value, and there is no evidence that the directors breached their standard of care or made a bad faith error in business judgment.

C. Almon is liable to Ennis for profits he made on the Durmac shares because he usurped Ennis' corporate opportunity when he bought the stock.

As a director of Ennis, Almon had a duty to disclose the $42 per share offer to the other board members before purchasing the stock himself. The stock offer was a corporate opportunity because Ennis already owned a substantial interest in Durmac, had an expectancy of acquiring more shares, and had the financial capacity to buy the shares. It is unclear whether Almon learned of the offer through his position as a director of Ennis (the offer to Almon was made prior to the offer to Ennis), but if so he has breached his duty of loyalty to the corporation. In any case, Almon's failure to disclose the offer to the other board members so that the corporation could benefit from the offer was a breach of his fiduciary duty. Therefore, Almon may not benefit from his competition with the corporation, and his profits should go to the corporation.

**ANSWER TO QUESTION #12**

I. Rescission of Purchase of Yang Stock

A. Authority

1. Actual Authority

   The facts indicate that Art executed the contract relying on his authority as president of Exco. While there is no indication that he had been granted the express authority to enter into such transactions by the articles, bylaws, or any resolution of the board of directors, this act would still be within the scope of his actual authority, and thus binding on the corporation, if he had the implied authority to make this purchase.

   A corporate officer has the implied authority to do anything reasonably incident to carrying out his express authority; here, however, there is no indication that the nature of Art's responsibilities makes it necessary for him to have the power to make purchases of this type. Authority can also be implied from an officer's title. Ordinarily the president of a corporation has the implied authority to bind the corporation as to any transaction which is in the ordinary course of business.
The acquisition of another corporation, whether or not its business is related to the business of the acquiring corporation, does not appear to be within the ordinary course of business. This is especially true in this case since the purchase required an immediate cash outlay equal to 10% of the total assets of Exco. Thus, unless there is evidence that corporations such as Exco routinely allow their presidents to make purchases of this type, the corporation was not initially bound by the contract signed by Art.

2. **Apparent Authority**

Even if Art lacked the actual authority to bind Exco in this case, the purchase might be binding on the corporation if Art had the apparent authority to do so. Apparent authority exists whenever the corporation holds an officer out as having specific powers and the third party reasonably relies on this holding out in good faith. Here, the facts are devoid of any act by Exco which would create the appearance that Art could act in this manner, and the close relationship between Art and the owners of Yang make it unlikely that they will be held to have acted in good faith.

3. **Informal Discussions Among Directors**

The former owners of Yang would argue that Art's act was either ratified or authorized by the informal discussions between Art, Bob, Curt, and Don. While it is true that these four individuals comprised a majority of the directors of Exco, the board of directors can act only if they act at a proper meeting or there is unanimous written consent to the action.

The facts reveal that Art discussed the acquisition with the other directors "individually," which indicates that these communications did not take place within the confines of a proper meeting. Even if they were all together at the same time, this could not be construed as a valid "special meeting" because, while there was a quorum present, no advance notice of this meeting was given to all seven directors. Furthermore, there is no evidence that any, let alone all, of the directors gave Art written approval to buy Yang's stock. Thus, these discussions did not confer authority on Art nor could they be construed as a valid ratification of his conduct.

4. **Acquiescence at Board Meeting**

An unauthorized act may be ratified by implication when the corporation accepts the benefits of the transaction with knowledge of the essential terms. Even though there was no vote on the matter, the board of directors did not seek to upset the purchase of Yang and the corporation apparently accepted the benefits of the acquisition. The problem is that while the general terms of the agreement were discussed, there was no disclosure of the relationship between Art and the owners of Yang.

While there is a general presumption that anything known by one director is known by them all, this presumption is rebuttable. Due to his conflict of interest, Art's knowledge would not be imputed to the other directors and the facts indicate that Bob did not disclose the relationship either. Furthermore, the fact that the identity of the owners could have been easily discovered is not enough to impute knowledge of this information.

The identity of the former owners of Yang would probably be deemed an essential fact because reasonable directors would most likely have looked at the matter more closely had they known that Art had arranged a purchase from his own relatives. Thus, there was no implied ratification at this meeting due to the lack of knowledge of this material fact.

B. **Interested Director Contract**

Alternatively, rescission may be sought due to Art's obvious conflict of interest. While Art was not an officer, director, or significant shareholder of Yang, members of his immediate family owned that
corporation. Consequently, it would seem appropriate to analyze the matter as if Art was an interested director.

Historically, when a corporation entered into a contract with another business in which one of its directors was interested, it could disaffirm the contract solely because of that interest. Under modern statutes, however, the common law presumption of voidability disappears when the interested director can prove any one of three things: (1) full and fair disclosure to the directors and valid approval by the board, (2) full and fair disclosure to the shareholders and valid approval by a majority of the shares present at a lawful meeting, or (3) that the contract was fair and reasonable to the corporation.

Here, there was no disclosure to the board of Art's relationship to the owners of Yang, nor any approval by the board. Furthermore, there was no attempt to obtain shareholder approval. Thus the contract was voidable unless the contract was fair. While the facts do not directly indicate that the price paid for Yang was unreasonable, the fact that the company was "consistently and increasingly unprofitable" since it was acquired by Exco is strong evidence that the contract was not fair and reasonable to Exco.

Furthermore, fairness does not render the contract valid, but it merely avoids the common law rule that the contract is voidable solely because of the director's interest. As will be discussed below, Art appears to have acted in bad faith. If this is so, the purchase of Yang is subject to rescission due to Art's breach of his duty of loyalty.

II. Liabilities of Art, Bob, Curt, and Don

A. Liability of Art

Subject to the business judgment rule, an officer or director is liable to his corporation for any loss that is causally related to his breach of the fiduciary duties of loyalty (or good faith) and due care.

A director breaches his duty of loyalty when he places his personal interest ahead of his corporate obligations. While there is no direct evidence as to Art's subjective state of mind, his failure to disclose his close relationship to the owners of Yang and the subsequent losses suffered by that corporation immediately after Exco's purchase would probably lead the court to conclude that Art had acted in bad faith.

Art may also have breached his duty of due care by failing to exercise the degree of care, skill and diligence of a reasonable director. Under the business judgment rule, Art would not be liable simply because he made an erroneous judgment, so long as his decision was arrived at through the exercise of reasonable care. Here, however, one might be able to presume that Art's relationship to Yang's owners resulted in a failure to make an appropriate investigation of the facts. Thus, there is a good chance that he will be found to have breached his duty of due care as well.

B. Liability of Bob

There is no indication that Bob breached his duty of loyalty, as defined above. He may, however, have acted unreasonably and thus breached his duty of due care.

Bob failed to reveal the relationship between Art and the owners of Yang to the other directors. Even though Art was obligated to make this disclosure, it was sufficiently foreseeable that he would not, so the court should find that Bob acted unreasonably in keeping silent.

In addition, there is no evidence that Bob properly investigated the proposed purchase before giving his approval. While a director is generally entitled to rely upon data supplied by corporate employees such as Art, this is not the case when the director has reason to question the accuracy of that information. Given
Bob's knowledge of Art's relationship to the owners of Yang, it was not reasonable for him to base a
decision on a purchase of this size solely upon his discussions with Art.

C. Liability of Curt and Don

There is no indication that Curt or Don breached their duty of loyalty, but they too may have breached
their duty of due care.

Curt and Don failed to discover the identity of the former owners of Yang even though they could
have done so by simply looking at Yang's corporate records (which would now be in the possession of
Exco). It is not clear that their failure to do so was unreasonable, however, and, in any case, such an
investigation might not have revealed the relationship between them and Art (especially if they had
different surnames).

ANSWER TO QUESTION #13

1. A. It does not appear that the action of the directors in increasing the size of the board violates
the corporation's articles, since the articles only state that the "initial" number of directors shall be five.
Therefore, the only issue is whether the directors may amend the by-laws to increase the number of
directors without shareholder approval.

As a general rule, the power to alter the bylaws, subject to repeal or modification by the shareholders,
is vested in the board of directors, unless the articles specifically reserve the power to the shareholders.
Here, the articles do not reserve the power. Therefore, the directors can increase the number of directors
without shareholder approval.

B. Dixie's Articles of Incorporation provide for annual election of directors. Staggered terms
means that not all directors would be elected annually; requiring staggered terms thus constitutes a change
in the articles. Since, shareholder approval is required before the articles may be amended, the directors'
decision was not lawful.

In addition, the Board's vote to stagger the terms may violate the directors' fiduciary duties. In
general, a corporation's directors must perform their duties in good faith and in a manner reasonably
believed to be in the best interests of the corporation (the duty of loyalty) and with such care as an
ordinarily prudent person in a like position would use under similar circumstances (the duty of due care).
Here, if the directors moved to stagger the terms in order to protect their jobs and not to protect Dixie from
a takeover, they may have violated their duty of loyalty and would be liable accordingly to the corporation.

C. As a general rule, special meetings of the shareholders may be called by the president or the
directors, or upon the written application of the holders of 10% of the shares entitled to vote. Here, Stan
owned 29% of Dixie's voting stock, thereby passing the 10% threshold. Therefore, Stan had the authority
to call a special meeting.

However, the right to call the shareholder meeting depends on the purpose(s) of the meeting.
Selecting directors is an appropriate purpose for shareholder action. Furthermore, the hostile takeover
threatens shareholders as well as directors. Therefore, shareholders have the right to call a meeting about
the selection of the directors.

Removal of the president, however, is a different matter. The Board has the exclusive authority to
select and remove corporate officers and agents, as such selection and removal are matters of everyday
business management. Although the selection and removal of officers is a matter of shareholder concern, it
is not a matter within their authority. Therefore, shareholders have no right to call a meeting to remove the
president.
For these reasons, the Board's refusal to grant the shareholder request for a special meeting was unlawful. Even though one of the asserted purposes did not give the shareholders a right to a meeting, the other proper purpose did.

D. Although shareholders have the power to select the directors, the board has the power to fill all vacancies that arise, subject to the shareholders' right to replace the temporary appointees at the annual meeting. Assuming that the Board increased its numbers properly, it could fill the vacancies.

The directors may have violated their fiduciary duties (defined above) by filling the new board positions with close personal friends. Here, although the close personal friendships make the selection suspect, the business experience of those selected would probably override any implication that the directors breached the duties of loyalty or due care.

Thus, the Board had the authority to fill vacancies, if only temporarily, and filled them properly. The Board's action was lawful.

2. First, the shareholder chose the proper action. Whereas a shareholder must sue on his own behalf in a direct action to redress his interest as a shareholder, he must sue on behalf of the corporation in a derivative action to redress a wrong to the corporation when the corporation fails to enforce its right. The Board's transactions may have deprived shareholder of expected profits, interest, or dividends, but such injuries are not usually redressed in direct action, but would be appropriate for a derivative action.

In order to bring a derivative action, a shareholder must satisfy certain conditions precedent - (1) the shareholder must be a contemporaneous owner of shares in the corporation, (2) he must make a demand upon the directors to enforce the corporation's right, and (3) in some jurisdictions, the shareholder may be required to make a demand upon the corporate shareholders.

In order to satisfy the contemporaneous ownership requirement, the plaintiff must have been a shareholder at the time of the transactions complained of, or must have received the shares thereafter by operation of law from a person who held the shares at the time of the transactions complained of. Although Stan owned 29% of the shares, we don't know how or when he came into ownership.

Here, there is no indication that Stan made such a demand or properly alleged, in particularized pleadings, that a demand would be futile. Furthermore, even if there was a proper allegation of futility (after all, a majority of the current board is responsible for all of the acts complained of), a demand is still required under the modern view if there is then, or the corporation later establishes, a "special litigation" committee comprised of disinterested persons.

Stan would be expected to attack the independence of the litigation committee; if he can succeed on this issue, the decision of the committee is of no legal consequence. Stan might first argue that the committee is not disinterested because its members were appointed by the defendants, their "close friends." The courts generally hold, however, that such facts do not, by themselves, render the committee incapable of rendering a fair decision. Stan could also argue that this committee is not independent because they would be putting themselves out of office if they were to find that the expansion of the board and/or the filling of the new positions was improper. This argument is quite strong on its face, although the fact that the board actually did have the authority to increase the number of directors and fill the new openings may destroy it.

If the committee is found to be disinterested, the issue is whether their finding that the suit would not be in Dixie's best interests would bar Stan's action. While there is authority to the contrary, the majority view is that the decision of such a committee is given the same weight as a decision of the full board - a refusal of the demand bars the derivative action unless the plaintiff can show that the committee's decision
violated the Business Judgment Rule (i.e., it was made in bad faith or resulted from a failure to exercise reasonable care in the decision-making process). If Stan can convince the court that the committee rejected his claims merely to protect their friends or keep their own jobs (i.e., they breached their duty of loyalty), he will win on this issue. Otherwise, he would have to prove that the committee failed to make a proper inquiry before reaching its decision (i.e., it failed to exercise reasonable care before rendering its opinion).

Finally, many jurisdictions allow a plaintiff to proceed with a derivative action only if a demand is first made on the shareholders (unless such a demand would be futile, as when the proposed suit is against a controlling shareholder). There is no indication that a demand would be futile here, and thus Stan's action could not proceed in these jurisdictions unless one of the special exceptions to the demand-on-shareholders rule applies. The rule that excuses a demand on the shareholders when the act complained of was fraudulent or non-ratifiable might apply, but this is questionable. The only other excuse, that it would be unduly expensive or time consuming to seek shareholder approval or disapproval, is neither supported nor refuted by the facts given, so this issue cannot be definitively resolved.

ANSWER TO QUESTION #14

There are four transactions which give rise to possible actions by Sol: (a) the contract with Buildco, (b) the refusal to give Sol a list of shareholders, (c) the huge loss suffered by the corporation, and (d) the sale of Chare's stock. Insofar as the request for the shareholder list is concerned, Chare's refusal affected Sol's personal rights and the injury would be redressed by a direct action; thus, the discussion of that issue falls within the ambit of Part I (as delineated by the question). As to the other three matters, the damage, if any, is to the corporation and any harm to the shareholders is only indirect; as such, the injuries would be vindicated by a derivative action and will be discussed in Part 2.

I. Chare's Liability to Sol

While statues differ as to their specific provisions, shareholders are usually given relatively free access to non-confidential corporate information. Indeed, in many jurisdictions, access to basic information can never be denied, at least when the person seeking inspection owns a large share of the corporation's stock (and here, Sol owns 50,000 shares).

Assuming that Sol is not given an absolute right to a copy of the shareholder list by the relevant corporate statute, Sol would have a common law right to the list if he had a proper purpose and he can make an appropriate showing of need. A proper purpose is found whenever a shareholder's reason for inspecting corporate records is related to the business of the corporation. A desire to communicate with fellow shareholders of Martco, and to solicit their proxies, is certainly related to Martco's business. Furthermore, Sol would not be able to communicate with the other shareholders without this list and the information contained therein is not so confidential that there is any substantial risk of injury to the corporation if the list is provided to Sol. Thus, there was no justification for refusing to provide the list.

In addition, the fiduciary duties of due care and loyalty (or good faith) limit the conduct of all corporate directors (such as Chare). While there is no indication that Chare breached his duty of due care by failing to exercise the degree of care, skill and diligence of a reasonable director when he refused to give Sol the list, we are told that his refusal was motivated by a fear that Sol would successfully challenge Chare's leadership. A director breaches his duty of loyalty when he places his personal interests ahead of his corporate obligations. Since there is no indication that Sol had threatened to alter fundamental corporate policies or that he was a corporate looter who would injure the corporation, his challenge to Chare should succeed since it appears that Chare acted in bad faith when he refused Sol's request.

The normal remedy for an improper refusal to allow inspection of corporation records is an injunction requiring the corporation to provide the requested information; here, however, it is unlikely that Sol would want this remedy (or that it would be available given the substantial amount of time that has elapsed i.e.,
the defense of laches would bar the equitable remedy of injunction). Similarly, a court of competent jurisdiction might be empowered to order that the next shareholder meeting be postponed or, perhaps, that an already held meeting be declared void or that a new meeting be called, but the passage of time here makes these remedies unavailable. Finally, the aggrieved shareholder is entitled to money damages (plus, in some jurisdictions, a penalty assessment). While this is the remedy that Sol is no doubt seeking, it would be difficult to place a dollar value on having a seat on the board and thus Sol might recover nothing more than nominal damages even if he can prove that he would have obtained Waters' proxy and elected himself to Martco's board.

II. Sol's Derivative Action

A. Contract with Buildco

1. Standing

The call of the question and the facts presented do not appear to invite a full discussion of the procedural aspects of Sol's derivative action (such as demand on the directors and/or the shareholders and bond for litigation expenses). The facts do imply, however, that Sol did not own any Martco stock at the time of the Buildco contract.

Ordinarily, the contemporaneous ownership rule prohibits a derivative action unless the plaintiff owned stock in the corporation at the time of the wrong complained of. This rule does not apply, however, when the plaintiff became a shareholder through operation of law. Here, Sol has standing to bring a derivative action complaining about the contract because he had inherited his stock (the classic example of acquiring ownership by operation of law) from Ida, who was a contemporaneous owner.

2. Damages from Chare

a. Duty of Loyalty

The duty of loyalty, as defined above, is breached only if a fiduciary subjectively acts in bad faith. Here, the facts indicate that Chare believed that this contract was fair, and therefore, as a technical matter, he did not breach this duty. As a practical matter, however, the fact that the contract was unfair might lead the fact-finder to conclude that Chare had acted in bad faith.

b. Duty of Due Care and the Business Judgment Rule

Even if Chare honestly thought that the contract was fair to Martco, he could be liable for the losses suffered by Martco on account of the unfair contract if he had breached his duty of due care. Under the business judgment rule, Chare would not be liable simply because he made an erroneous judgment, so long as his decision was arrived at through the exercise of reasonable care.

Given the fact that Chare sits on the board of a construction company, he would be held to a higher standard than the other directors of Martco when it comes to evaluating the propriety of the Buildco contract. Nevertheless, there is no indication that he failed to make an appropriate investigation of the facts before arriving at his conclusion that the contract was fair; thus, he did not breach his duty of due care.

c. Causation

Even if Chare is found to have breached one or both of his fiduciary duties with regard to the Buildco contract, he would be liable to the corporation only if his breach was causally related to the loss. Unless it can be shown that the other directors relied on Chare's opinion when making their own decisions to vote for
the contract, Chare's vote would not be a but-for cause of Martco's loss because the contract was approved without Chare's vote.

3. Rescission

Sol could conceivably try to rescind the contract with Buildco due to Chare's interest in both corporations. Historically, when corporations, which had a common director contracted with each other, either company could disaffirm the contract because there was a presumed conflict of interest. However, a discussion of this possibility seems to be outside the scope of the Bar Examiners' specific interrogatory, and, given the fact that the contract has probably been fully performed by both sides (and restitution would be impossible), it is extremely unlikely that rescission would be granted at this late date.

B. Losses Suffered by Martco

It is conceivable that the dramatic business losses suffered by Martco were caused by the misconduct of Chare. There are no facts here that indicate any breach of loyalty or due care that would not be protected by the business judgment rule, however.

C. Sale of Stock by Chare

According to the famous New York case of Diamond v. Oreamuno, when a corporate officer or director uses confidential information about his corporation when he trades in the company's stock, any profit must be disgorged to the corporation. The profit to be disgorged is the difference between the price at which the insider sold (or bought) and its fair value at that time (which is presumed to be the market price after the market has had an opportunity to react to the disclosure).

Here, as in Diamond, Chare sold his stock just prior to the public announcement of information which he knew would result in a drop in the value of the corporation's shares. Therefore, he must turn over the difference between $25 per share (the sale price) and $10 per share (the stock's "fair" price at that time) times 100,000 shares (a total of $1,500,000).

ANSWER TO QUESTION #15

1. Polly's Attempt to Compel Payment of Dividend

Polly is suing Dan and the directors in her individual capacity as a shareholder, and not derivatively for the corporation, because she will benefit primarily if her suit succeeds.

In general, the directors of a corporation are responsible for overall management of the corporation and for setting the major policies. Although shareholders must participate and assent to fundamental corporate changes, declarations of dividends are not fundamental changes, and are considered in the full discretion of the directors to decide to declare and pay them. In general, courts grant directors broad discretion in deciding when and if to declare dividends, since the directors are in the best position to determine corporate policies in the best interest of the corporation.

Therefore, Polly has a strong burden to overcome to convince a court to compel corporate directors to pay dividends. Courts will, however, order directors to declare dividends if the plaintiff can prove that the directors have been benefiting themselves at the expense of the shareholders by paying themselves bonuses or conferring upon themselves benefits out of retained earnings while not paying dividends to shareholders.

Polly will argue that Exco has made enormous profits (50% of gross sales annually for several years), has accumulated substantial retained earnings, yet has not shared or distributed any of these earnings to shareholders. If Polly can also prove that Dan and other directors have been benefiting themselves through those retained earnings, a court might compel dividends to be paid.
Dan will argue that there is a good faith rationale behind Exco's decisions not to pay dividends. It is the directors' judgment that large retained earnings will increase the value of the company to other companies looking to purchase it. If another company does buy Exco, then all shareholders will benefit, not just the directors. Furthermore, as a 10% shareholder, Dan may also argue he has no incentive to decrease the value of his shares.

Polly's attempt to compel the directors to pay dividends is unlikely to succeed, because the directors' decision is based on a seemingly rational judgment that is intended to benefit all shareholders, not just the directors themselves.

2. Can Exco Lawfully Indemnify the Directors?

A corporation can indemnify directors against litigation costs and judgments arising from the director's duties as director. There are situations in which indemnification is prohibited; others in which it is mandatory; and still others in which it is permissive.

**Prohibited Indemnification**

A corporation cannot indemnify its directors where the directors have either been held liable to the corporation or are liable for receiving an improper personal benefit. If Polly succeeds in her claim to compel the directors to pay dividends, and further, the court finds that Dan and the others have improperly benefited, then Exco could not indemnify their legal costs and judgments.

**Mandatory Indemnification**

Exco must indemnify the directors if the case ends with a favorable judgment for the directors. Therefore, if Polly's suit to compel fails (which is highly probable), Exco must indemnify Dan and the other directors for all expenses incurred in defending against Polly's action.

**Permissive Indemnification**

Finally, Exco may legally indemnify the directors if neither of the above circumstances apply, but the directors have acted in good faith and in a way they believe is in the best interests of the corporation.

For example, if Exco ultimately settles Polly's claim against them, then Exco may indemnify the directors for their legal costs, as long as the decision to indemnify was made by a majority of the disinterested directors, disinterested shares, or by an independent legal counsel.

Therefore, Exco may lawfully indemnify in this instance where a majority of disinterested shares or independent legal counsel so decides, since Polly brought suit against all directors.

3. Liability to Polly for Dan's Statement

Polly could bring suit against Dan for his statements reported in the *Stock Market Report* either directly as an Exco shareholder or derivatively for the benefit of the corporation.

**Polly's Direct Suit**

Polly's direct suits against Dan could take several forms: state securities laws, federal securities laws, or state corporations (common) law.

In a state securities law cause of action, Polly could sue Dan for either misrepresentation or nondisclosure of special facts. Misrepresentation consists of a misrepresentation of fact by the defendant
about which the defendant was aware, for the purpose of inducing action or inaction on the part of the plaintiff, justifiable reliance by the plaintiff upon the defendant's misrepresentation, and damages.

Polly can prove that Dan misrepresented facts about Exco's negotiations with Morcorp. However, at common law, Dan must have made the misrepresentation to Polly because privity is a required element. Furthermore, Polly must show that she justifiably relied to her detriment.

Since no privity between Dan and Polly exists, Polly's claim of misrepresentation will fail.

As to nondisclosure of special facts, corporate insiders have a duty to disclose all facts which would be important to a reasonable investor in their investment decision when dealing with them. Again, however, no privity exists since there was no sale of securities from Dan to Polly, and Polly's claim will fail.

Polly can make a successful federal securities claim under 10-b-5 claim if she can prove that Dan made a misrepresentation of material fact through an instrumentality of interstate commerce, in connection with a purchase or sale of a security, and there was reliance that led to damages.

Polly's action will succeed or fail on her federal claim depending upon whether or not she bought or sold securities "in connection with" Dan's misrepresentation of material fact. Since merger negotiations are material, the best argument for Polly would be that she traded on this information. If so, she is probably going to prevail on this claim.

Polly may also have a claim under the common law. In order to recover under common law fraud, she must establish (1) material misstatement of fact; (2) made with scienter; (3) made with the intent of inducing reliance; (4) actual reliance; and (5) justifiable reliance.

Dan told the paper that there "are no pending discussions regarding the sale or merger of Exco." However, Dan had actually started negotiations with the officers of Morcorp to sell Exco to Morcorp and hoped to "close the deal" quickly. The misstatement to the paper was material as a reasonably prudent investor, including Polly, would consider this information important. For instance, Polly would not sell her stock if she had notice of the pending sale. Dan's statement to the paper would bar this option.

Dan made the statement to the paper intentionally, thereby fulfilling the scienter requirement.

Dan made the statement to the paper in order to ensure that the current value of Exco was not reduced to insure sale at the highest price. Furthermore, Dan did not want current shareholders going out and selling their stock at a reduced value because it might interfere with the current valuations of Exco. Thus, statements were made to induce reliance.

Polly must establish that she actually relied on the statements in the newspaper. There are no facts to indicate actual reliance, however. Polly must show that she choose not to sell her stock based on the statement in the paper. Polly's reliance is likely to be reasonable as it was in the Stock Market Times, a nationwide financial newspaper which is arguably established.

Polly's Recovery

Polly would be entitled to the actual loss she suffered as a result of the misrepresentation or the reasonable value of her stock prior misrepresentation minus value after misrepresentation.

4. Directors' Responsibilities
Directors of a corporation owe the corporation the fiduciary duties of care and loyalty. It is necessary to analyze each to determine whether Dan and the Exco directors have fulfilled their responsibilities to Exco in the expedited merger negotiations.

A director owes the corporation a duty of care. The director must act as a prudent person, with reasonable care and skill, as he would in the management of his own business. If a director acts unreasonably and causes the corporation losses due to this unreasonableness, the director will be liable to the corporation.

Where business decisions and judgments are grounds for a director's liability under the duty of care, a director has fulfilled his duties by using his best business judgment, including using reasonable diligence, inquiry, and investigation.

Therefore to fulfill their duty of care to Exco, the directors must use their best business judgment. Simply because the transaction may be expedited does not necessarily mean the directors are acting unreasonably.

Dan and the directors must do the necessary due diligence to insure that the merger with Morcorp is in the best interests of Exco.

Dan's failure to submit the proposal to the Exco shareholders is not a breach, because Dan does not need to get shareholder approval until the merger negotiations have been completed and the directors of Exco pass a resolution of merger.

Finally, Dan's failure to get outside consulting can be a factor only if Dan and others at Exco have not fully analyzed the deal. A director owes the corporation a duty of loyalty, to act in good faith and to the best interests of the corporation. The facts do not indicate that Dan has acted in bad faith in his decision to merge with Morcorp. As long as the directors continue to act in good faith and refrain from self-dealing or usurping corporate opportunities they will fulfill their duty of loyalty to Exco.

**ANSWER TO QUESTION #16**

1) Sally

Rule 16. Sally has violated federal law on short term trading by corporate insiders. SEC Rule 16 applies any time a stock is sold at a higher price than it was purchased for within a six month period by an officer, director or 10% shareholder, if the stock is traded on a national exchange or meets certain other requirements.

Sally is an officer of ChipCo, whose stock is traded on a national stock exchange. She purchased stock on March 16 at $10 a share, and sold the stock on September 5 (within 6 months of the purchase) at $20 per share. She must disgorge the $10 per share profits from this sale.

Rule 10b-5. Sally probably also violated Rule 10b-5, which requires that corporate insiders either refrain from trading or disclose material nonpublic information in connection with buying or selling stock by means of an instrumentality of interstate commerce.

Here Sally knew about the development of the new technology and knew that a reasonable investor would find that information material. She, therefore, had a duty either to disclose the information or refrain from trading. She breached that duty when she purchased the stock. She used the telephone, an instrumentality of interstate commerce, to call her broker. Thus, she violated Rule 10b-5.

2) Laura
Rule 16. Laura’s purchase and sale of stock within a six month period also violated Rule 16 as discussed above. Laura was a 12% shareholder before she purchased the additional stock on March 16, so the rule applies to her. As mentioned above, ChipCo trades on a national stock exchange. Because Laura bought stock at a lower price than she sold it for within six months, she violated Rule 16. However, she is not required to disgorge the profits on the shares that she owned prior to March 16.

Rule 10b-5. Laura is also probably liable for violation of Rule 10b-5 on two grounds. First, Laura owed a fiduciary duty to the corporation as a corporate insider and was under a duty not to trade on inside information. Because she knew the information she learned in the conference call was material and was still confidential, she could not buy additional stock. Laura used an instrumentality of commerce when she made the telephone call to her broker. Therefore, she violated Rule 10b-5.

Laura may also have violated 10b-5 in disclosing to Arnold that ChipCo had developed new technology. “Tippers” are liable under 10b-5 when they have a fiduciary duty to a corporation that they breach by disclosing material information to a third party to use for an improper purpose. As an attorney for ChipCo, Laura had a fiduciary duty to the corporation. She breached that duty by disclosing material information (one a reasonable investor would deem important) to Arnold. It is unclear whether her purpose was improper; courts typically look to see if the “tipper” received some benefit in making the tip. The benefit need not be pecuniary, and it might be argued that Laura benefited by receiving the esteem of a fellow attorney or might have been seeking either reciprocal treatment, or else special consideration in the case in which she was dealing with Arnold. In any case, Arnold relied on her tip and bought some of ChipCo’s stock. Therefore, if the court thinks that Laura gave the tip for an improper purpose, she violated 10b-5 in this second respect as well.

3) Arnold.

Arnold might be subject to 10b-5 liability as a “tippee.” Tippees violate Rule 10b-5 when they receive a tip from a person who owes a fiduciary duty to the issuing corporation, knowing that the tipper has breached a fiduciary duty, and the tippee subsequently buys or sells the stock in reliance on the tip. Here Arnold received the tip from Laura, who was in a fiduciary relationship with ChipCo. Arnold probably knew that the tip was a breach of fiduciary duty: he knew that Laura was ChipCo’s attorney, and he is himself an attorney and must be familiar with what is required in the way of fiduciary duties. Finally, relying on the improper tip, he purchased some of ChipCo’s stock. Again, he used the phone, an instrumentality of interstate commerce, to call his broker. However, Arnold cannot be held to have violated Rule 10b-5 unless Laura also did so; that is, there can be no tippee liability without a tipper, so all the elements of Laura’s liability must be satisfied first.

4) ChipCo.

ChipCo may have violated Rule 10b-5 by issuing the press release. Rule 10b-5 prohibits fraudulent misrepresentations in connection with buying or selling stock using an instrumentality of interstate commerce. The misrepresentation must be material.

Fraudulent Material Misrepresentation. In this case, the news release may or may not have been fraudulent. It merely says that “ChipCo has not developed commercially viable technology.” In a strict sense, this is true, since the facts state that Sally knew it was not commercially viable at the time, and the technology did not pass viability tests until several months later. However, a court might find that ChipCo intended to mislead the general public in making the statement. The misrepresentation was obviously material and relied upon since after the announcement, the price of the stock dropped.
Buying or Selling Stock. ChipCo was actively acquiring its own stock, knowing that the technology would soon be released. Its statement led to stockholders selling ChipCo stock, so this element has been satisfied as well.

Use of Instrumentality of Interstate Commerce. Finally, since ChipCo is traded on a national exchange and the public announcement probably went nationwide by various interstate means, an instrumentality of interstate commerce was involved. Therefore, ChipCo has in all likelihood violated Rule 10b-5.

ANSWER TO QUESTION #17

Pat may sue all these parties on behalf of Buildco in a derivative action. A shareholder may bring a derivative suit on behalf of the corporation if he owned shares at the time the claim arose and the claim is one for which the corporation could sue. In the derivative suit, Pat should sue to rescind the agreement with Sellco because Buildco is not making a profit under it. Pat may also bring a direct personal action against Sellco and the other parties because his damages are different from those of the majority shareholder, Sellco, and if Pat sued for lost profit damages on behalf of all the shareholders, the majority of the recovery would inure back to Sellco as the majority shareholder.

Pat v. Sellco

As noted above, Pat can sue Sellco for rescission in a derivative action and for damages in his individual capacity. Although generally the majority shareholder in a corporation does not have a fiduciary duty toward the minority, a court today may find such a duty in a close corporation such as Buildco. Sellco and Pat are the only shareholders of Sellco, and Sellco has damaged Pat’s interest in Buildco while taking a healthy profit for itself under an insider transaction. This is a case of breach of the duty of fairness and loyalty. The transaction may also be void if not properly authorized, and it appears that it was approved by only one disinterested director.

Pat v. Adam

Adam owes fiduciary duties of care and loyalty to Pat and to Buildco as a director of Buildco. The duty of loyalty requires that he put the interests of Buildco above his personal interests. Due to his ownership interest in Sellco, Adam has apparently violated the interested director rules by engaging in an insider transaction with Buildco without fully disclosing the nature of his interest and the facts of the transaction to the rest of the board. He should have recused himself from the vote but apparently did not; any director who votes for the wrongful transaction can be liable and the transaction may be voided if not approved by the requisite percentage of disinterested directors. Adam joined in the vote rather than stepping aside with full disclosure to allow the other directors to make an informed decision. Pat can recover from Adam for breach of the duty of loyalty.

Pat v. Betty

Betty was also a director of Buildco and thereby owed Pat the same fiduciary duties as Adam. She violated the duty of loyalty in the same manner as Adam because as his wife, she shares his financial interest in the transaction. Even if she had no knowledge of the inner workings of the arrangement, she should have abstained from the vote.

By taking Adam’s word that the arrangement made sense, without doing any further investigation or requesting to see projected income or other benefits to Buildco from the arrangement, Betty violated the duty of care regardless of her interest in the transaction. Pat can recover from Betty for breach of the duties of loyalty and care.
Pat v. Evan

Because Evan had no personal interest in the Sellco-Buildco arrangement, he will not be liable for breach of the duty of loyalty. However, Evan violated the duty of care of a director by not investigating the transaction before approving it. He failed to act with the care with which a reasonably prudent person would attend to his own business affairs and thus will be liable for damages.

The business judgment rule protects a director from the effects of poor judgment in hindsight, so long as the decision was made carefully and fairly, in the best interests of the corporation as reasonably perceived at the time the transaction was approved. A failure to perform routine investigation, however, will constitute a violation of the duty of care that cannot be excused under the business judgment rule.
Note, that starting with July 2007 exam, the scope of the Evidence subject includes the California Code of Evidence. Question #3 of the July 2007 exam, which is in this text, deals with California Evidence. We suggest that you try to incorporate some California Evidence rules in to your practice answers.

QUESTION #1 (FEB. 2002 EXAM) –NOTE: THIS ESSAY IS THE SUBJECT OF THE CA ESSAY WRITING WORKSHOP. DO NOT DRAFT AN ANSWER UNTIL DIRECTED TO DO SO IN THE LECTURE.

Phil sued Dirk, a barber, seeking damages for personal injuries resulting from a hair treatment Dirk performed on Phil. The complaint alleged that most of Phil’s hair fell out as a result of the treatment. At a jury trial, the following occurred:

A. Phil’s attorney called Wit to testify that the type of hair loss suffered by Phil was abnormal. Before Wit could testify, the judge stated that he had been a trained barber prior to going to law school. He took judicial notice that this type of hair loss was not normal and instructed the jury accordingly.

B. Phil testified that, right after he discovered his hair loss, he called Dirk and told Dirk what had happened. Phil testified that Dirk then said: (1) “I knew I put too many chemicals in the solution I used on you, so won’t you take $1,000 in settlement?” (2) “I fixed the solution and now have it corrected.” (3) “Don’t worry because Insco, my insurance company, told me that it will take care of everything.”

C. Phil produced a letter at trial addressed to him bearing the signature “Dirk.” The letter states that Dirk used an improper solution containing too many chemicals on Phil for his hair treatment. Phil testified that he received this letter through the mail about a week after the incident at the barbershop. The court admitted the letter into evidence.

D. In his defense, Dirk called Chemist, who testified as an expert witness that he applied to his own hair the same solution that had been used on Phil and that he suffered no loss of hair.

Assume that, in each instance, all appropriate objections were made. Did the court err in:

1. Taking judicial notice and instructing the jury on hair loss? Discuss.

2. Admitting Phil’s testimony regarding Dirk’s statements? Discuss.

3. Admitting the letter produced by Phil? Discuss.

QUESTION #2 (DISCUSSED IN LECTURE)

You are the attorney for Chemco, a chemical manufacturer, being sued by Percy who claims to have suffered disabling lung damage as a proximate result of breathing air pollutants discharged by Chemco’s plant into the air over Percy's residence. The case is set for trial in a week.

You have available to you the following sources of possible evidence which you would like to present at trial:

1. An official verbatim transcript of the testimony of Dr. Abel, a recognized expert, who testified and was cross-examined under oath at a prior hearing on a worker's compensation claim brought against Chemco by one of its employees who claimed lung damage identical to that claimed by Percy. The transcript contains Dr. Abel's statement that nothing emitted by the Chemco plant can injure the human respiratory system. You have just learned that Dr. Abel is on an extended trip to Europe and will not be available to testify.

2. Baker, a recognized expert, will testify concerning measurements he made of the density of the smoke emitted from Chemco’s plant. Baker will also testify that he made no written record of the readings and does not remember them, but that, as he made the measurements, he called out the three single-digit Ringleman readings to his assistant, Carl. Carl does remember the readings. The Ringleman Chart is a universally accepted standard for measuring smoke emission. Both Baker and Carl will be available to testify at the trial.

3. A duly certified copy of Circular No. 6888, published by the U.S. Bureau of Mines, which explains Ringleman Chart readings. No one from the Bureau of Mines will be available to testify.

4. Motion pictures taken by Ed in which Percy is clearly identifiable and is shown engaging in strenuous physical activity at a city park which was not opened until after the filing of the law suit. Ed is now deceased.

5. Dan's earlier signed sworn statement given to your investigator, that Percy frequently coughed up blood even before Percy moved into the community where Chemco's plant is located. Dan will be available as a witness but you have just learned that he is likely to change his story.

As to each of the enumerated items of possible evidence:

A. What objections would you reasonably expect and how would you attempt to overcome them? Discuss.

B. What ruling should the court make on each objection? Discuss.

QUESTION #3 (DISCUSSED IN LECTURE)

Dan was tried for theft and burglary of the home of Mr. and Mrs. Charles in Central City. The crimes had been committed during the early morning hours of April 17. Dan's defense was that he had been 200 miles away at the time. Mrs. Charles testified to the losses, described the scene, and identified a half-eaten piece of cheese found in the kitchen following the burglary.

The court admitted the following evidence offered by the prosecution:
The testimony of Mr. Charles that while he and Mrs. Charles were sitting in a park a week following the burglary, Dan walked by and Mrs. Charles screamed, "You stole that jacket from our house," whereupon Dan ran away without saying a word.

The testimony of Yank, a dentist, which, based upon a comparison of legally obtained impressions of Dan's teeth and a cast of the piece of cheese identified by Mrs. Charles, the bite in the cheese was made by Dan's teeth.

The court then admitted the following evidence offered by the defense: The testimony of Bob that on April 16, Dan told Bob that he wanted to use Bob's mountain cabin, which was 200 miles from Central City, for the next two days; that Bob consented and gave Dan the key to the cabin; that on April 18 Dan returned the key and said that the stove had exploded when the stove pipe was struck by lightning during the early morning hours of April 17; and that when he visited the cabin the evening of April 18 the stove was as Dan had described.

The prosecution then offered and the court admitted Able's testimony that Bob had told him that Bob had not seen Dan during the entire month of April.

Assuming that all appropriate objections were timely made, did the court err in admitting the testimony of Mr. Charles, Yank, Bob and Able? Discuss.

**QUESTION #4**

Plaintiffs, as the parents and guardians ad litem of Peter, age 4, brought suit for damages against the parents of David, age 10, alleging that defendants had negligently entrusted David with an air rifle with which David had shot Peter in the eye, causing serious personal injury. Among other things, defendants denied that Peter's eye injury was inflicted by David.

At the trial before a jury the following occurred:

A. After Peter told the court that "good little boys always tell the truth," Peter testified that David shot him in the eye with the rifle.

B. Peter's father testified that the defendants had paid a substantial portion of Peter's medical bills and had offered to pay the rest.

C. Bill, a neighbor, testified that: (1) David was "a vicious little bully with malicious tendencies;" and (2) that when Bill, Bill's wife Clara, and David's mother were all standing together in Bill's yard after the incident, Clara stated to Bill that earlier David's mother had said to her that "she had tried to get David's father to put the air rifle in the attic where David couldn't get to it, before someone got hurt," and that David's mother said nothing in response to Clara's statement.

D. Wilbur, an eyewitness, corroborated Peter's description of the shooting. On cross-examination Wilbur was asked:

"Aren't you addicted to the use of heroin?"

"Aren't you in fact now under the influence of a narcotic?"

"May I look at your arm?"

In each instance all appropriate objections were made and urged and in A, B and C the court permitted the testimony over objection and in D sustained the objections to each of the three questions.
Were the rulings of the court correct? Discuss.

**QUESTION #5**

Attorney Arnold represents a client against charges that the client produced and distributed obscene materials. These charges are based on boxes of film which Officer Olson had seized in the client's warehouse pursuant to a search warrant. Arnold asked for copies of the search warrant and supporting affidavit.

While Olson was in Arnold's office to deliver the requested copies, Olson observed a film box of the same color and size as those he had seized at the warehouse. The box, which was several feet from Olson, bore a picture of entwined, unclothed people. The prosecutor had told Olson earlier that both the pictures on the seized boxes and the films in them depicted obscene sexual activity. Arnold noticed Olson looking at the box in his office and immediately told Olson that the box belonged to the client he represents on the obscenity charges. Olson seized the box.

Olson then returned to the police station with the box and obtained a search warrant which authorized opening the box and viewing any film found within. After viewing the film, Olson reasonably decided that it was obscene. He arrested Arnold for violation of a state statute which properly defines obscenity and provides further: "The possession of an obscene film, with knowledge of its obscene nature, is a public offense." Another statute provides: "All communications between a client and attorney are privileged."

The film is obscene under constitutional standards.

Arnold has retained you to represent him in his defense against the charge of possessing obscene film.

A. What, if any, objections based on Arnold's attorney-client relationship will you make to admission at trial of the film as evidence? Discuss.

B. What, if any, objections based on the U.S. Constitution will you make to admission at trial of the film as evidence? Discuss.

C. If Arnold is convicted after a trial at which the only evidence presented by the prosecution was the film and evidence of the above facts regarding the circumstances of its seizure, what additional issues should you raise on appeal from the judgment of conviction? Discuss.

**QUESTION #6**

Dick is brought to trial on an indictment charging him with larceny of a dangerous drug, a statutory offense. The prosecution's theory of the case, as revealed by its opening statement, is that Phil saw Dick enter Phil's Pharmacy, loiter about the prescription counter, reach behind the counter, grab two bottles, and flee by car. Phil called police officers who arrested Dick after a lengthy high-speed chase.

At the trial before a jury, the following events occur:

A. The prosecution offers in evidence a properly authenticated transcript of testimony by Officer Oats given during a previous trial of Dick for reckless driving based on the high-speed chase from Phil's Pharmacy. Oats' testimony was that during that chase and while Dick's car was passing over a bridge, two objects were ejected from Dick's car window and into the river below. It is stipulated that Dick was represented by counsel at the earlier trial and that Oats is now deceased.
B. The prosecution offers the testimony of Phil that the bottles seized by Dick were labeled "DLD," that the bottles were the original labeled containers received from the supplier, and that the bottles had not been opened.

C. The prosecution requests the court to take judicial notice that "DLD" is a derivative of opium. The statute under which Dick is prosecuted does not list "DLD" as a "dangerous drug," but does define dangerous drugs to include "any derivative of opium." In support of its request, the prosecution offers for the court's inspection a standard pharmacological dictionary, which defines "DLD" as an opium derivative.

D. The prosecution offers the testimony of Dick's divorced wife, Win, that during her marriage to Dick the latter frequently used narcotics but attempted to conceal that fact from Win.

Assume all appropriate objections are made by Dick.

How should the court rule on each of the prosecution's offers and requests? Discuss.

**QUESTION #7**

Paul sued Acme Motor Company for personal injuries suffered when the brakes on his Acme automobile failed when he was driving down a mountain road. The complaint alleges that Acme had manufactured and sold the automobile in a defective condition and that the defect posed an unreasonable risk to Paul. The case was tried before a jury on a single cause of action based on strict liability for defective product.

Cora, called as a witness by Acme, testified without objection that she had had a conversation with Paul about the accident but could not remember what Paul had said. She was then asked whether, in a conversation she had with Decker, an investigator for Acme, she related to Decker a statement that she said Paul had made to her concerning the accident. She responded that she could not remember.

1. Decker was called as a witness by Acme and testified that Cora had told him that Paul had told Cora that he had driven 175 miles in less than two hours just before the accident.

2. Decker also testified that he had driven the same model car as Paul's car up and down the same mountain road continuously for 14 hours on a summer day and experienced no brake overheating or failure.

3. Baker, a qualified expert automotive engineer called as a witness by Paul, testified that based upon his training, experience and examination of Paul's car, it was his opinion that Acme's design and construction of the automobile permitted the brakes to overheat and fail after only a few hours of normal operation on a warm day.

4. Baker was extensively cross-examined about a bulletin by the Society of Automotive Engineers. The bulletin stated that the brakes in the Acme automobile would overheat and fail only if the car was driven at excessive speeds for several hours.

The jurisdiction retains the defense of contributory negligence, and the court instructed the jury that if Paul was found to be negligent and his negligent conduct contributed to his injury, he could not recover.

Assume that timely and appropriate objections were made to the testimony and examination of Baker and Decker, and to the jury instruction.

A. Was each item of testimony 1 through 3 properly received in evidence? Discuss.

B. Was Baker properly cross-examined in item 4? Discuss.
C. Was the court's instruction to the jury proper? Discuss.

**QUESTION #8**

Bob was struck by an automobile owned by Owner and driven by Chauf, Owner's employee. After two weeks in a hospital, Bob died.

Chauf was convicted of involuntary vehicular manslaughter. He died in a prison knife fight one week after he was imprisoned.

Paula, Bob's wife, sued Owner for the wrongful death of Bob, alleging that Owner is liable, both on the doctrine of respondeat superior and because Owner was negligent in hiring Chauf.

At the trial by jury, the following occurred:

A. Paula's first witness, Carl, a police officer, testified that when he arrived on the scene immediately after the accident, he asked Bob what had happened but he does not remember what Bob said; that, however, he had immediately made a note of what Bob told him and incorporated it in his written report. Carl verified the accuracy of his report and read it aloud. The report stated that Bob told Carl that he, Bob, was crossing the street when a speeding car crossed over the center line and hit him. Upon Paula's request, the report was introduced into evidence.

B. Paula next called Dr. Flo, who testified that she was on duty at the hospital when Bob arrived there; that Bob complained of severe pain in his stomach and head; that Bob swore he would get even with the driver of the car that hit him; and that when asked what happened, Bob said he was hit by a speeding car driven by a drunken lunatic.

C. Paula next called Earl, the warden of the prison where Chauf died, who identified a writing made by Chauf a few hours before Chauf's death. The writing commenced with the statement, "I believe I am about to die and I make this statement with no hope of recovery." The writing recited that Chauf was intoxicated and was driving about 80 mph in a 25 mph zone at the time of the accident. The writing was admitted into evidence.

D. Paula next called Frank, who testified that he had known Bob for thirty years; that he had seen Bob on many occasions cross the intersection where the accident occurred; and that Bob always waited for the green light and looked both ways before crossing the street.

E. Paula called Owner as an adverse witness and asked Owner whether he had heard that Chauf had received five traffic citations over the last five years for driving under the influence of alcohol. Owner answered: "No, because Chauf never had a traffic citation."

Assume all appropriate objections were timely made.

Were the items of evidence A through D properly admitted and were the question and answer in item E proper? Discuss.

**QUESTION #9**

Paul brought a personal injury action against Helico, a helicopter manufacturer. The injury occurred when Paul attempted to board a Model Z helicopter manufactured by Helico. As he approached the helicopter from the rear, he was struck by the rotating tail rotor.
Two days after the accident, Al, the pilot of the helicopter, told Sam, an investigator of the National Transportation Safety Board (Board), that immediately after Paul was struck by the tail rotor, Paul exclaimed: "It's not anyone's fault. I just wasn't paying attention; I goofed."

Paul's complaint alleged Helico was negligent because the tail rotor was not marked so as to be conspicuous when operating under normal daylight ground conditions as required by a regulation of the Federal Aviation Administration (FAA), and that Helico was strictly liable because the helicopter was defectively designed.

At the trial by jury, the following occurred:

A. Paul testified that after his suit was brought an officer of Helico not only offered to settle the action, but also admitted during settlement negotiations that the company agreed with Paul that the helicopter was defectively designed.

B. After the jury had viewed the helicopter involved in the accident, Paul called Professor Jason, a recognized expert in the areas of engineering, navigation, and the operation of aircraft. He testified that, based solely on his in-court examination of photographs of the Helico Model Z helicopter and photographs of other helicopters, in his expert opinion the tail rotors on Helico Model Z helicopters are not conspicuous when operating under normal daylight ground conditions as required by the FAA.

C. When called by the defense, Al testified, after repeated attempts to refresh his recollection, that he could not remember what Paul said. The court then admitted Sam's testimony concerning what Al stated Paul had said.

Assuming that all appropriate objections were timely made, did the court properly admit the testimony of Paul, Jason, and Sam? Discuss.

**QUESTION #10**

In a rape prosecution against Roe, the following events occurred at the trial by jury:

(a) Adam, a neighbor of the victim, Tess, testified that within five minutes after the rape was alleged to have occurred, Tess ran to his house sobbing and said that she had just been raped by a man with a large brown blemish on his left arm.

(b) Detective Cable testified that, on receiving Tess' report, he examined the file of known sex offenders, that Roe was listed as a previously convicted rapist, and that Roe was described as having a blemish on his left arm.

(c) Tess testified that she saw Roe on the sidewalk, recognized the blemish on Roe's left arm, and told a police officer that Roe was the man who had raped her.

(d) Roe's wife voluntarily testified for the prosecution that Roe returned home on the night in question in an agitated state with scratches on his arm.

(e) Roe testified in his defense and denied the act, saying that he had never been near Tess' house. In rebuttal, the prosecution offered one of Roe's shoes, seized in an illegal search of Roe's house. The shoe was introduced together with expert testimony that a shoeprint identical to the shoeprint made by Roe's shoe had been located outside the window the rapist had used to enter Tess' house.
(f)  At the prosecution's request, the judge ordered Roe to bare his left arm for the jury's inspection. Roe refused. The judge allowed the prosecutor to argue in closing argument that Roe's refusal was an attempt to hide evidence, from which the jury might infer guilt.

Assume all proper motions and objections were timely made. Did the court err in admitting testimony in items (a) through (d), in admitting the shoe and testimony in item (e), or in permitting the prosecutor's argument in item (f)? Discuss.

QUESTION #11 (DISCUSSED IN LECTURE)

While traveling north through an intersection governed by a traffic light, Ann's car was struck on the driver's side by a dark blue sports car which sped from the scene of the collision.

Rick, the only pedestrian eyewitness, took photographs of the accident and of the sports car as it left the scene, but he did not observe the license plate on the car. Rick gave the undeveloped film to police who developed the photographs and were able to read the license plate number XJY-134 on the car. It was determined that Dave owned the car with the license number XJY-134.

Ann commenced a negligence action against Dave seeking compensation for property damage and personal injuries to herself and her passenger, her four-year-old daughter Jane. Dave's answer alleged that his car was not involved in the accident, but if it was, it was used without his knowledge or permission. Dave counterclaimed, alleging that Ann was negligent.

At the jury trial, the following occurred:

(1)  Ann's first witness, Bob, testified that he arrived at the scene within minutes of the accident, heard Jane crying, and heard Jane state that "the blue car went through a red light and hit us." A stipulation has been entered in the record that Jane is incompetent to testify at trial solely because of her age.

(2)  Ann testified that, prior to commencing suit against Dave, she spoke to him about settlement of her claim for $20,000. He stated, "I will settle with you if it isn't covered by insurance."

(3)  Rick, as a witness for Ann, testified as to the taking of the photographs developed by the police and the photographs were admitted into evidence.

(4)  In the defense case, Dave introduced testimony by a properly qualified expert that three days after the accident and before the expert had an opportunity to examine the possibly faulty brake system on Ann's car, the car was repaired. Further, the expert testified that the repair included substantial brake work.

Assume timely and appropriate objections were made to the foregoing.

A.  Was the testimony in items 1, 2 and 4 properly admitted? Discuss.

B.  Were the photographs in item 3 properly admitted? Discuss.

QUESTION #12 (DISCUSSED IN LECTURE)

Tim was tried in a State A court for possession of 1/10 gram of heroin, a felony. The government's only witness was Officer Jenks, an undercover police officer. Jenks testified that after Tim arranged to sell drugs to Jenks, Tim, in company with Sue, met Jenks on September 13, 1984. Jenks also testified that Tim refused to make the sale, and that Jenks arrested Tim, searched him, and found a substance he believed to be heroin in Tim's jacket pocket.
A. The Prosecutor then offered as an exhibit a document entitled "Official State A Forensic Laboratory Report," which states that the unknown substance found in possession of Tim was tested and found to be heroin. The report concludes: "I certify that the above is a true and accurate statement of the findings of this state agency as made this date" and is signed by A. Smith, Executive Director and Custodian (seal).

B. As its first witness, the defense called the defendant, Tim, who testified on direct that he was in possession only of powdered milk and that he was being framed by Jenks. On cross-examination, Tim was asked, "Isn't it true that on May 1, 1983, you were in possession of 1/2 gram of heroin?" Over defense objection, Tim was instructed by the court to answer and said "yes."

C. As its second witness, the defense called Sue, who testified that she had been dating the defendant for a year, and that on the eight occasions they dined out prior to the offense, he always drank his coffee after having added powdered milk taken from a jacket pocket.

D. Sue then testified that Jenks once arrested her for prostitution and offered her release on payment of a bribe, and that when she refused, Jenks said, "Just wait, I'll get you and all your friends."

E. In rebuttal, the prosecution called Dr. Walt, M.D., who testified that on September 9, 1984, he examined Tim, who complained of insomnia and anxiety, that during the private examination Tim stated that he was a narcotics addict in need of money to supply his habit, and that Tim asked Dr. Walt if he would like to buy drugs.

Assume all the appropriate objections were made.

Were the items of evidence A through E properly admitted? Discuss.

In dealing with item B, discuss only the cross-examination and ignore the defendant's privilege against self-incrimination.

QUESTION #13 (DISCUSSED IN LECTURE)

Parks, a patron of Delta Theatre, after watching the motion picture, started to descend a carpeted stairway leading to the men's room. He fell halfway down the stairs and broke his leg. Two months later, he sued Delta for his injuries, alleging that his foot had caught in a tear in the carpet which he could not see in the dim light and that Delta had negligently permitted the carpet to remain in its dangerous condition. Delta denied there was any defect in the carpet and alleged that Parks had fallen because he was intoxicated.

The following evidence was admitted at trial:

A. Parks introduced testimony of Ward that Ward was at the bottom of the stairway when Parks fell and that an unknown person rushed down the stairway to Parks and said, "I saw you trip on that tear in the carpet. Are you hurt?"

B. Parks introduced testimony of Carter that, a week after the accident, Carter was called to lay a new carpet and that the old carpet had been removed before his arrival.

C. Delta introduced testimony of Adams that he had sat next to Parks; that Parks had spoken to him just before Parks left his seat; that Adams followed Parks as he was going down the stairway and saw Parks fall; that in his opinion Parks was intoxicated and that his impression was that Parks fell because of his intoxication.
D. Delta introduced testimony of Martin, manager of the theatre, that prior to Parks' fall, thousands of persons had used the stairway, that there had been no complaints and no reports of any person falling.

E. Delta introduced testimony of Attorney Nate that, at Parks' request, he visited Parks a month after the accident and that during the visit Parks said to him: "I fell on the stairway in Delta Theatre. I had had too many drinks and I think that is why I fell. But I hear Delta has put a new carpet on the stairway and I want you to sue for me and say the old carpet had a tear in it and that is why I fell, although as far as I know the carpet was O.K." Nate further testified that he then refused to represent Parks.

Assuming that in each instance all appropriate objections were made, did the court err in admitting items of evidence A through E? Discuss.

QUESTION #14

During business hours a man entered the Superhealth Pharmacy, pointed a revolver at the pharmacist, and demanded a bottle of morphine, a statutorily controlled dangerous substance. The pharmacist complied, and the assailant rushed from the pharmacy with the morphine. Based upon information secured in their investigation, the police lawfully arrested Dee for the crime several days later.

Charged with armed robbery, Dee proceeded to jury trial, advancing the defense that he was at his residence when the robbery occurred.

At the trial, during the prosecution's case-in-chief, the following occurred:

A. Tom, a close acquaintance of Dee, testified that Tom had personally observed Dee possess and consume morphine on numerous occasions during the two years prior to the robbery.

B. The court admitted into evidence a properly authenticated letter, dated ten days before the robbery, written by Dee to his clergyman, which letter stated: "I am going to rob a pharmacy to get some morphine. I am suffering."

C. Police Officer Alert testified that, as he was placing Dee in the patrol car after his arrest on the street, Dee suddenly turned and ran but was recaptured about a block away.

D. Police Officer Alert testified that Wit, an eyewitness now deceased, identified Dee at a regularly conducted police lineup as the person who committed the robbery by stating to Alert: "Number 3 is the man who did it. I'm positive."

E. Lockup, a prison inmate, testified that on the second day of Dee's incarceration, Dee stated to him in the course of a conversation: "I was in the Superhealth Pharmacy when it was robbed. But I did not do it."

Assume that in each instance all appropriate objections were made. Were the items of evidence properly admitted? Discuss.

QUESTION #15

An automobile owned and operated by Paul collided with a taxicab driven by Don and owned by Cabco. Paul and Don were injured. Vicky, a passenger in Paul's automobile, suffered a broken leg. While she was undergoing necessary surgery to repair the fracture, she suffered a cardiac arrest and died. Action
was brought in state court by Paul against Cabco for personal injuries. The parties stipulated to the above facts.

At the trial by jury the following occurred:

A. Paul testified: "After the accident, I went over to the cab. Don was hurting real bad, and Don said, 'This wouldn't have happened if I hadn't been in such a hurry to pick up a fare.'"

B. Cabco's counsel asked Paul on cross-examination if he had ever had a traffic accident. Paul answered: "No." Cabco's counsel then introduced a properly authenticated copy of a three-year-old unrelated conviction of Paul for vehicular manslaughter, a felony.

C. Vicky's physician, Doc, testified as a witness for Cabco that, while Vicky was being prepared for surgery, he asked her how the accident happened, and she responded: "Don't tell anybody, Doc, but Paul and I were smoking marijuana. I dropped a lighted joint, and Paul had his head down looking for it when we hit the cab."

Assume that in each instance all appropriate objections were made. Were these items of evidence properly admitted? Discuss.

QUESTION #16

Mary Smith sued Dr. Jones, alleging that Jones negligently performed surgery on her back, leaving her partly paralyzed. In her case-in-chief, Mary called the defendant, Dr. Jones, as her witness. The following questions were asked and answers given:

[1] Q. Now, you did not test the drill before you used it on Mary Smith’s vertebrae, did you?
A. No. That’s not part of our procedure. We don’t ordinarily do that.

[2] Q. Well, since Mary’s operation, you now test these drills immediately before using them, don’t you?
A. Yes.

[3] Q. Just before you inserted the drill into my client’s spine, you heard Nurse Clark say “The drill bit looks wobbly,” didn’t you?
A. No. I did not.
Q. Let me show what has been marked as plaintiff’s exhibit number 10. [Tendering document] This is the surgical report written by Nurse Clark, isn’t it?
A. Yes.

[4] Q. In her report she wrote: “At time of insertion I said the drill bit looked wobbly,” didn’t she?
A. Yes. That’s her opinion.

[5] Q. Okay, speaking of opinions, you are familiar with the book, General Surgical Techniques by Tompkins, aren’t you?
A. Yes.
Q. And it is authoritative, isn’t it?
A. Some people think so.

A. I guess so, but again that’s his opinion.
Q. Now, you’ve had some trouble yourself in the past?
A. What do you mean?

[7] Q. Well, you were accused by two patients of having sexually abused them,
weren’t you?
A. That was all a lot of nonsense.

[8] Q. But you do admit that in two other operations which you performed in 1993 the drill bit which you were using slipped during back surgery, causing injury to your patients?
A. Accidents do happen.

What objection or objections could Dr. Jones’ attorney reasonably have made to the question or answer at each of the places indicated above by the numbers in the left-hand margin, and how should the court have ruled in each instance? Discuss.
QUESTION #17

Dan was arrested and charged with possession of heroin with intent to sell. Dan allegedly sold a small bag of heroin to Peters, an undercover officer, at Guy’s Bar and Grill. In his opening statement, Dan’s lawyer said the evidence would show that Dan was entrapped. The following incidents occurred at trial:

1. The prosecutor called Wolf, a patron at Guy’s, who testified over defense objections that Dan told him the night before the alleged sale that Dan intended to “sell some baggies” to Peters the next night.

2. The prosecutor called Peters, who testified that she was working as an undercover officer and received information that Dan was selling heroin at Guy’s. She testified she went to Guy’s two nights before the date of the arrest. Over defense objections, Peters testified she talked to Bob, another bar patron, who told her that he had bought marijuana from Dan at Guy’s the night before.

3. Peters testified she found out that Dan used e-mail. Over defense objections, she testified that she had e-mailed Dan a message to meet her at Guy’s with a small bag of heroin on the night in question. Peters preserved a paper copy of her e-mail message, which, over defense objections, was introduced into evidence.

4. The defense called Dan as a witness. Dan testified that Peters had begged and pleaded with him to get heroin for her because she was suffering from withdrawal and needed a fix. On cross-examination, the prosecutor asked Dan, over defense objections: “Isn’t it true that you were arrested by the police for selling marijuana in 1994?” Dan answered: “Yes, but they didn’t have any evidence to make the charge stick.” The prosecutor moved to strike Dan’s answer.

5. The defense called Cal, Dan’s employer, as a character witness. The defense laid a foundation showing that Cal had known Dan for ten years. Over the prosecutor’s objection, Dan’s lawyer asked Cal if he had an opinion on Dan’s good moral character. Cal answered: “Yes, I and everyone else who have known Dan for many years know that he always tells the truth.” The prosecutor moved to strike Cal’s answer.

Assume all appropriate objections were made. Was the objected-to evidence in items 1 through 4 properly admitted, and should the motion to strike in items 4 and 5 have been granted? Discuss.

QUESTION #18

David, owner of a physical fitness center known as "Dave's Gym," is being sued by Paul for negligence. Paul claims that he sustained permanent injuries as a result of an accident caused by faulty equipment supplied by Dave to Paul while Paul was working out at the gym. At the trial by jury, the following occurred:

1. Paul testified that while he was properly using the weight lifting equipment at Dave's Gym, the equipment broke causing his injuries. Proper admissible medical evidence regarding Paul's injuries was introduced. No other evidence was introduced. Paul then rested his case. Dave moved for a judgment as a matter of law (a directed verdict). The court denied the motion.

2. Dave introduced into evidence a fax received by Dave's Gym the day before the alleged accident. The fax recites on its face that it was sent by Paul, and it states that Paul would no longer use his membership at Dave's Gym because he had been injured at work.
3. Dave then called as a witness William, a trainer at Dave's Gym, who testified that he was the person in charge of the gym the day of the alleged accident and that no one reported to him that any accident occurred on that day.

4. On cross-examination, over Dave's objection, William was asked if he had written in a log book that someone was injured at the gym on the date of the accident. The court permitted the question and instructed the jury that William's answer could be considered for impeachment only.

5. The case was given to the jury. During a break in deliberations, a juror went to a sporting goods store near the courthouse and inspected weight equipment. That juror reported the information obtained to the other members of the jury during deliberations, and these facts came to the court's attention before a verdict was returned. The court advised the parties of the juror's conduct. Dave moved for a mistrial.

Assume that in each of the foregoing instance all appropriate objections were made.

1. Should the motion for judgment as a matter of law described in paragraph 1 have been granted? Discuss.

2. Was the evidence in paragraph 2 properly admitted? Discuss.

3. Was the evidence in paragraph 3 properly admitted? Discuss.

4. Did the court err in permitting the question and instructing the jury in paragraph 4? Discuss.

How should the court rule on the motion for mistrial described in paragraph 5? Discuss.

**QUESTION #19**

Evidence

Don has been charged with murder. The prosecution claims that Don started a fistfight in a boardinghouse where he and the victim, Vic, were staying and that when Vic seemed to be getting the better of him, Don drew a dagger and stabbed Vic. Don testifies in his own defense and claims that Vic started the fight, and that he (Don) drew the dagger only when he became afraid that Vic was going to "beat my brains out."

Should each of the following items of evidence offered by the defense be admitted into evidence? Why or why not? Discuss.

1. Don's testimony that several other residents of the boardinghouse told him that Vic was out to get him.

2. Testimony of Fred, that he had seen Vic start many other fights.

3. Testimony of Mindy, the boardinghouse manager, which in her opinion Don is ordinarily a nonviolent person, and that she remembers several occasions when Don "walked away" from potentially explosive situations in the boardinghouse.

Should each of the following items of evidence offered on rebuttal by the prosecution be admitted into evidence? Why or why not? Discuss.

4. Evidence in the form of a certified judgment that Don was convicted of assault with a deadly weapon eight years ago. (The prosecutor had not asked Don about this conviction while he was on the stand.)
5. Testimony by Smith, another boardinghouse resident with long acquaintance with both Vic and Don, that Smith heard Don lie to a census taker about his age, his family, and other matters. (The prosecutor had asked Don about these incidents of lying during his testimony and Don had denied them.)

6. Testimony by Smith that in his opinion Vic was a very peaceful and nonaggressive person, but that Don has "a very short fuse."

ANSWERS TO SELECTED EVIDENCE QUESTIONS

MODEL ANSWER TO QUESTION #1

Note that this Model answer has been drafted in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar.” You may use this answer to help you visualize the structure and writing approach.
I. JUDICIAL NOTICE ON HAIR LOSS

Phil sued Dirk for damages because Phil alleges that Dirk’s hair treatment made Phil lose his hair. The judge, on his own initiative, and based on his experience as a barber, took judicial notice that this type of hair loss is not normal.

Dirk will argue that judicial notice was not proper in this case because it was the result of the Judge’s professional training as a barber. While judicial notice of certain facts may be taken under FRE as well as in California, it must be of facts that are of such common knowledge within the jurisdiction that they cannot reasonably be the subjects of dispute. Phil could argue that judicial notice was proper because there was no other logical explanation for sudden hair loss and therefore it is a fact commonly understood in the community.

Dirk should prevail on this point. It is not a commonly known or a well-established fact that the type of hair loss suffered by Phil is abnormal. People could just as well think that it is a normal side effect of Dirk’s treatment. It is only because the Judge had training as a barber that he could make such a causal connection. Since it is not a commonly known fact by the general population that the hair loss suffered by Phil in this case was abnormal, judicial notice may not be taken of this fact. If Phil wishes to have this type of evidence introduced at trial, he should hire an expert witness to testify rather than rely on Judicial Notice.

II. PHIL’S TESTIMONY

A. Statement #1

The court allowed Phil to testify that Dirk said he put too many chemicals into the solution and that Dirk offered to settle for $1,000.

Dirk will first argue that Phil’s testimony as to what Dirk said to him should not be admitted. He will rely on the FRE rule concerning hearsay. A statement is hearsay when it is an out of court statement used for the truth of the matter asserted. Phil is attempting to admit Dirk’s out of court statement to prove there were too many chemicals in the solution. However, Phil will counter argue that Dirk’s statement should be admitted because it shows that Dirk knew he had made a mistake and is therefore an admission. An admission by a party opponent is generally admissible as non-hearsay unless there is some other reason that is should not be admitted. Dirk will respond that his statement was not an admission of guilt and should be excluded because it encompasses an offer of settlement. Offers to settle claims are not admissible evidence as against public policy, even if relevant in order to encourage open settlement talks among parties. Phil can respond that the rule excluding settlement offers only applies when there is an actual liability claim or dispute.

Phil may testify as to what Dirk told him about too many chemicals but may not testify that Dirk offered $1,000 to settle. The “too many chemicals” part of the statement is admissible as an admission by a party opponent, and is not considered hearsay. The settlement offer, on the other hand, should have been excluded because the fact that Phil called Dirk means that there was the threat or possibility of a lawsuit and Dirk clearly, by his statement, offered to settle. Thus, because offers of settlement are inadmissible on public policy grounds, the judge erred by letting Phil testify about this statement. The entire statement may be partially excised and Phil can testify about what Dirk said about the chemicals only.

B. Statement #2
Phil testified that Dirk stated on the phone to him that he fixed and corrected the solution.

Phil will initially try to argue that Dirk’s statement to him is admissible because it is relevant to the fact that the chemical solution was incorrect. Since his statement tends to prove that fact, he will argue that it is relevant and thus admissible. Generally relevant evidence is admissible because it tends to prove a fact at issue in the case, unless public policy prohibits its admission. Dirk will argue, however, that his statement is inadmissible because it is evidence of taking remedial measures to fix the chemical solution. Evidence of remedial measures is generally not admissible as against public policy in order to encourage people to take remedial actions without those actions later being used against them. Phil could assert that the statement should be admitted anyway as it shows Dirk’s ownership and control over the solution and chemical process. Evidence of remedial measure may be admitted to prove a party’s ownership or control over property.

Dirk will prevail and his statement to Phil about correcting the solution is inadmissible because it is evidence of remedial measures. Thus, the judge erred in allowing Phil to testify as to Dirk’s statement #2. If Dirk had testified that he is not at fault because he has nothing to do with mixing the solution, he only purchased it, then that statement could come in to show his control over the solution and mixing process. But, that is not the case here, and Phil’s argument will fail because Dirk is not contesting the fact that he performed the treatment or mixed the solution.

C. Statement #3

Phil testified that Dirk told him not to worry, that his insurance company would take care of everything.

Dirk will first argue that this statement should have been excluded as hearsay. It is an out of court statement offered by Phil to prove the truth of the matter asserted - that the insurance company will take care of everything. But, Phil will argue that this statement is admissible as an admission by a party opponent. An admission by a party may be introduced by the other party and is not considered hearsay. Dirk will then argue that although his statement may not be considered hearsay, his statement should not have been allowed in on public policy grounds because it provides evidence of insurance coverage. Evidence that a defendant is covered by liability insurance is not admissible to prove negligence.

Dirk will prevail. Since Dirk’s statement clearly exposes that he has liability coverage, it is against public policy to allow the statement in. The fact that the Dirk is covered by insurance is not really relevant to whether he was negligent and courts have found that evidence prejudicial and generally inadmissible. The court erred in letting this statement in.

III. THE LETTER

The court admitted a letter produced by Phil bearing Dirk’s signature stating that Dirk used an improper solution.

Dirk will argue that the letter was wrongly admitted because it was not properly authenticated. Since there are no facts here indicating whether or not, in fact, Dirk wrote the letter to Phil, so it must be authenticated. All nontestimonial evidence must be authenticated unless it is self-authenticating, or there is no real dispute over the genuiness of the document. Dirk will also argue that the letter is not self-authenticating because it is not an official document. Authentication, in this case, can be accomplished by several different ways. Dirk may testify that he did, in fact, write the letter. Phil may testify that he, in fact, saw Dirk write and sign the letter.
Also, someone who is familiar with Dirk’s signature may testify that Dirk’s signature on the letter is his. Phil can attempt to argue that his familiarity with the contents of the document and the fact that he received the letter a week after the incident is sufficient to authenticate the letter. Furthermore, he can try to assert that the document is authenticated by circumstantial evidence. Phil would argue that the facts in the letter about the solution being improper and it having too many chemicals are facts known only by Dirk. Distinctive characteristics, such as these, about a document may authenticate it. However, Dirk would argue that the possibility of forgery still exists and someone else, even Phil, could have written that letter.

Because the letter was not properly authenticated, it was improperly and prematurely admitted by the judge. If any of the authentication methods described above had been performed, then the letter would have been admitted.

IV. CHEMIST’S TESTIMONY

Chemist testified as an expert that he used the solution on his own hair and it did not fall out.

Dirk will argue that Chemist’s testimony is admissible on the basis of his expertise in science. Because Chemist is qualified as an expert in the field of chemistry and thus his testimony and opinion would be helpful to the fact finder by testifying about the chemical solution used in this case. In order for an expert to be qualified, there must be evidence presented that the proposed expert witness is knowledgeable, skilled, educated and trained in his field and that he is familiar or has made himself familiar with the particular problem in this case. Phil will argue that Chemist’s testimony should not have been admitted because it is not based on sufficient scientific evidence because conducting one experiment on him with the hair solution does not qualify as sufficient scientific facts or data. Expert testimony is permitted when the testimony is based on sufficient facts or data, the testimony is a product of reliable principles and methods and when the expert witness has applied the principles to the facts of the case.

Phil will likely prevail. The facts are not clear that Chemist was, in fact, certified as an expert in chemistry, but even if he was if the one experiment on his own hair is the only data Chemist used and the only experiment he did with the solution, then his testimony is clearly based on insufficient data and facts, and the court erred in admitting his testimony.

ANSWER TO QUESTION #4

A. The court was correct in admitting the testimony of Peter.

The issue here involves competency. Under Federal Rules 601 and 603, an individual is competent to testify if that person can understand the need to tell the truth and if that person had the ability to perceive what took place. Because of his age, Peter is on the borderline. The issue is one within the sound discretion of the court; since Peter was the victim and since he told the court that "good little boys always tell the truth," there was sufficient evidence to support the court's exercise of its discretion in admitting the testimony.

B. The court was wrong in admitting evidence that the defendant had paid a substantial portion of Peter's medical bills and had offered to pay the rest.

Under Rule 409, evidence of payment of medical expenses is not admissible on the issue of liability. Plaintiffs could argue that the court was correct in admitting the evidence because it goes to the issue of identity, not liability. While such evidence can be admitted to prove identity, identity is not really the issue
here. Liability is the real issue. Therefore, it is unlikely that the court had sufficient grounds to admit in the evidence.

C. (1.) The statement regarding David's disposition should not have been admitted into evidence, because it deals with character evidence. Under Rule 404, character evidence is inadmissible in civil cases. (In criminal cases, there are three limited exceptions where character evidence is admissible.)

(2.) The court was correct in admitting the statement. The statement from David's mother to Bill's wife, Clara, is hearsay since it is an out-of-court statement dealing with the issue of liability; the statement shows that David's mother recognized that the air rifle was dangerous if it got into David's hands. The statement is admissible, however, because Bill was present when Clara recounted the statement in the presence of David's mother and she said nothing. Because of this adoptive admission by silence, the statement is admissible against David's mother, and only David's mother, since the statement was not admitted, by silence or other, by David's father. Rule 801(d)(2)(B).

D. (1.) The court was correct in sustaining the objection regarding the question about Wilbur's heroin addiction. The question involves the impeachment of a witness through specific instances of conduct; such questions are prohibited unless they deal with the witness' character for telling the truth. Wilbur's status as an addict does not, in and of itself, affect his ability to tell the truth.

It is possible, however, that Wilbur could be impeached because he is a heroin addict if he has been convicted for use or possession of heroin. Depending upon the penalties under the state's statute and how recent was the conviction, Wilbur might be subject to impeachment under Rule 609. The facts, as stated, do not support such an argument.

(2.) The court was incorrect in sustaining the objection to the question regarding whether Wilbur was under the influence of narcotics while testifying. The question deals with the competency of Wilbur to testify, since narcotics may impair his ability to testify truthfully. Since the question focuses upon Wilbur's competency, it was probably incorrect for the court not to permit the question.

(3.) The court was correct in sustaining the objection regarding the question concerning the tracks on Wilbur's arm for the same reasons stated in (1.), above.

**ANSWER TO QUESTION #5**

A. Three objections can be raised based on Arnold's attorney-client relationship.

Because the film is preexisting communication, the attorney-client privilege does not apply directly to it. However, Arnold can argue that the film was involved in the communications between himself and his client, and that he could not have advised his client regarding the film's potential obscenity without having it present. The client could not have gotten thorough and competent legal advice without the film, so it would be an impermissible breach of the attorney-client privilege to hold Arnold guilty for possessing a film which was needed to aid a client.

The second argument is a variation on the first, focusing instead on the work-product rule. Arnold could not have prepared an adequate defense for his client without a copy of the film. While viewing such a copy, he may have made annotations to it, noting different scenes which could have established that it was not obscene. So the copy that Arnold possessed related to the preparation of his client's case and cannot be obtained or used by the prosecution under the work-product rule.

The last argument is based on the constitutional right of Arnold and his client to effective assistance of counsel. Arnold needed that film to be able to prepare a defense for his client because preparing a defense would be virtually impossible without it. To prosecute Arnold for possessing the copy would deny the
client effective assistance from counsel and would be unconstitutional. Therefore, for this reason if no
other, the film cannot be used as evidence against Arnold on the charge of possessing obscene material.

B. Besides raising the above-listed exceptions, counsel could also make an objection that the film
cannot be admitted into evidence because it was the product of an unconstitutional search and seizure. The
film was not seized under a warrant; Olson was only in Arnold's office to deliver copies of the warrants and
affidavits used to seize the film in the first place. Since Olson was present in the office for only a limited
purpose, he had no authority to make a seizure. The facts as presented do not offer grounds to justify a
warrantless search and seizure. For Olson to have obtained a valid warrant, he would have had to first
obtain a judicial determination of what materials were obscene, because the client's First Amendment
interests would be violated unless a properly issued warrant specifically designated which items were
obscene.

C. Besides making the above-listed arguments, counsel should also raise on appeal the defense that
such a prosecution violates Arnold's right to privacy (specifically, the right to possess obscene materials).
In Stanley v. Georgia, the Supreme Court held that a person has a constitutional right to possess obscene
materials, although that person has no right to exhibit or sell such material. Given that Arnold had the
material in his office and that there was no evidence he intended to exhibit or sell such material, it should
not be too difficult for counsel to argue that Arnold's right to privacy extends to his office as well as to his
home. Therefore, it would be unconstitutional to prosecute Arnold for possession of the material because it
would infringe on his right to privacy.

ANSWER TO QUESTION #6

A. The recorded testimony of Officer Oats is hearsay, since it is an out-of-court statement dealing
with the issue of Dick's guilt. If it is admissible, it will be under the prior recorded testimony exception.

In order for the prior recorded testimony exception to apply, Officer Oats must be unavailable. Death
constitutes unavailability. Rule 804(a)(4). Also, there has to be an identity of parties. Rule 804(b)(1).
There is an identity of parties here, since Dick is the defendant for both charges. The real issue is whether
the attorney in the reckless driving trial had a sufficient opportunity and motive to cross-examine Oats.
Given the facts, it is likely that that attorney did have such an opportunity and motive; throwing bottles
from a car might well relate to whether the driver of that car was driving recklessly. However, the facts as
presented are close and the court would be well within its discretion to refuse the testimony if it concludes
that the attorney did not have sufficient motive or opportunity to explore the issue.

B. This issue involves two parts, the first of which focuses on the identification of the pill bottle. The
prosecution needs to prove the writing on the bottles to establish what Dick took. While the original pill
bottles are unavailable (since they were thrown into the river), pharmacist Phil can testify from personal
knowledge about any labels on the bottles.

The more important issue for the prosecution to prove is that the bottles which Phil identified as being
"DLD", according to their label, did in fact contain the opium derivative. Phil has no direct knowledge of
that fact, since these particular pill bottles were unopened (although his experience with filling
prescriptions requiring this drug might lead him to believe that such bottles do contain the pills indicated on
the label). The prosecution needs a witness from the drug company to identify the pills and testify that it is
in the normal course of business to put in the pills indicated on the bottle's label. Since the prosecution has
not done this, they cannot show that Dick in fact stole pills which were controlled by law.

C. This issue poses a problem involving judicial notice. The court is being asked to take notice of the
fact that the pills, according to a medical dictionary, are opium derivatives. Judicial notice can be taken of
the dictionary's contents to establish the drug's nature because that fact is capable of accurate and ready
determination by resort to sources whose accuracy cannot be questioned; such a dictionary is relied upon throughout the medical profession and, as such, is highly accurate and credible.

D. While this issue seems to involve the husband-wife relationship, it in fact focuses more upon issues of character and habit. Even if it did involve the marital privilege, Dick would not be able to keep out the testimony.

A person charged with a crime can prevent his or her spouse from testifying in a criminal trial, so long as they are currently married to one another. Unfortunately for Dick, he is no longer married to Win and so cannot prevent her from testifying.

A spouse charged with a crime can prevent his or her spouse from testifying about confidential communications. This right will not apply for Dick here because Win's testimony deals with what she saw while married to Dick, and not from any communication they had while they were married.

However, the issue here really involves Dick's bad character or whether Dick engages in a habit, drug addiction, with which he acted in conformity when trying to steal drugs. Testimony construed to be about habit or character will not be admitted if such testimony is more prejudicial than it is relevant. Win's testimony is more prejudicial because it focuses more upon Dick's physical condition and less about whether he had a motive to steal; while the addiction does provide a basis to suppose motive, the prosecution is required to establish motive beyond a reasonable doubt through evidence. This testimony permits an unfair inference that is not supported by the evidence, given the facts as presented, and so Win's testimony should be excluded.

ANSWER TO QUESTION #7

A. (1.) Decker's testimony should not have been admitted into evidence.

The first question to ask about the testimony is whether it was relevant. High speed (if Paul drove 175 miles in two hours, his rate would be almost 90 miles per hour) might be relevant on whether or not Paul was misusing his car. Therefore, the testimony is relevant.

The second issue regarding the testimony involves totem pole hearsay. There would be no problem if Cora were able to testify, but there is no exception which would apply to Cora's statement to Decker regarding Paul's statement to her. Paul's statement to Cora is clearly against his pecuniary interest, and is in fact considered an admission and thus not hearsay according to Rule 801(d)(2)(A). As to the hearsay of Cora's statement to Decker, Acme might argue that the 804(b)(5) catch-all exception applies, since Cora's lack of memory effectively renders her unavailable to testify under 804(a)(3), but the statement lacks any of the indicia of reliability that the exceptions under 804(b)(1)-(4) possess. Therefore, Decker's testimony must be excluded.

(2.) The difficulty of getting into evidence Decker's statement about his test drive of another car is one of relevancy. If the cause of action were based upon improper design and Decker conducted his test under similar conditions as those under which Paul had his accident, Decker's testimony about a car similar to Paul's might be relevant. Decker's testimony is not relevant on the issue of strict liability for defective manufacture, and must be excluded from evidence.

(3.) There is no problem with Baker's testimony that would preclude its admission. Baker's credentials were established, and he testified as to those matters on which he relied to base his conclusion. Therefore, there is no basis to preclude him from testifying or to exclude his testimony regarding the car.

B. Acme sought to cross-examine Baker regarding his credentials by using a pamphlet issued by the Society of Automotive Engineers. On the facts provided, the pamphlet was inadmissible hearsay.
Acme's use of the pamphlet was based upon an exception to the hearsay rule, 803(18), the learned treatises exception. Before the exception can be applied, Acme has to establish that the pamphlet is a reliable authority. They can do this through the testimony or admission of the witness, through another expert, or through judicial notice. No other expert is mentioned in the facts, nor do the facts indicate that Baker established the reliability of the pamphlet. It is doubtful that the court could take judicial notice of the pamphlet, because the facts do not indicate what facts or resources the court could rely upon to establish the reliability of the pamphlet as required under Rule 201(b)(2).

C. The court was not correct in providing a jury instruction to the jury on the issue of contributory negligence. Under the general rules of tort law, contributory negligence is not a defense to a strict liability action. The only defense available to Acme is misuse by Paul.

**ANSWER TO QUESTION #8**

Note that Paula's action against Owner involves two claims: against Owner under a theory of respondeat superior, since Chauf was employed by Owner and the car Chauf was driving was owned by Owner, and of negligence, in hiring Chauf, who was something less than a careful driver.

A. The testimony of Carl involves totem pole hearsay and so each level of hearsay must be evaluated and found to be admissible before the testimony regarding the hearsay is admissible.

Bob's statement to Carl is probably admissible under Rule 803(2), the exception involving excited utterances. Although it might be stretching the doctrine a little bit, the facts do indicate that Carl heard Bob make his statement right after Bob was hit. It is possible that the statement could also be admitted as a dying declaration, but the facts do not indicate that Bob was then acting under a belief of his impending death when he made the statement.

The second level of hearsay involves the recording made by Carl of Bob's statement. It is admissible under 803(6) as a business record made in the ordinary course of business - although it might be rendered inadmissible on the theory that it was prepared in anticipation of litigation. However, the evidence is also admissible as a past recollection recorded (assuming that the writing can be authenticated). See Rule 803(5). If admissible under 803(6) as a business record, then the document itself can be physically entered into evidence, but if admitted as a past recollection recorded, then it can only be read to the jury.

B. All of Dr. Flo's statements are hearsay, since they are out-of-court statements on the issue of Chauf's - and Owner's - liability, and are admissible only if an exception applies.

The statement made by Bob to Dr. Flo regarding the pain in his stomach and head is admissible under 803(4) as statements offered for purposes of medical treatment, since they related to his physical condition at the time he was admitted into the hospital.

The remaining statements are inadmissible because no hearsay exception applies. Bob's statement about the speed of the car would be admissible had he lived to testify - because lay persons are considered to be competent to testify about such matters - but does not come within any hearsay exception. The statement about the driver being drunk is inadmissible under any circumstances because there is nothing in the facts to indicate that Bob had any personal knowledge of this fact. Paula may argue that these statements are admissible under the dying declaration exception, but by swearing vengeance against the driver who hit him, Bob made it clear that he was not anticipating an impending death when the statement was made. This statement of an intent to get even with the driver also robs the statement regarding the speeding car and a drunk, lunatic driver of the indicia of trustworthiness necessary to admit the evidence under the catch-all exceptions. Rule 803(24) is not available because the statements lack the indicia of
reliability which would permit their admission under this catch-all provision. (Bob's statement about vengeance makes any otherwise unsupported statements not credible).

C. This issue is more complicated than appears at first. Chauf's statement is not admissible as a dying declaration under Rule 804(b)(2) because it does not deal with his death, but the death of Bob. It is not admissible as an admission under Rule 801(d)(2)(D) because although it is against the interest of Owner, it was made when Chauf was no longer Owner's employee (assuming, of course, that Owner no longer employs as a chauffeur a man who is in prison for involuntary manslaughter). If the statement is admissible, it is as a declaration against interest under Rule 804(b)(3), since the statement leaves Chauf (or his estate) open to a lawsuit.

D. If the court concludes that it was a habit of Bob to wait at this intersection for the green light before crossing, then this evidence of particularized conduct can be admitted into evidence. For the court to make such a finding, it has to conclude that this conduct was done on each occasion as a regular response to a given situation without much independent thought. Because Frank knew Bob for thirty years and testified that "on many occasions" Bob waited at this intersection for the green light before crossing, there is sufficient evidence for the court to conclude that Bob was in the habit of waiting for the green light. Thus, the evidence can be admitted and the jury may conclude that Bob acted in conformity with this habit on the occasion in question. This evidence goes to the issue of any contributory negligence by Bob.

E. The first question to be settled about Owner's statement is whether the answer was relevant. Since Paula is suing Owner under theories of negligence in hiring and respondeat superior, the question was relevant on the issue of Owner's knowledge about Chauf's driving skills, and any answer regarding knowledge of such skills is also relevant.

The rest of the answer, Owner's statement that Chauf had not received any traffic citations, is inadmissible, since it goes beyond the scope of the question asked. The answer is also inadmissible because there is no evidence to indicate that Owner had any personal knowledge of the citations; therefore any such response is inadmissible.

ANSWER TO QUESTION #9

A. The court incorrectly admitted in Paul's testimony regarding Helico's offer to settle and admission of negligence. While the statement of the officer of Helico was not hearsay, since it was an admission against interest made by the defendant's duly authorized officer, Rule 408 prohibits the admission of either offers of settlement or statements made during negotiations to settle. The policy behind such a prohibition is to encourage parties to settle and allowing in statements made during negotiations would confound that policy.

B. The court incorrectly admitted Professor Jason's testimony. Before a witness can give an opinion as an expert, according to Rule 702, the court must determine whether that witness is qualified to testify as an expert and whether the expert's testimony will aid the jury in understanding a fact or determining an issue. The facts would support a conclusion that Professor Jason is qualified to testify as an expert, with his recognized expertise in engineering, navigation and the operation of the aircraft. It is not as clear, however, that his testimony will necessarily aid the jury in the performance of its duties. His testimony, dealing with the visibility of the rotor during daylight hours, is something that the jury was capable of evaluating when it took a view of the helicopter.

Even if the court had a basis for permitting Professor Jason to testify on this issue, the facts do not support a conclusion that he had sufficient information on which to base an expert opinion. While he studied photographs, he never took a view of the aircraft, although it was possible for him to do so. Without a proper foundation, his expert opinion cannot be admitted.
C. The court was incorrect in admitting Sam's testimony as to what Al told him about Paul's statement. The problem involves totem pole hearsay.

Paul's statement to Al is an admission, and thus admissible. Thus, the real issue is whether Al's statement to Sam is admissible. If Al had recorded the statement, it might be admissible into evidence as a past recollection recorded. But Al recounted the experience to Sam. No exception exists which would lend sufficient credibility to Al's telling Sam about Paul's statement. The statement is inadmissible hearsay and should not have been admitted into evidence.

ANSWER TO QUESTION #10

(a) The court correctly admitted the testimony of Adam. Tess' statement to Adam was hearsay, an out-of-court statement regarding her rape by Roe. It is admissible, though, because Rule 803(2), the excited utterance exception, applies. While five minutes did pass between the time of the rape and Tess' making her statement to Adam, it is likely that the rape was such a startling event that she was incapable of fabricating its contents; her agitated state precluded her from altering her recollection of the experience.

(b) The court incorrectly admitted the testimony of Detective Cable. His statement that he examined the files of known sex offenders deals with character evidence, which is inadmissible under Rule 404(a). The facts do not indicate that the defendant has put his character into evidence; only then could Cable testify, on rebuttal, under Rule 404(a)(1).

His testimony regarding the report and what he found in it is also inadmissible. Had Cable offered a police report about Roe, including a physical description, that report - which is hearsay - would probably be admissible under the business records exception. The facts do not indicate, however, that the file was something prepared in the ordinary course of business, so it lacks the indicia of reliability that a police report would possess.

Cable did not say why he had not brought along the file, even if it had been admissible, and that failure to explain the omission violates the best evidence rule. Therefore, none of Cable's testimony was admissible.

(c) The court correctly admitted into evidence Tess' statement regarding her out-of-court identification of Roe. Under Rule 801(d)(1)(C), a statement is not hearsay if it is a prior statement of identification, made by the witness now on the stand, who is subject to cross-examination concerning that statement.

(d) The court correctly admitted the testimony of Roe's wife. Her testimony is relevant because it is probative on the issue of Roe's condition that night. She can testify against her spouse, the defendant, because the right to testify rests in the witness spouse. Roe cannot prevent her from testifying on the basis of the marital privilege involving confidential communications made during the marriage between the spouses because the wife is testifying about what she saw on that night; the facts do not indicate that Roe actually told her anything.

(e) The court properly admitted in the testimony. While items which are obtained through an illegal search are considered to be the "fruits of the poisonous tree" and are excluded from use in the prosecution of a defendant, such illegally seized items can be used by the prosecution on rebuttal only to impeach the credibility of the defendant while on the stand. The defendant is entitled, however, to a limiting instruction to the jury, informing them that the expert's testimony is to be considered only for purposes of impeaching the defendant witness' credibility.

(f) The court correctly permitted the prosecution to comment about the defendant's refusal to show the blemish. The court could have required the defendant to show the blemish, as per the
prosecution's request, because the defendant's right against self-incrimination extends only to the giving of testimonial evidence, not physical evidence; a defendant can be required to give fingerprints or a blood sample. Since the defendant's right against self-incrimination was not at issue, the prosecution was not prohibited from commenting on the defendant's failure to show his arm (even though the prosecution is forbidden from commenting upon a defendant's failure to testify).

**ANSWER TO QUESTION #14**

A. Prior Use and Possession of Morphine

1. Logical Relevancy

   No evidence is admissible unless it is logically relevant, that is, it has some tendency to prove or disprove a material issue of the case. The fact that Dee had used and been in possession of morphine on numerous prior occasions tends to indicate that he was an addict who would need morphine in the future. In addition, it is well known that drug addicts commit a substantial number of crimes, and since morphine is not generally available, it is especially likely that Dee would have to steal that drug. All these facts tend to aid the fact-finder and the evidence is logically relevant.

2. Legal Relevancy/Character Evidence

   Even if the testimony is logically relevant, it should be excluded if its tendency to mislead or inflame the fact-finder substantially outweighs its probative value; this is sometimes called the rule of legal relevancy.

   Character evidence, in this case in the form of prior conduct, is generally inadmissible to prove that a person acted in conformity with this character trait. Such evidence is too likely to lead to a conclusion that Dee should be convicted because he is a bad person or because, even if he did not commit this crime, he has committed others for which he was never punished. Since the facts offered here are unrelated to the current charges, they would normally be excluded as substantially more prejudicial than probative. (While evidence of habit does not fall within this rule, there is no indication that Dee is in the habit of stealing morphine even if he is in the habit of using the drug.)

   Evidence of conduct on prior occasions is admissible, however, to prove issues other than conduct, such as motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. Here, the fact that Dee was a user of morphine, which he could not legally obtain, establishes a motive for stealing that drug. As such, it would probably be admissible over a character evidence objection.

3. Opinion

   Critical to the above relevancy analysis is the fact that the chemicals possessed and consumed by Dee on the prior occasions were, indeed, morphine. Thus, it must be determined if Tom's belief that the substance was morphine is accurate. Since it is now impossible to chemically analyze those alleged drugs, the issue becomes whether Tom's opinion was reasonably grounded.

   If Tom's conclusion was based on his reading of the label on the container, there would be no special problems, but if his information came from other sources, that data must be evaluated. For example, if Tom's conclusions were based on the statements of others, the hearsay rule would come into play; if Tom claims to have recognized the substance, the prosecution would have to lay a foundation showing that Tom has sufficient experience to make such an identification. In short, unless the bases of Tom's opinion were revealed and subject to cross-examination, Tom's testimony should have been excluded.

B. Dee's Letter
1. **Relevancy**

Dee might argue that the letter is irrelevant since it was written ten days before the robbery in question and since even if the stated facts were true (that Dee intended to rob a pharmacy), he might have changed his mind. This objection would clearly fail, however, because the fact-finder could properly conclude that he later did act in conformity with the stated intent.

2. **Hearsay**

Hearsay is generally defined as an out-of-court statement offered to prove the truth of the matter asserted. Since the letter contains the statements of Dee made at a time other than when he is testifying in the current trial, it meets this definition.

   a. **Admission**

   Words or acts of a party are not inadmissible because of the hearsay rule when they are offered against him. Under the Federal Rules of Evidence, such "admissions" are not considered hearsay at all, while the common law held that admissions constituted an exception to the hearsay rule of exclusion. Under either view, the hearsay rule will not prevent the admission of the letter.

   b. **Mental State**

   In addition, both the FRE and the common law provide an exception to the hearsay rule for declarations of present mental state. Since the letter states Dee's intent at the time the letter was written, it qualifies for this exception and may be used to prove that he later acted in conformity with that intent.

3. **Privilege**

In most jurisdictions, confidential communications between a person and a clergyman in his capacity as a spiritual advisor are privileged; this is true in most jurisdictions even if the communication is not part of a prescribed church rite (e.g., a confession required by church doctrine). While it is not entirely clear that Dee made the disclosure for the purpose of obtaining spiritual guidance (or as part of a required religious practice), it would seem that the letter may not be admitted in a jurisdiction with such a "priest-penitent" privilege.

C. **Attempted Escape**

1. **Relevancy**

Acts which indicate a "consciousness of a weak case" can create a logical inference that the actor was guilty. Here Dee's attempted escape from custody would be relevant to prove that he had committed the crime for which he was arrested. It would not be admissible, however, to prove that he is a law-breaker (this would be improper character evidence).

2. **Hearsay**

In some states, the hearsay rule covers conduct of a party even if the actions were not intended to communicate an idea (so-called non-assertive conduct), although the FRE provides otherwise. In any case, evidence of Dee's attempted escape would not be excluded by the hearsay rule because it is being offered against him as an admission by conduct, a form of admission as defined above.
D. Identification by Wit

Under the FRE, an eyewitness identification is not hearsay if the declarant is available for cross-examination, although the common law held that it would be hearsay in any event. Here, Wit obviously cannot be cross-examined because he is dead. So this identification would be admissible only if the statement qualified for some other hearsay exception. Since there do not appear to be any applicable exceptions, Police Officer Albert's testimony as to this identification is inadmissible.

E. Statement of Lockup

Even though Dee's statement as reported by Lockup denies guilt, it contradicts Dee's alibi defense and impeaches his credibility; thus, it is clearly relevant. Since Dee's own words are being offered against him, it is a party admission, and thus not barred by the hearsay rule.

If Lockup had been a police informant prior to his conversation with Dee, Dee could argue that he was being interrogated in the absence of counsel, a violation of the Sixth Amendment. However, there is no such showing here.
ANSWER TO QUESTION #15

A. PAUL'S TESTIMONY

1. Hearsay

   Hearsay is generally defined as an out-of-court statement offered to prove the truth of the matter asserted. Since Paul is repeating the statements made by Don at the time of the accident, the testimony certainly falls under this definition.

   a. Admission

      At common law, the words or acts of a party could be admitted over a hearsay objection if they were being offered against that party. This "admissions" exception to the hearsay rule applied to statements made by the agent of a party, but only if the agent was authorized to speak on the principal's behalf. It is unlikely that a cab driver would be authorized to speak for the cab company, and thus the common law exception would be inapplicable.

      Under the Federal Rules of Evidence (FRE), however, a party admission is specifically excluded from the definition of hearsay. Furthermore, the Rules provide that vicarious admissions are not hearsay so long as the employee is speaking of a matter related to his employment at a time when the employment relationship is still in existence. Under this test, Paul's testimony would clearly be admissible over a hearsay objection, as Don was Cabco's employee and the accident was obviously related to Don's employment (he was hired as a driver and the accident was related to this conduct).

   b. Excited Utterance/Present Sense Impression

      Spontaneous statements made while the declarant is still under the stress of an exciting event are admissible over a hearsay objection because there is insufficient time to fabricate and memory problems are not present. It appears that Don was still caught up in the stress of the accident when he made the statement (Paul testified that "Don was hurting real bad") and thus the excited utterance exception would apply.

      Under the FRE, statements describing or explaining an event are not inadmissible hearsay if they are made while the declarant was perceiving the event or immediately thereafter even if he was not under stress or particularly excited. While we are not told how much time had elapsed between the collision and Don's statement, the statement might well fall within this "present sense impression" exception to the hearsay rule.

   c. Declaration Against Interest

      In addition, Paul could overcome a hearsay objection by use of the declaration against interest exception if Don was shown to be unavailable (i.e., dead, mentally incompetent, or outside the jurisdiction's subpoena power) since his statement was clearly against his pecuniary interest when made (it would subject him to personal tort liability to Paul and Vicky and could cost him his job). Finally, Don's statement might be against his penal interests, an additional ground for admission of declarations against interest under the FRE, since his statement could subject him to criminal liability (for negligent homicide).

2. Opinion

236
Paul's statement that "Don was hurting real bad" is relevant to proving a fact in issue (was Don under stress, as is required by the excited utterance exception as discussed above). Nevertheless, it would be inadmissible if it was an improper opinion. Ordinarily, a witness may only testify as to observations and facts, not conclusions or opinions, unless a foundation showing the witness's special competence to formulate the opinion is made. Here, however, Paul's characterization is not being used to prove the severity of Don's injuries (something that would require special expertise), but merely that Don was upset. Since common experience enables ordinary laypersons to make such an assessment, no foundation would be required here and the opinion rule would not bar Paul's testimony.

B. CROSS-EXAMINATION OF PAUL

1. Character Evidence

Absent very special circumstances which are not present here, rules of character evidence prohibit the introduction of evidence as to prior conduct to prove how a person acted on another occasion. Thus, if Cabco had sought to introduce the prior conviction to prove that Paul was driving negligently at the time of the accident, the conviction would be inadmissible character evidence.

2. Impeachment

Here, however, Cabco will argue that it is introducing the evidence of the conviction to impeach Paul's credibility.

a. Collateral Matter Rule

Normally, a witness may not be impeached by use of extrinsic evidence on a collateral matter. Since whether or not Paul had ever been in a wholly unrelated traffic accident is not of great importance to this case, Cabco could not go beyond Paul's denial to prove that he had, in fact, had a prior accident.

b. Crime

Despite the collateral matter rule, criminal convictions are often admissible to impeach a witness under the theory that the jury might reasonably infer that criminals are less likely to tell the truth than others. In some jurisdictions, evidence of the conviction for any felony is admissible for impeachment purposes, while others allow the use of convictions, whether felonies or misdemeanors, only if the crime is related to dishonesty. Since vehicular manslaughter is not a crime involving dishonesty, evidence of Paul's earlier conviction could be had only under the former rule.

According to the FRE, convictions for crimes not involving dishonesty are admissible only if they are punishable by death or more than a year in prison and introduction would not be more prejudicial to the defendant than it is probative. While the first criterion is probably met (the facts indicate that Paul was convicted of a felony and most felonies are punishable by at least one year in prison), the prejudicial impact probably outweighed its probative value because the jury might improperly conclude that this conviction proves that Paul is a careless driver in general and thus he was probably negligent here, especially if there was no limiting instruction. Now that the ruling has already been made, however, reversal would be granted only in the event that the appellate court finds that the trial court's contrary holding was an abuse of discretion.

Assuming that evidence of the conviction was otherwise admissible, the FRE allows introduction of a public record in lieu of eliciting an admission from the witness. While such prior confrontation was preferred at common law, Cabco was not required to ask Paul specifically about the prior conviction since it was proved by properly authenticated court records.

3. Hearsay
The record of the conviction is technically hearsay. Nevertheless, the public records exception applies to statements made by public officials as part of their official duties if recorded at or near the time of the act in question. Assuming that the "authenticated copy" is the functional equivalent of a "certified copy," the record of the conviction would clearly fall within this exception.

4. **Best Evidence Rule**

Under the Best Evidence Rule, whenever the terms of a writing are in issue, the original must be produced or shown to be unavailable. Since a properly authenticated copy of a public record is considered an original, however, this is not a problem in this case.

C. **TESTIMONY OF DOC**

1. **Relevance**

Vicky's statement indicates two possible acts of negligence by Paul - that he wasn't looking while he was driving and that he may have been driving under the influence of marijuana - and thus it was obviously logically relevant. While this statement hurts Paul's case badly, its tendency to mislead the jury does not substantially outweigh its probative value, and so it is not barred by legal relevancy principles.

2. **Hearsay**

Vicky's statement to Doc is clearly hearsay as defined above, but it may be subject to various exceptions to the hearsay rule.

   a. **Declaration Against Interest**

Vicky is certainly unavailable (she's dead) and her statement was arguably against her interests when made. Her statement could be held to be against her pecuniary interests as her knowledge of Paul's use of marijuana could be construed as assumption of risk, contributory negligence, and/or comparative negligence which would reduce potential recovery from Paul. It would also be against her penal interest since smoking marijuana is a crime.

The problem would be that if her statement to Doc was privileged (see below), it could not be used against her and thus is not truly against her interest. Nevertheless, the "catch-all" exception to the hearsay rule would probably replace the declaration against interest exception here since there are adequate assurances of trustworthiness to satisfy the policy underlying the hearsay rule.
b. **Physical Sensation**

At common law, the "present physical sensation" exception to the hearsay rule permitted statements of then-existing physical sensations to be admitted over a hearsay objection. The FRE has broadened this exception by allowing statements relating to prior sensations and even the causes for the sensation so long as they are given for, and pertinent to, diagnosis or treatment. The presence of marijuana in Vicky's system and the possible position that she was in at the time of impact could conceivably be relevant to the treatment that she would require, but this argument seems somewhat tenuous.

c. **Dying Declaration**

A statement concerning the declarant's own death, as to matters within his or her personal knowledge, may be admissible if made under a sense of impending death. Here, there is no indication that Vicky knew that she was about to die. The facts seem to indicate that she had suffered a relatively minor injury and died from complications of surgery; even if it was foreseeable that she might die, it does not appear that Vicky was reasonably certain that this would happen. Furthermore, some jurisdictions recognize this exception only in homicide cases, although the FRE abandoned this limitation.

3. **Privilege**

Paul will argue that Vicky's statements are not admissible because of the physician-patient privilege. Under the typical physician-patient privilege, confidential communications between a patient and his or her doctor are privileged if related to diagnosis or treatment. Here, however, there are three problems. First, this privilege is not recognized by all jurisdictions. Second, as discussed above, it is not clear that the statements were made for purposes of diagnosis or treatment (although this test is often construed more broadly in the privilege area than when the issue is one of hearsay). Finally, while the physician is able to assert the privilege on the patient's behalf if the patient is not present, the rights and liabilities of Vicky and/or her estate are not in issue here and a third party such as Paul has no absolute right to invoke the privilege on Vicky's behalf.

**ANSWER TO QUESTION #16**

1. “You did not test the drill . . . did you?”

   **Objection:** Leading. Dr. Jones’ attorney might object that this question was leading because it suggests its own answer. This objection would be overruled because leading questions are admissible when examining a hostile or adverse witness, even on direct examination. Dr. Jones is the adverse party, called by Mary in her case in chief. Objection overruled.

   **Objection:** Misleading. Dr. Jones’ attorney could argue that the question is misleading and confusing because it is phrased in the negative. Objection sustained. The question should be rephrased, as “Did you test the drill . . .?”

2. “That’s not part of our procedure.”

   **Objection:** Non-responsive. Dr. Jones’ attorney could argue that this part of Jones’ answer was not responsive to the question asked. Jones was asked what he did, not about procedures. He answered the specific question but then went on to add information about which he had not been asked. Jones’ attorney might move to strike the non-responsive answer from the record, but such a motion should be granted only if requested by the examining party, Mary.

3. “Since Mary’s operation, you now test these drills immediately before using them, don’t you?”
Objection: Inadmissible Evidence of Subsequent Safety Measures. Jones’s practice in this regard is logically relevant; the fact that he subsequently changed his procedure makes it more likely that Jones was negligent with regard to the drill in the operation on Mary. Nevertheless, evidence of subsequent remedial measures by Jones is inadmissible to prove his negligence because public policy encourages remedial measures. Nevertheless, such measures would be admissible to prove ownership or control of the property or instrumentality causing the harm. The new procedure clearly seems remedial, and as there is no apparent purpose for the evidence except to show Jones’ prior fault, it should have been excluded.

4. “You heard Nurse Clark say ‘The drill bit looks wobbly, didn’t you?’”

Objection: Hearsay. Dr. Jones’ attorney will argue that this question calls for inadmissible hearsay evidence. Hearsay is an out-of-court statement repeated in court and used to prove the truth of the matter asserted. Nurse Clark’s operating room statement is apparently being offered to prove its truth, i.e., that the drill bit was wobbly. This statement is hearsay and thus admissible only if it comes under a recognized exception to the hearsay rule. There are two exceptions that Mary’s attorney might argue.

(1) Admission by a party – opponent. It could be argued that Clark was an agent of Jones, and thus that her statement could be imputed to him as an admission (actually, non-hearsay). But it appears Clark was a hospital employee rather than Jones’ employee. If so, the statement is not an admission by a party-opponent.

(2) Present sense impression. It appears Clark’s statement was a present sense impression. It was made while she was observing an event and described what she observed. (We have no evidence she was excited, so this isn’t an excited utterance.) As a present sense impression, it would be admissible under the hearsay rule, so the objection should be denied.

5. “In her report, she wrote: ‘At time of insertion I said the drill bit looked wobbly.’”

Objection: Hearsay. The statement from Nurse Clark’s report is double hearsay. The report itself is an out-of-court statement which contains another out-of-court statement. Both statements are being offered to prove the truth of what they assert. The statement from the report is being used to show that Nurse Clark did in fact say that the bit was wobbly. Thus, the statement in the report is admissible only if both statements fall under a hearsay exception. As noted above, the operating room statement is admissible as a present sense impression. There also needs to be an exception for the report.

Nurse Clark’s report is probably admissible as a business (or hospital) record. It was made pursuant to established hospital procedures, by one with a business duty to do the recording, soon after the events recorded took place.

Mary’s attorney might argue that the question was intended only for rebuttal since Dr. Jones denied hearing her statement. This would take care of the hearsay problem, but the fact that Clark said it does not mean Jones heard it, which was the initial question, so this form of rebuttal would be improper.

Authentication. The report must be authenticated. Jones’ attorney could have objected that Clark’s report was not adequately identified. Nurse Clark did not testify that it was the report she personally wrote according to hospital procedures, nor was Jones shown to be someone familiar with her handwriting or with the form of these reports. However, Jones, a person who should recognize a surgical report, testified that it was what plaintiff claimed it to be. This may be adequate authentication.

6. “And this book . . . says . . .”

Authentication: Widely published materials such as books and newspapers are regarded as self-authenticating, so Jones could not raise this as an objection.
Objection: Hearsay. The Tompkins book is hearsay because it is an out-of-court statement being offered to prove the truth of the matters asserted therein. Thus, it is admissible only if it falls within an exception. The applicable exception is for learned treatises. The treatise must be introduced to an expert to authenticate it. The expert need not have relied on the treatise, but it must be shown to be reasonably authoritative in the field. Here Jones just said that “some people” think this is authoritative. This is probably good enough, given that the standard doesn’t require universal acceptance as an authority. However, it is doubtful that Mary has called Dr. Jones as an expert in his own trial; he is testifying in his personal capacity. An expert witness should not be one with a personal interest in the litigation, and there is no evidence that Jones was qualified as an expert in this trial. If not properly introduced, the book remains inadmissible hearsay.

Objection: Use of Collateral Evidence for Impeachment. The book could be used to impeach Jones. Any party is allowed to impeach a witness. It is extrinsic evidence but extrinsic evidence may be used to impeach by contradiction on a non-collateral matter. Jones’s negligence isn’t collateral thus, the treatise can be used to contradict and thus impeach Jones.

7. “You were accused by two patients of having sexually abused them, weren’t you?”

Objection: Improper Use of Character Evidence. The question inquires about Jones’ prior bad acts. First, Jones’ attorney could argue this testimony is irrelevant because sexual assault is unrelated to the issues in the present case. The only purpose of this evidence would be to impeach Jones’ character generally, so the evidence should be excluded. Under the analysis of Rule 403, it is highly prejudicial with low probative value. Prior bad acts are admissible to impeach if relevant to veracity, which sexual assault is not. If there had been a felony conviction, it would be admissible to impeach regardless of the nature of the crime, but there was no conviction. Thus, the evidence may not be used to impeach Dr. Jones.

8. “But you do admit that in two other operations you performed . . . .”

Objection: Improper Use of Character Evidence. As noted above, character evidence is not admissible in civil trials to show fault. It is doubtful evidence of these similar accidents has any purpose other than to prove Jones’ negligence in this instance by his propensity for negligence. Character isn’t in issue in a negligence case. Thus, the question is improper under the Rules of Evidence, even though such evidence would seem more probative than questions about unrelated acts such as sexual abuse.

Impeachment. The prior bad acts can’t be used to impeach, because, as noted above, they are unrelated to truthfulness.

**ANSWER TO QUESTION #17**

1. Wolf’s statement about what Dan told him the night before the sale was properly admitted.

   This is first-hand testimony, relevant, and admissible under the hearsay rule.

   **Relevance.** Evidence is relevant if it tends to make the existence of a material fact more or less likely. Wolf’s statement is relevant because it tends to show that Dan went to Guy’s bar with intent to sell heroin to Peters. The probative value is not outweighed by any unfairly prejudicial effect.

   **Hearsay.** Dan’s statement to Wolf was an out-of-court statement but is non-hearsay. Since Dan is a party in this case, his out-of-court admissions are admissible against him without objection under the hearsay rule. Furthermore, Dan’s statement might be offered as a statement of present mental state tending to show that the speaker later acted according to his expressed intent. Showing Dan’s state of mind in this manner is not hearsay.
(2) Peters’ testimony that Bob told her he had bought marijuana from Dan the night before should have been excluded.

Character: Specific Bad Acts. While evidence that Dan had recently sold marijuana to another person may be relevant to show his intent to sell drugs and to contradict his entrapment defense, evidence of specific bad acts is generally inadmissible because the risk of prejudice outweighs its probative value. It is improper to ask the jury to infer that the defendant acted on the occasion in question in conformity with the prior bad act. The risk of prejudice is likely here that the jury would conclude Dan committed an offense on the night in question if he had committed a similar offense previously when in fact the offenses are not sufficiently similar because selling heroin is much more serious and it would be unfairly prejudicial to allow the jury to make this leap of logic.

Hearsay. Bob’s statement to Peters was made out of court and is being offered to prove the truth of the matter asserted, that Dan sold drugs to Bob. This hearsay statement might be subject to the exception for statements against penal interest if Bob knew Peters was an undercover officer, which is unlikely. We also have no indication that Bob is unavailable to testify, which would be required for the declaration against self-interest exception to apply. Since there appears to be no applicable hearsay exception, the statement should have been excluded.

(3) Peters’ hard copy of her e-mail message to Dan requesting that they meet for him to sell her heroin was properly admitted.

Writings. The hard copy of the e-mail message is probably the best evidence unless the court insists on a download of the message from her computer on disk. Peters should be able to authenticate the message as the e-mail she sent.

Hearsay. The e-mail message is an out-of-court statement by Peters, and thus is hearsay unless not offered in this case to prove the truth of the matter asserted. If it is not being offered for its content but to show the effect on Dan when he received the message, i.e., he left for the bar carrying heroin for sale, it can be admitted for this purpose.

4) Prosecutor’s question about Dan’s earlier arrest for selling marijuana should not have been allowed, and the answer was non-responsive.

Motion to Strike the Answer. Dan’s answer is non-responsive in that it goes beyond the yes or no called for by the question. The question simply asks about his arrest, not whether he was convicted or the reasons why not. The extraneous matter should be stricken.

Improper Use of Character Evidence. The court probably should have found that the question was improper as well. Here Dan, the defendant, is testifying in his own behalf. His character is not directly in issue and the prosecution has improperly put it in issue by asking about his former arrest unless this evidence is offered to prove something other than his character. Dan’s past history of selling marijuana would be relevant to his entrapment defense but inadmissible to show a propensity to act in accordance with such past acts in this case, i.e., to sell heroin. If evidence of other crimes is admissible to rebut entrapment, there need not have been a conviction. The fact that this was only an arrest, not a conviction, however, probably means that the potential prejudice would outweigh the probative value of a mere arrest. It cannot be used merely to impeach Dan, either, because for impeachment by reference to prior bad acts, the acts must involve dishonesty.

5) Prosecutor’s motion to strike Cal’s answer to defense question about Dan’s good moral character should be allowed.
The question is partly non-responsive since it gives more than asked for. Cal was asked for his own opinion and cannot testify about other people’s opinion of Dan—this is reputation and requires a separate foundation, a showing that Cal was aware of Dan’s reputation in the community. There was no opportunity for rehabilitation by evidence of good character or truthfulness since Dan had not been impeached, i.e., his character or truthfulness had not been attacked.
PROFESSIONAL RESPONSIBILITY ESSAYS

Note: Question # 2 contains a “model” answer prepared by a CBR editor in the FLA writing style taught in the Essay Writing Workshop.

QUESTION #1 (JULY 2004 EXAM)

After working for ten years as a deputy district attorney, Lawyer decided to open her own law practice and represent plaintiffs in personal injury actions. In order to attract clients, Lawyer asked her friends and family to “pass the word around that I have opened a solo practice specializing in personal injury law.”

Lawyer’s brother, Bert, works as an emergency room admitting clerk at a local hospital. Whenever he admits patients who appear to be victims of another’s wrongdoing, Bert gives them Lawyer’s business card and suggests that they talk to her about filing a lawsuit. Each time Lawyer is retained by someone referred by Bert, Lawyer takes Bert out to lunch and gives him $500.

One such referral is Paul, who suffered head injuries when struck by a piece of heavy equipment on a construction site at Dinoworld, a local amusement park. Recently Lawyer filed a personal injury action on Paul’s behalf against Dinoworld. Dinoworld’s attorney immediately filed an answer to the complaint. Lawyer and Dinoworld’s attorney agreed to set the deposition of the Chief Financial Officer (CFO) of Dinoworld within the next ninety days.

Lawyer’s brother-in-law holds an annual pass to Dinoworld. Two weeks ago, he invited Lawyer to a special “passholders-only” event at Dinoworld, at which Dinoworld’s CFO led a tour and made a presentation. At the event, Lawyer declined to wear a name tag and avoided introducing herself. She asked CFO several questions about Dinoworld’s finances, and made some notes about his responses.

What ethical duties, if any, has Lawyer breached? Discuss.

QUESTION #2

Len, a public defender, has been assigned to defend Art and Bill, two nineteen-year-old defendants who have been indicted for assault with a deadly weapon and attempted murder. Art and Bill admitted that they had approached Chuck, that they began a conversation with him, and that Bill pulled a handgun from his pocket and fired at Chuck, wounding him in the arm.

Len spoke with each defendant separately. Art told him that he had not recognized Chuck, which he had not known Bill was armed, and that they had approached Chuck to ask for a cigarette. Art said that from his own point of view, Bill's attack on Chuck was sudden and completely unexpected.

Bill told Len that he had believed that Chuck was a member of a rival gang and wanted to "shake him up a little bit." He said that he now knew he was mistaken and Chuck was a stranger. He also maintained that he thought the gun was empty when he fired it. Bill offered to hand the gun, which he had hidden, over to Len to do with whatever Len thought best. Len took the gun and gave it to the prosecutor without giving any explanation of how it came into Len's possession.
1. Did Len violate the ABA Model Rules of Professional Conduct or Model Code of Professional Responsibility by giving the gun to the prosecutor? Discuss.

2. Will Len violate the ABA Model Rules of Professional Conduct or Model Code of Professional Responsibility if he defends both Art and Bill or either of them? Discuss.

3. If the statements of Bill and Art are truthful, is Bill guilty of the charged offenses? Discuss.

4. If the statements of Bill and Art are truthful, is Art guilty of the charged offenses? Discuss.

**QUESTION #3**

Officer is the treasurer of Bank. Officer called the Bank's regular outside counsel, Lawyer, and asked that they meet immediately. Lawyer offered to come to Bank, but Officer insisted that they meet elsewhere for "confidentiality reasons."

When Officer arrived, he was visibly upset. He began by telling Lawyer that Bank was experiencing financial difficulties which, if not corrected, would lead "to more serious problems." The problem began several years ago when Officer's superior, Boss, the president of Bank, began making loans to fictitious corporations for Boss' benefit. The loans were initially for small amounts, but, the amounts increased and now totaled over $1,000,000. Neither Boss nor any of the fictitious corporations is able currently to repay the loans, and interest on the loans has not been paid for some time.

Officer learned of the loans a year ago but agreed with Boss to keep quiet. In return, Boss arranged to have a $25,000 loan made to XYZ, a newly created corporation, for Officer's personal benefit. Officer reminded Lawyer that Lawyer's firm prepared the incorporating documents for XYZ Corporation.

Officer believes that all loans for both his and Boss' benefit could be repaid over time, but because Bank's auditors are scheduled to review Bank's financial statements the following week, the problem loans are likely to be revealed.

Officer asked Lawyer to agree to advise him how to protect himself, Boss, and Bank from liability. Officer requested that the information he had disclosed and Lawyer's advice be kept confidential. Lawyer has not responded to Officer's requests.

Under the ABA Model Rules and ABA Code of Professional Responsibility:

1. Can Lawyer ethically agree to assist Officer, Bank, or Boss? Discuss.

2. Can Lawyer ethically disclose the information she has learned:
   a. to Boss? Discuss.
   b. to other officials of Bank? Discuss.

3. What individuals or entities will be able to waive Bank's attorney-client privilege relating to Lawyer's discussion with Officer? Discuss.

4. What are Lawyer's ethical obligations to Bank given her law firm's preparation of the incorporating documents for XYZ Corporation? Discuss.

**QUESTION #4**
Doctor is a nationally recognized surgeon. He operated on Patient who, after the surgery, developed an infection and died. Exec, the personal representative of Patient's estate, commenced a malpractice action against Doctor who referred the claim to Medins, Doctor's malpractice insurance carrier.

Doctor's policy provided that Medins would retain an attorney to defend any claim against Doctor, and would pay up to $1,000,000 in satisfaction of any claim or judgment against Doctor. The policy also provided that Medins would "investigate and settle any claim as it deemed appropriate."

Medins retained Lawyer to defend against Exec's claim. After reviewing the record, conducting some discovery and obtaining an opinion from a medical expert, Lawyer reasonably concluded that, while Doctor's liability was uncertain, Exec had a good chance of prevailing. In light of the possibility of substantial damages, Lawyer recommended that Medins settle the case. Medins authorized a settlement. Lawyer then negotiated with Exec's attorney and reached a tentative agreement to settle the case for $500,000.

Lawyer's secretary notified Doctor of the proposed settlement. Doctor expressed anger with the proposed settlement, stating unequivocally that he was not responsible for Patient's death. Doctor stated that settling would adversely affect his reputation, could increase his insurance premiums, and could result in disciplinary action against him. Accordingly, Doctor told the secretary that he would not authorize the settlement. There were no further communications between Lawyer and Doctor.

Lawyer contacted Medins, informing it of Doctor's objections and seeking further direction. Medins directed Lawyer to complete the settlement in accordance with the tentative agreement.

(1) Who does Lawyer represent in this case? Discuss.

(2) Has Lawyer violated rules of ethical behavior in her handling of the case prior to taking action on Medins' direction? Discuss.

(3) May Lawyer settle the dispute as directed by Medins without breaching rules of professional responsibility? Discuss.

(4) What rights does Doctor have, if any, against Lawyer? Discuss.

**QUESTION #5**

May has represented the International Bakers Union (IBU) as its attorney for several years. Last year, while IBU was on strike against Bakery, a car belonging to the owner of Bakery was firebombed outside his home. Walter, the vice president of IBU, and Frank, an apprentice member of the union, were charged with arson to property, a felony carrying a penalty of up to three years in prison.

IBU retained May to represent Walter and Frank in the criminal case. Shortly after entering her appearance, May was approached by Pete, the prosecutor, who told her that an unidentified member of IBU's Executive Board would testify that Walter and other members of IBU leadership planned the firebombing and got Frank to go along only after they threatened to revoke his apprentice union card. Pete said that if Frank would testify for the prosecution against Walter, Pete would allow Frank to plead guilty to a misdemeanor and would recommend that he be placed on probation. May immediately refused, telling Pete that she knows he is just a "union buster," and that IBU’s interests would suffer if she agreed to his proposal.

The case proceeded to trial, and the secretary of IBU testified for the prosecution as Pete had indicated. Both Walter and Frank were convicted. The judge denied May's pleas that her clients be placed on probation and sentenced each defendant to three years in prison.
What standards of professional responsibility, if any, has May violated? Discuss.

QUESTION #6

Jones & Smith is a law firm concentrating on plaintiffs’ personal injury litigation. The firm has decided to take several steps to increase its business volume.

First, the firm plans to run television advertisements stating that the firm offers to handle cases for discount contingency fees. The advertisements will state that, while most firms normally charge a 33% contingency fee for handling a personal injury case, Jones & Smith will undertake representation for a fee of 25%. In addition, the advertisements will state that the firm offers interest-free advances against prospective judgments in cases of clear liability of up to 50% of the firm’s estimated value of the case.

Second, the firm plans to acquire from the police department lists of individuals who have been involved in automobile accidents, and to mail letters to those persons informing them that the firm is available for consultation about their legal rights arising out of the accident. Individuals who have been hospitalized as a result of an accident will receive a flower arrangement, delivered “compliments of Jones & Smith, Attorneys at Law.”

Finally, the firm plans to make use of non-lawyers in order to reduce costs. The firm will employ several paralegals and investigators who will be responsible for working up personal injury cases. Their activities will include fact investigation, witness interviews, negotiation with insurance adjusters, and meetings with clients to discuss proposed settlements, and settlement conferences with clients to explain releases and to execute other documents necessary to conclude a case.

Do the proposed actions violate any rules of professional conduct? Discuss.

QUESTION #7

David has been arrested for and charged with Murder and robbery. David made a telephone call to Attorney, a member of the California Bar. Attorney came to see David in the small rural jail in which David is being held and agreed to represent him.

In an interview in the jail, David told Attorney that he killed the victim and stole the victim’s shirt, shoes, and ring, and was wearing them when he was arrested. David also told attorney that he had hidden the shirt and shoes as best he could in his cell, and that he had thrown the ring out of the cell window into a trash can behind the jail. David is now bare-chested, bare-fingered, and bare-footed.

Attorney told David to do nothing else to hide or destroy evidence and David reluctantly agreed. Attorney then left, went behind the jail and looked into the trash can. The trash can was empty except for a ring. At this point, Attorney heard a noise, looked up, and saw David throw a pair of shoes out of the cell window into a trash can behind the jail. David is now bare-chested, bare-fingered, and bare-footed.

Attorney told David to do nothing else to hide or destroy evidence and David reluctantly agreed. Attorney then left, went behind the jail and looked into the trash can. The trash can was empty except for a ring. At this point, Attorney heard a noise, looked up, and saw David throw a pair of shoes out of the cell window into a trash can behind the jail. The noise also attracted a police officer, who discovered the shoes and ring. The police officer asked Attorney what he knew about the ring and shoes. Attorney refused to tell the police officer anything about them.

Attorney returned to the jail and spoke to David again. David told him that he had torn the shirt into strips, which he plans to burn. Attorney told David not to burn the strips, but David insisted that he will burn them.

Attorney is called before the Grand jury investigating the murder and robbery. Consistent with his ethical obligations:
1. Should Attorney have told the police officer anything about the shoes or the ring? Discuss.

2. Should Attorney tell the Grand jury that David is threatening to burn the scraps of the shirt? Discuss.

3. May Attorney tell the Grand Jury anything about any of the other events described above? Discuss.

4. Should Attorney continue to represent David? Discuss.
ANSWERS TO SELECTED PROF. RESPONSIBILITY QUESTIONS

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law nor are the writer’s conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing essay. Also, another answer could have a totally different analysis and conclusions and still be considered an acceptable passing essay.

“MODEL” ANSWER TO QUESTION #1

I. Prior Government Lawyers

Lawyer worked for ten years as a deputy district attorney before transitioning to private practice, starting a personal injury firm to represent plaintiffs.

The disciplinary committee of the Bar may question whether it is a conflict of interest for Lawyer to switch from government service to private practice. Lawyer will argue that so long as none of the clients she takes on in private practice are involved in a matter she handled as deputy district attorney then there is no conflict of interest. The Rules prohibit an attorney from representing a private client after government service when the lawyer has personally and substantially participated in the matter as a public officer or employee.

Since there is no indication any of Lawyer’s clients in her private, personal injury practice are or were involved in matters she handled directly as a deputy district attorney, there is no conflict of interest. However, Lawyer should be aware of the potential for conflicts in the future.

II. Attracting Clients

A. Advertising

Lawyer opened her own law practice and requested that friends and family tell people they knew that Lawyer was now a solo practitioner specializing in personal injury.

The disciplinary committee will attempt to show that Lawyer’s request that her friends and family spread the word about her new practice constituted solicitation rather than a permissible advertisement. Advertisements are permissible so long as they comply with standards such as not making guarantees about outcomes or any misrepresentations. Conversely, solicitations, which are personal contact with a specific prospective client in order to obtain employment with respect to a particular matter, are generally prohibited. The disciplinary committee will point to the fact that the information coming from Lawyer’s friends and family will be direct and in-person, just as solicitations are. But Lawyer will attempt to distinguish them because those were non-lawyers talking to people directly and not the attorney seeking to profit. Finally, the disciplinary committee will argue that Lawyer is holding herself out as capable of representing plaintiffs in personal injury actions and therefore actually needs to possess such
skills. Since Lawyer came from the criminal law field, it is possible that she doesn’t have any of the relevant experience or skills required for personal injury law. If so, the disciplinary committee will assert she made a misrepresentation that turns even a valid advertisement into a reason for potential sanctions. A lawyer in California is not permitted to make any misrepresentation in her advertisements, whether they are material or not.

Lawyer’s request that her friends and family tell others about her opening up a solo practice would probably not be considered an impermissible solicitation under the Rules. What she is doing is more properly characterized as advertising. Lawyer is just telling people she knows that she opened a practice and asking them to spread the word about its existence and not directly soliciting clients. However, Lawyer may still be in violation of the Rules if she does not actually have the skills required to practice personal injury law because any misrepresentation in an advertisement is not allowed in California.

B. Solicitation

Bert, Lawyer’s brother, works in a hospital emergency room as an admitting clerk. Whenever he comes across a patient who may have a personal injury claim he suggests they talk to his sister about filing a suit. He also gives them her business card. Whenever one of those contacts becomes a client of Lawyer she takes Bert out to lunch and gives him $500.

The disciplinary committee will argue that Bert, under the direction of Lawyer, is soliciting clients in violation of the Rules. In California, a solicitation is any communication concerning the lawyer’s availability for professional employment in which a significant motive is pecuniary gain and which is either delivered in person or by telephone or directed by any means to a person known to the sender to be represented by counsel in a matter that is a subject of the communication. Lawyer will point to the fact that she didn’t actually speak with the hospital patients herself. However, the disciplinary committee will say that it was at her direction, or at least with her consent. It is impermissible to solicit clients through another person, just as it is to directly solicit them oneself. Additionally, the disciplinary committee will note that the people Bert talked to were in very vulnerable positions, particularly here where Bert was checking them in and they were likely scared and in pain and willing to do whatever he said in order to be seen by a doctor as quickly as possible. The disciplinary committee will also object to the lunch and $500 Lawyer gave to Bert for every successful referral. Lawyer will try to assert she was just having social lunches with her brother, but since they were each tied to a successful referral and came with a $500 gift, the disciplinary committee will argue they should be seen as compensation. Such payments are strictly forbidden under the Rules. It is impermissible to give money, gifts, or cross-referrals in exchange for referrals to a law practice.

Lawyer would be subject to discipline for soliciting clients through Bert. Although Bert is not an attorney, he was acting on Lawyer’s behalf and using his position in emergency room admissions to convince people at a very vulnerable point to contact Lawyer and sue for their injuries. Banning this type of behavior is within the goals of the Rules’ prohibition on solicitation. Lawyer would also be subject to discipline for compensating Bert for his referrals. Lawyer gave Bert money and took him out to lunch every time he successfully brought her a new client. This is compensation for a referral, which is prohibited.

III. Visit to Dinoworld

A. Duty to Client

One of Lawyer’s clients, Paul, was injured at Dinoworld and Lawyer filed suit against the amusement park on his behalf. Lawyer subsequently attended a special event at Dinoworld at the invitation of her brother-in-law, who has an annual pass to the park.
The disciplinary committee will assert that Lawyer’s acceptance of the special pass to Dinoworld was a conflict of interest because her client’s interests are directly adverse to Dinoworld’s. An attorney owes a duty of loyalty to her clients, which includes not having personal interests adverse to theirs. Lawyer will say she didn’t receive any personal benefit from Dinoworld because the ticket came from her brother-in-law and it was just a one-time event. In California, written disclosure is required where a lawyer has any business, financial, or personal relationship with the opposing party. Lawyer will argue that just going to this one event does not give her a personal interest adverse to Paul’s and does not constitute a business, financial, or personal relationship. The committee, however, will say that at a bare minimum this event gave the appearance of a conflict.

Lawyer most likely did not violate her duty of loyalty to Paul by going to the Dinoworld event with her brother-in-law. Although she could have avoided any appearance of impropriety by either declining to attend or getting informed consent from Paul first, just going to a special event at the park would probably not be enough to count as a breach of the duty of loyalty.

B. Duty to the Opposing Party

After filing suit against Dinoworld on behalf on Paul, opposing counsel filed an answer, and they scheduled the deposition of Dinoworld’s CFO. Recently, Lawyer went on a group tour of Dinoworld with the CFO. She never identified herself, but asked him questions about Dinoworld’s finances and made notes about the CFO’s replies.

Lawyer will assert that she just happened to be invited to the Dinoworld event by her brother-in-law and that the CFO just happened to be there. However, the disciplinary committee will say that Lawyer’s duty not to talk to someone involved in the suit that is represented by counsel without the permission of his counsel is not waived simply because she didn’t know he would be present at an event. Lawyer purposefully asked CFO questions about Dinoworld. Under the Rules, Lawyer would not be permitted to talk to a party represented by counsel about the subject of the suit unless the other counsel gave her express permission to do so. Lawyer would not be able to argue that the suit hadn’t commenced, since she had filed the action, Dinoworld had filed an answer, and a deposition had been scheduled. Also, even if the suit hasn’t yet commenced, all that mattered was that Lawyer had a client with adverse interests to Dinoworld and Dinoworld’s CFO was represented by counsel. Here, since a deposition of the CFO was scheduled through Dinoworld’s counsel, the disciplinary committee will argue that it would be unreasonable to assume that the CFO was not represented by counsel. That, however, will be Lawyer’s final argument—that the CFO is not the defendant in the lawsuit and therefore she didn’t know Dinoworld’s counsel represented him. However, the disciplinary committee will assert that since CFO was a very high ranking corporate officer he is considered the same as Dinoworld for this purpose. The test is whether the person is a manager or director of the corporate entity and whether his words could constitute an admission by the corporate entity.

It was improper for Lawyer to ask the CFO questions about Dinoworld without getting express permission from opposing counsel beforehand. Lawyer’s conduct suggested she knew the CFO would not answer the questions had he known she was currently suing Dinoworld and would be deposing him soon. She knew or reasonably should have known that he was represented because he is a director of the corporation and is likely represented by the corporation’s counsel in this matter. Since she took notes, it also indicates that Lawyer believed that the CFO’s words could be used against Dinoworld, further suggesting that she understood he spoke for them in corporate financial matters. Lawyer would be subject to discipline for this breach of the Rules.

“MODEL” ANSWER TO QUESTION #2
I. Giving the gun to the prosecutor

Len represented Bill after the nineteen-year-old was indicted for assault with a deadly weapon and attempted murder for the shooting of Chuck. When he met with Len, Bill still had possession of the gun he used to shoot Chuck. He offered to give it to Len to use in whatever way Len thought would be best. Len accepted Bill’s offer, took possession of the gun, and handed it over to the prosecuting attorney. Len made no comment about where or how he got the gun.

The disciplinary committee of the Bar may first assert that Len violated the Rules of Professional Responsibility by turning the gun over to the prosecutor. Len, however, will claim that he was actually acting within his duty under the Rules and it would have been a violation to keep the gun hidden. If an attorney comes into possession of a piece of evidence such as the weapon used to shoot someone, he has the obligation to turn it over to the prosecutor. The disciplinary committee could then argue that it was improper for Len to fail to tell the prosecutor anything about the weapon or explain how he came into possession of the gun. Len will point to the Rules to defend his decision to remain silent when handing over the weapon. They require an attorney to remain silent regarding how he came into possession of evidence if he received it from his client, so as not to violate his duty of confidentiality or the attorney-client privilege.

Len was acting within his duties under the Rules to hand the gun over to the prosecutor. He was also correct in not divulging how he came to possess the gun. Len did not violate any of the Rules of Professional Responsibility with regard to how he handled the gun.

II. Defending Art and Bill

Len, as a public defender, was tapped to represent both Art and Bill as they each face charges of assault with a deadly weapon and attempted murder. Both defendants agree they approached Chuck and began speaking with him when Bill took out a gun and shot Chuck in the arm. After talking to his clients one-on-one, Len learned that Art didn’t know Bill had a gun on him and didn’t expect Bill to shoot Chuck, who was a complete stranger to Art. Bill admitted that he had mistakenly thought Chuck was in a rival gang and had wanted to scare him. Bill thought the gun was unloaded, but did admit to firing it.

The disciplinary committee will argue that it is improper for Len to represent both Art and Bill because there is a direct conflict between their interests. For instance, it is in Art’s best interest to cast Bill as the one who committed any and all crimes. He will need to prove that all of the intent and action was on the part of Bill. Len’s representation could also have negative effects on plea bargaining for one or both defendants. Len will contend, however, that in California such a conflict is permitted. California does not have a provision like that found in the Model Rules prohibiting an attorney from representing two clients without reasonable belief that the representation of one will not adversely affect the relationship with the other. Instead, California allows a lawyer to represent two people with a conflict so long as the attorney secures informed
written consent from both clients. Therefore, Len will say that if both Art and Bill knowingly consent to the representation there is no violation of the Rules. Since Len would need to procure informed consent, the disciplinary committee may argue that true consent is not possible in this case because he cannot fully diverge the conflict between Art and Bill to Bill without violating his duty to keep the information Art told him confidential. Under the California Rules, if it is not possible for either of the clients to give truly informed consent, the attorney cannot represent both of them. Len will assert that nothing Art or Bill told him was unknown to the other defendant and therefore he can explain the full extent of the potential conflict without violating any professional responsibility obligations.

So long as Len can successfully get informed consent from both Bill and Art he will be permitted to represent them both under the California Rules. He will just have to ensure that in explaining the conflict he doesn’t reveal any protected or confidential information to either defendant.

III. Bill’s potential offenses

A. Is Bill guilty of assault with a deadly weapon?

Bill was carrying a handgun in his pocket when he and Art approached Chuck and struck up a conversation with him. Bill, mistakenly believing Chuck was a member of a rival gang, drew the gun and pulled the trigger with the intention of scaring Chuck. Although Bill believed the gun was unloaded, it had at least one bullet inside and Bill shot Chuck in the arm. Although the prosecutor will argue that Bill is guilty of assault with a deadly weapon, whether or not he is may depend on the definition of assault employed in the jurisdiction. The first definition is the attempt to commit a battery. Since attempt crimes are automatically subsumed by the completed offense when it occurs, Bill will argue that he cannot be guilty of both trying to shoot Chuck and successfully shooting Chuck. However, the second definition of assault is the intentional placing of another in apprehension of receiving an immediate battery. The prosecutor will contend that since Bill purposefully took out a gun and pointed it at Chuck he put Chuck in fear of being shot, which is a battery. Bill will counter that this assault definition should also be read as merging with battery where, as here, contact occurred.

Bill would not be guilty of assault with a deadly weapon under the first definition, since attempt crimes are merged with the completed crime once the offense has happened. Bill likely committed a battery when he shot Chuck, and therefore he cannot be convicted of attempting to shoot Chuck. Still, he may be guilty under the second definition of assault if it isn’t considered an attempt crime and the prosecutor can show that Chuck believed he was going to be harmed.

B. Is Bill guilty of attempted murder?

At the time of the shooting, Bill thought that Chuck was a member of a rival gang, but later realized he was a stranger. Bill also believed that the handgun in his pocket was unloaded when he took it out and fired at Chuck. It was loaded, however, and he shot Chuck in the arm.

Bill may first try to argue that he cannot be guilty of attempted murder because he mistakenly thought Chuck was a member of a rival gang. The prosecutor will point out, however, that even if Bill had been correct about Chuck’s gang status, there was still no provocation for Bill to shoot him. Adequate provocation consists of actions such as adultery and attempted battery. There is no evidence Chuck was doing anything to provoke Bill. Next, Bill will argue he believed the gun he was carrying to be unloaded and therefore he never intended to shoot Chuck. Mistake of fact is a defense if it negates the existence of a mental state essential to the crime charged. The elements of attempted murder are the same as those for murder, but with a substantial step in the direction of committing a crime, coupled with an intention to commit that crime and the apparent ability to
complete the crime. Bill will assert that since he never had the intention to commit murder he can’t be guilty of attempted murder. The prosecution will argue that the underlying crime Bill attempted was unintentional homicide and therefore even if Bill thought that the gun was unloaded he was still capable of attempted murder. A homicide can still be murder even without intent to kill if there was willful conduct containing a high risk of death. The prosecution will contend that shooting a gun at someone, even if you think it’s not loaded, carries with it a high risk of death since there’s always the chance that you’re wrong. Bill will argue that since attempt crimes require intent, he cannot be guilty because it is not logically possible to intentionally attempt to commit an unintentional murder.

Although Bill shot Chuck, he did not appear to have any intention to actually kill him. Had Chuck died, Bill might be guilty of committing an unintentional homicide. However, since it would be impossible to intend to commit unintentional murder and Bill did not have the requisite mental state for any other kind of homicide, he probably would not be guilty of attempted murder.

IV. Art’s potential offenses

A. Is Art guilty of assault with a deadly weapon?

Art approached Chuck along with Bill, but thought they were going to ask him for a cigarette. He didn’t know that Bill had a handgun with him, or that Bill believed Chuck to be a member of a rival gang.

Art will argue that he didn’t do anything other than approach Chuck to ask for a cigarette and therefore he cannot be guilty of assault with a deadly weapon since he neither attempted to commit a battery nor intentionally placed another in apprehension of receiving an immediate battery—the two possible definitions of assault. The prosecutor may argue that just by approaching Chuck with Bill, there was something threatening in his manner that made Chuck fear a battery. Perhaps Chuck will testify that he felt threatened by Art as well as Bill. However, Art can still argue that he had no intent to assault Chuck and such an intention is a vital element of the crime.

Art is not guilty of assault with a deadly weapon under either definition of the crime. There is no evidence that he attempted to commit a battery against Chuck, nor that he intentionally placed Chuck in apprehension of receiving an immediate battery. He was merely standing next to someone when a battery occurred, which is not enough to constitute an assault.

B. Is Art guilty of attempted murder?

Although Art approached Chuck alongside Bill, Bill acted alone when he took out a gun and fired at Chuck. Art thought the pair was simply asking Chuck for a cigarette.

Art will assert that he didn’t do anything to further an aim of murdering Chuck. The elements of attempted murder require the actor to commit any substantial step in the direction of murdering someone coupled with an intention to do so and the apparent ability to complete the crime. Although the prosecutor could argue that Art approaching Chuck was a substantial step, Art will point out that he still had no intention or apparent ability to commit such a murder.

Art is not guilty of attempted murder. He took no substantial step towards murdering Chuck, since all he did was start talking to him. Art also had no intention to commit murder, and, given that he was unarmed, had no apparent ability to carry out such a crime.

ANSWER TO QUESTION #5
May has potentially violated a number of standards of professional responsibility, under the Model Rules of Professional Conduct, and similar standards set by the California bar.

1. **Competence**

   The first potential violation was in breaching her duty of competence. Every attorney has a duty to only accept cases in areas in which she is reasonably competent, unless they are able to take the time to become competent in that area of law, or unless (with the client's consent), she consults with an attorney who is competent in that area. As a representative of the union, May probably specializes in labor law and the facts suggest that she might have no experience or skills as a criminal defense attorney. If May indeed did not have any reasonable amount of competence in criminal defense work, she should not have accepted the case.

2. **Conflict of Interest**

   May's agreement to represent Walter and Frank in the criminal case may have created two separate conflicts of interests between the two defendants Walter and Frank, and between her 3rd party former client IBU and the two defendants.

   May violated the Rules by accepting a fee from IBU for her representation of Walter and Frank. An attorney may not receive payment for her services from a party who is not her client unless: (1) the client consents, (2) no confidential information arising out of the representation is divulged to the paying party, and (3) the paying party does not interfere with the attorney's representation of her client's best interests. In this case, the third criterion was not followed—throughout the litigation, May represented IBU's interests, and not Walter and Frank's when she rejected a plea bargain that would have substantially benefited one of her clients. Thus by accepting IBU's money and subsequently allowing IBU's interests to prevail over her clients', May violated this standard.

   Even if IBU had not paid May's fees, there might have been a violation of professional standards when May took Walter and Frank's case, due to the confidential information that she probably possesses regarding IBU. May has a continuing duty of confidentiality to any client or former client, and so even if she had stopped representing IBU and represented Walter and Frank, she would be violating her duty of confidentiality to IBU if she used any confidential information regarding IBU in their defense. Given the nature of the case, it is likely that some confidential information about IBU may have been relevant and helpful to the defendants' case. Since that was foreseeable, May should not have taken on the representation.

   The facts do not indicate that May informed Walter and Frank of the possibility of the conflict. Here, as members of IBU, IBU more than likely expects them to represent their interests. But, as defendants they have their own interests to protect. In addition, IBU may want to know information about the case that would be privileged because they are paying. Frank and Walter had a right to know all of this before accepting May's representation. As May has represented the union in the past and is currently being paid to represent the defendants, she may have a tendency to want to protect her relationship with the union, thereby materially limiting and adversely affecting her representation of the defendants. The only way she should have continued with her representation is if Walter and Frank consented after disclosure and consultation.

   As indicated above, the facts do not show that May received their consent or even sought it. As such, she may be subject to discipline.

   The rules strongly discourage representation of two clients in a criminal case, as the possible conflicts of interest are tremendous. A criminal attorney may represent two clients in the same matter, however, if there is no potential conflict between them, and if they give consent. If there is no conflict at the outset of
the relationship, but one develops during the case, the attorney must withdraw immediately, from both cases if necessary to protect confidential information from being divulged. There are several conflicts in this case. As stated above, May should have sought the consent of the clients when the conflict presented itself. She did not.

When May was approached by Pete, the prosecutor, and told that a member of IBU's executive board would testify that Walter planned the firebombing and Frank was coerced into going along, a clear conflict was presented. If May continued to represent both clients, their defenses would be adverse. She could not say Frank was coerced into the act as a valid defense, without jeopardizing Walter's defense. When a conflict is so clear, the attorney has a duty to withdraw from both representations, as actual confidences were received. She should not seek consent after disclosure if a reasonable prudent attorney would not seek consent under the circumstances.

As indicated above, as their interests are directly adverse, May should have withdrawn from representation of both Walter and Frank.

3. Duty to Communicate

May has a duty to keep both Walter and Frank informed of all information in their case. The information received by the prosecution was critical, and both Walter and Frank should have been informed, particularly Frank. Failure to inform is a breach, and May may be subject to discipline.

While the attorney is responsible for the tactics and ways to obtain an objective, the defendant has the right to choose those goals and objectives. If any offer of settlement is made by the opposing side, the attorney must communicate it to the client and allow the client to decide whether or not to accept the offer (after giving proper advice and recommendations to the client). In this case, May did neither--she immediately rejected the offer without allowing Frank to make the decision, and without even informing him of its existence. Therefore, May is subject to liability for not presenting Frank with the deal offered by the prosecution. It is not May's right to make decisions, such as accepting or declining a plea without first notifying the client.

Here, it is unreasonable for an attorney not to present a settlement or plea offer to a defendant, especially since the charge carried a penalty of up to three years. Also, Pete said they would allow Frank to plead guilty only to a misdemeanor, and would recommend he be put on probation. Therefore, May's action is ineffective assistance of counsel, and a reversal is appropriate.

ANSWER TO QUESTION #6

The ethical issues concerning the actions of Jones & Smith involve attorney advertising, solicitation of business, fee arrangements, and support of the unauthorized practice of law in the use of non-lawyers in the firm.

Television Advertising

Attorney advertising is a form of commercial speech that cannot be restricted more than necessary to protect the public from false or misleading statements. The ethical rules on attorney advertising in California are somewhat stricter than the ABA's Model Rules because there is no materiality requirement with respect to what is considered misleading in California. A law firm may advertise its rates, but must disclose when advertising a contingency fee whether costs are to be recovered before or after the percentage fee is calculated on the recovery, if costs are to be recovered from the client’s recovery. The fact that this information is not included could render Jones & Smith’s ad misleading. Also, it is risky to make statements about other law firms’ practices, such as their contingency fee rates, because these statements may not be fully true.
If dramatizations are used in the advertisements, or if specific results in other cases are mentioned, various additional disclosure requirements would apply.

**Solicitation by Mail and Flowers for Accident Victims**

Attorneys are forbidden to solicit business in person or through runners, either at the scene of an accident or in the hospital. Sending gifts to prospective clients in an attempt to obtain business is impermissible.

Solicitation by mail to prospective clients is permissible because there is less pressure than with in-person solicitation. However, there must be a prominent label saying that the letter is an advertisement for legal services, and the contents of the letters will be scrutinized for misleading or deceptive content.

**Fee Arrangements**

The interest-free advances against prospective judgments pose problems because they appear to represent loans, not necessarily related to litigation expenses or medical expenses related to the case. However, California permits a lawyer to lend money to the client if the obligation is represented by a signed IOU.

In addition, attorneys are not permitted to make guarantees or assurances about the outcome of litigation or other legal matters. B&P Code §§ 6157.2. The advances in this case are offered only in cases of “clear liability” and require a calculation of the estimated amount of recovery, so they presume prohibited assurances of recovery.

**Use of Non-lawyers**

Lawyers and law firms may use non-lawyers such as paralegals to assist with quasi-legal tasks if properly supervised by the lawyer(s). However, it is ethically impermissible for lawyers to assist non-lawyers in the unauthorized practice of law. Whether a particular activity is or is not the practice of law depends on the nature of the activity. Conducting investigations and interviewing witnesses are considered proper activities for non-lawyers. However, allowing non-lawyers to negotiate settlements with insurance companies, or to conduct meetings with clients to discuss settlements would constitute assisting in the unauthorized practice of law.
REAL PROPERTY ESSAYS

QUESTION #1 (FEBRUARY 2004 EXAM)

Lori owns a small shopping center. In April 1999, Lori leased a store to Tony. Under the lease Tony agreed to pay Lori a monthly fixed rent of $500, plus a percentage of the gross revenue from the store. The lease term was five years. In part the lease provides:

Landlord and Tenant agree for themselves and their successors and assigns:

* * *

4. Tenant has the right to renew this lease for an additional term of five years, on the same terms, by giving Landlord written notice during the last year of the lease.

5. Tenant will operate a gift and greeting-card store only. Landlord will not allow any other gift or greeting-card store in the center.

* * *

In July 2000, Tony transferred his interest in the lease in writing to Ann. Ann continued to operate the store and pay rent.

In February 2003, a drugstore in the shopping center put in a small rack of greeting cards. Ann promptly complained, but Lori did nothing.

Beginning in March 2003, Ann stopped paying the percentage rent, but continued to pay the fixed rent alone. Lori took no action except to send a letter in April 2003 requesting payment of the percentage rent that was due.

In January 2004, Ann sent a letter to Lori requesting that Lori renew the lease according to its terms. Lori denied that she had any obligation to renew.

1. Is Ann entitled to a renewal of the lease? Discuss.

2. Is Lori entitled to the past-due percentage rent from:
   b. Tony? Discuss.

QUESTION #2

Ted and Bob pooled their life savings and purchased Greenacre. The deed named the grantees as "Bob, Joe, Ted and Sam, as joint tenants and not as tenants in common."

Subsequently Ted died. The administrator of his estate brought an action against Bob, Joe and Sam for the purpose of determining the respective interests in the property, if any, of the estate and the three defendants. Proctor intervened claiming an interest in the property.

At the trial Proctor established by competent evidence that Ted wanted to borrow $10,000 from Proctor but had no security other than Ted's interest in Greenacre; that Ted would not grant a mortgage of
Greenacre because he did not want Sam to know about the loan; that after considerable negotiation Ted executed a deed purporting to grant all his interest in Greenacre to Proctor; that Ted then handed the deed to a mutual friend with instructions to give it to Proctor after Ted's death; and that Proctor then loaned Ted the $10,000.

What are the respective interests of Proctor, Bob, Joe and Sam in Greenacre? Discuss.

**QUESTION #3**

On June 1, 1988, in accordance with a written contract of sale, George deeded some land to City. On the land was a small open bandstand used for summer concerts. The deed contained this language: "To have and to hold so long as City uses the land for park purposes, and should City at any time stop using said land for park purposes, said land shall revert to George, his heirs and assigns forever."

The deed was placed in escrow with Local Loan on the oral understanding that City would deposit the purchase price within 60 days after the date of the deed. Before the deposit was made, the bandstand was destroyed by a fire of unknown origin. City deposited the purchase price in time, but contended that it was entitled to a deduction because of the fire loss. George disagreed, but authorized delivery of the deed and consented not to withdraw the money until they could negotiate the matter.

City took the deed and recorded it at once, but, because of the loss of the bandstand, began using the land for storage of City Street Department trucks. George immediately wrote to City objecting to the use of the land and advising City that he would instruct Local Loan to return the purchase price to City if City would immediately give up possession of the land and reconvey it to George. Three days later, before City had taken any further action, George died.

City then caused the execution and recordation of a deed of the land to George, removed all of the trucks from the land and has requested George's executor to instruct Local Loan to release the escrowed funds to City.

George's executor wants to know whether he should comply with City's request and whether City would have a valid claim to either the land or the funds if he did not. What should he be advised? Discuss.

**QUESTION #4 (DISCUSSED IN LECTURE)**

In 1978 Fleet leased from Lessor for a term of ten years a building and adjoining rear yard in City. The property had been used as an assembly plant for the preceding 20 years. Fleet then converted the premises into a garage and offices for his large taxicab business. Fleet made improvements including the bolting of clothing lockers and office machines to the walls and the installation of repair bays and hydraulic automobile hoists in the foundations and floors. Fleet also installed gasoline pumps and a large underground gasoline storage tank in the rear. Fleet's cabs and service vehicles drove in and out at all hours.

Until the early 1970's the area had been predominantly one of light manufacturing plants and apartment houses. After that time, fashionable clothing merchants, artists and craftsmen had popularized the neighborhood. In 1975, City had passed an ordinance immediately restricting uses of property in the area to "residential dwellings, retail stores and the studios and workshops of artists and craftsmen." The ordinance provided that compliance could be deferred until 1985 but only where "immediate enforcement would put the owner or tenant in personal financial peril."

Although Fleet possessed independent wealth, the cost of moving would make it uneconomical for him to continue his taxi business.
A. In appropriate legal actions, could City force termination of Fleet's use of the premises?
   1. immediately?
   2. in 1985?

Discuss.

B. Could neighbors force termination of the use immediately? Discuss.

C. Assuming that City could force termination, could:
   1. Fleet remove from the building and yard the equipment which he had installed?
   2. Lessor recover future rents from Fleet?

Discuss.

QUESTION #5

On June 1, 1992, Bye, residing in State X, contracted in writing with Owner, residing in State Y, to purchase "Big Z," Owner's 10-acre tract of land improved with a lodge, located in State Z. The purchase price was $70,000 to be paid in full with recordation of deed on September 1, 1992.

Pursuant to the agreement, Bye paid Owner $5,000 on July 1, 1992, such payment to be applied to the purchase price and to be forfeited as liquidated damages if Bye defaulted on the agreement.

"Big Z" is one of the 1,000 tracts located in a 10,000 acre development, and is similar in size and site of tract, and size and design of lodge to most of the tracts in the subdivision.

On July 10, 1992, Bye, contracted in writing to sell "Big Z" to Kent, residing in England, for $90,000. On July 20, 1992, Pierre, residing in France, offered Owner $110,000 for "Big Z" and Owner accepted that offer in writing. All of the above transactions took place through correspondence. None of the parties has ever met any of the others.

On July 20, 1992, Owner advised Bye that he, Owner, would not convey "Big Z" to Bye, and (1) offered to pay Bye $20,000 for cancellation of the contract, or (2) to convey another parcel he owned known as "Retreat" which was immediately adjacent to "Big Z" and was identical in size of tract and size and design of building.

A. What are Bye's rights and remedies, if any, against Owner? Against Pierre? Discuss.

B. What are Kent's rights and remedies, if any, against Bye? Discuss.

C. In what jurisdiction should Bye seek relief? Discuss.

QUESTION #6 (DISCUSSED IN LECTURE)

Owen owned Blackacre, which consisted of a house on a lot. He conveyed Blackacre to his two children, Sam and Doris, by a deed which read as follows: "Owen hereby grants Blackacre to Sam and Doris, to be held by them jointly." The deed was duly recorded.
Thereafter, Sam borrowed money from Bank and gave Bank a mortgage on Blackacre to secure repayment of the loan. In the mortgage document, Sam covenanted for himself, his successors and assigns, that Blackacre would not be used for any purpose other than as a single-family residence.

Sam died before the loan became due. His will left all his property to his friend Tom. As applicable law permits, Bank elected not to file a claim against Sam's estate or to call the loan, but rather to rely on whatever rights it had under the mortgage.

Shortly after Sam's death the area in which Blackacre is located was rezoned to permit multiple-family dwellings. Tom decided to convert the house on Blackacre into a three-unit apartment building.

Bank, upon learning of Tom's plans, sought an injunction against Tom to prohibit the conversion.

Doris brought an action against Bank and Tom to quiet title to Blackacre in herself.

What result in each case? Discuss.

QUESTION #7

Phil owns a large parcel of rural land. Twenty years ago he leased a portion of it to Dolomite for a term of 50 years. The lease, which was in writing and signed by both parties, allows Dolomite to use the land for "mineral exploration, development and production purposes." The lease also allows Dolomite to use a road through the non-leased portion of Phil's property for access to the leased portion.

Dolomite tunnels underground for and mines valuable minerals from the leasehold tract. It originally processed these minerals elsewhere. Ten years ago it constructed, and has since continuously used, a processing plant on the leased premises.

Phil has recently complained to Dolomite about its operations and has demanded that Dolomite dismantle its processing plant and move it elsewhere. There are four conditions to which Phil objects:

A. Vibrations from the plant have caused unstable soil conditions on the portion of Phil's land that he irrigates and farms, resulting in localized landslides and damage to the irrigation system.

B. Noise and fumes from the plant prevent Phil from converting another portion of his non-leased land into a vacation-home subdivision.

C. Dolomite is cutting large trees on the leasehold for firewood which it uses as fuel for its plant's furnaces.

D. Dolomite is using increasingly heavy trucks which are destroying the access road through the non-leased portion of Phil's property.

What rights does Phil have against Dolomite, and to what relief, if any, is he entitled? Discuss.

QUESTION #8 (DISCUSSED IN LECTURE)

Andrew and Barry owned adjacent lots, each fronting on a busy public road. The conveyances by which each acquired his lot were duly recorded. On several occasions they discussed forming a partnership to construct a building on their properties in which to operate a restaurant. However, they never reached any agreement to proceed.
In January 1981, Andrew sent a letter to Barry stating that he had decided to proceed by himself to construct a building and operate a restaurant on his lot. Andrew offered in the letter to pay Barry $250 per month for the use of Barry's lot "for customer parking for five years, should the restaurant be successful for that period."

Upon receipt, Barry glanced at the letter and assumed that it referred to a partnership agreement. He wrote on the letter "OK with me," signed his initials, and mailed the letter back to Andrew.

Andrew constructed a large restaurant on his lot and at considerable expense, leveled, installed drainage in, and paved Barry's lot for use for restaurant parking. The restaurant opened in October, and cars filled the front of Barry's lot on many evenings. One such car belonged to Charlie, who was a frequent customer of the restaurant. In early December Charlie purchased the lot and improvements from Barry and built a fence around the lot. He has since refused to allow Andrew to use the lot for restaurant parking. Thereafter Charlie returned Andrew's payment checks uncashed.

What rights does Andrew have, and to what relief, if any, is he entitled:

A. against Barry? Discuss.

B. against Charlie? Discuss.

**QUESTION #9**

Alex owns Redacre. Bert owns an adjacent property, Greenacre. Alex delivered to Bert a deed reciting that Alex "conveys to Bert a four-foot wide strip across the middle of Redacre for an underground sewer line in order to connect a sewer line from Bert's apartment house on Greenacre with the city sewer line under the street adjacent to Redacre."

Bert installed an underground sewer line, extending from his apartment house, in the strip across Redacre.

Thereafter, Bert conveyed to Clyde a portion of Greenacre and an easement for a sewer line across another portion of Greenacre to connect with Bert's sewer line. Clyde planned to build an apartment house on his portion of Greenacre.

A year after Bert's conveyance to Clyde, and without Bert's knowledge, Alex connected a sewer line from a factory on Redacre to Bert's sewer line on Redacre. This overloaded Bert's line, causing it occasionally to back waste up into Bert's apartment house.

After Bert discovered the connection made by Alex, Bert disconnected the factory sewer line from his own. He did not notify Alex of his action and, by the time Alex learned of it, Redacre had been damaged by waste discharging onto it from the open factory line.

Alex then learned of the conveyance to Clyde and of Clyde's plans to construct an apartment house.

Bert commenced suit against Alex seeking an injunction and damages, including expenses incurred in successfully defending against municipal charges of maintaining unsanitary conditions in Bert's apartment house. Alex defended on the ground that Bert had a non-exclusive easement.
In a properly pleaded cross-action, Alex sought relief (a) against Bert for damages to Redacre caused by the discharge of waste from the factory onto Redacre, and (b) against Clyde to enjoin Clyde's proposed use of Bert's sewer line across Redacre.

A. Should Bert succeed in his action against Alex? Discuss.

B. Should Alex succeed in his action against Bert? Discuss.

C. Should Alex succeed in his action against Clyde? Discuss.

**QUESTION #10 (DISCUSSED IN LECTURE)**

Al owns Blackacre, a country property with extensive highway frontage. Blackacre adjoins property on which the Restview Inn is located. In 1982, after prolonged discussion, Al said to his son-in-law, Bret, "I grant you the right to construct and maintain 10 billboards on Blackacre." No consideration was agreed to or paid. The statement was overheard by Carl, an attorney and mutual friend. Al and Bret previously had asked Carl what words they should use to put their intentions into effect.

Immediately thereafter, Bret erected 10 large, neon-lighted billboards. Each cost in excess of $2,500. The billboards dominate the landscape as seen from the adjacent Restview Inn, which for more than 25 years prior to the erection of the billboards had been very popular with vacationers desiring to escape the urban sprawl and to enjoy the unobstructed view of the natural countryside. One billboard blocks the view and cuts off the sunlight to one side of the Inn's dining room.

Peter, the owner of Restview Inn, is threatening to sue Al if he does not remove the billboards and Bret is threatening to sue Al if he does.

A. What are the rights and remedies, if any, of Peter against Al? Discuss.

B. What are the rights and remedies, if any, of Bret against Al? Discuss.

C. If Bret sues Al, will Al be able to prevent Carl from testifying to what Carl heard Al say? Discuss.

**QUESTION #11 (DISCUSSED IN LECTURE)**

Lisa owns a five-story commercial building. On January 1, 1980, she leased the top floor to Tom for a five-year term at a rent of $500 a month. The lease was in writing and signed by both parties. It contained a restriction that the premises could be used only "as a dance studio and for no other purpose." It also provided: "Landlord shall not lease space in the building to any competitor of Tenant." The lease did not contain any express warranties or disclaimers.

Tom promptly moved in and began to operate a dance studio. In June 1980, he sold his dance studio business to Alice, one of his instructors, and assigned the lease to her. The assignment did not contain any express assumption or assignment of contract rights clauses.

In January 1981, a dance student fell through a floor board. When the board was replaced, it was discovered that, although the building met building code requirements, the floor was not strong enough for a dance studio.

In February, Lisa rented the basement to Charles, who used it for aerobic exercise classes.
Alice wrote to Lisa demanding that Lisa have the floor strengthened and cancel the lease with Charles. Alice claimed that Charles was in competition with her. Lisa refused both requests. On July 1, 1981, Alice mailed the studio key back to Lisa and moved out of the building. She has paid no rent since moving. Lisa has made all reasonable attempts to mitigate the loss.

Lisa has now sued both Tom and Alice for the rent due.

How should the court rule? Discuss.

**QUESTION #12**

In 1960, Owens purported to sell Greenacre to Able for $10,000 cash. Greenacre is a parcel of unimproved mountain land which is inaccessible by road during six months of each year due to snow. Owens gave Able a deed which granted Greenacre to Able in fee simple and contained all warranties of title. Able did not have a title examination made.

Able immediately recorded his deed, obtained an unsecured loan from Bank, and used the funds to build a vacation cabin on the land. Unknown to Able, Owens' grandfather was the true and sole owner of Greenacre.

From 1960 to the present, Able has paid taxes on Greenacre and lived in the cabin for one month each summer. The cabin and land have otherwise been unoccupied. Bank placed a sign on the land at the time of construction which read: "Built with financing from Bank." The sign has remained in place, readily observable, ever since.

In 1983, Owens borrowed $15,000 from Charlie. In 1987, Owens' grandfather died, leaving Greenacre to Owens by will. In the winter of 1988, Charlie induced Owens to deed Greenacre in full satisfaction of the $15,000 debt, which was then past due. Charlie had no actual knowledge of Able's claim to Greenacre.

Title searches in the state are customarily made in the grantor-grantee indexes of the official records. The recording statute reads:

"Any unrecorded conveyance is deemed void as against a subsequent taker for value and without notice."

Who owns Greenacre? Discuss.

**QUESTION #13**

In June 1986, Xavier, who owned a neighborhood grocery store and a large apartment house, leased a fourth floor apartment to Tessie for five years at a monthly rental of $725. The lease was on a standard printed form containing language requiring the landlord to maintain all common areas in a "safe and sanitary condition" and making all terms of the lease binding on the successors and assigns of both parties. The following two clauses were added in handwriting:

"27. Landlord agrees to leave Tenant a pint of milk and a newspaper every morning except Sunday.

"28. Landlord will repaint the kitchen and bathroom during the second year of the lease and replace the kitchen sink with a new one within the first 6 months of the lease."

264
When Tessie and Xavier signed the lease, a doorman and a garage attendant were on duty 24 hours a day. All entrances not under their direct observation were kept securely locked and were checked periodically by a watchman from dusk to dawn.

In June 1987, Xavier sold and conveyed the apartment house to Young Investment Trust (Young). In August 1988, Young sold and conveyed the apartment house to Zeke. Tessie has not received any milk or newspapers since the sale by Xavier. The repainting has never been done, and the sink has not been replaced.

Since Zeke became the owner, conditions have deteriorated. Zeke discharged the garage attendant and there has been no doorman on duty except in the afternoon and early evening. The 100 watt light bulbs in the hallways have been replaced with 25 watt bulbs. The locks on the doors from the fire escapes have fallen into disrepair. The responsibility for checking doors has been left to the local police, who are overburdened because of numerous thefts and violent crimes in the neighborhood.

At the time of their respective purchases of the apartment house, Young and Zeke were aware of the printed form lease which Xavier used, but they had no knowledge of the two clauses added to Tessie's lease.

A. What are Tessie's rights against Young? Discuss.
B. What are Tessie's rights against Zeke? Discuss.

QUESTION #14

In 1990 Albert owned Blueacre, a vacant 40-acre tract of land worth about $70,000. In January 1991 he borrowed $35,000 from Clara and gave his note secured by a mortgage on Blueacre. The note called for a single payment, including interest, on January 1, 1994. Clara promptly recorded the mortgage.

In June 1992, in exchange for $500, Albert granted an easement in Blueacre to his neighbor Donald. The easement was for a road 40 feet wide along the northern boundary of Blueacre to allow Donald more convenient access to his adjoining land. Donald immediately constructed a 20-foot wide road along the northern boundary of Blueacre, but he never recorded the document granting the easement.

In June 1993 Albert borrowed $10,000 from Eve. He gave Eve a note, due June 1, 1996, secured by a second mortgage on Blueacre. Eve promptly recorded the mortgage.

Albert failed to pay Clara's note when it came due. Clara filed a suit to collect the debt and foreclose her mortgage. She did not give notice to or join either Donald or Eve. Albert defaulted and Clara obtained a judgment on the note and an order authorizing the foreclosure sale of Blueacre. On June 1, 1994 the property was sold to Clara at the foreclosure sale for the amount of her judgment.

On July 1, 1994, Clara sold Blueacre to Pat for $80,000. She gave Pat a standard form warranty deed.

1. What rights, if any, does Donald have regarding the easement? Discuss.
2. What rights, if any, does Eve have against Pat and against Clara? Discuss.
3. What rights, if any, does Pat have against Clara? Discuss.

QUESTION #15

Since the early 1960s, Artist has had a year-to-year lease of the third floor of a small loft building which, like most buildings in the area, has mixed commercial and light manufacturing uses. Artist has used
her space, as other local craftspeople have used theirs, for both residential and studio purposes. She has enjoyed the serenity of her unit and the panoramic views of the distant hills and of the nearby park to which she has had easy access.

In July 1998, Landlord rented a lower floor of the building to Machinist, whose operations are extremely noisy. Artist’s complaints about the noise to both Machinist and Landlord have been to no avail.

At about the same time, Developer began building a large office tower nearby which will block Artist’s view when completed. The office building will provide needed employment for the community.

The State Power Department, a State governmental agency, has also begun construction of electric and communications lines for Developer’s office building. For the next several years the State Power Department construction will block a path across an undeveloped lot which separates Artist’s neighborhood from the park. The path has been regularly used for many years by Artist and other neighborhood residents because the only other access to the park is by a much longer circuitous street route.

1. What are Artist’s rights and remedies, if any, against Landlord, Machinist and Developer? Discuss.

2. What are Artist’s rights and remedies, if any, against the State Power Department for blocking the path? Discuss.

**QUESTION #16**

Sam and Paul entered into a written contract on September 1, 1999, for the sale by Sam to Paul of a mountain lakefront lot improved with a residence (the “parcel”) for $100,000. The contract was silent as to the quality of title Sam would convey, but provided that a quitclaim deed would be used. Paul failed to tender the agreed-on price on the performance date. Sam sued Paul for specific performance on July 5, 2000. Paul defended the suit on the ground that Sam’s title is not marketable.

Sam’s claim of title goes back to Owen, who owned an unencumbered fee simple absolute in the parcel. The parcel, which was accessible only during the summer months, had been occupied by Owen and Owen’s family as a summer vacation home since 1980. In 1984, Owen conveyed the parcel by recorded deed to “my daughter, Doris, and my son, George, so long as they both shall live, and then to the survivor of them.”

Owen died testate in 1987. Owen’s will made no specific reference to the parcel, but the residuary clause left to Doris “all my other property not specifically disposed of by this will.” Doris and George and their families continued to use the vacation home each summer. Doris died testate in April 1988, her will “devising and bequeathing all my estate to my son, Ed.”

George executed a deed in May 1988, purporting to convey a fee simple absolute in the parcel to Cain. Cain and his family occupied the parcel during the summers of 1988 through 1996. In May 1997, Cain conveyed the parcel to Sam. Sam’s family occupied it during the summers of 1997 through 1999.

The statute of limitations on actions to recover land in this jurisdiction is 10 years. There is no statute or decision by an appellate court either repudiating or affirming the common law doctrine of destructibility of contingent remainders.

Who should prevail in Sam’s suit against Paul? Discuss.

**QUESTION #17**
In 1980, Fred, a widower and the owner of Blackacre, a farm, died and by his will devised Blackacre to his three children, "Art, Bob and Carol as joint tenants with common law right of survivorship." Art, who had lived with his father on Blackacre, continued to occupy and farm it after Fred's death. Bob and Carol, although claiming equal rights to Blackacre, preferred to continue living in the cities in which they owned their homes and never went into possession of Blackacre.

Art lost money in his farming operations in each of the years 1980 to 1985. At the end of 1985, without consulting either Bob or Carol, Art conveyed by quitclaim deed all of his "right, title and interest in Blackacre to Dan and his heirs." Dan immediately took possession of Blackacre.

In 1990, Bob died intestate survived by Sam, his sole heir, and by Art, Carol and Dan. During the period from 1986 to 1995, the net profits resulting from Dan's operation of the farm amounted to $80,000. During the period from 1992 to 1995, Dan also received net rentals of $8,000 from a tenant renting a cottage on the farm.

Assume that there is a 10-year statute of limitations for the recovery of land and that no other statute of limitations applies.

1. What interest does each of the following have in Blackacre: Dan? Sam? Carol? Discuss.

2. What rights do Sam and Carol have with respect to the profits in the years from 1986-1995 and the rents from 1992-1995? Discuss.

3. Is Carol liable to Art for any of the monetary losses suffered by Art from 1980 through 1985? Discuss.

**QUESTION #18**

Tenant entered into a written lease of an apartment with Landlord on January 1, 1995. The lease provided that Tenant would pay $12,000 per year rent, payable in $1000 per month installments, commencing immediately.

Tenant moved into the apartment. Soon thereafter Tenant was visited by Inspector, who told Tenant that Landlord had received numerous warnings over the years about the unsafe electrical wiring in the bathroom, and had been cited and fined once for it. Tenant called Landlord and asked him to fix the wiring. Landlord promised to send someone to fix the wiring, but when no one had come for several weeks, Tenant decided to fix the wiring himself. While he was doing the work, he also put mirrors on the ceiling and tore out the tub and replaced it with a whirlpool bath.

A few months later, a noxious slime began oozing from the fixtures in the kitchen sink. Tenant complained of this condition to Landlord, but Landlord refused to have it fixed. The ooze continued, and it became so bad that Tenant was forced to stop using the kitchen. Tenant reported the problem to Inspector, who caused Landlord to be cited and fined for the condition. Despite this, Landlord did not make the repairs and the kitchen remained unusable. Tenant has remained in the apartment but has stopped paying rent.

On December 1, 1995, Tenant received a registered letter from Landlord giving him notice to vacate the apartment on January 15, 1996. In a subsequent telephone conversation, Landlord told Tenant that the notice was given because he was tired of Tenant’s demands for repairs and angry because of the fine.

What are Landlord’s and Tenant’s rights and obligations? Discuss.
ANSWERS TO SELECTED REAL PROPERTY QUESTIONS

ANSWER TO QUESTION #1

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law nor are the writer’s conclusions necessarily correct. Keep in mind that another answer could have a totally different analysis and conclusions and still be considered an acceptable passing essay.

I. Renewal of Lease

A. Ann as assignee or subleasee

Lori and Tony entered into a lease agreement. The lease had a right to renew clause. Tony transferred his interest in the lease to Ann. Ann wants to renew the lease and Lori refuses.

Ann will assert that she has the right to renewal of the lease under the terms of the original lease between Lori and Tony because she is considered an assignee of the Lori-Tony lease. Ann will argue that since Tony legally transferred and assigned his lease interest to her, she is entitled to have that clause enforced. An assignment of a lease takes place when the lessee, here Tony, transfers his entire interest in the lease. Generally, unless there is a lease provision prohibiting transfers, they are valid and lease interests are transferable. Furthermore, if there is a valid assignment, as Ann will assert, the assignee (Ann) of the tenant (Tony) takes the tenant’s estate and is considered in privity of estate with the landlord (Lori), and is entitled to benefit from the lease provisions that run with the land. Lori, on the other hand will argue, that the agreement between Tony and Ann was merely a sublease and therefore Ann is not in privity of estate with Lori. Thus, the right to renewal provision does not apply to Ann. Under a sublease, if a tenant conveys less than his entire estate, this creates a sublease and the subtenant, who would be Ann, would not be in privity of estate with the landlord and there is no direct landlord-tenant relationship between the subtenant and the landlord. If this would be the case, than arguably the right to renew clause would not apply to Ann.

In this case, the transfer between Tony and Ann was an assignment and not a sublease and therefore there is privity of estate between Ann and Lori. The facts are clear that Tony transferred his entire interest in the lease to Ann. The transfer was in writing, so the statute of frauds does not come into play. Moreover, it seems that Tony transferred his entire leased estate as opposed to merely a year or two while he is away. The facts given clearly evident a transfer, and Ann is considered an assignee of Tony’s interest. Since Ann is an assignee, there is privity of estate between her and Lori.

B. Covenant running with the land
Ann, an assignee of Tony’s interest in the Lori-Tony lease, wants to renew the lease. She sent a letter to Lori requesting that the lease be renewed.

Ann will argue that as an assignee of the lease, she is entitled to the rights of renewal under the original lease. She will assert that her right to renew is a covenant that runs with the land and therefore enforceable against Lori. In order for a covenant to run with the land there must be intent for it to run between the original parties (Lori and Tony), the successor must have knowledge of the covenant, there must be horizontal and vertical privity between the parties and the covenant must touch and concern the land. The intent element is obvious. Ann will point to the express terms of the lease which state that the landlord and tenant agree for themselves and their successors and assigns. Therefore, there is undoubtedly the intent that assigns be bound by the lease terms. As to knowledge of the covenant, Ann obviously has knowledge of the right to renewal clause, as she is the one seeking to enforce it. Furthermore, Ann will assert that by Tony assigning the lease to her, she is in vertical and horizontal privity with Lori. Lori and Tony, the promisor and promisee were in horizontal privity of estate at the time the covenant was made. In addition, since Ann succeeded to Tony’s estate, who was an original party to the covenant, vertical privity exists. Lastly, the covenant touches and concerns the land because the 5-year additional lease renewal terms burdens the leased premises. Lori will argue that although the covenant runs with the land, since Ann stopped paying the percentage rent beginning in March 2003, she did not fulfill her obligation under the original lease. Lori will assert that the obligation to pay rent is runs with the land and is enforceable against the assignee, Ann. Ann is liable for the rent pursuant to the original lease, which required $500 per month plus a percentage of the gross revenue, which Ann did not pay.

Ann will prevail. The covenant to renew the lease runs with the land and Ann will be entitled to enforce this covenant to renew the lease. The renewal clause meets all the requirements of covenants running with the land and since Ann gave timely notice of her intent to renew, Ann is obligated to renew the lease according to its terms. Although Ann may be considered in breach of the lease for not paying the full rent, she is still entitled to the benefit of the covenant as an assignee of the original Lori-Tony lease.

II. Lori’s possible entitlement to past due percentage rent.

A. From Ann

Ann, an assignee of Tony’s interest in the lease, stopped paying Lori percentage rent in March 2003. Lori will argue that since the obligation to pay rent by an assignee runs with the land, Ann’s failure to do so is a breach of the lease obligation and Lori is entitled to past due percentage rent. Generally, when a lessee accepts an assignment of the tenant’s interest in a lease, the tenant’s covenant to pay rent runs with the land and is enforceable against the assignee. Thus, in this case, Tony’s promise to pay percentage rent is enforceable against his assignee, Ann. Ann, will assert in response, that her obligation to pay the percentage rent is discharged by virtue of the fact that Lori breached the lease by leasing space to a competitor that sold cards. The lease provided that the landlord would not allow any other gift or greeting card store in the shopping center. If Lori, in fact, breached the lease by leasing to a competitor, then Ann’s obligation to pay percentage rent may be discharged. Lori, however, will argue that she simply leased space to a drugstore that had one small rack of cards. She will assert that a drugstore is not considered a greeting card or gift shop. Furthermore, the lease was clear that she would not lease space to “any other gift
or greeting-card store in the center.” The lease did not prohibit a drugstore to operate. Ann would also try to argue that Lori waived her right to collect percentage rent because by only sending a letter requesting the rent and allowing her to continue possession of the leasehold without paying the percentage rent constituted a waiver that Ann relied on to continue her tenancy. Courts will often find a waiver of a landlord’s right to an amount of rent if the landlord fails to object to the lesser amount paid by the tenant.

Ann’s argument will likely fail because Lori did send a letter one month after the percentage rent was due. Lori still has the right to pursue an action to sue for past rent or the evict Ann. Just because she only sent one letter does not mean she waived her rights to the rent. Furthermore, Lori is entitled to allow Ann to remain in possession of the property while she pursues any available remedies for past due rent and/or eviction. On the question of the past due percentage rent, Lori will prevail. Lori’s leasing space to a drugstore did not violate the lease agreement. A drugstore is normally not considered a gift or greeting card store, but a place to buy medicines and toiletries. The fact that the drugstore had one rack of cards is probably not enough to compete with Ann’s store or to drive business away from her store. Also, Ann has not shown, nor do the fact indicate that the presence of the drugstore impacted Ann’s business. Also, Lori’s actions by accepting the $500 rent from Ann and not yet aggressively pursuing percentage rent due did not constitute a waiver on Lori’s part.

B. From Tony

Tony assigned all his interest in the lease to Ann, who did not pay the percentage due rent. Lori now wants to pursue percentage rent from him.

Tony will argue that by virtue of the assignment, he is no longer in privity of estate with Lori, and Ann, the assignee is liable on the rent. The obligation to pay rent does run with the land and is enforceable against the assignee. Lori, however, will successfully argue that Tony is still obligated on the rent obligation because a tenant cannot discharge his rent obligation by an assignment. Generally, even if a tenant is no longer in possession of the property and he has transferred/assigned his interest in the leasehold, his obligation to pay rent continues, but only secondarily. She will assert that even though Ann is primarily liable on the rent, she has failed to pay the percentage rent, and, therefore, Tony is secondarily liable as a surety. Furthermore, since there was no novation of the Lori-Tony lease, which would have discharged all contractual duties, Tony is still liable for rent due subject to any defenses that Ann could assert.

Lori will prevail and may hold Tony liable for past percentage rents due. Since Tony merely assigned his leasehold to Ann, he may still remain secondarily liable for past due rent. However, if Ann is successful on any possible defenses to nonpayment of rent, Tony will not be liable based on Ann’s defenses if she prevails.

**ANSWER TO QUESTION #2**

The conveyance to “Bob, Joe, Ted and Sam, as joint tenants and not as tenants in common” is sufficient to create a joint tenancy between the four grantees. Thus, each grantee holds an undivided quarter-interest in the property with a right of survivorship. The fact that Ted and Bob produced the entire purchase price is not relevant. This is not a situation where a resulting trust would arise. Joe's and Sam's interests are a gift from Ted and Bob.
The proper disposition of Ted's interest depends on whether he held it as a joint tenant or a tenant in common at his death. If Ted's interest at his death was that of a joint tenant, Bob, Joe and Sam hold the entire title as joint tenants. Each has an undivided, one-third interest in the property, and no interest passes to Ted's estate or Proctor. If Ted's interest at his death was that of a tenant in common, his quarter interest passes to his estate or Proctor, depending on the interpretation of the deed. In the latter case, Bob, Joe and Sam still hold an undivided 3/4 interest in Greenacre as joint tenants.

The joint tenancy in Ted's interest was severed and his interest converted into a tenancy in common if the deed to Proctor executed and delivered to a friend of Ted and Proctor's constitutes a valid conveyance. Thus, we must analyze this transaction.

The transaction would not constitute a valid conveyance if the deed was not delivered. First, there is a question whether physical delivery to a friend constitutes "delivery" as required by the law. Since the party receiving the deed was a friend of Ted's, it could be argued that the friend was an agent of Ted (e.g., Ted could have asked him to return the deed and he would have done so) and thus there was no "delivery" to Proctor. Second, it could be argued that since Ted told his friend not to deliver the deed to Proctor until his (Ted's) death, there is no present creation of an interest, as the legal requirement of delivery demands. However, most courts recognize a valid "death escrow" in similar situations, saying that the delivery to the agent constitutes a present creation of an immediate future interest (i.e., a remainder following the grantor's life estate).

It would also be worth arguing in a lien theory jurisdiction that the deed was not actually a conveyance, but should be reformed to an equitable mortgage. In a state that subscribes to the lien theory of mortgages, the creation of a mortgage interest would not constitute a conveyance or sever a joint tenancy. There are facts to support the conclusion that a mortgage (as opposed to an actual conveyance outright) was intended by the parties. First and foremost, the deed was given in response to a "loan." On the other hand, the agent was not given any instructions to return the deed to Ted if he paid Proctor $10,000. Also, despite any intentions of the parties, a deed was executed. Thus, this argument likely would fail.

While it is arguable either way, the best answer is probably that there was a conveyance to Proctor, severing the joint tenancy as to Ted's interest. (If you find that there was no conveyance but Proctor had an equitable mortgage interest in Ted's interest, you should go on to discuss whether that interest is enforceable against Bob, Joe and Sam. The strict, legal answer is no; Proctor's mortgage interest was only on Ted's interest, which was extinguished at Ted's death. Ted cannot impinge on the title of his cotenants without their permission.)

The question remains, though, to who does Ted's one-quarter interest as a tenant in common pass? Proctor will argue that the conveyance was of a remainder, and a one-quarter interest in Greenacre as a tenant in common vested in him at Ted's death. Ted's estate will argue that an equitable mortgage was intended by the parties. Ted's estate will have the same trouble proving that a mortgage was intended as discussed above. However, in this context, a court might be more likely to hold that a mortgage was intended and the deed should only be enforced as an equitable mortgage. In this instance, the estate would hold a one-quarter interest in Greenacre as a tenant in common, subject to a mortgage for repayment of $10,000 to Proctor.

There are not enough facts to determine this question decisively. A well-reasoned argument either way would probably be considered acceptable.

**ANSWER TO QUESTION #3**
The deed from George created a fee simple determinable in City and a possibility of reverter in George conditioned on the City's ceasing to use the property as a park. The Rule Against Perpetuities does not apply to reversionary future interests, such as this possibility of reverter.

There was a valid transfer of title to City because the deed was properly executed, delivered and accepted. The facts that George did not then take possession of the purchase money and the parties had not decided whether City was due an abatement for the destroyed bandstand do not affect the legal conclusion that title was conveyed to City. (It may also be worth mentioning at this point that City's claim to an abatement is questionable. Under the common law, the doctrine of equitable conversion would place the risk of loss on the purchaser, City, after the execution of a valid purchase and sale agreement. However, in jurisdictions that have adopted the Uniform Vendor and Purchaser Risk Act, the risk of loss would fall on the party in possession, George. Again, though, this does not affect the legal result that title was conveyed.)

Immediately after taking title, City began to use the property as a parking lot for trucks. This clearly violates the condition of its fee simple determinable that the property be used only for park purposes. The result is that the property immediately reverted to George. Thus, George had both title to the property and a right to the purchase monies held by Local Loan (minus any abatement that the court might order). In essence, City paid for a fee simple determinable and got just that. The fact that City violated the condition on its estate, so soon and under somewhat defensible circumstances will not prevent title from re-vesting in George.

City may claim that George's letter objecting to City's use of the property also included a new purchase and sale agreement in that it asked for a conveyance of the property in exchange for the payment of money. However, George's executor can defeat this argument by pointing out that there was no consideration for George's promise to pay, because City had no title to convey - its estate was already terminated by its misuse of the property. Also, the letter does not constitute an agreement to convey land - only a request that land be conveyed. In effect, it was merely an offer, but that offer terminated at George's death. City had no right to accept the offer after George's death.

ANSWER TO QUESTION #5

A. Bye v. Owner. Bye has a valid and enforceable purchase and sale agreement with Owner for "Big Z." Owner's statement on July 20 that he will not convey the property to Bye is an anticipatory breach of the contract, giving Bye the right to sue. Since this agreement is for the sale of land, Bye has a right to sue Owner for specific performance of the agreement, i.e., he has a right to force Owner to convey "Big Z" to him (if Owner has not already conveyed "Big Z" to Pierre). On the other hand, Bye may sue for contract damages if he chooses to do so or if Owner has already conveyed "Big Z" to Pierre. Bye may also choose to accept one of Owner's other offers in satisfaction of their agreement. Bye should not accept Owner's offer to pay him $20,000 for cancellation of the contract, as Bye's contract damages would probably be greater. First of all, he can recover his $5,000 deposit. Second, he can recover the difference between the contract price and the fair market value of the land. Since Owner was later offered $110,000 for "Big Z," a court would likely find that that is its fair market value and award Bye $4,000 (the $110,000 fair market value of "Big Z" minus the $70,000 purchase price in the Owner-Bye contract). Bye may accept conveyance of "Retreat" in satisfaction of the agreement. However, the fact that the alternative piece of land offered by Owner is practically identical to "Big Z" will not affect Bye's right to conveyance of "Big Z" or require that Bye accept conveyance of "Retreat" in satisfaction of his contract right to a conveyance of "Big Z."

Bye v. Pierre. It is doubtful that Bye has any right to recover against Pierre. If Bye succeeds in obtaining specific performance of the agreement, he has no interest in suing Pierre. If Pierre beats Bye to the punch and obtains a conveyance of "Big Z", Bye can only defeat Pierre's title if Pierre was not a bona fide purchaser. There is nothing in the facts to indicate that Pierre would not be a bona fide purchaser if he took title to the land. There is no record notice of Bye's claim (e.g., a recorded purchase and sale
agreement). There are no facts indicating actual or inquiry notice. Thus, if Pierre has already taken a deed to "Big Z," Bye probably has no claim to the land in Pierre's possession.

B. Kent v. Bye. Kent has a valid and enforceable purchase and sale agreement with Bye for "Big Z." If Bye obtains a conveyance of "Big Z," Kent may in turn sue Bye for conveyance to Kent.

If, however, Bye does not obtain title to "Big Z," Kent will have to settle for contract damages - the difference between the fair market value of the land (presumably $110,000) and the parties' contract price ($90,000), or $20,000.

C. Bye may clearly sue Owner in State Y or State Z. A State Y court has personal jurisdiction over Owner, since Owner resides in State Y. A State Z court has in rem jurisdiction over "Big Z" and probably has in personam jurisdiction over Owner by the fact that he owns land in State Z, if under no other theory. It is unclear under the facts whether a State X court would have sufficient contacts with Owner to assert personal jurisdiction over him.

Bye should choose to sue Owner in State Z, where the land is located. This will bolster his specific performance rights. A State Y court could at most grant an injunction requiring Owner to convey "Big Z" to Bye, and might be reluctant to make an order affecting land in another jurisdiction. A State Z court could not only freely grant such an injunction, but could go one step further and actually convey "Big Z" to Bye if Owner fails to do so.

State Z is also a preferable forum for the practical reason that it might be easier for Bye to have his purchase and sale agreement with Owner or a lis pendens (notice of suit) put on the land records. This would prevent Pierre (or anyone else) from taking title to "Big Z" as a bona fide purchaser after recordation of either the agreement or the lis pendens.

ANSWER TO QUESTION #7

Phil has two different types of causes of action available to him to affect Dolomite's activities on the leased land. First of all, as Dolomite's landlord, Phil has whatever contract rights are engendered by the lease. Second, as a neighboring landowner, Phil has a cause of action in tort to limit any activities which are actionable under tort law.

A. Phil may try to shut down Dolomite's plant completely by claiming that the plant violates the lease provision limiting Dolomite's use of the land to certain enumerated purposes, namely "mineral exploration, development and production purposes." Interpretation of this provision is crucial. While an argument can be made that the provision does not allow for the construction and use of a processing plant, the better conclusion will seem to be that the phrase "mineral... development and production" would permit the construction and operation of a processing plant. Thus, Phil has no contract right to stop the vibrations which result from the operation of the plant.

However, Phil can argue in a tort action that Dolomite has violated its obligation to provide lateral support to Phil's land in that Dolomite has used its land in such a way as to cause a subsidence in the neighboring land occupied and owned by Phil. Dolomite will be strictly liable if Phil can show that his land would have subsided in its natural state. This would not seem to be much of a problem since the only apparent improvements to the land (the irrigation system) would not seem to alter the land in such a way that they would make subsidence more likely. Assuming that Phil can demonstrate this fact, he can recover for the damage to both the land and the improvements (i.e., the irrigation system).

If Phil cannot prove that the land would have subsided in its natural state, he will have to show that the vibrations are a result of Dolomite's negligence in order to recover. Also, in the alternative, Phil may be able to sue for the vibrations under a nuisance (or perhaps trespass) theory as discussed below in part B.
As to the form of Phil's recovery, he clearly can recover damages for both the past and future harm to his land. However, he may choose to seek an injunction against Dolomite operating the plant in any way that produces vibrations instead of seeking damages for future harm. Generally, injunctions are granted freely in situations such as this where damage to land is involved. In this case, though, Phil will first have to show that he is not guilty of laches. The plant has been in operation for ten years. If the subsidence began immediately upon the beginning of operation of the plant, Phil may be held guilty of laches. If, however, the subsidence began or became noticeable only relatively recently, laches will not bar the award of an injunction. Secondly, in deciding whether to award injunctive relief, the court will balance the equities of the situation. If the court determines that Dolomite cannot reasonably process the minerals without use of the plant, the plant cannot be operated without producing the damaging vibrations, and the social utility of the plant outweighs the harm to Phil, it may decide not to grant equitable relief. Such a result is not likely, though, and Phil will probably be able to obtain an injunction against the vibrations.

B. As discussed above, Phil will probably not be able to stop operation of the plant under a contract theory. However, in a tort action, the noise, fumes and vibrations from the plant will be actionable under either a trespass or nuisance theory.

Trespass actions are usually limited to cases where there has been a physical invasion of land which interferes with the possession of the land. Some courts have extended trespass theory to include trespass of noxious odors (i.e., the fumes) onto the neighbor's land. Recovery for noise and vibrations under a trespass theory is more questionable. One could argue that the shockwaves which make up the noise and vibrations physically trespass on the land much as the particles which make up the fumes do. This is a risky extension of the doctrine of trespass, though. It would also be difficult for Phil to show that the noise, odors and vibrations interfere with his right to possess the land. More likely, they interfere with his right to use and enjoy the land, which is more properly the basis of a nuisance action.

The noise, fumes and vibrations are clearly actionable under a nuisance theory, though. (The only reason a trespass theory is preferable is that there is automatic recovery in trespass once a physical invasion is shown. To succeed in a nuisance suit, the plaintiff must show that the neighbor's use of his land unreasonably interferes with the enjoyment of the plaintiff's land; the unreasonableness element leaves a court more discretion to deny relief.)

If Phil can prove his trespass case, he will be entitled to recover damages. He may seek an injunction instead of future damages, but equitable relief may be affected by the laches and social utility issues discussed above in part A. If Phil can only prove his nuisance case, he may be denied any recovery (including damages) if the court decides in balancing the equities that the noise and fumes from Dolomite's plant are not unreasonable in the situation.

C. In regard to Dolomite's cutting of trees on the land, Phil has no rights as a neighboring landowner. His rights are those of a landlord and remainderman. As remainderman, Phil has the right to sue for waste committed on the land by Dolomite, unless the lease allows such waste. In this case, the lease does not seem to permit the cutting of trees. It refers to exploration, development and production of "minerals." Trees are not minerals. It is unlikely that both parties anticipated the cutting of trees to further the production of minerals. Thus, Dolomite's actions constitute both waste and a breach of contract.

Under either theory, Phil will be able to recover damages for trees already cut and an injunction against further waste, if he so desires.

D. Whether Phil can recover for the heavy trucks which are now using the access road on the land retained by Phil depends upon an interpretation of the easement contained in Dolomite's lease. If a court finds that the heavier trucks overburden the easement, then it will grant damages and/or an injunction to compensate for and/or prohibit such use. However, the wording of the easement does not limit the use of
the access road. It seems that the scope of the easement would permit access by any reasonable means, including heavy trucks.

Even if Phil cannot prohibit the passage of heavy trucks, though, he can hold Dolomite liable for the damage to the access road. If Phil uses the access road, he can require Dolomite to maintain the road by repairing any damage done to the road by its use. If Phil does not use the road, his only basis for recovery is as a landlord-remainderman. The damage done to the road is clearly waste and would have to be repaired by the end of Dolomite's lease. In any case where Dolomite has a duty to repair the road, Phil can probably have the road repaired himself and hold Dolomite liable for the cost.

ANSWER TO QUESTION #9

A. Although it does not in fact control the outcome of Bert's suit against Alex, the rights of the parties in the four-foot-wide strip across Redacre should first be discussed. Bert will argue that he holds a fee simple interest in the strip, because of the fact that the interest was conveyed by a "deed" and the grant used the word "conveys". Alex will counter, probably successfully, that a deed can be used to convey an easement and the circumstances here indicate that an easement was intended - the strip was across the middle of Redacre and thus would have substantially lowered Redacre's value if conveyed in fee and the grant was for the purpose of constructing a sewer line, traditionally the subject of easements.

Regardless of whether Bert has a fee interest or only an easement in the strip, though, he will prevail in his action against Alex.

If Bert has a fee interest in the strip, Alex's use of the strip is a trespass. Alex has no right to access or use the strip in any way since he did not reserve any easement.

If Bert has only an easement, the result is the same even if the reasoning is different. Alex claims that Bert's easement was non-exclusive, meaning that Alex also had a right to use the strip (and presumably the sewer line). However, there are no words of reservation in the grant reserving to Alex any right to use the strip. Moreover, there are no circumstances in this case to indicate that the parties intended Alex to have the use of the easement. Thus, the better conclusion is probably that Bert's easement was exclusive and Alex's use was a trespass.

However, even if Alex successfully asserts that Bert's easement was non-exclusive, Alex is still guilty of overburdening the easement and is liable for the resulting damage. A property owner has the right to use the property covered by a non-exclusive easement, but only insofar as such use does not interfere with the use conveyed to the easement holder. In this case, Alex's use interfered with Bert's use.

Thus, regardless of the legal nature of Bert's interest, Alex's use was wrongful and he is liable for damages. Bert can also obtain an injunction against any further use of the sewer line by Alex (except that if the court determines that Bert's easement is non-exclusive, he will only obtain an injunction limiting Alex's use to that which will not overburden the system).

B. Given that Bert had a legal right to stop Alex's use of the sewer line, the issue remains whether his use of self-help measures in disconnecting Alex's line is appropriate or actionable.

If Bert went onto any of Alex's property not covered by the easement to disconnect Alex's line, he would be liable for trespass and the resulting damage.

If, as it appears, Bert disconnected Alex's line without leaving the property covered by the easement, then the question is more difficult. Generally, an owner of property (including an easement) has the right to repel or remove a trespasser, but he must exercise that right in a reasonable manner. An argument can be
made that Bert's disconnection of Alex's line was negligent since Bert could easily have contacted Alex and demanded that he cease (or limit) his use of the line.

C. If Bert is held to own the strip in fee simple, Alex has no cause of action to control his (or Clyde's) use of the land, unless such use constitutes a nuisance.

If Bert is held to own only an easement, then we must look to the wording of the easement to determine the rights of the parties. Since the terms of the grant seem to be limited to the existing apartment house built by Bert, it would be wrongful for Clyde to use the sewer line for his apartment house and such use can be enjoined.

However, it could be argued that the parties intended to include any and all apartment buildings on Greenacre within the scope of the easement. Then, Clyde's use can be enjoined only to the extent that it actually overburdens the easement. (This is not a case where Clyde's use would be an automatic overburdening, such as if he wanted to use the easement to benefit property other than the dominant estate. Clyde's use benefits part of the dominant estate, Greenacre.)

ANSWER TO QUESTION #12

I. The 1960 Deed to Able

A grantee cannot convey an interest that he does not own. The facts indicate that the true owner of Greenacre was not Owens, but Owens' grandfather. Unless it can be shown that Owens had the authority to sell Greenacre on his grandfather's behalf (and the authority to convey land must be expressed in a signed writing in most jurisdictions), the 1960 deed did not convey any interest in Greenacre.

II. Able's Possession from 1960 to Present: Adverse Possession

One may acquire title to real property by adverse possession if his possession is (a) hostile (or adverse), (b) open and notorious and (c) continuous for the statutory period.

Possession is hostile if it is without permission. While Owens gave Able his permission to occupy Greenacre, Owens was not the true owner of the land and thus his permission is meaningless. Furthermore, possession pursuant to a purported grant in fee is generally considered hostile because it is under a claim of right (i.e., the grantee is not recognizing the superior rights of anyone else).

Since the doctrine of adverse possession is premised on the running of the statute of limitations for an ejectment action, possession can ripen into title only if it is open and notorious (i.e., it is sufficiently public to put the owner on notice that another is in possession of the land). Able's building of the cabin, his occupancy of the premises for one month of each summer, and his payment of taxes would be sufficient to satisfy this requirement.

Possession is "continuous" so long as it is on a regular basis and consistent with the nature of the realty. Inasmuch as the land was generally inaccessible for six months of the year, it would appear that it was not suitable for year-round occupancy and thus seasonal possession could be considered continuous. While the issue is not without doubt, living on the land for one month each summer would seem to satisfy this requirement.

The common law statutory period was 20 years, and the facts here indicate that Able possessed the land for approximately 28 years. Thus, unless the relevant jurisdiction has created a longer period by statute, Able would have acquired title to Greenacre in 1980.
Because Able held the land pursuant to a deed, his possession was under color of title (even though the deed was, in fact, invalid). As a result, he takes the entire parcel of Greenacre even if he actually possessed only a portion of the tract.

III. Death of Owens' Grandfather: Estoppel by Deed

If a person lacks proper title when he purports to transfer ownership by warranty deed but later acquires a valid interest in the property, the newly acquired interest will pass through that person to his grantee by operation of law; this is the doctrine of estoppel by deed. This is exactly what happened here and thus Able gained title to Greenacre upon the death of Owens' grandfather in 1987 (assuming that he had not previously become the owner through adverse possession).

IV. Conveyance to Charlie: Recording Act

The problem with the conveyance to Charlie is that Owens had no title to give due to the fact that Able held title either by estoppel by deed or adverse possession. The common law doctrine of "first in time, first in right" does not survive an applicable recording act, however.

The controlling statute, as quoted in the facts, is a notice statute and would invalidate Able's prior interest if the following factors are present: (a) the prior interest was acquired through a document subject to the recording act, (b) that document was not properly recorded, and (c) the subsequent taker was a bona fide purchaser.

A. Interest Subject to Act

If Able became the owner of Greenacre through adverse possession, his acquisition was not subject to the recording act and Charlie's interest is subordinate to Able's. If, however, Able's title is based on estoppel by deed, Charlie may be the owner of Greenacre if Able's deed was not properly recorded and Charlie was a bona fide purchaser.

B. Proper Recording of Prior Conveyance

While Able promptly recorded his deed, in most states it would be properly recorded only if it would provide notice to subsequent purchasers. When the jurisdiction uses a grantor-grantee index (as here), it is generally held that a grantee is not required to look for a conveyance from his grantor prior to the date that the grantor received title. Thus, Able's deed was not properly filed under the majority rule because it was filed before Owens, Able's grantor, had received any rights in the property (i.e., it is outside the chain of title).

C. Was Charlie a Bona Fide Purchaser?

Even if Able's prior interest was subject to the recording act and was not properly filed, Charlie would prevail over Able only if he was a bona fide purchaser. To qualify as a bona fide purchaser, the transfer to Charlie must have been "for value" and Charlie must have taken without notice of Able's prior interest.

1. For Value

A subsequent conveyance is protected by a recording act only if the grantee gave valuable consideration for the land. In most jurisdictions, a conveyance given to cancel an antecedent debt is "for value." Thus, the transfer of title to Charlie in satisfaction of Able's pre-existing debt is protected by the recording act.

2. Without Notice
There are no facts to indicate that Charlie had actual notice of Able's interest. Furthermore, Able's "wild deed" does not provide constructive notice because it was not recorded within the chain of title. Nevertheless, Charlie will not be considered a bona fide purchaser if he had inquiry notice.

A subsequent purchaser has inquiry notice when the facts would indicate to a reasonable person in his position that someone other than the grantor has a valid interest in the property. In most jurisdictions, a prospective purchaser is expected to inspect the land before buying and if he finds evidence of possession by someone other than his grantor, he is required to make appropriate inquiries; if he fails to inspect, he is chargeable with whatever information would have been obtained if he had made a reasonable inspection and any necessary inquiries. Here, however, Greenacre was in a remote area and inspection might not be required, especially given the fact that transfer of the land was negotiated in the winter, when the land was inaccessible by road.

Assuming that Charlie had a duty to inspect the land and did so, he probably would have been surprised by the existence of the cabin. This is because the land sale contract and/or the deed would ordinarily mention that the land contained a building, and, since there is no evidence that Owens was aware that Able had constructed the cabin, it is unlikely that any document provided by Owens to Charlie indicated that Greenacre was anything other than unimproved land. When faced with this information, Charlie would then have been obligated to ask Owens about the cabin and, unless Owens was able to give him an appropriate explanation, Charlie would have to look further. If this investigation would have revealed Able's interest, Charlie would not be "without notice" within the meaning of the recording act.

Charlie would also have seen the sign if he had made a reasonable inspection. Normally, a bank places a lien on the land when it gives a construction loan. While this did not happen here (the facts indicate that the loan was unsecured), a reasonable person in Charlie's position would expect such a lien to have been recorded and would probably have mounted an investigation when the county records did not show any interest by the bank. If this inspection would have led to the discovery of Able's interest, Charlie was not a bona fide purchaser.

V. Conclusion

Most likely, Able acquired title by adverse possession and, since title so obtained is not subject to the recording act, he would prevail.

If, however, Able's title was premised on estoppel by deed, Charlie would defeat Able because Able's deed was recorded outside the chain of title, there was no actual or constructive notice and, under the circumstances, it would be unreasonable to have charged Charlie with inquiry notice.

ANSWER TO QUESTION #13

A. Tessie v. Young

Tessie's rights against Young depend on whether the burdens imposed by Xavier's covenants run with the land. The burden of a covenant will run with the land if (1) there is a valid agreement, evidenced by a signed writing, (2) the parties intend that future takers will be bound, (3) the burden touches and concerns the property, (4) there was privity of estate between the original covenantee and covenanter parties (horizontal privity), and (5) there is privity of estate between the party originally bound and the person against whom enforcement is sought (vertical privity). (It is sometimes said that a covenant can run against a successor only if he has notice of it; in this case, all of the covenants appeared on the lease itself and thus Young had constructive notice of the covenants added to the printed form even if its employees were in fact unaware of them.)
The agreements in question meet the ordinary contract requirements of clarity, consideration, etc. and are contained in a writing signed by Xavier (the party whose obligations are in issue). The landlord-tenant situation is a classic example of horizontal privity as both have simultaneous estates in the same property (the tenant having a leasehold estate and the landlord having a reversion). Also, there is vertical privity because Xavier conveyed his interest to Young. The problems of intent and touch and concern are different as to the various covenants and thus will be discussed in context.

1. Milk and Newspaper

The lease expressly provides that all terms are binding on the successors of both parties. Furthermore, the language of the covenant relating to the milk and newspaper indicates a continuous obligation ("every morning except Sunday") and it would normally be presumed that the parties intended that the obligations would run to subsequent grantees of Xavier. This type of obligation is not at all typical, however, and is no doubt offered only because Xavier owned a local grocery store. Under these facts, therefore, it would appear that the parties did not intend that the subsequent grantees of Xavier would be bound and the fact that the "milk and newspaper" term was added to the preprinted form could justify a court in finding that the "successors" clause did not cover this particular obligation.

A covenant "touches and concerns" land if it affects the parties as owners of land and not merely as individuals (i.e., it somehow affects the value or use of the land). The obligation to supply milk and newspapers does not appear to meet this test and thus this burden does not run to Young even if the intent requirement was satisfied.

2. Repainting

The obligations to repaint the kitchen and bathroom directly affect the value of the property and therefore touch and concern it. Since the obligations would not even arise for two years, an intent that future successors would be bound would be inferred even if the express "successors" clause was held to be inapplicable to this covenant. Thus, Young is liable for its failure to repaint.

3. Replacement of Sink

The obligation to replace the kitchen sink clearly touches and concerns the land. In addition, it would appear to be the kind of obligation that might well have been intended to be imposed on grantees of Xavier even in the absence of an express clause binding his successors. Here, however, this obligation was to be satisfied within the first six months of the lease and Young gained no interest in the property until well after that period had expired. Therefore, Young would have been justified in assuming that this obligation was fulfilled prior to his purchase of the property and he is not bound by it. Alternatively, the fact that Tessie has allowed more than two years to pass may indicate that she has waived the right to a new sink, at least if she has not continued to make appropriate demands throughout her tenancy.

B. Tessie v. Zeke

1. Milk and Newspaper, Repainting, and Sink

Zeke's obligations with regard to the added covenants relating to the milk and newspaper, repainting, and the sink are essentially the same as discussed above. Even though there was no direct dealings between Zeke and Xavier, the fact that Zeke took from Young and Young took from Xavier is enough to establish vertical privity. The fact that he bought the building more than two years after the start of Tessie's lease makes it even less likely that he will be responsible for supplying a new sink and may allow him to argue that Tessie has waived the right to have the apartment repainted as well.

2. Liability for Deteriorating Security
a. **Duty to Maintain Common Areas**

A landlord has a common law duty to maintain common areas. The precise dimensions of this duty are unclear, however. While it would probably cover the lighting of the hallways, traditionally there was no duty to protect the tenant from physical harm from outsiders. Several recent cases have held that a landowner does owe such an obligation, at least when he is aware of special facts which indicate that there is a particular danger that persons on his land are subject to attack. Here, the facts indicate that the property in question is located in an area which has a high rate of serious crimes. Thus, Zeke might be liable if Tessie is attacked, since he has not taken reasonable precautions to protect her.

b. **"Safe and Sanitary" Clause**

The express covenant requiring the landlord to maintain the common areas in a "safe and sanitary condition" would probably be construed to impose a somewhat higher duty on Zeke than the common law obligation discussed above, especially with regard to safety threatened by the conduct of outsiders. This covenant certainly touches and concerns the land by affecting its value and runs to Zeke for the reasons discussed above.

While the language is admittedly vague, a court would probably conclude that this clause should be interpreted in view of the condition of the premises at the time that the lease began, and thus the changes made by Zeke might be considered a per se violation of this covenant. Even without reference to the precautions in place when Xavier owned the building, it would appear that Zeke breached the covenant by allowing the locks to fall into disrepair and otherwise reducing security, especially where there had been numerous thefts and violent crimes in the neighborhood.

c. **Constructive Eviction**

Tessie might claim that there was a constructive eviction due to a breach of the implied covenant of quiet enjoyment. Since that covenant is only breached if the tenant's right to use and enjoy the property is disturbed by the landlord or someone claiming superior rights to possession, the courts would accept this argument only if Zeke's own acts have made the property untenable or if he can somehow be held responsible for the acts of any third persons whose acts have threatened her safety. Furthermore, to maintain such an action, Tessie would have to vacate the premises.

d. **Implied Covenant of Habitability**

Today, it is common to impose an implied covenant of habitability on all residential leases. If the condition of the premises has so deteriorated that the property is now in violation of health and safety codes, Zeke has violated this covenant.

**ANSWER TO QUESTION #14**

**I. DONALD'S RIGHTS REGARDING THE EASEMENT**

A. **Can Donald Enforce the Easement against Albert?**

An easement is a possessory interest in land which gives the holder of the easement the right to use land owned by another. In this case, Donald acquired the right to use a 40 foot wide strip of land along the northern boundary of Albert's land pursuant to an express easement appurtenant. Generally, in order to be enforceable an express easement must: a) be in writing, or there must be sufficient part performance to satisfy the statute of frauds; b) be signed by the owner of the servient estate (the servient estate is the one...
burdened by the easement); and c) describe the land, the parties and the easement. No consideration is necessary.

In this case, the facts state that sometime during the month of June 1992, in exchange for the sum of $500, Albert (owner of the servient estate) granted an easement to his neighbor Donald (the owner of the dominant estate) for a 40 foot roadway, in order to allow Donald more convenient access to his adjoining land. The easement was in writing, as evidenced in the facts by the statement that “Donald never recorded the document granting the easement.” This writing could satisfy the statute of frauds, but the facts do not specify whether Albert signed the document or whether the document described the land, the parties or the easement. However, even if the writing fails, the fact that Donald built a 20 foot wide road along the northern boundary of Blueacre should constitute sufficient part performance to take the transaction out of the statute of frauds. Therefore, as between Donald and Albert, the easement will be enforceable.

B. Will Donald be able to enforce the easement against Clara or Pat?

In order for an interest in real property to be enforceable against people other than the original grantor or the original grantee, we must look at whether those people had notice of the interest in question. Notice can be either actual, constructive (for example, if an easement runs with the land, there is a good chance that the holders of all subsequent interests in the land will be deemed with notice of the prior easement) or inquiry notice. In addition, we must look at the timing of the competing interests in order to decide whose interests will be enforceable against whom.

1. Donald v. Clara

   a. Superiority in time: Clara’s first mortgage is a valid encumbrance on Blueacre. Her mortgage was created and recorded before Donald obtained his easement. Therefore, Clara’s mortgagee interest in Blueacre is superior in time to Donald’s easement interest in Blueacre. In addition, even if Donald did not have actual notice of Clara’s mortgage, because Clara recorded the mortgage, he did have constructive notice of it. According to the facts, neither Donald nor Albert made any attempt to get Clara to subordinate her mortgage to Donald’s easement, or if they did, she must have refused. If Clara had complied with the foreclosure statutes, Donald would almost certainly have lost out to Clara, because her interest was senior to his under any type of recording statute.

   b. Invalid Foreclosure: Nearly all foreclosure statutes require a foreclosing mortgagee to give notice to all persons who have an interest in the property. If this notice is not given then the junior interests of those other persons in the foreclosed property are not extinguished by the foreclosure sale. Most statutes give unnotified parties a period of time in which to redeem their interests and assert their claims.

   Clara did not have actual notice of Donald’s easement, but she certainly would have been obligated to give notice to all persons who have a recorded interest in the property. Unfortunately for Donald, his interest was not recorded, so Clara had no constructive notice either. However, Clara may have been on inquiry notice of the existence of Donald's interest. If she had visited the site prior to buying at the foreclosure sale, she would have seen the 20 foot road along the northern boundary of Blueacre leading to Donald’s adjoining property, and would have been put on notice of as to the possibility of some kind of interest in that property. Furthermore, if Clara was in the mortgage loan business, she would have obtained a survey of the property at the time she made the mortgage, and that survey would not have shown a road along the northern boundary of the property. Therefore, she should have had notice of at least 20 feet of the 40 foot easement.

   This is a close one. If Clara had joined Donald in the foreclosure action, he would have had an opportunity to protect his interest by buying at the foreclosure sale. Clara will probably win if Blueacre is in a state with a pure race recording statute. Such statutes put no emphasis on notice, and she would win because such a state's foreclosure statute, if consistent, would probably only require her to give notice to
parties with recorded interests. Clara will probably lose in a close call to Donald in a notice or race-notice recording state, at least as to 20 feet of the 40 feet easement actually used and apparent.

2. Donald v. Pat

Pat's rights are derivative of Clara's. Furthermore, unlike Clara, Pat had the opportunity to inspect the property before he acquired his interest. He was on inquiry notice of the easement and will take subject to it if Clara didn't follow the required notice procedures under the foreclosure statute.

II. EVE’S RIGHTS IN BLUEACRE IN RESPECT TO PAT’S AND CLARA’S

1. Eve v. Clara

Albert had given Eve a second mortgage on Blueacre which she recorded in June 1993. This mortgage is clearly junior to Clara’s mortgage, because it was created and recorded more than 2 years after Clara’s mortgage. Therefore, Eve had constructive notice of Clara’s mortgage. However, Clara failed to join Eve in the foreclosure action, and therefore also failed to foreclose Eve’s interest in Blueacre. If Clara had searched the public records before filing her foreclosure suit, she would have discovered Eve’s mortgage. Clara therefore had constructive notice of Eve’s mortgage on Blueacre, and has no excuse for failing to join Eve in foreclosure action.

As discussed above, junior interests can be extinguished by the foreclosure of a superior lien only if the junior lienholder is notified of the foreclosure proceedings and has the opportunity to protect its interest. Since Eve did not have this opportunity, Clara purchased Blueacre at the foreclosure sale subject to Eve’s mortgage. Eve should be able to seek redemption of her $10,000 note from Clara who sold the property for $80,000.

2. Eve v. Pat

Pat has only such rights as Clara did. If Clara takes subject to Eve's mortgage (or Donald's easement), so does Pat. Eve should be able to seek redemption or foreclosure against Pat. Pat might try to claim he has some benefit as a bona fide purchaser for value that Clara didn't, because he had no notice of the defective foreclosure sale, but he will probably not succeed.

III. PAT’S RIGHTS IN BLUEACRE IN RESPECT TO CLARA’S RIGHTS

General Warranty Deed

The facts state that on July 1, 1994, Clara sold Blueacre to Pat for $80,000 and gave her a standard form warranty deed. Warranty deeds carry with them the following covenants which are classified into two categories, present and future:

1. Seisin/Right to Convey.
The covenant of seisin and right to convey warrants that the grantor owns the property and had the present right to convey the property. Since Clara had won a foreclosure judgment, she did have title and the right to convey.

2. **Covenant Against Encumbrances**

This warranty states that the property the grantor is conveying is not subject to any encumbrances that are unknown by the buyer. Here, Pat will argue that she had no knowledge of either Donald’s easement or Eve’s mortgage, and that therefore Clara breached the covenant against encumbrances.

Clara will argue that Pat did have knowledge of the encumbrances because she had inquiry notice of Donald’s easement and constructive/record notice of Eve's mortgage on the property.

If Clara is found to have breached the covenant against encumbrances, then she will be liable to Pat for damages. But, if Pat is found to have inquiry notice of the easement and record notice of Eve's mortgage, Clara will not be liable.

3. **Covenant of Quiet Enjoyment**

This is a future covenant which warrants that no third parties will interfere with the purchaser’s rightful claims to the land.

As noted above, Donald has an easement over Blueacre and Eve has a mortgage for $10,000 against the property. They will both assert their respective rights against Blueacre, and Pat will have breached this covenant.

4. **Covenant of Warranty**

This covenant warrants that the grantor will defend any reasonable and lawful claims against the property. Therefore, Clara will have to defend Pat against any claims by Donald or Eve against Blueacre.

5. **Covenant of Assurances.**

This covenant promises that the grantor will take whatever steps necessary to perfect title to the property against reasonable and valid claims. Clara will have to perfect Pat's title in the property, possibly by paying off Eve for the $10,000 note.

**ANSWER TO QUESTION #15**

1. **Artist has the following rights and remedies against Landlord, Machinist, and Developer:***

   **A. Rights against Landlord:**

   Artist has a year-to-year lease on the property. It may be subject to special rules for residential leases if Landlord was aware that Artist was using the premises as her dwelling as well as her office. In all leases there is an implied warranty of quiet enjoyment. In residential leases, there is also an-implied warranty of habitability.

   **Warranty of Quiet Enjoyment:** The landlord has impliedly covenanted that Artist will not be disturbed in her use and possession of the premises. Tenant’s possession has not been physically interrupted, so she does not have a claim for total or partial eviction under this covenant. Artist’s best argument is that the disruption caused by the Machinist has caused her constructive eviction. Constructive eviction occurs when the landlord causes an unreasonable disruption in the premises so that the tenant can
no longer use the premises and the tenant must, in fact, abandon the premises within a reasonable time. In this case Artist could argue that although Landlord himself is not making the noise, he rented the premises to Machinist and thus his actions caused the disruption of her possession. Tenant must also show that the disruption was so severe as to deprive her of use and possession. Clearly the noise of machine operations, if severe and at unreasonable hours, would deprive Artist of the use of the premises as a dwelling. (If Landlord was unaware of the residential use and thought the lease was only for studio purposes, Artist may have a more difficult case.) Finally, the tenant must actually vacate the premises within a reasonable time. Regardless of the severity of the noise intrusion, Artist has remained upon that premises for a year since the disruption began and she thus has no claim for a constructive eviction.

**Warranty of Habitability:** If the lease is for residential purposes, the warranty of habitability is implied. The standards for this warranty are tied to the housing codes. Thus, if the housing codes address noise level and the Machinist violates this, Landlord may have breached this warranty. For breach of the implied warranty of habitability, a tenant has extensive remedies. Artist may terminate the lease and leave the premises. In this case she cannot repair the problem herself, but she may withhold rent until the landlord fixes the problem, or she may abate the rent to the fair market value with the noise level, but this would be hard to determine.

**B. Rights against Machinist:**

Tenant may have a cause of action against Machinist for nuisance.

**Elements of Private Nuisance Claim:** Activities on Machinist’s own property may be a nuisance to Artist if they substantially and unreasonably interfere with Artist’s use and enjoyment of her premises. The noise level may substantially and unreasonably interfere with Artist’s use and enjoyment, but it is unclear whether it is the use as a residence or a place to work that is being interfered with. The hours of the day in which the noise occurs may be an important factor. The court may consider the zoning for the area although the fact that an activity may be permitted by zoning law is not dispositive in a nuisance action, and the zoning in this area most likely permits commercial and industrial uses since others seem to be doing this. It seems that Artist’s use of the premises as a residence is inconsistent with the surrounding area. Thus, although the noise level may cause a substantial interference with such use if it continues throughout the night, it is unlikely to be found to be unreasonable in this area. But if it does constitute a nuisance, there are several possible remedies.

**Remedies for Nuisance**

**Damages:** Machinist may have to pay for the harm to Artist. If the nuisance is permanent and if Artist were the owner of the property, she might receive damages in the amount of the decrease in fair market value. Artist is unlikely to be entitled to this remedy, however, because Artist has only a year-to-year tenancy and awarding her the full decrease in the FMV would grant her a windfall. The better measure of damage may be harm caused to Artist during the limited term of her lease, as measured by the difference between fair market value with the nuisance and actual rent.

**Injunction.** At common law, courts only granted injunctions for nuisance to persons with an ownership interest in the property, but that restraint is no longer followed. Artist’s leasehold interest should be sufficient. Courts will enjoin an activity only when legal remedies are inadequate and an injunction would be feasible to enforce. In this case, a court may consider that damages are inadequate because the tenant would be required to bring multiple suits to get damages every few years. And a negative injunction prohibiting the noise level would be easy for court to enforce.

In deciding whether to enjoin a nuisance, the court will balance the hardships. Artist may not prevail here because she is only leasing. A tenant can easily move to a quieter residential community to escape the noise and it may be much more difficult for Machinist to relocate or modify the noise level. In
sum, the court is unlikely to grant an injunction because the balance of hardships weighs in favor of Machinist.

C. Rights against Developer: Artist may argue that she has a negative easement against Developer for light and air, but it is really only her view that is blocked. Such easements are not implied at law and cannot be gained by prescription. Since there is no express easement, Artist has no claim against Developer.

2: Artist has the following rights against the State Power Department:

Tenant may argue that she has acquired an easement by prescription in the path that crosses the lot. The period of adverse use required is likely to have run for prescriptive easements since Artist has been there for 30 plus years, and her use has been open and notorious, continuous and hostile. However, the State may exercise eminent domain and condemn the easement. Artist would not receive compensation because only the owner, not users, of the condemned property would be entitled to just compensation.

ANSWER TO QUESTION #16

Sam and Paul appear to have a valid contract for the sale of land that is in writing and is thus enforceable. Sam will could prevail and can force Paul to pay the agreed price for the land if Sam can show that he has marketable title to the parcel. The contract between Sam and Paul contains an implied covenant of marketable title even though it calls for a quitclaim deed. Paul has not yet accepted any defects in the title, and has a right to insist on marketable title.

Sam’s claim of title goes back to Owen, who conveyed the parcel to his daughter Doris and son George for their joint lives and then to the survivor of them. Doris died after Owen but before her brother George. Doris’s will could not leave the parcel to her son Ed because the parcel was not in Doris’s estate under the terms of Owen’s conveyance; the parcel then belonged solely to George. The common-law doctrine of the destructibility of contingent remainders would have conveyed any possibility of reverter that Owen held to Doris as part of the residue of his estate. George’s contingent remainder would be destroyed if there were any contingencies that meant his interest did not vest immediately when the prior interest terminated, and in such case the property would revert back to Owen’s estate and through there to Doris’s estate. It seems unlikely that a modern court would apply the rule here because George’s interest vested immediately upon Doris’s death. The better result would be to find that George had good title that he could convey to Cain.

Alternatively, if the court finds that Cain could not convey title to Sam by deed, Sam might claim that he obtained title through adverse possession, tacking his period of possession onto that of Cain’s family. Together, they occupied the property from 1988 through 1999, more than long enough to meet the 10 year statutory requirement in this jurisdiction. Adverse possession means possession that is open and notorious, exclusive, and continuous for the statutory period of time. The fact that they only used the property during the summer months does not mean the possession was not “continuous” since the property was only accessible during the summer months and had always been used only as a summer home. Sam’s right to the property by adverse possession would not give him marketable title that he could convey to Paul, however, unless he asked the court to quiet title.

On either theory, it appears that Sam can demonstrate that he has marketable title and then obtain specific performance from Paul.
TORTS/REMEDIES ESSAYS

QUESTION #1 (DISCUSSED IN LECTURE)

Seller owned a house and lot which he listed for sale with Broker. Almost immediately thereafter, a storm caused a tree to fall on the house, damaging the roof. The estimated cost of repair was $5,000.

At Broker's suggestion, Seller propped up the roof and concealed the damage under a new roof covering, at a cost of only $600. The roof was left in a weakened condition.

Subsequently, Broker negotiated a sale of Seller's property to Buyer for $60,000. The sale contract provided that the property was sold "as is" and that "no representations or warranties other than those contained herein" have been made by either party. The contract contained no reference to the damaged roof, except that Broker pointed to the new roof covering as one of the good features of the house.

Buyer could have detected the damage to the roof by crawling through a hatch into the space under the roof, but it did not occur to him to do so.

Seller was paid by Buyer, Broker received his commission for the sale, and Buyer now has title to and possession of the property.

Two months after the sale, the roof collapsed due to its weakened condition.

Buyer has replaced the roof at a cost of $7,500. This is $2,500 more than it would have cost to repair the roof properly when it was first damaged. The fair market value of the repaired property is $65,000.

To what relief, if any, is Buyer entitled:

A. Against Seller? Discuss.

B. Against Broker? Discuss.

QUESTION #2 (DISCUSSED IN LECTURE)

Jill, a married public school teacher in her late twenties, became involved several years ago in an affair with Don, her principal at Hudson High School. Jill broke off the relationship after counseling with her minister. Since that time Don has attempted to continue the affair. He called Jill at her home, threatened to make full disclosure to Jill's husband, and, without cause, charged her with violations of school regulations.

Because of Don's harassment, Jill resigned her position at Hudson effective at the end of the school year and applied for a new teaching position for the next school year at Clark High School in an adjoining school district. She was notified by Clark officials that her application had been accepted and that she would be employed for the next school year. A few days later, however, she received notice from Clark that upon reconsideration her application had been "finally rejected."

Jill was advised by a Clark official that, in response to Clark's inquiry, Don had reported that Jill was a woman of poor moral character who often appeared at work with alcohol on her breath. The Clark official stated that her application had been rejected based on the information supplied by Don. In fact, Jill has never appeared at work with alcohol on her breath.
Jill commenced an action against Don seeking damages and equitable relief. Jill alleged that unless Don is restrained, she will be unable to find employment with other schools, because schools routinely make inquiry of former school employers; that she is unable to find other employment except as a waitress at two-thirds the compensation she could earn as a teacher; that she has declined such other employment; and that because of fear and emotional trauma she has suffered and is continuing to suffer irreparable injury.

To what relief, if any, is Jill entitled against Don? Discuss.

**QUESTION #3 (DISCUSSED IN LECTURE)**

Alice took her diamond ring worth $14,000 to Bob, a jeweler, to have the stone reset. After Bob had agreed to reset the stone and Alice had left the shop, Bob placed the ring on a counter for a few minutes while he helped another customer. Carl, also a customer, took Alice's ring and left the shop.

Carl later sold the ring for $15,000. He deposited $2,000 of the proceeds in a savings account that already contained $5,000 of his own funds and bought Blackacre with the remaining $13,000.

When Alice returned for the ring, Bob told her that it had been stolen, that he thought he knew the identity of the thief, that he had hired a private investigator, and that he hoped to recover the ring. The investigator's activities prompted Carl to admit his theft.

Blackacre is now worth $26,000. The balance in Carl's savings account, which had dropped to a low of $600 after he had deposited the $2,000, is now $3,000.

Carl has revealed that he sold the ring to Dan, who knew nothing about Carl's theft.

What are Alice's rights and to what relief, if any, is she entitled? Discuss.

**QUESTION #4 (DISCUSSED IN LECTURE)**

Owen owned Blackacre, a tract of grazing land which could not be used for farming because of periodic flooding. Its market value was $40,000 on April 1, 1977. County owned the adjacent tract, Whiteacre. On April 1, 1977, Deft contracted with County to construct an earthen flood control dam on Whiteacre.

Deft started the project in late April. There was not enough sand on Whiteacre to build the dam. In May, without Owen's knowledge, Deft began removing sand from Blackacre to use in building the dam. Deft built a shed and a conveyor belt on Blackacre so that the sand could be removed more efficiently. Deft removed 1500 tons of sand from Blackacre during May, June and July. Deft ceased all operations and removed all his equipment from Blackacre on July 31. He completed the dam in October and earned a net profit of $40,000 on his contract with the County.

Deft could have purchased sand from a commercial dealer about 10 miles from the dam site at a cost of $5 per ton. Transportation costs would have been $1 per ton. The rental value of Blackacre during May, June and July was $300 per month. The removal of the sand leveled Blackacre to some extent but did not affect its market value. However, the completed dam increased the market value of Blackacre to $50,000 because the dam will prevent flooding of the property, making it suitable for farming.

What claims for relief might Owen properly assert against Deft and what is the probable recovery under each claim? Discuss.
QUESTION #5 (DISCUSSED IN LECTURE)

Ped suffered a broken leg on November 1, 1977 when he was struck by an automobile negligently driven by Driver. Ped's doctor, Dr. Brown, placed the leg in a cast. Three weeks after the accident, Ped received a payment of $5,000 from Driver's insurance carrier and Ped signed the following release:

"I, Ped, hereby release Driver from any and all liability arising out of the injuries received by me on November 1, 1977."

One month after the accident, Ped returned to the hospital to have the cast removed. At that time Dr. Brown discovered that the leg had become infected under the cast. Dr. Brown used a full dose of a new drug in order to counteract the infection.

Ped had a serious reaction to the drug, was hospitalized for ten days, and is still in a greatly weakened condition. At the time of administering the drug, Dr. Brown did not know that the drug would be likely to cause such a reaction. However, it was generally known in the medical profession that drugs of this type had components that would produce such a reaction in about one patient out of ten thousand and that a simple skin test, using a small quantity of the drug, would disclose the possibility of that reaction.

A. What rights, if any, does Ped have against Dr. Brown for harm resulting from the drug? Discuss.

B. What rights, if any, does Ped have against Driver for harm resulting from the drug? Discuss.

C. Assuming Ped recovers against Driver for harm resulting from the drug, what rights, if any, does Driver have against Dr. Brown? Discuss.

QUESTION #6 (DISCUSSED IN LECTURE)

Paul, an antique collector, bought a painting at an auction for $20, primarily because he liked the antique frame. He took the painting to Artco, a local art store, to have it appraised. There, Tom, one of the two partners who operate Artco, after a cursory inspection of the painting said that he thought it was painted by Rand, a little-known artist, and was worth about $100 with the frame. Tom offered to buy the painting for that price. Paul said he would think about it and left.

Denny, the other Artco partner, had noticed the painting when Paul brought it into the store and had immediately recognized it as an early Remington, worth at least $10,000. Denny also heard the entire conversation between Paul and Tom.

After he left Artco, Paul took the painting home and removed the frame. The following day he returned to Artco. Tom was not there but Paul told Denny of his conversation with Tom and offered to sell the painting without the frame for $100. Denny told Paul that although he did not think the painting was by Rand, he accepted Paul's offer.

Shortly after buying the painting from Paul, Denny sold it to the Art Institute for $12,000. He then told Tom all of the facts. Tom demanded and Denny gave him one-half the proceeds from the sale.

Denny invested his half of the proceeds from the sale of the painting in 100 shares of stock, then selling for $60 per share. The other half Tom used to purchase Blackacre, a city lot. Subsequently, Tom deeded Blackacre to Juanita, his favorite niece, as a birthday gift. Juanita had no notice of Denny's dealings with Paul. The shares of stock have since declined in value to $30 per share; however, Blackacre's present market value has risen to $10,000.
Paul has now discovered the facts.

What is Paul entitled to recover and from whom? Discuss.

QUESTION #7 (DISCUSSED IN LECTURE)

Peter carelessly left his wallet containing $100 lying on the cashier's counter in Jim's restaurant and walked away. Jim observed the wallet but neglected to call it to Peter's attention. Immediately thereafter, David, another restaurant patron, paid his bill and picked up Peter's wallet by mistake, thinking it was his own.

As David was leaving the restaurant, Peter saw the wallet in David's hand and recognized it as his own. Before Peter could call out, David boarded a bus owned by Busco. Peter followed and managed to board the bus just as it started to move. He skinned his knee in so doing. He yelled, "Stop, thief!" and worked his way around other passengers to where David stood.

The loud accusation angered David, who, even after he noted that the wallet was not his own, retorted, "Don't you call me a thief! Take your wallet and get out of here." He hurled the wallet at Peter. It struck Peter's face, glanced off and flew out the bus window. Peter attempted to get off the bus, but the bus was so arranged that passengers were required to pay fares as they left. Peter had no money with him and argued with the operator of the bus while the bus traveled several blocks. When the bus was stopped by traffic, Peter jumped out and ran back. He was unable to locate his wallet.

A. What are Peter's rights against:


2. David? Discuss.


B. Does David have any right against Peter? Discuss.

QUESTION #8 (DISCUSSED IN LECTURE)

Jones, a civil engineer with two years' work experience, entered into a three-year written employment contract with Alpha, a corporation, at a salary of $24,000 per year. The contract was executed on January 15, 1977, and Jones was to begin work on March 1, 1977. Jones was particularly pleased with the contract for two reasons. First, Alpha's offices were located in City where Jones' mother lived in a retirement home. Secondly, Alpha's employees worked a 32-hour work week on a flexible time plan scheduled at the employee's convenience Monday through Friday between 7:00 a.m. and 7:00 p.m. This plan had been designed primarily for the benefit of working parents. Although he had not discussed it with anyone at Alpha, Jones, who was a bachelor, planned to use his free hours each week doing "free-lance" consulting. While a graduate engineering student, Jones did approximately 10 hours of free-lance consulting each week at an hourly rate of $15. The current rate for persons with Jones' experience is now $20 per hour.

Jones spent $75 to have a summary of his qualifications and experience printed. This summary stated that Jones was employed by Alpha. Jones intended to use the summary in his efforts to obtain consulting work.
On February 28, 1977, Smith, who knew of the contract between Jones and Alpha, persuaded Alpha to breach its contract with Jones and to hire instead Donna, the daughter of a prominent local politician. Smith received a fee of $1,000 from Donna for obtaining the job for her.

Jones spent all of his time during the next three months looking for a job and had no time to do consulting. He obtained unemployment compensation of $300 per month for those three months. On June 1, 1977, because of his mother's financial needs, Jones accepted an engineering position with Beta for three years at a salary of $18,000 per year. Beta's offices are 100 miles from City. This position requires a full 40-hour week, leaving Jones no time for consulting. Jones now spends about $10 every weekend on gasoline in order to visit his mother in City.

What relief might Jones obtain against Smith and on what grounds? Discuss.

What relief might Jones obtain against Alpha and on what grounds? Discuss.

**QUESTION #9 (DISCUSSED IN LECTURE)**

Abel and Baker were working on a scaffold lawfully erected over a public sidewalk. Abel, contrary to an express rule of his employer, was not wearing a hard hat.

While trying to park her automobile near one of the supports of the scaffold, Diana maneuvered it into such a position that she knew there was a risk of knocking the scaffold down if she backed without someone to guide her. She appealed for help to Sam, a stranger who was passing by. Sam just laughed. Angered, Diana proceeded to back her automobile without assistance and knocked a support out from under the scaffold, causing Abel and Baker to fall.

Abel severely fractured his skull and was taken unconscious to a hospital. If he had been wearing his hard hat, he would have suffered only a slight concussion with minimal disability.

Baker sustained a fracture of a vertebra, but he was able to walk and felt only slight pain. The fracture could have been easily diagnosed by x-ray and a medical doctor of average competence could have successfully treated it by immobilization. Instead of visiting a physician, Baker worked the rest of the day. While driving his car home later that day, Baker stopped at an intersection and his car was struck from the rear by a car driven by Ed. The collision caused only slight damage to Baker's car, but it was sufficiently severe to aggravate the fracture in Baker's back, resulting in paralysis.

Diana and Sam settled Baker's claims against them and received general releases from him. Abel sued Diana and Sam. Baker sued Ed. Assume that Diana, Sam and Ed raise all appropriate defenses.

A. What rights, if any, does Abel have against Diana? Sam? Discuss.

B. What rights, if any, does Baker have against Ed? Discuss.

**QUESTION #10 (DISCUSSED IN LECTURE)**

Bayban is an oral contraceptive manufactured by Drugco. Unlike some other birth control pills, it has no known undesirable side effects. However, it is completely ineffective with about 0.4% of all women. Bayban could not be made 100% effective without creating a risk of side effects. Bayban is advertised only through circulars mailed to doctors and is sold only on a doctor's prescription. Its label does not mention that it is ineffective with some women, although Drugco so informs the physicians to whom its promotional literature is sent.
Albert and Amy Able had three minor children. Albert's salary, their only source of income, was $28,000 a year, and was not likely to increase significantly. In June 1984, Albert and Amy concluded that three children were as many as they could hope to raise and educate adequately. They decided to have no more children. Accordingly, Amy consulted her physician, who prescribed Millpill, another contraceptive which she took regularly until October 1984.

In October 1984, the Ables spent two weeks with their friends the Bakers in a nearby city. When she unpacked her bag, Amy discovered that she had forgotten her Millpills. Mrs. Baker, informed of the problem, told Amy that she would give Amy some Bayban pills which the Baker family physician had prescribed.

Although her doctor warned her that Bayban was not 100% effective, Mrs. Baker did not mention this when she gave the package of Bayban to Amy. Amy took the Bayban pills as directed on the package during the two-week visit. In December 1984, she discovered that she was pregnant.

Since they learned of Amy's pregnancy, the Ables have suffered from severe insomnia caused by economic worries, and as a result Amy has been treated by a psychiatrist. Their 17-year-old daughter, Dora, has also been emotionally upset and under psychiatric treatment since her parents told her they now could not afford to send her to college.

Amy refused to consider an abortion even though her doctor assured her that it would present no danger to her health. Both the pregnancy and the birth were normal and uneventful. Thomas Able, a healthy baby, was born on July 10, 1985. Thomas was conceived during the time Amy was taking Bayban.

On what legal theories, and for what injuries, might Albert, Amy, and Dora receive from Drugco? Discuss.

**QUESTION #11**

Star stored furniture in a warehouse owned by Ware and prepaid one month's storage fees. At the end of the month, Star demanded return of his furniture but Ware, claiming in good faith that storage fees were due, refused to surrender the furniture. Ware informed Star that he would check to determine if the fees had been paid and would call Star if he determined payment had been made. Star heard nothing further from Ware.

The day following Star's demand, Ware contracted with Exco, a licensed exterminator, to free the warehouse of rats. Ware and Exco agreed that a poisonous gas would be used for this purpose, but all decisions about the work were left to Exco.

Two days later, before Exco had completed the job, some of the gas escaped from the warehouse into the adjoining building. Otis, an occupant of that building, was injured by inhalation of the gas. There is no evidence as to how the gas escaped into the adjoining building. All usual precautions had been taken to seal all exits and openings in the warehouse.

Gas fumes exploded when they came into contact with an open flame in the warehouse. The explosion destroyed Star's furniture. This is the first instance in which the gas used by Exco has exploded. The accepted opinion of the experts was that it was not flammable or explosive.

What are the rights of Star against Ware? Against Exco? Discuss.

What are the rights of Otis against Ware? Against Exco? Discuss.
QUESTION #12

Transit operates buses in a city. One morning Driver, a Transit driver, awoke with a bad cold. He consulted the yellow pages of the telephone directory and called Dr. Ard, a physician listed under the category, "Physicians & Surgeons-M.D. - Eye, Ear, Nose & Throat." Driver told Dr. Ard that he had a bad cold and was scheduled to report for work at noon that day. Dr. Ard listened to Driver describe his symptoms, said he could not give Driver an appointment, and told him to buy a bottle of "Pyrib" at a drug store and to use its contents as directed on the label. Pyrib is a cold remedy antihistamine prepared and marketed by Drugco. Driver obtained the Pyrib from a drug store, took the first dosage called for on the label and reported for work at noon.

At 1:30 p.m. that day while driving his bus, Driver felt drowsy. However, he continued driving and shortly thereafter, fell asleep. The bus jumped a curb and hit a pole. Pat, a paying passenger on the bus, was injured.

Pyrib is known to cause drowsiness and sleep in about 20% of the persons who take it. Dr. Ard did not warn Driver that the medication prescribed might cause drowsiness and sleep and the label on the bottle did not contain any such warning.

A. What are Pat's rights against Transit? Discuss.

B. What are Pat's rights against Dr. Ard? Discuss.

QUESTION #13

A storage shed on the suburban yard of Construction Co. (Conco) caught fire on a Sunday morning. Dennis, Conco's draftsman at its downtown office, happened to be bicycling by on a personal errand. He broke into the yard office through a closed window and notified the local volunteer fire department. He next located ignition keys and moved eight pieces of heavy equipment onto an adjacent field. The heavy equipment consisted of trucks and bulldozers, which were threatened with imminent destruction, but were not damaged.

Unknown to Dennis, the adjacent field belonged to a wholesale florist, Frank. Although the field appeared to be vacant and unused, Frank had planted it with valuable tulip bulbs. Bulbs valued at $9,000 were destroyed under the weight of the heavy equipment.

After firefighters extinguished the fire, Frank asked Dennis to come to his office to discuss the damage. Dennis agreed. As soon as Dennis entered the office, Frank told Dennis, in the presence of four of Frank's employees, that Dennis would have to remain at the office until he summoned the president of Conco and the president had arrived at the office. When the president arrived an hour later, Frank told Dennis he could leave, and Dennis left.

A. What are Frank's rights against Dennis and against Conco? Discuss.

B. What are Dennis' rights against Frank? Discuss.

QUESTION #14

Mag, Inc. publishes a magazine and operates a laboratory for testing merchandise of its advertisers. Mag authorizes the use of a symbol that says "Mag Seal of Approval" when Mag's tests indicate the product is safe and wholesome.
Mag examined samples of Tint hair coloring produced by Tintco, Inc. Mag's tests indicated that Tint was effective and satisfactory. Mag authorized Tintco to use Mag's Seal of Approval in advertising Tint and on Tintco's labels placed on containers of Tint. Neither Tintco nor Mag was aware that when Tint is brought into direct contact with Balm, an infrequently used scalp medicine, Tint causes hair to turn purple.

Gloria, a contestant in a beauty contest, used Tint on her hair while it was still wet with Balm. As a result, Gloria's hair turned purple and she had to withdraw from the contest. She had been regarded as the favorite. To Gloria's embarrassment her hair discoloration persisted until her hair grew out.

What are Gloria's rights against:

A. Tintco? Discuss.
B. Mag? Discuss.

**QUESTION #15 (JULY 2002 EXAM)**

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as "the modern, safe means of controlling allergy symptoms." Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her doctor (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because "this pill is the best-known method of controlling allergy symptoms."

Bud, Sally's brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally's eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally's medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

**QUESTION #16**

Upon retirement, Bill and Jane Mason purchased a specially designed, custom-built mobile home trailer from Dealer for $65,000. They made a down payment of $10,000 and Dealer retained a security interest for the balance of the purchase price. The Masons moved with the mobile home into a space rented from Dream Park, where they paid monthly rental.

Several months later the trailer was removed from Dream Park by agents of Finance Company. Bill protested the removal and suffered a broken leg when he refused to step down and fell from the step of the trailer as it was being pulled away. He has since been hospitalized.
Because of mental distress suffered when she learned of these events, Jane has been hospitalized and under the care of a physician.

The trailer is now in the possession of Finance Company and is being advertised for sale.

Finance had erroneously repossessed the Mason's trailer, believing it was the property of Stranger. Stranger had defaulted on a debt due Finance that was secured by a mortgage on a trailer similar to the Masons' trailer.

The fair rental value of the Masons' trailer is $1,000 a month. A small section of the trailer was dented while it was in Finance's possession. It would cost $500 to repair the dent, but the damage is neither serious nor noticeable. The Masons' clothes and other personal possession are missing from the trailer. The Masons replaced such personal property at a cost of $5,000.

What are the rights of Bill and Jane, and what relief, both temporary and permanent, is available to them? Discuss.

**QUESTION #17**

Jack, aged 22, and his friend, David, aged 16, were riding their motorcycles around Jack's property. They decided to race each other down Jack's driveway, across a seldom-used public road and into a neighboring field.

David was ahead of Jack by about 75 feet when, without slowing down, he entered the road. David failed to see Peter’s car approaching. Peter, an adult, was driving carefully but he was not a licensed driver, and he was not wearing a seatbelt although required to do so by state law.

Peter avoided hitting David by braking suddenly. This caused Peter to strike his windshield and to suffer severe physical injuries.

Peter sued David and Jack in state court, alleging negligence. The parties stipulated to the facts given above.

Jack moved for summary judgment, claiming that as a matter of law he was not liable for Peter's injuries. The court granted Jack's motion.

David moved for summary judgment on the grounds that Peter was not wearing a seatbelt and was not a licensed driver. The motion was denied.

At trial, over Peter's objection, the judge instructed the jury to apply the standard of care applicable to children in assessing David's conduct.

Did the court err in:
A. granting Jack's motion for summary judgment? Discuss.
B. denying David's motion for summary judgment? Discuss.
C. instructing the jury to apply the child standard of care? Discuss.

**QUESTION #18**

White, a Marine Corps officer, was convicted of murder in 1946 in a highly publicized trial. The only evidence against him at the trial was the testimony of two former Marines that Japanese prisoners of war
had been killed while in the custody of troops commanded by White during the battle for control of Guadalcanal. In 1954, one of these witnesses who was then dying of cancer confessed that he and the second witness had lied at the trial of White in order to avoid punishment for their own misconduct. When investigation confirmed the truth of the confession, White received a pardon, was released from prison, and entered a religious order where he lived in seclusion under vows of silence and poverty.

Late in 1992 White developed a serious illness. He reluctantly left the order and entered a hospital for treatment.

News, a daily newspaper in the city in which the hospital is located, has prepared a feature article that fully and truthfully recounts the trial, imprisonment, and the events leading to the pardon of White. The author and editors have relied solely on information available in public records. News has notified White that it intends to publish the article. White objects to the prospect of unwelcome publicity. White and News have been warned by White's doctors that the emotional stress White may suffer if the story is published will impede his recovery.

A. If the story is published, on what theory or theories might White base an action for damages against News? Discuss.

B. If White seeks an injunction to prohibit publication of the proposed story, what defense or defenses should News offer, and how should the court rule on them? Discuss.

**QUESTION #19**

Harold grows roses in his flower garden. To keep the roses in good health, he applies ROSEBRITE, an insecticide solution manufactured by Acme and sold in spray cans. On several occasions Harold has read a warning printed on the spray can which admonishes:

**DO NOT ALLOW THIS SOLUTION TO GET IN EYES OR ON EXPOSED PARTS OF BODY. EXTREMELY TOXIC. DO NOT DRINK. IF CONSUMED, CALL DOCTOR IMMEDIATELY. MANUFACTURER IS NOT LIABLE FOR INJURIES CAUSED BY THIS PRODUCT.**

Last week, while Harold was applying ROSEBRITE to the roses, his telephone rang. He left the spray can of ROSEBRITE on the lawn, went inside to answer the phone, and forgot about the ROSEBRITE.

The next day, Johnny, age 5, a neighbor's child who had come over to play with Harold's son, went into the yard, picked up the spray can, and sprayed some ROSEBRITE on his arms. He thought the can was filled with perfume because he noticed a picture of roses on the spray can and he could not read. He became ill almost at once. The children were at the time under the care of a teenaged babysitter, Sarah.

Sarah had been in the house watching television and had not heard Johnny leave the house. Johnny came into the house crying and obviously ill. He pointed to the ROSEBRITE spray can and told Sarah that the "perfume" made him sick. Sarah looked at the spray can and read the warning. Realizing the gravity of the situation, she called an ambulance and got Johnny to the hospital. Johnny suffered cramps, blurred vision, and diarrhea. He was hospitalized for several days.

Though the warning on the spray can did not mention it, washing the exposed area with soap and water would have minimized Johnny's injuries.

What are Johnny's rights against:

1. Acme? Discuss.

QUESTION #20

Dan operates a plant where he makes pottery. To provide a special high-capacity power source to his pottery kilns, Dan recently installed on the electric company’s power pole outside of his building an electrical transformer that would increase the electrical current entering his plant from the main power line. He did this without the knowledge or consent of the electric company. Dan did not know that the power line on which he installed the transformer also feeds power to the adjacent office buildings.

Peter occupies one of those adjacent office buildings. In the building, he has an extensive computer network that he uses in his business of providing advanced computer services to local commercial enterprises. Peter has been in this business for ten years. He employs several highly paid computer operators and technicians.

Dan’s installation of the transformer caused power surges each time his kilns were turned on and off. Soon after Dan had installed the transformer, Peter’s computers began to malfunction and eventually were severely damaged by the repeated power surges. As a result, Peter lost a large amount of data stored in his computers. He laid off some employees without pay and shut down his business for two weeks while the computers were repaired and while the remaining employees restored the lost data.

During the shutdown, Peter lost considerable income because he was unable to furnish computer services to his customers.

Peter and the laid-off employees have filed suit against Dan.

1. In an action against Dan, what theories, if any, might Peter assert and what defenses might Dan raise if Peter seeks to recover:
   a) The cost of repairing his computers? Discuss.
   b) The cost of restoring the lost data? Discuss.
   c) His lost income? Discuss.
   d) Loss of goodwill and other incidental effects of the disruption of his business? Discuss.

2. May Peter recover punitive damages? Discuss.

3. May the laid-off employees recover lost wages and benefits from Dan under any theory? Discuss.

QUESTION #21

In 1998, Diane built an office building on her land adjacent to land owned by Peter. Neither she nor Peter realized that the building encroached about ten inches on Peter’s adjacent property. Because of the narrowness of Diane’s lot, Diane did not have much latitude in the design of her office building. In December 2000, a town survey made for other purposes revealed the mistake. In constructing her office building, Diane inadvertently destroyed two dozen ornamental trees that had been on Peter’s land for years.

Peter, who was a restaurateur, maintained a garden where he grew specialty vegetables for his restaurant. The vegetables have been unable to flourish without the filtered sunlight provided by the trees that Diane destroyed. As a result, Peter’s costs have risen as he has been forced to buy more produce from
suppliers. In addition, his reputation as a restaurateur has suffered because his customers had come to look forward to his fresh garden vegetables. Many of his customers have begun to frequent other restaurants, and the long-term effect on his business is incalculable.

Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction.

Diane’s tenants have been parking on a lot in back of Diane’s building. Diane paid for the paving of the lot under the mistaken belief that the lot was on her land. In reality, the lot is almost entirely on Peter’s land. Diane has been charging her tenants $50 a month to lease parking space in the lot. Peter has never voiced any objection to this practice because, until the town survey, he did not realize that the lot was on his land.

What remedies are available to Peter against Diane, and on what theories of liability are they based? Discuss.

QUESTION #22

Peters, a suburban homeowner, decided to resurface with bricks the concrete area surrounding his pool. He purchased from Homeco, a local home improvement store, a concrete cutter manufactured by Conco, which had a blade manufactured by Bladeco. He then took the concrete cutter home and assembled it following the instructions provided by Conco.

The blade that Peters purchased was clearly labeled “Wet.” Although no instructions or warnings came with the blade, Conco included several warnings throughout the instructions to the concrete cutter stating, “If using a wet blade, frequently water the blade and surface being cut to avoid risk of blade degradation.” No other warnings relating to the blade were included with the concrete cutter.

Peters began cutting the concrete with the concrete cutter without using water. Less than five minutes into the job he noticed that the cutter was vibrating excessively. He turned the machine off by hitting the “kill switch” located near the blade at the bottom of the cutter, with his right foot. The cutter’s handle did not have a “kill switch.” After carefully examining the concrete cutter and blade, Peters became convinced that nothing was wrong and continued to operate it. Nevertheless, within seconds, the concrete cutter again began vibrating violently.

As Peters reached with his right foot to hit the “kill switch” again, the blade broke into pieces, forced off the cutter’s safety guard, spiraled into Peter’s right foot and caused permanent injuries.

On what theory or theories might Peters recover damages from and what defenses may reasonably be raised by:


ANSWERS TO SELECTED TORTS/REMEDIES QUESTIONS

“MODEL” ANSWER TO QUESTION #9

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and fact, law, application methodology taught in the Essay Writing Workshop. Keep in mind that this answer is merely an acceptable passing answer and does not cover everything that is discussed in the lecture. Also, do not rely on this answer or any model or sample answer for accurate black letter law.

I. Abel’s rights

A. Against Diana

1. Battery

While trying to park her car, Diana knocked a support beam from under the scaffold, which caused Abel to fall.

Abel will argue that Diana was angry because Sam would not help her guide her car and therefore she intentionally knocked the support out from the scaffold, thus committing battery upon Abel. A person commits a battery upon another person when she intends to commit a harmful or offensive touching without the other’s consent. Diana will argue in response that there is no evidence that she intended to cause harm to Abel or knock down the scaffold. She was merely attempting to park her car. Even if Diana’s conduct amounted to negligence or willfulness, liability in battery will not exist under common law.

Diana will prevail because there is not enough evidence that Diana intentionally tried to harm Abel or even intentionally tried to knock the support down.

2. Negligence

Diane was trying to park her vehicle near one of the support beams of the scaffold where Able was working. Abel’s employer required employees to wear hard hats. Abel was not wearing one and fell when Diane knocked out a support beam.

Abel would assert that Diana maneuvered her automobile without assistance knowing that there was a risk of knocking down the scaffold. As a result, Able fell and was injured. Generally, a person has a duty to operate her vehicle safely and this duty is breached when she acts in a way knowing there is a risk of injury. Diana would respond by arguing that had Abel been wearing his hard hat, he only would have been slightly injured. Therefore, by not following his employer’s express rule, Abel was contributory negligent and his negligence caused his injuries. When a party’s own negligence is the cause of his injuries, he is barred from recovery.

Abel will prevail and can recover damages for his injuries from Diana. Even though Abel violated a safety rule, the likely purpose of the rule is to protect workers from falling objects, not to prevent them from falling. In other words, Abel was required to wear a hard hat in order to
prevent injuries associated with the risks of his job, not to prevent a situation wherein someone comes along and knocks a support beam down. Even though in this case, the hard hat would have prevented his injuries, the fact that he was not wearing one at this time is not deemed contributory negligent because Diana’s actions had nothing to do with the risk being prevented.

B. Against Sam

Sam, a stranger passing by, was asked by Diana to guide her into the space. Sam walked away. Diana continued to park, knocked into a support beam, causing the scaffold to fall. Abel was injured.

Abel would argue that had Sam helped Diana, she would have not caused the scaffold to fall and Abel would not have been injured. Sam, however, will successfully assert that Abel has absolutely no cause of action against him because he owes no duty of care toward Abel. He has no special relationship that would warrant a duty owed toward Abel and he was certainly under no obligation to help Diane. If Sam had rendered assistance to Diane, then he may be obligated to use reasonable care, but in this case, he did not volunteer, therefore there is no duty owed by him. Abel has no viable counter argument.

Abel as no rights against Sam because Sam owed no duty to Abel.

II. Baker vs. Ed

A. Contributory Negligence

Baker also fell from the scaffold but only suffered minor injuries. He did not see a doctor. While driving home from work, Ed rear-ended him. Baker became paralyzed.

Ed would argue that he is not responsible for Baker’s injuries because had Baker gone to see a doctor after his fall, his fracture would have been diagnosed and treated much earlier. Generally, a person must act reasonably in caring for himself and he could be deemed contributory negligent for not taking acts to minimize his damages. Baker would respond by stating that he was feeling fine and was able to walk after the accident. He worked the rest of the day and was only in minimal pain. Thus, given the physical condition that he was in, he did not deem it necessary to seek medical attention, and therefore acted reasonably under the circumstances.

Baker would likely prevail. It would ultimately be up to the fact finder to determine whether a reasonable person in Baker’s situation would have gone to see a doctor. Even though it seems prudent to seek medical attention after falling off a scaffold, given the fact that Baker was able to walk and work following his fall indicated to him that medical treatment was not necessary. Also, given the fact that it is possible to have an asymptomatic fracture, it is entirely probable that Baker felt OK after his fall. Therefore, Baker is likely not contributory negligent for not going to a doctor.

B. Is Ed Responsible for the Full Extent of Baker’s Injuries?

Ed rear-ended Baker. There was minimal property damage and Baker had a pre-existing undiagnosed back fracture from his prior fall off the scaffold. Due to the collision, Baker’s fracture was aggravated and he became paralyzed. It has been established that Ed committed a negligent act.

Ed would assert that he is not responsible for Baker’s paralysis because the accident was minor, the property damage was minimal and he could certainly not expect this accident to cause such a debilitating injury. Ed will rely on the ruling of some courts that a defendant is liable only for the
harm that was a foreseeable consequence of his act. On the other hand, Baker will argue that Ed’s act of colliding with Baker’s vehicle was a substantial cause of his paralysis because there was no intervening event that caused his injury. Generally, if a defendant has acted negligently (which Ed did), he is liable for any harm that follows in unbroken sequence, without an intervening cause. In other words, you take the victim as they are.

Baker will prevail and Ed’s rear-ending Baker’s vehicle is the proximate cause of his injuries. Baker’s back was fractured prior to the accident and this is how he is as the victim to Ed’s negligence. Ed must take Baker as he is. Since there were no negligent intervening acts after the accident, Ed is responsible for all of Baker’s injuries.

C. The Effect of the Release

Diana and Sam settled with Baker. Baker gave a release to each of them, but not to Ed since he was not part of the settlement.

Ed will try to argue that since Baker settled with Diana and Sam, that there is no viable action against him because the case is over. This argument would clearly fail, however, because Ed may still be independently liable to Baker. Just because one party settles, even if they are joint tortfeasors, the other party may still be amenable to a lawsuit.

The release has no effect on Ed. Diane, Sam and Ed each acted independently to allegedly cause harm to Baker and each of their actions and injuries caused is actionable by itself. Ed would be responsible for all damages he caused to Baker, but the court may deduct the amount paid by Diana and/or Sam.

ANSWER TO QUESTION #11

I. Star's Rights Against Exco

Exco is not liable to Star in negligence unless Exco breached a duty which it owed to Star, and if Star was proximately harmed as a result of Exco's breach. Exco used poisonous gas, and owed a duty to any persons who might be in the zone of danger from toxic fumes. Star, however, was apparently not near the warehouse when the gas was used and would not be a foreseeable plaintiff. Furthermore, the type of harm which resulted - an explosion which damaged Star's furniture - was unforeseeable. The facts state that the opinion of experts was that the gas was not explosive.

Under the minority view, that of Justice Andrews in the Palsgraf case, the fact that Star was not a foreseeable plaintiff is not controlling. Even under this view, it will be difficult for Star to prevail on a negligence theory because although another person (Otis) was injured by inhaling the poisonous gas, there is nothing in the facts that suggests any causal connection between Exco's negligence (if any) in allowing gas to escape, and the explosion, which resulted from fumes which (properly) were in the warehouse. Thus, Star is unlikely to prevail against Exco on a negligence theory.

Star is also unlikely to prevail against Exco in a strict liability action based on Exco's engaging in an abnormally dangerous or ultrahazardous activity. Even if fumigation with poisonous gas is an abnormally dangerous activity, Star will not prevail because the type of harm which makes use of the gas dangerous - the harm which would result if someone inhaled the gas - was not the kind of harm which Star experienced. Therefore, Star unlikely to prevail against Exco either in a negligence or in a strict liability action.

II. Star's Rights Against Ware
Star might assert that his furniture was converted by Ware. As a bailee, Ware had a duty to return the furniture on demand, and he refused to do so. However, the facts make clear that Ware in good faith believed that storage fees were due, and a warehouseman has a privilege to retain a bailor's goods for a reasonable time under these circumstances. The explosion occurred three days later, and this lapse of time does not appear to be unreasonable. Accordingly, although there is a question for the trier of fact whether Ware held the goods beyond a reasonable time, it appears that Star is unlikely to be successful in an action against Ware for conversion.

It is clear from the facts, which state that all decisions about the extermination were left to Exco, that Exco is an independent contractor. An employer can be found negligent if he hires a contractor known to be negligent or incompetent, but the facts do not support such an argument. As a general rule, Ware will not be vicariously liable for the torts of an independent contractor. There is an exception, however, for inherently dangerous activities, and Ware's agreeing to Exco's use of poisonous gas indicates that Ware has reason to know that the activity will be dangerous. As noted above, however, even if Exco's use of the gas is an inherently dangerous activity, Exco in unlikely to be found liable to Star, and therefore Ware, who hired Exco, will not be liable on a theory of vicarious liability.

III. Otis's Rights Against Exco

Because Exco was using poisonous gas, Exco had a duty to Otis and other persons nearby to take reasonable care to prevent any gas from escaping to any place where it could be inhaled and thereby cause harm. Otis lived in a building adjoining the warehouse, and it was foreseeable that if gas escaped, he would be injured by inhaling it. Because Exco took all usual precautions, it is not clear whether Exco breached its duty of due care. Otis might successfully use the doctrine of res ipsa loquitur to establish that it is more likely than not that his being injured by inhalation of gas resulted from Exco's negligence.

If Otis does not prevail on a negligence theory, an action based on Exco's engaging in an abnormally dangerous activity is likely to succeed. If, as seems likely, use of poisonous gas is not a common usage in the community and it involves a risk of harm that cannot be eliminated even with reasonable care, Exco will be liable to Otis because the type of harm experienced by Otis, in contrast to the destruction of Star's furniture by explosion, is that which makes the use of the gas abnormally dangerous.

Otis may also bring an action in nuisance against Exco, but this is unlikely to succeed because the primary effect of the gas was on Otis personally, and not on his use and enjoyment of his property. Similarly, an action for trespass to land is unlikely to succeed, because the intrusion of gas on Otis's land was neither intended nor substantially certain to occur.

IV. Otis's Rights Against Ware

Nothing in the facts suggests that Ware was negligent in selecting Exco to exterminate the warehouse. However, if Exco is liable to Otis on either a negligence or a strict liability theory, Ware will probably be vicariously liable to Otis. Ware agreed that poisonous gas could be used, and Ware therefore is charged with awareness that the work of the independent contractor is inherently dangerous. Ware is vicariously liable to Otis, and as noted above, Exco will probably be liable either for negligence or on a strict liability theory.

ANSWER TO QUESTION #12

A. Pat's Rights Against Transit

Pat may prevail against Transit if the company was negligent in its supervision of Driver - for example, by allowing him to drive while knowing that he was taking medication that could cause drowsiness. Nothing in the facts suggests such negligence, however. Pat may also recover against Transit...
if Driver is Transit's employee and, while acting within the scope of his employment, he tortiously injured Pat. It appears from the facts that Driver is a servant of Transit, not an independent contractor. Driver is apparently subject to Transit's right of control. The injury to Pat occurred while Driver was driving Transit's bus, and nothing suggests that he was on a frolic and detour.

It is likely that Driver's negligence was a proximate cause of Pat's injuries. Driver owed a duty of reasonable care to his passengers; in some states he would owe the duty of the highest care that could reasonably be exercised, because Transit is a common carrier. Driver probably breached that duty not by taking the medication (which had no warning about drowsiness) but by falling asleep after feeling drowsy. A reasonable bus driver, in a position of responsibility, would have recognized that his drowsiness (which he might reasonably link to the cold medication) created a risk of harm to his passengers. Driver could, for example, have stopped the bus and called Transit to send another driver. Only if the Pyrib caused him to fall asleep without the usual warning of drowsiness, would Driver not have breached his duty to Pat.

Assuming Driver's breach of duty, there was both factual and proximate causation between the breach and the injuries to Pat. Transit, as Driver's employer, is therefore vicariously liable to Pat if Driver is liable to Pat.

B. Pat's Rights Against Dr. Ard

Pat may bring an action in negligence against Dr. Ard. As a physician, Dr. Ard had a duty of reasonable care to his patient, Driver. It is not clear from the facts whether Driver told Dr. Ard that he was a bus driver. Even if not, however, it was foreseeable that Driver would be operating a motor vehicle. Pyrib is known in the medical community to cause drowsiness and sleep in 20% of the persons who take it. A reasonable physician would have known of these risks and advised his patient. If Dr. Ard was a specialist (which is suggested by his listing in the yellow pages under "Eye, Ear, Nose And Throat"), he is held to a higher standard, that of a reasonable physician with that specialty.

At issue, however, is whether Dr. Ard had a duty of care to Pat, who was not his patient. If Dr. Ard knew that Driver was a bus driver, it is clearly foreseeable that if Driver falls asleep, his passengers will be endangered. Even if Dr. Ard did not know and reasonably should not have known that Driver was about to drive a bus, Pat can contend, following the reasoning of the dissent in Palsgraf, that if Dr. Ard breached a duty to Driver, it was a wrong to the public at large.

There is still a causation issue, however. Even assuming, as seems likely, that the Pyrib caused Driver's drowsiness (which Dr. Ard might disprove if he can show that Driver was not one of the persons who become drowsy by taking the medication), Dr. Ard could reasonably contend that based solely on his suggesting a medication in a short telephone conversation with Driver, it is extending his duty beyond a reasonable scope to extend a duty of care to Pat. The issue of proximate cause appears to be one for the jury.

ANSWER TO QUESTION #13

A. Frank's Rights Against Dennis and Conco

If Dennis was an employee of Conco acting within the scope of his employment, then Conco will be liable under the doctrine of respondeat superior for any actions for which Dennis is liable. It is clear from the facts that Dennis is an employee, not an independent contractor. Although Dennis was not on duty at the time, his actions were designed to benefit his employer. Because Dennis acted on behalf of his employer in moving the equipment, it is likely that his actions will be found to be within the scope of his employment. Thus, if Dennis is liable in tort to Frank, Conco will also be liable.
Dennis has apparently trespassed on Frank's land; Dennis's moving the heavy equipment onto Frank's land was intentional and done without Frank's permission. However, Dennis has a privilege to enter upon Frank's land in an emergency. Dennis's actions were taken not to benefit the public generally, but to assist his employer, and although Dennis's moving the equipment onto Frank's land is privileged, he remains liable for the damages caused. Because Dennis's actions were taken to benefit Conco, the damages caused to Frank by Dennis's exercise of the privilege of necessity must be paid by Conco, the party for which the actions were taken. Conco is also probably liable under the doctrine of respondeat superior.

B. Dennis's Rights Against Frank

Dennis might bring an action against Frank for false imprisonment. At issue is both Frank's intent (whether he intended to confine Dennis without his consent) and whether Dennis consented to the confinement. Frank did not restrain Dennis by force or a threat of force. However, Frank's telling Dennis that he would have to stay was made in the presence of four of Frank's employees. In some jurisdictions, a plaintiff's reasonable belief that force will be used constitutes restraint sufficient for false imprisonment. Here, however, there is no indication that Frank felt coerced, and he may well have wanted to await the arrival of Conco's president in order to explain his actions.

Even if Dennis did not consent to remain, Frank could contend that the merchant's privilege to detain persons to recapture property should be applied by analogy in this case. Dennis has caused $9,000 in damage to Frank's property, and if, as is likely, Dennis asserts that he was acting on behalf of Conco, Frank may not have acted improperly by requiring that Dennis await the arrival of Conco's president.

ANSWER TO QUESTION #14

A. Gloria's Rights Against Tintco

Gloria may bring actions against Tintco based in negligence, breach of warranty of merchantability, and products liability.

In a negligence action Gloria will have to prove that she was harmed as a proximate result of Tintco's breaching its duty of reasonable care. It is not clear from the facts whether Tintco tested Tint, or whether reasonable testing would have revealed the effects of interaction of Tint with Balm. The issue of whether Tintco was negligent in failing to conduct tests that would reveal the effect of contact between Taint and Balm is one for the finder of fact. If it is found that Tintco breached its duty of reasonable care by failing to test properly, there is sufficient causation for a finding of negligence. It is not unforeseeable that Tint would be used in conjunction with Balm, and the use of the two products together would be concurrent and not superseding causation. Accordingly, if it is found that Tintco failed to conduct reasonable tests, Tintco will be liable to Gloria in negligence.

Gloria may also bring an action based either on breach of warranty of merchantability, or strict products liability. Many jurisdictions which have adopted one of these theories do not recognize the other, because the theories are quite similar. In a breach of warranty action Gloria will contend that Tintco is not fit for the ordinary purpose for which it is used, nor would it pass without objection in the trade, because of the adverse reaction which occurs when Tintco comes in contact with Balm. Although some courts will not permit recovery based on breach of warranty for adverse effects of chemicals when the plaintiff's idiosyncrasy caused the adverse reaction, here it was not Gloria's idiosyncrasy, but the contact with the infrequently used scalp medication which caused the injury. Nothing in the facts suggests that a warning was provided regarding interaction with Balm, and unless Balm was so infrequently used as to render contact between Tint and Balm extraordinarily unusual, Gloria is likely to prevail on a breach of warranty action.
If the jurisdiction is one in which breach of warranty for defective products has been superseded by strict tort liability, Gloria may bring an action against Tintco based on Section 402A of the Restatement (Second) of Torts. Gloria will contend that Tint is a defective product which is unreasonably dangerous to users and that she was harmed by using it. Under the consumer contemplation test, Tintco is clearly more dangerous than a consumer would have reason to expect. If the jurisdiction uses the risk-utility test, Tintco will have the burden of showing that the benefits of its product outweigh the risks. Because the harm could have been avoided if Tintco had warned consumers not to let Tint come in contact with Balm, and because such contact is foreseeable, it is likely that Tintco will be found strictly liable in tort to Gloria.

B. Gloria's Rights Against Mag

Gloria may seek recovery from Mag, if she relied upon its seal of approval, on several theories. It is unlikely that an action based on strict tort liability will succeed because Mag is not a manufacturer, supplier, or otherwise directly engaged in the stream of commerce producing or selling Tint. An action for breach of express warranty might lie against Mag, which represented that Tint was safe. However, both U.C.C. §2-313 and §402B of the Restatement (Second) of Torts limit liability for breach of express warranties to sellers of goods. Tintco, not Mag, was the seller of Tint, and Gloria may be unsuccessful in attempting to recover on a warranty theory, unless she can establish that it was Mag's express warranty that the product was safe that induced her reliance and that Mag profited from endorsing products (in which case Gloria can contend that Mag is in effect a seller).

Gloria's greatest likelihood of recovery against Mag appears to be an action based on Mag's negligent misrepresentation. Mag's business is to test products and to represent to consumers whether such products are safe and wholesome. Mag tested Tint and permitted Tintco to use Mag's seal of approval. If Gloria establishes that she reasonably relied upon Mag's representation of the safety and effectiveness of Tintco, and that Mag was negligent in granting its seal of approval to the product, she may prevail in an action for negligent misrepresentation. If Gloria relied upon the Mag seal of approval in purchasing Tint, it is likely that such reliance will be found to be reasonable. What is less clear is whether Mag breached its duty of reasonable care in testing Tint and concluding that Tint was satisfactory. Because Balm is an infrequently used medication, Mag may have acted reasonably if it did not test for the effect of combining Tint with Balm. The issue is one for the trier of fact.

C. Damages

If Gloria succeeds in action against either Tintco or Mag, she is entitled to damages for her physical injury (the discoloring of her hair), any expenses reasonably incurred in restoring her hair to its former condition, and for mental suffering resulting from her injury. She is also entitled to compensation for the lost opportunity, although the chances of her winning the beauty pageant and of earning additional money if she had won, may be too speculative to be compensable.

QUESTION #15 (JULY 2002 EXAM)

This is a “Model” Answer written in the Celebration Bar Review Proprietary Writing Method. Although it is not a “perfect” answer, it does demonstrate the structural mechanics you should use in drafting essay answers.

I. Sally's Claim Against Mfr.

A. Strict Products Liability
Mfr. marketed its allergy pills as “the modern, safe means” of controlling allergy symptoms. Mfr. knew that there was a slight chance of complete loss of eyesight as a side effect of this medication, but never issued any warnings. Sally saw the ads and asked Doc to prescribe the allergy medication. Doc prescribed the medication. After taking the pills, Sally suffered a substantial loss of eyesight and could potentially completely lose her eyesight. Doc knew of the risks, but did not warn her either. Sally lost eyesight in both eyes.

Mfr. will argue that it did issue warnings to Doc that the drug had the potential side effect of loss of eyesight. If the drug is a prescription drug, courts have held that the drug company may rely on the warning it provided to the doctor as to the risks involved in using the drug. Sally is going to argue that Mfr. manufactured and marketed an allergy pill that was unreasonably dangerous and did not provide the proper warning advising her that she could lose her eyesight. Strict liability may be applied even if a product does not contain a defect, strict liability may be applied if the product is unreasonably dangerous and the manufacturer fails to give proper warning of the danger. Mfr. is going to argue that the risk of loss of eyesight is very remote compared to the benefits that the medication offers the public as a means of controlling allergy symptoms. Under current law, it is recognized that there are certain products that are unavoidably unsafe, but whose need justifies their marketing. Sally is going to further argue that allergies are not a deadly disease, and as such, marketing a product to control them with blindness as a side effect makes that product unreasonably dangerous. Common law has provided that the marketing and use of drugs that prevent death from disease are justifiable even though these drugs have an unavoidably high degree of risk. Mfr. will further argue that Sally did not inquire as to any possible side effects of the product, so she is also to blame. Contributory negligence of the plaintiff is not a defense to strict liability when that negligence is a failure to discover the defect in the product or to guard against the possibility of its existence.

In this particular case, Sally will most likely prevail, since Mfr. marketed an unreasonably dangerous product without adequate warnings directly to her. This product does not rise to the level of those medications that are unavoidably unsafe, where its benefits outweigh its risks since it is used to control common allergy symptoms not prevent deadly disease. Additionally, although the Mfr. warned Doc, and that would ordinarily satisfy the warning requirement, in this particular case, Mfr. directly marketed its product to Sally without any warnings. Mfr. and Doc will be jointly and severally liable.

**B. Negligence in Warnings**

Mfr. advertised its allergy pills as “the modern, safe means” of controlling allergy symptoms. Mfr. knew that there was a remote risk of complete loss of eyesight as a side effect of this medication, but never issued any warnings. Sally saw the advertisements and asked Doc to prescribe the allergy medication. Doc prescribed the medication. After taking the pills, Sally suffered a substantial loss of eyesight and could potentially completely lose her eyesight. Doc knew of the risks, but did not warn her either. Sally’s brother, Bud, was willing to donate one of his corneas to her to restore eyesight in one of her eyes. Sally was afraid to go through with the procedure. Sally lost eyesight in both eyes.

Mfr. is going to argue that Mfr. is not responsible for Sally’s injuries, since Doc did not provide warnings to Sally about the remote risk of complete loss of eyesight as a side effect of this allergy medicine. In order to be found to be a proximate cause of the injury, the defendant is liable only for the harm that was a foreseeable consequence of his unreasonable act. Sally is going to argue that although Mfr.
did not prescribe the medication to her, Mfr. did market the medication to her, without providing any warnings whatsoever. Negligence in warnings requires that the defendant can be liable in negligence if he fails to provide adequate warnings with regard to foreseeable uses to which the product may be put. Mfr. is going to further argue that Sally contributed to her own injuries, since she did not attempt to have the cornea transplant that would have restored eyesight to one eye and has now completely lost all of her eyesight. Under comparative negligence, the plaintiff is allowed to recover her damages reduced by the percentage of negligence attributable to the plaintiff.

Sally will prevail against Mfr. in her action for negligence in warnings. Although Mfr. relied on Doc to provide Sally and other patients the warnings relating to its allergy medication, that was not sufficient in this case since Mfr. directly marketed its product to Sally, not only Doc. Mfr. breached its duty to Sally when it advertised the allergy medication without mentioning its side effects, no matter how remote those risks were. However, Sally’s damages will be reduced since she did not do anything to mitigate the damages. The cornea transplant would have restored excellent vision in one of Sally’s eyes.

C. Intentional Tort of Battery

Mfr. advertised its allergy pills as “the modern, safe means” of controlling allergy symptoms. Mfr. knew that there was a remote risk of complete loss of eyesight as a side effect of this medication, but never issued any warnings. Sally saw the ads and asked Doc to prescribe the allergy medication. Doc prescribed the medication. After taking the pills, Sally suffered a substantial loss of eyesight and later completely lost eyesight in both eyes.

Sally is going to argue that Mfr. committed a battery when Mfr. intentionally marketed its product to her causing her to lose her eyesight without adequate warnings. A battery requires that there be intent, an offensive touching, and no consent to those acts. Mfr. is going to argue that this was not a battery, since Sally consented, she went to Doc and requested to be prescribed this particular medication that Mfr. was advertising. For a battery to be actionable, the plaintiff must establish that he did not consent to the touching. Sally is going to argue that she may have consented to taking the medication, but she did not consent to be exposed to the unmentioned risks of the medication, her complete loss of eyesight. To render the consent ineffective, the fraud, misrepresentation, or mistake must relate to the nature or essence of the invasion, or to the extent of the harm to be expected from it, and not merely a collateral matter.

In this particular case, Sally will more than likely prevail on the battery claim. Although Sally did consent to taking the medication, which is a total defense to battery, her consent would be invalidated by the extent of the side effects which had not been disclosed to her. When Sally took the allergy medication she did not anticipate complete loss of eyesight as a side effect, which is not a reasonable expectation for a medication of this type.

D. Express Warranty

Mfr. advertised its allergy pills as “the modern, safe means” of controlling allergy symptoms. Mfr. knew that there was a remote risk of complete loss of eyesight as a side effect from this medication. Sally saw the ads and asked Doc to prescribe the allergy medication. Doc prescribed the medication. After taking the pills, Sally lost eyesight in both eyes.
Mfr. is going to argue that Mfr. did not provide a warranty or guarantee as to the effectiveness of the allergy medication or that the allergy medication was side effect free, Mfr. simply stated that the medication was a “modern, safe means” for controlling allergy symptoms. Under the UCC, a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty. Sally is going to argue that Mfr.’s statement that this allergy medication is a “modern, safe means” of controlling her allergy symptoms was the only reason she purchased the medication, that statement was essentially a promise that she would have relief from her allergies without side effects or safely control her allergy symptoms. Under the UCC, any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

On this particular issue, Sally will prevail on the warranty claim. Although Mfr. did not explicitly warrant or guarantee that the allergy medication was safe, Mfr. did state that in the advertisement Sally received. Sally purchased the medication on the basis of this statement alone, making that statement a promise or affirmation of fact. That promise would be enforceable as an express warranty.

E. Implied Warranty of Merchantability

Mfr. advertised its allergy pills as “the modern, safe means” of controlling allergy symptoms. Mfr. knew that there was a remote risk of complete loss of eyesight as a side effect of this medication, but never issued any warnings. Sally saw the ads and asked Doc to prescribe the allergy medication. Doc prescribed the medication. After taking the pills, Sally completely lost her eyesight.

Mfr. is going to argue that the allergy medication was effective as an allergy medication and as such is fit to be sold as allergy medication. Under the UCC, the implied warranty of merchantability requires that the goods be fit for the ordinary purposes for which these goods are used. Sally is going to argue that the allergy medication is not fit to be used as allergy medication, since it causes complete loss of eyesight and it is being marketed as “safe” without any warnings. Under the UCC, the implied warranty of merchantability applies unless it is clearly disclaimed.

On this particular issue, Sally will prevail. The allergy medication is being marketed by Mfr. as a safe product. This medication is being directly marketed to Sally, not only doctors. Mfr. provided no warnings or disclaimers in the advertising that Sally saw. As such, there is an implied warranty that this product is safe and considering the extent of Sally’s side effects, complete loss of eyesight, this product is not safe.

F. Implied Warranty of Fitness for a Particular Purpose

Mfr. advertised its allergy pills as “the modern, safe means” of controlling allergy symptoms. Mfr. knew that there was a remote risk of complete loss of eyesight as a side effect of this medication, but never issued any warnings. Sally saw the ads and asked Doc to prescribe the allergy medication. Doc prescribed the medication. After taking the pills, Sally lost total eyesight in both eyes. Sally said had she known of the risk, she would not have taken the medication.
Mfr. is going to argue that the medication was fit to control the symptoms associated with allergies. Under the UCC, goods that the seller provides to a buyer for a particular purpose are impliedly warranted to be fit for that particular purpose. Sally is going to argue that taking an allergy medication to get relief from allergy symptoms and as a result losing one's eyesight is not a buyer's expectation of possible side effects from such pills, rendering the product unfit. A seller breaches the implied warranty of fitness for a particular purpose when the consequences of utilizing the product produces an unreasonably unforeseeable result.

Sally will prevail on the implied warranty of fitness for a particular purpose claim. Mfr. marketed this drug as a safe means of alleviating allergy symptoms, however that is not the case. It is not reasonable that the price of relief from allergies is loss of your eyesight. Such a serious side effect from an expectedly benign product renders it unfit as a product to relieve the symptoms of allergies.

II. Sally’s Action Against Doc

Sally saw Mfr.’s advertisements for its allergy pills which make the claim it is a “safe means of controlling allergy symptoms.” Sally requested that Doc prescribe her the medication. Doc did. Sally never saw any warnings from Mfr. Doc did not advise her of any warnings regarding potential side effects. Doc knew of the risks. Sally took the medication and suffered a substantial loss of eyesight. Sally claims that she would never have taken the medication if she had known about the risks. Sally’s brother, Bud, was willing to donate one of his corneas to her, which would restore some eyesight to her with minimal risk. Sally refused to have the surgery. Subsequently, Sally completely lost her eyesight.

Sally is going to argue that Doc had a duty to warn her about blindness being a side effect of this medication and did not; had Sally known of this risk, she would not have taken the medication. In informed consent cases, where the plaintiff claims that the doctor obtained her consent to a certain medical treatment by withholding material information concerning the risks involved negligence is determined by measuring the reasonableness of the doctor’s conduct in not disclosing the risks. Doc is going to argue that his conduct did not cause Sally’s loss of eyesight, which was caused by Mfr. It must be determined that the defendant’s conduct must actually be connected with the plaintiff’s harm, if the plaintiff is unable to prove that her harm actually resulted from the defendant’s negligence, then plaintiff is not entitled to recover. Sally is going to respond that she lost her eyesight because Doc prescribed the medication, this was a prescription medication, she could not purchase this without the prescription written by Doc. Causation can be proven by the fact that the defendant’s conduct is a cause of the event when it is a material element and substantial factor in bringing about the event. Doc is going to argue that the medicine provided a warning to him that there was a remote chance of loss of eyesight, not a substantial risk. In proving proximate cause, the defendant’s conduct may be held not to be a legal cause of harm to another where, after the event and looking back from the harm to the defendant’s negligent conduct, it appears highly extraordinary that it should have brought about the harm. Sally is going to argue that Doc should have foreseen that she could lose her eyesight, since Doc was told that this was a risk. Proximate cause may be proven when the harm is a harm that a reasonable man would have foreseen as a probable consequence of his act. Doc is going to argue that even if he caused harm to Sally, Sally had a duty to mitigate that harm by having the surgery of transplanting Bud’s cornea into one of her eyes, restoring excellent eyesight to one of Sally’s eyes. Under comparative negligence, the plaintiff is allowed to recover her damages reduced by the percentage of negligence attributable to the plaintiff.
In this particular case, Sally will prevail since Doc negligently failed to warn her of the risks of the allergy medication. As her doctor, Doc owed her a duty, Doc breached that duty when he did not provide the information she needed to make a decision about her treatment. Sally has a right to refuse a treatment if its risks are concerning to her, here Sally was denied that right. Sally states that she would not have taken this medication if she had known the risk of losing her eyesight. There is no question that Sally’s loss of eyesight is a consequence of taking the allergy medication. Also, loss of eyesight is foreseeable, since both Mfr. and Doc knew that this was a side effect of this particular medication. However, Sally’s recovery will be limited as a result of her failure to have the corrective surgery mitigating her loss.

III. Damages

Sally was prescribed the allergy medication by Doc that was marketed by Mfr. Sally was not warned of any side effect of this medication. Both Mfr. and Doc were aware of the side effect of loss of eyesight. Sally suffered a substantial loss of eyesight as a result of taking the allergy medication. Sally’s brother, Bud, was willing to donate one of his corneas to her which would restore eyesight to Sally in one eye with minimal risk to her. Sally’s insurance company would pay for expenses associated with the transplant surgery. Sally refused to have the surgery. Sally has now completely lost her eyesight in both of her eyes.

Sally is going to argue that she is entitled to be compensated for her injury. In California, damages are provided to the extent that they are in an amount that will compensate for all harm proximately caused. Mfr. and Doc are going to argue that they are not responsible for Sally’s complete loss of eyesight, because she refused to have cornea transplant surgery which would have restored excellent vision in one of her eyes. The rule in California is that the defendant is not liable for any damages that could have been avoided by reasonable acts of the plaintiff. Sally is going to argue that she was afraid of the surgery, her fear is based on the fact that she was told the allergy medicine was safe, but it was not, so maybe this surgery was not safe. An injured plaintiff must submit to reasonable medical care, but does not have to undertake a relatively dangerous treatment or operation. Doc is going to argue that Sally is unable to recover more than $250,000 for loss of future earnings, pain and suffering and medical expenses. In California, a plaintiff may not recover in excess of $250,000 for non-pecuniary losses from a health care provider.

Sally will be able to recover compensatory damages for her loss of eyesight. Those damages will include amounts for medical expenses, loss of earnings capability, and pain and suffering. However, her damages will be significantly reduced by her failure to mitigate the loss. Sally would not have to undergo any dangerous treatment or surgery as part of mitigation. In this particular case, Sally unreasonably refused to have a cornea transplant which had minimal risks, but would have significantly impacted her vision. Rather than a total loss of eyesight, Sally would have had excellent eyesight in one eye. This will be a major factor in a large reduction of her award. In Sally’s case against Doc, Sally’s non-pecuniary damages will be limited to $250,000.
ANSWER TO QUESTION #16

A. Rights of Bill and Jane

1. Trespass on Real Property

Bill and Jane have an action for trespass on real property, a tort which involves the interference with a possessory interest in real property. The Masons have such an interest since they leased their trailer lot from Dream Park. There is no doubt that Finance Company, through its employees, intended to enter upon the land to remove the Mason's trailer. Nor did the Finance Company have defenses in the way of consent or privilege. Taking the home constituted an interference with the use of the land which the Masons had a right to possess, so they have made out the elements of the tort.

Their damages reflect the harm that was done to their possessory interest. Although the facts do not indicate that there was harm to the property, the Masons are entitled to at least nominal damages for Finance Company's interference with their possessory interest. The benefit of receiving nominal damages is that the Masons can then seek punitive damages. Although the awarding of punitive damages is an issue of fact, securing nominal damages will allow the Masons to pursue this remedy.

2. Conversion

The Masons have a cause of action for conversion of both the trailer and the possessions contained therein. Conversion is the unlawful interference with a plaintiff's possessory interest in personal property; the interference has to be so great as to exercise dominion over the property.

a. The Trailer

The Finance Company committed conversion when it took the trailer, since its intention was to sell the trailer for satisfaction of the debt. The Masons can pursue two types of remedies.

i. Damages

The Masons could seek damages for the loss of the trailer; those damages would be the fair market value of trailer at the time it was converted. Although the facts indicate that it cost $65,000 when built, evidence must be supplied to determine its value at the time of loss.

The Masons may also seek punitive damages; it is difficult to determine whether, on the facts presented, the conduct was so outrageous as to justify punitive damages. However, punitive damages might be justified if the court wants to make an example of Finance Company, to warn other such agencies from being reckless in the exercise of their business.

ii. Restitution

As an alternative to substitutional remedies in the form of damages, the Masons could attempt to return to the status quo ante by seeking the trailer's return from Finance Company. They may pursue two types of restitutional relief.

(a) Replevin

The Masons could seek the return of the trailer by pursuing the remedy at law, a prejudgment action called "claim and delivery", which is filed with the complaint. The Masons need to show the basis for their claim - Finance Company's wrongful detention of the property - a description of the trailer, its location and
a reason, based on information and belief, for detaining the property. The disadvantage to this remedy is that the Masons can have a sheriff secure the property but only after their right to retain ownership has been established. Therefore, it's possible that in the time between securing the order and serving it, Finance Company could have sold the trailer.

(b) Constructive Trust

The Masons have a remedy at equity if they can prove that the trailer is unique and that to permit Finance Company to keep it would subject them to irreparable damages. In support of their argument, the Masons could point out that the trailer was custom-built and that remanufacturing it would cause an undue delay. If the court is convinced, it could impose a constructive trust on the property and order the Finance Company to hold the trailer for the Masons.

iii. Equitable Remedies

The arguments in support of imposing a constructive trust could also be used to obtain injunctive relief such as a temporary restraining order. The Masons could argue that the property is unique, that they would be irreparably harmed if forced to settle for a substitutional replacement, and that Finance Company would be unjustly enriched if it sold the trailer (the advertisements are proof of this danger). Therefore, the Masons would argue, the court must issue a temporary restraining order preventing the Finance Company from selling or otherwise disposing of the trailer until a court determines whether the Finance Company converted the trailer. On the basis of those arguments, the court should issue such an order. None of the defenses to application of equitable relief - unclean hands, laches, promissory estoppel - are available here for Finance Company.

b. The Trailer's Contents

The Masons also have a claim for conversion for the contents of the trailer, since it was highly likely that the trailer would be furnished and so it was likely that the Finance Company would be aware of that fact. Here, too, the Masons have recourse to two types of remedies.

i. Damages

The Masons could seek damages for the loss of the contents, which would be their fair market value at the time of the conversion. The evidence of their replacement would probably be the most accurate measure of their value, since it would be otherwise quite difficult for the court to assess the value of personal goods. Another measure of their value is the amount the Finance Company got if they sold the goods.

ii. Restitution

Instead of a substitutional remedy, the Masons could attempt to have the contents returned to them. As with the trailer, restitution could come under the law, replevin, or under equity, imposition of a constructive trust. The same rationale offered for recovering the trailer also applies to selecting one remedy over the other.

3. Trespass to Chattels

As with a trespass on real property, this tort involves the interference with the possessory interest in personal property; the difference between this tort and conversion is that the interference is not intended to be as permanent. On the basis of the interference with the possession of their trailer, the Masons are entitled to damages for the cost of repairing the trailer.
They would also be entitled to damages for loss of use of the trailer; such loss is often measured by the rental cost of replacement property.

B. Rights of Bill

1. Battery

   a. Cause of Action

   Bill may well have a cause of action in tort against the Finance Company. Battery is the intentional, unpermitted touching of another, and the Finance Company - through its employees - caused a battery when it pulled the trailer while Bill was standing on its steps. A battery can come about from the indirect application of force, so Finance Company's intentional removal of the trailer while Bill was on its step was a battery.

   b. Damages

      i. Compensatory

      Bill's damages for the battery must be for all harm that was reasonably foreseeable to arise from the tortious conduct: medical bills, lost wages, loss of earning capacity, and pain and suffering.

      ii. Punitive

      It is possible that Bill can obtain punitive damages because of the outrageous conduct of Finance Company's employees. Generally, an employer is not liable for the act of an employee under a theory of respondeat superior for punitive damages, unless the employer (1) knew of or should have known of an employee's unfitness, or (2) ratified or authorized the employee's acts. It seems unlikely that Finance Company will be liable for punitive damages unless Bill can show that it instructed its employees to use whatever means necessary to obtain "their" property.

2. Negligence

   a. Cause of Action

   If Bill is unable to make out a claim based on battery, then he can certainly make out a cause of action in negligence. Finance Company and its employees had a duty to remove the trailer by reasonable means; it was unreasonable for the employees to pull the trailer as a means of removing Bill, since they could have summoned assistance from the police. Finance Company will be found liable for negligence on a theory of respondeat superior because the employees were acting within the scope of their employment when they were removing the trailer.

      i. Compensatory

      Bill's damages will be for all harm that was reasonably foreseeable to arise from the tortious conduct: medical bills, lost wages, loss of earning capacity, and pain and suffering.

      ii. Punitive

      Bill will probably not be able to obtain punitive damages unless he can prove that the Finance Company's employees were unfit to do such a job. The facts as presented do not support such an argument.
C. Rights of Jane

1. Infliction of Emotional Distress

   a. Causes of Action

   Jane can pursue alternative claims for the emotional distress which Finance Company's actions caused her. She can allege intentional infliction of emotional distress if she can show that Finance Company intended to cause her emotional distress. In the alternative, Jane can claim that Finance Company negligently caused her emotional distress if she can show that she is related to Bill, that she suffered emotional distress, and that her distress is manifested by some physical effect to her. She does not have to establish that she saw Bill suffer the harm as it happened.

   b. Damages

   In either case, Jane's damages would be to correct the harm suffered by her personal injury: for medical expenses, lost wages and earning capacity, pain and suffering, and any other consequential damages.

2. Loss of Consortium

   Jane would be entitled to damages for loss of consortium if she can prove that as a result of Finance Company's actions, she was deprived of the companionship of Bill.

ANSWER TO QUESTION #17

A. Jack's Motion for Summary Judgment

A motion for summary judgment may be granted only when there are no genuine issues of fact and the movant is entitled to judgment as a matter of law. Since the parties stipulated to the facts, it is clear that there were no disputed issues of fact. Thus, the issue is whether Jack was entitled to judgment as a matter of law.

   Jack would be entitled to judgment as a matter of law only if one or more of the required elements for Peter's cause of action in negligence - duty, breach, causation, and compensable damages - was clearly missing or, in some jurisdictions, if Peter was unquestionably guilty of contributory negligence or assumption of risk.

1. Duty

   A duty is owed whenever a person creates a risk of harm to others. Even though the road was "seldom used," Jack could reasonably foresee that drivers such as Peter might be present and could be injured by his conduct. Thus, Jack would not be entitled to summary judgment on the ground that he owed no duty to Peter.

2. Breach

   In determining whether Jack breached his duty, his conduct would be measured against the degree of care that would be exercised by a reasonable person under the circumstances. Jack may have acted unreasonably in racing at all or, if he knew that David was a dangerous rider, in racing with David.

   In addition, the fact-finder could conclude that the agreement to race made Jack and David joint venturers which would render Jack liable for the conduct of David, which appears to be negligent (it is
probably unreasonable to enter a public highway without slowing down and looking for traffic even when, as here, the road is "seldom used"). While vicarious liability based on a joint venture is most often applied in business or commercial settings, some states apply the theory to any case where there is an agreement to act in concert and each participant has an equal right of control.

While the facts do not indicate that Jack must be found to have breached his duty to Peter under either of the above theories (it is especially questionable as to whether Jack and David were joint venturers since it is far from clear that they had equal right of control), such a finding is sufficiently likely that a summary judgment in Jack's favor could not be premised on a finding that there was no breach as a matter of law.

3. Causation

Assuming that Jack acted unreasonably (or that he was vicariously liable for the conduct of David), that conduct was clearly the cause-in-fact of Peter's injuries since Peter would not have been injured but for the racing of Jack and David. In addition, there were no unforeseeable intervening events which might break the chain of proximate cause. Therefore, it cannot be said that causation is missing as a matter of law.

4. Compensable Damages

Personal injuries are clearly compensable in negligence. Peter properly alleged such damages and this prima facie element cannot be treated as unprovable.

5. Defenses

The facts indicate that Peter was driving "carefully," and so there was no negligence in his operation of the vehicle; similarly, it appears that he acted reasonably in braking suddenly in an attempt to avoid hitting David. There is no indication that Peter voluntarily exposed himself to a known risk (that David or someone like him would suddenly appear in the road), so assumption of risk is not clearly a defense that would defeat Peter's action.

Conceivably, Peter was contributorily negligent as a matter of law in failing to wear a seatbelt and/or by driving without a license. Since these defenses are the sole bases for David's motion, however, they will be discussed below.

B. David's Motion for Summary Judgment

David's motion must have been premised on the theory that either Peter's act of driving without a license or his failure to wear a seatbelt constituted contributory negligence as a matter of law.

1. Absence of License

The violation of a statute may be used to establish negligence if the statute was designed to protect a specific class of persons to which the victim belongs from the type of injury actually suffered; a violation may also establish contributory negligence if the violator is injured (assuming that he was in the class to be protected from this type of harm).

It is typically held, however, that the violation of a licensing statute is not relevant to establishing negligence (either on the theory that such statutes are not designed to protect any specific class of persons from any particular type of harm or because there is no direct causal link between the violation and the plaintiff's injuries). Therefore, Peter's failure to obtain a license is irrelevant to proving his contributory negligence and does not entitle David to summary judgment as a matter of law.
2. Failure to Wear Seat Belt

a. Contributory Negligence

A mandatory seatbelt law, on the other hand, would appear to be designed to protect drivers from being injured in the event of collisions or emergency stops. It is clear that Peter is in the class of persons that the statute was designed to protect and he suffered the type of injury that was the object of legislative concern; thus, the statute is relevant. The ultimate effect of the statute, however, depends on the jurisdiction.

Under the traditional, majority rule, the violation of a relevant statute is negligence per se (or contributory negligence per se). That is, unless the court determines that what the actor did was reasonable given the unusual circumstances of this particular case (i.e., it fell within an implied exception to the statute), the fact-finder must find that the violation establishes a breach of duty. Here, there is no "implied exception" that would excuse Peter's failure to wear a seatbelt and the fact-finder would have to conclude that Peter was contributorily negligent so long as his failure to wear a seatbelt was causally related to his injuries. One could logically assume that Peter would not have been injured had he been wearing a seatbelt, but it is not clear that such a finding is required as a matter of law.

In other states, a statutory violation is only evidence of negligence or creates a mere presumption of negligence. Obviously, the violation of the seatbelt law would not prove negligence as a matter of law in an evidence-of-negligence jurisdiction, although it would be sufficient in a presumption-of-negligence state, since Peter did not introduce any evidence that he acted reasonably in not wearing his seatbelt (which would be necessary to overcome the presumption).

b. Assumption of Risk

Peter's action might be defeated due to assumption of risk if he voluntarily exposed himself to a known danger. There is no indication that Peter was coerced into driving without a seatbelt, so his act was voluntary. The ultimate determination of this issue therefore depends on whether the safety advantages of "buckling up" are so well-known that it could be presumed that Peter knew that a failure to wear a seatbelt could result in injury to himself and whether knowledge of such a generalized danger is sufficient to constitute assumption of risk. The law on this point is not clear enough to allow one to resolve this issue in a definite manner.

c. Effect of Contributory Negligence and/or Assumption of Risk

In a common law jurisdiction, a finding that Peter was guilty of contributory negligence or assumption of risk as a matter of law would require the court to grant David's motion because either defense would bar the plaintiff from receiving any recovery.

In a state that has adopted "pure" comparative negligence, however, the court would be required to deny David's motion since neither defense precludes recovery (at most, they would reduce the size of Peter's judgment).

If Peter's action was brought in a jurisdiction with "restricted" (or "modified") comparative negligence, Peter would recover nothing if his fault was greater than that of the defendants (or, depending on the state, if it was at least equal to their fault). The court could not make such a determination of relative fault as a matter of law, however, and thus David's motion would have to be denied under this view.

C. Instruction re: Standard of Care

The facts do not specify what "child standard of care" instruction was given - the majority rule (standard of children of like age, knowledge, intelligence, and experience) or the minority rule (children...
under 7 are conclusively presumed to be incapable of negligence, children between the ages of 7 and 14 are rebuttably presumed to be incapable of negligence, and children over 14 but under the age of majority are presumed to be capable of negligence). In any case, a child is generally held to an adult standard of care if he is engaging in an activity normally undertaken by adults and for which adult qualifications are required.

If the kind of motorcycle that David was riding was of the type that children might ride as toys (i.e., a small bike with little power), it might have been proper to give the instruction concerning the standard of care of children. Given David's age, 16, and the fact that he was racing with an adult (Jack, age 22), however, it is likely that David was riding a full-sized, adult motorcycle. If this is the case, his conduct would be governed by the adult standard of care and the court's instruction was erroneous.

ANSWER TO QUESTION #18

A. Tort Claims

Invasion of Privacy

White's first claim would be that the story constitutes an invasion of privacy. There are four categories of this tort:

(1) Unreasonable intrusion on the seclusion of another;

(2) Appropriation of another's name or likeness;

(3) Unreasonable publicity given to another's private life;

(4) Publicity which unreasonably places another in a false light before the public.

Since the fact pattern indicates that the story was truthful and accurate, White cannot make out a false light claim. Nor can he argue that his name has been appropriated for a commercial purpose. Intrusion is also inapplicable as this tort requires an actual, literal intrusion, such as eavesdropping or unauthorized entry into plaintiff's home or office, rather than publication of material about the plaintiff.

White has the most likelihood of succeeding under a theory of unreasonable publicity given to another's private life. This claim is available when embarrassing or private facts concerning an individual are revealed to the public and the disclosure of these facts is offensive to the reasonable person.

The chain of events which led to White's imprisonment could certainly be considered offensive to the reasonable person. The fact that White sought total seclusion after his pardon supports this view.

However, the newsworthiness defense, which protects the public's right to know as well as the rights of the media, presents a major problem for White. His invasion of privacy claim will fail if the News story is deemed to be of legitimate concern to the public. Since the article concerns the history of World War II, it is of legitimate interest to the public.

Furthermore, News derived its story entirely from facts that are a matter of public record. The Supreme Court has held that revealing facts which are a matter of public record cannot be actionable as an invasion of privacy. Here, White's trial and conviction are a matter of public record.

However, the "newsworthiness" and "public records" defenses are weakened by the passage of time between White's trial and the proposed publication. The courts have acknowledged that public facts may, over time, acquire the status of private facts, especially when the person has rehabilitated himself.
Although the time lapse will bolster White's claim, the historical importance of the events surrounding World War II will most likely outweigh White's right to privacy, and the News will prevail.

Defamation

White would be unsuccessful in a libel claim, since the story reflects accurate and truthful reporting. Truth is regarded as the ultimate defense to a cause of action for defamation.

Intentional Infliction of Emotional Distress

White may also bring an action for intentional infliction of emotional distress. In order to succeed, White must prove that News intentionally or recklessly caused him severe emotional distress by extreme and outrageous conduct.

Ordinarily, publishing a legitimate news article would not be considered an "extreme and outrageous act." However, while a defendant is normally liable for emotional injuries only if his conduct would unduly disturb the mental tranquility of the average, reasonable person, here News is actually aware of White's special sensitivity; in such a case, News' conduct must be viewed in light of these facts. Publishing the article with this knowledge could be deemed "extreme and outrageous," although the free speech aspects of this case (discussed above and below) cut the other way.

There is no indication that News would be publishing the story for the purpose of injuring White, but News does have knowledge that doing so would threaten White's physical and emotional well-being. If it is held that it is unreasonable to print the story in light of this knowledge, News' conduct would be considered reckless - sufficient intent for liability under this tort. The problem is that publication of the story will not be unreasonable, despite the risks to White, if the First Amendment interests are sufficiently strong.

Finally, no action for intentional infliction may lie unless the plaintiff actually suffers severe emotional distress. If the story is published and the resulting emotional stress does indeed impede White's recovery, however, the resulting emotional injury would no doubt be considered "serious."

In summary, White's ability to collect for invasion of privacy or intentional infliction of emotional distress will depend on whether White's right to be free of emotional distress sufficiently outweighs the public's right to know. This is a very close call, but the author believes that the First Amendment considerations would ultimately be found to prevail.

B. Injunction

Today, equity will protect the right to privacy and the right to be free from severe emotional distress so long as the remedy at law is inadequate. If the adverse effects of the publication could not be reversed, White's harm would be "irreparable," a clear basis for rendering the legal remedy inadequate. Furthermore, White might be able to convince the court that it is impossible to place a precise dollar value on the injury to his physical health, a second justification for concluding that money damages are inadequate.

However, equity is hesitant to enjoin speech as any attempt to do so could be considered a prior restraint in violation of First Amendment rights. Prior restraints are greatly disfavored by the courts and are permitted only when absolutely necessary (e.g., to protect national security). It is probable that the court would find that White's interest is insufficient to justify a prior restraint.

Finally, assuming that the prior restraint issue is not dispositive, the court would have to carefully balance the equities before granting or denying an injunction. The court would no doubt consider the likelihood that the story would injure White, the probable magnitude of these injuries, and the strength of the public's right to know these particular facts at this time. The court should also explore the propriety of a
compromise (e.g., could the basic facts be reprinted without mentioning White by name or without revealing his present profession or whereabouts). Once again, this is a close question, but it is unlikely that the court would find that White's interests are strong enough to justify limiting the right to freedom of the press.

**ANSWER TO QUESTION #19**

1. **Johnny vs. Acme**

   a. **Action Based on Negligence**

   If Johnny's action is premised on negligence, he must prove duty, breach, causation, and compensable damages. In addition, the defenses of contributory negligence and assumption of risk (and the possibility of comparative negligence) must also be considered.

   Whenever a person creates a risk of harm to others, he must act reasonably to minimize the dangers to anyone foreseeably endangered by his conduct. Here, Acme could reasonably foresee that children such as Johnny could be exposed to its products and thus it owed him a duty of reasonable care even though Johnny did not purchase the insecticide.

   In determining whether Acme acted reasonably, one must measure its conduct against the degree of care that would be exercised by a reasonable manufacturer of insecticides, although the fact that Acme might have complied with business custom in the insecticide industry is not necessarily determinative. Based upon the warning and Johnny's reaction to the exposure, it is clear that Rosebrite can cause significant injuries and the likelihood that someone would have Rosebrite come in contact with his body would appear to be fairly high. Given that a product which keeps roses free from garden pests is of relatively little social importance, a manufacturer of pesticides such as Rosebrite would have to exercise a fairly high degree of care. Here, there are several bases for finding that Acme breached this duty.

   It is possible that an equally effective product could be made which would be less harmful to humans; if a safer formula would not be unreasonably more difficult or expensive to produce, Acme would be negligent in selling Rosebrite as currently constituted.

   In addition, Acme might have acted unreasonably in its packaging of Rosebrite. Given its danger, it probably should have come with a childproof cap. Furthermore, a pictorial warning (i.e., a skull and cross bones) would seem appropriate given the substantial possibility that the can could be picked up by persons unable to read the written warning (either because they are too young or because they are illiterate in English), especially since the picture of the rose makes the product appear relatively benign. Perhaps most clearly, the label should have indicated that persons exposed to Rosebrite should wash with soap and water. Any or all of these changes could be made with minimal expense and each would substantially lessen the risk of harm to people like Johnny.

   While Johnny cannot definitively prove that he would not have been injured even if Rosebrite had been reformulated or more reasonably packaged, the likelihood that he would not have been injured but for Acme's negligence is sufficiently clear that convincing the fact-finder of cause-in-fact should not be much of a problem. Acme would be expected to argue that the conduct of Harold and Sarah were superseding events which break the chain of proximate cause, however.

   An intervening cause is superseding only if the possibility of that event was unforeseeable. Even if Harold's act in leaving the can in the yard is unreasonable (see part 2), negligence of such type is clearly foreseeable. Similarly, it is reasonably foreseeable that parents or babysitters would fail to keep children away from dangerous products; thus, Sarah's negligence, if any, would not be a superseding cause. Furthermore, even if the specific manner in which the injury arose could not be reasonably anticipated, the
ultimate result was clearly foreseeable, and that is enough in many jurisdictions to find that Acme's negligence was a proximate cause of Johnny's injuries.

Traditionally, a negligence cause of action could be maintained only if the plaintiff suffered some injury to his person or property. Johnny suffered from cramps, blurred vision, and diarrhea, and thus had physical injuries clearly compensable in negligence.

While Johnny voluntarily sprayed Rosebrite on his arms, his action would be affected by assumption of risk only if he was actually aware of the risks created by such actions. Given that he was subjectively unaware of the dangerousness of his conduct (he thought the can contained harmless perfume), he did not assume the risk of being injured by Rosebrite.

In determining whether Johnny was contributorily negligent, his conduct would be measured against the standard of care that would be exercised by children of like age, experience, and intelligence. While undoubtedly some five-year-olds can read or would otherwise know not to act as Johnny did, it would appear that Johnny did not act unreasonably for a child of his age. (In a minority of jurisdictions, a child under the age of 7 is conclusively presumed to be incapable of negligence; since Johnny is only 5, this rule certainly would help him.) Finally, even if Sarah was negligent in failing to watch over Johnny, her negligence would not be imputed to him. (If Johnny were found to be guilty of contributory negligence, his action would be totally barred in common law jurisdictions, although most states now apply comparative negligence so that his damages would, at most, be reduced by the percentage of his fault unless, perhaps, his fault is found to be equal to or greater than that of Acme.)

Finally, it should be noted that Rosebrite's attempt to disclaim liability for personal injuries is of no effect because such a disclaimer violates public policy.

b. Action Based on Strict Products Liability

Another basis for recovery for Johnny would be an action based on strict products liability. Under this theory, Johnny would have to prove that the can of Rosebrite was defective and unreasonably dangerous when Acme sold it.

A product is defective if it fails to meet the expectations of the reasonable consumer. While the product itself might be no more dangerous than would be normally anticipated (a reasonable consumer would expect that insecticides could be harmful to people), Rosebrite could still be considered defective if its packaging or accompanying warnings do not appropriately minimize the risks. Thus, Rosebrite is defective for the same reasons that Acme's conduct would be considered negligent. (Indeed, it would be defective even if the reasonable manufacturer would not have reasonably foreseen the nature of the danger.)

In most jurisdictions, the product must not only be defective, but it must also be unreasonably dangerous. Based on Rosebrite's capacity to do harm (as evidenced by the warning and Johnny's actual injuries) and the relatively small social utility, this test would appear to be satisfied.

Privity of contract is not required in strict products liability (all that is required is that the defendant is a commercial supplier, which Acme obviously is, and that the plaintiff be foreseeably endangered) and the causation issues are the same as discussed above. While assumption of risk could be a defense in this type of action (although contributory negligence normally is not), as indicated above, the facts do not support an argument that Johnny voluntarily and knowingly exposed himself to the risk of injury. Misuse of the product could also be a defense (and insecticides are obviously not intended to be sprayed on people's arms), but this is true only if the misuse is unforeseeable. In this case one would probably conclude that Acme should have reasonably anticipated that people would have Rosebrite sprayed on their arms. The disclaimer is of no effect for the reasons discussed under Negligence.
2. Johnny vs. Harold

Johnny's action against Harold would be based on negligence, as discussed above. The special considerations are discussed below:

Since Johnny was injured while on Harold's land, the nature of the duty owed to Johnny would depend on Johnny's status. The facts indicate that Johnny entered Harold's property to play with Harold's son. Presumably, Johnny had permission to enter the land at any time for this purpose, in which case he would be considered a licensee. The duty owed to licensees is to warn of known dangers. While Harold may have forgotten that he had left the Rosebrite in the yard, he was "aware" of the danger in the legal sense (the facts indicate that he had read the warning printed on the Rosebrite can on many occasions, so he knew that that product posed a risk of injury). Since he failed to warn or protect Johnny, he breached his duty.

If Johnny was allowed to enter the property only when express permission was granted and no such permission was given here, he would be a trespasser who, ordinarily, could recover only for Harold's affirmative misconduct. As a child, however, Johnny is owed a duty of reasonable care if (a) Harold could foresee the presence of trespassing children (likely since the friends of Harold's sons might come over, even without permission), (b) a condition on the land created a risk of death or serious personal injury (Rosebrite would appear to pose such a danger), and (c) children are unlikely to appreciate the danger (as indicated above, a reasonable child would not recognize the risk). Given the risks threatened by Rosebrite, its minor utility, and the ease in protecting children like Johnny, Harold acted unreasonably in leaving the insecticide where Johnny could get at it.

Finally, a minority of jurisdiction would simply say that Harold owed Johnny a duty of ordinary care regardless of his status (and irrespective of whether the special factors discussed in the preceding paragraph were present). For the reasons stated above, Harold did not behave reasonably and thus would be liable under this view as well.

Harold's negligence was obviously a cause in fact of Johnny's injuries and Sarah's conduct was not superseding. The only special causation issue relates to whether Johnny was a foreseeable plaintiff. Under the Andrew's view of Palsgraf, Johnny need not specifically be within the risk so long as Harold's conduct created a risk to anyone; here, Harold's negligence at least threatened harm to his own son. Under the Cardozo view, however, Johnny would have to be within the zone of danger. While Johnny was not around when Harold left the Rosebrite in the yard, his continuous failure to remove the pesticide means that anyone who might enter the yard while it was still there was foreseeably endangered. Johnny would appear to fit within this category.

Harold is liable to Johnny in negligence.

In addition, Harold might be vicariously liable for the negligence of Sarah (if any) under the doctrine of respondeat superior if she was Harold's "servant" and the tort occurred within the scope of her employment.

The facts could be clearer, but it appears that Sarah was hired by Harold. If so, she is properly classified as his servant (as opposed to being an independent contractor) because the employer of a babysitter usually has the power to control the manner in which such a person does his or her job. Since it is clear that Sarah's nonfeasance was related to her specific duties, Harold will be liable under respondeat superior if Sarah's omission was tortious.

If Sarah was hired to watch both children, she clearly owed a duty to Johnny; even if she was hired only to watch Harold's son, once she knew that Johnny had come to play, a failure to object to watching him as well would most likely be construed as a voluntary assumption of such a duty. Since a reasonable
babysitter, even if just a teenager, would understand that she must keep a careful eye on a five-year-old, Sarah probably breached this duty when she allowed Johnny to leave the house without supervision. (This would certainly be true if she had known of the presence of the Rosebrite or other dangerous conditions on Harold’s property.) In addition, it is possible that Sarah was negligent in failing to wash off the Rosebrite; this depends on whether a reasonable babysitter would have taken this precaution even in the absence of a warning label instruction to do so.

**ANSWER TO QUESTION #20**

1. Peter’s Theories and Dan’s Defenses

   **Trespass**

   Trespass is the intentional tort of entering onto someone else’s property without that person’s consent. There must be an “entry” by some physical means, however, and the only contact with Peter’s property was by means of electrical currents. This is not a form of entry that would be recognized under the traditional law of trespass.

   **Strict Liability**

   Peter might argue that Dan’s activities were abnormally dangerous and that strict liability should apply, but an activity is considered abnormally dangerous if (a) it cannot be made safe even with the exercise of reasonable efforts, (b) the activity is uncommon in that area, and (c) the utility to society is low compared to the risk of injury. The transmission of electric power is not considered “abnormally dangerous” because it can be done safely with proper safeguards and is an activity of high social utility that is considered reasonable and necessary in most areas. Peter will not recover on a strict liability theory.

   **Nuisance**

   Nuisance is the unreasonable interference with another’s use and enjoyment of his property or interest in property. Peter’s use and enjoyment of the property that he occupied, the office building, was substantially interfered with by the electrical surges caused by Dan. Interference with the use of electricity in a modern office building, causing loss of computer data, would probably be considered substantial and unreasonable in this case, allowing Peter to recover damages for nuisance.

   **Negligence**

   Finally, Peter could argue that Dan was negligent in installing the transformer without the knowledge or consent of the electric company. If Dan had communicated with the electric company about his plans, he most likely would have learned of the connection between the power line he planned to use and the nearby office buildings. A reasonable person would have contacted the electric company for such information for safety’s sake.

   **Damages.** If Dan did not act with reasonable care, Peter may recover all damages that were the natural and probable consequence of Dan’s breach.

   (a) Damage to Peter’s computers were a natural and foreseeable consequence of an electrical surge to an office building, so Dan should be liable for the cost of repairing Peter’s computer hardware.

   (b) Computer data is now accorded many of the protections of traditional forms of personal property, so the loss of data should also be compensable and the cost of restoration may be the most reasonably ascertainable measure of damage.
The nature and amount of Peter’s lost income is recoverable as an adjunct to the actual damages if it can be proved with certainty.

Loss of goodwill is almost surely too speculative to be recoverable.

2. Punitive Damages for Peter

Dan should be held liable for punitive damages only if his actions were willful and malicious, or at least extremely reckless. Peter probably cannot hold Dan liable on any theory of intentional harm, and further cannot show a malicious motive. Although Dan’s behavior was probably careless, it does not seem to have been reckless, which means disregard for a high probability that someone would be harmed. Therefore, punitive damages should not be awarded unless the court does find recklessness.

3. Lost Wages and Benefits for Laid-Off Employees

Peter’s laid-off employees cannot recover on a theory of interference with their employment contracts. There is no evidence of contract, and most employees are terminable at will without a contractual right to sue their employer unless they were dismissed in bad faith. If they have no contractual rights against Peter, it would be hard to show any interference with contract as to Dan’s activities. Furthermore, the tort of interference with contract requires that the defendant have known of the existence of the contract and intentionally interfered with the plaintiffs’ right. The facts do not know that Dan was aware of any contractual employment rights these employees may have had, nor that he intentionally took any actions to interfere with such rights. Without some cognizable personal or property interest that was harmed by Dan, the employees cannot recover for purely economic loss.

ANSWER TO QUESTION #21

Peter may seek to recover for three wrongs: (1) the encroachment of Diane’s building onto his lot, (2) the destruction of the ornamental trees on Peter’s land and the resulting damage to his vegetable plot and restaurant business, and (3) use of Peter’s land for parking.

1. Encroachment of Diane’s Building onto Peter’s Property

The theory on which Peter may recover for the encroachment of Diane’s building onto his land is trespass. Trespass involves an intentional entry onto another’s land, but the defendant need not have known the land belonged to the plaintiff so long as the defendant intended to enter the land. Diane intended to build her building where she did, although she did not know that she had encroached on Peter’s property. Therefore, Diane will be liable to Peter for a continuing trespass on his land. Peter could seek compensatory damages, requiring her to pay for the portion of his land that she is occupying, in the form of fair rental value if he would like to retain title.

Peter might also argue that Diane should be ordered by injunction to remove the encroachment. This is an equitable remedy, which requires that Peter show that money damages would be inadequate. Furthermore, whether an injunction will issue depends upon a balancing of the costs and benefits that would flow from the issuance of the injunction. In balancing the hardships, a court should look at whether the encroachment was willful or an innocent mistake, whether the intrusion is substantial or minimal, and whether the encroachment interferes with the value or use of the remaining part of the plaintiff’s property. The fact that this was an innocent mistake and a fairly minimal intrusion, weighed against the cost of removing the building and dislocating Diane’s tenants in the process would appear to make money damages the preferable remedy. On the other hand, the state might take the traditional view that a trespass to land should be remedied by removing the encroachment rather than requiring the land owner to take payment for the unauthorized use of his land.

2. Damage to Ornamental Trees and Vegetables
These plants were Peter’s personal property, and Diane may be held liable for their destruction. With respect to ornamental or shade trees, the measure of damages is the difference in the value of the land before and after destruction of the trees. The loss of crops to be consumed on the property could be measured the same way, but the loss of these plants and trees are particular to Peter’s use of the land for a restaurant and might not affect the market value of the land to another buyer. Thus, Peter might argue that his measure of damages should be the cost of obtaining produce elsewhere. However, Peter further argues that the cost of obtaining produce elsewhere cannot make him whole because he has lost customers as a result of not having the freshest vegetables. However, the long-term effect is “incalculable” and any measure of special damages must have some certainty. Thus, he is unlikely to receive a damage award for a loss of business amount that seems speculative. The cost of replacing the trees and vegetable garden plus the cost of obtaining vegetables elsewhere in the meantime is probably all he can recover for this wrong.

3. **Use of Peter’s Land as Parking Lot**

Again, Diane has committed trespass by using a portion of Peter’s land as a parking lot for her building. Peter may seek compensatory damages for the loss of use of his land. He might be able to recover the amount of the fees she has been charging her tenants. He might also seek an injunction for removal of the parking lot, and the balancing test discussed above might weigh in his favor in this instance because the removal of the paving on the lot would be relatively inexpensive and Diane might be able to make other arrangements for her tenants to park.
TRUSTS ESSAYS

QUESTION #1

Smith, single and childless, spent much of his income from his real estate transactions supporting his disabled half-brother, Jones.

In January 1992, Smith, while competent, signed a written declaration of trust stating, in part:

"I, as trustee, am holding in trust:

(1) my promissory note, payable to myself as trustee, in the amount of $10,000, and

(2) all profits to be earned from my real estate transactions during the period July 1 through December 31, 1992."

The trust instrument further provided that all income from the trust was to be paid to Jones for life and upon Jones' death, the income and corpus were to go to Brown. The trust instrument contained a spendthrift provision declaring that creditors could not reach either income or principal in the hands of the trustee. The declaration finally stated that if Smith ever became incompetent, then Bank was to be appointed trustee and one-half of Smith's then existing property not within the trust would be added to the trust.

On April 1, 1992, while competent, Smith revoked the declaration of trust.

On May 1, 1992, Smith sustained a serious brain injury. He was thereafter declared legally incompetent and ceased all business activities.

In 1993, Adams recovered a judgment in a tort action against Jones and Brown. The judgment is unsatisfied and Jones and Brown have no assets other than their interests, if any, in the trust. The conservator of Smith's estate asserts that there is no trust and that all assets of Smith are free of any trust.

What are Adams' rights, if any, with respect to any assets now held by Smith's conservator? Discuss.

QUESTION #2

By a written trust instrument, Kirk transferred 200 shares of Capco stock to Burr, as trustee, to pay the income to Sue for her life with the remainder to Pack. The trust instrument also gave Burr a power of sale over the trust property. Thereafter the shares were registered by Capco in the name: "Burr, trustee for Sue and Pack." Kirk reserved no power to revoke or modify the trust.

Later, Kirk desired to regain control over the 200 shares but wanted to conceal his acquisition of control from the other Capco shareholders. Kirk directed Rob, a business associate who owed Kirk $50,000, to pay this amount to Burr in return for the transfer of the shares to Rob.

Burr sold the stock for the $50,000 to Rob because Burr knew Kirk wanted control of the stock and was settlor of the trust, although Burr was also aware that $50,000 represented only half the value of the stock.

At Burr's direction, Capco registered the stock in the name of Rob. Kirk then informed Rob by letter that Rob was to hold the stock upon a secret trust for Kirk. In reply to Kirk, Rob stated that he was a bona fide purchaser for value and the beneficial owner of the stock. When Sue learned of the transfer she complained to Burr. To keep her quiet, Burr turned over to Sue the $50,000 received from Rob.
Pack learned of the transfer of the Capco stock and the payment to Sue, and seeks your advice.

To what relief, if any, is Pack entitled:

A. against Kirk? Discuss.
B. against Burr? Discuss.
C. against Sue? Discuss.

**QUESTION #3**

Abner died in 1991 leaving a will which created a valid testamentary trust for his wife, Carol. Abner's will appointed his brother, Bob, and his lawyer, Smart, trustees and authorized the trustees to buy land and to build and operate apartment houses. The will relieved the trustees from liability except for willful and intentional breaches of duty.

In 1992 Bob and Smart decided to buy adjoining private homes, tear them down, and build an apartment house on the lots for the trust. Bob wanted to travel and told Smart that Smart should arrange to buy the homes. To avoid publicity and inflated prices, Smart asked Page, an employee of his law firm, to buy two homes.

Smart told Page the trust would buy the homes from Page for 110% of what Page paid for them. Page brought the homes for $50,000, and Smart bought them from him for the trust for $55,000. When discussing the trust with Carol, Smart described the arrangement with Page. Carol made no comment.

An apartment house was built on the lots. Smart employed Brush to paint it for the trust. Smart and Brush disagreed about the quality of Brush's painting. Smart refused to pay Brush; Brush sued Smart. Smart acted as defense counsel and won the suit. Smart paid himself an attorney's fee of $1,000 from trust funds for defending Brush's suit.

Carol consults you for legal advice and relates the above facts. What rights, if any, does Carol have against Bob or Smart? Discuss.

**QUESTION #4**

In 1982, Agatha loaned $300,000 to her brother George. George died in 1985. His will provided if Agatha forgave the $300,000 debt, a $300,000 trust would be created for her under his will (Trust #1). Agatha forgave this debt in exchange for the trust interest. Under this trust, Agatha receives the income for life, and upon her death the corpus is to be distributed to Betty, Agatha's daughter.

George's residuary estate passed into Trust #2 for the benefit of five named beneficiaries. Agatha was not named as a beneficiary of this trust.

George's residuary estate passed into Trust #2 for the benefit of five named beneficiaries. Agatha was not named as a beneficiary of this trust.

George's residuary estate passed into Trust #2 for the benefit of five named beneficiaries. Agatha was not named as a beneficiary of this trust.

Each of the trusts created by George's will contained a spendthrift provision stating that creditors could not reach income in the trustee's hands. Nancy, George's accountant, was designated trustee of Trust #1, and Agatha was designated trustee of Trust #2. Each trustee was authorized to sell trust assets.

In 1988, Agatha defaulted on a $10,000 loan from John made in 1981. She relied on the spendthrift clause to shield her income interest in Trust #1 from John's claim for the debt. However, to discharge her
debt, she offered to sell John 100 shares of T stock from the corpus of Trust #2 for $10,000 less than its fair market value. John agreed and purchased the stock from Trust #2 on the offered terms.

In 1989, John gave the T stock to his nephew Larry as a wedding present. Larry had no notice of the prior transactions and still has possession of the T stock.

What are the rights and liabilities of John, Agatha, and Larry? Discuss.

**QUESTION #5**

Troy, a wealthy man, planned to endow a public library in his home city. To carry out his plan Troy executed the following documents.

1. A declaration stating his intention to create the "Troy Library" for use of the inhabitants of the city, designating three persons as the first "Troy Library Board of Governors (Board)" and providing for the selection of successor members of Board in the event of death or resignation of a member or members;
2. A deed conveying a block of land Tory owned near the city center to Board "in perpetuity" for the purposes stated in his declaration;
3. A check payable to Board in sum of $100,000 as an initial contribution for the library; and
4. A document containing an itemized list of certain of Troy's stocks and bonds having a market value of two million dollars and a statement that those stocks and bonds were to be delivered to Board in specified installments over a two-year period.

The above documents were delivered to Board, the deed was recorded, the check was cashed and the proceeds were deposited in a bank account in the name of "Troy Library Board." No funds have been withdrawn from or charged to the account.

Three months after delivery of the documents Troy died without having made any of the specified installment gifts to Board. Troy's validly executed will names his only child, Betty, as executrix and sole beneficiary. Troy's wife predeceased him.

The funds now in possession of Board are not sufficient to construct a building for and to maintain a library. If the specified stocks and bonds are transferred to Board, a library building can be constructed and the library can be maintained.

If Board fails to receive funds sufficient for the library, it proposes to use the block of land as a public park to be named "Troy Memorial Park." The funds now in Board's possession are sufficient to maintain the land as a public park.

Betty has brought suit to recover from Board the block of land and all money in the Troy Library Board account, and for a declaratory judgment that all the stocks and bonds on the itemized list are free from any claim by Board. Board has responded, asserting all applicable rights and defenses.

To what relief, if any, are Betty and Board entitled? Discuss.

**QUESTION #6**

Bill, a widower, had one child, his daughter, June. Bill purchased a $100,000 farm (Blackacre), bought a single payment life insurance policy on his own life (face amount $60,000), and maintained a large balance
in a checking account (usually $100,000). Titles to the farm and the account were always in Bill's name only. June was named originally as beneficiary of the insurance policy, but Bill reserved the power to change the designation of his beneficiary.

A few years before his death, Bill requested the insurance company to make Joe, his neighbor, sole policy beneficiary. After the company informed Bill the change had been made, Bill wrote Joe: "I have named you my insurance beneficiary - you are to collect the proceeds and divide them three ways. You are one; the others I shall name later." Joe replied: "Sure, I'll do what you want."

In June of 1990, Bill executed a deed conveying Blackacre to an old friend, Pete. The day of this execution, Bill mailed a signed letter to Pete directing him to "rent my farm, pay the net income to June yearly, and when she dies, convey the farm to my church." Pete received and read the letter. A few days later, Bill attempted to deliver the deed to Pete but found out from Pete's housekeeper that Pete was on a three-month sailing trip in the South Pacific. Bill gave the housekeeper the deed and told her to give it to Pete when he returned.

In July 1990, Bill suffered a heart attack and while hospitalized, executed a valid will which left "all property I own to my daughter, June, and I recommend that she look out after my 90-year-old Aunt Selma, as long as she lives, making such gifts and provisions for her as she, June, thinks best."

The day after executing this will, Bill wrote the following on a separate piece of paper: "To Joe: the other two beneficiaries are Tom Allen and his wife."

Bill died the following day. Two days after Bill's death, Pete's housekeeper handed Pete the deed.

Who is entitled to the assets and why? Discuss.

QUESTION #7

Connie, who died in 1989, left a will which created a trust of which her son, Sam, was to be both trustee and life income beneficiary. On Sam's death, the successor trustee was to distribute the corpus outright to the then surviving issue of Connie's predeceased daughter, Deborah. The trust contained a standard clause regarding trustee's powers, including the power to "sell, invest and manage" the trust property. Common shares of Hercules Corp., a well-established, successful manufacturing company, made up 30 percent of the original trust corpus. For years, Hercules regularly paid generous cash dividends, all of which Sam, as trustee, allocated to income. In 1993, instead of paying a cash dividend, Hercules distributed a dividend of its own stock, which Sam also allocated to income.

In January 1994, Fabulon Inc., a newly formed company, made an initial public offering of its common stock. The prospectus stated that Fabulon had created a new material similar to fiberglass, but which experimental testing had shown to be of superior durability. The prospectus further disclosed the company's intent to distribute most of its earnings as dividends.

After reading the Fabulon prospectus in February 1994, Sam sold the trust's Hercules stock to his wife at its current fair market value. The sale of stock produced a profit for the trust, and Sam allocated the capital gain portion to the income account. He used the balance of the proceeds to purchase Fabulon stock for the trust.

Hercules continued to prosper and its stock continued to appreciate. Fabulon's product failed and, in December 1995, Fabulon went bankrupt and its stock became worthless.

Has Sam breached his duties as trustee? Discuss.
ANSWERS TO SELECTED TRUSTS QUESTIONS

ANSWER TO QUESTION #1

If the trust was valid and it was properly revoked, Adams may not reach any assets held by Smith's conservator because Jones and Brown have no interest in the revoked trust. Conversely, if the revocation was ineffective and the trust is valid, Adams may reach income of the trust once it is distributed to Jones.

Smith created a valid trust in 1992. He was competent at the time and he intended to establish the trust, as evidenced by the declaration of trust. A trust must have property which the settlor has a present right to transfer at the time the trust is created. At least some of the trust property in the written declaration is subject to present transfer by Smith: The $10,000 promissory note may be transferred and assigned, and therefore a court would probably find the note is sufficient to be considered trust property and to establish a trust. However, the real estate profits which Smith intended to make in the future were contingencies and could not serve as a basis for the trust. It is unlikely Smith realized any profits during the time period stated because he was legally incompetent at the time. Thus, a court considering the validity of the trust would find a valid trust consisting only of the promissory note as trust property.

If the trust was valid at creation, it must be determined whether Smith properly revoked the trust. A valid revocation must be in a nontestamentary writing, signed by the settlor, and delivered to the trustee during the settlor's lifetime. If Smith complied with all the statutory requirements, then the revocation was valid and Jones and Brown no longer have any interests in the trust which Adams can reach.

However, if the revocation was ineffective, Adams has recourse. Assuming the trust remains valid, Bank became the successor trustee when Smith became incompetent, and Bank had the authority granted by the declaration of trust to add one half of Smith's then existing property to the trust corpus. Thus, the trust corpus now consists of the promissory note and the property added from Smith's existing non-trust property. Smith's conservator must pay into the trust any amounts due on the promissory note, at which time the amounts will be deemed income of the trust. Jones is the life beneficiary of the income, and therefore the Bank must turn over the income to Jones. When the income is distributed to Jones, Adams may reach it to satisfy the judgment against Jones.

The spendthrift provision in the trust does not protect Jones because the trust is nondiscretionary, that is, the trustee is required to pay all income to Jones for life. Under California law, a creditor may seek a court order for a percentage of the income distribution to the beneficiary where the trustee attempts to withhold distribution based on a spendthrift clause.

Model Answer to Trust Question #2

I. Pack’s potential relief against Kirk

Kirk set up a trust with 200 shares of Capco stock, naming Burr as trustee, Sue as beneficiary, and Pack as the remainderman. Kirk then decided that he wanted the 200 shares of Capco stock in the trust back, so he had his business associate, Rob, buy them for $50,000, which was half their value.

Pack will argue that Kirk’s actions breached a duty to Pack because Kirk entered into an unfair, biased deal with the trustee. Kirk will reply that since he is the settlor and not the trustee he owes Pack no duties regarding the trust. A settlor creates the trust and names the terms of it, but is not responsible for its ultimate execution. Pack will assert that Kirk should have revoked the trust instead of conspiring with Burr to defraud the trust. A settlor who is still living has the ability to validly revoke a trust he has created. In
this instance, Pack will argue Kirk didn’t revoke because he wanted to illegally gain shares of Capco in someone else’s name. Shares of stock must be purchased in the name of the true owner. Pack will contend that Kirk conspired with Burr, the trustee, to defraud the trust for Kirk’s own gain. Therefore, Pack will argue, the court should recognize a constructive trust. A court may grant a constructive trust when there is a fraud, violation of a fiduciary or confidential relationship, or an oral testamentary transfer. In such cases, the plaintiff receives the equitable remedy of a legal fiction that the defendant was simply holding the property in trust. In that instance, the property and any income gained from it would be returned to the plaintiff. Kirk will counter that a constructive trust is not appropriate here because he didn’t perpetrate a fraud that unjustly enriched him at Pack’s expense.

Kirk’s actions may be fraudulent even if he didn’t have any fiduciary duty or duty of loyalty to the beneficiaries since he was the settlor and not the trustee of the trust. However, even if Kirk’s actions were illegal or a breach of his duty to Pack, Rob was a bona fide purchaser of the stock. That means that Pack cannot get the stock back or have it placed back in the trust. Rob paid consideration for the stock and his name is on the shares. So long as he didn’t know that the stock was worth $100,000 and had no reason to suspect that he was taking part in a bad deal, Rob would get to keep the stock. There would also be no constructive trust unless Rob committed fraud since he is the current owner of the stock. If Rob knew he was taking part in a fraudulent transaction it is possible that the stock and any gains on it would revert back to the trust. Otherwise, Pack would not be able to recover it.

II. Pack’s potential relief against Burr

Burr, the trustee, agreed to sell Rob the Capco stock for $50,000, knowing that was half of its true value. Burr also knew that Rob was really buying the stock for Kirk, but sold it because Kirk was the settlor.

Pack will argue that since he was a beneficiary of the trust Burr owed him a fiduciary duty. Such a duty includes the responsibility to make sound business and investment decisions on behalf of the trust. Burr will reply that he only owes a fiduciary duty to Sue, who was the current beneficiary, and not to Pack, who only takes any remainder left after Sue passes away. Pack, however, will point out that Burr’s duties as trustee extend to any and all beneficiaries. A trustee owes a fiduciary duty to all of the beneficiaries, no matter how large or small their share and no matter when they stand to take control of that share. Burr will then assert that he was granted the power to sell the stock on behalf of the trust and therefore he made a decision that was his alone to make as the trustee. However, although trustees are given leeway when it comes to business decisions and certainly aren’t held to the unreasonable standard that any investment or business decision they make has to be profitable, they do have to act in what they reasonably believe to be the best interests of the trust. Here, Pack will argue that Burr purposefully acted in Kirk’s best interest rather than that of the beneficiaries and Burr sold the stock for $50,000 even though he knew that it was worth twice as much on the open market. Such a decision, Pack will say, cannot be construed as in good faith. If Burr is not a professional trustee, he will assert that his decision to sell the stock should be viewed in a more forgiving light. If the trustee is a businessman or someone who would regularly deal in stock or hold assets for others in exchange for a fee, then he is held to a higher standard than if he were simply the settlor’s friend or family member with no particular skill or expertise.

Whether Burr is a professional trustee or not, it is unlikely that his dealing with Rob and Kirk could be considered a good faith or reasonable dealing in the best interests of the trust. Burr therefore breached his fiduciary duty to Pack. Although Burr was under no obligation to save any of the trust assets for Pack beyond Sue’s lifetime (and therefore giving Sue the entire $50,000 profit was not a breach), he did have the obligation to act on behalf of the beneficiaries and make prudent investment and sale decisions. Burr no longer has access to the stock or the money, so he is not able to give any of it to Pack as relief. However, Burr may be held personally liable for the breach of his fiduciary duty since he acted beyond his capacity as the trustee in entering into the fraudulent deal with Rob and Kirk to the detriment of the trust.

III. Pack’s potential relief against Sue

Upon the sale of the stock, Burr gave Sue all $50,000 in exchange for keeping her quiet about the transaction.
Pack will assert that Sue ratified the fraudulent transfer by taking the money from Burr and thereby made herself a party to the fraud. Sue will defend herself with the argument that she had a good faith belief that she was simply getting the proceeds of a legitimate sale of the stock in trust. Had the transaction been valid she would have been entitled to the entire income since she is the sole beneficiary of the trust until her death. However, Pack will point to the fact that the $50,000 was used to buy her silence as proof that she knew a fraud had occurred and she was helping to cover it up. Pack will argue that Sue’s taking of the $50,000 therefore constituted a constructive trust. When a fraud is perpetrated, such a trust can be created to prevent the defendant from profiting from the fraud. Sue will claim that she never intended to commit a fraud and therefore no constructive trust can apply.

Sue knew that the money had been fraudulently transferred for the stock and it appears she took the proceeds in exchange for an agreement that she wouldn’t share what she had learned. This made the funds transfer fraudulent and would entitle Pack to relief against Sue in the form of a constructive trust. Some of the money in a valid sale might have legitimately gone to Sue, depending on when the sale took place relative to her death, so Pack could either argue for the whole $50,000 plus any interest as his relief or a fair percentage that could have been Pack’s had the stock not been sold and had all or some of it remained in the trust after Sue’s death.

**ANSWER TO QUESTION #3**

**Carol v. Smart**

(a) Purchase of private homes. Carol may have an action in damages against Smart for the contract he made with Page to purchase the homes, because Smart delegated a non-delegable duty to an employee and the transaction involved a conflict of interest between Smart's duty to the trust and his duty to his law firm.

A trustee may not delegate duties he or she would normally be expected to do, such as purchasing trust property. However, Smart possibly could have delegated purchase of the homes if there were extenuating circumstances such as a need for anonymity in order to avoid escalation of the selling price. Even if such circumstances existed, Smart agreed to pay Page 110% of the purchase price, thus creating a disincentive for Page to get the lowest possible price for the benefit of the trust.

It is also arguable whether Smart should have paid Page anything, because as an employee of Smart's law firm Page had a preexisting duty to represent the interests of the settlor. Smart's entering into a contract with his own employee may be a conflict of interest with Smart's responsibilities as co-trustee. Similarly, if the payment to Page was actually paid into the law firm accounts rather than to Page individually, Smart has breached a duty of loyalty to the trust which is represented by the law firm. Depending on any extenuating facts brought out at trial, the court will probably find the home purchase was a delegable duty, but the contract between Smart and his employee and Smart's lack of supervision of Page may very well be found improper.

Smart may assert the defense that the trust instrument absolves him of all liability except for willful or intentional breaches, but the court will decide whether it will permit the trust's standard to stand.

(b) Attorney's fees. A trustee who is a lawyer may charge a reasonable fee for services to the trust. However, here Smart provided legal services to himself in a suit in which the only parties were Smart and Brush. The trust itself was not a defendant. If Smart provided services to defend against his personal liabilities alone, then the trust should not have had to pay and the fees should be returned to the trust.

**Carol v. Bob**

Carol may have an action against Bob for breach of duty as co-trustee if it was unreasonable for Bob to be absent while Smart was purchasing the homes and defending the suit. Co-trustees share equally in
trust duties; however, a co-trustee may delegate duties in certain circumstances. The court must examine whether Bob had knowledge of Smart's ability to handle trust duties. Bob may assert the defense that the trust relieves him of liability except in the case of willful or intentional breaches. The court must determine whether the facts absolve Bob under the trust's standard for liability and whether the court will impose a different standard.

**ANSWER TO QUESTION #4**

Agatha has breached her fiduciary duty of loyalty as trustee of Trust #2, and she is liable to the five beneficiaries for any loss. Agatha properly relied on the spendthrift provision of Trust #1 to shield her income interest from her creditor John. As long as Nancy, the trustee of Trust #1, does not distribute income to Agatha, John may not reach that income. However, when Agatha sold assets of Trust #2 for the purpose of discharging her debt to John, she used the assets for her own purposes rather than for the good of the trust. A trustee whose self-interest conflicts with the interests of the trust is guilty of self-dealing and bad faith breach of duty of loyalty. Agatha had the authority to sell trust assets, but only for the benefit of the trust. Agatha must now account to the trust for the loss of the stock which was sold at far less than market value.

John may be guilty of fraud on the beneficiaries if he knew the stock was an asset of a trust, Agatha had no authority to sell the stock, and neither the court nor the beneficiaries would approve of the sale at the price agreed upon by Agatha and John. In such a case, the beneficiaries could ask the court to set aside the sale; however, the stock has passed to Larry by gift.

John appears to have made an irrevocable gift to Larry. If John had the present donative intent to transfer ownership of the stock and delivered it to Larry who accepted it, the gift is absolute. Larry holds legal title to the shares if he received the shares and his name appears on the certificates. (Some jurisdictions require the entry of the donee's name in the corporate records.) However, if legal title has not passed to Larry, the beneficiaries of Trust #2 could seek to set aside the sale as to John if there was fraud in the transaction.

**ANSWER TO QUESTION #6**

I. Life Insurance Policy

A. Initial Taker

The proceeds of a life insurance policy are outside of the decedent's estate and so June does not get this money through Bill's will. Furthermore, while June might argue that she was a third-party beneficiary of the insurance contract, she has no vested rights so long as the insured is alive, especially when he has expressly reserved the right to change beneficiaries, as here. Thus, the proceeds of the policy pass to Joe.

B. Nature of Joe's Interest

Obviously, Bill attempted to create a trust. To do so, the following criteria must be met: (1) the settlor must have the legal capacity to create a trust, (2) there must be a valid trust purpose, (3) the settlor must express his intent to create a trust and satisfy certain formal requirements, (4) there must be specific trust property (the trust res), and (5) there must be an ascertainable beneficiary or beneficiaries.

1. Capacity and Purpose

There is no indication that Bill lacked the mental capacity to create a trust (there is no evidence of insane delusion, fraud, undue influence, etc.), and the trust was not created to violate the law or public policy, so there is a valid trust purpose.
2. Intent and Formalities

Bill ultimately expressed an unambiguous intent to create a trust. The problem, however, is that the document under which the trust res is to pass to Joe (the insurance contract) is absolute on its face and the trust obligations are imposed by an outside agreement. Nevertheless, extrinsic evidence is admissible to prove that Joe took pursuant to a "secret trust" and his promise to hold and distribute the proceeds as Bill had asked will be enforceable.

Joe might argue, however, that he takes the proceeds of the policy outright because Bill named him as the beneficiary before Joe had agreed to act as a trustee. At that point, however, Joe's rights were only contingent (dependent on Bill's death before Bill changed beneficiaries) and it seems clear that Bill would have changed the beneficiary again had Joe not agreed to act as a trustee. Thus, the precise moment when Joe's rights arose should not be controlling.

Since the trust was established during Bill's lifetime, there is no need to satisfy the Statute of Wills (i.e., the creating document need not be signed or acknowledged before subscribing witnesses). Further, since the trust does not affect the title to real property, the Statute of Frauds is inapplicable (although there is a sufficient writing here). The only technical requirement, therefore, is delivery. "Delivery" is a term of art that requires only that the settlor's intent to create a trust be clearly manifested. Bill's act in notifying the insurance company that Joe is the beneficiary, when coupled with the subsequent notification of Joe as to his rights and duties, satisfies this requirement. The trust would not have failed even if Joe had refused to act as trustee, since identity of the trustee is immaterial unless the trust expressly provides otherwise.

3. Trust Res

In many states, statutes specifically provide that an inter vivos trust may be funded entirely by a life insurance policy on the life of the settlor. In other states, however, it could be argued that the contract right is a mere expectancy, which is not a valid trust res. Nevertheless, the fact that this was a single payment policy, payment on which was conditioned only on Bill's death, means that the obligation is more properly classified as a debt (which may be placed into trust) and thus the trust would not fail for this reason.

4. Beneficiaries

The trust need not specifically identify each and every beneficiary of the trust so long as it provides a method for identification and the exact identity of the beneficiaries is resolved within the Rule Against Perpetuities period. Bill identified one beneficiary, Joe, at the time of trust creation and promised to name the others within his lifetime (which he in fact did); since the identity of all of the beneficiaries would be ascertained (or be incapable of being ascertained) within 21 years of a life in being (using Bill's own life as the measuring life), there is no violation of the Rule Against Perpetuities. Finally, while no trust is created if the trustee is to be the sole beneficiary, this is not the case here and the fact that Joe was the only named beneficiary at a particular time is irrelevant.

Technically, the trust might be considered "passive" in that Joe has no duty to perform any act of management or administration which requires discretion; the only required act is the mechanical job of dividing the insurance proceeds into thirds and distributing one third to each beneficiary. Even if the trust is passive, however, Joe would not get to keep the entire policy amount, since title in a passive trust is said to pass through the trustee to the beneficiaries (and thus would still be divided equally among Joe, Tom Allen, and Tom Allen's wife).

II. Blackacre
Since the trust res is land, the Statute of Frauds applies, but the signed letter, which sets forth the basic obligations of the trustee, satisfies this requirement. Inasmuch as there are no apparent problems as to capacity, beneficiaries or trust purpose, the only remaining issues are trust intent and whether there was delivery (and, if so, when).

As was the case with the life insurance policy, the deed conveying Blackacre to Pete was absolute on its face. Here, however, Pete has not expressly promised to hold Blackacre as a trustee and therefore it would be difficult to conclude that he holds the land as the trustee of a secret trust. Nevertheless, the court would most likely conclude that the gift to Pete was conditioned on his acceptance of the trust restrictions and if he refuses to do so, a resulting trust in favor of Bill's estate will be imposed to prevent unjust enrichment.

Pete did not obtain possession of the deed to Blackacre until after Bill's death. If the trust was not effective until that time, the trust would be invalid as the trust document does not comply with the Statute of Wills. As mentioned above, however, acceptance is not required for valid trust formation so long as there is delivery. Bill clearly indicated his intent to relinquish his right to control Blackacre when he gave possession of the executed deed to Pete's housekeeper. This is enough to constitute delivery even if the housekeeper is not Pete's agent in the ordinary sense.

III. Bank Account and Other Assets

The bank account and any other assets of Bill's estate pass to June through the July 1990 will (the facts indicate that that will was valid and, while Bill was hospitalized at the time, there is no indication that he was under the influence of drugs or otherwise lacking in testamentary intent or testamentary capacity). The only issue is whether June takes subject to a support trust for the benefit of Aunt Selma.

The problem here is that Bill used precatory language (i.e., "I recommend") rather than imposing any mandatory duties on June. Historically, language of hope or desire was not sufficiently indicative of an intent to create a trust. Today, however, most courts will examine the relationship between the parties to determine whether the alleged settlor (Bill) was really leaving the ultimate decision to the grantee (June) or whether he was merely imposing mandatory duties in a more polite manner. While it would be helpful to know more about the nature of the personal relationships between the three parties, the familial relationships and Aunt Selma's age might lead the probate court to conclude that June is obligated to support Aunt Selma in an appropriate manner (at least to the extent of the trust assets).
WILLS ESSAYS

QUESTION #1

Tate, a bachelor, validly executed a witnessed will in 1984 in which he left Blackacre to his nephew David; $10,000 to his nephew James; and the residue of his estate to his niece Alice. In 1985, Tate obtained Greenacre from Robert, in exchange for which Tate orally promised to leave Robert both Blackacre and $10,000 by will. Tate subsequently wrote the following words on a blank sheet of paper: "Codicil to My Last Will and Testament. I give Blackacre and $10,000 to Robert." Tate signed and dated the sheet of paper in his own handwriting. Below the handwritten matter, but above his signature, Tate typed the following sentence: "I hereby revoke my gift of Blackacre to David." In 1986, Tate, in the presence of two witnesses, stated that he was revoking his codicil and he drew red lines through all of the handwritten and typewritten words on the sheet of paper headed "Codicil to My Last Will and Testament."

James died in 1986, survived by David, who was his brother and sole heir. Tate died in 1987, survived by David, Alice and Robert. David and Alice are Tate's sole heirs. Tate's net estate consists of Blackacre, Greenacre and $15,000.

The applicable statutory law is the same as the comparable provisions of the California Probate Code.

How should Tate's estate be distributed? Discuss.

What rights, if any, does Robert have in any assets of Tate's estate, and against any of Tate's heirs? Discuss.

QUESTION #2

James Tait typed this draft will:

"September 27, 1975

"I, James Tait, being of sound mind, hereby publish this my last will.

"First. To my son, Sal, I give my 150 shares of Minco stock.

"Second. To my daughter, Diane, I give my 500 shares of Oilco stock.

"Third. My personal effects located in the wall safe in my living room, I give to my friend Bill.

"Fourth. To my wife, Wanda, I give the rest, residue and remainder of my estate."

Tait did not execute this will. The following appears in Tait's handwriting across the bottom of the draft:

"June 15, 1976

"Being of sound mind, I adopt my draft will, dated September 27, 1975, written above as my last will. J. T."

Tait died in September 1976.
Tait's son, Sal, died in August, 1976. Sal's sole surviving heirs are his mother, Wanda, and his adopted daughter, Helen. On July 1, 1976, Minco had declared a 100% stock dividend. On August 15, 1976, Oilco had merged with Zebco, with the Oilco shareholders receiving one share of Zebco stock in exchange for each share of Oilco stock.

After payment of all expenses of administration, taxes and debts, Tait's estate included only the following:

Community property - 50 shares of Abco stock in the living room wall safe, and $100,000 in bank accounts; and

Separate property - personal jewelry in the living room wall safe, and 300 shares of Minco stock and 500 shares of Zebco stock in a bank safe deposit box.

Assume that the applicable statutory law is the same as the comparable provisions of the California Probate Code.

A. Is there a validly executed will? Discuss.

B. If the will is validly executed, how should the estate be distributed? Discuss.

C. If the will is not validly executed, how should the estate be distributed? Discuss.

QUESTION #3

In 1965, when Todd's wife, Freda, was pregnant with Todd's first child, Todd executed a trust instrument for his "children" with State Bank as trustee. He delivered 80 shares of WACO stock to the trust at that time. The trust instrument provided for final distribution to Todd's "children" in equal shares upon Todd's death. That first child and two more were born to Todd and Freda. On Todd's death in 1989, his two youngest children were living. The oldest child had died in 1988 but left a son who survived Todd.

In 1982, Todd executed a valid will in which he gave 100 shares of WACO stock to Freda "out of shares held by me at death," and "the residue of my estate to my children in equal shares." In 1987, after he and Freda were divorced, Todd executed a valid codicil giving 100 shares of WACO stock to his close friend Sally "out of shares held by me at death."

When he executed his will, Todd had owned 100 shares of WACO stock. Before the codicil was executed, a one-for-two stock dividend was declared and issued. At the time he executed the codicil Todd owned 150 shares, which were the 150 shares he owned at his death. After Todd's death, a two-for-three stock dividend was declared and issued so that Todd's estate held 250 shares at the time of distribution. The trust held 120 shares of WACO stock at Todd's death and, as a result of the above two-for-three stock dividend, now holds 200 shares.

Assume applicable statutory provisions are the same as comparable provisions of the California Probate Code.

How should Todd's estate and the trust assets be distributed? Discuss.

QUESTION #4

In 1984 Thomas Thor, a widower, validly executed a formal, witnessed will which contained the following dispositive clauses:
"(1) to my friend Robert Rood $10,000 to be used by him for the education of his daughter, Carrie;

"(2) the residue of my estate to my friend Doris Drake, trustee, in trust, to pay the income to my
daughter Ethel so long as Ethel may live and upon Ethel's death to distribute the trust corpus to my heirs;
the trustee may invade the corpus if necessary for the proper care and maintenance of Ethel."

On June 30, 1988 Thor signed a typewritten document purporting to be his last will and testament. The
document was identical to the 1984 will except that the last clause of the residuary bequest, giving the
trustee power to invade the corpus, was omitted. This will was attested by only one subscribing witness.

Thor died in 1990. The 1984 and 1988 documents were found in Thor's safe deposit box. Stapled to
the 1984 document was the following document, in Thor's handwriting:

"July 1, 1988; this will is hereby canceled and revoked. I have made a new will.

Thomas Thor"

Thor was survived by the following heirs and legatees and no others:

(a) his daughter Ethel;
(b) his friend Robert Rood and Robert's 16-year-old daughter Carrie;
(c) John and Gil, sons of his deceased sister Anne;
(d) Warren, grandson of his deceased sister Bessie;
(e) Doris Drake.

Ethel died after Thor, but before distribution of Thor's estate. By a valid will, Ethel left her entire
estate to her friend Sandra.

Assume applicable statutory provisions are the same as comparable provisions of the California
Probate Code.

1. Did Thor die testate or intestate? Discuss.

2. Assuming Thor died testate, what persons are entitled to Thor's estate, and what share or
interest will each receive? Discuss.

3. Assuming Thor died intestate, what persons are entitled to Thor's estate, and what share or
interest will each receive? Discuss.

QUESTIONS #5 (JULY 2002 EXAM)

Theresa and Henry were married and had one child, Craig. In 1990, Theresa executed a valid will leaving
Henry all of her property except for a favorite painting, which she left to her sister, Sis. Theresa believed
the painting was worth less than $500.

On February 14, 1992, Theresa typed, dated, and signed a note, stating that Henry was to get the painting
instead of Sis. Theresa never showed the note to anyone.
In 1994, Theresa hand-wrote a codicil to her will, stating: "The note I typed, signed, and dated on 2/14/92 is to become a part of my will." The codicil was properly signed and witnessed.

In 1995, Theresa's and Henry's second child, Molly, was born. Shortly thereafter, Henry, unable to cope any longer with fatherhood, left and joined a nearby commune. Henry and Theresa never divorced.

In 1999, Theresa fell in love with Larry and, with her separate property, purchased a $200,000 term life insurance policy on her own life and named Larry as the sole beneficiary.

In 2000, Theresa died. She was survived by Henry, Craig, Molly, Sis, and Larry.

At the time of her death, Theresa's half of the community property was worth $50,000, and the painting was her separate property. When appraised, the painting turned out to be worth $1 million.

What rights, if any, do Henry, Craig, Molly, Sis, and Larry have to:

1. Theresa's half of the community property? Discuss

2. The life insurance proceeds? Discuss.

3. The painting? Discuss.

Answer according to California law.

QUESTION #6

Carol, a widow with a son, Sam, and a daughter, Dot, had often said she did not need a will, since she wanted the children to have everything. In 1970, after being notified by the Department of State that Sam had been killed in Vietnam, Carol executed a valid will, which provides:

"In view of the death of my son Sam, I leave one-third of my estate to my brother Tom and my sister Jane, share and share alike; the remaining two-thirds of my estate I give to my daughter Dot. The shares of my brother and sister in the portion of my estate allocated to them should be adjusted to reflect any advancements I may make to each of them, as recorded in a book of account which will be found with my will."

In 1972, Carol made gifts of $5,000 to Jane and $10,000 to Tom. In her ledger, which was later found with her will, under the caption "Advancements," Carol erroneously transposed the amounts, so that the entry read:

"4/9/72 - Jane $10,000
Tom $5,000"

In 1981, the Department of State wrote Carol that Sam apparently was a prisoner of war, and that efforts were being made to verify this and to secure his release. Dot, who lived with Carol, intercepted the letter and concealed it.

In 1983, Carol died, leaving a net estate of $270,000. Before Carol's estate was distributed, Sam was released and returned home.

A. Under what theories can Sam participate in the distribution of the estate? Discuss.

B. To what other relief, if any, is Sam entitled? Discuss.

C. How should Tom, Jane, and Dot participate in distributions from the estate? Discuss.
QUESTION #7

On January 1, 1983, Ted, his wife Wilma, and their two adult children, Chuck and Sally, were residents of the State of Alsan. On that date, Ted wrote, dated, and signed his will entirely in his own handwriting. The will provides:

"I want my house to go to my daughter, Sally. All my other property of any kind is to go to my wife, Wilma, if she survives me, and otherwise to Sally."

Sally witnessed Ted’s signing and dating the will. Sally added her signature as the sole witness. Alsan requires that a handwritten will be signed by two witnesses.

In 1986, Chuck died, survived by his infant son George, born in 1984. In 1988, Ted and Wilma moved to the State of Calco. In 1989, Wilma died intestate. Shortly thereafter, Ted gave Sally $300,000 for the purchase of a home. At the time of the gift, Ted stated in writing that the gift was an advancement.

In 1992, Ted died a resident of Calco, never having revoked his 1983 will. Ted was survived by Sally and George, whom Ted had never seen. When Ted died, his house in Calco was worth $200,000. His other assets were worth a total of $50,000.

On January 1, 1983, and at all times thereafter, the probate code of the State of Calco is the same as the probate code in effect in California.

1. Is the 1983 will effective in Calco? Discuss.

2. How should the assets of Ted's estate be distributed? Discuss.

QUESTION #8

Tom's first will, properly executed on July 1, 1988, created a $50,000 trust for Lil, the 65-year-old widow of Tom's deceased brother Bob. The trustee was directed to pay to Lil "as much of the income and, if income be insufficient, as much of the principal as may be required for her proper support and maintenance for so long as she lives." After providing for the remainder interest in this trust to go to the American Red Cross on Lil's death, Tom gave "the rest and residue of my estate to the surviving issue of my brothers, per stirpes."

On July 1, 1990, while Tom was confined to the hospital for minor surgery, a new will was delivered to Tom in a sealed envelope by two secretaries from his attorney's office. One of them told Tom, "We have a will here that Attorney Smith has asked us to deliver to you for your signature which we are to witness." Tom opened the envelope, read the paper, signed it at the end in front of the secretaries, and handed it to them. The secretaries then walked to a small table in the hallway around the corner from Tom's room, signed the paper on the lines provided therefor, and then immediately returned the paper to Tom. In accordance with Tom's instructions, the new will was identical to the 1988 will except that nephew E was now the sole residuary beneficiary.

Tom died in an automobile accident on August 12, 1990. He had never been married and left no issue. He was survived by:

1) A and B, grandchildren of his deceased brother Sam and children of Sam's deceased son James;

2) C, son of his deceased brother John; and
3) D and E, children of his deceased brother Frank.

The original of the 1988 will was found in Tom's safe deposit box. It bears no evidence of acts of revocation. The 1990 will, which contained an express revocation clause, cannot be found, but an unsigned copy is in Attorney Smith's possession. The $60,000 trust produces a net annual income of $5,000.

1. Which will, if either, should be admitted to probate? Discuss, applying California law.

2. Except for the $50,000 trust, what difference, if any, does it make to the family whether they take under the 1988 will or under the laws of intestacy? Discuss, applying California law.

3. Lil's support needs are approximately $1,000 per month; she has pension and other income of $600 per month and has been making up the difference by withdrawals from savings. If either will is admitted to probate, should the trustee pay Lil $1,000 per month or $400 per month? Discuss.

**QUESTION #9**

Gloria, a widow, signed a typewritten will in the presence of Tom and Larry, who, being present at the same time, witnessed Gloria's signing, understood the document was Gloria's will, and signed the will as witnesses. The will contained the following provisions:

1. $10,000 to my friend, Tom.

2. My residence to my only daughter, Dora, provided she survives me by thirty days.

3. All my Mega Corp stock to my friend, Max, requesting that he distribute it as indicated in a letter to be found with this will.

4. The residue of my estate to my only son, Seth.

Subsequently, Gloria and Dora were involved in an automobile collision. Dora was killed instantly, and Gloria died one day later in the hospital.

Gloria's will is found in her safe deposit box together with a typewritten, signed, but unwitnessed letter requesting Max to distribute the Mega Corp stock to Ben, a needy cousin whom Gloria had assisted financially in the past. Max truthfully testifies that the letter was prepared after the will was executed and that he orally agreed with Gloria to distribute the stock as requested in the letter.

Dora is survived by her husband, Hank, and her daughter, Gail. In addition to Hank and Gail, Tom, Max, Ben and Seth all survived Gloria. Gloria's net estate consists of her residence, Mega Corp stock, and $100,000 in cash.

What portion of Gloria's estate, if any, should be distributed to each of Tom, Hank, Gail, Max, Ben and Seth? Discuss.

Assume that the applicable statutory law is the same as that of California.
QUESTION #10

In 1996, Hal, who was married to Wanda, created a trust that he funded with $200,000 of his separate property. Trustee Inc., named as trustee, was directed to pay the income to Hal for life and the remainder to Wanda. At the same time, Hal executed a valid will that provided as follows:

Article 1: $20,000 to my friend Frank.

Article 2: $35,000 to the person named on a sheet of pink paper dated December 31, 1989 and located in my top desk drawer.

Article 3: The residue of my estate to my son, Stan.

In 1998, Wanda executed a valid will solely in favor of her son, Stan. Shortly thereafter, Wanda died while giving birth to the couple’s second child, Dawn.

Later in 1998, while grieving Wanda’s death, Hal regularly consulted a fortune teller, Florence. In 1999, based on Florence’s predictions that Stan would become a criminal, Hal executed a codicil to his 1996 will, changing the residuary beneficiary from Stan to Florence.

In 2000, Hal and Frank, passengers on a commercial plane, were simultaneously killed when the plane exploded on takeoff. The pink sheet of paper referred to in Article 2 of the 1996 will provided: “To my next-born child, if any.”

1. To whom should the trust property be distributed? Discuss.

2. To whom should Hal’s estate be distributed? Discuss.

Answer according to California law.

QUESTION #11

Tess was a widow with two adult children: Sam, from whom Tess was estranged, and Donna, to whom Tess was devoted. In 1992, Tess validly executed a typewritten will containing the following provisions:

A. My Bigco stock to my friend, Fred.
B. The residue of my estate to my daughter, Donna.

During the next few years Tess and Sam reconciled. In 1995, Tess prepared another typewritten will containing the following provisions:

A. I hereby revoke all prior wills.
B. My Bigco stock to my son, Sam.
C. The residue of my estate to my daughter, Donna.

Tess took this will to the house of Wit, a neighbor, declared to Wit that it was her will, and signed the will in Wit's presence. Wit then signed the will as witness, although he did not know its contents.

Tess next took the will to the house of Ness, another neighbor, and asked Ness to "witness this paper." Ness signed the will as witness, although he did not understand that it was a will.

After Tess's death, both wills were found in her safe deposit box. The 1992 will had a large "X" drawn across all of its pages. The 1995 will was unmarred.
Tess is survived by Donna, Sam and Fred. Her net estate consisted of her Bigco stock (worth $400,000) and $600,000 in cash.

1. Is Tess's 1995 will valid? Discuss.

2. How should Tess's estate be distributed, assuming Tess's 1995 will is not valid? Discuss.

Assume that the applicable statutory law is the same as that of California.
ANSWERS TO SELECTED WILLS QUESTIONS

ANSWER TO QUESTION #1

Distribution of Tate's Estate

The 1984 will was validly executed, as stated in the facts. Distribution of Tate's estate turns on the effect of the codicil on the original will provisions. Tate's codicil was handwritten, and therefore its execution must conform to the requirements for execution of a holographic will. Under California law, the signature of the testator and the material provisions of the holographic will must be handwritten. Here, everything in the codicil is in handwriting except the typewritten revocation of Tate's gift of Blackacre to David. Therefore, it can be argued that the holographic codicil is ineffective if the revocation is a "material provision" of the codicil.

In determining whether the revocation of the gift is a material provision, the court will look to inconsistencies between the provisions of the codicil and the original will. Here, the disposition of Blackacre to Robert in the codicil is clearly inconsistent with the giving of Blackacre to David in the original will. The handwritten provision in the codicil leaving Blackacre to Robert validly amends the original will; the typed revocation provision merely reiterates the fact that David will not receive Blackacre. Therefore, the latter provision is not material. Thus, the court may view the revocation provision as "surplusage" under the theory that if it is allowed to stand it will invalidate the entire codicil, which but for the typed revocation provision satisfies the requirements of a holographic will. If the court finds the codicil is only a partial revocation of the 1984 will, that is, all holographic provisions of the codicil are effective, the estate will be distributed as follows: The $10,000 gift to James lapses because he predeceased Tate and left no issue, and the gift passes into the residue. Robert receives Blackacre and $10,000. Alice receives the residue, including Greenacre and the lapsed gift, provided the $10,000 disposition to Robert is satisfied first.

Even if the codicil was validly executed, it can be argued that it was revoked by Tate's subsequent drawing of red lines through all the handwritten and typed provisions. A will or codicil is revoked by (1) another writing properly signed and witnessed; (2) burning, canceling, tearing, obliterating or destroying with intent to revoke, or; (3) operation of law. Here, Tate's physical act of crossing out the provisions of the codicil shows an intent to revoke the codicil and have the original will take effect as executed. The court will permit revival of the original will if the court determines from the circumstances that by Tate's revocation of the codicil he intended the original will to be revived. If such intent is found, the provisions of the 1984 will will govern distribution: David will receive Blackacre. The $10,000 gift to James will lapse and pass into the residue because James predeceased Tate and left no issue to prevent lapse. Alice, the residuary legatee, will receive Greenacre and $15,000 (which includes the $10,000 lapsed gift).

However, if the court does not permit revival of the 1984 will, the doctrine of dependent relative revocation may be applied in an attempt to render the original will operative. Under this doctrine, the provisions of the original will remain operative if the testator intended such a result in the event the second will is ineffective and provided the dispositive plan in both wills is consistent but for minor changes. Here, Tate's dispositive plan for Blackacre in the 1984 will is inconsistent with the plan in the codicil, and the court is unlikely to apply the doctrine and allow disposition according to the 1984 will.

If the court finds that Tate died intestate, the estate will go to the issue of Tate's parents because he left no issue and was predeceased by his parents. David and Alice, as issue of Tate's parents of the same degree of kinship to Tate (niece and nephew), take in equal shares.


California Essays Book 1
Robert's Rights

Assuming Robert does not receive Blackacre and $10,000 from the estate, he may recover from the estate based on the breach of a contract to make a will. In 1985, Tate orally contracted with Robert to leave Blackacre and $10,000 by will to Robert in exchange for Greenacre. Under current California law, a contract to make a will is proven by (1) a will provision stating the material provisions of the contract; (2) an express reference to the contract in the will and extrinsic evidence proving the contract terms; or (3) a writing evidencing the contract signed by the testator.

Here, because the contract was for the sale of land, a writing signed by Tate is required to satisfy the Statute of Frauds. Robert could argue that the codicil operates to satisfy the Statute; however, it is more likely the court will find Robert's transfer of Greenacre to Tate is sufficient part performance to render the contract enforceable. The court will then impose a constructive trust on Blackacre and $10,000 of the estate for the benefit of Robert. Therefore, whoever holds Blackacre pursuant to the will will be deemed the constructive trustee to hold the property for conveyance to Robert, and the estate will be deemed to hold $10,000 for Robert.

If Robert cannot enforce the contract to make a will, his alternative remedy is to recover his consideration (Greenacre) under the theory of unjust enrichment.

ANSWER TO QUESTION #3

Estate Assets

In 1982, when Todd validly executed his will, he bequeathed to his then-wife Freda 100 WACO shares out of the shares held by him at death and left the residue of his estate to his children. At the time of the making of the will, Todd held 100 WACO shares. These shares are distinct from the 80 WACO shares which form the res of the trust created by Todd in 1965, because there is no indication Todd revoked the trust in 1982 upon making the will or pulled any shares or dividends from the trust.

If Freda remained Todd's wife at the time of his death, the amount of shares distributed to her would depend on whether the court found Todd's bequest a general or specific devise. A general devisee of securities takes all the securities which are part of the testator's estate at death, plus any additional securities from stock dividends or stock splits after death. A specific devisee takes only the amount of securities enumerated in the will. Thus, if Freda was a general devisee, she would take all 250 WACO shares existing at the time of distribution, and the children would take nothing because there would be no residue. If Freda was a specific devisee, she would take 100 shares, and the remaining 150 shares would pass into the residue and be divided into thirds among the surviving children and the child of the predeceased child.

However, Freda will take nothing because she is no longer Todd's wife, and his bequest to her has been revoked by operation of law. Under California law, a divorce after execution of a will revokes any will provision disposing of property to the former spouse. It can also be argued that the valid codicil executed in 1987 was a valid partial revocation of the 1982 will by a subsequent instrument. The provision in the codicil giving 100 WACO shares to Sally is clearly inconsistent with the 1982 will provision giving 100 shares to Freda. At the time the codicil was executed, Todd held 150 WACO shares, an insufficient number to satisfy a 100-share bequest to both Freda and Sally. Therefore, he appears to have had an intent to revoke the 100-share bequest to Freda and replace it with a similar bequest to Sally.

If the partial revocation by codicil is presumed, the provision in the codicil operates as a testamentary provision, and Sally takes. The court is likely to find the bequest to Sally is specific because Todd had 150 shares when he executed the codicil but bequeathed Sally only 100 of the shares. Therefore, Sally takes 100 shares, and the remaining 50 shares pass into the residue. Todd's two surviving children take. The grandson also takes because he is the issue of a legatee who predeceased Todd and was Todd's kindred, and
the California anti-lapse statute applies to prevent the gift from lapsing. Therefore, the two children and the
grandchild will share the 50 shares in thirds.

Trust Assets

In 1965, Todd had a present intent to create a trust for the benefit of his children. Todd properly
executed the trust instrument and transferred identifiable property, 80 WACO shares, to the trustee. The
beneficiaries, his children, were ascertainable. Therefore, at Todd's death the 120 shares composing the
trust res pass to Todd's beneficiaries, the two surviving children, in equal shares. The children also take the
80 additional stock dividends declared after Todd's death.

ANSWER TO QUESTION #4

(1) Thor died testate only if the original 1984 will is valid.

Thor's 1984 will was validly executed; however, subsequent acts by Thor may have revoked it. The
document dated June 30, 1988 purports to be a second will. It revokes the 1984 will only if the document
meets the requirements for execution of a valid will. The 1988 document is a writing signed by the testator,
but it was attested by only one witness rather than the two witnesses required by California law. Therefore,
the 1988 document does not operate to revoke the original will.

The subsequent handwritten note dated July 1, 1988 indicates an intent by Thor to revoke the 1984
will and replace it with the 1988 document. The note, stapled to the 1984 will, meets the formal
requirements of a holographic will because it is entirely in Thor's handwriting and he has signed and dated
the note. However, the note does not contain the material provisions (that is, dispositive provisions) of a
will, unless the stapling of the note to the 1984 will incorporated the 1984 will by reference into the note.
Incorporation may be successfully argued because the 1984 will was in existence when the note (the
holographic will) was executed and was sufficiently described ("this will") in the note to permit
identification. Alternatively, it could be argued that stapling the note to the 1984 will showed Thor's intent
to integrate the writings.

If the court finds the note and the 1984 will should be construed together, then the note may be
deemed a valid revocation of the original will. If both the original 1984 will and the 1988 will are invalid,
then Thor died intestate. However, the court may apply the doctrine of dependent relative revocation to
find that Thor intended the 1988 document to be his testamentary instrument and believed he had properly
executed the 1988 will. Thus, the court would find the revocation evidenced by the 1988 note was
conditional on the validity of the 1988 will and would allow the original 1984 will to operate as Thor's
testamentary instrument. Thor's estate would be distributed according to the provisions of the 1984 will.
Conversely, if the court refused to revive the original will, Thor's property would pass by intestacy.

(2) If Thor died testate, his estate will be distributed according to the provisions of the 1984 will.

The $10,000 to Robert may be construed as either a trust set up for the benefit of Carrie with Robert
as the trustee or an outright gift to Robert. The will provision states the money is to be used by Robert "for
the education of his daughter." The court will find a testamentary trust has been created if it finds the
language of the provision imposes enforceable duties on Robert. If the language is merely precatory,
expressing Thor's hope that Robert use the money for Carrie's benefit, Robert will not be bound by any trust
duties and may treat the $10,000 an outright gift. The court will look to the relationship between the
settlor, Thor, and the trustee and proposed beneficiary to determine whether a trust was intended. Here,
Carrie has no natural claim on Thor's property and there is no indication Thor has promised her support.
Therefore, it is likely the court will construe the language as an expression of Thor's hope that the money
will be used in a particular way rather than as an expression of his intent to create a trust.
The residue of the estate passes to Drake as trustee for Ethel who is the income beneficiary for life. At Ethel's death, the corpus is to be distributed to Thor's heirs, in this case, to the issue of his parents. John, Gil and Warren are not of the same degree of kinship to Thor, and therefore they take by representation: John and Gil, the sons of Thor's sister Anne, share one-half equally, and Warren, the grandson of Thor's sister Bessie, takes the remaining one-half.

(3) If Thor died intestate, his estate passed to his surviving issue, Ethel, who took the entire estate. Ethel's death prior to the distribution of Thor's estate did not affect her right to the estate, and she could leave the entire estate by will to Sandra. Therefore, Sandra will take Thor's estate.

MODEL ANSWER TO QUESTION #5

This “model” answer has been prepared and edited for the limited purpose of illustrating the writing style and the fact, law, application methodology taught in the Essay Writing Workshop. You should not rely on this answer for accurate black letter law nor are the writer’s conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing essay. Also, another answer could have a totally different analysis and conclusions and still be considered an acceptable passing essay.

I. Theresa’s half of the community property

A. Henry’s potential rights

Theresa and Henry were married when Theresa created a valid will in 1990 that left Henry all of her property except for a painting. In 1995, Henry left Theresa and moved to a commune, but the two never divorced.

Henry will fight for the will to be enforced as it is, giving him Theresa’s entire share of the community property. He will argue that because Theresa executed a valid will in 1990 its provisions should still stand at her death. Henry’s children will attempt to argue that since he left Theresa and the two were separated, Henry forfeited his rights to the property left him in the will. In California, only a dissolution or annulment which terminates the parties’ marital status operates to revoke a will by operation of law. A legal separation is not sufficient to do so. Henry will therefore reply that since he and Theresa never actually divorced, the will won’t be automatically modified to expel any provisions relating to Henry.

Henry will be entitled to what Theresa left him in her will (potentially subject to sharing with his children, discussed below). Since the two never legally divorced, Theresa would have needed to actually modify her will to leave Henry out. In California, the law will not do it automatically when there is only a separation, even if it is for years.

B. Craig’s potential rights

Craig, Theresa and Henry’s son, was born before Theresa executed her will in 1990. He was not discussed in the will at all.

Craig will argue that since he is Theresa’s child he should get a share of the $50,000 in community property going to his father under the will. Had Theresa died intestate, Henry, Craig and Molly would all take a third of the property. However, Henry will point out that Theresa did leave a valid will and Craig was not in it. Craig will then argue that he is an omitted child and should therefore receive a share. An omitted child is one born or adopted after the execution of the will for whom the testator has failed to provide in the will. A child cannot be an omitted child if it appears from the will that the omission was intentional, if at the time of executing the will the testator had one or more children and devised substantially all the estate to
the other parent of the omitted child, or if the testator provided for the child by transfer outside the will and
the intention that the transfer be in lieu of a testamentary provision is shown by statements of the testator,
the amount of the transfer or other evidence. Henry will point out that Craig was not born after the date the
will was executed, which is the first requirement of being an omitted child.

Craig will not receive a share of the community property because he was not included in the will
and, since he was already alive when Theresa executed the will in 1990, he cannot be considered an omitted
child. His claim would not interfere with Henry’s right to the property.

C. Molly’s potential rights

Molly, the daughter of Theresa and Henry, was born five years after Theresa executed her will and
just before Henry left for the commune. She was not mentioned in her mother’s will at the time of
Theresa’s death.

Much like Craig, Molly will assert that since she is Theresa’s child she has a right to a share of the
community property, despite the fact that she wasn’t written into the will. Molly will argue that she is an
omitted child. First, she was born after the execution of the will, second, she was not provided for in any
non-probate asset and third, there is nothing in the will that would indicate her omission was purposeful.
However, Henry will point out that the fourth requirement for Molly to be an omitted child is lacking since
Theresa provided for Molly’s dad in her will at a time when Craig was already alive. A child cannot be
considered omitted if the other parent of the child is provided for in the will and the testator had one or
more children at the time she executed the will. That could show that the deceased expected the other
parent to take care of the child with that property and therefore purposefully didn’t amend the will. Henry
may argue that Theresa simply believed that by leaving her half of the community property to Henry their
children would be taken care of by him.

Since Henry, Molly’s dad, received Theresa’s entire share of community property in the will and
Craig was alive at the time the will was executed, Molly cannot be considered an omitted child. Molly
therefore does not have the right to any of Theresa’s share of community property and Henry will receive
the full $50,000 value.

II. Life insurance proceeds

After Theresa and Henry separated Theresa fell in love with Larry, and took out a life insurance
policy on herself, with Larry as the beneficiary.

Henry will claim he has the right to half of the life insurance proceeds because he was married to
Theresa at the time she took out the policy and therefore it is community property. The proceeds from a life
insurance policy are community property if the premiums have been paid out of the community estate,
regardless of who is named as the beneficiary. However, Larry will argue that Theresa bought the insurance
policy with separate property rather than community property. Separate property of a spouse is under that spouse’s
sole management and control and may be conveyed without the consent of the other spouse. Henry, Craig,
and Molly may try to show that since the life insurance wasn’t in Theresa’s will it should be dealt with as
though Theresa died intestate. Larry will correctly show, however, that insurance policies are outside of
probate and therefore do not need to be in the will to be valid. Even in the absence of a will, a non-probate
asset will not necessarily fail.

Larry is entitled to the full $200,000 of life insurance proceeds. Theresa bought them with her
separate property and named Larry the beneficiary. Since no community property was used for the
premiums, Theresa had the ability to assign the proceeds to whomever she wished. They also did not have
to be in her will to be valid.

III. The painting

When Theresa initially wrote her will in 1990, she left her favorite painting to her sister, Sis. In
1992, she typed up a note giving the painting to Henry instead. The note was dated and signed, but Theresa
never revealed it to anyone else. In 1994, Theresa created a hand-written codicil amending her will to add
the typed note.
Sis will argue she should receive the painting because she was the initial recipient in Theresa’s will, while Henry will point to the note and 1994 codicil as legally amending Theresa’s will to give the painting to him. He will attempt to prove that the codicil was holographic and therefore valid. To be legally binding the codicil must have included all material provisions in the testator’s handwriting and have been signed by the testator. Sis will argue, however, that only the codicil was holographic—not the 1992 note that actually purported to give the painting to Henry. That note was typed and never shown to anyone. A valid codicil must be attested and subscribed in the testator’s presence by at least two competent witnesses. The fact that Theresa never showed her note to anyone implies there were no witnesses to it. Therefore, Sis will say, the note is not valid. Henry will reply that the 1994 codicil incorporated the note by reference into the will and that only the latter document needed to be valid. Sis will argue that although the 1994 codicil was handwritten and signed, it is ambiguous. If it is unclear what note the codicil is referring to, then no one knows what the referenced note says and it will be ignored. Henry, however, will assert that the 1992 note is incorporated by reference because the later codicil pinpoints the exact document it is referring to. In order to successfully incorporate a document by reference, a codicil must refer to the document with sufficient certainty.

If the note is in existence and is the only note written February 14, 1992 that Theresa could have been referring to in her 1994 codicil, the painting will go to Henry because the valid codicil effectively incorporated the note into Theresa’s will and superseded her past wish. If there is ambiguity about which 2/14/92 note Theresa was referring to, the codicil would not incorporate the note and the painting will belong to Sis because the original will would stand.

**ANSWER TO QUESTION #6**

(A) Sam can participate in the distribution of the estate under the omitted child statute or under the theory of mistake in the inducement.

Under California law, a child born before the execution of a valid will is an omitted child if the testator failed to provide for him under the mistaken belief that the child was dead. When Carol executed her will in 1980, she believed Sam had been killed. If she had known Sam was alive, she would have provided for him because she intended Sam and Dot “to have everything.” Thus, Sam is an omitted child, and he will take his intestate share. As one of two issue of Carol, Sam will take one half the estate, or $135,000.

Under the theory of mistake in the inducement, Carol made her will under a mistake as to Sam's existence which induced her to dispose of her property in a manner in which she would not normally have disposed of it. This theory must be distinguished from fraud in the inducement, which turns on another's false representation to the testator causing the testator to make a different will than the testator had contemplated making. Here, Dot's fraudulent withholding of information about Sam's prisoner of war status occurred after Carol made her will, and therefore there was no fraud in the inducement. Even if there was mistake in the inducement, the will provisions will not be set aside and Sam will not be able to take. However, he will take his intestate share under the omitted child statute.

(B) Sam may also obtain relief under a constructive trust theory based on Dot's nondisclosure of his status as a prisoner. If Carol had known Sam was alive before she died, she would have executed a new will or a codicil so that Sam would be included. Dot's action effectively increased her own share of the estate because the will provides she will receive two thirds of the estate, one third more than she would have received if Sam was included as a devisee with Dot, Tom and Jane. Therefore, the court may impose a constructive trust on the proceeds to Dot (at least to the extent of one half the proceeds to her) for the benefit of Sam in order to prevent unjust enrichment.

(C) If Carol died intestate, Tom and Jane will take nothing because Sam and Dot as Carol's surviving issue will share equally, that is, each will take $135,000.

It is more likely the will will be upheld and Sam will take under the omitted child statute or a constructive trust theory. Thus, Dot will take one third ($90,000), Sam will take one third, and Tom and
Jane will split the remaining one third, subject to the advancements. A devise or a portion of it is adeemed by satisfaction if (1) the will provides for an inter vivos transfer, (2) the testator declared a lifetime gift in a contemporaneous writing, or (3) the devisee acknowledged an inter vivos transfer in writing. Here, the advancements to Tom and Jane were entered into Carol's ledger. It can be argued that the ledger entries are incorporated by reference into the will because the "book of account" was referred to in Carol's will and the ledger was found with her will after her death. This argument succeeds only if the ledger existed at the time the will was executed. If the contemporaneous requirement is met, Tom and Jane's advancement will be deducted from their one third share. However, Carol transposed the amount of the advancements, and the court must determine whether the contemporaneous writing (the ledger) is conclusive regarding the value of each inter vivos gift. If the court finds the figures conclusive despite Carol's error, Jane's share of the estate will be reduced by $10,000 rather than $5,000 and Tom's share will be reduced by $5,000 rather than $10,000.

**ANSWER TO QUESTION #7**

1. Is the 1983 will effective in Calco?

   The 1983 will is a holographic will executed in the state of Alsan while Ted was a resident of Alsan. However, Ted was a resident of Calco when he died. Under Calco law, the execution of a will must comply with the law of the place of execution at the time of execution, or else with the law of the testator's domicile either at the time of execution or the time of death. Therefore, Ted's will must meet the requirements of either Alsan law or Calco law.

   It is clear that Ted's will was not validly executed under Alsan law, which requires two witnesses to a holographic will. Ted's will had only one witness.

   Calco law does not require witnesses to a holographic will. Since no witnesses are required, the fact that Sally is an interested witness is of no effect. A holographic will in Calco only requires that the material provisions of the will and the signature of the testator be in the testator's handwriting. These requirements have been met and, therefore, Ted's will is valid in Calco.

2. Distribution of Assets

   Ted died without a surviving spouse. Wilma's estate takes nothing since she predeceased Ted and her residuary interest was conditioned on survival.

   The will provided for an alternative gift of the residue to Sally in the event Wilma predeceased Ted, so Sally takes the house and the remainder of the estate under the terms of the will. Sally does not fall under the presumptions of undue interest by an interested witness to the will since her signature was not required under Calco law. However, there is an issue as to whether the $300,000 given by Ted to Sally for the purchase of a home was an advancement. Calco law requires that an advancement be in writing and be labeled as an advancement in the instrument creating the gift or in a separate contemporaneous writing, unless the donee acknowledges in writing that the gift is an advancement. This requirement is met by Ted's written statement at the time of the gift. If the money was intended to replace the house mentioned in the will, the house would pass under the residuary clause like other lapsed gifts. Here Sally is also the residuary legatee, however, so she would still take the house unless adeemed by extinction.

   The issue of ademption by extinction arises from the fact that the house Ted referred to in the will was probably in Alsan, and later Ted moved to Calco. We may assume that he sold the house in Alsan and purchased a different one in Calco. The gift of the house might be viewed as adeemed because the specific house referred to was no longer in the estate at death. However, a will is construed to speak as of the time of death, so a gift of "my house" should simply mean the one Ted owned at the time of his death and the gift is not adeemed. Therefore, Sally takes the house.
The final question is whether Sally's interest in the estate would be cut down by an interest in Ted's grandchild, George. The statute includes only pretermitted children born after execution of the will. George therefore does not qualify to take a share under this statute since he is not Ted's child.

ANSWER TO QUESTION #8

1. Which Will Should Be Probated

A. Initial Validity of 1988 Will

According to the facts, the 1988 will was "properly executed." While this might mean only that all of the formal requirements for execution (signature, witnesses, etc.) were satisfied, there are not facts which suggest that the will might otherwise be invalid (i.e., that Tom lacked testamentary capacity or testamentary intent). Therefore, it appears that the 1988 will is entitled to be admitted to probate unless it was revoked.

A will can be revoked in California by physical act (i.e., burning, tearing, canceling, obliterating, or destroying it with the intent to revoke) or by executing a subsequent testamentary instrument which expressly revokes prior wills or which is inconsistent with them. Here, there is no evidence of revocation by act, so the 1988 will is entitled to probate unless the 1990 will was valid and can be proven.

B. Initial Validity of 1990 Will

The 1990 will contained an express revocation clause and, even if it did not, it would revoke the 1988 will to the extent of any inconsistency. The issue, therefore, is whether the 1990 will was a valid testamentary instrument.

i. Testamentary Capacity and Intent

A will is valid only if the testator had testamentary capacity and testamentary intent. While one might argue that the fact that Tom signed the 1990 will while in the hospital could call his capacity into question, he was there for only minor surgery and there is no showing that he was under the influence of medication, acting under an insane delusion, or that he was otherwise unable to understand the nature of his property, the natural objects of his bounty, and the legal effect of his execution of the will. Since the facts indicate that the changes were made pursuant to Tom's instructions and that Tom read the will prior to signing it, it would appear that Tom intended the 1990 will to dispose of his property; thus, testamentary intent is also present.

ii. Signature of Tom

Tom signed the will in the presence of the witnesses, so acknowledgment is not necessary. In California, unlike many states, the will need not be signed at its logical end (although it was here anyway).

iii. Witnessing

Since the dispositive provisions of the will were not entirely in Tom's own handwriting, the will could not qualify as a holographic will and would be admitted into probate only if it were properly witnessed. In California, two witnesses must see the testator sign the will (or acknowledge his signature) at the same time; this was clearly the case here.

Traditionally, the witnesses then had to sign the will within the presence of each other (this was done) and also within the presence of the testator; here, however, the secretaries left the room to sign the will. In California, however, this would not be a problem since the statute no longer lists such a requirement and, in
any event, case law under earlier statutes has held that the witnesses need not be in the testator's actual line of sight so long as they were within his "conscious presence" (e.g., they were within his range of hearing) and the signing by the testator and the witnesses constituted a continuous transaction.

Finally, California law requires that the witnesses know that the document was a testamentary instrument when they signed it. While Tom did not expressly acknowledge that this was his will, the secretaries told Tom that the envelope contained his will, which he was to sign and they were to witness, and thus this requirement is easily satisfied.

C. Loss of Executed Copy of 1990 Will

The effect of the loss of the 1990 will depends on whether its initial existence and validity can be proven (as by the testimony of subscribing witnesses).

i. If Initial Validity Proven

If the initial validity and existence of the 1990 will can be proven, the 1988 will would be revoked. In addition, the 1990 will could normally be probated if the proponent of that will can prove its contents by a preponderance of the evidence. The unexecuted copy is not sufficient evidence by itself; at least one witness must testify as to the contents of the lost will (although the copy can be used to establish its exact terms, if the witness testifies that it accurately reflects the lost will's contents).

When a will was in the testator's possession and cannot be found at his death, however, there is a presumption that the testator destroyed the will with the intent to revoke it. Thus, the 1990 will may be probated only if the proponent can overcome this presumption (in addition to proving that will's valid execution and contents).

If the existence and validity of the 1990 will can be proven but the presumption of revocation cannot be overcome, the issue is whether the 1988 will, which was revoked in 1990, can be revived by the revocation of the superseding instrument. In California, revival can occur only if the testator's intent to revive the prior will is evident from the act of revocation or from his contemporaneous or subsequent statements. On the facts given, there is no way to know if Tom intended to revoke at all, let alone why he may have wanted to revoke the second will. The fact that the two wills are so similar tends to indicate that he preferred the 1988 will to intestacy, but it is not clear whether this, by itself, is enough to permit revival. If it does not, Tom died intestate.

Under the doctrine of dependent relative revocation, however, when a testator revokes a will by physical act on the assumption that a different will is valid, the revocation is conditioned on the other instrument being eligible for probate. Thus, if it can be shown that Tom revoked the 1990 will intending to revive the 1988 will, but that revival is not possible, the court might find that the intent necessary to revoke the 1990 will was absent. Since there is no direct evidence of Tom's intent, the court will make its decision based on whether the 1990 will or intestacy most closely approximates the disposition under the 1988 will (which, for purposes of this discussion, is assumed to be not subject to probate).

The only difference between the 1988 will and the 1990 will is that the later disinherits A, B, C, and D. If Tom dies intestate, these heirs will receive part of Tom's estate (see Part 2 below), something that Tom presumably desires (since this would occur if the 1988 will could be probated). On the other hand, both wills expressed a desire that Lil and the American Red Cross have substantial interests, which neither would receive under the rules of intestate succession. Thus, the court must determine whether Tom's intent to provide for Lil and the Red Cross was stronger than his intent to benefit all of his brothers' issue. This, in turn, might depend on the size of Tom's total estate (e.g., if the $50,000 trust constitutes the bulk of the estate, the shares of A, B, C, D, and E are relatively insignificant and thus the need to provide for Lil and
the Red Cross would be paramount, but if the estate is very large, the $50,000 bequest might be deemed incidental and subordinate to the desire to benefit all of the residuary legatees).

ii. If Initial Validity Cannot Be Proven

If the initial existence and validity of the 1990 cannot be proven, the 1988 will is admissible into probate since there was no revocation by physical act and there would be no proof of a subsequent testamentary instrument.

2. Distribution under the 1988 Will vs. Intestacy

A. 1988 Will

According to the 1988 will, the residue of the estate was to pass to the surviving issue of Tom's brothers per stirpes. This means that residue would initially be divided into thirds (one third for each brother) and that the nephews and nieces would take by right of representation. In other words, A and B, the descendants of brother Sam, would equally divide Sam's one-third share; C, the descendant of brother John would receive his father's share; and brother Frank's share would be equally divided between D and E. Thus, C would receive one-third of the residue of Tom's estate and A, B, D, and E would each receive one sixth.

B. Intestacy

Under the California rules of intestate succession, the distribution is also per stirpes but the level at which the shares are determined is different. The relevant statute provides that shares are determined by the closest level of heirs which has at least one living member. Since none of Tom's brothers survived him, the distribution is made at the niece/nephew level since at least one person at this level is still alive.

More specifically, the residue of Tom's estate would first be divided into fourths because there are three living nieces and/or nephews plus the issue of a fourth nephew. Thus, C, D, and E would each receive one-fourth of the residue of Tom's estate and A and B would divide the share that otherwise would have gone to their father, James (i.e., they each get one-eighth of the residue).

3. Lil's Support

While the issue is not without doubt, Tom's intent seems to be only to be sure that Lil is not left destitute, not that her entire support is to be paid by the trust. Furthermore, if the trustee has to pay her $1,000 per month, he would have to dip heavily into corpus (since the trust is generating less than half of that amount in income). While he is expressly empowered to do so, this could result in the entire trust being exhausted in less than 6 years since Lil might well live at least that long and given the likelihood that her health will deteriorate (thus increasing her expenses) as she ages, the trustee should err in the direction of caution. At a minimum, he should deduct the amount of her pension from the $1,000 that he would otherwise have to pay to her; whether the money otherwise earned should be counted against the $1,000 would best be determined by evaluating the hardships that Lil must suffer in earning that money.

ANSWER TO QUESTION #9

I. VALIDITY OF WILL

The requirements for a valid will are as follows: (1) testator’s signature on the will; (2) testator’s publication of the will; and (3) two witnesses’ signatures on the will. Gloria's will is valid under California law as a formal (attested) will. Gloria signed a typewritten will in the presence of Tom and Larry. Both of them knew the instrument was Gloria's will, and they both signed the will as witnesses. Thus, Gloria’s will
seems to be valid. The fact that Tom was both a witness and a beneficiary of the will does not automatically invalidate the entire will - see discussion below.

II. DISPOSITION OF GLORIA’S ASSETS

A. The $10,000 Gift to Tom

Gloria devised that $10,000 from her estate be given to her friend Tom. Gloria's estate contained $100,000 at her death; therefore, under normal circumstances the gift would be valid. Unfortunately for Tom, he also signed Gloria's will as a witness, and therefore became an interested party. At common law, an interested party was not competent to be a witness. Under California law if there are not two other disinterested witnesses, Tom's witnessing creates a rebuttable presumption of undue influence, fraud or duress. Therefore, for the devise to be valid, Tom will have to rebut the presumption and prove that he was not aware of Gloria’s distributive scheme until after the dispositions has been made. If Tom was in a confidential relationship with her, or the gift to him appeared unnatural, the court would presume undue influence. Tom certainly had the opportunity to affect the disposition of Gloria’s assets, but we really do not have enough facts to establish undue influence on behalf of Tom.

If Tom fails to rebut the presumption, then the court will have 3 options: (1) the court can invalidate the entire will; (2) the court can invalidate the devise to Tom because he is an interested party; or (3) the court can create a constructive trust in favor of Gloria’s estate.

If the court chooses to only invalidate the devise to Tom, then he can take no more than his intestate share. From these facts, it seems as though Tom was only a friend of Gloria’s, not a relative. Friends do not qualify as heirs under California intestacy statutes; therefore, Tom would not be entitled to inherit any intestate share of the estate. In any event, if the gift to Tom fails, the $10,000 will go back into the residue of Gloria’s estate, and will pass to Seth.

B. Gloria’s Residence

Gloria made the devise of her residence to Dora contingent upon Dora surviving Gloria by 30 days. However, Gloria and Dora were involved in an automobile accident. Dora died instantly, and Gloria died one day later. Since Dora predeceased Gloria, she clearly failed to satisfy the condition set forth in the devise.

1. Anti-Lapse Statute

At common law the death of a beneficiary after the will was executed and before the testator died meant the gift to that person “lapsed” and went to the other class members (if a class gift) or passed into the residuary of the estate. California, like most states now has an "anti-lapse" statute to prevent the harsh result of the common law. Under these types of statutes, if the devise was made to a relation of the testator who predeceased the testator but left issue, the issue take the devise. The California anti-lapse statute is very broad. It applies to any devisee who is “kindred of the testator or kindred of a surviving, deceased or former spouse of the testator.” Dora certainly was the kindred of the testator, because she was her daughter, so she would be covered by the anti-lapse statute, and her daughter would be able to inherit Gloria’s house. In this case, however, Gloria imposed a condition on the devise, and that condition will change the outcome.

2. Condition Precedent

The California anti-lapse statute also provides that a requirement that the initial devisee survive for a specified period of time after the death of the testator constitutes an intention that the anti-lapse statute not
operate. This is clearly the case in connection with Gloria and Dora. Therefore the gift of Gloria’s residence will lapse back into the residue of her estate.

C. Gloria’s Mega Corp. Stock to Her Friend Max

Upon Gloria's death, her will was found in her safety deposit box, together with a typewritten, signed, but unwitnessed letter requesting that Max distribute all of the Mega Corp. stock to her cousin Ben.

1. Codicil

Gloria's typewritten letter that was found with the will may have been an attempt to create a codicil or an amendment to the will. California law requires that a codicil be executed with the same formalities as a will. In this case the letter was signed, but it was not witnessed, so the letter would fail as a formal codicil. However, because the letter was signed, it could be a valid holographic codicil.

2. Incorporated by Reference

Gloria's reference to the letter may indicate her attempt to incorporate the letter into the will by reference. However, to successfully incorporate the letter, two requirements must be met: (1) the will must adequately describe the letter, and (2) the letter must be in existence at the time of the will's creation.

Under these facts, the will describes that the letter was to be found with the will, and that the letter would contain some type of instructions to let Max know how to distribute the Mega Corp. stock. This description is adequate, because the letter was, in fact, was found with the will, and it did contain instructions regarding the distribution of the stock. However, there is no indication that the letter was in existence at the time of the will's creation. There are no dates on the documents. In fact, according to Max, Gloria prepared the letter after she created her will. Therefore, the letter cannot be incorporated by reference.

3. Acts of Independent Significance

Acts of independent significance are non-testamentary acts that have validity apart from their meaning under the will. The letter to Max could be valid as an act of independent significance if it had some other purpose than instructing a devisee regarding the disposition of a devise. The letter had no such other purpose, and cannot qualify as an act of independent significance.

4. Secret Trust

Max's oral agreement to distribute the stock as requested in the letter may be considered a secret trust. A secret trust arises when a beneficiary is given an outright gift, but there is evidence to suggest that the testator intended that beneficiary to hold the gift for the benefit of another. In this case, in light of the probable failure of the letter to have any weight, the devise of the Mega Corp. stock could become an outright gift to Max. Ben will contest this and try to bring in extrinsic evidence of Max's promise to act in accordance with the provisions of the letter. If Ben is successful, the court will impose a constructive trust in favor of Ben. Courts have imposed constructive trusts even when the beneficiary has promised to hold the devise in trust for another after the execution of the will, even though the testator didn't rely on the promise in executing the will.

The only problem is that the court will probably not allow Ben to use extrinsic evidence to reveal the meaning of the secret trust, and the trust will fail.

5. Valid Trust
If the court were to validate the letter as a regular trust, five elements would have to exist: (1) interest; (2) identifiable trust corpus; (3) ascertainable beneficiaries; (4) proper purpose; and (5) mechanics.

Here, all the elements are met. Gloria's intent to create a trust is clear, the trust corpus is the Mega stock, the beneficiary is Gloria's cousin Ben, whom she helped financially in the past. Additionally, the purpose is proper: to assist her needy cousin. All the mechanics have been met, because of the declaration of the transfer of stock and the letter. Thus, if the court upholds the trust, Ben would be the income beneficiary of the stock.

The other heirs will argue that the gift of Mega Corp. stock to Max failed when the letter was not incorporated by reference or deemed to be a codicil or have any independent significance. They can argue that the devise was conditioned upon Max's power of appointment to distribute the stock. Max can argue that Gloria's "request" is only precatory language, and that he takes the stock outright.

D. Residue of Gloria’s Estate

The $10,000 gift to Tom will pass through to the residue of Gloria’s estate if he is unable to rebut the presumption of undue influence (as discussed above), and Seth will take this gift. Seth is also eligible to receive the $100,000 cash, and depending on whether the court upholds the devise of stock to Max, he may also receive the Mega Corp. stock. Finally, as discussed above, the house will also pass through to the residue of Gloria’s estate.

E. Intestate

If the court negates the validity of the will due to Tom's undue influence, then Gloria's estate will pass intestate.

Right of Representation

In California, the court follows the intestate distribution scheme of per capita by right of representation. The court will look to the testator's closest level of surviving relatives and relatives on the same level who left lineal descendants. Then the court will divide the estate on that level, the lineal descendants receiving the portion that their heirs would have received.

Thus, Seth would receive his 1/2 of the estate intestate, and Gail, as Dora's lineal descendant, will receive Dora's 1/2 of the estate intestate.

ANSWER TO QUESTION #10

1. Distribution of Trust Property

Hal created a trust funded with his separate property, giving himself a life income and Wanda the remainder interest. With Wanda’s death before Hal’s, the issue becomes whether Wanda’s remainder interest passes through Wanda’s estate or reverts to Hal’s estate.

At common law, if a remainder beneficiary died before the holder of the life estate, the beneficiary’s interest would lapse. Statutes in most states prevent lapse when the beneficiary is a close relative of the deceased. Under California’s anti-lapse statute, Wanda’s interest would pass to her estate if she were a blood relative. However, the anti-lapse statute does not apply to a gift to a spouse, so the remainder reverts to Hal’s estate. Upon the failure of an interest in trust, a resulting trust arises for the conveyance of such interest back to the settlor. The $200,000 of trust property thus will pass through the residuary clause of Hal’s will.

2. Distribution of Hal’s Estate
Hal’s estate will pass as follows:

Re: Article 1: $20,000 to friend Frank

Frank and Hal died simultaneously. The Simultaneous Death Act applies when a testator’s beneficiary dies at or around the same time as the testator, treating the gift as if it lapsed regardless of whom actually died first. Since Frank was a friend and not a blood relative of Hal’s, the anti-lapse statute does not apply to save Frank’s gift from lapse. This $20,000 will pass through the residuary clause of Hal’s will.

Re: Article 2: $35,000 to person named on paper dated 12/31/89

Because she was born after Hal’s will was executed and he did not republish his will after her birth, Dawn would be considered a pretermitted child and take an intestate share if she were not provided for either in the will or outside it. If Dawn is provided for in the “pink sheet” and this sheet is incorporated by reference or takes effect as a fact of independent significance, then she will not take an intestate share.

Naming a beneficiary on a separate sheet of paper raises issues of incorporation by reference. The pink paper meets the requirements for incorporation by reference because it was a writing that was in existence at the time of the making of the will in 1996, was clearly identified in the will, and the testator expressed intent to incorporate it into the will. The disposition called for in the pink paper was to Hal’s “next born child.” His next-born child was Dawn so it appears Dawn should receive $35,000 under Hal’s testamentary scheme, rather than an intestate share as a pretermitted child.

Re: Article 3: Residue to son Stan or Florence

Stan may raise the question whether the codicil changing the will to replace him with Florence as the residuary beneficiary was valid, or void for undue influence or fraud. A finding of undue influence requires that the beneficiary have abused a confidential relationship with the testator. The initial question is whether a court would find that Hal’s relationship with Florence was such that he placed in her a great deal of trust and faith. If these are the facts, and Florence used such trust to gain influence over Hal to use in her own interests rather than his, undue influence might be found, especially because she was not a natural recipient of Hal’s testamentary beneficence. However, it seems unlikely that Hal was relying heavily on Florence to help him make decisions regarding the disposition of his property. Another ground for Stan to contest the gift to Florence might be fraud, as where Florence engaged in a common practice of telling men that their sons would disappoint them in an attempt to replace the sons in their fathers’ testamentary plans. Fraud and undue influence are difficult to prove, however. Florence made a prediction of Stan’s future, not a statement of fact as would be required for a fraud action. It is not enough that Hal’s choice of a residuary beneficiary was strange or undesirable from his children’s point of view. Without more facts, it appears that the residue of the estate will pass to Florence.