



**THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION**

Area of Specialty:
APPELLATE LAW - CIVIL OR CRIMINAL



LEGAL SPECIALIST EXAMINATION

Registration & Preparation Packet
Examination Date: October 27, 2015

INTRODUCTION

This packet contains key information you will need to prepare for the legal specialist examination to be given on October 27, 2015.

For full detail, please be sure to visit the examination page as well as your legal specialty page on www.california-specialist.org.

This packet contains:

- An Action List for Examination Preparation
- Examination Specification listing topics that may be tested on the examination
- Sample essay questions from past examinations (Multiple-choice questions are not released for practice)
- A fillable examination registration form

2015 EXAMINATION ACTION LIST

Start Today:

1. Registration is in this packet and also at www.californiaspecialist.org.
 - a. Early Bird Pricing Ends **September 1, 2015**.
 - b. Registration closes **October 1, 2015**.
 - c. Choose Oakland Convention Center or Pasadena Convention Center.
2. Review this packet for an overview, and visit the examination and specific specialty pages at www.californiaspecialist.org for more details about the examination and the application you will file afterward.
3. Select the examination you plan to take – Appellate Civil Law or Appellate Criminal Law

Know the Examination:

1. Format: Four Hour Morning Session, 8 essays; Approximate 90-minute lunch; Two and One Half Hour Afternoon Session, 75 Multiple-Choice Questions.
2. Examination Topics: See attached Examination Specification for Examination Topics.
3. Examination Practice: Sample essays are enclosed for both the Civil and Criminal versions of the examination. No multiple-choice questions are released for practice.
4. If you plan to register for an optional preparation class from a commercial provider, be sure to check the schedule right away, as some courses are already underway, and all are designed to accommodate your full-time working schedule. Your specialty page at www.californiaspecialist.org will list all preparation classes reported to the Department of Legal Specialization.

Prepare for Examination Day:

Arrive with enough time to arrive by 7:00 a.m. so that you have registered, found your seat, and started your laptop your laptop computer will be on if you are using one, by the time the examination begins at 7:30 a.m.

Bring only those items allowed on the examination bulletin that will be sent to you when you register.

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APPELLATE LAW – CIVIL OR CRIMINAL
Examination Specifications**

Purpose of the Examination: The Appellate Law Examination consists of a combination of essay and multiple-choice questions. It is designed to verify the applicant’s knowledge of and proficiency in the usual legal procedures and substantive law that should be common to specialists in the field as represented by the skills listed below. We recognize that these skills are interrelated, which may require that you apply several skills in responding to a single exam question. Also, the order of the skills does not reflect their relative importance, nor does the skill sequence represent an implied order of their application in practice.

Your answers to the exam questions should reflect your ability to identify and resolve issues, apply appellate law to the facts given, and show knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. Of primary importance for the essay questions will be the quality of your analysis and explanation.

Knowledge of the following fundamental lawyering skills may be assessed:

<p>Subject Area 1: Professional Responsibility 1.1 Duties to clients, opposing counsel and the court 1.2 Bases for attorney's fees/costs 1.3 Bases for sanctions 1.4 Fee agreements 1.5 Arbitration/mediation and dual representation 1.6 Conduct resulting in malpractice/discipline 1.7 Conflicts of interest</p>	<p>Subject Area 2: Pre-Briefing 2.2 Appealability 2.3 Standing 2.4 Notice of appeal and cross appeals 2.5 Timing of notice of appeal/cross appeal 2.6 Designation and preparation of the record on appeal 2.7 Perfecting record on appeal 2.8 Stays, supersedeas, appeal bonds/bail</p>
<p>Subject Area 3: Motions 3.1 Applications, motions, and requests 3.2 Correction/augmentation of the record on appeal 3.3 Judicial notice</p>	<p>Subject Area 4: Briefing 4.1 Reviewing the record 4.2 Spotting issues 4.3 Legal research 4.4 Issue selection, strategy, and waiver 4.5 Overcoming procedural problems 4.6 Drafting and reviewing the brief 4.7 Filing and service requirements 4.8 Standard of review 4.9 Standard of prejudice</p>
<p>Subject Area 5: Post-Briefing 5.1 Supplemental briefing 5.2 Oral argument 5.3 Petitions for rehearing 5.4 Petitions for review 5.5 Remittitur and post-remittitur issues 5.6 Preservation of issues and timing for Petition for Writ of Certiorari</p>	<p>Subject Area 6: Writs 6.1 Appropriate petitions for extraordinary writs 6.2 Procedural requirements for extraordinary writs 6.3 Review of writ orders</p>

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Sample Essay Questions from Past Examinations**

These questions are actual questions from past exams. These questions were designed to be read and answered within 45 minutes, though current examination questions are designed to be read and answered in 30 minutes. No 30 minute essay questions will be released publicly.

Sample Question #1 – Civil

Dello Sporting Goods (D) is a small athletic supply store in Slotown, California. California Polyanna College (P) is a four-year college situated in Slotown and part of the California College system of fifteen other colleges throughout the state operated through a Board of Trustees. Since 1901, the general public in Slotown has referred to P as “Poly.” To show support for the local college, D has sold products such as hats, shirts and sweatshirts bearing the name “Poly” since it opened its doors in 1940.

In 1980, California College Code §101 was enacted, which provides that “no person shall use the name ‘California College’ or any abbreviation of it without the permission of the trustees of the college.” State and federal trademark law defines a trademark as a name used by a merchant or company that distinguishes its goods or services from another’s goods or services. Trademark law also provides that no person or company may use a trademark of another without the permission of the owner of the trademark. Whether a name or words is a protectable trademark is a question of fact.

In January 2003, P sued D for federal and state trademark infringement and violation of College Code §101, seeking injunctive relief under both causes of action. After filing the complaint, P brought a pretrial motion for a preliminary injunction seeking an order enjoining D from selling products bearing the name “Poly” on the ground “Poly” is an abbreviation of “California College” and protected under College Code §101. The motion was denied.

After denial of the preliminary injunction, P brought a motion for summary judgment pursuant to Code of Civil Procedure §437 (c), on the ground that “Poly” was a protectable trademark under federal and state trademark law as a matter of law because “Poly” had obtained secondary meaning in the community. P did not address the College Code because of the trial court’s initial ruling on the preliminary injunction. The trial court granted the motion for summary judgment and issued an order articulating its reasons for the ruling, specifically referring to the evidence which indicated to the trial court that no triable issue of fact existed. Judgment was entered in favor of P enjoining D from selling products bearing the name “Poly.”

D appealed. After entry of judgment but before briefs were filed, the state legislature amended College Code §101 expressly providing that “Poly” is a name protected under §101.

D argues in its opening brief that the trial court committed error in granting the motion for summary judgment because there remained a triable issue of fact as to whether the name “Poly” is a protectable trademark.

- A. Before P moves for summary judgment, does P have any appellate rights as to the denial of the motion for preliminary injunction? If so, what is the standard of review? Discuss.**
- B. Assuming D’s argument is legally correct that the trial court committed error because there remained a triable issue of fact, what argument should P make to preserve the judgment notwithstanding the trial court’s error? Discuss.**
- C. How should the Court of Appeal respond to P’s argument? Discuss.**

Sample Question #2 – Civil

As she was walking down the street on the way to work, Patty accidentally bumped into Dennis. Enraged by this indiscretion, Dennis threw a cup of hot coffee onto Patty, who staggered backward into the street where she was struck by a passing motorist, sustaining serious injuries. Patty thereafter filed a civil suit for battery against Dennis.

Following the presentation of evidence, the jury is instructed. After two days of deliberations, the jury determines that it is split 8-4 in favor of Patty. At this time, both Juror Number 1 and Juror Number 2 indicate that, based on their religious beliefs, they do not believe they can sit in judgment of another person. The judge then instructs all jurors that they are to base their decision on the evidence and the Court’s instructions alone. Juror Number 1 agrees to do so; Juror Number 2, however, indicates that she believes that she has to follow God’s law. Defense counsel moves for a mistrial, but the Court instead chooses simply to replace Juror Number 2 with Alternate Number A. Shortly after replacing Juror Number 2, the jury returns a 9-3 verdict in favor of Patty.

After the verdict but before the bifurcated trial on damages, the Jury Foreperson (Juror Number 4) informs the Court that, before the jury had deadlocked, Juror Number 3 visited the intersection where the battery allegedly occurred and told the rest of the jury panel that it was extremely unlikely that the incident could have happened as Patty testified. This issue is raised properly in Dennis’s motion for new trial, which is denied by the trial court.

At the conclusion of the case, Juror Number 4 telephones defense counsel and indicates that, during deliberations, he had done some research on the internet and found a newspaper article that said Dennis had suffered a prior conviction for assault with a deadly weapon in a highly publicized case. Juror Number 4 states that he did not share this information with the remaining jurors, but that he was not sure whether it affected his decision.

Assume a timely notice of appeal has been filed.

As to Jurors Number 1 through 4:

- A. Identify each claim of error and discuss whether each may be considered on direct appeal.**

B. Identify the appropriate standard of review. Discuss.

C. Briefly analyze whether each claim of error is likely to succeed. Discuss.

Sample Question #3 – Civil

In January 2002, Port, Inc., represented by the Pond Law Firm, sued Dandy Corporation for misappropriation of trade secrets. Dandy Corporation hired the firm of Dohr & Dohr (D&D) to represent them. D&D is a 20-lawyer “boutique,” and is the best-known firm in the area for defense of trade secret cases.

The litigation was highly contentious from the very beginning. Discovery was extensive and involved “sensitive” disclosures by both sides, with many documents exchanged in discovery under strict confidentiality conditions. A five-week trial is scheduled for January 2004.

In March 2003, D&D learned that one of their former partners, a Certified Appellate Specialist who had left the D&D firm in 2002 to open her own office, became “of counsel” to the Pond Law Firm to do their appeals. In April 2003, D&D filed a motion to disqualify the Pond Law Firm from representing Port, Inc., based on the fact that one of their former partners presently serves as an appellate lawyer for the Pond Law Firm. The superior court heard the motion in June 2003 and granted the motion.

A. What, if any, are Port, Inc.’s remedies in connection with the Pond Law Firm’s disqualification in the Court of Appeal? Discuss.

B. What, if any, ethical issues are presented by the Certified Appellate Specialist’s association with the Pond Law Firm? Discuss.

Sample Question #4 – Civil

A jury found that Dalia unlawfully sold quantine, a very dangerous chemical, to Pete, who was severely injured when he failed to take the necessary precautions to handle the material safely. Dalia appeals from the judgment, contending that the trial court erred in precluding her from presenting a defense focusing on the fact that Pete had passed the safety course necessary to become a licensed quantine hauler. When precluded from tendering the defense, Dalia’s counsel became extremely irate and ranted that the statute contemplated exactly such a defense. Defense counsel was nearly sanctioned during the tirade on how the court’s ruling was unfair, violated due process, and essentially ended the case for Dalia. Deterred by the threat of sanction, defense counsel did not renew the objection when the trial court failed to instruct on this defense. The respondent’s brief argues that it is irrelevant whether the statute so provides because Dalia’s evidence of the defense was too weak to persuade a rational jury.

Dalia also complained that the trial court erroneously barred the introduction of the quantine handling course work that Pete successfully completed. The record shows that defense counsel made an offer of proof, but sheds no light on Pete’s assertion that the trial court ruled on the basis of Evidence Code §352’s provision that cumulative evidence may be excluded.

Dalia asserts that the basis for ruling was the trial court's failure to understand the business records exception to the hearsay rule. To bolster the argument, Dalia refers to a point later in the trial in which the trial court also barred a related piece of evidence by explaining the business records exception in a clearly erroneous manner. Though the record contains the mistaken explanation, it does not reveal an offer of proof for this evidence. Since the jury deliberated for nine days, both sides admit that the case was close.

For the issues of (1) the failure to allow a defense, and (2) the exclusion of Dalia's evidence, discuss:

- A. the scope of review;**
- B. the standard of review for whether the trial court erred;**
- C. how the court will view the evidence if it finds legal error**

Sample Question #5 – Civil

Pam was the Chief Financial Officer (CFO) of Dabco. Pam retained Potter as her lawyer to sue Pam's former employer, Dabco, for wrongful termination and wrongful denial of stock options. During her two-week jury trial, Pam testified that, three years prior, when she was age 56, she had been awarded options to buy 100,000 shares of Dabco stock at \$1 per share. The options were scheduled to vest in January 2003. However, she was fired from her job in December 2002.

Pam testified that she was awarded the stock options based upon her excellent performance as CFO of Dabco: Dabco's stock had risen 47 percent in 1997, 38 percent in 1998, and 41 percent in 1999. Potter asked Pam on direct examination about Pam's age as compared to the ages of other officers of Dabco. The Court sustained defense counsel's objection based on relevance. Thereafter, Dabco's president testified, without objection, that Dabco's stock price dropped precipitously in 2001 – it dropped 63 percent. In the year 2002, Dabco stock went down another 64 percent. Dabco's president testified further, without objection, that he fired Pam because, "she was mean and nobody liked her."

In addition to standard BAJI jury instructions regarding the wrongful discharge cause of action, both sides requested special instructions regarding the wrongful deprivation of stock options cause of action. Potter and defense counsel engaged in lengthy, formal arguments to the Court over jury instructions regarding the stock options, all of which were off the record and took place in the judge's chambers. Potter argued that the "options" instructions that had been proposed by Dabco were "too long," "too complex," and "had gaps." Thereafter, the judge asked Potter, "Do you have any other objections to the stock options instructions?" Potter said he had no further objections. The judge gave all of the stock option instructions proposed by defense counsel and gave none of the instructions that had been proposed by Potter.

The jury returned a special verdict in favor of Dabco on both causes of action.

On August 20, 2003, Pam has an appointment with you, a Certified Appellate Specialist. You are aware of a new California Supreme Court decision stating that in "wrongful denial of stock option cases" the jury must be instructed in a way that does not conform with the instructions the judge had given in this case.

Pam insists that the Court erroneously allowed the Dabco president to testify about the steep drop in stock prices in 2001 and 2002 because this testimony “ruined her wrongful termination case and was irrelevant because the drop was caused by general market conditions.” Pam also claims the court erred in refusing to allow her to testify that she was older, by 15 years, than the other company officers since the crux of her case was that Dabco wanted to replace Pam with someone younger.

Advise Pam about the strengths and weaknesses of the three appellate issues she has brought to your attention:

- A. jury instructions on stock options;**
- B. evidence of the decline of stock prices;**
- C. exclusion of “age” evidence.**

Sample Question #6 – Civil

A bench trial resulted in the finding that David committed battery by throwing a baseball at Victor. Now that the notice of appeal has been filed, you have agreed to represent David on appeal. Prior to your first meeting, you have had an opportunity to review the appellate record. Your discussion with David proceeds as recounted below. (The italicized portions of the dialogue represent your notes on the appellate record and a subsequent discussion with trial counsel.)

David: I was wronged! That judge was totally biased against me. In her tone of voice. And the way she glared at me. She was out to get me!

Appellate record notes: The record suggests that the trial judge did not “like” David.

David: But that wimpy trial attorney of mine, he never did anything about all of those insulting stares or the way she overruled more of his objections than the other side’s.

You: Anything else?

David: Can you believe that Victor admitted that he had told his best friend that he was looking forward to getting rich from suing me?

You: David, I’m sorry, but the reporter’s transcript says that he answered “no” to that question by your trial attorney. I’ve read the whole record.

David: no way, that’s got to be a typo or something. He said, “yes.”

Appellate record notes: A discussion with trial counsel confirms David’s statement.

You: What I don’t understand, is why your attorney never introduced evidence that Victor’s house is too far away from the baseball field for you to have thrown a ball that far.

David: Why bother? Everyone knows that the baseball field is nearly a mile away from Victor's house where he claims to have been hit. Heck, you can see the distance from the courthouse steps!

Appellate record notes: Trial counsel explains that her investigation of the scene of the incident showed that the baseball field is two blocks from Victor's house.

You: Do you know what Dr. Goodwin was supposed to testify about?

David: Oh him. Yeah, my attorney called him to testify that Victor's injury could not have been caused by a flying baseball, but only something like a bullet. That wimp didn't put up much of a fight when the court denied the only motion made in open court. This is the story of my life, I always get wronged.

Based on the foregoing dialogue and notes:

- A. identify each appealable and non-appealable issue.**
- B. If the issue is non-appealable, explain why. If appealable, explain any steps you need to take to ensure that the appellate court can consider the issue.**
- C. Explain what others – such as the courts, clerks, and attorneys involved in the case – may need to do in response.**

Sample Question #7 – Civil

Pearl started walking four blocks home from the bus stop. She saw a sign on a telephone pole on the first block saying, "Pearl is a killer." She came upon a sign on the next pole on the next block that read "Pearl Beatrice Pearle (Pearl's full name) killed my brother." On the next block a sign said, "Pearl must die." She backtracked and tore down all the signs.

She reached home to find that someone had posted a big sign on the light post nearest her house that read, "Get Pearl. Killer Pearl lives here. Pearl Beatrice Pearle – 701-555-5555 – DIE!" She went into her house and picked up the phone to call the police. Twenty-two threatening phone messages were on her voicemail. The police came and took a "report". They said they thought this was probably some sort of prank. Pearl had her phone number changed.

Four days later, Pearl found eight "Killer Pearl" and "Die Pearl!" messages spray-painted on the City sidewalk near her house. Pearl answered her ringing phone. It was Darla, sister of Pearl's former boyfriend, David. The caller said, "Hello killer. This is Darla. You've had it." Pearl called the police again. They said they were short-staffed and needed to concentrate on more serious matters.

They told Pearl to ignore the "silly stuff."

Pearl called the City about the spray painted threats. The City said they would put this "graffiti" on their "eradication list" and would probably clean it up within the next six to nine months. Pearl bought her own can of black spray paint, which she used to spray over the threats. She

continued to do this whenever new spray paint threats appeared, and she continued to get telephone threats from Darla at home and at work.

Pearl's attorney, Larry, sought an injunction against Darla. The court denied the injunction approximately two months ago, ruling that the injunction would interfere with Darla's free speech rights. Pearl sued David and Darla for defamation, assault, and intentional infliction of emotional distress. Pearl's complaint also named the City as a defendant, asserting negligence and breaches of duty to Pearl, i.e., failing to take reports and failing to quickly eradicate spray painted threats. All defendants filed answers. David and Darla have refused to respond to discovery or appear for deposition because David is ill with cancer. In deciding Pearl's motion to compel discovery, the judge recently refused to order David and Darla to respond to any discovery or appear for deposition because of David's condition.

The City's attorney called Larry to inform him that the City is "disappointed" Pearl has sued the City. He also said the City has an ordinance prohibiting spray-painting of any kind on City property, and intends to prosecute Pearl for her "admitted" use of black spray paint on City sidewalks, but this "might be avoided if Pearl dismisses her suit against the City." Larry moved for sanctions against the City for bad faith litigation conduct, which the court just denied.

Larry has referred Pearl to Art, an appellate attorney. What actions should Art advise Pearl to take regarding:

- A. the court's refusal to issue an injunction against Darla? Discuss.**
- B. Darla and David's refusal to respond to discovery and have their depositions taken? Discuss.**
- C. imposing sanctions against the City for its litigation conduct? Discuss.**

Sample Question #8 – Civil

The Mance family own and live in a home in Mojave, California. Sandy, Inc. (Sandy) is a small private manufacturing company that conducts business a few blocks away from the Mances' home. The Mance family sued Sandy in California Superior Court for private nuisance. The Mances alleged that the smoke emitted from the smoke stacks of Sandy polluted the air space above the Mance property causing them personal injuries and property damage. Sandy denied the charges on the ground that the emissions meet federal pollution regulations and the federal pollution regulations preempt a claim for private nuisance.

At the court trial, over the Mance attorney's objections, the trial court bifurcated the case to hear evidence relating to whether the emissions met federal pollution regulations before hearing any other evidence. After hearing the evidence from the parties' experts, the trial court ruled that Sandy complied with the federal pollution regulations and that the federal pollution regulations preempted a claim for private nuisance in state court. Judgment was entered in favor of Sandy. The Mance family appealed to the California Court of Appeal. You were hired to handle the appeal on behalf of Sandy.

On today's date, the California Court of Appeal issued an opinion reversing the judgment and remanding to the trial court for further proceedings on the grounds that the federal pollution regulations are minimum standards only and do not preempt a claim for private nuisance by a private citizen in state court.

- A. If Sandy, Inc., wants to seek review in the United States Supreme Court –**
- 1. what procedural steps must be taken to appeal timely?**
 - 2. assuming all procedural steps have been properly performed, is the case ripe for review in the United States Supreme Court? Discuss.**
- B. If the California Court of Appeal issues a remittitur –**
- 1. what effect, if any, will that have on further appellate review by Sandy?**
 - 2. assuming it will have an adverse effect on further appellate review, what procedural remedies, if any, would be available to Sandy to prevent the adverse effect?**
- C. Assume the first California Court of Appeal decision became final with no further appellate review. On remand the trial court finds in favor of the Mance family and judgment is entered accordingly. Can Sandy assert on appeal from the new judgment in favor of the Mances, that compliance with federal pollution regulations preempts a claim for private nuisance? Discuss.**

Sample Question #9 – Civil

Pace filed an action against Dodd for breach of contract. Dodd filed a motion for summary judgment which was granted by the superior court. Pace has retained you to be his counsel. At the time of your retention, the clerk's transcript on appeal and reporter's transcript on appeal have been prepared and filed with the court of appeal.

In reviewing the clerk's transcript you discover that a pleading designated as part of the appellate record has not been included. In response to your inquiry, the superior court clerk advises you that the document cannot be located in the court file. The court register does not indicate that the pleading was filed. Counsel's case file contains a conformed copy of the document.

A. What steps should you take to bring this document before the court?

Pace's trial counsel informs you that on the originally scheduled hearing date for the motion for summary judgment, he presented the court clerk with a document entitled "Supplemental Declaration", which included a proposed first amended complaint which added a cause of action for fraud. At the same time, he served a copy of the document on Dodd's counsel. Just prior to the beginning of the hearing, the court clerk returned the non-conformed Supplemental Declaration to Pace's counsel and indicated that the court rejected the document because there was no such pleading as a "Supplemental Declaration." When the hearing began, the judge stated he was continuing the hearing on the motion to permit Pace's counsel the opportunity to complete the deposition of a witness. The court also ordered that there could be no hearing before any judge in the courthouse on any motion to amend the complaint prior to the continued hearing date on the motion for summary judgment. Your review of the reporter's transcript of

this hearing reveals no reference to the Supplemental Declaration or the attempt to amend the complaint.

B. What steps should you take to bring this document before the court?

In opposing the motion for summary judgment, Pace filed exhibits in support of his opposition, which included pertinent excerpts from the deposition of a Mr. Grove. Pace also lodged with the court the entire original transcript of Mr. Grove's deposition, which was returned to counsel after the ruling on the motion for summary judgment. During the course of preparing appellant's opening brief, you find that five separate pages from the excerpts which were referenced in the Response to Statement of Undisputed Material Facts and in the Memorandum of Points and Authorities in Opposition to the Motion for Summary Judgment are not included in the clerk's transcript. In reviewing counsel's conformed file copy of said exhibits, you find that the five missing pages are included. Your personal review of the superior court file reveals that the filed exhibits do not include the five missing pages.

C. What steps should you take to bring the five missing pages before the court?

Initially, Pace had filed his action in United States District Court. Dodd filed an answer to the complaint. Subsequently, Dodd filed a motion to dismiss based on lack of jurisdiction. The motion was granted and Pace filed a new action in superior court. You believe that certain statements contained in the Answer will assist Pace in his appeal.

D. What steps should you take to bring this document before the court?

Sample Question #10 – Civil

Presley and Pault are scientists and business partners who created a bio-product they sold under the name "Bioclear." In very small quantities, Bioclear breaks down harmful chemicals contained in petroleum-based materials. Approximately eight tablespoons of Bioclear, diluted with plain water, can neutralize an oil spill spreading to about one-quarter mile. That same amount of Bioclear can rid a property the size of an average gas station of petroleum contamination in the soil. Bioclear is also effective against petroleum contamination of groundwater.

The government put Charter Oil Company, the largest petroleum product distributor on the West Coast, on notice that it must clean up a large oil spill near Catalina Island and numerous gas station properties where petroleum had leaked into the groundwater and/or soil. Charter issued an "emergency" purchase order for six gallons of Bioclear at a price of \$10 million per gallon, to be delivered in one-gallon lots over a period of three months.

Presley and Pault delivered the first gallon. Charter promptly paid the amount due for that gallon: \$10 million. Charter then notified Presley and Pault that the product worked far better than expected, and they had no need for the other five gallons. Presley and Pault had already made the additional five gallons, however, and they were ready for delivery. They tried to deliver the five gallons to Charter, but Charter refused to take or pay for them.

Presley and Pault filed suit against Charter for payment of the \$50 million contract price. Charter defended vigorously. Charter filed several ultimately unsuccessful rounds of demurrers, several unsuccessful motions for summary adjudication and engaged in extensive discovery during the past two years.

During one discovery battle, Charter's lawyers filed a motion to compel responses to discovery. Presley's and Pault's attorney filed an opposition to the motion to compel quite late – in fact, on the date of the hearing. At the hearing on the motion to compel, the judge was furious that the opposition to the motion was filed so late. Sensing the judge's extreme outrage, Charter's attorney asked right then and there for terminating sanctions against Presley and Pault. The judge granted the motion and dismissed the case.

Presley and Pault fired their trial lawyer. They now wish to appeal from the dismissal. They have come to you, an appellate lawyer, and explain that they are interviewing and telling their story to the 20 top appellate lawyers in the area.

Presley and Pault explain that Presley is the "money person" and Pault is the real science genius behind Bioclear. Presley spent all of his money, and most of what he could borrow, to fund the very costly production of Bioclear and pay for the extensive trial court litigation on an hourly rate basis.

They have special needs now that the appeal is looming and they will hire the very best appellate lawyer among the 20 they interview who can meet their needs. They need to retain an appellate lawyer on a "contingency fee" basis. They are willing to pay 10% of their ultimate judgment against Charter to the appellate lawyer. In addition, they need the appellate lawyer to pay all costs during the appeal and they need the appellate lawyer to pay monthly, during the appeal only, for storage space they have rented which houses the hundreds of thousands of documents and other materials that accumulated during the two years the case was pending with the trial court. Presley and Pault explain that while the appeal is pending, they are going to do everything they can to market Bioclear to other customers, however, when the appeal and the case are over and Presley and Pault get their \$50 million (minus the \$5 million they will pay to their appellate lawyer, and some sort of contingency fee to their next trial attorneys), Presley has decided that he will leave the business altogether.

Although 80% of your appellate practice is devoted to representation of defendants, the other 20% is devoted to appeals on behalf of plaintiffs. You are intrigued with the likelihood of success of this appeal, and flattered that Presley and Pault think of you as one of the 20 top appellate lawyers in the area.

Discuss all ethical concerns you should have about undertaking representation of Presley and Pault in their appeal from the trial court's dismissal of their case, and explain how you would resolve those ethical concerns.

Sample Question #11 – Civil

Professor brought an action against Dexter College and its President, Ivory, charging age discrimination, defamation, and negligent infliction of emotional distress after being denied tenure. Professor alleged she had been defamed because Ivory told the tenure committee

Professor's teaching was "just mediocre" and Ivory did not think Professor had the mental caliber of the rest of the faculty. Professor also alleged a colleague at Dexter falsely declared to the committee that Professor copied portions of someone else's work without proper attribution in her last book; Professor alleged she complained to her department chair about that comment, but the chair did not discipline the colleague and, in fact, said he agreed with the comment.

Dexter and Ivory demurred to Professor's complaint. The court sustained each defendant's demurrer to the age discrimination claim without leave to amend for failure to exhaust administrative remedies. The court also sustained Ivory's demurrer to the defamation and negligent infliction of emotional distress causes of action without leave to amend because it found his statement was not defamatory. However, the court overruled Dexter's demurrer to defamation and negligent infliction of emotional distress causes of action, stating it found Professor's colleague's comment to be defamatory and there was a sufficient allegation of ratification by Dexter. In July 2004, the court signed and entered an order that incorporated those rulings and also stated the action against Ivory was dismissed.

In January 2005, the court entered an order granting Dexter summary adjudication on the claim for defamation but denied Dexter's motion as to negligent infliction of emotional distress.

In February 2005, the court entered an order granting discovery sanctions against Professor and Professor's counsel in the sum of \$10,000. Professor, upset because of the sanctions order, immediately dismissed her counsel.

In March 2005, upon advice of her new counsel and in order to take an immediate appeal, Professor filed a request for dismissal without prejudice as to her claim for negligent infliction of emotional distress.

In early July 2005, the court signed and entered a document entitled "Order of Dismissal" that recited that "Plaintiff Professor's action is dismissed and plaintiff is to take nothing from defendants."

In late July 2005, the court awarded Dexter costs of \$2,000, denying Professor's motion to tax costs.

Assume all orders were dully filed.

- A. Identify what issues, if any, may be raised on appeal and explain what steps need to be taken to ensure the appellate court can consider the issue.**

- B. Identify what issues, if any, the appellate court will likely not consider on appeal and explain why the court will likely not consider them.**

Sample Question #12 – Civil

Debra Deering's husband died a year ago, leaving her with their family home worth \$1.5 million with no encumbrances. The Deering's have three minor children living in the family home. Debra Deering has no other assets other than the family home; she works as a nurse earning

\$85,000 per year. Debra Deering's mother and father are financially "well off" but have never had to financially help Debra in her adult life. However, Debra and her children have a very loving relationship with her parents. At the time of Debra's husband's death, her husband was Chief Financial Officer for the XYZ Company.

Shortly after the death of her husband, Debra was sued in superior court for the County of San Francisco by the XYZ Company for allegedly conspiring with her husband to embezzle \$1.5 million

Ten days ago, a jury returned a verdict in favor of XYZ in the amount of \$1.5 million. Judgment was entered last week shortly after the verdict.

After the entry of judgment, XYZ immediately garnished Debra's wages.

Debra has retained you to determine if the judgment should be appealed, and to determine if anything can be done to stop execution on the judgment pending your opinion concerning appealable issues, and pending appeal if you agree to handle the appeal.

- A. What, if anything, can be done procedurally in the superior court or appellate court and what arguments should be made by you as appellate counsel for Debra to stop garnishment and possible execution against Debra's home pending your opinion concerning appealability? (Assume that Debra is not entitled to bankruptcy remedies.)**

- B. Assuming there are meritorious appealable issues and you are hired to handle the appeal, describe in detail the procedural avenues available to you in the superior court or appellate court to stay execution of the judgment. Discuss how Debra's financial condition and her parent's financial condition could affect these procedural avenues available to you. (Again, assume that Debra is not entitled to bankruptcy remedies.)**

- C. Twenty days after filing a Notice of Appeal on behalf of your client Debra, XYZ Company submitted a cost bill in the amount of \$50,000 to the trial court. Your client's trial attorney filed a motion to tax costs which was denied. How, if at all, does the subsequent award of costs affect the procedural avenues available to you to stay execution of the judgment?**

Sample Question #1 – Criminal

John was charged with the murder of his neighbor, Ted. At trial, testimony was presented that John and Ted argued constantly as neighbors. During their arguments, Ted often threatened serious injury to John. One morning, the two got into a heated argument over John's leaf blowing because Ted accused John of blowing leaves onto his property. During the argument, Ted yelled to John, "I've got something for you John," and went inside his house. Soon Ted returned outside with a long and shiny object in his hands. Fearing that Ted was going to kill him, John pulled a gun from his back pocket and shot Ted four times, killing him. As it turned out, Ted was holding his own new silver gas blower.

The jury was instructed on self-defense and defense of property over defense objection. During his closing argument, John's attorney argued that John acted in self-defense because of Ted's prior threats and therefore John had a right to act quicker and harsher when he saw Ted holding what looked like a rifle.

After two days of deliberations, several members of the jury told the court that they did not believe two of the jurors were properly deliberating because they failed to see reason and were too focused on Ted's prior threats rather than more important testimony. Several jurors complained that "the persons that had some doubt owed it to the others to state why they still had doubt." There were complaints that two jurors kept referring to their own personal experiences with neighbors rather than the facts. Some jurors were also upset that several members kept using their cell phones while deliberating.

Defense counsel asked the Court to inquire about the "cell phone problem," but the Court ignored counsel and told the jurors to "go back there and try and urge your positions." The Court then instructed, without objection, on her "philosophy" of deliberations. The Court instructed that it was the jury's duty to determine questions of fact based solely on the evidence presented in court, uninfluenced by passion, prejudice or pity. The Court informed the jurors that their individual backgrounds and experiences make up part of their ability to reason, but that's where it stops. The jurors returned to deliberations and reached a verdict twenty minutes later, finding John guilty of first-degree murder.

Following the trial, defense counsel later moved for a new trial arguing that the verdict had been coerced because of the Court's instruction on philosophy of deliberations and jury misconduct because some jurors used cell phones during deliberations. The motion for new trial was denied.

- A. Was there Ineffective Assistance of Counsel for arguing that the jury could acquit appellant of murder because of Ted's prior threats? Discuss.**

- B. Was the jury misconduct issue preserved for appeal? Discuss.**

- C. Should the new trial motion have been granted on the grounds of juror coercion? Discuss.**

Sample Question #2 – Criminal

Assume the legislature passed a sentencing enhancement statute stating that proof of a blood alcohol (BA) content of .10 is sufficient to presume impaired driving, and that anyone found guilty of intentionally driving with a .10 or above BA content shall be sentenced to state prison for seven years in addition to the punishment prescribed for the underlying crime.

Ryan was charged with second degree murder and drunk driving. At trial, a criminalist testified that she tested Ryan's blood and determined that the BA content was .11. Consistent with the new statute, the jury was instructed that it could presume Ryan's driving was impaired because

of the BA content. Defense counsel did not object to the instruction and stipulated that the wording of the

Instruction was correct. Counsel and told the jurors to "go back there and Counsel did request that the jury be instructed on whether Ryan intentionally drove a vehicle with a BA content of .10 or above, but the court refused the instruction.

Ryan was convicted of second degree murder and drunk driving, and was sentenced to a term of 22 years to life. The drunk driving conviction was stayed pursuant to Penal Code §654.

- A. Is a challenge to the instruction preserved for appeal? Discuss.**
- B. Is the instruction a proper presumption instruction? Discuss.**
- C. Did the trial court err in denying the request to have the jury instructed on the enhancement? Discuss.**

Sample Question #3 – Criminal

A jury found that Dalia unlawfully sold quantine, a very dangerous chemical, to Pete, who was severely injured when he failed to take the necessary precautions to handle the material safely. Dalia appeals from the judgment, contending that the trial court erred in precluding her to present a defense focusing on the fact that Pete had passed the safety course necessary to become a licensed quantine hauler. When precluded from tendering the defense, Dalia's counsel became extremely irate and ranted that the statute contemplated exactly such a defense. Defense counsel was nearly sanctioned during the tirade on how the court's ruling was unfair, violated due process, and essentially ended the case for Dalia. Deterred by the threat of sanction, defense counsel did not renew the objection when the trial court failed to instruct on this defense. The respondent's brief argues that it is irrelevant whether the statute so provides because Dalia's evidence of the defense was too weak to persuade a rational jury.

Dalia also complains that the trial court erroneously barred the introduction of the quantine handling course work that Pete successfully completed. The record shows that defense counsel made an offer of proof, but sheds no light on Pete's assertion that the trial court ruled on the basis of Evidence Code §352's provision that cumulative evidence may be excluded.

Dalia asserts that the basis for ruling was the trial court's failure to understand the business records exception to the hearsay rule. To bolster the argument, Dalia refers to a point later in the trial in which the court also barred a related piece of evidence by explaining the business records exception in a clearly erroneous manner. Though the record contains the mistaken explanation, it does not reveal an offer of proof for this evidence. Since the jury deliberated for nine days, both sides admit that the case was close.

For the issues of (1) the failure to allow a defense, and (2) the exclusion of Dalia's evidence, discuss:

A. the scope of review.

B. the standard of review for whether the trial court erred.

C. how the court will view the evidence if it finds legal error.

Sample Question #4 – Criminal

The appellate records reveal all of the following facts. Information filed in the California Superior Court charged Andy with four counts of first-degree burglary in addition to an allegation of a prior conviction for first-degree burglary.

Defense counsel filed a motion to suppress highly incriminating statements on grounds that the police violated Andy's Fourth Amendment rights by eavesdropping on cell phone conversations in which Andy bragged to his girlfriend about his prowess in committing a spree of burglaries. In support, defense counsel relied on recent Ninth Circuit case law holding that cell phone conversations – though easily monitored – carry a reasonable expectation of privacy and thus require a warrant. The Superior Court, however, denied the suppression motion on the basis of California Supreme Court precedent holding that cell phone conversations are so easily picked up by ordinary radio receivers that there is no Fourth Amendment right to privacy.

Sensing a really good legal issue, defense counsel urged Andy to plead guilty in order to raise the issue in the California Court of Appeal. When the prosecution offered a deal in which Andy would admit one burglary in exchange for dismissal of the other three charges, Andy acquiesced to the deal when it came to include a five-year prison maximum. When presented with the terms of the plea, the trial court noted that the deal was in Andy's best interest because he did not really have much of a defense if the suppression motion was not granted.

After being properly advised of his rights to a jury trial, confrontation, and against self-incrimination, Andy waived those rights and admitted the burglary and the prior conviction. At sentencing, the trial court imposed a three-year sentence for the burglary that was doubled pursuant to the Three Strikes law. Andy immediately regretted his plea and asked the superior court to hear his appeal immediately. The trial court explained that appeal was to the Court of Appeal. Andy was remanded to custody and, after several months, inquired about the appeal. Defense counsel never responded, but Andy did find out that notice of appeal had never been filed.

Andy now files a petition for writ of *habeas corpus* in the California Court of Appeal in *pro per* that complains of:

- his anger at defense counsel's failure to file a notice of appeal;
- the denial of the motion to suppress;
- the fact that no one told him that he would be deported from the United States because he is not a citizen; and
- the fact that he received more time than he bargained for.

- A. May the appellate court consider Andy's complaint about the failure to file the notice of appeal since the time to appeal has expired? Why or why not? Discuss.**

Assume for B, C, & D that the notice of appeal was timely filed and that the matter is before the Court of Appeal on direct appeal with appointed appellate counsel.

- B. Does the appellate court have power to reverse a suppression motion ruling after Andy admitted his guilt and before the California Supreme Court overrules its holding? Discuss.**

Assume for C & D that a certificate of probable cause was timely issued on the following issues:

- C. May the appellate court reverse on Andy's assertion that he would not have accepted a plea if he had known it would result in deportation? Discuss.**
- D. How should the Court of Appeal resolve the claim that Andy was sentenced to a greater term than was called for in the negotiated plea? Discuss.**

Sample Question #5 – Criminal

As she is walking down the street on the way to work, Patty accidentally bumps into Dennis. Enraged by this indiscretion, Dennis throws a cup of hot coffee onto Patty, who then staggers backwards and falls into the street where she is struck by a passing motorist, sustaining serious injuries. Dennis, thereafter, is arrested and charged with battery.

The jury is instructed following the presentation of evidence. After two days of deliberations, the jury determines that it is split 11-1 in favor of the prosecution. At this time, both Juror Number 1 and Juror Number 2 indicate that, based on their religious beliefs, they do not believe they can sit in judgment of another person. The judge then instructs all jurors that they are to base their decision on the evidence and the Court's instructions alone. Juror Number 1 agrees to do so; Juror Number 2, however, indicates that she believes that she has to follow God's law. Defense counsel moves for a mistrial, but the Court instead chooses simply to replace Juror Number 2 with Alternate Juror Number 1. Shortly after replacing Juror Number 2, the jury returns a 12-0 verdict in favor of the prosecution.

After the verdict, but before sentencing, the Jury Foreperson (Juror Number 4) informs the Court that, before the jury had deadlocked, Juror Number 3 visited the intersection where the battery allegedly occurred and told the rest of the jury panel that it was extremely unlikely that the incident could have happened as Patty testified. This issue is properly raised in defendant's motion for new trial, which is denied by the trial court.

At the conclusion of the case, Juror Number 4 telephones defense counsel and indicates that, during deliberations, he had done some research on the internet and found a newspaper article that said Dennis had suffered a prior conviction for assault with a deadly weapon in a highly

publicized case. Juror Number 4 states that he did not share this information with the remaining jurors, but that he was not sure whether it affected his decision.

Assume a timely notice of appeal has been filed.

As to Jurors Number 1 through 4:

- A. Identify each claim of error and discuss whether each may be considered on direct appeal.**

- B. Identify the appropriate standard of review. Discuss.**

- C. Briefly analyze whether each claim of error is likely to succeed. Discuss.**

Sample Question #6 – Criminal

A bench trial resulted in the finding that David committed battery by throwing a baseball at Victor. Now that the notice of appeal has been filed, you have agreed to represent David on appeal. Prior to your first meeting, you have had an opportunity to review the appellate record. Your discussion with David proceeds as recounted below. (The italicized portions of the dialogue represent your notes on the appellate record and a subsequent discussion with trial counsel.)

David: I was wronged! That judge was totally biased against me. In her tone of voice. And the way she glared at me. She was out to get me!

Appellate record notes: The record suggests that the trial judge did not "like" David.

David: But that wimpy trial attorney of mine, he never did anything about all of those insulting stares or the way she overruled more of his objections than the other side's.

You: Anything else?

David: Can you believe that Victor admitted that he had told his best friend that he was looking forward to getting rich from suing me?

You: David, I'm sorry, but the reporter's transcript says that he answered "no" to that question by your trial attorney. I've read the whole record.

David: . . . no way, that's got to be a typo or something. He said, "yes."

Appellate record notes: A discussion with trial counsel confirms David's statement.

You: What I don't understand, is why your attorney never introduced evidence that Victor's house is too far away from the baseball field for you to have thrown a ball that far.

David: Why bother? Everyone knows that the baseball field is nearly a mile away from Victor's house where he claims to have been hit. Heck, you can see the distance from the courthouse steps!

Appellate record notes: Trial counsel explains that her investigation of the scene of the incident showed that the baseball field is two blocks from Victor's house.

You: Do you know what Dr. Goodwin was supposed to testify about?

David: Oh him. Yeah, my attorney called him to testify that Victor's injury could not have been caused by a flying baseball, but only something like a bullet. That wimp didn't put up much of a fight when the court denied the only motion made in open court. This is the story of my life, I always get wronged.

Based on the foregoing dialogue and notes:

- A. Identify each appealable and non-appealable issue.**
- B. If the issue is non-appealable, explain why. If appealable, explain any steps you need to take to ensure that the appellate court can consider the issue.**
- C. Explain what others – such as the courts, clerks, and attorneys involved in the case – may need to do in response.**

Sample Question #7 – Criminal

After his wife Wendy failed to return home from a shopping trip, Hans contacted the police and filed a "Missing Person Report." In this report, Hans indicated that his devoted wife of 24 years had failed to return home unexpectedly and there was no prior history of any family problems. A very public search was commenced. However, neither Wendy nor her car was ever recovered.

As the search for Wendy continued, public scrutiny of Hans' life began to take place. Soon, it was discovered that contrary to Hans' representations about an idyllic marriage, he and Wendy had an extremely volatile relationship. To make matters worse, it was discovered that Hans was having an affair with his secretary and that he had recently increased the value of Wendy's life insurance policy.

Upon learning of the inconsistencies in Hans' story, and notwithstanding the fact that Wendy's body had never been found, the District Attorney filed a one-count complaint charging Hans with the murder of Wendy.

Contrary to his initial statements to the police, at trial Hans testified that his marriage was "stormy" and marked by occasional periods in which Wendy would leave the home for several days at a time, only to return after she had a sufficient "cooling off" period. Based on this past history, Hans argued that the prosecution had failed to carry its burden of proof because it had not been proven beyond a reasonable doubt that Wendy had, in fact, been murdered.

The jury was unmoved by Hans' defense and, following a three-week trial, convicted Hans of the murder of Wendy after deliberating for less than two hours. Hans was sentenced to 25-years-to-life.

On direct appeal, appointed counsel raised a single issue: that insufficient evidence existed to convict Hans of murder based on the fact that it had not been established that Wendy was, in fact, dead. The court of appeal confirmed the conviction, and on June 30, 2005, the California Supreme Court summarily denied Hans' Petition for Review.

Yesterday, you were contacted by Hans' elderly mother to explore the possibility of "filing another appeal" on behalf of her son. At the time she contacted you, Hans' mother explained that while she was on vacation two weeks ago, she had spotted Wendy alive and well at a Florida shopping mall.

At the mall, Hans' mother confronted the woman she believed was Wendy. The incident, which was captured on mall security video, quickly escalated to the physical. Mall security were called to the scene of the battling women and attempted to separate them, but not before Hans' mother grabbed the woman by her hair and yanked out several strands by the roots. These hair strands, as well as the mall security video, were retained by the local Florida police as evidence for a possible criminal battery charge against Hans' mother.

A. What plan of action should you propose on behalf of Hans? Discuss.

B. What procedural problems, if any, might you encounter in implementing this plan? Discuss.

Sample Question #8 – Criminal

Al went to a casino one evening where he met a woman who agreed to drive him home in her car. On the way home, he suggested they stop at a motel. When the woman said she didn't want to, Al grew terribly angry. He forced the woman to pull the car to the side of the road, where he beat her, threw her out of the car, and drove off with her purse containing \$5000.00 in cash. Police stopped to aid the woman, and found and arrested Al approximately one hour later, while he was still driving the car.

Al was charged with carjacking, robbery and assault by means of force likely to produce great bodily injury. At trial, the woman testified consistent with the foregoing facts. Al testified that the woman was a prostitute who had told him how much money she wanted, and the two had agreed to proceed to a motel. Shortly before they arrived at the motel, the woman doubled her fee. When Al told her he would not pay that much, she became irate and pulled a knife on him. According to Al, a struggle ensued, resulting in Al pushing her out of the car and driving away to escape her. Fearing potential prosecution for soliciting prostitution, Al was still driving around, contemplating what to do, when police arrested him.

The jury acquitted Al of carjacking, but convicted him of the lesser offense of violating Vehicle Code §10851 (unlawfully driving or taking a vehicle) and assault by means likely to produce great bodily injury.

Al had previously been convicted of grand theft auto in 1999. At sentencing, the trial court denied his motion to declare the instant vehicle-taking offense a misdemeanor and further denied his motion to strike his prior conviction. The court stated it did not believe this incident involved a “garden variety” vehicle taking, commenting that the offense involved great violence. The court further stated that Al left the victim particularly vulnerable, given that he drove away with her purse and left her with no means of communication or transportation. The trial court sentenced appellant to the upper term of four years for the vehicle taking and imposed a consecutive three-year sentence for the assault. The court limited Al’s pre-sentence custody credit for being convicted of a violent felony (defined as any felony in which the defendant inflicts great bodily injury on another person.)

Al filed a timely notice of appeal, and you have been appointed to represent him on appeal. You filed an opening *Wende* brief on May 15, 2004.

In light of the June 24, 2004 United States Supreme Court decision in *Blakely v. Washington*, and in light of the California Supreme Court’s recent treatment of that decision, what further actions, if any, should you take as appellate counsel?

Sample Question #9 – Criminal

Alicia Atkins was convicted of the attempted murder of Bill Brown. At trial, Brown testified that while walking through an alley at twilight someone attacked him from behind, stabbing him in the side with a knife. Brown fell forward onto the ground, the knife still in his side. He looked back over his shoulder and saw his attacker exiting the alley. Brown identified his attacker as Atkins, with whom Brown had argued several hours earlier.

Detective Cortez then testified that she had retrieved the knife with which Brown was stabbed and that it had a price tag on it. Detective Cortez traced the knife to a store near the alley. The storeowner, who testified through a Chinese translator, explained that he had sold the knife to a woman who looked like Atkins a few minutes prior to the attack on Brown.

Atkins testified that the knife was not hers, that she had not bought the knife, and that she had not attacked Brown. An expert witness testified on behalf of Atkins, concluding that, given the position of Brown when he saw his assailant exiting the alley, it would have been impossible for him to make any identification of that person.

Pursuant to the agreement of the parties, the jury was instructed that its options were to find Atkins not guilty, guilty of attempted murder, or guilty of assault with a deadly weapon.

On the second day of deliberations, one of the jurors became sick and was replaced. On the third day of deliberations, the jury passed out a note that they were hopelessly deadlocked, 11-1. The judge, over defense counsel’s objection, called out the jury and told them that if they didn’t decide this case, some other jury would have to, and there was no reason to believe that any other panel of jurors could do a better job than they. She ordered them to continue deliberating and to make every effort to reach a verdict. The jury returned its guilty verdict later that day.

After the trial, defense counsel spoke with several jurors in the hallway. Juror No. 3 told defense counsel that while the jury was discussing whether Atkins had bought the knife, one of the jurors had explained that she spoke Chinese and that the translator had done a poor job of translating the storeowners testimony. She said that although the translator said that the storeowner had testified that Atkins “looked like” the woman to whom he had sold the knife, what the storeowner had actually said was that Atkins “looked exactly like” the woman to whom he had sold the knife.

Juror No. 4 told defense counsel that when Alternate No. 1 joined the jury, the foreperson told him that they had already determined that the knife belonged to Atkins and that they were now discussing Brown’s identification of Atkins as his attacker.

Finally, Juror No. 5 explained that after Alternate No. 1 joined the jury, they conducted an experiment to see if Brown really could have identified Atkins. One of the jurors lay on the floor and looked over his shoulder at another juror who was at the other end of the jury room, the same distance as there had been between Brown and his attacker when he saw his attacker exit the alley. The juror on the floor said it was easy to identify the other juror. Another juror said that the test wasn’t accurate because there wasn’t as much light in the alley as in the jury room, so they turned off the lights and lowered the shades so that the room was almost dark. The juror on the floor said he could still identify the other juror.

Defense counsel brought a motion for new trial, supported by declarations from Jurors 3, 4, and 5, stating what they had told him following trial. The defendant’s motion for new trial was denied.

After the motion was denied, Juror No. 6 telephoned defense counsel and told him that just before the jury had reached a decision, they had been deadlocked 11-1. Juror No. 7 was holding out for a finding of guilty of assault with a deadly weapon, while the remainder wanted to find Atkins guilty of attempted murder. When Juror No. 7 suggested that they inform the judge that they were hopelessly deadlocked, the foreperson reminded Juror No. 7 of what the judge had said about another jury having to decide the case. He suggested that they flip a coin. If it was heads, they would tell the judge they couldn’t reach a verdict; if it was tails, Juror No. 7 would change her vote. Juror No. 7 agreed, the coin came up tails, and the jury reported a verdict of guilty of attempted murder.

- A. Identify each potential claim of error described above.**
- B. As to each potential claim of error identified, explain whether or not each such claim can be considered on direct appeal (as opposed to any other means of appellate review, such as petitions for writs of mandate or habeas corpus).**
- C. As to each potential claim of error that you conclude can be considered on direct appeal, state what standard of review will apply to the consideration of the claim by the appellate court, and state the standard the appellate court must follow in determining whether such an error requires reversal.**
- D. As to each potential claim of error that you conclude can be considered on direct appeal, briefly analyze whether each such claim of error is likely to succeed on appeal and whether it will cause Atkins’s conviction to be reversed.**

Sample Question #10 – Criminal

On January 1, 2003, Daryl was committed to Atascadero State Hospital for the statutory two-year period as a sexually violent predator. Prior to December 30, 2004, a civil petition was filed in superior court to extend the civil commitment period for an additional two years until December 31, 2006.

At the probable cause hearing, Daryl moved to dismiss the petition on the grounds that: (1) probable cause was lacking to support the commitment; and (2) one of his two prior convictions was not a qualifying prior conviction under the statute.

On January 31, the superior court issued its ruling, finding probable cause to hold Daryl for trial on the civil commitment petition. The court also denied the motion to dismiss after finding that the prior conviction challenged by Daryl met the requirements of the commitment statute.

After Daryl's motion to dismiss was denied on both grounds, Daryl decided that he did not want to appear for trial and executed a signed "Waiver of Appearance Declaration." In this declaration, Daryl declared that: (1) he was aware of his right to appear at all proceedings and was giving up this right; (2) he was aware of his right to a jury trial, and was giving up that right; (3) he had spoken with his attorney, and that he was requesting the waiver of his own free will; and (4) he wished to agree to a two-year extension without appearing in court.

This declaration was filed on February 15, 2005, and the court issued its order of commitment on the same day. Thereafter, on February 28, 2005, Daryl filed a notice of appeal from the denial of his motion to dismiss.

You have been appointed to represent Daryl on appeal.

Has Daryl properly perfected his appeal and any procedural impediments that may exist in this appeal? Discuss.

NOTE: for the purposes of answering this question, knowledge of substantive civil law, in general, or the Sexually Violent Predator Act, in particular, is neither required nor expected.

Sample Question #11 – Criminal

One night Austin and Berg went to a bar, had far too much to drink, and decided to challenge all other patrons in the bar to a fight. Not only did they lose, they were both arrested and charged with several felonies each. Austin's family was able to arrange bail for him and hired a private attorney to represent him. Berg was unable to make bail and the public defender was appointed to represent him. At trial, Austin testified that Berg alone had started the fight and claimed that he was only acting in self-defense once the fight started. Both men were convicted on all charges. Austin's lawyer was able to convince the judge to allow him to remain free on bail pending the appeal. Berg was transferred to state prison to begin serving his sentence.

Austin's attorney timely filed a notice of appeal on Austin's behalf. Berg told his public defender that he wanted to appeal, and his attorney explained to him what he had to do to file a notice of

appeal and to have counsel appointed to represent him on the appeal. She also told him the deadline for filing the notice of appeal.

Berg handwrote out a notice of appeal, and on the last day for filing the appeal, handed it to one of the guards at the prison, told him what it was, and asked him to have it filed. The guard took the notice and marked on the envelope the date and time he received it, however, the notice of appeal was not received by the court clerk until several days after the final deadline for filing it.

After reviewing the record on appeal, Austin's attorney was unable to find any grounds for reversal. He drafted a *Wende* brief, asking the Court of Appeal to review the record itself to determine whether any grounds for reversal exist. Berg's appointed appellate attorney came to the same conclusion and also submitted a *Wende* brief, asking that the Court conduct the same review.

Berg, after receiving a copy of the *Wende* brief from his attorney, decided that he would be better off without a lawyer. He filed a motion with the Court of Appeal requesting permission to discharge his appointed counsel and to represent himself on the appeal, and to present his own case at oral argument. The appellate court denied Berg's motion. Instead, over Berg's objection, the Court of Appeal removed Berg's appointed counsel and in his place appointed Austin's appellate attorney to represent Berg for the remainder of his appeal.

- A. The Attorney General filed a motion to dismiss Berg's appeal on the ground that it was untimely filed. How should the Court rule on the motion, and why? Discuss.**

- B. How should the Court respond to each appellant's counsel's request that it conduct its own review of the record to determine if there are any appealable issues as to that appellant, and why? Discuss.**

- C. Did the Court make the correct ruling on Berg's request to represent himself on appeal and to present his own case at oral argument? Discuss.**

- D. Did the Court exceed its authority when it removed Berg's appointed counsel and appointed Austin's appellate attorney to represent Berg for the remainder of his appeal? Discuss.**

Sample Question #12 – Criminal

While on routine patrol, Police Officer Jordan received a call of a robbery in progress at a local liquor store. When Jordan arrived, he immediately observed a man, later identified as the shopkeeper, lying on the street outside of the liquor store in a large pool of blood. Jordan approached the shopkeeper, bent down beside him and asked, "Who did this to you?" The shopkeeper looked up briefly and said " Dave." The shopkeeper then collapsed.

Officer Jordan immediately called for back up and an ambulance. After doing so, Jordan noticed that directly next to the shopkeeper, a series of letters and numbers had been written on the sidewalk in what appeared to be blood. Jordan also observed that the letters were immediately adjacent to the shopkeeper's right hand. Subsequent forensic analysis established that the

letters and numbers had, in fact, been written in the shopkeeper's own blood and that the shopkeeper had bloody residue on the index finger of his right hand.

While paramedics attended to the shopkeeper, Officer Jordan then called in a DMV check on the series of letters and numbers and learned that they matched a license plate of a vehicle registered to Dave Drexel. Jordan also learned that Dave lived within three blocks of the scene. Officer Jordan then drove to Dave's last known address. Upon arriving at the scene, Jordan saw a vehicle, with license plates matching the series of letters and numbers scrawled on the ground, parked in front of the house. Jordan then observed Dave exiting the home, carrying a large paper bag, and walking briskly toward the car. Jordan stopped Dave, and while performing a *Terry* pat-down search, discovered a .38 special handgun. Dave was then arrested without further incident, and during the course of the subsequent search incident to arrest, Jordan discovered that the paper bag contained money and checks written to the liquor store. In addition, subsequent ballistics tests confirmed that the handgun recovered matched the weapon used to shoot the shopkeeper.

After Dave was arrested, Officer Jordan returned to the scene and learned that the shopkeeper had never regained consciousness, and had died as a result of his injuries.

At trial, the prosecution introduced evidence of both the license plate and the shopkeeper's statements to Officer Jordan. The defense objected, stating that the introduction of both pieces of evidence violated the hearsay rule. In addition, the defense claimed that because it did not have the ability to confront and cross-examine the shopkeeper, the introduction of this evidence violated the defendant's right under the confrontation clause. The trial court overruled the objections. Dave was convicted as charged and has appealed.

- A. How should the appellate court rule on Dave's claim that the introduction of both pieces of evidence violated the hearsay rule? Discuss.**
- B. How should the appellate court rule on Dave's claim that his right to confront and cross-examine the shopkeeper was violated? Discuss.**
- C. Assuming the appellate court agrees the evidence was erroneously admitted, what effect, if any, would this have on Dave's conviction? Discuss.**



Application to take the Certified Legal Specialist Examination

Examination Date: October 27, 2015

Registration Deadline: October 1, 2015

You are eligible to take the examination if you have been practicing in the specialty area since January 2014. Registration with payment will guarantee your space in the test center. Registration fees are non-refundable, non-transferable, and applicable only to the October 2015 administration of the legal specialist examination.

State Bar Number: _____

We will communicate with you via your address, phone, and e-mail as provided in your "My State Bar Profile" under private contact information. To update your profile, visit www.calbar.ca.gov and log on with your State Bar username and password. For assistance with updating your profile, contact Member Services at (888)800-3400.

Examination Registrant's Name: _____

1. Subject Matter

Examination for which you are registering (Please check one box):

- | | |
|----------------------------------|---------------------------|
| Admiralty & Maritime | Family |
| Appellate – Civil | Franchise & Distribution |
| Appellate – Criminal | Immigration & Nationality |
| Bankruptcy | Legal Malpractice |
| Criminal – State | Taxation |
| Criminal – Federal | Workers' Compensation |
| Estate Planning, Trust & Probate | |

2. Test Center

Southern California (Pasadena Convention Center)

Northern California (Oakland Convention Center)

3. Choose Handwriting or Laptop/Netbook

Please read the laptop/netbook bulletin available at www.californiaspecialist.org which sets forth the requirements for using a laptop/netbook to take the examination.

I wish to take the essay portion of the examination using the following method (check one):

Handwriting

Typing on Laptop/Netbook. (Please review and sign the Release of Liability Form on page 3).

4. Payment Options

The following payment is enclosed (check one):

Enclosed Check made payable to The State Bar of California

Enclosed Money Order made payable to The State Bar of California

MasterCard or Visa (complete and sign the credit card authorization form on the last page)

5. Source

How did you learn about the legal specialization program? (check all that apply)

A colleague

State Bar Website

Information booth at conference:

Mailing or e-mail to State Bar of California
section members

California Bar Journal

Other: _____

The undersigned states:

- I am an active member of The State Bar of California.
- I understand that the examination is the first step in the certification process and that if I am successful on the examination, I will be required to file an application for certification with the appropriate fee demonstrating compliance with all other requirements of the legal specialization program, including education, tasks and experience, and recommendations, on or before April 27, 2017 before my application can be considered by the California Board of Legal Specialization.
- I am aware that the requirements for becoming a certified specialist are set forth in the Rules and Standards available at www.californiaspecialist.org and that the California Board of Legal Specialization recommends that I review these rules prior to applying to be sure that I can meet the requirements by January 31, 2019, if I have not fulfilled these requirements prior to taking the examination. After that date, the examination results will no longer be valid and I will need to take the examination again to continue with the recertification process.
- I understand that the program is self-funded, and, if certified, I will be required to pay an annual fee and to recertify every five years, though I will not need to take the examination again.
- I understand that any and all fees related to this examination are non-refundable, non-transferrable, and applicable only to the 2015 Legal Specialization examination and not any future examination.
- I understand that failure to make a truthful disclosure of any fact or item of information required may result in denial of my registration, revocation of my certificate of specialization, if granted, or referral to disciplinary investigation by The State Bar of California.

I have carefully read the foregoing and declare, under penalty of perjury under the laws of The State of California, that the information I have provided is true and correct.

Executed on _____ at _____, California
(Date) (City and/or County)

Signature _____

(Please print and manually sign this document or use Adobe's e-signature function.)

Before mailing, please check to see if you have:

- 1) Answered all questions.
- 2) Signed this registration application and if you plan to use a laptop, the Release of Liability.
- 3) Enclosed payment or filled in the attached credit card authorization form.

Mail or fax application and payment to:

Mail: Department of Legal Specialization
The State Bar of California
180 Howard Street
San Francisco, CA 94105

-or-

Fax (with Credit Card Payment Page):
415-538-2180.

You will receive an e-mail confirmation and receipt when your application has been processed.

THANK YOU!

CALIFORNIA BOARD OF LEGAL SPECIALIZATION

OF THE STATE BAR OF CALIFORNIA

180 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105-2120
TELEPHONE: (415) 538-2120
FAX: (415) 538-2180
E-MAIL: legalspec@calbar.ca.gov
WEBSITE: www.californiaspecialist.org



RELEASE OF LIABILITY – LAPTOP COMPUTER PROGRAM

I, _____, acknowledge that the California Board of Legal Specialization of the State Bar of California (Board) is allowing examination applicants to use personal laptop computers with pre-installed SofTest software from ExamSoft (Software) to take examinations administered by the Board. I understand that the use of personal laptop computers is offered by the State Bar of California (State Bar) as a convenience to me and that the State Bar does not warrant or guarantee said Software. I agree to bear sole responsibility for the use of said Software and I hereby release the State Bar (its Board of Trustees, officers, agents, representatives and employees, as the same may be constituted now and from time to time hereafter), including the Board, from all liability, claims, damages, or demands for personal injury or property damage, arising from or related to my use of a personal laptop computer during the examination. I further acknowledge that the State Bar does not warrant or guarantee the Software nor does it accept any liability in the event there is a technical or mechanical failure of the personal laptop computer and all associated equipment, Software and/or associated materials during administration of an examination, the uploading of my examination answers, or in the printing of my examination answers.

I will accept the use of SofTest under the provisions of the ExamSoft click license at the ExamSoft website and agree to be bound by its terms and conditions. By my election to use a personal laptop computer to take an examination administered by the Board, I also agree to begin or continue the examination by handwriting in the event there is any malfunction, or issue with access to, the computer, Software, electrical system or such other items associated with administration of the examination; and, understand I will not receive a refund of the fees I paid to use my laptop computer if any of these events should occur. I agree: 1) that I will exit the exam file upon the conclusion of each examination session; 2) that I will not attempt to access my exam file(s) following the examination for the purpose of altering my answers; 3) that I will upload the exam file(s) that contain the examination answers, which I completed during the examination, by the published deadline; 4) that a deduction of ten scaled points will be taken from my total written scaled score if I fail to upload my answer file(s) by the published deadline and, 5) that I will receive a grade of zero (0) for each answer not uploaded timely if I fail to upload my answer file(s) within two (2) weeks of the published deadline.

Date of Examination Administration: October 2015 Legal Specialist Examination

Bar Number: _____

Applicant Name (please print): _____

Applicant Signature: _____

(Please print and manually sign this document)

Date: _____

**The State Bar of California
Board of Legal Specialization
Legal Specialist Examination
Payment Page**

Bar Number: _____

Name: _____

**Legal Specialization Examination Fees if valid payment is received between
September 2, 2015 and October 1, 2015: (please select one)**

\$600 - Examination registration without laptop fee

\$750 - Examination registration with laptop fee (applies to Registrants who wish to type the essay portion of the exam on their laptop/notebook rather than handwrite answers)

Payment Options:

Check made payable to The State Bar of California

Credit Card – Complete and return Credit Card Authorization below

Credit Card Authorization:

Visa

MasterCard

Only Visa and MasterCard credit cards are accepted.

Credit Card Number: _____

Expiration Date (Month/Year): _____

Name on Card: _____

Billing Address: _____

City: _____ State: _____ Zip: _____

Signature: _____ Date: _____

(Please print and manually sign this document)

By my signature on this document, I hereby authorize The State Bar of California to charge my Visa or MasterCard account for the amount that I have entered in the "total" box above. Registration fees are non-refundable, non-transferable, and applicable only to the Legal Specialist Examination to be administered in October 2015.