

WILL

Simultaneous Death

For purpose of intestate succession, if it cannot be established by clear and convincing evidence that a person survived the decedent by **120 days**, it is deemed that the person failed to survive the decedent.

If title to property depends upon the priority of death of two or more persons, and it cannot be established by clear and convincing evidence that one survived the other, the property of each person will be treated as if that person had survived the other. (Exception: husband & wife, joint tenants, certain beneficiaries)

Disclaimers (相続放棄)

The disclaimer must: (i) be in **writing**, (ii) be **signed** by the disclaimant, (iii) **identify the decedent**, (iv) **describe the interest** being disclaimed, and (v) **state that there is a disclaimer** and the extent of it.

The disclaimer must be filed **within a reasonable time** after the heir or beneficiary learns of the interest.

Posthumous Relatives: 死亡前に受精、死亡後に出産の場合 <3要件> (mini P4)

Adoption severs the parent-child relationship for inheritance purposes unless:

- (i) the natural parents and adopted person live together at any time as parent and child; AND
- (ii) the adoption was by a spouse of either natural parent of the adopted person, or after the death of either natural parent.

Presumption of "Relationship to Father": Californiaのみ。父子関係の推定<3場合> (mini P5)

Capability of Will: Individual **18 years of age or older** who is of **sound mind** may make a will.

Formal (Attested) Will

- (i) in **writing**
- (ii) be **signed by the testator** (or by another person in his presence and at his direction)
- (iii) the testator's signing or acknowledgment of his signature or in the **joint presence of at least two witnesses** who sign the instrument during the testator's lifetime;
*In California, 2009/1/1以降の死亡は、**intent**を"**clearly convincing**"に立証すればOK!!

(iv) the **witness must understand** that the instrument being witnessed is the testator's will

In California, unless there are at least two other disinterested subscribing witness, the fact that a will makes a devise to a subscribing interested witness creates a **presumption** that the witness procured the devise by duress, menace fraud, or undue influence. (<注>この**presumption**はCommon Lawには存在しない!!)

If the witness fails to rebut the presumption, the witness gets proportion within the intestate share.

Undue Influence: The will may fail in whole or in part because of undue influence. (Fraudもrevokeされる)

Undue influence is mental or physical coercion that deprives the testator of his will, causing him to substitute another person's desire for that of his own. Undue influence requires that:

- (i) the testator was **susceptible** to undue influence.
- (ii) the person who committed the undue influence had the **opportunity** to exercise it.
- (iii) such person had the **disposition** on influence the testator for the purpose of personal benefit
- (iv) the provisions of the will appear to be **unnatural** and the result of such influence

Holographic Will is permitted in California if the **signature** and **material provisions** of the will are in the testator's own handwriting. Handwritten changes made by the testator to a holographic will after the will is completed are given effect. (By contrast, changes made after the execution of an attested will are not given effect, and in fact may work a revocation.)

Revocation of Will (<注>:codicilのrevokeは、Will本体のrevokeにならない。)

- (i) **Written Instrument**: late will or codicil executed with the formalities, inconsistent second will
- (ii) **Physical Act**: burned, torn, canceled, obliterated. In California, a will can be revoked in part.
- (iii) **Operation of law**:

(a) **Pretermitted Spouse**: Gifts abated to make up permitted spouse's intestate share
<Exception> (A) "pretermitted" was intentionally and the intent appears on the face of the will
(B) the spouse was provided by a transfer outside the will or revocable trust and the intent that the transfer was in lieu of will is shown (extrinsic evidence is OK)
(C) the spouse made a valid agreement waving the right to share.

(b) **Pretermitted Children**: Gifts abated to make up permitted children's intestate share
<Exception> (A) Same, (B) Same, (C) the decedent devised substantially all of the estate to the other parent of the pretermitted (omitted) child. (the other parent should survive the decedent)

(c) **Dissolution or annulment of marriage**: All provisions in favor of former spouse are revoked

Dependent Relative Revocation (“DRR”)

The doctrine of DRR applies **when** the testator revokes his will upon the mistaken belief that another disposition of the property is effective, and **but for this mistake would not have revoked the will.**

＜注＞2nd Willが適切にexecuteされなかった場合、DRRは適用されない。（1st Willが残る）

Unfound Will

Executeしたwillが死亡時に見つからない場合、revokeされたと推定する。

Revokeされていない限り、extrinsic evidenceによりprobateすることも可能である。

Revival of Revoked Will

1st Will をrevokeした2nd Willをrevokeした場合、

*Common lawでは、当然に1stWillが復活する!!

*In California, 1stWillを復活させるintentを立証する必要あり（当然には復活しない。）

⇒ physical actの場合は、extrinsic evidence OK / 3rd Willの場合はextrinsic evidence NG

Specific Bequest <Ademption (遺贈取消)>: 密接な関係の具体例＋例外(mini P24)

*Under the Common Law, Specific bequest is adeemed if the specific property given is not part of the testator's estate at the time of death.

*In California, ademption is dependent upon the testator's intent to adeem at the time that he disposes of the specific property.

Component of Will (4つの方法が全て不適用でも、beneficiaryは”Secret Trust”を主張できる!!)

1. Integration: All papers **actually present at execution** are integrated into the will if the testator intended the papers to be a single will.
2. Codicil: must be executed with the same formalities as a will
3. Incorporation by Reference: Any separate document may be incorporated into the will by reference if the document is in existence at the date of the will.
In California, documents which were not in existence at the date of the will may be integrated if:
(i) An unrevoked will **refers** to the writing
(ii) The writing is **dated** and is either in the **testator's handwriting or signed** by the testator; AND
(iii) The writing **describes the items and the recipients with reasonable certainty.**
4. Act of Independent Significance: “Blanks” in a will can be filled in by referring to acts or documents which have **no sufficient significance apart from its impact on the will.**

Revocable Inter Vivos Trust

In California, a trust is valid even if the settlor is the sole trustee and sole beneficiary during the settlor's lifetime, as long as the trust provides for successor beneficiaries following the settlor's death.

Surviving Spouse's Waiver of Rights

1. **SOF**: Fully disclose of the financial status、Independent legal counsel、Not unconscionableが必要。
2. Consideration不要。Minorは結婚するまで放棄不可。
3. Waiverの変更、修正、取消は、written agreement signed by each spouse, prospective spouseが必要。
4. Waiver後も、自らのCommunity Property(CP)まで移転するWillはrevoke可能。

Satisfaction of Legacy by Inter Vivos Gift: In California, there is no satisfaction unless the testator's intent is expressed in a contemporaneous writing signed by either the testator or the donee.

Anti-Lapse Statutes

When a beneficiary dies after the testator executes his will but before the testator dies, the gift to the beneficiary lapses. (If the beneficiary is dead at the time the will is executed, the gift is void.)

In California, the anti-lapse statute applies only if the devisee who predeceased the testator was kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

⇒future interestが複数人に遺贈される場合、一人が先に死亡したら残りの者が受贈する。但し、Anti-Lapse Statuteが適用されると、代襲相続する。

The anti-lapse statute does not apply if the will expresses a contrary intention or substitute disposition.

* Under California law, an out-of-state will is valid if executed under the law of the state where the will was executed.

TRUST

A **trust** is fiduciary relationship with respect to specific property (res) wherein the trustee holds legal title to the property subject to enforceable rights of the beneficiary.

Elements of Valid Private Trust (Discretionary Trust, Mandatory Trustの両方に対応する。)

1. **Intent** to create a trust (manifested by settlor's words, writing, or conduct) (of **Settlor**)
2. **Trustee** (inter vivos trusts only; a testamentary trust will not fail for lack of a trustee)
3. **Trust property (+ Delivery)**
4. **Definite beneficiary** (唯一のtrustee兼beneficiaryは×)
5. **Valid trust purpose** (not illegal, tortuous, or against public policy)

Secret Trust: Where a will makes a gift that is absolute on its face, but was in fact made in reliance on the beneficiary's promise to hold the property in trust for another, the intent trust beneficiary may present extrinsic evidence of the promise. (**Constructive Trust**) *beneficiaryが立証に失敗すると、heirがsemi-secret trustを得る。

Semi-Secret Trust: ...fails to name the beneficiary. **Resulting Trust** for the testator's heirs.

Charitable Trust: (1)indefinite beneficiary, (2)perpetual, (3)cypress doctrine (as near as possible)

Honorary Trust: commonly established for the benefit of pets or for the maintenance of burial places.

*Void on the basis of Rule Against Perpetual (RAP), if its duration may be more than a (human) life in being plus 21years. Under the Uniform Trust Code (UTC), honorary trusts are enforceable up to 21 years.

Spendthrift Trust: the beneficiary is precluded from voluntarily or involuntarily transfer his interest, and his creditors are precluded from reaching it to satisfy their claims. (to protect the beneficiary from his own improvidence)

Modification and Termination of Trusts

1. **By its own terms**: upon the expiration of the term or when all of the purposes of the trust have been accomplished
2. **Power of settlor to revoke or modify**: Under the UTC, a trust is presumed revocable unless expressly provided otherwise.
3. **By Agreement of Beneficiaries**: (1)All beneficiaries consent, (2)Not frustrate any material purpose (ex/spendthrift, support)
4. **Judicial Power**: impossible, illegal, has been completed, "Doctrines of Changed Circumstances"(California)

Uniform Principal and Income Act ("UPAIA"): gives the trustee or personal representative an adjustment power to **reallocate** investment portfolio return. This adjustment power authorizes the trustee deems it appropriate or necessary to carry out the trust purposes. (traditionalの扱いを先に検討する!!)

- (1) Necessary to carry out the trust purpose
- (2) (the allocation is) fair
- (3) (the allocation is) reasonable to all beneficiaries

Pour-Over Gift from Will to Revocable (In Vivos) Trust

A pour-over trust results where the testator adds or "pours" his estate into an inter vivos trust.

While such trust violate the requirement that the trust res be immediately delivered to the trustee, courts have sustained such trusts on two theories; (1)incorporation by reference and (2)independent significance

Under the Uniform Testamentary Additions to Trust Act (UTATA), a settlor can make gifts by will to a trust – even an amendable and revocable trust – established during his lifetime. (3要件)

- (1) The trust must have been **established before or at the same time as the will**.
- (2) The trust may remain **unfunded** during the settlor's lifetime.
- (3) The trust must be **clearly identified** from language **in the will**.

Resulting Trusts – When will they be implied?

1. **Purchase Money Resulting Trusts**: Yがtitle取得時まで、Xが代金を支払った場合 (例外: 親族、違法目的)
2. **Resulting Trust on Failure of Express Trust**: (1)the trust is void or unenforceable, (2)the beneficiary is dead
3. **Resulting Trust Implied from Excess Corpus**: when trust purpose is fully satisfied and some property remains

Constructive Trusts (mini P22) RemedyのOutline参照: The constructive trustee's only duty is to convey the property to the person who would have owned it but for the wrongful conduct

Totten Trust Bank Accounts: A bank account depositor declares himself trustee of the account for a person who is to receive the money in the account at the time of the depositor's death. The depositor retains full control of the money in the account during his lifetime. Revocable by (1)withdrawal, (2)lifetime act, (3)in a will.

Trustee's Liability: A trustee **may not offset** losses by profits if the breaches are separate and distinct.

Co-Trustee's Liability

A trustee is liable for acts of a co-trustee if: (1)approve, (2)conceal the breach, or (3)improperly delegate

Exculpatory Clauses <免責条項>: is strictly construed, but are enforceable where (1)no bad faith etc. and (2) they were not inserted as a result of the trustee's abuse of a confidential relationship with the settler. However, clauses absolving the trustee from all liability are void.

★Duties of Trustee (mini P11) 「一覧表」参照

Duty of Care: A trustee must exercise that degree of care that a **reasonable prudent person** would exercise in managing her own property. (ex) ***Duty to property diversify investments, *Duty not to speculate**

Duty to Preserve Trust Property: Implied in the duty to preserve the trust property is a duty to **make the property productive** and to invest with reasonable care. (cf. non-interest account)

Duty to Account to Beneficiaries:

DUTIES OF THE TRUSTEE			
Duties	Definition	Examples of Breach	Remedy
☆ Loyalty (Duty of Accountを含む)	Trustee cannot represent both her personal interest and the interest of the trust; i.e., no self-dealing	Buying or selling trust assets for self or another trust; borrowing from or making loans to trust; personal gain through position as trustee; etc.	Beneficiary may recover any profit from trustee, affirm the transaction, or set aside the transaction
○ Separate and Earmark Property	Trust assets must be kept physically separate from trustee's personal assets and assets of other trusts; i.e., no commingling ※混合した上の一部消滅の場合、Trusteeの損失を消滅したと相定する。	Placing personal and trust funds in same account	Trustee is liable for any resulting loss; property lost or destroyed is presumed trustee's, and any increase in value in commingled property belongs to trust
○ Perform Personally	Trustee must personally perform functions that a reasonably prudent person would not delegate	Delegation of entire administration of trust	Trustee is liable for the amount of actual loss to trust
☆ Preserve and Make Trust Property Productive ※自己執行が不合理な場合は、部分的に委任OK。 ex) 投資利配は、委任OK。	Trustee must use reasonable care to invest the property (prudent investor rule), collect claims due, lease or manage land, record documents, pay taxes, and secure insurance	Failure to diversify in making investments; failure to obtain reasonable yield on investments; failure to promptly review investments; failure to insure property; etc.	Trustee is liable for losses resulting from breach and for any profit that would have accrued to the trust but for the breach, plus interest ※Trusteeが自己のコントロールを不当に制限すると、保証人となる

COMMUNITY PROPERTY

Because W and H were married and domiciled in California, California community property law principles apply.

In California, all property acquired during marriage is community property (CP), while property acquired before marriage or after permanent separation, or by gift or inheritance, is separate property (SP).

The characterization of an asset as CP or SP depends on three factors: (1) **source** of the item, (2) **actions** of the parties that may have altered the character of the item, and (3) any statutory **presumptions** affecting the item.

Quasi-Community Property (QCP) is property acquired by either spouse that would have been CP if the spouse had been domiciled in California at the time of the acquisition. During marriage, QCP is treated as the acquiring spouse's SP.

*For purpose of **creditors' rights**, and **at divorce**, QCP is treated as though it were CP.

***At death**, the survivor spouse has a **one-half interest in decedent's quasi-CP**. 子供は相続なし

Putative Spouses (QMP) *婚姻状態にない事実を認識するまで。

H and W were never legally married. A putative spouse is one that has a good faith belief that he or she is lawfully married. It is objectively reasonable for W to believe that she was married to H because... Therefore, W would be treated as a putative spouse.

In California, a putative spouse is treated as a legal spouse and takes according to quasi-marital property (QMP) principles. Under QMP laws, all property acquired during the putative marriage is QMP, while property acquired before the putative marriage or after permanent separation, or by gift or inheritance, is separate property (SP).

The characterization of an asset as QMP or SP depends on three factors: (1)(2)(3).

When one partner is a good-faith putative spouse but the other knows of the defect in the attempting marriage, the California Supreme Court suggested treating them equally.

Antenuptial Agreement

H and W orally agreed before marriage that

To be valid, an antenuptial agreement made before marriage must be in writing.

An oral antenuptial agreement is valid only where the executed promise was fully executed by the promisor or the promisee detrimentally relied upon the agreement. (H and W's agreement was not fully executed because W placed the fund in an account in her name only.)

1. **Source** SP inheritance, gift CP earning

2. **Actions**

Form of Title: "H and W, as joint tenants with the right of survivorship" ⇒ 1/2 undivided SP
(The form of title will rebut the general presumption that all property acquired during marriage is CP.)

Transmutation: After January 1, 1985, transmutation must be in writing that is signed or accepted by the spouse whose interest is adversely affected. (Giftの主張と関係するが、Giftは殆ど認められない。)

Jointly Titled Bank Account: the Probate Code refuses to make any gift presumption from the form of title held on a commingled bank account and allows full tracing of separate funds unless the parties have agreed otherwise.

Community Labor Enhances Value of SP Business:

Under ***Pereira*** accounting method, in which the increased value of a business is due to the managing spouse's labor, the SP investment is given a reasonable return (10%/year) and the remainder is deemed CP.

Under the ***Van Camp*** accounting method, in which the increased value is due to the character of the business, the community receives a fair market salary less any family expenses already paid and the remainder is SP.

Presumptions

All Property Held in Joint Form is Presumptively CP: ,at divorce, can only be overcome by a collateral written agreement providing that the property is 1/2 Undivided SP for each (Lucas case, 1987 statutory scheme)

However, under the anti-Lucas statutes, a spouse who deeds SP into jointly titled property is entitled to a right of reimbursement for the fair market value of the house at the time it was deeded into jointly tenancy.

All Property Acquired During Marriage is CP: (上記・大原則)

Married Woman's Special Presumption: property acquired by a married woman prior to January 1 1975, by an instrument in writing is presumed to be her SP unless a different intention is expressed in the instrument.

3. Others

Two valuation techniques for Goodwill:

market sales valuation is the price the goodwill would command in a sale of the business or professional practice.
capitalization of past excess earnings ascertains the present value of the future stream of income that the goodwill developed during the marriage will generate in the business or professional practice.

Creditor's right: Debtor's SP & CP / <Necessaries> during marriage, the other spouse's SP is liable for the debt.
⇒Bank accounts in the name of a married person is held harmless against all claims by the depositor's spouse.
/ For purpose of creditor's right, QCP is treated as though it were CP. ⇒ (Debtor's) SP should be exhausted first before CP

Management: Both spouses must join in executing any instrument by which community real property is sold.
⇒One year statute of limitation(SOL). 未同意の配偶者は取消OK。代金返還義務。BFPは保護される。

Education: 原則として、reimburse / (Law Degree: is not a divisible asset subject to CP laws.)

⇒<例外>①CP増加に貢献した(10年が目安)、②他方配偶者もeducationを受けた、③spouse supportが減額された。

CPによるSPに付着したMortgageの支払い: CPが割合的取得

CPによるSPに付着したLienの支払い: reimburse

Designation of third-party insurance beneficiary: A community-funded life insurance policy is CP.

⇒Third party beneficiaryが配偶者以外の者であっても、1/2を取得する。

Survivor's Duty to Elect: WillがCPの1/2を超える場合は、生存配偶者は、WILL又はCPの1/2を選択できる。

CP & SP passed by intestacy:

CP: 100%配偶者が取得する。

SP: (i) 配偶者以外に承継者(issue)無し ⇒配偶者ALL
(ii) 配偶者以外に子供 1 人or両親 ⇒配偶者1/2
(iii)配偶者以外に子供 2 人 ⇒配偶者1/3

CMR SUMMARY CHART METHODS OF APPORTIONING BUSINESS PROFITS		CMR SUMMARY CHART CHARACTERIZATION OF PROPERTY THAT IS DIFFICULT TO CLASSIFY	
Fact Situation: H owned and managed a business valued at \$100,000 at the time H married W. The marriage lasted 10 years. At the time of divorce, the business was worth \$400,000.		Type	Characterization
Van Camp Accounting <i>valuable company or asset</i> (use if the character of the business was the primary cause of its growth)		Business Goodwill	CP
Pereira Accounting <i>personal skill/effort</i> (use if H's management was the primary cause of the business's growth)		Disability Pay	CP (to extent replacing marital earnings)
Value of H's services (\$30,000/yr.) \$300,000		Education	Not CP (but right of reimbursement under certain circumstances)
Less family expenses paid from business earnings (\$20,000/yr.) - \$200,000		Life Insurance Proceeds	Apportioned CP (with exceptions)
Equals CP \$100,000		Pensions In General	Apportioned CP
Reasonable rate of return (10%/yr.) \$100,000		Pensions Through Federal Government	See Federal Aspects chart, <i>infra</i> , X.
Plus original principal + \$100,000		SP Property Insurance Proceeds	SP (but right of reimbursement for premiums paid from CP)
Equals H's SP interest \$200,000		Severance Pay	Generally treated like disability pay
Remaining \$300,000 of business's value is H's SP.		Stock Options	Apportioned CP
Remaining \$200,000 of business's value is CP.		Tort Recovery Against Third Party	CP if cause of action arose during marriage (note divorce exception)
		Tort Recovery Against Spouse	SP

CIVIL PROCEDURE

Personal Jurisdiction Over D (company) <barbri Q2の参考答案がGood!!> (*Waive可能 ⇒ 適時に主張すべき)

This issue is whether the State X court has personal jurisdiction over D. Personal jurisdiction refers to the ability of a court to exercise power over a particular defendant.

Statutory Limitation

(1)Physical presence at time of personal service, (2)Domicile, (3)Consent

(4)Long Arm Statute: Under the statute, jurisdiction is proper so long as it is constitutional.

Constitutional Limitation

Jurisdiction is constitutional when sufficient minimum contacts exist between the defendant and the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. This standard requires two hurdles to be cleared: minimum contacts and fairness.

Minimum Contacts

In considering whether minimum contacts exist, the court will look at two factors: purposeful availment and foreseeability. ⇒ “balancing test”

Purposeful availment

Foreseeability

Fairness of Exercising Jurisdiction over D

To assess fairness, a court will look at (1)...,(2)..., and(3)....

Relatedness of Claim to Contact

Convenience

Forum State’s Interest

Subject Matter Jurisdiction (*Federal Courtの問題) / (*Waive不可能 ⇒ appeal後も主張可能)

Diversity of citizenship:

(i) Complete diversity (*Corporation – principle & incorporated)

(ii)Good faith allegation of over \$75k (counterと加算不可) (can aggregate claims only if Ds are jointly liable)

Federal question jurisdiction

Supplemental Jurisdiction: A federal court has discretion to hear a state claim if the federal and the state claim derive from a common nucleus of operative fact. But, it cannot get supplemental jurisdiction if plaintiff asserts a claim attempting to overcome lack of diversity. (cf. cross-claim, counterclaimも同一の基準で判断する)
*ABの訴訟中において、B(third-party plaintiff)がC(third-party defendant)を訴える場合、AC間に主張関係が無ければ、AB間及びBC間にdiversityがあればOK!! (A及びCが同一州在住でもOK) (Supplemental Jurisdiction不要)

Change of Venue (any D resides, events occurred, or in diversity case, where any D is subject to personal jurisdiction)

Even though venue is proper in a particular district, under the FRCP, an action may be transferred to another district where the action “might have been brought.” (⇒管轄チェック)

Transfer is permitted when the parties or witness would be greatly inconvenienced by the trial in the original forum. (consider “Public Factors” and “Private Factors”) (⇒“Forum Non-Convenience”も同じ)

“Public Factors” :what law applies, what community should be burdened by jury service

”Private Factors”:convenience ... where witnesses/evidence are

Remove: A defendant may remove an action that could have originally been brought by plaintiff in the federal court.

Remand: A plaintiff can file a motion to have the case remanded back to state court. (e.g. No federal SMJ)

Erie Doctrine

A federal court exercising diversity jurisdiction is required to apply the substantial law of the state in which it is sitting but apply federal procedural law. (However, a federal court rule will not be applied in diversity cases when its effect would toll a state statute of limitations.)

Relate Back Doctrine

Amendments relate back to the date that the original pleading was filed if

(i) the amendment concerns the **same conduct**, transaction or occurrence as the original pleading

(ii)**within 120 days** after filing the complaint

(iii)the **new party knew** that, but for mistake, she would have been named originally.

Compulsory Counterclaim Rule (called compulsory “cross-complaint” in California)

Under both the FRCP and California law, D will be barred from asserting his claim.

The compulsory counterclaim rule requires a defending party to assert any claims against the plaintiff arising out of the same transaction or occurrence as plaintiff’s claim.

Class Action (Court must determine at an early practicable time whether ...) / (Class不適當の判断はat any time)

- (1) **Numerosity** – too many class members for practicable joinder
- (2) **Commonality** – some questions of law or fact are common to class
- (3) **Typicality** – representative's claims/defenses typical of those of the class, AND
- (4) **Representative is fairly and adequate** for the class
+ one of the following three situations is present:
 - (i) risk of inconsistent result
 - (ii) injunctive or declaratory relief is appropriate for the class as a whole
 - (iii) Common questions predominate over individual questions (e.g. mass tort)

Compulsory Joinder (joint tortfeasor subject to joint and several liability is not a person needed for just adjudication)

- (1) **complete relief cannot be given to the existing parties** in his absence;
- (2) disposition in his absence may **impair his duty to protect his interest** in the controversy; or
- (3) his absence would expose existing parties to a substantial **risk of double or inconsistent obligations**

Permissive Intervention: Permissive Intervention is available when the applicant's claim or defense and the main action have a **common question of law or fact** and joinder will **not destroy complete diversity**.

Discovery of Third Party's Record (scope)

Discovery may be had of any non-privileged matter that is relevant to any party's claim or defense. (...the maintenance records are relevant to show whether the machine had malfunctioned in the past.)
(P should serve a **subpoena** on the third party to produce the records. P should include a declaration that explains why the records are relevant to the action. If the third party refuses to provide the records, P can ask the court to hold the third party in contempt of court.)

Order to Compel Physical and Mental Examination of Plaintiff

The Federal Rules of Civil Procedure (FRCP) provide for an independent physical and mental examination of a party when the party's physical or mental condition is in controversy.

Right to Jury Trial (the Seventh Amendment)

The Seventh Amendment preserves the right to a jury trial in federal courts in all "suits of common law" where the amount in controversy exceeds \$20. Where damages are claimed as part of an action seeking an injunction, a jury trial cannot be denied on the damages issue.

Where legal and equitable claims are joined in one action involving common fact issues, the legal claim should be tried first to the jury before the equitable claims are determined by the judge. (Californiaは逆!!)

Res Judicata (既判力)

- (1) the earlier judgment is **valid, final, and on the merits**
- (2) the cases are brought by **the same claimant against the same defendant**
- (3) the **same cause of action** (or claim) is involved in the prior action (*異なる争点もOK)
- (4) the cause of action was **actually litigated or could have been litigated** in the prior action

In California state court, a judgment is not considered final until the conclusion of any possible appeals.

"cause of action" (新訴訟物理論)

California state courts have adopted "**primary rights doctrine**," under which a cause of action is defined as an invasion a single primary right. ex)同一事故に起因する身体損害と財産損害はsame cause of action

A summary judgment is **final** because it is granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

Collateral Estoppel (争点効)

Under the doctrine of collateral estoppels, judgment for the plaintiff or defendant is conclusive in a subsequent action on a different cause of action between them, as to **issue actually litigated and essential to the judgment in the first action**.

In California state court, the "mutual principle" had been eroded. The following tests are usually applied to determine whether a stranger may rely on a prior judgment.

- (i) the issue decided in the first case is **identical** to that in the second
- (ii) there was a **final judgment** on the merits.
- (iii) the party against whom the judgment is to be used had a **fair opportunity** to be heard on the critical issue
+ the party is being asserted a party or in privity with a party to the prior proceeding
- (iv) the purpose of the case such that it would **not be unfair or inequitable** to a party to apply collateral estoppels

* Fail to state cause of actionの場合、dismissされる。(summary judgment, direct verdictではない。)

* "Regarding B, see A above"という記述のみでは、claimがsufficiently pleadされたとは言えない。

CORPORATION

De Facto Corporation

Under the common law, a de facto corporation has all right and power of a de jure corporation but remains subject to direct attack in a quo warranto proceeding by the state.

For a de facto corporation to exist, there must have been:

- (1) A **statute** under which the entity could have been validly incorporated;
- (2) **Colorable compliance** with the statute and a good faith attempt to comply; and
- (3) The **conduct of business** in the corporate name and exercise of corporate privileges.

Disregard of Corporate Entity: Under the doctrine of piercing the corporate veil, the court disregards a corporate entity and holds individuals liable for corporate obligations.

Where the corporation ignores corporate formalities such that it may be considered the “alter ego” of the shareholders or another corporation, the corporate veil may be pierced.

Shareholder Suit

1. **Direct Action** may be brought for a breach of a fiduciary duty owed to the shareholder by an officer or director. (ex. Rule 10b-5に基づく、証券に関連する訴訟)
2. **Derivative Action** : The shareholder is asserting the corporation’s right rather than her own rights.
 - (1) **Standing** – Ownership at time of wrong
 - (2) **Demand Requirement**: The shareholder must make a **written notice** on the corporation to take suitable action. A derivative proceeding may not be commenced until **90 days** pass from the date of demand, unless: (i) corporation **rejects** the demand, (ii) **irreparable injury** would result, or (iii) **futile**.

Shareholder’s Liability (*Disregard of corporate entityは、酷い場合のみ議論する。)

Generally, shareholders have no fiduciary duty to the corporation or their fellow shareholders.

A **controlling shareholder** must refrain from using his control to cause the corporation to take action that unfairly prejudices minority shareholders. He is liable for selling the corporation to an individual who subsequently loots the company. (“Sale at Premium” evidences his recognition of the buyer’s plan.)

When shareholders are held liable, they will be held liable for the entire amount of the claim.

★Directors’ Duties and Liabilities

Duty of Care (“business judgment rule”)

The directors must perform in **good faith** and in a manner to be in the **best interest of the corporation**, **with the care that an ordinary prudent person in a like position** would use under similar circumstances.

cf. Directors have a duty **not to waste** corporate assets by overpaying for property or employment service.

Duty of Loyalty

1. Conflicting Interest Transactions

A conflicting interest transaction will not be enjoined or give rise to an award of damages due to the director’s interest in the transaction if:

- (i) the transaction is **approved by majority of the directors (but at least two) without a conflicting interest after all material facts have been disclosed** to the board;
- (ii) the transaction is **approved by majority of the shareholders without a conflicting interest after all material facts have been disclosed** to the shareholders; OR
- (iii) the transaction was **fair to the corporation**, judged according to circumstances at the time of commitment.

2. Corporate Opportunity Doctrine

The directors are prohibited to divert a business opportunity from the corporation without first giving their corporation an opportunity to act, if:

- (1) the corporation has interest or expectancy for the business
- (2) the opportunity is within the corporation’s scope of business

If the director is found liable, he is liable to the corporation for any profits made and the corporation may impose a **constructive trust** upon the opportunity so that the director will have to convey the opportunity, or its fruits, to the corporation.

Duty of Disclose: Directors also have a duty to disclose material corporate information to other members of the board.

Discretionary Indemnification

A corporation may indemnify a director for reasonable expenses incurred in unsuccessfully defending a suit brought against the director on account of the director’s position if:

- (i) the director acted on good faith; AND
- (ii) the director believed that his conduct was (a) in the best interest of the corporation; (b) not opposed to the best interest of the corporation; or (c) not unlawful.

Fundamental Changes in Corporation Structure (disposition of more than 75% of its assets)

Generally, the following procedure applies to fundamental changes:

- (i) the board adopts a resolution;
- (ii) written notice is given to shareholders;
- (iii) shareholders approve changes by a majority of the votes entitled to be cast; AND
- (iv) the change in the form of article filed with the state

Dissenting Shareholders' Appraisal Remedy (Redemption)

If a corporation approves a fundamental change, shareholders who dissent from the change may have the right to have the corporation purchase their shares. The following have a right to the "appraisal remedy:"

- (i) shareholders entitled to vote on a plan of merger and shareholders of the subsidiary in a share exchange;
- (ii) shareholders of the corporation whose shares are being acquired in a share exchange
- (iii) shareholders who is entitled to vote on a disposition of substantially all of the corporation's assets
- (iv) shareholders whose rights will be materially and adversely affected by an amendment.

Procedure: (mini,P27) Before a vote is taken, the shareholder must deliver written notice of his intent to demand payment for his shares if the proposed action is taken.

The federal Williams Act: controls tender offers.

If a bidder makes a tender offer, and the offer will result in the bidder obtaining more than 5% of a class of securities of the target, the bidder must file a schedule disclosing: ... (mini,P28)

Judicial Dissolution (Involuntary Dissolution)

Dissolution is a harsh measure and should not be granted in the absence of other acts indicating oppressive or fraudulent conduct by the directors.

1. Action by shareholders (mini,P30)
2. Action by creditors

★Securities Regulation "the Federal Securities Exchange Act"

Misrepresentation (Common Law Fraud): (1) misrepresentation made by defendant, (2) scienter, (3) an intent to induce reliance on the misrepresentation, (4) causation, (5) justifiable reliance, (6) damages

Rule 10b-5 prohibits "any manipulative or deceptive means" in connection with the purchase or sale of a security

Rule 10b-5 makes it illegal for any person to use any means or instrumentality of interstate commerce to employ any scheme to defraud, make an untrue statement of material fact (or omit a material fact), or engage in any practice that operates as a fraud in connection with the purchase or sale of any security.

A private plaintiff must show the following elements to recover damages under the rule 10b-5:

- (i) Fraudulent Conduct – Materiality + Scienter (or Reckless)
- (ii) In Connection with the Purchase or Sale of a Security by Plaintiff (=Causation)
- (iii) In interstate Commerce (sometimes as simple as use of the telephone or the mail will suffice)
- (iv) Reliance
- (v) Damages

Insider Trading

- (1) **Insiders** e.g. director, officer, controlling shareholder, employee of the issue, company attorney, banker
- (2) **Tippers and Tippees:** Tippee can be liable only if Tipper **breached a (fiduciary) duty** and Tippee **knew** it.
- (3) **Misappropriation:** in breach of a duty of trust and confidence owed to the source of the information

Rule 16(b)

Because Co shares are traded on the national stock exchange, the SEC apply to this transaction.

Rule 16(b) requires surrender to the corporation of any "profit realized" which is determined by matching the highest sales price against the lowest purchase price for any six-month period.

- (a) Purchase and Sale or Sale and Purchase within 6 months
- (b) Equity Security
- (c) Officer, Director, or More than 10% Shareholder

The Sarbanes-Oxley Act of 2002

§ 302 : CEO and CFO should **certify** in each company's financial report that (i) the officer has reviewed the report; (ii) based on the officer's knowledge, the report is true and does not contain any material omissions; and (iii) the signing officer is responsible for establishing internal controls.

§ 304 : CEO and CFO must **reimburse** the company for any bonus or other incentive-based compensation received by them during 12-month period after the inaccurate reports were filed with the SEC or made public.

***Shareholder agreements** may include almost any aspect of the exercise of corporate powers or management. It is invalid if shareholders unilaterally designated themselves as permanent directors.

AGENCY

Agent's Duties

- (1) Fiduciary duties of loyalty
- (2) Obedience to reasonable directions (An agent must obey all reasonable directions)
- (3) Reasonable care under the circumstances
- (4) Disclose all relevant information
- (5) Duty to conduct within the scope of authority (actual, apparent, ratification)

Principal's Duties

- (1) Duties imposed by their contract
- (2) Reasonable compensation
- (3) Reimbursement for expenses

Termination of Actual Authority

- (1) Lapse of a specific or reasonable time
- (2) The happening of a specified event
- (3) A change in circumstances
- (4) Agent's breach
- (5) Either party's unilateral termination
- (6) Operation of law (e.g. death or loss of capacity if either party)

*Death terminates an agency unless the agency is irrevocable ⇒ apparent authorityにならない。

***Actual Authority** is what the agent reasonably believes he possesses based on the principal's dealing with him.

***Apparent Authority** is that authority third party reasonably believes an agent possesses based on the principle's holding out the agent as having such authority.

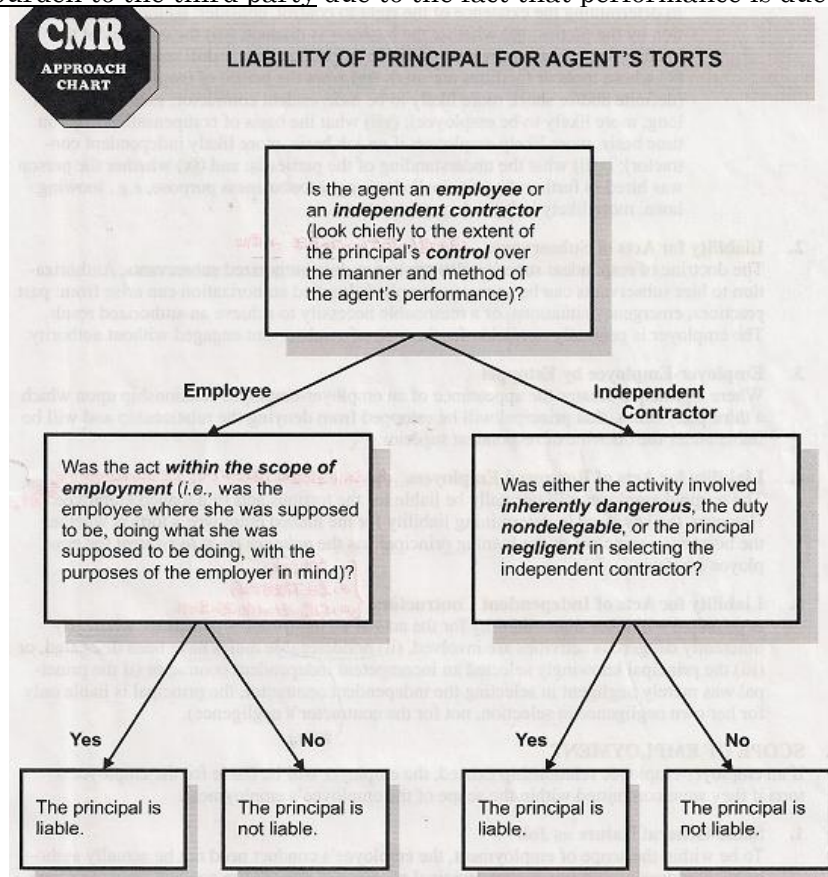
To terminate an agent's apparent authority, the principal must personally notify third parties he knew had dealing with the agent and must publish notice for all others.

Unusual circumstances surrounding an agent's actions, or extraordinary transactions entered into by the agent, may create a duty on the third-party to inquire into the agent's authority to act.

A principal will be liable to a third-party even for an agent's misrepresentations, if the agent had any type of authority to make the representation.

*保険会社が事故者に弁護士を付ける場合、弁護士は、保険会社と自己者の両方を代理している。

Undisclosed Principalが契約を行使できない場合: The principle may not enforce the contract if there has been an affirmative fraudulent misrepresentation of the principle's identity or if there is an unforeseen increased burden to the third party due to the fact that performance is due to the principal.

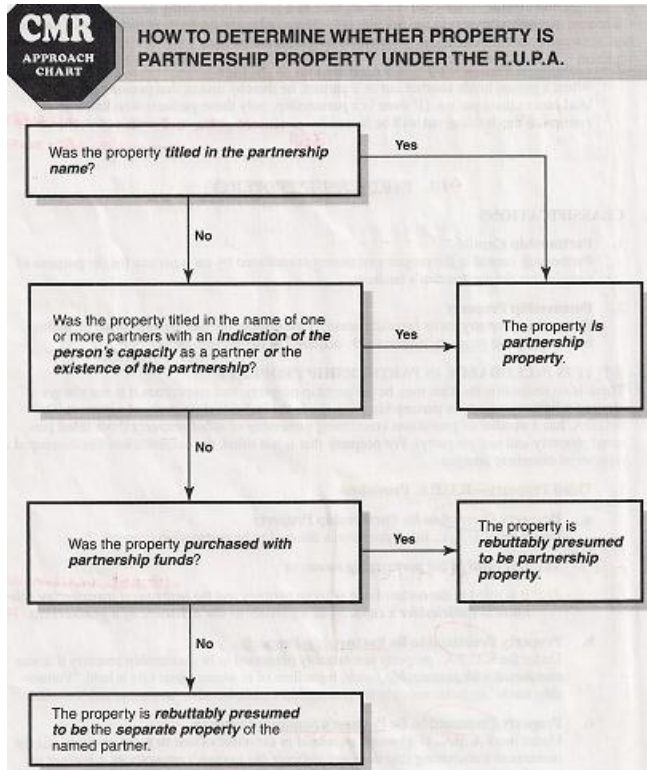


PARTNERSHIP

Absent an agreement to the contrary, all partners have **equal rights** in the management of the partnership business. Decisions regarding matters within the ordinary course of business of the partnership are majority vote, but matters outside of the ordinary course of business require the consent of all partners.

A partnership at will is dissolved and its business must be wound up when there is notification by a partner of an intent to withdraw. A partnership will be bound by a partner's act after dissolution if the act is appropriate for winding up the partnership.

All partners are **jointly and severally liable** for all obligations of the partnership, whether the obligation arises in contract or tort.



CMR SUMMARY CHART

MAJOR DIFFERENCES BETWEEN A REGULAR PARTNERSHIP AND A LIMITED PARTNERSHIP

Requirements	Regular Partnership	Limited Partnership
Writing required?	No	Yes (certificate of limited partnership)
Records office required?	No	Yes
Special name required?	No	Yes (must include words "limited partnership")
Liability limited?	No	Yes (for limited partners)
Partners have management rights?	Yes	No (for limited partners, but they may if otherwise provided by agreement)
Partners share profits and losses?	Yes (equally)	Yes (according to value of contributions)

CMR SUMMARY CHART

RIGHTS OF PARTNERS

Management—	All partners have an equal right to participate in the management of the partnership unless the partnership agreement provides otherwise.
Distributions—	Partners have whatever rights are granted in the partnership agreement as to distribution of profits. If the agreement is silent, partners share profits (and losses) equally .
Remuneration—	Partners have no right to remuneration for their services to the partnership except for winding up the partnership business.
Indemnification—	A partner has a right to be indemnified by fellow partners for expenses incurred on behalf of the partnership.
Contribution—	A partner has a right to contribution from fellow partners where the partner has paid more than his share of a partnership liability.
Inspection—	A partner has a right to inspect and copy the partnership books.
Lawsuits—	Generally, a partner may sue his partnership and the partnership may sue a partner in an action at law or in equity.

PROFESSIONAL RESPONSIBILITY

*malpracticeがあれば、Clientはattorneyに対し損害賠償請求できる(勝訴できたことを立証する必要あり。)

Duty to Report Professional Misconduct

他の弁護士の懲戒規則違反の報告を怠った弁護士は懲戒される。
他の弁護士の弁護士としての誠実性(honesty)、信頼性(trustworthiness)、適合性(fitness)についての**重大な(substantial)**疑問を生起させる懲戒規則違反に限定している。

Unauthorized Practice by Nonlawyers

弁護士としての業務を認められていない者は、無認可法律業務を行ってはならない。非弁護士の無認可法律業務を幫助した弁護士は懲戒に服する。

“Practice of Law”

- (i) 法的知識・能力を伴う
- (ii) 拘束力ある法的権利に関するアドバイスを構成する、または
- (iii) 伝統的に弁護士により行われていた業務(例: 和解交渉、法的書面の作成)

Implied Assent and Reasonable Reliance

弁護士が明確に代理を拒否しなかったため潜在的顧客が合理的にその弁護士の代理を頼りにしている場合には、弁護士の黙示の同意が認定される。合理性は事実問題(matter of fact)。

ATTORNEYS' FEES

California Rules: require agreements of attorney's fee to be in writing unless under \$1,000, it is with a corporate client, it is routine services for a regular client, or it is an emergency or impractical.

Cutting Off Services

弁護士は、関係(仕事)の途中でサービスを切り落とし、顧客を不利な立場に追いやるような報酬(体系を持った)契約を締結してはならない。

Contingent Fees

成功報酬は、刑事事件及び家族関係事件では×。支払期限の到来した債権回収案件はOK。

Must be signed by client and contain 1) your %, 2) what expenses are to be deducted, 3) whether your % taken before or after expense. In California, + 4) how work not covered by contingency will be paid, and 5) that fees are negotiable.

California Rules: only bar contingency fees if the agreement encourages the breakup of a marriage. (刑事は×)

Decisions to Be Made by Client

顧客の権利に実体的な影響を及ぼす顧客の判断には、常に従わなければならない。

- a. *settlement offer* 和解の提案を受け入れるか否か
- b. *plea* 刑事事件において冒頭手続での答弁(ex. guilty or not guilty)の内容
- c. *waive a jury trial* 刑事事件において陪審審理を放棄するか否か
- d. *testify* 刑事事件において顧客が証言するか否か、及び
- e. *appeal* 上訴するか否か

Attorney's Duties Upon Termination of Representation

辞任の前に、代理人は顧客に対して辞任について合理的な通知を行い、他の代理人選任の機会を与えなければならない。

★ATTORNEY-CLIENT PRIVILEGE < Exceptions > 以下の場合には弁護士—顧客秘匿特権の適用はない。

☆ Under the ABA Model Rules exceptions, a lawyer may disclose information regarding a future crime or fraud to prevent or rectify substantial financial loss. Under California law, a lawyer may only disclose information regarding a future crime likely to cause imminent death or substantial bodily injury.

- a. *future crime or fraud* 顧客が、将来の犯罪または詐欺に従事・幫助するために弁護士のサービスを求めている場合
- b. *breach of the duties of arising out of the attorney-client relationship*
- c. *formerly joint clients* 代理人のかつての共同依頼者同士の間で民事訴訟が発生している場合
- d. *competency or intent of a client* 顧客の意思能力または意図に関する証拠を、代理人が求められている場合

★DUTY OF CONFIDENTIALITY < EXCEPTIONS > (上記☆と同じ。)

1. *Client's Informed Consent* 顧客から事前の同意を得ている場合、開示の権限を暗に与えられている場合。
2. *Dispute Concerning Attorney's Conduct* 弁護過誤、懲戒違反、違法行為についての顧客との共謀その他これに類する行為に関するクレームから自己を守るために必要な限度。
3. *Disclosure to Obtain Legal Ethics Advice* 弁護士から法的倫理についてのアドバイスを得るのに必要な限度。
4. *Disclosure Required by Law or Court Order* 法律または裁判所の命令により要求される限度。
5. *Disclosure to Prevent Death or Substantial Bodily Harm* 合理的に確かな程度の死亡または実質的な身体への被害を防止するために必要、と合理的に信じる限度。 <裁量>
6. *Disclosure to Prevent or Mitigate Substantial Financial Harm* 第三者に対して実質的な金銭的損害を齎す。

Where the lawyer learns that her client has used her services to financially injure a third party, the lawyer must withdraw from representing the client in any future work.

Concurrent Conflicts of Interest 弁護士は、以下の場合には顧客を代理してはならない。

- (i) [他の顧客のためにならない場合] その顧客の代理が、他の顧客の利害に直接的に負の影響を及ぼす場合:例えば、以前の訴訟で入手した秘密情報が、本件訴訟に影響を与える場合。
- (ii) [その顧客のためにならない場合] 弁護士自身の利害、または弁護士が他の顧客・旧顧客・第三者に対して既に負っている責任が原因で、その顧客の代理そのものが大きく限定される「**実質的な危険**」が存在する場合

Informed, Written Consent Can Solve Some Conflicts

- (i) コンフリクト対象となる複数の顧客を、有能にかつ勤勉に代理できると弁護士が合理的に信じる場合
- (ii) 代理が法律によって禁止されていない場合
- (iii) 代理の内容が、…弁護士が代理している顧客に対する法的請求を含んでいない場合、かつ
- (iv) コンフリクト対象となる複数の顧客全てが、事前に書面にて同意している場合

Business Transactions with Client and Money or Property Interests Adverse to Client 弁護士は、以下の全ての条件が満たされない限り、(a)顧客とビジネス取引(business transaction)をしてはならず、また、(b)意図的に顧客の利益に反して所有権・占有権及び保証金及び金銭的利益を得てはならない。

- (i) 取引条件（または利益が得られる条件）が顧客に対して公平であること
- (ii) 顧客が合理的に理解できる方法によって、条件が書面により顧客に全て開示されること
- (iii) 顧客が独立した弁護士の助言を取引の前に得るべきであることについて、顧客が書面による助言を受けている
- (iv) 顧客の事前の合意を、サイン入りの書面にて顧客から取得していること

Financial Assistance to Client in Litigation 弁護士は、訴訟継続中の顧客を、経済的に補助してはならない。

Advancing Litigation Expenses Lawyer may advance court costs and litigation expenses.

California Rules: permit loans to the client, so long as the client promises to repay the lawyer for the loan (,but prohibits the promise or paying a prospective client's debts.)

A lawyer must not accept compensation from a third person for representing as client unless

- (i) the client consents after consultation,
- (ii) the third person does not interfere with the lawyer's independence or the representation of the client
- (iii) the arrangement does not compromise the client's confidential information

Conflicts Between Client's Interest and Third Person's Interest 第三者の利益が、顧客を効果的に代理する弁護士の能力を大きく限定する実質的な危険があっても、以下の2要件が整うならば、弁護士は顧客を代理してもよい。

- (i) 第三者の利益が当該代理行為に悪影響を及ぼすものではないと弁護士が合理的に信じる場合であり、
- (ii) 顧客が書面により事前に同意している場合

Reporting Requirement Securities lawyer が、顧客が連邦又は州の証券取引法に実質的に違反している旨を示す信頼性の高い証拠を見つけた場合、顧客の CLO(Chief Legal Officer)にその証拠を報告しなければならない。

SAFEGUARDING THE CLIENT'S MONEY AND PROPERTY 弁護士は、顧客の金銭や財産を弁護士自身の金銭又は財産と区分することなく一緒にした場合、懲戒の対象となる。

Using False Evidence 刑事被告人の被告自身のための証言の場合（自己負罪拒否特権の適用がある場合）を除き、虚偽であると自らが合理的に信じる証拠の提出を拒絶することができる。証拠を提出した後に、その証拠が虚偽であると判明した場合には、弁護士は、以下のことをしなければならない。

- (i) 内々に顧客と話し、状況の修正するよう顧客の説得を試みる
- (ii) 説得に失敗した場合には辞任を申し出る、及び
- (iii) 辞任が許可されない場合又は辞任が状況の解決にならない場合には、弁護士は裁判所に情報を開示する。

In California, if the court refuses to permit withdrawal, the lawyer must proceed with the case. The lawyer may allow the perjures client to testify in a narrative fashion.

ADVERTISING 「広告」には、内容に責任を持つ少なくとも一人の弁護士又は法律事務所の名前と住所を記載する。特定の法的問題に直面していることが周知である潜在的顧客との通信（書面的、電子的あるいは録音による）には、「広告物」(Advertising Material)とラベルしなければならない。この規則は、弁護士とその親戚、親しい友人、現在又は過去の顧客及び他の弁護士との間の通信には適用されない。

最高裁判決: 州は広告が嘘または誤解を招くものでないか確認するための合理的規制を採用することができるが、弁護士の広告全てを完全に禁止することはできない。**California Rules: presume improper any ad that guarantees, warranties, or predictions of result. Lawyer has burden of disproving violations.**

前払いを提案している集団や集団法律サービスプランを提案している集団に対しては、個人的な接触をしてもよい。更に、同プランは、特定の法律サービスを必要としているか周知で無い潜在的加入者に対して、個人的又は電話によるコンタクトをとってもよい。

SOLICITATION 「勧誘」: Absent actual knowledge that the prospective client does not wish to receive communications from the lawyer, a lawyer is not prohibited from sending truthful, nondeceptive letters to person known to face a specific legal problem.

An attorney who withdraws must return all papers and properties to which the client is entitled, and cannot refuse to return the client's file to pay outstanding fees.

Duty to communicate with client

A lawyer has a duty to furnish the client with all the information necessary to allow the client to make decisions about the matter intelligently and to communicate with the client. ...the lawyer could not rely on a client with adverse interests to fairly and adequately interpret her communications to the client.

Fee splitting with non-lawyer or lawyer

A lawyer must not share legal fee **with a non-lawyer**. The purpose of this rule is to protect the lawyer's independence of judgment. **If he is a lawyer**, under the California rules, fee sharing is allowed provided that the client agrees after full disclosure of the fee splitting agreement, the total fee is not increased because of the split, and the fee itself is not unconsciously high.

Sexual relationship with a client (Different from the ABA Model Rules,)

California Rule does allow for sexual relationship with a client as long as the lawyer did not demand sexual relations with the client as a condition of professional representation or by coercion or undue influence.

(A lawyer may accept a gift from a client if the gift meets general standards of fairness.)

The Sixth Amendment right to counsel includes effective assistance of counsel.

An attorney is incompetent if her conduct falls measurable below the performance ordinary expected of fallible lawyers and her conduct affects the outcome of the trial.

銀行強盗の被告人から盗難紙幣で弁護士費用の支払いを受けた場合 (cf. Duty not to falsifying Evidence)

The lawyer should have given the bills to the court. To accommodate his dual duties of confidentiality to his client and candor to the court, he should have refused to disclose how he came into possession of the bills. Requiring the lawyer to turn over evidence without disclosing its source, this result would strike a balance between these two competing duties.

信憑性に疑問がある被告人の否認⇒Closing Argument

A lawyer for the defendant in a criminal case is not subject to discipline for putting the prosecution to its burdens and requiring every element of the case to be proven beyond a reasonable doubt.

Malpractice の責任を限定する和解

A lawyer must not settle a malpractice claim with an unrepresented client without first advising that person, in writing, to seek advice from an independent lawyer about the settlement.

Duty of Competence <42> A lawyer must act with the necessary legal knowledge, skill, thoroughness and preparation. Ann's failure to properly investigate Harry's claim violated her duty to Harry even though Harry benefitted from Ann's negligence.

Duty of Diligence <42> Ann's failure to investigate Harry's claim also violated duty of diligence; for this reason, Ann's argument that she acted zealously by filing the lawsuit will be rejected.

Discipline for Asserting a Frivolous Position <52> Ann is not subject to discipline for filing a frivolous lawsuit unless she filed the action solely to harass or maliciously injure Wilma.

Duty of Fairness <55> Ann owes a duty of fairness to Wilma, the court and opposing counsel. Ann will be subject to discipline if she filed the civil lawsuit in order to gain an advantage in the custody proceeding.

Perjury by Civil Client <52> A lawyer is subject to discipline for offering evidence that the lawyer knows is false. A lawyer must counsel her client to testify truthfully. If a lawyer knows that her client in a civil case intends to commit perjury, the lawyer can and must refuse to call the client as a witness. Here, it is unclear if Harry testified in the custody proceeding, whether Ann knew that Harry was testifying falsely, and whether Ann induced Harry to testify falsely. Ann may be subject to discipline.

Ethical Duty of Confidentiality <44> Ann owed Harry an ethical duty not to disclose any of the communications regarding their conversation.

Exception: Future Crime or Fraud <44> The ethical duty of confidentiality may prevent disclosure of the intended future crime or fraud. Under the ABA Model Rules exceptions, a lawyer may disclose information regarding a future crime likely to cause imminent death or substantial bodily harm or a future crime or fraud to prevent or rectify substantial financial loss. Under California law, lawyer may only disclose information regarding a future crime likely to cause imminent death or substantial bodily injury.

Attorney-Client Privilege <43> Harry's story would be protected by the attorney-client privilege as well since it occurred during the course of the attorney-client relationship.

Exception: Future Crime or Fraud <43> Under the ABA Model Rules and the California Evidence Code (CEC), the attorney-client privilege does not apply if the client seeks the attorney's services to enable or aid anyone in committing a future crime or fraud. Furthermore, California law makes the attorney-client privilege inapplicable if the attorney reasonably believes that the disclosure of confidence is necessary to prevent the client from committing a crime that is likely to result in death or substantial bodily injury.

Exception: Dispute Concerning Attorney's Conduct <45> The ethical duty of confidentiality does not apply if the disclosure is necessary to collect a fee or protect a lawyer. Similarly, the attorney-client privilege does not apply where the communication is relevant to an issue of breach of the attorney-client relationship.

Discovering Illegal Conduct/Withdrawal <58> Attorney must withdraw if continued representation requires attorney to violate a law or disciplinary rule.

Duty of Candor <52> Lawyer is subject to discipline for making a false statement of material fact to the court, but has no obligation to volunteer harmful facts.

REMEDIES

*Replevin 動産占有回復訴訟 / *Ejectment 不動産(占有)回復訴訟 / 返還義務あるときは、Resulting Trustもある。

<Torts> (契約の相手方に misrepresentation があれば、torts も検討する!!) (wrongdoer が複数 ⇒ Election of Remedies)

1. Legal Remedies

- a. Damages: Money (Actual Damages / Nominal Damages / Punitive Damages)
- b. Restitution: Money (unjust enrichment), Replevin, Ejectment / *Conversion の場合、BFP に対して返還請求 OK!!

2. Equitable Remedies

- a. <Constructive Remedies> P must show that:

- (1) D has title to property,
- (2) D's acquisition of title can be traced to property that defendant wrongfully acquired,
- (3) D's retention of property would result in unjust enrichment, and
- (4) (most courts) P has no adequate remedy at law. (ex. D's insolvency)

- b. <Equitable Lien> An equitable lien can be imposed on property to which:

- (1) D holds title, and
- (2) The wrongfully obtained (or improved) property can be traced.
 - * "merely improved with the P's property" is OK. / *trace できる金額は constructive trust と同じ!!
 - * can be enforced only up to the amount of plaintiff's claim; the enhanced value of the property cannot be recovered. P may seek a deficiency judgment after imposition of it.

- c. Injunction: (Breach of Contract でも認められる。)

- (i) **Permanent Injunction**: P is entitled to a permanent injunction against D if he can demonstrate:
 - (1) the legal remedies are **inadequate**,
 - (2) property **right** or protectable personal right involved,
 - (3) a injunctive decree is **feasible**,
 - (4) **hardship** balance,
 - (5) D has **no defenses**.
- (ii) **(Ex Parte) Temporary Restraining Order**: may be issued after notice and a party showing of the need for urgency.
 - (1) He will likely succeed on the merits of the suit,
 - (2) Injunctive relief is necessary to maintain status quo pending trial. (Permanent では不要)
- (iii) **Preliminary injunction**: is an injunction that is put in place until a trial can be held on the merits.
 - (1) He will likely succeed on the merits of the suit,
 - (2) Injunctive relief is necessary to maintain status quo pending trial, (Permanent では不要)
 - (3) The hardships weigh in his favor. (Temporary Restraining Order では不要)

<Contracts>

1. Legal Remedies

- a. Damages: Money (Expectation / Incidental / Consequential <uncertain な損害は×> / Liquidated Damage)
- b. Restitution: Money (unjust enrichment), Replevin, Ejectment

2. Equitable Remedies

- ~~a. <Constructive Remedies>, b. <Equitable Lien>~~

- c. <Specific Performance>: P is entitled to a specific performance against D if he can demonstrate:

- (1) the legal remedies are **inadequate**,
- (2) the contract sufficiently **definite and certain**, (cf. Parol Evidence Rule)
- (3) a specific performance decree is **feasible**,
- (4) there is **mutuality** of obligation, and *反対義務が履行可能であること
- (5) D has **no defenses**. (**Laches, Unclean Hands, Hardship, Freedom of Speech**)
(**Mistake, Misrepresent, Impossible, Impractical**)

- d. <Modification>: The contract is rewritten correctly and is then enforced. <Defense> Laches, BFP, (PER 問題なし)

★**Anticipatory repudiation**: (i) In a contract with **executory duty on both sides**, (ii) The **promisor, prior** to the time set for performance of his promise, **indicates unequivocally** that he will **NOT perform** when the time comes.

Compensatory Damages are awards of money to protect P's expectation interest. As with tort cases, damages must be (1)causal, (2)foreseeable, (3)certain, and (4)unavoidable (**unmitigated**).

Liquidated damages clause is valid provided it is shown that:

- (1) At time of contracting actual damages would have been extremely difficult to ascertain
- (2) The amount stipulated was a reasonable forecast of the actual harm.