

California Bar Examination  
Issue Checklists

Good luck [r/lawschool](#)

# CRIMES ISSUES CHECKLIST

“ICED four, five, six other”

## CRIMINAL LAW

### A. INCOMPLETE CRIMES & ACCOMPLICE

#### LIABILITY **CALM-AS**

##### 1. **A**tttempt

- a) AR = Overt act beyond mere preparation
  - (1) MPC = sub. step 2 complete
  - (2) CL = Danger. prox. 2 success
- b) MR = Specific intent to commit

##### 2. **S**olicitation

- a) Request or encourage another to commit a crime with the specific intent that they do so; merges into actual crime.

##### 3. **C**onspiracy

- a) Agreement between two or more people intending to commit an unlawful act, majority with an overt act in furtherance of conspiracy.
- b) Co-Con. liability = Foreseeable + In furtherance.
- c) Does not merge.

##### 4. **A**ccomplice **L**iability

- a) Principal = commits crime
- b) Accomplice
  - (1) Aids, abets or encourages principal before or during the commission of a crime with specific intent crime be committed.

##### 5. **M**erger

### B. CRIMES AGAINST THE PERSON

#### **BAM-FIHRK**

##### 1. **B**attery

- a) Intentional or reckless
- b) Causing
- c) Injury or offensive touching

##### 2. **A**ssault

- a) Attempt to commit battery or
- b) Intentional creation of reasonable apprehension of imminent bodily harm

##### 3. **M**ayhem

- a) Permanent dismemberment of body

##### 4. **H**omicide

- a) **Murder**
  - (1) 1st Degree - Need statute
    - (a) Deliberation + Premeditation
    - (b) FMR need statute
  - (2) 2nd Degree - Malice Aforethought
    - (a) Intent to kill

- (b) Intent to cause GBH
- (c) Depraved heart: willful and wanton disregard
- (d) Intent to commit felony (FMR).
  - i) Natural + Probable consequence
  - ii) During commission
  - iii) No liability if co-felon killed by non-felon

##### b) **M**anslaughter

- (1) Voluntary Manslaughter
  - (a) Adequate provocation
  - (b)  $\Delta$  in fact provoked
  - (c) No time to cool off
  - (d)  $\Delta$  did not cool off
  - (e) OR imperfect self-defense
- (2) Involuntary Manslaughter
  - (a) Unintentional killing
  - (b)  $\Delta$  disregards sub. danger or death/harm
    - i) No sub. awareness req.
  - (c) Misdemeanor Murder

##### 5. **R**ape

- a) Sexual Intercourse
- b) Without consent
- c) By force or threat of force
- d) Statutory Rape
  - (1) Strict liability

##### 6. **F**alse **I**mprisonment

- a) Unlawful confinement of a person

##### 7. **K**idnapping

- a) False imprisonment
- b) Movement or concealment in secret location.

### C. CRIMES AGAINST PROPERTY

#### **BAR-REF-LEF**

##### 1. **L**arceny

- a) Wrongful taking
- b) Carrying away
- c) Property of another
- d) W/ intent to permanently deprive

##### 2. **E**mbezzlement

- a) Fraudulent
- b) Conversion
- c) Personal property of another
- d) By person in lawful possession

##### 3. **F**alse **p**retenses

- a) Obtaining title
- b) To personal property of another
- c) By intentional false statement of past or present fact

# CRIMES ISSUES CHECKLIST

"ICED four, five, six other"

- d) W/ specific intent to defraud
- 4. **Robbery**
  - a) Larceny
  - b) From person or presence of owner
  - c) By force or threat of immediate harm
- 5. **Forgery**
  - a) Making or altering
  - b) Writing of apparent legal significance
  - c) So that it is false
  - d) W/ intent to defraud
- 6. **Extortion**
  - a) Threat of future harm
  - b) SI to have another cede property
- 7. **Receipt of Stolen Property**
  - a)  $\Delta$  receives stolen property
  - b) W/ knowledge property is stolen
  - c) SI to deprive true owner of property
- 8. **Burglary**
  - a) Trespassory breaking + entering
  - b) Dwelling of another
  - c) At night
  - d) W/ SI to commit theft or felony inside
- 9. **Arson**
  - a) Malicious
  - b) Burning
  - c) Dwelling of another
- D. DEFENSES III-SDOP-AND-MEC**
- 1. **Insanity**
  - a) M'naghten Test
    - (1)  $\Delta$  has mental disease
    - (2)  $\Delta$  can't understand, or
    - (3)  $\Delta$  doesn't know wrong
  - b) Irresistible Impulse
    - (1)  $\Delta$  has mental disease
    - (2)  $\Delta$  unable to control conduct
  - c) Durham Test
    - (1) Crime was product of disease or defect. But for test.
  - d) MPC ALI test
    - (1)  $\Delta$  has mental disease/defect
    - (2)  $\Delta$  lacks capacity to
    - (3) appreciate criminality or conform conduct to law
- 2. **Intoxication**
  - a) Voluntary
    - (1) May negate SI
  - b) Involuntary
    - (1) Possible defense to all crimes
- 3. **Infancy**
  - a) <7 no criminal liability
  - b) <14 presumption no crim. liability
- 4. **Self-defense**
  - a) Reasonable force
  - b) Deadly Force
    - (1) Rsb belief imminent death or GBH
  - c) Imperfect self-defense
- 5. **Defense of Others**
  - a) Reasonable belief
  - b) Reasonable force
- 6. **Defense of Dwelling**
  - a) Deadly
    - (1) Riotous + Forcible Entry
    - (2)  $\Delta$  intends to commit felony inside or personal danger
  - b) Non-Deadly
    - (1) Unlawful entry or
    - (2) Attack on dwelling
- 7. **Defense of Property**
  - a) Reasonable force
  - b) No deadly force
- 8. **Adequate provocation**
- 9. **Duress**
  - a) Rsb. belief death or GBH to victim or family if victim does not commit crime for  $\Delta$ .
- 10. **Necessity**
  - a) Reasonable belief
  - b) Necessary to avoid
  - c) Imminent and greater injury to society
  - d) No rsb alternatives
- 11. **Mistake**
  - a) Mistake of Fact
    - (1) Negates SI
    - (2) Negates GI if rsb.
  - b) Mistake of Law
    - (1) No defense
- 12. **Lawfully resisting arrest**
- 13. **Entrapment**
  - a) Law enforcement
  - b) Induces  $\Delta$  to commit crime
  - c)  $\Delta$  had no predisposition to commit
- 14. **Consent**
  - a) No defense unless lack of consent is element of crime (rape/battery)

# CRIMES ISSUES CHECKLIST

“ICED four, five, six other”

## II. CRIMINAL PROCEDURE

### A. FOURTH AMENDMENT **SAW-SEEN**

#### 1. Seizure of a person

- a) **Seizure** → Arrest
- b) Rsb person would believe she is not free to leave or end encounter

#### 2. **Arrest**

- a) Need warrant if in home
- b) **Warrant** based on PC
- c) PC = Rsb belief

#### 3. **Search**

- a) Gov. intrusion where person has a rsb. + justifiable expectation of privacy
- b) State action required

#### 4. Warrant

- a) Requirements
  - (1) Issued by neutral and detached magistrate
  - (2) Probable Cause: Rsb person would believe incriminating evidence would be found
  - (3) Particularly describes place + items

- b) **Exceptions (LAP CHESS)**

- (1) **Lawful Arrest**
  - (a) Area w/in access/ immediate control
  - (b) Protective sweeps ok
  - (c) Autos- recent occupant rule- car yes; trunk no
- (2) **Automobile Exception**
  - (a) Probable cause vehicle contains evidence of crime or contraband.
- (3) **Plain View**
  - (a) Police legitimately on premises
  - (b) Discovery in plain view
  - (c) Incriminating character immediately apparent.
- (4) **Consent**
  - (a) Voluntary and Intelligent based on totality of circs.
  - (b) Joint party authority
- (5) **Hot Pursuit**
  - (a) Police may use broad search powers to apprehend a fleeing felon
- (6) **Evanescent Evidence**
  - (a) Evidence would disappear if waited for warrant. i.e. blood alcohol

#### (7) **Stop and Frisk**

- (a) **Stop** = Articulable rsb. suspicion
- (b) **Frisk** = Rsb. believe person presently armed and dangerous.

#### (8) **Special Needs Exception**

- (a) Routine sobriety checks = Initial stop const.
- (b) Ordinary criminal wrongdoing = unconst.

#### 5. **Non-investigatory Searches**

- a) Border Searches
- b) Administrative Inspections & Searches

#### 6. **Exempt Proceedings**

### B. FIFTH AMENDMENT **DCCP-DP**

#### 1. **Double jeopardy**

- a) Cannot be tried for same offense twice
- b) Applicable
  - (1) Δ pleads guilty
  - (2) Jury sworn or
  - (3) First witness called

#### 2. **Confession**

- a) **Miranda**
  - (1) Right to remain silent
  - (2) Anything he says can be used against him
  - (3) Right to attorney
    - (a) Custodial
    - (b) Interrogation by police
      - i) Likely to elicit incriminating response
      - ii) Suspect must know police are questioning
- b) **Waiver of Miranda**
  - (1) Voluntary, knowing, intelligent
  - (2) Spontaneous statements
- c) **Exceptions**

#### b) **Waiver of Miranda**

- (1) Voluntary, knowing, intelligent
- (2) Spontaneous statements

#### c) **Exceptions**

#### 3. **Right to Counsel**

- a) Unambiguous request by accused to invoke
- b) Police must cease all questioning
- c) Post charge in person lineups

#### 4. **Privilege against compelled testimony**

- a) **Right against self-incrimination**
  - (1) Only to testimony, or
  - (2) Communicative evidence
  - (3) Could expose Δ to criminal liability

#### 5. **Due Process (pre-trial ID)**

- a) Voluntary Confessions

# CRIMES ISSUES CHECKLIST

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- b) No unnecessarily suggestive ID
  - C. SIXTH AMENDMENT CCW-JST-PH**
    - 1. Right to Counsel
      - a) Post charge
      - b) Line-up, show-up, or sentencing
      - c) Not for photo ID, handwriting, fingerprints or physical evidence
      - d) Ineffective Assistance of Counsel
        - (1) Counsel performance deficient
        - (2) Based on rsb. competent atty.
        - (3) Different result if not deficient
      - e) Δ can waive
    - 2. Right to Confront Witnesses
      - a) Adverse/hostile
      - b) Compel testimony on cross examination
      - c) Only for testimonial statements
        - (1) non testimonial if ongoing emergency
      - d) Co-defendants
        - (1) Redact statement or
        - (2) Other Δ takes stand
    - 3. Right to Jury
      - a) For all non petty offenses
      - b) Potential for jail > 6 months
      - c) Δ can waive
      - d) At least 6 jurors -unanimous
      - e) Fed crime - unanimous
      - f) 12: majority
      - g) Impartial jury
      - h) Fair cross section of community
    - 4. Right to Speedy Trial
      - a) Case-by-case basis
      - b) Court balances:
        - (1) Length of delay
        - (2) Reason for delay
        - (3) Prejudice to Δ
        - (4) Time and manner in which Δ asserted his right.
      - c) Remedy = dismiss w/ prejudice
    - 5. Right to Preliminary Hearing
      - a) Need probable cause if not established
      - b) Within 30 days of arrests
      - c) Δ can waive
  - D. OTHER CRIMINAL PROCEDURE:GEG-CI8**
    - 1. Grand Jury Rules
    - 2. Exclusionary Rule
      - a) Judge made doctrine
        - (1) Can't use evidence if found in violation of 4,5,6 rights.
        - (2) Δ needs standing- his own rights violated
  - b) Fruit of the Poisonous Tree
    - (1) Other evidence stemming from violation inadmissible too.
    - (2) Exceptions
      - (a) Independent Source
      - (b) Inevitable Discovery
      - (c) Purged Taint
  - c) Can still use to:
    - (1) Impeach
    - (2) In civil proceeding or parole hearing
3. Good Faith Warrant Exception
  - a) Improper warrant results in 4A violation
    - (1) Not barred if officer acted in good faith
    - (2) Except lie or no PC
4. Confessions/ Identification
  - a) Voluntariness
    - (1) No police coercion
    - (2) Totality of circs.
    - (3) Mental illness irrelevant
  - b) Due process
    - (1) No unnecessarily suggest. ID
    - (2) Totality of Circs.
    - (3) ID unfair to Δ
  - c) Pleas
    - (1) Voluntary, Intelligent
    - (2) No obligation to plea
    - (3) Judge doesn't have to accept
5. Eighth Amendment
  - a) Bail
    - (1) Not excessive/unduly high
    - (2) Court Considers:
      - (a) Seriousness of offense
      - (b) Weight of evidence
      - (c) Δ' s financial obligations
      - (d) Δ's character
  - b) Sentencing
    - (1) Penalty can't be grossly disproportionate to crime
    - (2) No death for retarded/minors
    - (3) Vic statements allowed
- III. ELEMENTS: MACC**
  - A. Actus Reus
    - 1. Commission: Voluntary Act
    - 2. Omission where legal duty to act
  - B. Mens Rea: guilty mind (SI, GI, Malice)
    - 1. Malice = intentional or reckless disregard of obvious or known risk
  - C. Concurrence
  - D. Causation

# CONTRACTS ISSUES CHECKLIST

“Defense For Pittsburgh Players: Blitz on Third Down”

## I. PRELIMINARY ISSUES: **GT**

### A. GOVERNING LAW

1. UCC
2. Common Law
3. Mixed Contracts

### B. TYPES OF CONTRACTS

1. Express/Implied
2. Unilateral/Bilateral Contracts

## II. CONTRACT FORMATION: **OTAC**

### A. OFFER

1. Intent
2. Definite Terms (QTIPS)
3. Communicated to offeree

### B. TERMINATION OF OFFER

1. Lapse of time
2. Death or incapacity of either
3. Revocation
  - a) Irrevocable Offers
  - b) UCC Firm Offer
    - (1) Max 90 then revocable
4. Rejection
5. Supervening Illegality

### C. ACCEPTANCE

1. Words or conduct of Offeree
2. Manifesting assent to offer
3. Unequivocal acceptance
4. Communicated to offeree
5. Additional Terms
  - a) CL = Mirror Image Rule
  - b) UCC
    - (1) 1 Merchant = Proposal
    - (2) 2 Merchants = Yes Unless
      - (a) Offer expressly limits to terms of offer
      - (b) Material Alteration
      - (c) Offeror objects to change
6. Mailbox Rule = Effective at dispatch

### D. CONSIDERATION

1. Bargained for legal detriment or forbearance
2. Promissory estoppel
3. Lack of Consideration
4. Contract Modification
  - a) CL = New consideration usually
  - b) UCC = No new consideration req.

## III. DEFENSES TO CONTRACT FORMATION (ARISING AT TIME OF CONTRACTING)

### A. VCS-PUMM

### B. VOID/VOIDABLE/UNENFORCEABLE

### C. CAPACITY

### D. SOF (STATUTE OF FRAUDS)

1. Incapable of being performed in 1 yr.
2. Sale of goods \$500 or more
3. Promises in consideration of marriage

4. Guarantee to pay debts of another
5. Executor promises pay w/ own funds
6. Transfers of interest in real property
7. Satisfaction of SOF

#### a) Writing

- (1) CL: Material terms + signed
- (2) UCC: Writing + Quantity + Signed
  - (a) Exc: Merchant confirm. memo

#### b) Performance

- (1) Perf. + Serv. contracts
- (2) Sale of goods
  - (a) Ordinary goods
  - (b) Specialty goods
- (3) Land Sale K (2/3)
  - (a) B takes possession
  - (b) B pays all or part price
  - (c) B makes sub. improve.

#### c) Judicial Admission

### 8. Equal Dignity Rule

## E. MISREPRESENTATION (FRAUD)

1. Fraud in the Inducement = *Voidable*
2. Fraud in the Factum = *Void*

## F. MISTAKE: belief not in accord w/ facts

### 1. Mistake of Fact

#### a) Mutual

- (1) Basic assumption
- (2) Adverse effect
- (3) No assumption of risk

#### b) Unilateral

### 2. Mistake due to Ambiguity

- a) Mat. term sub. to 2 rsb. interpret.
- b) Each has diff. meaning in mind
- c) Neither aware of ambiguity

## G. UNCONSCIONABILITY

1. At time K *formed*
2. K *one sided*
3. Disparate *bargaining* power
4. *Adhesion* K (take it or leave it)
5. *Public Policy*

## H. PUBLIC POLICY DEFENSE OF ILLEGALITY

1. Illegal subject matter = *Void*
2. Illegal purpose = *Voidable*

## IV. PAROL EVIDENCE & CONTRACT TERMS

### A. PAROL EVIDENCE RULE

1. Limits admissibility of prior written or oral expressions or contemporaneous oral statements.
2. Complete Integration
  - a) No PE to contradict or supp.
3. Partial Integration
  - a) Inadmissible to contradict
4. Exceptions

# CONTRACTS ISSUES CHECKLIST

“Defense For Pittsburgh Players: Blitz on Third Down”

- a) Defense to formation
- b) Condition precedent
- c) Consistent collateral contract
- d) Clarify ambiguous terms
- 5. Merger clause
- 6. Reformation
- B. INTERPRETATION OF AMBIGUOUS K TERMS**
  - 1. Theories
  - 2. Maxims
  - 3. Course of performance
    - a) Same people, same K
  - 4. Course of dealing
    - a) Same people, different K
  - 5. Usage of trade
    - a) Different people, different K
- C. DEFAULT UCC TERMS: DRW-PPU**
  - 1. **Delivery**
    - a) Time: Rsb
    - b) Place: Seller's place of business or home
    - c) Delivery not by Common Carrier
      - (1) Merchant Seller: B receives
      - (2) Non-merchant Seller: S tenders goods.
    - d) Delivery by Common Carrier
      - (1) Shipment K: FOB S's city
      - (2) Destination K: FOB not S's city
  - 2. **Risk of Loss**
    - a) Non-Common Carrier Delivery
      - (1) Merchant S = B receives
      - (2) Non-Merchant S = S tenders goods
    - b) Common Carrier Delivery
      - (1) Shipment K = S completes delivery obligation
      - (2) Destination K = Goods delivered at final destination
  - 3. **Warranties of Quality**
    - a) Express warranty of quality
    - b) Implied Warranties
      - (1) Warranty of Title
      - (2) Implied warranty of merchantability
      - (3) IWFPP
  - 4. **Price**
    - a) Rsb. price at time of delivery if
      - (1) nothing said as to price
      - (2) price left to be agreed and didn't
      - (3) or price agreed to be set by market standard and not.
  - 5. **Payment**
    - a) If silent, at time and place B receives goods.
- 6. **UCC PER**
- V. DISCHARGE: RASMIN-FICAM**
  - A. RESCISSION**
    - 1. Mutual
    - 2. Unilateral
  - B. ACCORD**
    - 1. Agreement to accept different performance
    - 2. Suspends rt. to enforce original K until accord satisfied.
  - C. SATISFACTION**
    - 1. Performance of the accord agmt.
    - 2. Discharges original K and accord K
  - D. CONTRACT MODIFICATION**
    - 1. CL: New consideration unless
      - a) Addition or change performance
      - b) Unforeseen difficulty
      - c) 3rd party promises to pay
  - E. NOVATION**
    - 1. Previous valid K
    - 2. Agmt by all parties including 3rd party
    - 3. A valid and enforceable new K
    - 4. Dif. person assumes duty/receives benefits
  - F. IMPOSSIBILITY**
    - 1. Circs. affecting K have changed
    - 2. Change not due to act of  $\Delta$
    - 3. Change of circs. causes performance to be impossible objectively
  - G. IMPRACTICABILITY**
    - 1. Circs. affecting K have changed
    - 2. Change not due to act of  $\Delta$
    - 3. Undue hardship on  $\Delta$
    - 4.  $\neq$  uncertain weather, mkt. conditions
  - H. FRUSTRATION OF PURPOSE**
    - 1. Purpose of K known by both parties
    - 2. Unforeseeable supervening event out of  $\Delta$ 's control
    - 3. Original purpose unavailable
  - I. FAILURE OF A CONDITION PRECEDENT**
  - J. ANTICIPATORY REPUDIATION**
    - 1. Unambiguous statement by words or conduct to other party
    - 2. Before performance due
    - 3. Unequivocal intention not to perform
    - 4. Non Repudiating Party Options
      - a) Rescind K
      - b) Sue immediately
      - c) Suspend performance and sue when performance due
    - 5. Can retract until accepted or detrimentally relied
    - 6. Rsb. grounds for insecurity
  - K. MATERIAL BREACH**

# CONTRACTS ISSUES CHECKLIST

“Defense For Pittsburgh Players: Blitz on Third Down”

## VI. BREACH & REMEDIES: UC-ME

### A. UCC

1. Breach = less than perfect tender
2. B's options for < perfect tender
  - a) Accept/Reject all/some + sue
3. Cure
  - a) Time to perform not expired
  - b) Rsb. grounds to believe less than perfect tender acceptable
4. Installment K = Sub. Impairment
5. Accept = Can no longer reject
  - a) Rsb. opp. to inspect
  - b) Fail to reject w/in rsb. time
  - c) Act inconsistent w/ S's ownership
6. Revocation of Acceptance
  - a) Nonconformity sub. impairs value of goods
  - b) Excusable ignorance or rsb. reliance on S's assurances of conformity +
  - c) Revocation w/in rsb. time of discovery of nonconformity

### B. COMMON LAW

1. Substantial performance
2. Material breach excuses performance
3. Divisible Ks
  - a) Material breach based on each individual performance

### C. MONETARY REMEDIES

1. Expectation Damages
  - a) Loss in value + other loss - cost avoided - loss avoided
2. Damages
  - a) foreseeable
  - b) certain
  - c) duty to mitigate
3. Incidental Damages
4. Consequential Damages
5. Reliance Damages
6. Punitive Damages ≠ Breach K
7. Liquidated Damages: specified in K
  - a) Dmg. dif. to predict at K formation
  - b) Rsb. forecast of damages
  - c) Cannot be a penalty
  - d) Sliding scale = presumed valid
8. UCC Monetary Damages
  - a) Seller Breach
    - (1) B keeps = [FMV Perfect - FMV as delivered]
    - (2) S keeps goods
      - (a) B covers = [Replacement - K price]
  - b) Buyer Breach
    - (1) B keeps = K price

### (2) S keeps

- (a) S resells = [K price - Resale price]
  - i) Lost profits for volume seller
- (b) S doesn't resell = [K price - Mkt. price @ time of delivery]

### D. EQUITABLE REMEDIES

1. Restitution
2. Specific performance

## VII. THIRD PARTY: TAD

### A. THIRD PARTY BENEFICIARIES

1. Promisor: party who promises to perform for benefit of 3PB
2. Promisee: Party to whom performance for the benefit of 3PB is owed
3. Third Party Beneficiary
  - a) Intended Beneficiary = K Rts.
    - (1) Creditor Beneficiary
      - (a) Made K in order to discharge obligation owed to 3P
    - (2) Donee Beneficiary
      - (a) Confer gift on 3P
  - b) Incidental Beneficiary = No K Rts.
4. Who can 3PB sue
  - a) Promisor if intended beneficiary
  - b) Promisee
    - (1) 3P Donee Beneficiary = NO
    - (2) 3P Creditor Beneficiary - YES

### B. ASSIGNMENT

1. Valid K btw. 2 parties
2. One party to K transfers rights or benefits under K to 3P
3. Parties
  - a) Assignor: Party who makes assignment
  - b) Assignee: 3P recipient of assignment
  - c) Obligor: Other party who owed performance to assignor
4. No consideration needed

### C. DELEGATION

1. Valid unless:
  - a) K prohibits delegation/assignment
  - b) K calls for special skill or reputation of delegator
  - c) Delegator: P who transfers oblig.
  - d) Delegatee: 3P who agrees to perf
  - e) Obligee: Other party to K



# CONSTITUTIONAL LAW ISSUES CHECKLIST

“State the 3 branches, Feds Due First”

## I. JUDICIAL POWER: **ASC-11-S**

### A. ART. III

1. Cases and Controversies Req.
2. Justiciability Doctrines (NSRMP)
  - a) No advisory opinions
  - b) Standing
    - (1) Injury in fact
    - (2) Causation
    - (3) Repressibility
    - (4) Third party standing
  - c) Ripeness
  - d) Mootness
  - e) Political Questions

### B. SUPREME COURT JURISDICTION

1. Original and Exclusive
  - a) Controversies btw. state gov.
  - b) Actions involving ambassadors
2. Appellate
  - a) Final judgment

### C. 11TH AMEND LIMITATIONS ON REVIEW

1. Suits Barred by 11th Amendment
  - a) vs. state for damages
  - b) vs. state for injunction or declaratory relief
  - c) vs. state official
  - d) Quiet title
2. Exceptions
  - a) Waiver
3. Sovereign Immunity
  - a) Bars suits against states to private suits in state courts and federal agencies

### D. STANDARDS OF REVIEW

1. Rational Basis: Rationally related to a legitimate gov. interest
2. Intermediate Scrutiny: Substantially related to an important gov. purpose
3. Strict Scrutiny: Necessary to achieve a compelling gov. purpose

## II. LEGISLATIVE POWER: **NEIL-DB**

### A. NO GENERAL FEDERAL POLICE POWER

1. Except
  - a) Military
  - b) Federal land + territory
  - c) Native American reservations
  - d) DC

### B. ENUMERATED AND IMPLIED POWERS

1. Necessary & Proper Clause
  - a) Con. may use any means not Const. prohibited to carry out authority
2. Taxing & Spending
  - a) Rsb. relation to revenue production OR

- b) Congress has independent authority to tax

### 3. Commerce Clause

- a) Regulate *channels*
- b) Regulate *instrumentality*
- c) Regulate *persons/thing in IC*
- d) Regulate activities that have *substantial effect on IC*

### 4. Impeachment & Removal

- a) Impeach by House = Majority
- b) Conviction by Senate = 2/3

### 5. Other Powers

- a) War, Property, Citizenship, Elections, Speech or Debate, Control Fed. Ct. Jdx., Borrow, Postal, Bankruptcy, Coin/ Measure

## C. LIMITATIONS ON CONGRESSIONAL POWER

### 1. 10th Amendment

- a) Strings on Financial Grants
  - (1) Cond. exp. stated
  - (2) Cond. rel. 2 purp. program
  - (3) Pressure not compulsion

### 2. §5 of 14th Amendment

## D. DELEGATION OF POWERS (NO LIMIT)

## E. BICAMERALISM & PRESENTMENT

## III. EXECUTIVE POWER

### A. FOREIGN POWERS = **T.E.D.**

#### 1. **T**reaties

- a) President negotiated
- b) Ratified by 2/3 Senate
- c) Conflicts
  - (1) State Law = Treaty wins
  - (2) Fed. Law = Last in time
  - (3) Const. = Const. wins

#### 2. **E**xecutive Agreements

- a) Effective when POTUS and head of foreign nation sign.
- b) Conflicts
  - (1) State Law = EA wins
  - (2) Fed. Law = Fed. law wins
  - (3) Const. = Const. wins

#### 3. **D**eployment of Troops Overseas

- a) Power to act militarily in actual hostilities

### B. DOMESTIC POWERS: **TAR-PIVE**

#### 1. **T**ake Care Clause

#### 2. **A**ppointment Powers

- a) Ambassadors, public consuls
- b) Supreme Court
- c) Inferior officers if Cong. vests

# CONSTITUTIONAL LAW ISSUES CHECKLIST

“State the 3 branches, Feds Due First”

3. **Removal**
    - a) Any officer of Exec branch unless
      - (1) Independence from POTUS desirable
      - (2) Statute limits but doesn't prohibit removal
      - (3) Congress cant remove
  4. **Presidential Immunity**
    - a) Absolute civil immunity for actions taken in office
  5. **Executive Privilege**
    - a) Not absolute
  6. **Presidential Pardon**
    - a) Fed. crimes only
    - b) No pardon for impeachment
  7. **Veto Power**
    - a) Pocket Veto= 10 days unsigned
      - (1) Con. in session = Yes law
      - (2) Con. not in session = Vetoed
- C. EXECUTIVE ORDERS**
1. **Max Authority**
    - a) Exp. Con. grant by statute
  2. **Zone of Twilight**
    - a) Con. silent
  3. **Lowest Ebb**
    - a) Con. prohibits POTUS from acting
  4. **Rejection of Proposed Power**
    - a) Gray Area
- IV. FEDERALISM AND INTERSTATE**
- COMMERCE: PSC-DPPT**
- A. PREEMPTION & SUPREMACY CLAUSE**
1. **Express**
  2. **Implied**
    - a) Direct Conflict
    - b) St. law sub. impedes Fed. obj.
    - c) Field Preemption
  3. **Federal immunity from State Reg.**
- B. STATE REGULATION OF IC**
1. **Dormant Commerce Clause**
    - a) Can't discriminate against out of staters
    - b) Can't place undue burden on IC
    - c) Protectionist laws uncon. unless serves legitimate local interest that can't be served by non-disc. legislation.
    - d) No Disc. but undue burden
      - (1) Uncon. if undue burden > benefit of law to state
    - e) Exceptions
      - (1) Con. Approval
      - (2) Market Participant
2. **P&I Clause of Art. IV.**
    - a) State cannot discriminate against noncitizen
    - b) unless substantially related and no less disc. alternative
    - c) Applies to rights fundamental to national unity i.e
      - (1) Civil Liberties
      - (2) Commercial Activities
  3. **P or I Clause of 14 Amend**
    - a) Freedom of travel
  4. **State Taxation of Interstate Commerce**
    - a) Can't discriminate
    - b) Substantial nexus
    - c) Fairly apportioned
    - d) Fair relationship
- V. STATE ACTION: PE**
- A. NEED STATE ACTION**
- B. PRIVATE ACTION THAT QUALIFY**
1. **13th Amend**
    - a) § 2 prohibit race disc.
  2. **Commerce Clause**
  3. **§5 of 14th Amend → No**
- C. EXCEPTIONS**
1. **Public Function**
    - a) Private entity
    - b) Performing task *traditionally and exclusively* performed by the gov.
  2. **Entanglement**
    - a) Entity comply with Const. if gov. commanded, authorized, encouraged or facilitated the unconstitutional conduct
    - b) Gov. stops or entity ceases conduct
- VI. DP & EP: P-NH S-EF F-PABTV**
- A. LEVELS OF SCRUTINY**
1. *See I.D.*
- B. DUE PROCESS**
1. **Procedural: Notice + Hearing**
    - a) Deprivation of *life, liberty or property*
    - b) Procedures Required Balancing Test: **Matthews Factors**
      - (1) Interest of ind. affected by official action
      - (2) Risk of erroneous deprivation
      - (3) Probable value of additional or substitute procedural safeguards
      - (4) Government's Interest

# CONSTITUTIONAL LAW ISSUES CHECKLIST

“State the 3 branches, Feds Due First”

2. **Substantive**
  - a) Law limits ability of everyone to engage in activity. Protects economic liberties + fund. rts.
  - b) **Economic Liberties** = RB
  - c) **Fundamental Rights** = apply applicable scrutiny.
  - d) **Contracts Clause**
    - (1) St./Local gov. can't impair existing Ks
    - (2) Private Ks = Intermediate Scrutiny
    - (3) Gov. Ks = Strict scrutiny
  - e) **Takings Clause**
    - (1) Gov. can take prop. for *public use* if *just compensation* paid.
    - (2) **Possessory**
      - (a) Gov. confiscates or occupies person's prop
    - (3) **Regulatory**
      - (a) Elimination of investment backed expectation of economic value

## C. EQUAL PROTECTION

1. **Race & National Origin**
  - a) *Strict scrutiny*
  - b) Facially Discriminates
  - c) Facially Neutral (**Arlington Hts.**)
    - (1) Discriminatory Impact
    - (2) Discriminatory Intent
2. **Alienage**
  - a) *Generally strict scrutiny*
  - b) Exceptions
    - (1) Fed. disc. vs. aliens
    - (2) Self-gov. democratic process
    - (3) Undocumented aliens
3. **Gender**
  - a) *Intermediate scrutiny + exceedingly persuasive justification* (**Virginia VMI**)
  - b) Facially Discriminate
  - c) Facially Neutral
    - (1) Discriminatory Impact
    - (2) Discriminatory Intent
4. **Legitimacy**
  - a) *Intermediate Scrutiny*
  - b) Bastards
5. **Religion**
  - a) *Strict Scrutiny*
6. **Rational Basis = All else**

## D. FUNDAMENTAL RIGHTS

1. **Right to Privacy**
  - a) *Strict Scrutiny*

- b) Marriage, Procreation, Contraceptives, Sex, Parents
2. **Right to Abortion**
  - a) **Roe** - *Strict Scrutiny*
  - b) **Casey** - *New test = Undue Burden*
    - (1) Prior to viability can't prohibit abort. but may regulate so long as it doesn't place undue burden on ability to get abortion
      - (a) =Substantial Obstacles
3. **Right to Bear Arms**
  - a) *No level of scrutiny*
  - b) 2nd Amend. not absolute
4. **Right to Travel**
  - a) Foreign Travel = *Rational Basis*
  - b) State to State = *Strict Scrutiny*
5. **Right to Vote**
  - a) *Strict Scrutiny*
  - b) Exceptions
    - (1) Residency
    - (2) Age
    - (3) Citizenship
    - (4) Felons

## VII. FIRST AMENDMENT: **PUOAR**

### A. REGULATION OF **P**ROTECTED SPEECH

1. **Content Based**
  - a) Subject Matter Restriction
  - b) Viewpoint Restriction
2. **Content Neutral**

### B. REGULATION OF **U**NPROTECTED SPEECH

1. **Government Officials Speech**
  - a) No protection for speech made on job and in scope of duties
2. **True Threats**
  - a) Threatening communication not threat in jest
  - b) Not protected bc
    - (1) Prevent fear
    - (2) Prevent disruption following fear
    - (3) Diminish likelihood of violence
3. **Imminent Lawless Action**
  - a) Purpose to cause imminent lawless action
  - b) Substantial likelihood of imminent lawless action
4. **Defamation and Libel**
  - a) **Public Official/Figure**
    - (1) Clear and Convincing Evidence
    - (2) False Statement
    - (3) Actual Malice

# CONSTITUTIONAL LAW ISSUES CHECKLIST

“State the 3 branches, Feds Due First”

- (a) Knowledge OR
  - (b) Reckless Disregard
  - b) *Private Figure*
    - (1) *Public Concern*
      - (a) Clear and Convincing
      - (b) False Statement
      - (c) Negligence
      - (d) Punitive = need malice
    - (2) *Not Public Concern*
      - (a) BOP  $\Delta$  to prove truth
      - (b) False Statement
      - (c) Negligence
      - (d) Punitive = no malice needed
5. Obscenity
- a) Appeals to *Prurient Interests*
    - (1) Shameful/Morbid interest in sex
    - (2) Community Standard
  - b) *Patently Offensive*
  - c) *Lacks serious literary, artistic, political or scientific value*
    - (1) National Standard
  - d) Adult theater/bookstore - zoning ordinances ok
  - e) Child Porn: no need for obscene
  - f) Obscene, profane, indecent speech = 1st A protection
6. Commercial Speech
- a) *Truthful*
    - (1) Only regulate if intermediate scrutiny met
      - (a) Serves sub. gov. purpose
      - (b) Directly advances that interest
      - (c) Narrowly tailored to that interest
  - b) *Unprotected*
    - (1) Unlawful activity
    - (2) Misleading or fraudulent
- C. OTHER FREEDOM OF SPEECH ISSUES: SPAVCO**
1. Anonymous Speech
- a) Protected
2. Campaign Contributions
- a) *Elections*
    - (1) Contribution limits = constitutional
    - (2) Expenditure limits = unconstitutional
  - b) *Ballot Initiatives*
    - (1) Contribution limits = unconstitutional
    - (2) Expenditure limits = unconstitutional
- c) Corporations treated as persons
3. Symbolic Speech
- a) Medium is the message
  - b) Expressive Conduct
    - (1) Protestor intended to communicate message
    - (2) Audience likely to understand communication
  - c) To Regulate
    - (1) Important government interest unrelated to suppression of message
    - (2) Narrowly tailored to further substantial gov. interest
4. Prior restraint
- a) Stop speech before it happens
  - b) Licensing/Permitting
    - (1) Important reasons for licensing
    - (2) Clear criteria leaving no discretion
    - (3) Procedural safeguards
5. Vagueness
- a) If rsb. person can't tell what speech is prohibited or permitted
6. Over-breadth
- a) Punished speech that is constitutionally protected
- D. FREEDOM OF ASSOCIATION**
1. Prohibitions on group membership = Strict scrutiny
2. Punishing group membership
- a)  $\Delta$  actively affiliated with group
  - b) W/ knowledge of group's activities
  - c) W/ specific intent to further those illegal activities
3. Groups can discriminate if:
- a) Intimate association (very small)
  - b) Discrimination is integral to purpose of group
- E. FREEDOM OF RELIGION**
1. Religion
- a) Genuine belief in that religion
2. Free Exercise
- a) Intentional Laws = Strict scrutiny
  - b) Unintentional neutral laws of general applicability = No challenge under Free Exercise
3. Establishment Clause: Lemon Test
- a) Secular purpose
  - b) Effect doesn't inhibit or advance religion
  - c) No excessive entanglement btw. gov. + religion

# EVIDENCE ISSUES CHECKLIST

“PREP CHIPPS”

## I. LOGICAL RELEVANCE **OCMLPCD8**

- A. *Tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable.*
1. CA = In Dispute
  2. Of Consequence
    - a) Time/Event or Person in controversy
  3. Similar Occurrences
    - a) Prove Causation: Must be very similar
    - b) Prior Accidents or Claims of π
      - (1) Usually irrelevant + inadmiss.
      - (2) Exceptions
        - (a) Pattern
        - (b) Pre-existing condition
        - (c) Habit
        - (d) Intent
        - (e) Routine Business Prac.

## B. PROPOSITION 8

1. Criminal Cases
2. All relevant evidence admissible
3. Except:
  - a) hearsay, rape shield, exclusionary rule, privilege, character evidence 1st presented by prosecution, secondary ev.

## II. LEGAL RELEVANCE & JUDICIAL NOTICE **PV>UP**

### A. Probative Value > Unfair Prejudice

1. Probative Value: consider confusion, misleading jury, waste of time
2. Unfair Prejudice
  - a) Emotionally disturbing ev.
  - b) Same ev. both admis. + inadmiss.

### B. Judicial Notice = Recognize as True

1. Facts of common knowledge or capable of verification by sources of unquestionable accuracy.
2. Mandatory if requested. Discretion if not, done whenever
3. Conclusive?
  - a) Civil = Yes
  - b) Crim = No, CA YES
4. Adjudicative not leg. facts

## III. PUBLIC POLICY EXCEPTIONS **LISRMSPPME**

### A. Liability Insurance

1. Inadmiss. to prove culpable conduct or Δ's ability to pay a judgment.
2. Admis. to prove anything else

### B. Subsequent Remedial Measures

1. Inadmiss. to prove culpable conduct or defective product design, CA ok for defective product design.
2. Admissible all else

## C. Settlements, Offers to Settle, Pleas

1. Claim asserted or implied + dispute actually exists as to liab./dmg.
2. Civ. = Not for fault
3. Crim. = Not for guilt
4. CA = Stmt. in mediation

## D. Payments & Offers to Pay Medical Expenses

1. Inadmiss. to prove liability
2. Limited to payments/offers
3. CA = Expressions of Sympathy protected

## IV. PERSONAL KNOWLEDGE, TESTIMONIAL & DOCUMENTARY EVIDENCE

### A. Testimonial Evidence

1. Competency **Pk ORC O**
  - a) **Observe, Remember, Communicate + CA appreciate oath**
    - (1) **Personal Knowledge +**
    - (2) **Oath**
    - (3) **Refreshed Recollection**
      - (a) **W shown item 2 refresh**
      - (b) **W testifies from memory**
    - (4) **Recorded Recollection**
      - (a) **KCFAI**
      - (b) **W once had Knowledge**
      - (c) **Doc. Created/adopted by W**
      - (d) **When Fresh in W's memory**
      - (e) **Accurate when made**
      - (f) **Insufficient recollection to testify**
  2. Lay Witness (3 FRE) **RHN**
    - a) **Rat. based on W's perception**
    - b) **Helpful to trier of fact**
    - c) **Not based on scientific knw.**
  3. Expert Witness **HQBPD KF**
    - a) **Helpful to Jury**
    - b) **Qualified Expert**
    - c) **Belief to rsb. degree. certain.**
    - d) **Proper factual basis**
    - e) **Daubert Standard**
      - (1) **Peer review + Published**
      - (2) **Tested + Tested Again**
      - (3) **Low Error Rate**
      - (4) **Rsb. level of acceptance**
    - f) **CA + Kelly-Frye**
      - (1) Generally accepted in comm.

### B. Documentary Evidence

#### 1. Authentication

- a) **BOP sufficient to sustain a finding**
- b) **Self-Authenticating/Chain Cust.**

# EVIDENCE ISSUES CHECKLIST

“PREP CHIPPS”

2. **Best Evidence Rule**
    - a) W testifies to contents of writing
      - (1) Writing = tangible collection of data
    - b) Writing in issue
    - c) Writing required unless
      - (1) Lost/destroyed + not fault/intentional misconduct
      - (2) CA = Secondary Ev.
- V. **TESTIMONIAL PRIVILEGES** **AcSPDPsC**
- A. **Attorney-Client Privilege**
    1. Intended to be confidential
    2. Made to facilitate legal services
    3. Client holds privilege until
      - a) FRE after death
      - b) CA = Estate settled
    4. Corporations
      - a) FRE = Person authorized to speak to attorney
      - b) CA = Anyone who says corp. liab.
  - B. **Spousal Privileges**
    1. Confidential Marital Communication
      - a) Crim + Civ Applicable
      - b) All communications
      - c) During course of valid marriage
      - d) Intended to be confidential
      - e) Both spouses hold privilege
    2. Spousal Testimonial Privilege
      - a) FRE-Crim; CA-Civ. + Crim
      - b) Legally valid marriage @ trial
      - c) Spouse can refuse to testify to anything + before marriage
      - d) Holder
        - (1) FRE + Min = Wit. spouse
        - (2) Maj. = Δ Spouse
  - C. **Doctor Patient Privilege** (CA only)
    1. Intended to be confidential
    2. Made to receive diagnosis/treatment
    3. Pertinent to diagnosis or treatment
    4. Exceptions
      - a) Condition in issue
      - b) Crime/fraud/malpractice
      - c) Doesn't apply in CA crim.
      - d) CA mandatory reporters
  - D. **Psychotherapist-Patient & Social Worker-Client Privilege** (FRE+CEC)
    1. Intended to be confidential
    2. Made to facilitate professional servs.
    3. Exceptions
      - a) Same at Dr./Pt.
  - E. **CA Privileges**
    1. DV
    2. Penitential
    3. Reporters
- VI. **CHARACTER EVIDENCE & IMPEACHMENT**
- A. **Character Evidence** (Rep/Opin/Sp.Inst)
    1. Civil
      - a) Admissible if character at issue
        - (1) Defamation
        - (2) Negligent Entrustment
        - (3) Child Custody Disputes
        - (4) Rep. + Opin. Spec. Inst. OK
      - b) Inadmissible to prove conduct
        - (1) FRE exc. Sex assault/molest
      - c) Rape Shield Civil
        - (1) Reputation
          - (a) Vic. put at issue
          - (b) Prob. Val. sub. outweighs unfair prejudice
        - (2) Opinion + Specific Instances
          - (a) Prob. Val. sub. outweighs unfair prejudice
    2. Criminal
      - a) To prove conduct of Δ
        - (1) None in prosecution's case in chief
        - (2) Except: Sex assault/molest. or vic. character offered by Δ + DV cases
        - (3) Mercy Rule: Δ can int. first
        - (4) Direct
          - (a) Rep/ + Opinion only
        - (5) Cross
          - (a) Rep. + Opinion +
          - (b) Specific Instances
      - b) To prove conduct of Vic.
        - (1) Prosecution cant intro. 1st
        - (2) CA Prop 8 yes sub. 2 bal. test
        - (3) Direct
          - (a) Rep. + Opinion
          - (b) CA specific instances OK
        - (4) Cross-Examination
          - (a) All methods ok
      - c) Rape Shield Criminal
        - (1) Reputation + Opinion No
        - (2) Specific Instances only for
          - (a) Third party injury/semen
          - (b) Prior consensual acts
    3. **MIMIC**
      - a) Still need to balance
      - b) Character evidence doesn't apply if used to prove:
        - (1) **M**otive/Opportunity
        - (2) **I**ntent/Preparation
        - (3) Absence of **M**istake or Accident
        - (4) **I**ntity
        - (5) **C**ommon Plan or Scheme

# EVIDENCE ISSUES CHECKLIST

“PREP CHIPPS”

## B. Impeachment

### 1. Character For Truthfulness

- a) Rep. + Opinion OK
- b) Specific Acts
  - (1) FRE- Yes. No Extrinsic Ev.
  - (2) CA- Civ. Yes, Crim. No

### 2. Prior Consistent

- a) Not until impeached unless
  - (1) Timely complaint
    - (a) Rape victim or coerced confession
  - (2) Prior consistent statement of identification
- b) Admiss for all purposes if made before bribe or incon. stmt.

### 3. Prior Inconsistent

- a) Extrinsic evidence inadmissible to impeach on collateral matter
- b) Admissible to impeach
- c) Inadmissible for truth
- d) If given under oath ok for anything
- e) Give opp. to explain or deny

### 4. Bias, Interest, Motive

- a) Admissible to impeach through cross-exam or extrinsic evidence
- b) Give opp. 2 explain/deny

### 5. Prior Convictions

- a) Mis./Fel. involving false statements = Admis. to impeach
  - (1) CA Moral turpitude
  - (2) No power to balance admis. one purpose inadmis. other
    - (a) Except: + 10 y/o ≠CA
- b) Fel. not involving false stmts. = may be admis. to impeach
  - (1) Felony:
    - (a) Impeach accused: prob. val. > prej. effect
    - (b) Impeach anyone else: prej. effect does not sub. outweigh prob. val.
  - c) Misdemeanor
    - (1) FRE- NO
    - (2) CA- Civ. No, Crim. Moral Turp

### 6. Non-conviction misconduct that bears on truthfulness

- a) Admis. Civ. + Crim. if involve lying
- b) FRE no extrinsic ev.; CA ok

### 7. Sensory Deficiencies

- a) Defects in Capacity
- b) Lack of Knowledge
- c) Cross Exam- Extrinsic Ev. OK

### 8. Rehabilitation

- a) Explain on redirect
- b) Good reputation for truth
- c) Prior Consistent Statement

### 9. Exclusion

## VII. HEARSAY

### A. Out of court statement offered to prove the truth of the matter asserted

- 1. OCS TOMA
- 2. Statement
  - a) verbal or written expression of a person including assertive conduct intended to communicate.
- 3. Generally inadmissible unless exception or exemption
- 4. Prop 8 Exception

### B. Not Hearsay IEKS

- 1. Independent Legal Significance
  - a) Contracts, Defamation, Adverse Possession, Ownership of Prop.
- 2. Effect on Listener
  - a) IIED
- 3. Knowledge of Facts Stated
- 4. State of Mind of Speaker
  - a) Circumstantial

### C. Hearsay Exemptions (FRE only, CA exceptions) AVP

#### 1. Admission of Party Opponent

- a) Statement by party
- b) Offered by opponent
- c) Not subject to personal knowledge req. or opinion rules

#### 2. Vicarious Party Admission

- a) Authorized Spokesperson
- b) Principal-Agent
- c) Adoptive Admission
- d) Co-conspirator stmt. during course of and in furtherance

#### 3. Prior Statement by Witness

- a) Prior inconsistent if under oath
  - (1) CA all inconsistent stmts.
- b) Prior Consistent Statement
  - (1) Rebut motive to fabricate
  - (2) If made B4 motive to fab.
- c) Prior Identification

### D. Exceptions for Unavailable Declarant

#### 1. UFSD

#### 2. Unavailable

- a) Privilege
- b) Dead
- c) Sick
- d) Cant compel thru rsb. means
- e) Refusal ≠ CA

# EVIDENCE ISSUES CHECKLIST

“PREP CHIPPS”

- f) Memory Failure ≠ CA +
- g) Fear of total memory loss = CA
- 3. **Former Testimony**
  - a) Offered against someone w/ opp. + similar motives to examine OR
  - b) Civ.= offered against someone who has a predecessor in interest w/ sim. opp. + motive
- 4. **Statements Against Interest**
  - a) Against financial interests of dec.
  - b) Would sub. dec. to crim. liability
  - c) If to exculpate, need corroborating evidence
  - d) CA also stmt contra social int.
- 5. **Dying Declarations**
  - a) FRE-Civ. + Homicide
  - b) CA- Civ. + Crim.
  - c) Made under belief of impending death
  - d) Describing cause or circumstances leading to
  - e) Unavailable dec.
    - (1) CA must die
- E. **Exceptions Where Unavailability Immaterial**
  - 1. **EPPMBPJRC**
  - 2. **Excited Utterance**
    - a) Startling event or condition
    - b) Dec. made stmt. while under stress or excitement of condition
  - 3. **Present Sense Impression**
    - a) Stmt. desc. or exp. event/cond.
    - b) Made while dec. perceived event/cond. or immediately after
    - c) CA = Contemporaneous stmt.
    - d) CA= Describes declarant's conduct only
  - 4. **Present State of Mind**
    - a) Stmt. of dec. then existing state of mind or mental condition
    - b) Intention = State of mind
  - 5. **Statements Made for Medical Diagnosis or Treatment.**
    - a) Admis. if made for or pertinent to medical diagnosis/treatment
    - b) CA only if minor who desc. abuse/neglect
    - c) CA Past Physical or Mental Cond.
      - (1) If cond. at issue in case
  - 6. **Business Records (6 FRE)**
    - a) **ReKoPkMT**
    - b) Record of Events, conditions, opinions or diagnoses
      - (1) CA Cts will apply if contain simple opinions or diagnoses
  - c) Kept in Ordinary course of bus.
  - d) By Person w/ knowledge of info.
  - e) Made at or near time of matters described.
  - f) Must be Trustworthy
  - 7. **Public Records (AOI)**
    - a) Record describes Activities of office
    - b) Describes matters Observed pursuant to duty imposed by law
      - (1) Not for prosecution in Crim.
      - (2) CA = No restriction
    - c) Record contains factual findings from Investigation made pursuant to authority granted by law
      - (1) Must be trustworthy
      - (2) Not for prosecution in Crim.
  - 8. **Judgments of Previous Conviction**
    - a) Civ. + Crim. prove fact essential to judgment
    - b) CA only for civil cases
    - c) Prop 8 yes if moral turp.
  - F. **Residual Hearsay**
    - 1. Offered as evidence of material fact
    - 2. More probative on the point for which it is offered than any other evidence
    - 3. Interests of justice best served by admission
    - 4. Advance notice to adverse party
  - G. **Confrontation Clause**
    - 1. Declarant does not testify at trial
    - 2. Declarant now unavailable
    - 3. Statement is testimonial
      - a) Statements made in court
      - b) Statements aimed at producing evidence for a prosecution
      - c) Ongoing emergency = not testimonial
    - 4. Δ had no opportunity to cross declarant about statement when made.



# REAL PROPERTY ISSUES CHECKLIST

“For Real Property, its ONLY ConConZon”

## I. OWNERSHIP

### A. FREEHOLD ESTATES

1. Fee Simple Absolute
  - a) “to A [and her heirs]”
  - b) Absolute ownership of potentially infinite duration.
2. Fee Tail
  - a) “to A & the heirs of her body”
  - b) Abolished - becomes FSA
3. Defeasible Fees
  - a) Fee Simple Determinable
    - (1) Clear durational language
    - (2) Violation = Auto reversion to grantor
  - b) Fee Simple Subject to Condition Subsequent
    - (1) Clear durational language +
    - (2) Expressly reserve right to re-enter
    - (3) Grantor must exercise to terminate
  - c) Fee Simple Subject to Executory Limitation
    - (1) Estate automatically passes to a third party upon happening of event
    - (2) Clear durational language
4. Life Estate
  - a) “to A for life”
  - b) Ownership measured in terms of lifetime, not years
  - c) Entitled to ordinary uses + profits
  - d) Pur Autre Vie
    - (1) “to A for B’s life”
    - (2) Life estate measured by the life of someone other than the grantee
    - (3) Defeasible Life Estates
  - e) Waste
    - (1) Affirmative
      - (a) Harm to estate or
      - (b) Depletion of resources
    - (2) Permissive
      - (a) Failure to maintain physically + financially
    - (3) Ameliorative
      - (a) Improvement
      - (b) All future interest consent

### B. FUTURE INTEREST

1. Grantor (vested≠RAP)
  - a) Possibility of Reverter
    - (1) FS Determinable
  - b) Right of Entry
    - (1) FS Sub. Cond. Sub.

- c) Reversion
  - (1) Any estate of lesser quantum
2. Grantee
  - a) Remainder
    - (1) Vested Remainder
      - (a) Ascertained person
      - (b) NOT sub. to condition precedent
      - (c) Indefeasibly Vested Remainder
    - (2) Contingent Remainder
      - (a) Unascertained person, **or**
      - (b) Sub. to condition precedent
      - (c) Destructibility
        - i) CL = YES
        - ii) ML = NO
      - (d) Rule is Shelly’s Case
        - i) “B for life, then to B’s heirs”
        - ii) CL= Merger FSA-B
        - iii) ML= Abolished
      - (e) Doctrine of Worthier Title
        - i) “B for life, then to O’s heirs” + O alive
        - ii) Creating a remainder in the grantor’s heirs = void
    - b) Executory Interest
      - (1) Shifting Executory Interest
        - (a) Future interest in grantee
        - (b) Divests/cuts short a defeasible fee in
        - (c) Another *grantee*
      - (2) Springing Executory Interest
        - (a) Future interest in grantee
        - (b) Divests *grantor*
        - (c) Upon completion of stated event

### C. RULE AGAINST PERPETUITIES

1. For a future interest to be valid, the interest must vest, if at all, w/in 21 years after some life in being at the instrument’s effective date. Applies to:
  - a) Contingent Remainders
  - b) Executory Interests
  - c) Vested Remainders Sub. to Open
2. Modern RAP
  - a) Wait and See
  - b) Uniform Statutory RAP
    - (1) If CL RAP is satisfied = Valid
    - (2) F.I. vests w/in 90 yrs = Valid
    - (3) Cy Pres Doctrine
3. Charitable Exceptions

# REAL PROPERTY ISSUES CHECKLIST

“For Real Property, its ONLY ConConZon”

## D. CONCURRENT ESTATES

### 1. Joint Tenancy

- a) Requires (4) Unities (TTIP): Time, Title, Interest, Possession
- b) Express language of survivorship
- c) Severance = TIC
  - (1) Voluntary Agmt
  - (2) Court Ordered Division
  - (3) Inter Vivos Conveyance
  - (4) Mortgages
    - (a) Majority= Lien Theory. Doesn't sever JT
    - (b) Minority= Title Theory. Severs JT.
  - (5) Forced Sale
    - (a) Judgment Lien = no severance until sold at foreclosure sale
    - (b) Foreclosed Mtg= If foreclosed + sold = severance

### 2. Tenancy by the Entirety

- a) Valid Marriage
- b) Requires the (4) unities (TTIP): Time, Title, Interest, Possession
- c) Right of Survivorship (presumed unless stated otherwise)
- d) Severance/Termination (3)
  - (1) Divorce
  - (2) Agreement
  - (3) Joint Creditors

### 3. Tenancy in Common

- a) Unity of Possession needed
- b) No right of survivorship
- c) Presumed by ML

### 4. Rights/Duties of Co-Tenants

- a) Possession
  - (1) Ouster
  - (2) Rents from Co-Tenant
    - (a) Exclusive Possession= not unless ouster
- b) Profits from non-tenant
- c) Carrying Costs + Repairs
- d) Improvements
- e) Duty Not to Commit Waste
- f) Right to Bring Action for Partition

## II. NATURAL RIGHTS

### A. RIGHT TO EXCLUDE

#### 1. Trespass

- a) Invasion of land by tangible physical object
- b) Δ enters land w/o permission
- c) Δ remains on land w/o right

d) Δ places physical object on land and refuses to remove

e) Seek Ejectment

### 2. Private Nuisance

- a) π has interest in land
- b) Unreasonable interference w/ use and enjoyment of land
- c) Δ's conduct is negligent, intentional or abnormally dan.

## B. LATERAL AND SUBJACENT SUPPORT

### 1. Strict Liability

a) π shows weight of building did not contribute to collapse of land

### 2. Negligence

a) If no SL need neg. to recover

## C. WATER RIGHTS

### 1. Riparian Rights

a) Landowner whose prop. is adjacent to body of H2O have right to make rsb. use

### 2. Prior Appropriation

a) First person to use quantity of water for beneficial use has right to continue to use that quantity for that purpose.

### 3. Percolating Water (Ground Water)

a) Owner of prop. at surface can make rsb. use but not waste

### 4. Surface H2O + Common Enemy Doc

- a) Uphill can protect property even if disadvantages downhill prop.
- b) Modernly= act reasonably

## III. LANDLORD & TENANT

### A. LEASEHOLDS

#### 1. Tenancy for Years

- a) Lease for fixed period of time
- b) Dates must be specified
- c) Lease > 1 year = writing req.
- d) No notice req. to terminate

#### 2. Periodic Tenancy

- a) Express agmt. OR
- b) Implication OR
- c) Operation of law
- d) Automatic renewal
- e) Need valid notice to terminate

#### 3. Tenancy at Will

- a) No stated duration
- b) Endure as long as L and T desire
- c) Terminate at any time = Modernly give reasonable notice

#### 4. Tenancy at Sufferance

- a) T 'holds over' at end of lease
- b) Termination
  - (1) Evict T OR

# REAL PROPERTY ISSUES CHECKLIST

“For Real Property, its ONLY ConConZon”

- (2) Elect new tenancy
- B. TENANTS DUTIES**
- Pay Rent
    - Breach In Possession
      - Evict T
      - Continue + Sue for back rent
      - No Self help
    - Breach Out of Possession
      - Treat as surrender
      - Min = Leave vacant + sue for back rent
      - Maj = Duty to mitigate
  - Repair
    - Lease Silent
      - Keep in rsb. good repair
      - Not commit waste
    - Express Covenant to Maintain
      - CL: T responsible for any loss or destruction regardless of fault, including acts of God
      - ML: T may terminate if premises destroyed + T not at fault
  - Invited Third Parties
    - Keep premises in rsb. good cond.
  - Tort liability

- C. LANDLORDS DUTIES**
- Deliver Possession
    - Maj. English Rule = put T in actual, *physical* possession
    - Min. American Rule = put T in *legal* possession
  - Implied Covenant of Quiet Enjoyment
    - Res + Comm leases
    - L can't unreasonably interfere w/ T's use + enjoyment of prop.
    - Wrongful Conviction
    - Constructive Eviction
      - Substantial Interference
      - Notice to L
      - T must vacate w/in rsb. time
  - Implied Warranty of Habitability
    - CL: Caveat Emptor
    - ML: residential lease. Premises must be fit for basic human habitation
    - Retaliatory Eviction
  - Landlord's Tort Liability
    - L not usually liable for acts of other T
    - CL: Caveat Lessee

- D. ASSIGNMENT & SUBLEASE**
- Assignment: Transfer *Entire* Interest
    - L + T (assignor)

- Privity of K = Yes
  - Privity of Estate = No
- L + Assignee
    - Privity of Estate = Yes
    - Privity of K = No
  - Subsequent Assignments
- Sublease: Transfer *Part* of Interest
    - L + T (Lessee)
      - Privity of Estate = Yes
      - Privity of K = Yes
    - T (Lessee) + Sublessee
      - Privity of K = Yes
    - L + Sublessee
      - Privity of K = No
      - Privity of Estate = No

## IV. YOUR RIGHTS IN ANOTHER'S LAND

### A. EASEMENT

- A non-possessory interest in land that entitles the person to use the land owned by another (aka servient land).
- Types
  - Affirmative: **PINE**
    - Express Grant
      - >1yr = Need writing
      - Signed by grantor
      - Manifest intent to create easement
      - Describe land
      - Identify parties
    - Implication
      - Originally one parcel
      - Severed
      - Apparent + continuous use on servient land
      - Parties intend use to continue
      - Rsb. nec. 2 use + enjoy of dominant land
    - Necessity
      - Prev. united ownership
      - Absolute necessity
      - Necessity existed at time of severance of property
    - Prescription (**ROACH**)
      - Running of statute
      - Open and notorious
      - Actual (exclusive not required)
      - Continuous
      - Hostile
  - Negative
    - Light
    - Air
    - Subjacent/Lateral Support

# REAL PROPERTY ISSUES CHECKLIST

“For Real Property, its ONLY ConConZon”

- (4) Stream H2O from artificial flow
  - (5) CA = Scenic Views
  - (6) Always Appurtenant
3. **Forms**
- a) **Appurtenant**
    - (1) Benefits owner in use and enjoyment of her land
    - (2) Two parcels of land req
      - (a) Land benefitted = Dominant Tenement
      - (b) Land burdened = Servient Tenement
  - b) **In Gross (Personal)**
    - (1) Does not benefit the owner in the use and enjoyment of her land but merely gives a right to use the servient land
4. **Termination (END CRAMP)**
- a) **E**stoppel
  - b) **N**ecessity
  - c) **D**estruction
  - d) **C**ondemnation
  - e) **R**elease
  - f) **A**bandonment action
  - g) **M**erger Doctrine
  - h) **P**rescription
- B. LICENSE**
1. Mere privilege to use land for a specified purpose
  2. Revocable unless
    - a) Estoppel OR
    - b) Coupled with interest
- C. PROFIT**
1. Right to enter servient estate to remove minerals, timber, oil, etc.
  2. Gov. by same rules as easements
- D. COVENANT**
1. A contractual limitation, written promises, related to land.
  2. Remedy = damages
  3. Types
    - a) Negative
      - (1) Promise not to do something related to land
    - b) Positive/Affirmative
      - (1) Promise to do something related to land
  4. Running with the Land
    - a) Burden to Run (WITCH VaN)
      - (1) **W**riting required
      - (2) **I**ntent of original parties
      - (3) **T**ouch + **C**oncern land
      - (4) **H**orizontal + **V**ertical privity
    - (5) **N**otice
    - b) Benefit to Run (WITCV)
      - (1) **W**riting Required
      - (2) **I**ntent of original parties
      - (3) **T**ouch + **C**oncern land
      - (4) **V**ertical privity
- E. EQUITABLE SERVITUDE**
1. Restriction on how land may be used
  2. Remedy = injunction
  3. Writing Required
  4. Burden to Run (WITCN)
    - a) **W**riting
    - b) **I**ntent of original parties
    - c) **T**ouch + **C**oncern land
    - d) **N**otice
    - e) **\*\***Privity ≠ required
  5. Benefit to Run (WITC)
    - a) **W**riting
    - b) **I**ntent of original parties
    - c) **T**ouch + **C**oncern land
    - d) **\*\***Notice and privity ≠ required
- F. IMPLIED EQUITABLE SERVITUDE**
1. Common scheme existed before 1st sale
  2. Δ had knowledge of common scheme
- V. CONVEYANCE**
- A. ADVERSE POSSESSION (ROACH)**
1. **R**unning of statutory period
  2. **O**pen + **N**otorious
  3. **A**ctual & **E**xclusive
  4. **C**ontinuous
  5. **H**ostile
- B. THE LAND CONTRACT**
1. K law governs
  2. Statute of Frauds satisfied (SWIPPD)
    - a) **W**riting
    - b) **D**escribe the land
    - c) **I**dentify the **P**arties
    - d) **S**igned by party to be bound
    - e) **P**rice or other consideration
  3. Part Performance Exception to SOF
    - a) No Writing required if 2/3 (**PIP**)
      - (1) B takes **P**ossession
      - (2) B **P**ays all or part of purchase price
      - (3) B makes substantial **I**mprovements
  4. Implied Promises of Seller
    - a) Marketable title at closing
    - b) No false stmt. of material fact
    - c) No failure to disclose latent material defects

# REAL PROPERTY ISSUES CHECKLIST

“For Real Property, its ONLY ConConZon”

5. Equitable Conversion
  - a) Buyer and Sellers interest are switched once K is signed
  - b) B= Real prop. interest
  - c) S= Personal prop. interest
  - d) Damages or destruction after equitable conversion
    - (1) Maj = Risk on B
    - (2) Min = Risk on S

## C. THE CLOSING: **EDA**

1. **Execution**: (**WIP-DS**)
  - a) **W**riting
  - b) **I**dentify **P**arties
  - c) **D**escribe Prop.
  - d) **S**igned by Grantor
2. **Delivery**
  - a) Words/Conduct evidencing grantor's intent that deed have some present operative effect
  - b) Actual
  - c) Implied
  - d) Presumptions
    - (1) Handed to grantee
    - (2) Acknowledged by notary
    - (3) Recorded
3. **Acceptance**
4. **Types of Deeds**
  - a) Quitclaim Deed
    - (1) No Covenants
  - b) General Warranty Deed
    - (1) Present Covenants (**SRA**)
      - (a) **S**eisin
      - (b) **R**ight to Convey
      - (c) **A**gainst Encumbrances
    - (2) Future Covenants (**QWF**)
      - (a) **Q**uiet Enjoyment
      - (b) **W**arranty
      - (c) **F**urther Assurances
  - c) Special Warranty Deed
    - (1) Grantor has not conveyed to another
    - (2) Free from encumbrances created by grantor

## D. RECORDING STATUTES

1. Race
  - a) First to record prevails
2. Notice
  - a) Sub. BFP w/o notice will prevail regardless of who records first
3. Race-Notice
  - a) Sub. BFP w/o notice who records first will prevail

## VI. CONTRACTS FOR SECURITY INTERESTS (MORTGAGES)

## A. MORTGAGES

1. Conveys a security interest in land intended by the parties to serve as collateral for repayment of a debt
2. Parties
  - a) Creditor = Mortgagee
  - b) Debtor = Mortgagor
3. Creation
  - a) Writing required
  - b) Parties
  - c) Description of land
  - d) Recording not required

## B. DEED OF TRUST

## C. INSTALLMENT LAND CONTRACT

## D. EQUITABLE MORTGAGE

## E. SALE LEASEBACK OPTION

## VII. ZONING & CONSTITUTIONAL PROT

### A. EMINENT DOMAIN

1. Taking
  - a) Possessory
    - (1) Gov. confiscates or physically occupies a person's property
  - b) Regulatory
    - (1) No reasonable economically viable use of property
    - (2) Total Taking
      - (a) Entire property devoid of economically viable use
    - (3) Partial Taking
      - (a) Penn Central Balance Test
        - i) Nature of gov. action
        - ii) Level of diminution in value of owner's property
        - iii) Property owner's reasonable investment backed expectations

2. Public Use
  - a) Reasonable belief that taking will benefit the public

3. Just Compensation
  - a) Measured by loss to owner

### B. ZONING ORDINANCES

1. Zoning destroys economic value of land = Regulatory Taking
2. Zoning Variances
  - a) Undue Hardship
  - b) Public will not suffer substantial detriment from variance
3. Unconstitutional Exactions
  - a) Essential Nexus
  - b) Rough Proportionality

# TORTS ISSUES CHECKLIST

“PINS DeEP”

## I. INTENTIONAL TORTS

### A. PRIMA FACIE CASE

1. Act
2. Intent
  - a) Desire or purpose to bring about the effect, or knowledge with substantial certainty
  - b) Transferred intent
3. Causation

### B. INTENTIONAL TORTS TO PERSON: **BAFI**

1. Battery
  - a) intent
  - b) harmful or offensive
  - c) contact
  - d) causation
2. Assault
  - a) Intent
  - b) Causing Apprehension
    - (1) must be aware
  - c) Imminent
  - d) Harmful or offensive
3. False Imprisonment
  - a) Intent - desire or knowledge with substantial certainty
  - b) Confined
  - c) Bounded Area
  - d) No reasonable means of escape
  - e) Aware
4. IIED
  - a) Intent
  - b) Severe emotional distress
  - c) Extreme and outrageous
  - d) 3rd Party
    - (1)  $\pi$  was present and known by the  $\Delta$  to be present, and is a close relative of victim.
    - (2)  $\pi$  was physically present and known by the  $\Delta$  to be present, and the  $\pi$  suffers bodily harm as a result of the severe emotional distress.

### C. INTENTIONAL TORTS TO PROPERTY: **TlCC**

1. Trespass to Land
  - a) Intent
  - b) Wrongful physical invasion
  - c) Real Property
  - d) Causation
2. Trespass to Chattels
  - a) Intent
  - b) Interference with use or possession
  - c) Chattel
  - d) Causation
  - e) Damages

### 3. Conversion

- a) Intent
- b) Substantial interference with use or possession
  - (1) so severe that  $\Delta$  should pay full value
- c) Chattel
- d) Causation
- e) Damages
  - (1) FMV at time of conversion
  - (2) Replevin

### D. DEFENSES TO INTENTIONAL TORTS

1. Consent
  - a) Express
  - b) Implied
  - c) Scope
  - d) Must have capacity
2. Self-defense
  - a) Reasonable belief of a genuine threat
  - b) Degree of force
  - c) duty to retreat
3. Defense of Others
  - a)
4. Defense of Property
  - a) Warning is required.
  - b) Deadly force = reasonable belief of death or GBH.
5. Recapture of Chattels
  - a) Hot pursuit - prop owner must be in fresh pursuit
  - b) Deadly force prohibited
6. Re-entry onto land
7. Necessity
  - a) Private - person acts to prevent injury to himself or his property, or the person or property of another. Compensation is owed for the damages.
  - b) Public - harm threatened is to the community or large number of people. No compensation owed
8. Shopkeepers Privilege
  - a) temporarily detain. Police must be called in order to make arrest.
9. Privilege of Arrest

## II. NEGLIGENCE

### A. PRIMA FACIE CASE

1. Duty
2. Breach
3. Causation
4. Damages

# TORTS ISSUES CHECKLIST

“PINS DeEP”

## B. DUTY OF CARE

1. To whom owed?
  - a) Foreseeable plaintiffs
    - (1) Maj = Zone of Danger
    - (2) Min = Everyone
  - b) Rescuers — injuries to rescuers are foreseeable
  - c) Prenatal injuries — duty is owed to a viable fetus
2. Standard of Care
  - a) *RPP under the circumstances*
  - b) Legal Duty to Act
    - (1) Special relationship
    - (2) Creation of Peril
    - (3) Vol. Assumption of Care = must act w/reasonable care
  - c) Children - must conform conduct of a child of like age, intel., and experience.
    - (1) Exceptions: Adult activities, children < 4 y.o.

## C. BREACH

1. Negligence Per Se
  - a) Requirements
    - (1) Member of class protected by statute
    - (2) Prot. against particular harm
  - b) Unexcused violation of safety statute = conclusively establishes  $\Delta$  negligence
  - c) Exceptions
    - (1) Compliance would cause more harm than violation
    - (2) compliance beyond  $\Delta$  control
2. Res Ipsa Loquitur
  - a) No direct evidence
  - b) Accident normally does not occur without negligence by someone
  - c) instrument within  $\Delta$ 's exclusive control

## D. CAUSATION

1. Cause in fact
  - a) “But For” the breach of duty by the  $\Delta$ , the  $\pi$  would not have been injured.
  - b) Concurrent Causes - so long as one of the causes was a substantial factor in bringing about the plaintiff
  - c) Alternative Causes - burden shifts to  $\Delta$ s to show that her negligence was not the actual cause
2. Proximate cause

- a) Reasonably Foreseeable -  $\Delta$  is liable for all harmful results that were reasonably foreseeable
- b) Intervening Causes
  - (1) Foreseeable
  - (2) Unforeseeable

## E. DAMAGES

1. Personal Injury
  - a) Eggshell  $\pi$  -  $\Delta$  take  $\pi$  as they are
2. Property Damage
3. Punitive Damages
4. Duty to mitigate
5. Collateral Source Rule - if  $\pi$  collects damages from a collateral source her recoverable damages in a tort action will not be reduced.

## F. DEFENSES

1. Contributory Neg. = Complete Bar
  - a) Last Clear Chance - if  $\Delta$  had an opportunity to prevent the harm just before the accident and the  $\pi$  did not, the  $\pi$  will not be barred from recovery. This is a limit on the defense of contributory negligence.
2. Comparative Neg. = Reduction
  - a) *Partial* =  $\pi$  barred if  $\pi > 50\%$
  - b) *Pure* =  $\pi$  can always recover, but will be reduced by % of fault.
3. Assumption of Risk
  - a) if  $\pi$  voluntarily consented to known risk  $\pi$  is denied recovery
  - b) express or implied

## G. OTHER STANDARDS OF CARE

1. Professionals
  - a) Req. to possess the knowledge and skill of a member of their prof. in good standing.
  - b) *Fireman's Rule* - prohibits firefighters (and law enforcement) who are injured in the line of duty from suing for negligence
2. Medical Specialists = Nat'l Standard
  - a) Duty to disclose risk of treatment
3. Owners & Occupiers of Land
  - a) Off Premises = gen. no duty
    - (1) Unreasonably danger artificial cond = reasonable care
  - b) On Premises
    - (1) **Licenseses** = social guests
      - (a) On prop = reason care
      - (b) unknown concealed dangers = no duty to inspect

# TORTS ISSUES CHECKLIST

“PINS DeEP”

- (c) Known Concealed Dangers = duty to warn
- (2) **Invitees** = business dealings
  - (a) On prop = reason care
  - (b) unknown concealed dangers = duty to inspect w/ reasonable care
  - (c) known concealed dangers = duty to warn

### (3) **Trespassers**

- (a) Discovered
  - i) Activities = reasonable care
  - ii) dangerous cond. on land = duty to warn or make safe
- (b) Undiscovered = no duty
- (c) Attractive Nuisance:  
**(I-RULAR)**
  - i) Dang **A**rtificial cond. that O is or should be aware of
  - ii) kids **L**ikely to Trespass
  - iii) Cond. likely to cause **I**njury
  - iv) C **U**naware of danger
  - v) **R**isk substantially outweighs expenses
  - vi) O failed to exercise **R**easonable care

### H. **NIED = SEVERE EMOTIONAL DISTRESS**

1. Duty Breached
  - a) Zone of physical danger = threat of physical impact leads to emotional distress
  - b) Special relationship
2. Physical Consequences Required
  - a) Exceptions: (1) Erroneous report of relative's death  
(2) mishandling of a relatives corpse
3. Bystander Fear of Another's Safety
  - a)  $\pi$  present at scene
  - b)  $\pi$  observed and perceived injury
  - c)  $\pi$  and injured party are closely related

### III. **STRICT LIABILITY**

#### A. **ANIMALS**

1. Trespassing Livestock = SL for damages
2. Non-trespassing Animals
  - a) Domestic = No SL
    - (1) Exception: Dangerous tendency

- b) Wild = SL
  - (1) Animals that have not been domesticated
  - (2) injury must result from dangerous propensity

#### B. **ABNORMALLY DANGEROUS ACTIVITY**

1. 2nd Rest. (6)
  - a) high degree of risk
  - b) of serious harm
  - c) risk cannot be eliminated
  - d) activity not common
  - e) activity not appropriate for place
  - f) danger outweighs value
2. 3rd Rest. (2)
  - a) foreseeable & highly significant risk of physical harm even when reasonable care is exercised
  - b) activity is not one of common usage in the community

#### C. **LIMITATION ON LIABILITY**

1. SL = Must be risk that makes activity abnormally dangerous.
2. **Proximate Cause** = no SL if the harm occurs in an unforeseeable manner.
3. Defenses
  - a) Comparative Negligence = yes
  - b) Contributory Negligence = no
  - c) Assumption of Risk = yes

### IV. **PRODUCTS LIABILITY**

#### A. **STRICT PRODUCTS LIABILITY**

1. Manufacture or Sale by  $\Delta$ 
  - a) Casual sellers  $\neq$  SL
2. Defect in Product
  - a) Manufacturing Defects = lemon
  - b) Design Defects = design is generally defective
  - c) Inadequate Warnings = property manufactured & designed product
3. Actual Cause = Defect existed in hands of manufacturer
  - a) no subsequent alterations
  - b) Presumed if ordinary channels of commerce
  - c) Res Ipsa
    - (1) ordinarily occurs as a result of a product defect
    - (2) No other cause identified
4.  $\Delta$  liable for intended use or reasonably foreseeable misuse

#### B. **DEFENSES SAME AS SL**

1. Comparative Negligence = yes
2. Contributory Negligence = no
3. Assumption of the risk = yes
4. Disclaimers & Waivers ineffective



# TORTS ISSUES CHECKLIST

“PINS DeEP”

## C. IMPLIED WARRANTIES

1. Merchantability
  - a) must be fit for their ordinary purpose
  - b) Disclaimer
    - (1) “as is” or “with all faults”
    - (2) Conspicuous
2. Fitness for Particular Purpose
  - a) Buyer has particular purpose
  - b) Seller is aware
  - c) goods must be fit for that particular purpose

## D. REPRESENTATION THEORIES

1. Express warranty of quality (Sample)
  - a) Statements of opinion
  - b) disclaimer of express warranty - only effective if consistent w/ warranty
2. Misrepresentation of material fact
  - a) Misrepresentation of material fact
  - b) seller intended to induce reliance

## V. DEFAMATION

### A. ELEMENTS

1. Defamatory Statement
2. Of or concerning  $\pi$
3. Publication to a 3rd party
4. Damage to  $\pi$  reputation

### B. TYPES

1. Libel
  - a) published in durable form (i.e. written, printed, recorded)
  - b) damages are presumed
    - (1) economic harm
2. Slander
  - a) published in fleeting form (oral)
  - b) Must prove special damages
3. Slander Per Se
  - a) Categories
    - (1) crimes of moral turpitude
    - (2) loathsome disease
    - (3) sexual misconduct
    - (4) adversely reflects on ones conduct in business, profession, trade or office
  - b) Damages are presumed

### C. FIRST AMENDMENT PRIVILEGE

1. When first amend is implicated
  - a) Public figures
  - b) Public concern
2. Additional requirements (2)
  - a) Statement is false
    - (1) BOP on  $\pi$  to prove falsity
  - b) Fault by Defendant

- (1) Public official or figure = malice (knowledge or reckless disregard)
- (2) Private persons = negligence

## D. DEFENSES

1. Consent
  - a) complete defense if  $\pi$  consents to publication
2. Truth
  - a) complete defense if statement is factually accurate.
  - b) statement is presumed to be false unless 1st amend is implicated
3. Absolute privileges (5)
  - a) Husband & wife
  - b) Judicial proceeding
  - c) Legislative proceeding
  - d) Government official
  - e) Compelled broadcasts
4. Qualified privileges (5)
  - a) Forfeiture
    - (1) Actual malice = knowledge or reckless disregard
    - (2) ulterior motive
    - (3) excessive publication
  - b) Categories
    - (1) report of public proceedings
    - (2) prot. of publisher's interest
    - (3) prot. of recipient's interest
    - (4) common interest
    - (5) communication to one who may act in the public interest

## VI. PRIVACY & NUISANCE

### A. INVASION OF PRIVACY

1. Appropriation
  - a) unauthorized use of plaintiff's image or likeness
  - b) for  $\Delta$  own benefit.
2. Intrusion upon seclusion
  - a)  $\pi$  solitude is intruded upon by  $\Delta$
  - b) in a manner that would be highly offensive to a reasonable person
3. Publicity of private life
  - a)  $\pi$  has publicized the details of  $\pi$  private life
  - b) effect must be highly offensive to a reasonable person of ordinary sensibilities and
  - c) the matter is not a legitimate concern of the public
4. False light
  - a)  $\Delta$  places  $\pi$  before the public eye
  - b) in a false light
    - (1) pub figures & matters of pub concern = malice required

# TORTS ISSUES CHECKLIST

“PINS DeEP”

- c) that would be highly offensive to a reasonable person
- 5. Defenses
  - a) Newsworthy Use
    - (1) only for appropriation and publicity of private life
  - b) Consent
  - c) Absolute & Qualified Defamation Privilege
- B. NUISANCE**
  - 1. Public
    - a) Substantial harm required
    - b) injury to the public at large
  - 2. Private
    - a) plaintiff has interest in land
    - b) substantial interference
    - c) unreasonable interference with use and enjoyment of land
      - (1) unreasonable if
        - (a) harm to  $\pi$  > utility of  $\Delta$  conduct
        - (b) harm to  $\pi$  > than req to bear w/o compensation
  - 3. Remedies
    - a) Damages or
    - b) Injunctive relief
  - 4. Defenses
    - a) Contributory Neg
    - b) Assumption of Risk
    - c) Others contributing to nuisance
- VII. EXTRAS**
  - A. VICARIOUS LIABILITY**
    - 1. Respondeat Superior = EE & ER
      - a) scope of employment
        - (1) frolic
        - (2) detour
      - b) ER is generally not liable for intentional torts committed by EE
    - 2. Independent Contractors
      - a) generally ER not liable for IC
      - b) Exceptions
        - (1) Direct liability in neg
        - (2) Non-delegable duty
        - (3) Inherently Dangerous Activity
    - 3. Partners & Joint Ventures
      - a) vicariously liable for tortious acts of other partners in the course and scope of the p'ship.
    - 4. Parents & Children
      - a) CL = not VL
      - b) ML = liable for willful and intentional torts of their minor children. however, such liability is usually limited to a certain \$ amt
  - 5. Tavern Keepers
    - a) CL = no liability
    - b) ML = dramshop acts
  - B. JOINT TORTFEASORS**
    - 1. Joint & Several Liability
    - 2. Indemnity
  - C. SURVIVAL OF TORT ACTIONS**
    - 1. Tort resulting in P.I. = yes
    - 2. Tort to property = yes
    - 3. Torts invading intangible personal interest = no
  - D. WRONGFUL DEATH**
    - 1. spouse = yes
    - 2. parents recover for dead child = yes
    - 3. child recover for dead parent = no
  - E. OTHER MISCELLANEOUS TORTS**
    - 1. Intentional Misrepresentation
      - a) Misrepresentation of material fact
      - b) scienter
      - c) intent to induce reliance
      - d) justifiable reliance
      - e) causation
      - f) damages
    - 2. Negligent Misrepresentation
      - a) Misrep. in business or prof. capacity
      - b) breach of duty to  $\pi$
      - c) justifiable reliance by plaintiff
      - d) causation
      - e) damages
    - 3. Misuse of Legal Proceedings
      - a) Malicious Prosecution
        - (1)  $\Delta$  initiated criminal proceeding against  $\pi$
        - (2) terminated in favor of  $\pi$
        - (3) no probable cause
        - (4) improper purpose
        - (5) Damages
      - b) Wrongful Civil Prosecution
        - (1) malicious prosecution extended to civil proceedings
      - c) Abuse of process
  - F. TORT IMMUNITIES**
    - 1. Family Immunity
      - a) CL: (1) spouses, and (2) parent-child.
      - b) ML: abolished
    - 2. Government Immunity
    - 3. Charitable Immunity

# CIVIL PROCEDURE ISSUES CHECKLIST

## I. **SUBJECT MATTER JURISDICTION**

### A. **ARTICLE III LIMITS**

1. Courts of limited jdx
2. Only Fed ? + Diversity

### B. **FEDERAL QUESTION**

1. All civil actions *arising under* Constitution, laws, treaties
2. Well Pledged Complaint
  - a) Fed ? Integral
3. Exclusive
4. Common Law Fed Question

### C. **DIVERSITY**

1. Complete Diversity
  - a) No  $\pi$  is citizen of same state as any  $\Delta$
  - b) Individuals = Domicile
    - (1) Presence
    - (2) Intent to remain
  - c) Corporations
    - (1) State Incorporated
    - (2) Principal Place Business
  - d) Unincorporated Associations
    - (1) Domicile of members
2. Amount in Controversy
  - a) Exceeds \$75,000
  - b) Aggregation
    - (1) Mult.  $\pi$  = No unless joint interest
    - (2) 1  $\Delta$  = Yes
    - (3) Mult.  $\Delta$  = No
  - c) Equitable Relief

### D. **SUPPLEMENTAL**

1. Common nucleus of operative facts
  - a) Same T + O = YES
2. Pendant =  $\pi$  tacks on claim
  - a) Prohibited in diversity actions where additional claim destroys complete diversity
3. Ancillary =  $\Delta$  tacks on claim
4. Ct. Discretion
  - a) State claim predominates
  - b) Complex issue of state law
  - c) Original claim dismissed
  - d) Other compelling reason

### E. **California Subject Matter Jurisdiction**

1. Unlimited Civil = exceeds \$25K
2. Limited Civil = exceeds \$7.5K
3. Small Claims = under \$7.5K
4. Aggregation
  - a) Single  $\Delta$  = Yes even unrelated
5. Reclassification

## II. **PERSONAL JURISDICTION**

### A. **TRADITIONAL BASIS (3)**

1. Presence @ time served
2. Domicile

- a) Individual
    - (1) Physical presence
    - (2) Intent to remain
  - b) Corporations
    - (1) Auto PJ if Inc in forum state
    - (2) Min. Contacts + Fairness otherwise
3. Consent
    - a) Express
    - b) Implied

### B. **MINIMUM CONTACTS**

1. Long-arm statute
2. " $\Delta$  must have certain min. con. w/ forum st. such that maintain. suit does not offend notions of fair play and substantial justice."
3. Purposeful Availment
  - a)  $\Delta$  voluntarily reached out to state
  - b) Stream of Commerce
4. Fair Play and Substantial Justice
  - a) Related = Specific PJ
  - b) Unrelated = General PJ
    - (1) Systematic + Continuous
    - (2)  $\Delta$  feels at home
5. Reasonableness
  - a) Burden on  $\Delta$
  - b)  $\pi$  interest in obtaining relief
  - c) Interest of forum state

### C. **NOTICE AND OPPORTUNITY TO BE HEARD**

1.  $\Delta$  given rsb. notice that under the circs. is actually calculated to give actual notice

## III. **VENUE & CHOICE OF LAW**

### A. **PROPER VENUE**

1. All  $\Delta$  reside
2. Sub. part of claim arose
3. If no district
  - a) Diversity =  $\Delta$  sub. to PJ
  - b) Fed ? = Where  $\Delta$  can be found

### B. **TRANSFER OF VENUE**

1. Convenience of parties
2. Interests of justice
  - a) Public factors
  - b) Private factors

### C. **CHOICE OF LAW**

1. Transferor Court

### D. **FORUM NON-CONVENIENS**

1. Alternative Forum
2. Transfer Impossible
3.  $\pi$ 's recovery = Irrelevant
4.  $\pi \neq$  resident of current forum
5. Convenience of parties
6. Interests of Justice
  - a) Public Factors
  - b) Private Factors

# CIVIL PROCEDURE ISSUES CHECKLIST

## E. REMOVAL

1.  $\Delta$  only can remove
2. Only if could have originally been filed in federal court
3. Limits
  - a) 30 days after notice that removable
  - b) Diversity = 1 year after claim filed

## F. WAIVER

1. Can waive PJ, process, notice, venue, removal
2. Can not waive SMJ

## G. ERIE DOCTRINE

1. Substantive Law = State Law
2. Fed. law on point + in direct conflict = apply federal law
3. Procedural law = Federal law
4. Procedural v Substantive
  - a) State law outcome determinative
  - b) Balance St. v. Fed. interest
  - c) Avoid forum shopping

## IV. PLEADINGS

### A. COMPLAINT

1. Statement of SMJ
2. Statement of claim showing entitlement to relief
  - a) CA Fact Pleadings
3. Demand for relief sought
4. Special Matters = Particularity
  - a) Fraud, Mistake, Special damages, Condition precedent
5. CA = Doe  $\Delta$  ok

### B. ANSWER

1. Respond to allegations of complaint
2. Raise affirmative defenses

### C. RULE 12 MOTIONS

1. 12(e)- motion for more definite stmt.
2. 12(f)- motion to strike
3. 12(b) motions to dismiss
  - a) Lack of SMJ
  - b) Lack of PJ
  - c) Improper Venue
  - d) Insufficiency of process
  - e) Insufficiency of service of process
  - f) Failure to state a claim
  - g) Failure to join indispensable party

### D. AMENDED PLEADINGS

1. Relation Back Doctrine
  - a) Claims: same conduct, transaction or occurrence
  - b)  $\Delta$ s: Same conduct, transaction or occurrence
    - (1) New party knew
    - (2) Would have been named
2. California

- a) "Doe" amendments: 3 years if genuine ignorance of:
  - (1) Identity of party
  - (2) Facts give rise
  - (3) Law allows COA

## E. RULE 11

## V. JOINDER

### A. CLAIMS

1. Counterclaim: against opposing party
  - a) Permissible: Not same T + O
  - b) Compulsory: Same T + O
    - (1) Supp. Jdx. = Yes
  - c) CA = Cross-complaint against  $\pi$
2. Cross Claim: against a co-party
  - a) Same T + O
  - b) Never compulsory
  - c) Supplemental Jdx. = Yes
  - d) CA = cross-complaint against co-party

### B. PARTIES

1. Permissive
  - a) Arise from same T + O
  - b) Commonality of law or fact
2. Compulsory
  - a) Necessary Parties
    - (1) Complete relief not possible
    - (2) Missing party's interest would be harmed
    - (3) Missing party's claim would subject party to multiple liability
  - b) Jurisdictional Requirements
    - (1) PJ
    - (2) Joinder will not destroy diversity
3. Impleader
  - a) w/in 14 days of answering complaint
  - b) File 3rd party complaint
  - c) Serve 3rd party = PJ
  - d) SMJ
  - e) CA = Cross complaint against third party defendant
4. Intervention
  - a) Intervention of right
    - (1) Impair 3rd party interest
    - (2) Applicant's interest not adequately represented
  - b) permissive intervention
    - (1) Common question of law or fact
    - (2) No undue delay or prejudice
    - (3) CA = Direct and immediate interest
5. Interpleader

# CIVIL PROCEDURE ISSUES CHECKLIST

- a) Stakeholder has property and 2 or more other claim ownership. Forces all claimants into single lawsuit avoid multiple liability and inconsistency
  - b) Statutory
    - (1) Minimal diversity
    - (2) AIC = \$500 or more
    - (3) Venue= Any district where any claimant resides
    - (4) Nationwide service of process
  - c) Rule 22
    - (1) Regular diversity applies
    - (2) Venue= Normal rules
    - (3) Service of process = Normal rules
- C. CLASS ACTIONS**
- 1. Requirements
    - a) Numerosity
    - b) Commonality
    - c) Typicality
    - d) Adequacy
  - 2. Types
    - a) Anti prejudice Class
      - (1) Cannot opt out
      - (2) Notice discretionary
      - (3) Limited funds
      - (4) Inconsistent adjudications
    - b) Injunctive & Declaratory Relief Class
      - (1) Cannot opt out
      - (2) Notice discretionary
    - c) Damages Class
      - (1) Can opt out
      - (2) Mandatory notice
  - 3. Class Action Fairness Act
    - a) Minimal diversity
    - b) AIC > \$5 mil.
    - c) Mandatory decline of Jdx.
    - d) Discretionary decline of Jdx.
  - 4. Settlements
    - a) Court approval required
    - b) Notice required
- VI. DISCOVERY & PRETRIAL MOTIONS**
- A. DISCOVERY**
- 1. Scope of Discovery
    - a) Anything relevant to claim or defense
    - b) Relevant = reasonably calculated to lead to discovery of admissible evidence
    - c) CA = Anything relevant to subject matter of pending litigation
    - d) Work Product
      - (1) Absolute
        - (a) Mental impressions
        - (b) Opinions
        - (c) Conclusions
        - (d) Legal theories
      - (2) Discoverable
        - (a) Witness statements
          - i) Substantial need
          - ii) Not otherwise available
  - 2. Required Disclosures
    - a) Initial Disclosures
      - (1) List of relevant witnesses
      - (2) Docs. supporting claims or defense
      - (3) Computation of damages
      - (4) Relevant insurance policy
      - (5) CA = No required disclosures
  - 3. Discovery Devices (5)
    - a) Depositions
    - b) Interrogatories
    - c) Requests to Produce
    - d) Physical or Mental Examination
    - e) Request for Admission
- B. DISPOSITION WITHOUT TRIAL**
- 1. Dismissal
    - a) Voluntary
      - (1)  $\pi$  right before  $\Delta$  serves answer or moves for summary judgment
      - (2) Without Prejudice
      - (3) With Prejudice
      - (4) CA = Anytime before trial commences
    - b) Involuntary
      - (1) Party fails to comply with court order, pursue the action or a motion to dismiss is granted
      - (2) CA
        - (a) Discretionary: Case not brought to trial w/in 2 years of filing
        - (b) Mandatory: Not brought to trial w/in 5 years of filing or process not served w/in 3 years of file
  - 2. Default Judgment
    - a) Clerk
      - (1) No response by  $\Delta$
      - (2) Monetary Damages
      - (3) Affidavit by  $\pi$
      - (4)  $\Delta \neq$  minor or incompetent
    - b) Court
      - (1) If cant meet clerk standard

# CIVIL PROCEDURE ISSUES CHECKLIST

- c) Relief from Default
    - (1) After default, before default jdmt. = Good cause + viable defense
    - (2) After default jdmt. = Motion to set aside i.e. good cause + viable defense
  - d) CA Default Judgment
    - (1)  $\Delta$  fails to respond w/in 30
    - (2)  $\Delta$  given notice of application for entry of DJ
    - (3) Clerk
      - (a)  $\Delta$  doesn't respond
      - (b) Claim = K or jdmt.
      - (c) Claim = sum certain \$
      - (d) Affidavit of  $\pi$
  - 3. Failure to State a Claim
    - a) Before answer
  - 4. Motion of judgment on the pleadings
    - a) After answer.
    - b) Same as failure to state a claim
  - 5. Summary Judgment
    - a) No triable issue of material fact
    - b) Pierce the pleadings
    - c) Evidence viewed in light most favorable to non-moving party
    - d) No reasonable trier of fact could find for the non-moving party
    - e) Deadlines
      - (1) Anytime up until 30 days after close of discovery
      - (2) Opposing party file response w/21 days of being served motion
      - (3) Moving party respond w/in 14
  - 6. CA Summary Judgment
    - a) Moving party files statement of undisputed, material facts
    - b) Burden shifts to non-moving party
    - c) Deadlines
      - (1) Bring w/in 60 days of general appearance of non-moving party
      - (2) Moving party file + serve 75 days before hearing
      - (3) Opposition files > 14 before hearing
      - (4) Reply no more than 5 days before hearing.
- a) CA civil actions involving law and equity
  - b) Equitable issues determined first by judge
  - c) CA Demand Requirement
    - (1) At time case is set for trial OR
    - (2) W/in 5 days of scheduling trial date
3. Jury Selection
  - a) At least 6
  - b) CA 12 unless agreed
  - c) Verdict
    - (1) Unanimous
    - (2) CA 75% ok
  - d) Equal Protection
    - (1) Representative cross section
  - e) Due Process
    - (1) Fair and Impartial
  - f) Voir Dire
    - (1) Any reason other than gender/race = 3 peremptory challenges
    - (2) CA = 6
    - (3) For Cause = Unlimited
- B. REMOVAL FROM JURY**
- 1. JMOL
    - a) AKA Directed Verdict
    - b) No reasonable person could differ as to the outcome of the trial
    - c) When
      - (1)  $\Delta$ 
        - (a) Close of  $\pi$ 's evidence
        - (b) Close of all evidence
      - (2)  $\pi$ 
        - (a) Only after close of all trial evidence
    - d) CA JMOL
      - (1) Only at close of all ev.
      - (2) After  $\pi$ 's case = Motion for non suit
  - 2. Renewed JMOL
    - a) AKA JNOV
    - b) No reasonable jury could have reached the verdict
    - c) Must have filed for JMOL
    - d) W/in 28 days of entry of jdmt.
    - e) CA RJMOL
      - (1) Dont need to request JMOL
      - (2) File notice of intention to move before jdmt./ earlier of:
        - (a) 15 days mailing or service of notice of entry of judgment
        - (b) 180 days of entry jdmt.
  - 3. Motion for new trial

## VII. TRIAL, APPEAL & PRECLUSION

### A. TRIAL

- 1. Right to Jury
  - a) Civil Actions at common law
  - b) Demand = no later than 14 days after served last pleading
- 2. CA Right to Jury

# CIVIL PROCEDURE ISSUES CHECKLIST

- a) W/in 28 days of entry of jdmt.
  - b) Grounds
    - (1) Prejudicial error
    - (2) Misconduct
    - (3) Newly discovered evidence
    - (4) Erroneous jury instructions
    - (5) Verdict against weight of ev.
    - (6) Partial new trial
    - (7) Excessive or Inadequate Damages
      - (a) Remittitur:  $\pi$  chooses to accept less or have new trial
      - (b) Additur:  $\Delta$  chooses to pay more or new trial.
- C. MOTION TO SET ASIDE JUDGMENT**
- 1. Anytime
    - a) Clerical Error
  - 2. Within 1 Year
    - a) Mistake/Excusable Neglect
    - b) Fraud/Misrepresentation or other misconduct of adverse party
  - 3. Within Reasonable Time
    - a) Newly discovered evidence
    - b) Judgment void
  - 4. CA Motion to Set Aside Jdmt
    - a) Mistake, Inadvertence, Surprise, or Excusable Neglect
    - b) Must include affidavit of fault by party or lawyer
    - c) W/in rsb. time not to exceed 6 months of entry of jdmt.
- D. TYPES OF VERDICTS**
- 1. General
    - a) Jury finds in favor of one party
  - 2. Special
    - a) Jury makes findings on factual issues
    - b) Judge decides legal effect
  - 3. General with Interrogatories
    - a) General verdict
    - b) Answers to interrogatories on one or more issues of fact
- E. APPELLATE REVIEW**
- 1. Final Judgment Rule
    - a) Federal COA: Notice of appeal w/ in 30 days of entry of jdmt.
    - b) SCOTUS: 90 days
  - 2. Interlocutory Appeals
    - a) Preliminary Injunctions + TRO
    - b) Appointment of Receivers
    - c) Interlocutory Appeals Act
    - d) Collateral Orders Doctrine
    - e) Class Action Certification = W/in 14 days
- 3. Extraordinary writs
    - a) Mandamus
    - b) Prohibition
- F. PRECLUSION**
- 1. Preliminary Issues
    - a) Preclusion = Affirmative Defense
    - b) Governing Law = Law of system that presided over action
    - c) Earlier Case on Appeal
      - (1) CA = NO
  - 2. Claim Preclusion/Res Judicata (4)
    - a) Related to same T + O of a previously litigated claim
      - (1) Federal Law = Claim
      - (2) CA = Primary Rights
    - b) Same claimant v same defendant
    - c) Claim actually litigated or could have been litigated
    - d) Previous claim resulted in valid final judgment on the merits
    - e) Merger =  $\pi$  won first case
    - f) Bar =  $\Delta$  won first case
  - 3. Issue Preclusion (Collateral Estoppel)
    - a) Elements
      - (1) Previously litigated issue of law or fact
      - (2) Actually litigated
      - (3) Final judgment on the merits
      - (4) Issue was essential to judgment in the first case
      - (5) At least one party from previous litigation present
    - b) Non-Mutual Collateral Estoppel
      - (1) Use by non-party
      - (2) Mutuality not required by Due Process
      - (3) Offensive
        - (a) Use by non-party  $\pi$
        - (b) Permitted if fair
          - i) Full/Fair opportunity to litigate
          - ii) Multiple suits foreseeable
          - iii)  $\pi$  could not have joined original action
          - iv) No inconsistent judgments on record
      - (4) Defensive
        - (a) Use by nonparty  $\Delta$
        - (b) Full + Fair opp 2 litigate

# REMEDIES ISSUES CHECKLIST

“The **Remedies DR** has 1 equitable medicine for **Torts**, 3 for **Contracts**, and 2 for **Property**”

## I. **LEGAL REMEDIES**

### A. **CONTRACTS**

1. Legal Damages
  - a) Compensatory Damages (EI)
    - (1) Mkt. Price - K Price
    - (2) Causation
    - (3) Foreseeability
    - (4) Certainty
    - (5) Unavoidability
  - b) Consequential Damages
    - (1) Naturally arose from breach
    - (2) Reasonably foreseeable
  - c) Nominal Damages
    - (1) Breach Yes.
    - (2) No actual proof of damages
  - d) Punitive Damages
    - (1) Not unless breach = tort
  - e) Liquidated Damages Clause
    - (1) Actual dmg. diff. estimate
    - (2) Reasonable forecast
    - (3) Cannot be penalty
    - (4) Either/Or clause - Invalid
2. Restitutory Remedies
  - a) Quasi-Contract: prevent UE
    - (1) Unenforceable K
      - (a) Val. benefit conferred
      - (b) Not lim. to K rate
      - (c) Recovery of property
        - i) Property unique
        - ii)  $\Delta$  insolvent
    - (2) Material Breach
      - (a) Non-Breacher = Val. ben. conferred
      - (b) Breacher = CL NO
        - i) ML = Val. ben. conferred - dmgs.

### B. **TORTS**

1. Legal Remedies
  - a) Compensatory Damages
    - (1) Put  $\pi$  in position as if no wrong had occurred. Compensate for loss
    - (2) Causation
      - (a) Actual = But For
      - (b) Proximate = Foreseeable
    - (3) Certainty
      - (a) Past
      - (b) Future
      - (c) Special = Yes
      - (d) General = No
    - (4) Unavoidable = Duty to Mitigate
    - (5) Calculation
      - (a) Lump sum

- (b) Discount to present val.
- (c) Inflation irrelevant

- b) Nominal Damages
  - (1) Harm was technical  $\neq$  actual
- c) Punitive Damages
  - (1) Punish  $\Delta$ , Deter conduct
  - (2) Attach to Comp, Nom, Rest
  - (3) Wanton/Willful/Malicious Con.
  - (4) Proportionate to act. dmg.
2. Restitutory Remedies (UI)
  - a) Calc = Rsb. val. conf. to  $\Delta$
  - b) Legal Restitutory Remedies
    - (1) Replevin
      - (a) Right to possession
      - (b) Wrongful withholding
      - (c) BFP cuts off right
    - (2) Ejectment
      - (a) Right to possession
      - (b) Wrongful withholding + possession

## II. **EQUITABLE REMEDIES FOR TORTS**

### A. **WHEN AVAILABLE?**

1. Only if Legal Remedies Inadequate

### B. **EQUITABLE RESTITUTIONARY REMEDIES**

1. Requirements
  - a) Legal remedies inadequate
  - b)  $\Delta$  wrongfully acquired title to prop.
2. Constructive Trust
  - a) Property appreciates
  - b) Solely traceable
3. Equitable Lien
  - a) Prop. depreciates
  - b)  $\Delta$ 's prop. improved w/  $\pi$ 's prop.
  - c) Prop. not solely traceable
  - d) Deficiency Jdmt. = Sale < FMV

### C. **INJUNCTIONS**

1. Permanent Injunction
  - a) Inadequate legal remedy
    - (1) Mon. dmg. inadequate
      - (a) Speculative
      - (b)  $\Delta$  insolvent
      - (c) Irreparable injury
      - (d) Multiplicity of suits
  - b) Prop. rt. or protectable personal interest
    - (1) Traditional = Prop. Rt.
    - (2) Modern = Personal Interest
  - c) Feasibility of enforcement
    - (1) Negative Inj. = Easy
    - (2) Mandatory Inj. = Hard
  - d) Balance of hardships
    - (1) Min. = Strict. Grant if (a)-(c)
    - (2) Maj. = Liberal



## REMEDIES ISSUES CHECKLIST

“The **Remedies DR** has 1 equitable medicine for **Torts**, 3 for **Contracts**, and 2 for **Property**”

- e) Defenses
    - (1) Laches
    - (2) Unclean Hands
    - (3) Freedom of Speech/Assn.
    - (4) Sought against crim. act
  - 2. Preliminary Injunction
    - a) Preserve status quo
    - b) Sub. likelihood of success on merits
    - c) Sub. threat of irrep. harm/injury
    - d) Balance of harms
    - e) Bond required
    - f) Notice required
  - 3. Temporary Restraining Order
    - a) Preserve status quo
    - b) Imminent + Irreparable Injury
    - c) Necessary for status quo
    - d) Max = 14 days
    - e) Bond
    - f) Ex-Parte OK
      - (1) Notice not required
      - (2) Adversarial proceeding not needed
  - 4. Parties Bound
    - a)  $\Delta$
    - b) Parties in privity
    - c) Third party with notice
  - 5. Subsequently Invalid Injunctions
    - a) Bound until mod./dissolved
  - 6. Enforcement of Injunctions
    - a) Civil Contempt = Coercion
      - (1) Fines
      - (2) Imprisonment:  $\Delta$  = keys
    - b) Criminal Contempt = Punishment
      - (1) Fines
      - (2) Imprisonment:  $\Delta \neq$  keys
- ### III. **K - RESCISSION & REFORMATION**
- #### A. RESCISSION
- 1. Grounds for Rescission
    - a) Mistake
      - (1) Unilateral
        - (a) No unless other party knows/should other mistaken
      - (2) Mutual
        - (a) Material Fact = YES
        - (b) Collateral Fact = NO
    - b) Misrepresentation = Yes if actual reliance
    - c) Undue Influence
    - d) Lack of Capacity
    - e) Lack of Consideration
    - f) Duress
    - g) Illegality
- 2. Defenses
    - a) Laches + Unclean Hands = Valid
    - b) Negligence of  $\pi \neq$  Valid
  - 3. Plaintiff's Election Remedies
    - a)  $\pi$  sues for damages first  $\neq$  Resc.
    - b)  $\pi$  sues resc. first = Dgms allowed
- #### B. REFORMATION
- 1. Valid Contract Required
  - 2. Grounds for Reformation
    - a) Mistake
      - (1) Unilateral = No but exc.
      - (2) Mutual Yes
    - b) Misrepresentation = Yes
      - (1) Both innocent + intentional
  - 3. Defenses to Reformation
    - a) Unclean Hands
    - b) Laches
    - c) Subsequent BFP
  - 4. Invalid Defenses
    - a) PER
    - b) SoF
    - c) Failure to read
    - d) Negligence of  $\pi$
- ### IV. **K - SPECIFIC PERFORMANCE**
- #### A. REQUIREMENTS
- 1. Valid K
  - 2. Plaintiff's K Conditions must be satisfied
    - a) Maxim = If seek, do.
    - b) Time is of the essence
    - c) Deficiency in perf.
      - (1) Abatement
  - 3. Legal Remedies Inadequate
    - a) Personal Prop. gen. not unique
    - b) Unique Property
      - (1) Land = Unique ALWAYS
    - c) Damages Too Speculative
    - d) Defendant Insolvent
    - e) Multiplicity of Litigation
  - 4. Mutuality
    - a) Security of Performance Test
  - 5. Enforcement Feasible
    - a) Personal Servs. Ks  $\neq$  SP
  - 6. No Defenses
    - a) Equitable Defenses
      - (1) Unclean Hands
      - (2) Laches
      - (3) Unconscionability
    - b) K Defenses
      - (1) Mistake
      - (2) Misrepresentation
      - (3) SoF
        - (a) Exc. = Part Perf. + Rely

# REMEDIES ISSUES CHECKLIST

“The **Remedies DR** has 1 equitable medicine for **Torts**, 3 for **Contracts**, and 2 for **Property**”

## V. LAND SALE CONTRACTS

### A. EQUITABLE CONVERSION

1. Upon execution of K
2. Interests of B and S switch
  - a) B = Real Prop. Interest
  - b) S = Pers. Prop. Interest
3. Effect of Death
  - a) Heirs take. *See V.A.2 above*
4. Damage/Destruction After EC
  - a) Majority = Risk on B
  - b) Modern = Risk on S

### B. COMPENSATORY DAMAGES

### C. RESTITUTION

### D. RESCISION

### E. REFORMATION

### F. SPECIFIC PERFORMANCE

1. Statute of Frauds
  - a) In writing
  - b) Exception: Part performance on land sale K (2/3)
    - (1) *Payment*
    - (2) *Possession*
    - (3) *Valuable Improvements*
2. Clear and Definite Terms
  - a) Parties
  - b) Description of property
  - c) Time for performance
  - d) Purchase price
3. Plaintiff's Conditions Fulfilled
  - a) Time is of the essence clause
    - (1) Equity abhors forfeiture
4. Inad. Legal Dmg = Land Unique

## VI. PERSONAL PROPERTY, CONSTRUCTION & PERSONAL SERVICE KS

### A. PERSONAL PROPERTY CONTRACTS

1. Non-UCC
  - a) Compensatory Damages
  - b) Restitution
  - c) Rescission
  - d) Reformation
  - e) Specific Performance ≠ generally
    - (1) Exceptions:
      - (a) Rare
      - (b) One of a kind
      - (c) Unique circumstances
2. UCC
  - a) Buyer's Remedies
    - (1) Before Acceptance
      - (a) Cancel K = Cover/Mkt
      - (b) SP = unique goods
    - (2) After Acceptance
      - (a) Keep non conform goods + recover con. damages

- (b) Revoke for material breach = Cover/Mkt.

### b) Seller's Remedies

#### (1) Before Acceptance

- (a) Resell + Recover diff. btw. K price - resale
- (b) Action for Price
- (c) Volume S = Lost Profits

#### (2) After Acceptance

- (a) Sue for K price
- (b) Replevin

### B. CONSTRUCTION CONTRACTS

1. Compensatory Damages
2. Restitution
3. Specific Performance = Owner only

### C. PERSONAL SERVICE CONTRACTS

1. Compensatory Damages
2. Restitution
3. Specific Performance
  - a) Personal Serv. K = No
  - b) Valid Non-Compete Covenant = Yes
    - (1) Valid if:
      - (a) Protect legitimate interest
      - (b) Rsb. geographic + durational scope

## VII. TORTS COMMITTED AGAINST REAL & PERSONAL PROPERTY

### A. REAL PROPERTY

1. Trespass
  - a) Nominal
  - b) Restitutionary
  - c) Injunctive Relief
2. Encroachments
  - a) Compensatory Damages
    - (1) Continuing Trespass = fair rental value of land
    - (2) Permanent Trespass = fair market value of land
  - b) Injunctive Rel. = Leg. Rem. Inad.
    - (1) Balance Hardships
      - (a) Encroach Inadvert = YES
      - (b) Encroach Willful = NO
3. Destruction or Injury to RP
  - a) Compensatory Damages
    - (1) Injury: CoR + Loss of use. Capped at diminution
      - (a) DIV = FMV before - FMV after
    - (2) Destruction: FMV @ Destruction
  - b) Injunctive Relief

# REMEDIES ISSUES CHECKLIST

“The **Remedies DR** has 1 equitable medicine for **Torts**, 3 for **Contracts**, and 2 for **Property**”

4. Destruction or Interference with Easements
  - a) *Compensatory Damages*
    - (1) Destruction: Diminution in value of land attached to easement.
    - (2) Interference: CoR plus loss of use and any related expenses.
  - b) *Injunctive Relief = Legal Relief Inadequate*
5. Waste
  - a) Voluntary
    - (1) *Compensatory Damages*
      - (a) DiV or CoR
      - (2) *Injunctive Relief = Yes*
    - b) Premissive
      - (1) *Compensatory Damages*
        - (a) Cost of repair
        - (2) *Injunctive Relief generally not available*
  6. Nuisance
    - a) *Compensatory Damages*
      - (1) Loss enjoyment + abatement costs + emotional distress
      - (2) From nuisance beginning to time of action
    - b) *Injunctive Relief*
      - (1) Land unique + multiple suits
    - c) No Restitutionary Remedies
    - d) Coming to nuisance ≠ defense

**B. PERSONAL PROPERTY**

  1. Destruction
    - a) *Compensatory Damages*
      - (1) FMV @ destruction - salvage value + interest
        - (a) Income producing prop. = Lost Profits
  2. Injury
    - a) *Compensatory Damages*
      - (1) CoR (capped @FMV chattel) or
      - (2) DiV: FMV before - FMV after
  3. Dispossession
    - a) *Compensatory Damages*
      - (1) Conversion: FMV @ conversion + interest + expenses to recapture
      - (2) Minor Dispossession: nominal damages
    - b) *Restitutionary Damages*
      - (1) If Δ derived benefit from π's prop.
      - (2) Self-Help ok under CL to recapture chattels.
  - (3) ML: hot-pursuit of Δ
  - (4) Replevin
  - (5) Quasi-K: FMV @ time of dispossession
  - (6) Constructive Trust
  - (7) Equitable Lien
  - c) *Equitable Remedies*
    - (1) Injunctive Relief

**C. PERSONAL INJURIES**

  1. Compensatory Damages
    - a) *Special Dmg.* = Certainty Req.
      - (1) Bills, Treatment
    - b) *General Dmg.* = No Certainty Req.
      - (1) Pain, Suffering
    - c) *Calc. Compensatory Damages*
      - (1) Lump sum payment
      - (2) Discounted to present value
      - (3) Inflation irrelevant
  2. No Restitutionary Remedies
  3. Injunction
    - a) Rare. No harm of repetition. Harm already occurred

**D. FRAUD**

  1. Damages = Must prove actual injury
    - a) *Consequential Dmg* = if actual injury shown
    - b) *Punitive* = Need Malice
  2. Restitution
    - a) *Constructive Trust*
    - b) *Equitable Lien*

# PROFESSIONAL RESPONSIBILITY ISSUES CHECKLIST

“For PR, remember your duty of the **5 Cs** to your Client, plus **Other Duties** and **Regulatory Controls**”

## I. **CONFLICTS OF INTEREST**

### A. **LAWYER-CLIENT RELATIONSHIP**

1. When client intends to seek professional servs. from atty.

### B. **DUTY OF LOYALTY**

#### 1. Resolving Conflicts of Interest

- a) Continuing Duty
- b) ABA
  - (1) Rsb. Belief
  - (2) Inform each C
  - (3) C gives informed written consent
- c) CA
  - (1) Actual + Potential Conflicts
  - (2) Written Disclosure
    - (a) Previous or current legal, business, financial, professional or personal relationship w/ int. party
  - (3) Informed Written Consent
    - (a) Mult. Clients + Int. Pot. Con.
    - (b) Mult. Clients + Int. actually conflict

#### 2. Past Client Conflicting with Present Client

- a) Cant use con. info obtained in prior rep. in new engagement
- b) Imputed Disqualification
  - (1) Former Firm
    - (a) Matters same or sub. rel.
    - (b) Remaining atty has con. material info
  - (2) Former Gov Client
    - (a) Ethical Wall
    - (b) No Fee Sharing
    - (c) Gov. Informed
  - (3) Purely Personal Relationship
    - (a) Ethical Wall
  - (4) CA Disqualify. No disci. action

#### 3. Representation of Multiple Clients

- a) Atty. may rep. mult. C w/ potential con. Must disclose. Must have rsb. belief. Rsb. atty. std (**≠CA**)
- b) Almost never proper if interest are in actual conflict.

#### 4. Counseling Client to Act

- a) Don't counsel client to act exposing to liability unless goof faith + belief C's best interest

#### 5. Use of Confidential Information to Client's Disadvantage

- a) Also need C's consent

#### 6. Propriety Interest in Subject Matter of the Litigation

- a) Can't do it.
- b) Lien to secure fees/expenses ok
- c) **CA = Charging Liens ok**

#### 7. Business Transactions with Clients

- a) Fair + Rsb. Terms
- b) Fully disclosed in understandable Writing
- c) Independent legal counsel
- d) Written informed consent

#### 8. Publication Rights Contract

- a) ABA = No K before rep. ends
- b) **CA = Discouraged but tolerated if judge satisfied C understands**

#### 9. Expense Advances & Loans

- a) ABA = Indigents ok + advance litigation costs for contingent case
- b) **CA = Has to be loan. Contingent cases ok too.**

#### 10. Serving in Legal Servs Organization

- a) Can't participate in decision/action if:
  - (1) Incompatible w/ duty of loyalty
  - (2) Material adverse effect

#### 11. Former Gov. Lawyers in Priv. Practice

- a) ABA = if worked pers. + sub. on matter, need consent of gov.emp.
- b) **CA former prosecutor cant work for defense in same case**

#### 12. Third Party Interference

- a) Accepting payment from 3 party
- b) Organizational Clients
  - (1) Act in best interest of entity
  - (2) ABA: Must ↑ May →
  - (3) **CA: May ↑ Cant →**

#### 13. Limiting Malpractice Liability

- a) ABA need independent atty.
- b) **CA ≠ limit liability even pro bono**

#### 14. Gifts from the Client

- a) Can't solicit sub. gifts
- b) Can't draft inst. giving atty. sub. gift unless related

#### 15. Close Relationship with Adversary Attorney

- a) Need C's consent
- b) **CA = Related, Live together, Sex**

#### 16. Trial Counsel is Necessary Witness

- a) ABA = No unless
  - (1) Testify to uncontested matter
  - (2) Testify to nature/value service
  - (3) Sub. hardship to client
- b) **CA ≠ written consent + ABA Rules**

# PROFESSIONAL RESPONSIBILITY ISSUES CHECKLIST

“For PR, remember your duty of the **5 Cs** to your Client, plus **Other Duties** and **Regulatory Controls**”

## 17. Consensual Sexual Relations

- a) ABA not unless prior to AC rel.
- b) CA = ABA rule or competent ok

## II. **DUTY OF CONFIDENTIALITY**

### A. **DUTY OF CONFIDENTIALITY**

1. Scope of Duty
  - a) All communications related to rep. by C to A even if disclosure wouldn't harm/embarass C
2. Timing of Duty
  - a) Applies to prospective Cs
  - b) Applies after death + AC rel.
3. Exceptions
  - a) *Consent*
    - (1) CA = In writing
  - b) *Prevent crime of death or GBH*
    - (1) CA = If rsb. try to persuade C not to act + tell C will disclose
  - c) *Intent commit fraud → fin. inj.*
    - (1) ≠CA
  - d) *To establish claim or defense*
  - e) *Compelled by law*

### B. **ATTORNEY-CLIENT PRIVILEGE**

1. Scope of Privilege
  - a) Comm. pertaining to legal servs.
2. Timing of Privilege
  - a) ABA = Indefinitely
  - b) CA = Terminated → Estate Settled
3. Exceptions
  - a) Servs. used to commit crime/fraud
  - b) Allegations over representation
  - c) Litigation btw. former joint Cs
  - d) Compet. of C to dispose by will

### C. **WORK PRODUCT DOCTRINE**

1. Protects materials prepared in anticipation of litigation
2. CA = on materials prepared by atty/ agent of atty.

### D. **REPRESENTATION OF MULTIPLE CLIENTS**

## III. **DUTY TO COMMUNICATE**

### A. **PROMPTLY INFORM OF DECISION REQUIRING CLIENTS INFORMED CONSENT**

1. Settlement Offers
  - a) Joint Clients = Inform all of offer

### B. **REASONABLY CONSULT ABOUT MEANS**

### C. **KEEP CLIENTS REASONABLY INFORMED ABOUT STATUS OF MATTER**

1. Regular Billing

### D. **PROMPTLY COMPLY WITH REASONABLE REQUIRES FOR INFORMATION**

### E. **CONSULT CLIENT ABOUT LIMITATIONS ON LAWYERS CONDUCT**

## IV. **DUTY OF COMPETENCE**

### A. **ELEMENTS**

1. Legal Knowledge or Skill
  - a) Educated w/o undue exp/delay
  - b) Associate w/ competent counsel
2. Preparation + Thoroughness

### B. **DUTY OF DILIGENCE**

1. Diligently, zealously, promptly pursue matter to completion despite opposition or inconvenience

### C. **MALPRACTICE ACTION**

1. Negligence
  - a) Breach of duty of care i.e. skill, care, jdmt. that rsb. prudent atty. in the jdx. would exercise
2. Ethical Violation
3. Malpractice Settlements
  - a) Advise C in writing to seek atty.
  - b) Give time for C to seek atty.
4. Limiting Liability for Malpractice
  - a) See I.B.13

## V. **FEES & OTHER DUTIES**

### A. **FINANCIAL INTEGRITY**

1. Non-Contingent Fees
  - a) Communicated to C what fees/ exp. preferably in writing before or w/in rsb. time
  - b) Must be reasonable. Consider:
    - (1) Time, preclusion of other employ., fee usually charged in locality, nature + length rel.
  - c) CA ≠ unconscionable
    - (1) Writing unless
      - (a) <\$1K, routine, co., impracticable/impossible
2. Contingent Fees
  - a) In writing
  - b) Signed by C
  - c) State method of fee calculation
  - d) CA = ABA + state fee negotiable
3. Fee Splitting with Attorneys
  - a) Within firm ok
  - b) Outside firm
    - (1) ABA: rsb., written disc, proportionate
    - (2) CA = Rsb., Disclose, Consent in writing
4. Fee Splitting with Non-Attorneys
  - a) No unless employee or:
    - (1) Death ben., non-profit, LRS
5. Referral Fees
  - a) ABA = NO
  - b) CA = ok if disclosed to C + no extra charge.

# PROFESSIONAL RESPONSIBILITY ISSUES CHECKLIST

“For PR, remember your duty of the **5 Cs** to your Client, plus **Other Duties** and **Regulatory Controls**”

## B. OTHER DUTIES TO THE PROFESSION

1. No Duty to Accept Representation
  - a) Court Appointed = Yes unless good cause
    - (1) Personal Feelings
    - (2) Violate ethical law/rule
    - (3) Unrsb. fin. burden
2. Duty to Reject
  - a) Violate law or ethical rule
  - b) C's motive = Harass/injure
  - c) Frivolous claim/defense
  - d) Lawyer incompetent
  - e) Personal feelings
  - f) Atty. mental/physical condition
3. Duty to Withdraw
  - a) Court permission required in Litigation
  - b) Mandatory Withdraw
    - (1) Atty. mental/physical condition
    - (2) Violate law/ethical duty
    - (3) Harass or delay
    - (4) Atty. fired
  - c) Permissive Withdraw
    - (1) *Good Cause*
      - (a) Failure to pay fee/exp.
      - (b) Crime/Fraud conduct
      - (c) Morally repugnant
      - (d) Atty. fin. burden
      - (e) C agrees/ wont cooperate
    - (2) Procedure for permissive withdrawal
      - (a) Notify + give opp 2 find new atty.
      - (b) Return: \$, papers, prop.
        - i) **CA cant hold papers to secure payment**
4. Duty as Adviser
  - a) Atty. decisions = Means
  - b) C decisions = Ends
    - (1) C: sue, settle, plea, jury, testify, appeal
5. Duties of Prosecutors
  - a) Timely disclosure of exculpatory evidence
  - b) Refrain from making stmts. w/ sub. likelihood of increasing condemnation of accused
  - c) Seek justice ≠ conviction
  - d) Have PC
  - e) Higher ethical std. than attys.
6. Duty of Dignity and Decorum
  - a) Duty to preserve the impartiality of the tribunal
    - (1) Comm. w/ jury. Dont do it.

- b) Duty to preserve the decorum of the tribunal
- c) Chicanery @ trial
  - (1) A not state personal opinion
7. Duty to Expedite Cases
  - a) ABA = affirmative duty
  - b) **CA = A can't delay to harass or gain personal gain or conven.**
8. Violate Court Rule or Order
9. Discovery Abuse
  - a) Make frivolous discovery req.
  - b) Fail to comply w/ discovery req.

## C. DUTIES TO THIRD PARTIES

1. Duty of Fair Dealings & Honesty to the Public
2. Dealings with the Press
  - a) Avoid prejudicing case
  - b) Exceptions:
    - (1) Public record
    - (2) Public warning
    - (3) Response to opposing party harmful stmts.
3. Counseling Criminal or Fraudulent Acts
4. Must not violate Legal Rights or Delay, Burden or Embarrass
5. Duties to the adversary
  - a) Duty not to Speak with Parties Represented by Counsel
    - (1) Employee = Need consent
    - (2) Former Employee = not req.
      - (a) **CA = regularly consult/ supervise, can bind co., may be imputed to org. need consent of co.**
  - b) Duty to Return Material Mistakenly Delivered
  - c) Duty to Avoid Deception
  - d) Must not violate legal rights or delay, burden or embarrass

## D. DUTIES TO THE COURT

1. Duty of Candor & Fairness
  - a) Be honest
2. Duty to Present Facts & Evidence Truthfully
  - a) Duty to prevent client perjury
    - (1) Rsb. belief ≠ Knowledge
    - (2) Civil = Refuse to call
    - (3) Crim = Tell C to tell truth
      - (a) Permissive withdrawal
      - (b) ABA = inform judge
      - (c) **CA = allow C testify in narrative.**
  - b) Duty to prevent Witness Perjury
    - (1) Refuse to put on stand

# PROFESSIONAL RESPONSIBILITY ISSUES CHECKLIST

“For PR, remember your duty of the **5 Cs** to your Client, plus **Other Duties** and **Regulatory Controls**”

3. Duty to Produce Evidence
  - a) Duty not to obstruct access to or tamper with fruits or instrumentalities of a crime
  - b) Prosecutor's duty to timely disclose evidence favorable to the defenses
4. Ex Parte Proceedings
  - a) Don't talk to judge w/o other atty. present
5. Duty to Uphold the Law
  - a) Assist Crimes
    - (1) Mandatory = using A to commit crime
    - (2) Permissive = A not assisting
  - b) Prevent Crimes: *See I.A.3.b-c*
    - (1) Prevent crimes of death/GBH
    - (2) Fraud/Financial Injury
6. Duty to Be Candid about the Law
  - a) Duty to cite adverse authority from controlling jdx. + on point
  - b) Duty to prevent frivolous claims/ defenses

## VI. CASH

### A. DUTY TO PROTECT CLIENT'S PROPERTY

1. Safeguard + Identify
2. Money
  - a) Client trust acct.
    - (1) Interest = C's
  - b) Pooled client trust accts
  - c) No borrowing or commingling

### B. DUTY TO PROMPTLY NOTIFY & DELIVER

### C. DUTY TO WITHHOLD

1. Withhold disputed portion in the separate C trust account

### D. DUTY TO KEEP GOOD RECORDS

1. Keep good records, render accounting, notify client of \$ received
2. CA = keep records for 5 years. Make available to CA Bar for audit

## VII. REGULATORY CONTROLS AND UNAUTHORIZED PRACTICE

### A. ADVERTISING RULES

1. *Communication w/ public public at large or segment of public*
2. Can't be false or misleading
3. Must not harass
4. Procedural Requirements
  - a) Labeled
  - b) Identify at least 1 A responsible for for content
  - c) Keep records for 2 years
5. Commercial Speech
  - a) Gov. assert sub. int.
  - b) Reg. directly advances int.

- c) Narrowly tailored
6. Claims of Specialization
  - a) ABA = Certified by proper org.
  - b) CA = Board of Leg. Spec. req:
    - (1) Education
    - (2) Experience
    - (3) Examination
    - (4) Evaluation
  - c) CA Advertising Presumptions
    - (1) Guarantee, Warranty, Prediction of result improper
    - (2) Testimonials/endorsements must have disclaimer
    - (3) At hospital = presumed misleading.

### B. SOLICITATION RULES

1. *Individualized contact w/ layperson*
2. Must not seek professional employment for profit by live or telephone contact w/ person whom A had no preexisting relationship
  - a) ABA = Phone + Email (electronic)
  - b) CA = Live or telephone only
3. CA Solicitation Presumptions
  - a) Scene of accident
  - b) On route to hospital
  - c) To person lacking capacity/jdmt.

### C. UNAUTHORIZED PRACTICE OF LAW

1. Practice of law = legal knowledge + skill + advice binding legal rights OR
2. Activities traditionally performed by As
3. By Attorneys
  - a) Not Admitted in Jurisdiction
    - (1) Exceptions:
      - (a) Pro-Hac Vice
      - (b) Temp. practice arising out of authorized practice

### D. DUTY NOT TO GO INTO BUSINESS WITH A NONLAWYER

1.

### E. LAW RELATED SERVICES

### F. MULTI-JURISDICTIONAL PRACTICE

### G. REPORTAGE MISCONDUCT

1. ABA = Must snitch
2. CA = Self-report if:
  - a) Charged/Convicted for felony, > \$1K sanctions, 3 mal. claims 1yr

### H. SUBORDINATE LAWYERS

1. Clear violation = Sub. A responsible

### I. RESPONSIBILITIES OF PARTNERS, MANAGERS & SUPERVISORY LAWYERS

1. Duty to supervise subordinates
2. A responsible for violation of subordinate if fail to take rem. action

# AGENCY & PARTNERSHIP ISSUES CHECKLIST

“**FAR** For **Partners To Drive**”

## I. **FORMATION**

### A. **AGENCY**

1. Agency is a consensual legal res. where one party, the principal, grants authority for another party, agent, to act on behalf + under control of prin.
2. Forming Principal Agent Relationship
  - a) By Agreement
    - (1) Assent
    - (2) Benefit
    - (3) Right to control agent
  - b) By Estoppel (apparent auth)

### B. **GENERAL PARTNERSHIPS**

1. Association of two or more people carrying on as co-owners of a business for profit
  - a) Share profit = presume p'ship
2. No Formalities Required for Formation
3. Default Rules: unless agmt otherwise
  - a) Management = Equal control
  - b) Salary = None unless wind up
  - c) Profit/Loss = Equal share

## II. **AUTHORITY**

### A. **ACTUAL AUTHORITY**

1. Actual Express
  - a) Equal Dignity Rule
  - b) Removable any time + death
2. Actual Implied
  - a) Necessity
  - b) Custom  
Prior Dealing

### B. **APPARENT AUTHORITY**

1. P cloaks A w/ appearance of auth.
2. Reliance by 3P: 3P cant have not. rev.

### C. **RATIFICATION**

1. Knowledge of all material facts
2. Acceptance of K benefits
  - a) Ratify all or none

## III. **RIGHTS & LIABILITIES**

### A. **PRINCIPAL LIABILITY FOR CONTRACTS & TORTS OF THE AGENT**

1. Respondent Superior (Tort)
  - a) P + A relationship
  - b) In scope of P + A rel.
    - (1) W/in job description
    - (2) On the job
      - (a) Frolic v. Detour
    - (3) Intended for P's benefit
  - c) Intentional Torts: No unless
    - (1) Specifically auth. by P
    - (2) Nature of employment
    - (3) Motivated by desire serve P

### 2. Contract Liability

- a) Generally: P liable for Ks entered by A if P authorized A to enter K
  - (1) No auth: P ≠ liable
  - (2) Authority: P = liable
- b) Authorization
  - (1) Actual Express
  - (2) Actual Implied
    - (a) Necessity, Custom. Prior dealing
  - (3) Apparent
  - (4) Ratification

### B. **AGENT'S LIABILITY FOR CONTRACTS**

1. Unauthorized K: A = liable
2. Authorized K: A ≠ liable

### C. **GENERAL PARTNERSHIPS**

1. Powers of Partners to Bind the Partnership
  - a) Actual Authority = Yes
  - b) Apparent Authority = Yes unless
    - (1) No authority +
    - (2) 3P knew no authority
2. Partnership Rights & Obligations
  - a) See I.B.3
3. Personal Liability of General Partners for Partnership Obligations
  - a) Torts = Yes if in scope of usual p'ship business
  - b) Ks = Yes if entered into w/ auth.
4. Partnership by Estoppel
5. Incoming & Outgoing Partner Liability
  - a) Incoming not liable for prior debts
  - b) Outgoing liable for future debts until
    - (1) Notice of dissociation to cred.
    - (2) 90 days after filing not. w/ st.

### D. **LIMITED PARTNERSHIPS**

1. Formalities
  - a) At least one GP
  - b) At least one LP
  - c) File Ltd. P'ship cert naming GPs
2. General Partners Rights & Liabilities
  - a) Right to manage
  - b) Pers. liable for GP and LP debts
3. Limited Partners Rights & Liabilities
  - a) No right to manage
  - b) No personal liability

### E. **LIMITED LIABILITY COMPANIES**

1. Formalities
  - a) Articles of Organization
    - (1) State that entity is LLC
    - (2) Name
    - (3) Address of reg. office
    - (4) Name registered agents



# AGENCY & PARTNERSHIP ISSUES CHECKLIST

“**FAR** For **P**artners **T**o **D**rive”

- (5) Name all members
  - b) May adopt operating agmt.
  - 2. Financial Rights & Obligations of LLC Members
    - a) Profits/Losses allocated by contrib
    - b) No personally liability
  - 3. Management
    - a) All members unless AoO says no
  - 4. Limited Life
  - 5. Limited Tax- like p'ship
  - 6. Limited Liquidity
  - F. REGISTERED LIMITED LIABILITY PARTNERSHIPS**
    - 1. Formalities
      - a) File Statement of Qualification
        - (1) 2 partners
        - (2) Name + Address
        - (3) State that entity is LLP
      - b) File annual reports
    - 2. Effective on Filing Date or Deferred Effective Date
    - 3. Liability of General and Limited Partners
      - a) GP + LP no liability for Ks
      - b) Still liable for torts or GP/LP
- IV. FIDUCIARY DUTIES**
  - A. FIDUCIARY DUTIES OF AGENTS**
    - 1. Duty to Exercise Reasonable Care
    - 2. Duty to Obey Reasonable Instructions
    - 3. Duty of Loyalty
      - a) No self-dealing
      - b) No usurping principal opportunity
      - c) Secret profits
    - 4. Principal Remedies for Breach
      - a) Recover loss from breach
      - b) Disgorge profits made by agent
  - B. DUTIES OF PRINCIPALS**
    - 1. Duties Imposed by Contract
    - 2. Reasonable Compensation
    - 3. Reimbursement for Expenses
    - 4. Duty to Cooperate with Agent & Not Unreasonable Interference
  - C. FIDUCIARY DUTIES OF PARTNERS**
    - 1. Duty of Care
      - a) No negligent, reckless or unlawful conduct
    - 2. Duty of Loyalty
      - a) See IV.A.3
    - 3. Partnership Remedies for Breach
      - a) See IV.A.4
- V. PROPERTY**
  - A. SPECIFIC PARTNERSHIP ASSETS**
    - 1. Need authority to transfer
      - a) Land
      - b) Lease
      - c) Equipment
  - B. PARTNER'S SHARE OF PROFITS & SURPLUS**
    - 1. Profit Sharing: equal unless agree
    - 2. Loss Sharing: equal unless agree
  - C. SHARE IN MANAGEMENT**
    - 1. Asset owned by P'ship not partners
  - D. PARTNERS OR PERSONAL PROPERTY**
    - 1. Use P'ship funds = P'ship prop.
  - E. RIGHTS OF SUCCESSORS & ASSIGNEES**
    - 1. Successors: death/withdraw of p'nee
      - a) Right to join P'ship
      - b) Right to distributions/allocations
    - 2. Assignees
- VI. TERMINATION OF AGENCY RELATIONSHIP**
  - A. Lapse of Time: specified or rsb.
  - B. Occurrence of Specified Events
  - C. Change in Circumstances
    - 1. Destruction of subject matter
    - 2. Insolvency of P or A
    - 3. Change in law
  - D. Agent's Breach of Fiduciary Duty
  - E. Unilateral Termination by Either Party
  - F. Death or Incapacity of Principal or Agent
    - 1. Exception: Durable power of atty.
- VII. DISSOCIATION OR DISSOLUTION OF PARTNERSHIP**
  - A. Dissociation
    - 1. Events
      - a) Withdrawal/Expulsion of partner
      - b) Partner bankruptcy/death/incap.
      - c) Appointment of receiver
      - d) Term. bus. entity that was partner
    - 2. Effect
      - a) Buy out partners interest
      - b) Dissociated P's power to bind w/in 2 years
        - (1) Would have bound prior to dis
        - (2) 3P reliance P still P
        - (3) No notice of dissociation
      - c) Dissociated P's liability 2 years if:
        - (1) 3P rsb. believed P still P
        - (2) No notice of dissociation
  - B. Dissolution
    - 1. Auto upon notice of will of P to dissoc.
    - 2. Other Events
      - a) Lapse time, specified event, change law, ct. order, cant continue under agmt., not rsb. pr.
  - C. Winding Up
    - 1. Priority: Creditors, Cap contrib of partners, profits/surplus, losses
    - 2. Compensation ok for wind up

# CORPORATIONS ISSUES CHECKLIST

“**Forming** a corporation, **ODDS** are there will be **Stock Issues, Promotions, and a Merger**”

## I. FORMATION

### A. DE JURE CORPORATION

1. Articles of Incorporation: PAINN
  - a) **N**umber of Authorized Shares
  - b) **P**urpose
    - (1) Ultra Vires Doctrine:  
Corporation engages in activity beyond its stated purpose.
    - (2) Shareholders may enjoin activity
    - (3) Director & Officers directly liable to Corp.
    - (4) State may dissolve Corp.
  - c) Identify Registered **A**gents
  - d) Identify **I**ncorporators
  - e) **N**ame of Corporation

2. Ultra Vires Doctrine

### B. DE FACTO CORPORATION VAG

1. **V**alid Corporation Law
2. Colorable **G**ood Faith Attempt
3. Corporate **A**ction

### C. CORPORATION BY ESTOPPEL HAPEC

1. Corp **H**old out to public as Corp
2. **A**cts as Corp.
3. Enters into **C**ontract as Corp.
4. Not Corp at **P**resent
5. **E**stopped from claiming no Corp.

### D. FOREIGN CORPORATION: PAINN

1. Corp. formed outside CA
2. Must file Cert. of Authority w/ Sec. St.
  - a) **N**umber of authorized shares
  - b) **P**urpose
  - c) Identify Registered **A**gents
  - d) Identify **I**ncorporators
  - e) **N**ame of Corporation

### E. LIMITED LIABILITY FOR SHAREHOLDERS

1. Piercing the Corporate Veil
  - a) Corp. form ignored by court to avoid fraud or unfairness
  - b) Only controlling shareholders
  - c) Only if justice requires
    - (1) Torts v. Contract
  - d) Theories
    - (1) Fraud, Undercapitalization, Alter Ego, Enterprise Liability, Deep Rock

### F. CONTRACT FORMATION

1. In order to bind Corp.
  - a) Validly incorporated @ contracting
  - b) Actions taken must validly bind Corp.
2. Exception: Quasi-K, Adoption, Estop.

## G. ALTERNATIVE CORPORATE FORMS

1. Closely-held Corporation
  - a) Stock not freely traded
  - b) Small # shareholders
  - c) No Corp. formalities
  - d) Unanimous shareholder elect
  - e) No public trading of shares
2. S-Corp
  - a) Max 100 shareholders
  - b) American Res. + Nat. Person
  - c) One Class of Stock
3. Professional Corporation
  - a) Corp. of Licensed Professionals
    - (1) Architects, Attorneys, CPAs, Engineers, Medical
  - b) Articles of Incorporation **PAINN** +
    - (1) Label as professional corp.
    - (2) Purpose to render prof. servs.
    - (3) Shareholders must be licensed professionals
  - c) Limited Liability
    - (1) Only own malpractice/ misconduct

## II. STOCK ISSUES

### A. CAPITAL STRUCTURE

1. Issuance of Stock
  - a) Par Value = Minimum Price
    - (1) If issue for less who liable?
      - (a) Directors
      - (b) Buyers of shares
  - b) No Par Value = No Min. Price
  - c) Preemptive rights
    - (1) Maintain existing ownership
    - (2) Must be existing shareholder
2. Debt Securities
  - a) Corp. borrows funds from outside investors and promises pay back
  - b) Secured or unsecured
3. Shareholders' Claims
  - a) Own equity interest
  - b) No right to dividends
  - c) Pay creditors first

### B. FEDERAL SECURITIES REGULATION

1. Publicly Held Corporation
2. Section 16(b)- "Short Swing Trading"
  - a) Dir., Off., or >10% shareholder
  - b) Publicly traded Co. on NSE
  - c) or assets over \$10mil/500shld
  - d) Buy or Sell/ Sell or Buy
  - e) Within 6 months

# CORPORATIONS ISSUES CHECKLIST

“**Forming** a corporation, **ODDS** are there will be **Stock Issues, Promotions, and a Merger**”

3. Rule 10b-5
  - a) Use of instrumentality of IC
  - b) Fraudulent/Deceptive conduct
    - (1) Misrep. material facts
    - (2) Failure to disclose
    - (3) Insider Trading
      - (a) Insiders
      - (b) Misappropriation
      - (c) Tippers + Tippees
  - c) In connection w/ purchase or sale of security
  - d) With scienter (reckless)
  - e) Reliance by person on other side of transaction
  - f) Damages

## C. **SARBANES-OXLEY ACT**

1. CEO + CFO Financial Certifications
  - a) Certify that no misstatements or omissions and do fairly present company's financial position
2. Criminal Penalties: 20 yrs, \$5 mil.
3. Civil Penalties: Corp. bring claim against CEO/CFO
  - a) False Reports
  - b) Insider trading during pension blackouts

## III. **SHAREHOLDERS**

### A. **SHAREHOLDER CONTROL**

1. Direct Control
  - a) Generally no control of day to day
2. Indirect Control
  - a) Elect/Remove Dir. w/ or w/o cause
  - b) Adopt/Modify/Repeal Bylaws
  - c) Must approve fundamental changes

### B. **SHAREHOLDER RIGHTS**

1. Derivative Suits
  - a) Own at least 1 share of stock when COA arises thru litigation
  - b) Written demand of BOD to act
    - (1) 90 day waiting period unless
      - (a) Notified of rejection
      - (b) Irreparable injury
2. Voting Rights
  - a) Proxies: need writing, signed, sent to co. sec., authorizes vote
3. Shareholders' Meetings
  - a) Annual/Special
  - b) Voting
    - (1) Quorum: > 50% shares vote
    - (2) Binding: majority
    - (3) Director elect: plurality ≠ maj.
4. Shareholder Inspection Rights

- a) 5 days notice + proper purpose
- ## C. **SHAREHOLDER VOTING AGREEMENTS & VOTING TRUSTS**
1. Voting Trust
    - a) Writing
    - b) Filed w/ co.
    - c) T'fer legal title to voting trustee
    - d) Trust cert. issued to shareholders
    - e) Shld. retain all other rights
    - f) 10 year limit

### 2. Voting (Pooling) Agreement

- a) In writing
- b) Signed by shareholders
- c) Binding + enforceable

### 3. Management Agreements

- a) Included in Aol, Bylaws, Writing
- b) Valid 10 years
- c) Terminate if listed on NSE

## D. **DISTRIBUTIONS: DIVIDENDS, REDEMPTIONS AND REPURCHASES**

1. No right to dividends
2. Not if co. insolvent
3. Priority
  - a) Preferred stock then
  - b) Common stock

## E. **LIMITED LIABILITY FOR SHAREHOLDERS**

1. Piercing Co. Veil: *See I.E. 1*
2. Fiduciary Duty of Controlling Shldr.
  - a) Self-dealing
  - b) Cant unfairly prejudice min. Shldr.
  - c) Sale + sub. looting
    - (1) Defense: rsb. investigation

## IV. **DIRECTORS**

### A. **POWERS**

1. Meeting: req. unless written consent by all.
2. Notice
  - a) Reg Meet: can not must
  - b) Special: 2 days time + place
3. Quorum = > 50% Con. call ok
4. Voting = >50% or quorum
  - a) No proxies. Con. call ok

### B. **RIGHTS AND DUTIES OF DIRECTORS**

#### 1. **MACCDLF**

#### 2. Duty to Manage

- a) May delegate to comm. 1 or more
- b) Business Judgment Rule
  - (1) Good faith
  - (2) Rsb. Informed
  - (3) Rational Basis

# CORPORATIONS ISSUES CHECKLIST

“**Forming** a corporation, **ODDS** are there will be **Stock Issues, Promotions, and a Merger**”

3. Duty of Care
    - a) Discharge duty w/ good faith, care of ordinary prud. pers., in best int. of co.
    - b) Aol may limit liability for director
    - c) Defense = Bus. Jud. Rule.
  4. Duty of Loyalty
    - a) Good faith, act in co. best int. Cant receive benefit to detriment of co. or shldr.
    - b) Interested Transactions
      - (1) Material Disclosure
      - (2) Independent Ratification
    - c) Usurping Co. Opportunities
      - (1) Interest or Exp/ Line of Bus.
      - (2) Personal capacity defense
      - (3) Lack of adequate fin. not def.
  5. Duty to Disclose
  6. Right to Appoint + Fire officers
  7. Compensation = good faith + rsb.
- C. DIRECTOR LIABILITY**
1. See *V.D.1*
- D. REMOVAL OF DIRECTORS**
1. Shareholders remove w/ or w/o cause
  2. Remove for fraud/gross abuse of auth
- V. OFFICERS**
- A. Fiduciary Duties
1. Same as Dir. See *IV.B*
- B. Agents of Corporation
1. Actual Authority
    - a) Express
    - b) Implied
      - (1) Necessity
      - (2) Custom
      - (3) Prior Dealing
  2. Apparent Authority
    - a) Held out to 3P that have auth.
    - b) 3P relies on on that auth.
- C. Req: Pres., Secretary, Treasurer
- D. Officer Liability
1. Indemnification
    - a) Never = Dir. liable to Corp
    - b) Always = Dir. wins claim
    - c) Permissive = Dir. liable to 3rd party or settles w/ corp.
- E. Resignation and Removal
1. Resign = ok any time w/ notice
  2. Remove = any time, w/ or w/o cause
- VI. PROMOTERS**
- A. PROMOTERS: act on behalf of Corp. not formed yet
1. Fid. duties to other promoters
  2. Fid. duties to co. = good faith + fair disclosure
  3. Co. liable for Pr. pre-inc. Ks when
    - a) Express/Implied Adoption
    - b) Mere adoption doesn't relieve Pr.
  4. Pr. Liable Until
    - a) Novation or
    - b) K expressly says no Pr. liab.
- B. SUBSCRIBER: Offers to buy stock of Corp. not yet formed.
1. Irrevocable for 6 months
- C. INCORPORATOR: Person/entity signed and files Articles of Inc. w/ state.
- VII. MERGER & DISSOLUTION**
- A. Fundamental Changes to Co.
1. Merger: (A + B = B)
    - a) Short form merger
      - (1) Parent merges w/ subsidiary
      - (2) Parent owns >90% stock
      - (3) Board approval
      - (4) Notice to shldr.
  2. Consolidation: (A + B = C)
  3. Dissolution
  4. Sale of sub. all of Corp. assets
  5. Dissenter's Rights
- B. Requirements for Fundamental Changes
1. BOD resolves change at val. meeting
  2. Special notice for special meeting
  3. Shareholder approval
    - a) Maj. all shares entitled to vote
    - b) Maj. of any group adversely effected by change
  4. Notice of change filed w/ state
- C. Dissenter's Rights
1. Fund. change, dissenter has right to force co. to buy their shares @ fair val
  2. Before vote: not. obj. + demand pymt.
  3. Vote against or abstain
  4. After vote: prompt demand of pymt.
  5. Fair Value
    - a) Can hire expert. Expert binds both

# TRUSTS ISSUES CHECKLIST

“Eat The Bird and The Frog Legs Too”

## I. ELEMENTS OF TRUSTS

### A. TRUST

1. A fiduciary relationship in relation to prop (trust corpus), between a trustee who holds legal title and a beneficiary who holds beneficial (equitable) title.
2. Inter Vivos Trust — see II.A.
3. Testamentary Trust — see II.B.

### B. ELEMENTS OF PRIVATE EXPRESS TRUST

1. Capacity = testamentary capacity
2. Intent (Present)
  - a) Precatory lang is not sufficient
3. Trust Property (Res)
  - a) Identifiable property
  - b) Expectancy or any other illusory prop not sufficient
4. Delivery
  - a) Actual
  - b) Symbolic
  - c) Constructive
    - (1) CL = giving trustee access to prop
    - (2) ML = settlor has done everything possible to effectuate delivery
5. Trustee does not need to be named.
6. Ascertainable Beneficiary
  - a) Must have ascertainable beneficiary.
  - b) Unincorporated associations
    - (1) CL = No, not ascertainable
    - (2) ML = yes
  - c) RAP Applies
7. Trust Purpose
  - a) Purpose must not be illegal or against pub. policy

## II. TYPES OF TRUSTS & REQUIREMENTS

### A. INTER VIVOS TRUST

1. Trust created while settlor is alive
2. (2) Types
  - a) Transfer in Trust = settlor transfers property to 3rd party trustee
    - (1) RP = (1) must transfer title to trustee. (2) Must satisfy SOF
    - (2) PP = must deliver the prop
  - b) Declaration of Trust = settlor declares herself the trustee.
    - (1) Settlor may be a beneficiary but not the only beneficiary

### B. TESTAMENTARY TRUST

1. A trust created by a will
2. Will contains the material provisions of the trust, and
3. Trusts becomes effective upon death of Settlor/Testator

## C. SECRET & SEMI-SECRET TRUSTS

1. Secret = Constructive Trust
  - a) Deed or will makes a gift that while absolute on its face was made in reliance on the recipient's promise to hold the property in trust for the benefit of another.
  - b) If intended beneficiary can prove by C&C evidence, a constructive trust is imposed.
2. Semi-Secret Trust = Resulting Trust
  - a) Deed or will makes a gift to a trustee as trustee but does not name a beneficiary.

## D. CHARITABLE TRUST

1. Trust created for the benefit of society.
2. Must satisfy all trust reqs except ascertainable beneficiary. Beneficiary must be unascertained because the public is the real beneficiary
3. Advancement of religion = Ok
4. Dissemination of Political Views = Yes
5. Political parties = No
6. Cy Pres Doctrine = allows ct to modify a charitable trust that would otherwise fail for impossibility or impracticability
  - a) General charitable intent, and
  - b) means impracticable/impossible

## E. RESULTING TRUST

1. ≠ trust, but a remedy
2. Trustee duty is to convey corpus back to the settlor[’s estate].

## F. CONSTRUCTIVE TRUST

1. ≠ trust, but restitutionary remedy to combat unjust enrichment
2. Trustee duty to transfer title and possession to beneficiary.

## G. HONORARY TRUST

1. Neither a charitable trust nor ascertained private beneficiary where trustee is on her honor to fulfill her duties and carry out settlor's intent
2. If trustee unwilling = resulting trust
3. RAP issue ct. split
  - a) Trust invalidated at inception = resulting trust
  - b) Valid for 21 years followed by resulting trust

## H. SPENDTHRIFT TRUST

1. Prohibits voluntary and involuntary alienation of the beneficiary's right to future payments.

## I. DISCRETIONARY TRUST

1. trustee given discretion to pay or withhold trust income or principal to or from the beneficiary

# TRUSTS ISSUES CHECKLIST

“Eat The Bird and The Frog Legs Too”

## J. SUPPORT TRUST

1. Trustee has power to distribute trust income or principal to the beneficiary only as necessary for the beneficiary's support

## K. WILL SUBSTITUTES

1. Revocable Inter Vivos Trust
  - a) Pour-over Will
2. Life Insurance Trust
  - a) a trust whose res is life insurance policy; the beneficiary is the trustee. In CA, settlor may name trustee in her will.
3. Trotten Trust
  - a) named beneficiary receives the remainder of an account at the time of the trustee's death

## III. BENEFICIARIES' INTERESTS

### A. TRANSFER OF BENEFICIARIES INTEREST

1. In General
  - a) Beneficiary's interest is both voluntarily and involuntarily alienable as a property right
2. Spendthrift = Restraint on Alienation
  - a) Voluntary permitted while involuntary prohibited = invalid
  - b) Exceptions:
    - (1) Preferred Creditors—ct will disregard a spendthrift clause and allow a preferred creditor to attach to the beneficiary's future income or principal payments from the trust.
      - (a) Government
      - (b) Dependents
      - (c) persons supplying necessities
      - (d) tort creditors
    - (2) Settlor as Beneficiary
      - (a) Involuntary alienation = invalid
      - (b) voluntary:
        - i) maj = ignore spendthrift provision
        - ii) min = uphold spendthrift provision
    - (3) Surplus = creditors may attach
3. Discretionary Trust
  - a) Trustee has discretion to pay or withhold corpus and/or proceeds of the trust to or from the beneficiary
  - b) Settlor as beneficiary = creditors may compel payment
4. Support Trust

- a) Trustee distributes corpus and/or proceeds of the trust to the beneficiary only in the amount that is necessary for the beneficiaries support.
- b) Voluntary/Involuntary alienation = prohibited
- c) whether other income by beneficiary is considered depends upon settlor intent

### B. UNIFORM PRINCIPAL & INCOME ACT

1. Life Tenant = Income Beneficiary
  - a) *Income Allocated to LT*: cash receipts from entities, insurance proceeds, interest income, 10% of deferred compensation; 10% of mineral, water & other natural interests
  - b) *Expenses to LT*: interest on debt; minor repairs; recurring taxes assessed against principal; insurance premiums; 1/2 of trustee's & advisor's compensation; 1/2 of accounting & judicial expenses.
2. Remainder man = Principal
  - a) *Principal allocated to Remainderman*: receipts from entities (liquidating distributions, capital gains, property other than money); insurance proceeds; principal assets.
  - b) *Expenses allocated to Principal*: principal portion of debt; major repairs/improvements; insurance premiums; estate tax; environmental matters; 1/2 of trustee's & advisor's compensation, accounting & judicial expenses.
3. Trustee
  - a) Duty not to Discriminate between Beneficiaries
  - b) Adjustment Power

## IV. TRUSTEE'S POWERS

### A. SOURCE OF POWER

1. Express powers = enumerated
2. Implied powers
  - a) Power to sell
  - b) Power to invest
  - c) Power to lease land
  - d) Power to pay expenses
  - e) Power to sue third parties
  - f) No Power to incur debts, mortgage or encumber prop

### B. IMPERATIVE POWER

# TRUSTS ISSUES CHECKLIST

“Eat The Bird and The Frog Legs Too”

1. Powers the trustee is required to exercise but subject to review for abuse of discretion.

## C. DISCRETIONARY POWER

1. trustee may or may not exercise but subject to review for abuse of discretion.

## D. JOINT TRUSTEES

1. CL = Unanimous Agreement in order to exercise trustee power.
2. ML = majority

## V. FIDUCIARY DUTIES OF TRUSTEE

### A. DUTY OF UNDIVIDED LOYALTY

1. Must Avoid Self-Dealing
2. Duty to Inform & Account
3. Beneficiaries Remedies for Self-Dealing
  - a) Ratify transaction
  - b) recover profits which are considered to be held in constructive trust
    - (1) Trustee liable for losses
  - c) Set aside transaction, unless BFP

### B. DUTY OF DUE CARE

1. Must exercise the care, skill, and caution as a reasonably prudent person under the circumstances
2. If Trustee has special skill or expertise they must use it.

### C. DUTY TO ADMINISTER ACCORDING TO TERMS

1. Must comply with trust terms, but cannot blindly follow (duty of care).

### D. DUTY TO INVEST

1. CL = RPP
  - a) Each investment must be prudent
  - b) Measured at time of investment
  - c) Investments constantly reviewed & changed if necessary.
2. Uniform Prudent Investor Act = RPI
  - a) Measured at time of trustee's action
  - b) Entire portfolio scrutinized
  - c) Any type of investment permitted so long as acting as RPI
  - d) Includes Duty to Diversify

### E. DUTY NOT TO DELEGATE

1. May seek professional advice, but the trustee must exercise independent judgment and make final decision
2. Duty to Invest
  - a) CL = no, could not delegate
  - b) ML = yes
3. Remedy = strictly liable for losses incurred.

### F. DUTY TO CAREFULLY SELECT & SUPERVISE AGENTS

1. May delegate activities that would be unreasonable to require the trustee to perform (i.e. mailing letters).
2. Trustee must carefully select and supervise these agents
3. Delegation of Investment Decisions
  - a) Reasonable skill, care, caution in:
    - (1) Selecting agent
    - (2) Establishing Scope & Terms of Delegation
    - (3) Periodically review agent's actions

### G. DUTY TO PHYSICALLY SEPARATE ASSETS

1. Duty not to commingle assets
2. Remedies
  - a) Removal of trustee
  - b) Trustee liable for losses

### H. DUTY TO EARMARK

1. CL = SL, even if failure to earmark was not the cause of the loss.
2. ML = Liable for Damages caused by failure to earmark

### I. REMEDIES (6)

1. Recover Damages
  - a) Actual loss plus interest
  - b) Offsetting Prohibited — a trustee cannot offset loss from one breach of duty with the gain from another breach of duty
2. Constructive Trust
3. Tracing and Equitable Lien on Prop
4. Ratify Transaction
5. Set Aside Transaction
6. Remove Trustee

### J. THIRD PARTY LIABILITY

1. Non BFP
  - a) May be set aside by a beneficiary or the trustee.
  - b) 3rd party = not a BFP if:
    - (1) they knew or should have known of the existence of the trust by reasonable inquiry
2. BFP > Beneficiaries
3. Innocent donee
  - a) required to restore the prop to the trust but will not be liable for damages

## VI. LIABILITY OF TRUSTEE

### A. EXCULPATORY CLAUSE

1. Cause absolving trustee of liability
2. Strictly construed and will not free the trustee from all liability.
3. Clause relieving trustee from ordinary negligence is enforceable.

# TRUSTS ISSUES CHECKLIST

“Eat The Bird and The Frog Legs Too”

## B. CONTRACT LIABILITY

1. CL = Sued in personal capacity
  - a) Liable for all Ks trustee enters into on behalf of the trust unless the K expressly relieves trustee of liability. Trustee is sued in her personal capacity.
  - b) If K relieves Trustee of Liability
    - (1) Trustee is sued in her representative capacity.
  - c) Indemnification from Trust if:
    - (1) within the scope of Trustee's power, AND
    - (2) Trustee not personally at fault
2. ML = if other K party has knowledge of trust, the trustee can only be sued in representative capacity

## C. TORT LIABILITY

1. CL = Personally Liable
  - a) Indemnification available if trustee was not at fault
2. ML = Personally Liable only if at Fault
  - a) Trustee at Fault = personal capacity
  - b) Trustee not at Fault = representative capacity

## VII. TERMINATION & MODIFICATION

### A. MODIFICATION

1. By Settlor = Implied from Power to Revoke
2. By Beneficiaries
  - a) Unanimous consent, AND
  - b) Modification does not frustrate any material trust purpose
3. By Court
  - a) Cy Pres for Charitable Trusts
  - b) Doctrine of Changed Circumstances
    - (1) unknown & unanticipated changed circumstances, AND
    - (2) Continuing under existing terms would impair trust's purposes

### B. TERMINATION

1. Revocable
  - a) Maj = presumed irrevocable.
    - (1) Settlor reserved right to revoke
    - (2) Complies w/all provisions in trust agreement regarding revocation
  - b) Min = presumed revocable unless trust states otherwise
2. Irrevocable (3)
  - a) Unanimous agmt between alive settlor & all beneficiaries

- b) The Clarflin Doctrine
  - (1) All beneficiaries agree, AND
  - (2) No material trust purpose unperformed
    - (a) Spendthrift provision is always material and therefore cannot be terminated early even if all beneficiaries agree.
- c) Merger
  - (1) If trustee becomes the sole beneficiary, the trust interests merge and the trust terminates.
3. Judicial Power to terminate = purpose impossible, illegal, or completed



# WILLS ISSUES CHECKLIST

“In Re DR ICP”

## I. **INTESTATE SUCCESSION**

### A. **DISTRIBUTION OF CP & QCP**

1. All CP/QCP = 100% to Surv Spouse

### B. **DISTRIBUTION OF SEPARATE PROPERTY**

1. No issue, parents, siblings or issue of siblings = 100% to surviving spouse
2. 1 issue or issue of predeceased child, parent(s) or issue of parents = 1/2 to surviving spouse
3. > 1 issue or issue of predeceased child = 1/3 to surviving spouse.

### C. **ORDER OF TAKERS**

1. Applicable when there is no SS or DP
2. Order (Table of Consanguinity)
  - a) to issue
  - b) to parents, if no issue
  - c) issue of parents, if none above
  - d) g-parents, if none of the above
  - e) issue of g-parents, if none above
  - f) issue of predeceased spouse/partner, if none of the above
  - g) Next of kin, if none of the above
  - h) Parents of predeceased spouse/partner, if none of the above
  - i) Issue of parents of predeceased spouse/partner, if none above
  - j) Escheat to state, if none above

### D. **DISTRIBUTION SCHEME**

1. Strict per Stripes
  - a) “Remainder goes the POT”
2. Modern per stripes (Per Capita w/ Right of Representation (CA))
  - a) Start 1st living gen.
  - b)  $\div$  amt of estate (\$) by # of takers
  - c) Give share to the living
  - d) Go to 1st gen of 1st dead taker
  - e) Count # of takers (alive + dead w/ living issue)
  - f)  $\div$  # of takers into their dead parent’s share
  - g) Give to living
  - h) Repeat steps e—g until all \$ for that taker has been distributed.
  - i) Move to next dead taker, and repeat until entire estate has been distributed.

### E. **SURVIVAL RULE**

1. 120 Hours
  - a) Heir must survive by 120 hours, or she predeceases decedent.

### F. **CHILDREN**

1. Adoption
  - a) Adoptive Parents & Relatives = Inherit

- b) Natural Parents = Severance and no inheritance

- (1) Exceptions to Severance
  - (a) Step-parent adoption by spouse/DP of either natural parent

- c) Equitable Adoption

- (1) Relationship began during child’s minority
- (2) R’ship continued throughout both parties lifetimes
- (3) C&C evidence of adoption but for legal barrier

## 2. non-marital children

- a) EP Violation to allow child to inherit from mom but not dads.
- b) Mother = child can always inherit through their mother
- c) Father = Yes if parent child relationship existed. Presumed:
  - (1) Child born during actual or attempted marriage
  - (2) Parents married or attempted to marry:
    - (a) before child’s birth & birth within 300 days
    - (b) After child is born and:
      - i) father named on birth certificate
      - ii) father makes voluntary promise to pay child support
      - iii) father ordered to pay child support by court
    - (c) Holding Child out as own

## 3. Half-bloods

- a) inherit same as whole bloods

## 4. Posthumous Heirs / Conceived Children

- a) Def. — heirs conceived during T’s life but born after the T’s death.
- b) Posthumously Conceived Children — use of decedent’s egg or sperm to conceive a child after the death of the decedent.
  - (1) Born during T’s life if:
    - (a) use authorized in writing
      - i) signed & dated
      - ii) designates person in control
    - (b) written notice within 4 months, and
    - (c) conceived & in utero w/in 2 years of death cert.

# WILLS ISSUES CHECKLIST

“In Re DR ICP”

## II. REQUIREMENT & COMPONENTS OF WILLS

### A. EXECUTION (C-TIF)

1. Capacity
  - a) Requirements
    - (1) 18 or older
    - (2) understand nature of the testamentary act
    - (3) Situation of Prop
    - (4) Effect of family
  - b) Challenges to Capacity
    - (1) Insane delusion
    - (2) fraud
    - (3) undue influence
2. Testamentary Intent
  - a) Intend to make a disposition of property that would become effective on T's death
3. Formalities (5) (WSW-2PSU)
  - a) Writing
  - b) Signed
  - c) Witnesses: (2PSU)
    - (1) 2 witnesses
    - (2) Present together
    - (3) Signed within T's lifetime
    - (4) Understand that they are signing a will.
  - d) Interested W's=presumed UI.
    - (1) Exceptions: (1) two other disinterested witnesses,
    - (2) Fiduciary capacity

### B. COMPONENTS

1. Integration (PI)
  - a) Present at the time of execution
  - b) Intent
    - (1) satisfied by either a physical or logical connection
2. Incorporation by Reference (DDDI)
  - a) Document or Other Writing
  - b) Document in Existence at Time of Execution
  - c) Documents Clearly Identifiable
  - d) Intent by Testator
3. Facts of Independent Significance
  - a) Non-testamentary in nature
  - b) Test = does the fact have significance apart from its effect on the will
4. Disposing of Tangible Personal Prop
  - a) Scope = Decedent's dying on or after 1/1/07
  - b) Elements
    - (1) Writing describes items & beneficiaries w/reasonable certainty

- (2) Executed before or after will
- (3) Disposes of tangible personal property = no more than 25K in the aggregate & no single item over 5K
- (4) Excludes: Cash, Trade or business prop, items > 5K

### 5. Codicil

- a) Testamentary instrument changes or revokes a pre-existing will.
- b) Codicil = Republishes will
- c) Revocation (rebut presumption)
  - (1) of Codicil = only codicil
  - (2) of Will = Will & all codicils
- d) Holographic Codicil = must satisfy §6111 reqs.

### 6. Pour over Wills

- a) Provision that devises part or all of T's estate to the trustee of an inter vivos trust created during settlor's lifetime.

### C. CONDITIONAL WILLS

1. Only take effect when a certain condition happens
2. Probated only if cond. is satisfied
3. May take the form of a formal attested will or holographic will.

### D. EXECUTION OF HOLOGRAPHIC WILLS

1. Formalities
  - a) Writings
  - b) Material terms handwritten by T
    - (1) gifts, and
    - (2) names of beneficiaries
  - c) signed by T
2. Testamentary intent
3. No Date Required
  - a) Issue when there are other contradictory instruments

## III. DEFENSES: MIFE-UPI

### A. INSANE DELUSION

1. T suffers from a mental disorder
2. Causing delusion/hallucination resulting in false belief
3. Resistant to contrary evidence
4. Delusion must have affected will
5. Effect = only part affected invalid

### B. FRAUD

1. Misrepresentation of material fact
2. known to be false by the wrongdoer
3. for purpose of inducing action/omission, and
4. actually induces the desired outcome

### C. FRAUD IN THE EXECUTION

# WILLS ISSUES CHECKLIST

“In Re DR ICP”

1. Forging will or T signs will under belief that it is not a testamentary instrument. Entire will is invalid
  2. Effect = intestate unless prior val. will
- D. FRAUD IN THE INDUCEMENT**
1. Only part of will that is affected by the fraud is invalid. Court may distribute:
    - a) Residuary Clause
    - b) no residuary = intestate success
    - c) Constructive trust
- E. FRAUD IN PREVENTION OF REVOCATION**
1. No probate
  2. Effect = constructive trust
- F. UNDUE INFLUENCE**
1. Prima Facie Case
    - a) Susceptible Testator
    - b) Opportunity to Influence
    - c) Disposition/motive to exert influence
    - d) Unnatural result
  2. Effect = only part affected invalid
    - a) Ct had 3 options:
      - (1) Residuary
      - (2) no residuary = intestate
      - (3) constructive trust
  3. Presumption of Undue Influence
    - a) Elements
      - (1) Confidential relationship
      - (2) Active participation in procuring a will
      - (3) unnatural result
    - b) Interested witness = presumed UI
    - c) same effect and options
  4. Statutory Undue Influence
    - a) Invalidates donative transfers to:
      - (1) Drafter of instrument
      - (2) Drafter's
        - (a) relatives, spouse, DP, cohabitants, business partner, or employee
    - b) Exceptions
      - (1) reviewed by independent attorney
      - (2) C&C evidence
      - (3) inapplicable when T is the drafter's or Transferee's
        - (a) relative, spouse, DP, or cohabitant
- G. MISTAKE: LIES-DC**
1. In the Execution
    - a) T signs under mistaken belief that instrument is non-testamentary
    - b) Reciprocal will or mutual wills
  2. In the Inducement
    - a) T makes a particular devise based on a mistaken belief.
    - b) Generally, no relief is granted.
3. In the Content
- a) Wrong person named as beneficiary or wrong gift devised
  - b) Generally, there is no remedy. However, if omission is in a sub instrument that revokes a prior will, court may use DRR to reinstate the prior will.
4. In the Description (2)
- a) Non-Identification — description does not exactly match any person or thing.
  - b) Equivocation—applies equally well to 2 or more people or things
  - c) Effect = extrinsic evidence is admissible to explain both latent and patent ambiguities.
    - (1) Latent = not on face of instrument. PER admissible to establish ambiguity and resolve it.
    - (2) Patent = on face of instrument. PER admissible in CA. However, some courts allow devise to fail
5. Involving Living Children
- a) Pretermitted child = born or adopted after testamentary instrument executed & not provided for.
    - (1) Effect = takes intestate share.
  - b) Born or adopted before testamentary instrument executed ≠ pretermitted child
    - (1) Effect = child disinherited.
    - (2) Exception: T believed Child dead/non-existent
      - (a) Effect = pretermitted child
6. Mistake in Validity of Subsequent Instrument = Dependent Relative Revocation (DRR)
- a) Revocation in whole or in part
    - (1) by physical act, or
    - (2) sub executed instrument
  - b) Upon mistaken belief in validity of subsequent will, AND
  - c) Prior will is substantially identical and consistent with T's intent
  - d) Effect = prior will reinstated by operation of law
  - e) 1st will destroyed = CA Lost Will Provision

# WILLS ISSUES CHECKLIST

“In Re DR ICP”

- (1) Destroyed will may be probated if at least 1 witness testifies to the contents of the destroyed instrument.

## IV. REVOCATION: POS-AAI

### A. BY PHYSICAL ACT

1. Requirements
  - a) Physical act
  - b) by testator or another in testator's presence, AND
  - c) Simultaneous intent to revoke
2. Duplicate wills
  - a) revocation of one instrument will revoke all instruments
3. Cancellation & Interlineation
  - a) Increase gift = invalid if Not holograph but DRR
  - b) Decrease Gift = invalid if not Holograph & No DRR
4. Misplaced wills that cannot be found are presumed to be destroyed.

### B. BY SUBSEQUENT INSTRUMENT

1. Express Revocation
  - a) Sub instrument states that it revokes all prior instruments
2. Implied Revocation
  - a) T executes a sub instrument that is inconsistent w/ original
  - b) Entire Revocation—1st will revoked entirely if 2nd disposes of all of T's estate
  - c) Partial Revocation—later instrument will control where there are any inconsistencies
3. Revival
  - a) Need 3 testamentary instruments
  - b) 2nd revoked by Physical Act = extrinsic evidence is admissible
  - c) 2nd revoked by Sub Instrument = no extrinsic evidence

### C. BY OPERATION OF LAW (4)

1. Omitted or Pretermitted Child
  - a) Effect = given intestate share
  - b) Exceptions (3):
    - (1) omission intentional & on face of instrument
    - (2) Pretermitted child provided for outside of the instrument
    - (3) Parent of omitted child
2. Omitted Spouse/DP
  - a) Requirements
    - (1) Married T after all T instruments executed
    - (2) Surviving spouse not provided for

- b) Effect = revocation and all CP/QCP and instate share of SP.
- c) Exceptions:
  - (1) omission intentional & on face of instrument
  - (2) Spouse provided for outside of the instrument
  - (3) Signed waiver by omitted spouse
    - (a) writing
    - (b) signed by waiving spouse
    - (c) Full & fair disclose, AND
    - (d) (1) Reped by indep counsel, or (2) waiver was fair, or (3) should have / had knowledge of decedent's \$

### 3. Divorce or Dissolution of Marriage/DP

- a) Devise to former spouse = revoked by operation of law
  - (1) legal sep is not sufficient
- b) Remarriage to spouse = reinstated if unchanged

### D. ADEMPMENT

1. By Extinction
  - a) Specific devises only. Occurs when gift not owned by T at death
  - b) CL = gift fails
  - c) CA = \$ value if devisee can show T did not intend gift to fail
2. By Satisfaction
  - a) Intervivos gift, AND
  - b) Intent of satisfaction by T
    - (1) will expressly provides for deduction
    - (2) intent expressed by T in contemporaneous writing
    - (3) written acknowledgement by beneficiary at the time
    - (4) specific devise & intervivos gift = specific property

### E. ADVANCEMENT

1. Intervivos gift
2. Intent of advancement by intestate

### F. INTERPRETATION OF CONFLICTS

## V. INTERPRETATION & CONFLICT OF LAWS

### A. INTESTATE PROPERTY

1. PP = law of decedent's domicile
2. RP = law of where RP is located

### B. PROBATE IN CA

1. Will Complies with CA will formalities
2. Will complies with formalities of state where will was executed
3. Will complies with formalities of state T domiciled at death or execution

# WILLS ISSUES CHECKLIST

“In Re DR ICP”

## VI. CONTRACTS RELATING TO WILLS & POWERS OF APPOINTMENT

### A. CONTRACTS TO MAKE OR NOT REVOKE WILL

1. K law governs
2. Proof of K can be established by
  - a) instrument sets forth material provisions of K
  - b) Express reference to K in will or instrument
  - c) Signed by decedent
  - d) Clear & Convincing evidence
3. Enforceable at death
4. Apply K remedies

### B. JOINT & MUTUAL WILLS

### C. WILL SUBSTITUTES

1. Gift Causa Mortis
  - a) Requirements
    - (1) Donor must fear impending or imminent death
    - (2) Personal property only
    - (3) Donative intent
    - (4) Delivery
      - (a) actual/symbolic/construc
    - (5) Acceptance
  - b) Revocable
  - c) If D'nor survives = Revoked
2. Totten Trust
  - a) Revocable by
    - (1) Withdrawal of funds
    - (2) act manifesting intent to revoke, or
    - (3) contrary will.

## VII. PROBATE & ADMINISTRATION OF ESTATE

### A. RESTRICTIONS ON TAKING

1. SP — freely dispose
2. CP/QCP— may dispose T's 1/2
3. Widow ≠ CA
4. Slayer Statute
  - a) Felonious and intentional killing of T = Killer bar from inheritance
  - b) Evidence of Homicide
    - (1) Convicted = conclusive
    - (2) not convicted = preponderance of evidence
  - c) Killer = predeceased T
5. Elder Abuse = Bar from inheritance

### B. WHO CAN TAKE?

1. Posthumous Beneficiaries (see I.E.4)
2. Lapse
  - a) Beneficiary dies before T = gift lapses.

### 3. Anti-Lapse

- a) Gift does not lapse and lineal descendants of beneficiary take
  - b) Requirements
    - (1) Blood relative
    - (2) predeceased Beneficiary leaves issue
    - (3) instrument does not express intent to the contrary
4. Uniform Simultaneous Death Act
    - a) Simple Survival = will
    - b) 120 Hour Rule = intestate
    - c) Simultaneous Death: CP/QCP = 50/50 btwn estates of spouses/dp
    - d) Simultaneous Death of JTs = JT is severed, and half to each TC
    - e) Insured & Beneficiary
      - (1) Beneficiary is presumed to predecease insured

### C. TYPES OF DEVISES

1. Specific = specific personal/real prop
2. General = money
3. Demonstrative = monetary gift from a specific source
4. Residuary = all prop not disposed of

### D. ABATEMENT

1. Occurs when omitted spouse/child or estate has insufficient assets to pay debts and devises.
2. Order of Abatement
  - a) Intestate
  - b) residual devises
  - c) general devises to non-relatives
  - d) general devises to relatives
  - e) specific/demonstrative devises to non-relatives
  - f) specific/demonstrative devises to relatives

### E. EXONERATION

1. Freeing specific gifts from encumbrances
2. CL = Yes
3. CA = No unless express intent by T

# COMMUNITY PROPERTY ISSUES CHECKLIST

“Community Property is SAD and Difficult to Manage”

## I. COMMUNITY PROPERTY

### A. FRAMEWORK

1. When acquired?
  - a) Before = SP
2. How acquired?
  - a) Labor or inheritance
3. Presumptions?
  - a) *See II*
4. Actions by H/W change character?

### B. DEFINITIONS

1. CP: All property, real or personal, wherever situated, acquired by a married person, during the marriage.
2. SP: All property, real or personal, acquired by a person before the marriage; or by gift inheritance, bequest or devise; or the rents, issues of profits therefrom.
3. QCP: Acquired DM in another state that would have been CP if acquired in CA.

### C. MARITAL STATUS

1. Legal Marriage: **CWI**
  - a) Legal **C**apacity of both parties
  - b) **W**itnessed ceremony of marriage
  - c) **I**ssuance of marriage license
2. Invalid Marriage: **BINP**
  - a) **B**igamy
  - b) **I**ncest
  - c) **N**oncompliance w/ law
  - d) **P**rior invalid divorce
3. Registered Domestic Partners
  - a) Same sex couple or elderly opposite sex couple receiving SS
4. Putative Spouse
  - a) Objectively reasonable and good faith belief in a valid marriage same rights at div/death
  - b) Effect: QMP = CP
    - (1) Only lasts as long as spouse has good faith belief.
  - c) Estoppel: once PS knows, estopped.
  - d) Decedent leaves S + PS = Share equally
5. No Legal Marriage
  - a) *Marvin*: K law governs unless 100% based on sex
  - b) *CL Marriage* = No but rec. outside st. if valid under st. law

### D. TERMINATION OF ECONOMIC COMMUNITY

1. Requirements
  - a) *Permanent* physical separation
    - (1) Separate + Apart
  - b) *Intent* not to resume marital rel.

(1) 1 spouse ok

2. Facade of Marital Relationship
  - a) Mar. econ. comm. ≠ ended
3. Effect of Termination
  - a) Acquiring spouse prop. = SP

## II. PRESUMPTIONS

### A. COMMUNITY PROPERTY

1. *See I.B.1*

### B. SEPARATE PROPERTY

1. *See I.B.2*
2. Tracing (Source Back Rule): If traceable to SP = SP
  - a) *Exhaustion*: Val. prop. exceeds total val. CP, presumed SP
  - b) *Direct Tracing*: Use of SP funds to buy prop. Trace directly to prop
3. BOP on party trying to prove SP

### C. QUASI-COMMUNITY PROPERTY

1. Generally only relevant @death/div.

### D. COMMINGLED ASSETS

1. Source cant be identified presume CP
2. Joint Bank Accounts: presume CP unless traceable to SP + no agmt. contrary

### E. EARNINGS WHILE SEPARATE & APART

1. Not CP. Earning spouse's SP

### F. PRESUMPTIONS INFERRED FROM TITLE

1. *See IV*

## III. DIFFICULT TO CLASSIFY ASSETS

### A. MNEMONIC: **BPDS-MS-GET**

### B. **B**USINESS OWNED BEFORE MARRIAGE **S**UBSTANTIALLY **I**NCREASES IN **V**ALUE **D**URING MARRIAGE

1. Van Camp = Valuable Co./Asset
  - a) *Where capital investment was the major factor not S's skill/effort.*
  - b) SP = Value of S's earnings @ mkt. rate - fam. exp. from bus. earnings
  - c) Sub. salary + bonus = favor VC
2. Pereira = Personal Skill + Effort
  - a) *Favors comm. est. S's skill, time and effort are reason bus. growth*
  - b) SP = Initial SP investment + Interest (10%)
  - c) CP = Rest
3. Appreciation CP Business During Separation
  - a) Reverse Pereira
    - (1) CP = Val. CP bus. @ DoS + (Val. CP bus. DoS \* Fair Return \* Yrs separated)
    - (2) SP = FMV CP Bus. DoS - CP

# COMMUNITY PROPERTY ISSUES CHECKLIST

“Community Property is SAD and Difficult to Manage”

- b) Reverse Van Camp
    - (1) SP = Rsb. Val. Serv. during Sep. - Salary already paid
    - (2) CP = FMV CP bus. div. - SP
  - C. PENSION BENEFITS**
    - 1. Proration Rule: CP
      - a) *Numerator* = # yrs serv. DM
      - b) *Denominator* = # yrs → Retirement
    - 2. Form?
      - a) When/If Received Decree
      - b) Cash Out
      - c) Retain Jdx. → pension vests
    - 3. Election Not to Retire
      - a) Spouse entitled to CP share
    - 4. Death of Nonparticipant Spouse Before Divorce
      - a) No devisable interest. ERISA.
  - D. DISABILITY RETIREMENT & WORKER'S COMP BENEFITS**
    - 1. Classified when received
    - 2. Choice → cant defeat CP share
  - E. SEVERANCE**
    - 1. SP Auth = SP lost earnings after div.
    - 2. CP Auth = CP bc. collective bargain
  - F. MILITARY RETIREMENT**
    - 1. Regular military retirement = YES
    - 2. Military disability retirement = NO
  - G. STOCK OPTIONS**
    - 1. Awarded DM, CP interest.
    - 2. Proration Formula: awarded DM not vested at DoS
      - a) *Reward past services*
        - (1) N=#yr employ → DoS
        - (2) D=#yr employ → Vesting
      - b) *Future retention of employee*
        - (1) N=#yr granted → DoS
        - (2) D=#yr granted → exercisable
  - H. GOODWILL OF BUSINESS**
    - 1. CP if earned DM
    - 2. Val. not attributed to assets/liabilities
    - 3. Market sales valuation
    - 4. Expert witness
    - 5. Capitalize excess earnings attributable to goodwill
  - I. EDUCATIONAL EXPENSES**
    - 1. Reimbursement if education enhanced acquiring S's earning pow.
    - 2. Defenses:
      - a) Substantial benefit: 10 yr. rule
      - b) Reciprocal Cp funded education
      - c) Waiver
      - d) Education offsets S support need
    - 3. Debt assigned to S who incurred loan
  - J. PERSONAL INJURY & TORT LIABILITY**
    - 1. Other S tortfeasor: award as SP injured S. Don't let bad guy benefit
    - 2. Third Party tortfeasor
      - a) Death = CP
    - 3. Community Liability for S tortfeasor
      - a) Primary Source: CP or SP
        - (1) *Act to benefit comm.*
          - (a) CP then SP
          - (2) *Act not for benefit of comm.*
            - (a) SP then CP
            - (3) *Non-tortfeasor S's SP*
              - (a) Never
- ## IV. SOURCE
- A. MARRIED WOMAN'S SPECIAL PRESUMPTION**
    - 1. Property acquired pre-1975
    - 2. Presumptions
      - a) *Title taken in W's name alone*
      - b) *Title taken both names not JT or as HW*
        - (1) TIC
          - (a) H's half = CP
          - (b) W's half = SP (W=75%)
        - c) *Title taken in name of third party*
          - (1) W = TIC w/ 3P
    - 3. H rebut w/ val rsn. for W on title alone
  - B. POST 1974**
    - 1. "To H & W" = CP
  - C. TITLE IS JOINT & EQUAL FORM**
    - 1. Joint Tenancy: "To H & W as JT RoS"
      - a) Prior to 1985 = JT
        - (1) CP if Intent + Writing says CP
      - b) Post 1984 = CP
        - (1) No writing required
    - 2. Lucas: Death Only
      - a) "Joint + Equal Form" = CP
        - (1) H+W, Mr./Mrs. etc.
      - b) "H+W as JT" = SP
      - c) "As CP w/ RoS" = CP
    - 3. Anti-Lucas: Divorce Only
      - a) *Must have a title document*
      - b) Prop. acquired in joint + equal form (JT, TIC, CP) presumed CP. Rebut by:
        - (1) Express statement in deed
        - (2) Written agmt. by parties
      - c) Reimbursement: DIP
        - (1) **D**own Payments
        - (2) **I**mprovements
        - (3) **P**rincipal payments on mtg.

# COMMUNITY PROPERTY ISSUES CHECKLIST

“Community Property is SAD and Difficult to Manage”

## V. ACTIONS

### A. BY AGREEMENT

1. Pre-Marital Agreements
  - a) In Writing (SoF)
    - (1) Exceptions:
      - (a) Oral agmt. fully executed
      - (b) Estoppel re detriment rely
    - b) Signed by both parties
    - c) Cant limit child support
    - d) Limit spousal supp? ≠ enforce if
      - (1) Not rep. independent counsel
      - (2) Uncon. @ enforcement
  - e) Defenses
    - (1) “tends to promote divorce”
    - (2) Unconscionable
      - (a) No fair/full disclosure
      - (b) Mat Law = Judge decides
    - (3) Not voluntarily signed
      - (a) Not rep. indep. atty. + not waived
      - (b) 7 day cool off period
      - (c) Fully informed in writing + in language proficient
2. Transmutation (T) aka Marital Agmts.
  - a) SP→CP, CP→SP, SP→SP
  - b) Oral T ok prior to 1/1/85
  - c) Post 1/1/85
    - (1) Writing required absolutely unless gift of tangible PP of personal nature
    - (2) Signed by adversely affected party
    - (3) Expressly state ownership change

### B. BY CONDUCT

1. Mortgage Payments
  - a) Installment purchase began prior to marriage, payment w/ CP funds after or S inherits prop and CP used to pay down.
  - b) Proration Rule (Moore)
    - (1) N = Princ. debt reduced w/ CP
    - (2) D = Purchase price
    - (3) Gift to community if active consent use CP to pay SP
2. Life Insurance Policy (Invest. Feat.)
  - a) N = # prem. paid w/ CP
  - b) D = Total # prem. paid
3. Term Life Insurance Policy (No Invest. Feat.)
  - a) Last premium payment determines

### 4. Feathering Own Nest

- a) CP used by spouse to benefit own SP
  - (1) Fixtures Doctrine = merge
  - (2) Comm reimburse = greater of cost or enhanced value
5. CP Used to Improve Other's SP
  - a) Split
    - (1) Gift
    - (2) Reimburse: *See V.B.4.a*
6. Commingled Bank Accounts
  - a) BOP on S trying to recoup SP
  - b) To prove CP unavailable
    - (1) *See II.B.2*
7. SP Used on Family Living Expenses
  - a) Presumed gift absent agmt.
  - b) Fam. Exp. Presumption
    - (1) Fam. exp. presumed to be made w/ CP if SP also available

## VI. MANAGEMENT & CONTROL

- A. **EACH = MGMT. + CONTROL OVER ALL CP.**  
Each power to buy/sell CP and K debts w/ o other spouses joinder/consent unless (B) or (C) below.
- B. **BUSINESS EXCEPTIONS**
  1. S who operates bus. that is all or sub. all CP has primary control of bus.
  2. Can act alone in all transactions but must give other S prior written notice of any sale, lease, encumbrance
  3. Effect if no notice
    - a) No effect on third parties
    - b) Claim by S for impairing interest
- C. **PERSONAL BELONGINGS EXCEPTION**
  1. Written consent of other spouse to sell/encumber prop/clothes used
  2. Effect of failure = voidable any time
- D. **CONVEYANCE OF COMMUNITY RP**
  1. Joinder of both S to convey
  2. Failure to join both
    - a) *BFP*: 1 yr. SoL set aside
    - b) *Non-BFP*: No SoL set aside
- E. **TRANSFER OR ENCUMBER CP**
  1. Cant transfer or sell CP share
  2. Exception: Fam. Law Atty. RP Lien
- F. **GIFTS OF CP**
  1. Neither S can make gift of CP for less than fair rsb. val. w/o other S's written consent
  2. During lifetime of gift-giving spouse = set aside
  3. *Divorce* = Misappropriation of CP



# COMMUNITY PROPERTY ISSUES CHECKLIST

“Community Property is SAD and Difficult to Manage”

4. *After death of gift-giving S = recover 1/2 from:*

- a) Donee OR
- b) Deceased S's estate

5. US Gov. Bonds = Preemption

## G. FIDUCIARY DUTIES OF SPOUSES

1. Highest good faith + fair dealing
2. Presume undue influence if one S gets advantage to detriment of other
3. Gross Neg./Reckless invest = BoFD

## H. CONTRACT LIABILITY

1. Premarital Debt: Debtor's SP + all CP
  - a) Exception
    - (1) Non-debtor S earnings kept in separate bank account
2. Debts Incurred During Marriage
  - a) *Community credit presumption*
    - (1) Cant reach non-debtor's SP
  - b) *Primary intent of lender*
  - c) *Ks for Necessaries*
    - (1) Each S personally liable for other S's necessities
      - (a) May have reimbursement claim.
3. Post Divorce
  - a) Creditor cant reach CP awarded to spouse in divorce unless:
    - (1) Personally Liable
    - (2) Assigned the debt by court

## VII. DIVORCE & DEATH

### A. COMMUNITY PROPERTY

1. Divorce
  - a) *Valuation of CP: date of trial not date of separation unless cause*
  - b) Disparity of Earning Power
    - (1) Spousal/Child Support = YES
    - (2) Division of CP = NO
  - c) Pro-Rata
    - (1) 50/50 or offset
      - (a) Family Residence
      - (b) Stock in closely held co.
      - (c) Pension/Retirement
  - d) Statutory Exceptions: award one spouse > 50% total CP
    - (1) Misappropriation of CP
    - (2) GSA Loans + Education Debt
    - (3) Tort Liability
    - (4) Personal Injury Awards
    - (5) Negative Community

### 2. Death

- a) No elective share statute in CA
- b) Intestate = surv. S gets 1/2 CP + portion of SP
  - (1) No issue = All SP
  - (2) 1 issue = 1/2 SP
  - (3) 2+ issue = 1/3 SP
- c) Restrictions on Testamentary Disposition
  - (1) SP = Free to do whatever
  - (2) CP = Only their 1/2 share
  - (3) QCP = treated as CP
  - (4) Widow's Election: tries to dispose of more than 1/2 CP
    - (a) Take under will
    - (b) Take against will

### B. QUASI-COMMUNITY PROPERTY

1. Divorce
  - a) QCP = CP; *See VII.A.1*
2. Death of Acquiring Spouse
  - a) Surv. S has 1/2 interest in deceased acquiring S's QCP
3. Death of Non-Acquiring Spouse
  - a) No right to QCP

### C. DECEDENT LEAVES BOTH LEGAL SPOUSE & PUTATIVE SPOUSE

1. Death
  - a) *Legal + Putative S share equally in CP and QCP*
    - (1) Legal Spouse Deceased = putative spouse treated as decedent's surviving spouse