Constitution

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2001 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

QUESTION 4

To prepare herself for a spiritual calling to serve as a pastor at City's jail, Ada enrolled in a nondenominational bible school. After graduating, Ada advised the pastor of her own church that she was ready to commence a ministry and asked that her church ordain her. While sympathetic to her ambition, Ada's pastor accurately advised her that their church did not ordain women.

Ada began going to City's jail during visiting hours and developed an effective ministry with prisoners, particularly women inmates who increasingly sought her counsel. Ada noticed that ordained ministers who visited the jail received special privileges denied to her.

Dan, the jail supervisor, told Ada that ministers who were ordained and endorsed by a recognized religious group were designated "jail chaplains" and, as such, were permitted access to the jail during nonvisiting hours. He told Ada that she too could be designated a jail chaplain if she obtained a letter from a recognized religious group stating that it had ordained her as a minister and had endorsed her for such work.

Ada replied that her church was not part of any recognized religious group and would not ordain her anyway because she was a woman. She asked Dan nonetheless to designate her a jail chaplain because of the effectiveness of her work.

Dan refused to designate Ada a jail chaplain or to allow her the access enjoyed by jail chaplains. He acted pursuant to jail regulations adopted to avoid security risks and staff involvement in making determinations as to who was really a "minister."

Ada has brought suit in federal court to obtain an injunction requiring that she be designated a jail chaplain or be granted access to City's jail equivalent to those who have been designated jail chaplains. Ada's complaint is based on the grounds that the refusal to designate her a jail chaplain violates rights guaranteed to her and the prisoners by the First Amendment to the U.S. Constitution and also violates rights guaranteed to her by the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

How should Ada's suit be decided? Discuss.

ANSWER A TO ESSAY QUESTION 4

Standing -- Federal courts are only empowered to hear cases involving real controversies, and a plaintiff has standing to bring a case only if he or she suffers, or will imminently suffer, an injury in fact that may be remedied by the court's action.

Here, Ada (A) alleges that she is being denied privileges that are afforded to others because of her particular religion, which is not "recognized," and because she is not ordained by her religion. Both, she argues, violate her constitutional rights under the first and fourteenth amendments to the U.S. Constitution. Thus, she has alleged an injury in fact sufficient to give the federal court the power to hear the case. Further, an injunction, if granted, directing the jail to grant her the additional privileges would remedy the injury. Thus, A has standing to bring the case.

Ada also appears to be raising the rights of prisoners in her action. A plaintiff may only raise her own constitutional rights, unless the persons she is seeking to represent are unable to vindicate their own rights, the proposed plaintiff has the same motivation to pursue the litigation as the rightholder, and the proposed plaintiff is capable of doing so. Prisoners are capable of raising their own rights, and A's motivations are not necessarily the same as the prisoners. Therefore, she will be precluded from raising the prisoners' rights in her lawsuit.

Eleventh Amendment -- In general, the eleventh amendment prevents a private individual from bringing suit in federal court against a state government. However, this prohibition does not apply to local governments, nor to individual state officers. A is bringing her suit both against "City" jail and, apparently, against Dan, the jail supervisor. She is also seeking injunctive relief. For these reasons, the eleventh amendment is not a bar to this suit.

State Action -- Generally where a plaintiff alleges violation of personal rights under the constitution, the violation must have been committed by a state or federal actor in order to be actionable. Here, A is primarily arguing that City Jail's actions violate her rights. City Jail is a political subdivision of state, and is therefore a state actor. However, Jail may argue that it is only implementing a classification (ordained vs. unordained) that is established by a private church, and therefore A's real injury is caused by a private, not state actor. However, the fact that Jail adopts the private entity's classification is enough to establish state action.

The fourteenth amendment clearly applies to the state. The first amendment only applies to the federal government, but the rights under the first amendment have been incorporated into the fourteenth amendment and are therefore applicable to the state as well.

First Amendment
A may argue that the jail's policy of granting special privileges only to ordained pastors of established religions violates both the free exercise of religion clause and the establishment clause of the first amendment.

Free Exercise Clause -- The state may not impose restrictions on the free exercise of religion unless the restriction serves a compelling state interest and is narrowly tailored to serve that interest. A law of general applicability, however, which merely incidentally burdens religious practices will not be subject to invalidation. A will argue that the jail regulation is not generally applicable, since it focuses directly on "established" religions, and singles out these religions for special privileges. She will also argue that the regulation inhibits her ability to preach to inmates who are interested in receiving her ministry, and therefore impairs her free exercise of religion. Therefore, the burden will be on the state to demonstrate the necessity of the regulation to serve a compelling interest.

The jail will argue that the regulation serves important security interests, and that if all self-proclaimed ministers were given security clearances, it would raise the risk that some ministers are falsely representing themselves. However, the jail has alternative means of determining the security risk of a person claiming to be a minister other than classifying them as "ordained" and from "established" religions. Since the regulation is not narrowly tailored, the regulation does not pass the strict scrutiny test.

No Inquiry into Legitimacy -- Further, the regulation differentiates between established and non-established religions. This in effect amounts to an inquiry into the legitimacy of [sic]. The supreme court has held that the government may not inquire into the legitimacy of a religious belief. The regulation is invalid for this additional reason.

Establishment Clause -- The first amendment also prohibits the government from establishing a religion. A will argue that by giving preference to established religions, the Jail is giving support to those religions, and in effect establishing them. The establishment clause is not violated, however, if the regulation or statute at issue serves a secular purpose, has primarily a secular effect and does not entangle the government in religious matters.

Here, the jail will argue the regulation has the secular purpose of increasing security at the jail by limiting the number and types of outside visitors allowed in. However, the regulation clearly does not have a secular effect -- it impacts religious practice directly, by limiting the right of non-established religions to send their ministers, and it prevents unordained ministers from receiving privileges. Therefore, the second prong is not met.

The third prong is also not met. A will argue successfully that by allowing only established religions to send ministers to the jail, the state must get involved in determining what is an established religion. Although the jail has argued that it is limiting its entanglement with religious affairs by allowing the particular religion to determine who can be ordained, the mere acceptance of these decisions necessarily entangles the public entity in the religious organization's decisions.

The regulation will be found to be a violation of the establishment clause because, although it may serve a secular purpose, it has a non-secular effect and entangles the state in religious

affairs.

In addition, as discussed above, the regulation is a violation of the free exercise clause.

Equal Protection -- State and local governments may not discriminate against individuals on the basis of a suspect class unless the discrimination serves a compelling state interest and is necessary and narrowly tailored to serve that purpose. A classification based on a quasi-suspect class is subject to intermediate scrutiny -- the state must show an important interest being served, and the regulation must be necessary for the purpose. Further, if the disparate treatment is in relation to the exercise of a fundamental right, the state must also meet the stricter scrutiny standard of review.

A will argue that the disparate treatment is based on her affiliation with a non-established [sic] religion, her status as a non-ordained [sic] minister, and, indirectly, on her status as a woman (since her church won't ordain her because she is female). Further she will argue that the disparate treatment relates to the exercise of a fundamental right (the free exercise of religion).

Non-ordained [sic] and Non-Established [sic] -- Classifications based on religious titles or on membership in a particular religion are not suspect classes for purposes of the equal protection clause. Therefore, A must prove that the regulation serves no legitimate purpose and is not rationally related to this purpose.

The stated purpose is to increase security at the jail. This is a legitimate purpose. Further, limiting the ministers who are allowed to serve as chaplains to those who are endorsed by established religions tends rationally to limit these outside influences in a jail to those who are legitimately there for religious, and not ulterior, motives. Therefore, the regulation passes this low level of scrutiny.

Gender-Based Class -- Gender discrimination is a quasi-suspect class (see above for standard of review). The jail's regulation itself does not on its face differentiate between male and female chaplains, but A will argue that since some religious organizations, such as her own church, refuse to ordain females, the regulation has a discriminatory effect on women. However, A will have to show that the discrimination by the state was intentional, and there is no indication of this here, unless the jail knew when it passed the regulation that no, or almost no, religions ordain female ministers. The regulation also allows "endorsed" ministers to be considered chaplains, and arguably even those religions that don't ordain women may at least "endorse" them.

A will also argue that the private church's discrimination, though not directly actionable under the equal protection clause, has been endorsed by the jail through the use of the religion's classification system. This argument will succeed, and the jail will therefore have to meet the midlevel scrutiny.

Although security is an important issue, as discussed above, the regulation limiting chaplains to those who are ordained or endorsed does not appear to be necessary to ensure security. Therefore, if the church's discrimination against women will be applied to the jail, the regulation will be struck down for this additional reason.

Exercise of a Fundamental Right -- Because the classification involves the exercise of a fundamental right, the regulation is subject to strict scrutiny under the equal protection clause. However, the standard of review is identical to that provided under the first amendment, and therefore the discussion above is applicable here as well.

Thus, the regulation should be found invalid, and A should be given access to the jail as a chaplain (access during non-visiting hours) as requested in her injunction.

ANSWER B TO ESSAY QUESTION 4

Justiciable
For Ada's (S) suit to be heard in federal court, it must involve a case or controversy. The justiciable requirements ensure that the case or controversy requirement of Article III are met.

Ripeness
A plaintiff's suit must represent a case ripe for review by federal courts. A suit for a declaratory judgment or a pre-enforcement injunction against a regulation or law may present an issue as to whether a case is ripe for review.

Here, A has already sought to be named a jail chaplain or receive jail chaplain privileges. Thus, her suit is ripe for review, because A is not seeking either a declaratory judgment or pre-enforcement review. A's injury by being denied the privileges as a jail chaplain is ongoing and occurring now.

Mootness
Mootness doctrine prevents a federal court from continuing to hear a case when the case is no longer a live controversy, because the real world injury to the plaintiff has already ended. Here, A's case is not moot -- she is still being denied the rights of a jail minister.

Political Question
Federal courts may not hear non-justiciable political questions. This case does not involve a political question.

Abstention
Federal courts will in general abstain from enjoining an ongoing state criminal prosecution. There is no criminal prosecution in this case -- abstention does not apply.

Standing
To be able to sue in federal court, a plaintiff must have standing, which includes injury in fact, causation and redressability.

Injury in fact
A plaintiff must have suffered (or be about to suffer with a significant likelihood) an injury in fact. The injury may be the denial of constitutional or statutory rights, economic injury, or even environmental or aesthetic harm.

Here, A is suffering an alleged denial of her first and fourteenth amendment rights. Her first amendment rights to freely exercise her religion and to not have state action force an established religion on her have been allegedly denied -- her fourteenth amendment right to equal protection has also been denied. Moreover, A's desire to serve as a jail chaplain, and the denial of that by the jail, would alone probably qualify as enough of an injury in fact.

Causation
The plaintiff's injury must have been caused by the defendant's action. Here, the denial of A's rights was caused by the City's refusal to allow her to be a jail chaplain. Thus, City's action caused A's injury.

Redressability
The plaintiff's injury must be redressable by a court order. Here, an injunction from the court to require City to admit A as a jail chaplain would redress A's injury. Thus, there is redressability.

Third Party Standing
Generally, plaintiffs may not assert the rights of third parties in filing suit. However, there is an exception when either the relationship between the plaintiff and third party is close (e.g.) doctor -- patient; buyer -- seller) or where the third party would be unlikely to assert their rights on their own.

Here, A is attempting to also assert a violation of the prisoner's first amendment rights. A court might hold that this is not appropriate because it is third party standing.

However, a court might also hold that the exceptions apply. Here, A does have a close relationship with the prisoners, as she is effectively serving as a minister to them. Also, the prisoners might be unlikely to assert their rights to have A serve as a jail chaplain, since they may not even know this is an issue. Thus, a court might allow A to assert the prisoners' rights in this case.

State Action
The first amendment applies to states because it has been incorporated through the fourteenth amendment. The fourteenth amendment only applies to state action -- action by state governments.

This includes branches of state governments. Here, City is the party allegedly denying A's rights by not allowing her to be a jail chaplain. City is a municipality, and so is a branch of state government. Thus, there is state action.

First Amendment
Free exercise clause: Ada
The first amendment prohibits state action that interferes with the free exercise of religion. However, neutral laws of general applicability with no intent to infringe on free exercise, but which happen to prohibit religious activity, are allowed under the first amendment.

Here, A would argue that the City rule prohibiting her from being a jail chaplain violates her free exercise of religion, because it keeps her from expressing her religion by ministering to inmates after visiting hours.

The City might respond that the law is of general applicability because it restricts access to visiting hours to everyone who is not a jail chaplain.

However, A would respond that the law is not a neutral law, because only members of "recognized religions" can become jail chaplains. Thus, the law explicitly distinguishes among religions and is not neutral.

Strict Scrutiny

Since the law is not a neutral law of general applicability, and infringes on A's free exercise rights, it will be only upheld if it meets strict scrutiny. This requires the government to show that the law is necessary to fulfill a compelling state interest, and is narrowly drawn to meet that interest.

Here, the state has two possible interests: avoiding security risks and not having staff determinations as to who is really a minister. Avoiding security interests in a jail is clearly a compelling interest. However, avoiding staff determinations as to who is a minister does not appear to be compelling, because there is no clear reason why it matters if someone is a minister -- a non-religious psychiatrist, for example, might be just as helpful to the inmates. Thus, the security risk interest is the only compelling interest.

It also does not appear that the rule is narrowly drawn (and thus necessary) to serve the compelling interest of jail security. It is unclear that ministers from recognized religious groups would pose any less of a security threat than other ministers. Instead, background checks or the monitoring of visits would seem to serve the security interest much better.

Thus, the City policy would not meet strict security and should be struck down as violating free exercise.

Free Exercise Rights of Prisoners

The prisoners have a free exercise right to receive A's ministry services, and to participate in those services after visiting hours.

On the other hand, prisoners' rights in jail may be curtailed more than other individuals' rights for valid penological reasons -- such as security.

However, again, the City policy is not neutral on its face, and thus strict security would apply. This is because inmates who share A's faith are denied A's help outside visiting hours, while others can receive chaplains at that time. The same analysis would be undertaken as above -- security would be a compelling interest, but the policy is not necessary to that interest, and so it would also violate the prisoners' free exercise rights.

Establishment Clause

The first amendment also prohibits states from establishing any form of religion. The test as

to whether a state action establishes a religion is whether it (1) has a valid secular purpose, (2) has a primary effect that neither inhibits nor advances religion, and (3) does not result in excessive entanglement of the state with religion.

Secular Purpose
Here, City's policy has a secular purpose of reducing security risks and of avoiding staff determinations as to who is a minister. Thus, there is a valid secular purpose for the "recognized religion" requirement.

Primary Effect
However, City's policy does have the primary effect of advancing some religions, and inhibiting others. Here, "recognized religion" chaplains may enter the jail after visiting hours, while non-recognized chaplains may not. Thus, some religions have considerably greater access to prisoners, which they might use to proselytize, etc. Thus, the state action advances some religions and inhibits others.

City might argue that City's effect is not "primary" because non-recognized chaplains may still visit during visiting hours, so the impact is minimal. This would depend on how large a difference in time there is between visiting and non-visiting hours -- unless the difference is minimal (e.g., visiting hours last 20 hours/day), then this argument would probably fail and the effect would be primary.

Excessive Entanglement
The jail officers must determine what religions are "recognized." This is an excessive entanglement of the City with religion.

Thus, the City policy also is an unconstitutional establishment of religion.

Fourteenth Amendment
Equal Protection
Religion
A might argue that the City policy classifies and discriminates based on religion, and this either involves a suspect class or fundamental right. If the court argues with this, the analysis would be the same as for the free exercise clause of the first amendment, above.

Gender
The equal protection clause requires states to grant equal protection of the laws to all citizens. If one state denies a fundamental right to some citizens, or distinguishes based on a suspect classification, then the state action will undergo a heightened level of scrutiny. Otherwise, the rational basis test applies.

If a state law improperly classifies on the basis of gender, then intermediate scrutiny applies. The state must show that the classification is substantially related to an important government

interest (and also must provide an exceedingly persuasive justification).

Gender is only a classification for equal protection analysis if the law facially discriminates based on gender, or there is a discriminatory impact and a discriminatory intent to the law.

Here, the City policy does not facially discriminate against women, but only based on the type of religion.

A might argue that the city policy has a discriminatory impact -- most organized religions (including A's) do not ordain women. Thus, it is much more difficult, if not impossible, for women to qualify as jail ministers. Thus, there is a discriminatory impact.

However, there does not appear to be any discriminatory intent to City's action -- City's policy is instead based on staff and security concerns.

Rational Basis

Thus, no suspect class is involved, and only a rational basis test would apply. The burden is on the plaintiff to show that there is no conceivable legitimate state interest that could rationally be served by the policy.

Here, the City clearly has a legitimate interest in security. While City's policy may not be narrowly tailored to that policy (see above), it is certainly rationally related. Thus, any gender discrimination claims by it would fail.

Fundamental Rights

Strict security applies to any discriminatory denial of a fundamental right under the equal protection clause. Here, A's freedom of religion is allegedly denied because she is not part of an organized religion. Thus, strict scrutiny would apply under this claim -- the same analysis as for free exercise (above) would apply and the policy would be struck down.

California Bar Examination

Essay Questions and Selected Answers

February 2002

Question 5

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

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

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

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

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

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

ANSWER A TO QUESTION 5

1. Assembly of Life's (AAssembly@) Challenge of the City Ordinance

The Assembly, an unpopular religious organization in the City, is attempting to obtain building approval for its worship center on a one acre parcel of land. However, in response to the growth of the City and the strain on the City's infrastructure, the City enacted an ordinance that strictly limits growth, and affords priority largely on the basis of increasing affordable housing with preexisting facilities. Assembly challenges the ordinance based on (1) Due Process, (2) Equal Protection, and (3) the Takings Clause of the United States Constitution.

Standing

Because Assembly is suing in Federal Court for violation of its constitutional rights, it must first demonstrate that it has proper standing to bring its claim. A plaintiff has standing to

sue (1) where it has suffered an actual injury, (2) where that injury has been caused by the defendant's actions, and (3) where the harm or injury is redressable by a court order.

In the present case, Assembly has standing to challenge the ordinance. Assembly has suffered an actual injury because it cannot build its worship center because of the change in the law, preventing it and its members from more fully exercising their religious beliefs. This injury was caused by the change in the law when the city enacted the ordinance, and it could be redressed if the court struck down the ordinance.

However, the city could argue that even if the court struck down the ordinance, Assembly's injury would not be redressed because [it] may not receive final zoning approval regardless. In light of the fact that Assembly received preliminary approval without difficulty, this argument would likely fail.

It is also important to note that the assembly has organizational standing, because its members are injured by the city's action, and it relates to the purpose of the organization (exercise of religious beliefs).

Ripeness

In a related matter, Assembly's claim must also be ripe in order for the court to hear its claim. A suit is not ripe where the injury has not yet occurred or where the harm is speculative in nature or where the issues for the record are not fully developed or fit for adjudication.

The City may argue that Assembly has not yet been turned down for its permit, and that it could conceivably receive its permit after the lottery takes place. However, this argument would likely fail, given the limited nature of available permits, and given the fact that the available permits will be given on a basis of priority which excludes Assembly. Additionally, the issues in the case are fit for adjudication, and there is no further factual development necessary before the court can properly decide the merits.

State Action

The protections of the Constitution prevent the government from infringing the Constitutional rights of its citizens, and therefore, for Assembly to succeed it must prove state action. However, because the City's ordinance is at issue, and the City is a government actor, there is sufficient basis for state action.

Substantive Due Process

Assembly will argue that the city enacted the ordinance in order to prevent it from exercising its unpopular religious beliefs, violating its fundamental right to exercise its religion, as well as it members' right to free assembly.

In cases where a statute denies a plaintiff the exercise of a fundamental right, the statute should receive strict scrutiny. However, if the law does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

This law would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. The members are still free to assemble where they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

Under rational basis review, the law will be upheld if it is rationally related to achieve a legitimate governmental interest. In the present case, the city has a legitimate interest in preserving the city infrastructure for necessary housing purposes, and delaying approval for development that may otherwise tax the city's resources until they can be improved. This ordinance is rationally related to achieve this purpose because it gives a priority to housing development and development with pre-existing infrastructure, thereby limiting growth to necessary housing, and housing that will not sufficiently burden the resources of the city. Thus, under rational basis review the ordinance will be valid.

However, if the law is analyzed under strict scrutiny, the law will only be upheld if the City can show that (1) it is narrowly tailored to (2) achieve a compelling governmental interest. Additionally, there must be no less restrictive means available to achieve the city's goal. Under this analysis, the City would assert that it has a compelling interest in

increasing housing and limiting development. However, the Assembly will likely argue that it is not narrowly tailored to achieve this goal because it includes housing that had final zoning approval at the time the ordinance was passed, which could potentially include land that did not include housing. Additionally, because the religious center was only going to have one person (the minister) live on the property, they could argue that the law could have been less restrictive by allowing development of property which would not tax the water supply, sewers or schools by the mere addition of one person. Therefore, in the unlikely event that the court applies strict scrutiny, the ordinance would be struck down.

Equal Protection

The Assembly would argue that the ordinance is discriminating against it because of its unpopular religious beliefs, and that the law is therefore invalid under the Equal Protection clause because it discriminates against them based on their exercise of their fundamental right to exercise their religion.

Classification

If the statute does not discriminate on its face or expressly in its terms, the plaintiff must prove (1) discriminatory effect, and (2) discriminatory intent.

The ordinance in this case does not discriminate on its face between religious or nonreligious development. The classification in the ordinance is between affordable

housing and nonaffordable housing. Because this classification does not implicate a fundamental interest, the statute would receive rational basis review.

However, the Assembly would argue that the ordinance has a discriminatory effect, because other development would be permitted under the new law, but the religious development is now prevented. Additionally, it would argue that the timing of the ordinance leads to a conclusion that the law was passed because of discriminatory intent. Assembly would argue that it received preliminary approval of its zoning, but that immediately after the unfavorable newspaper articles were printed, the city enacted the ordinance that prevented their development. The city would argue that there is no discriminatory intent because it was not acting to prevent the Assembly from its religious beliefs, but was instead motivated by the dire crisis for city resources.

This is a close call, but the city would likely prevail. Absent additional evidence, the City's ordinance appears to be related primarily to its concern regarding limited resources, rather than an aversion to Assembly's religion.

Level of Review

If the court believes that the ordinance was not motivated by discriminatory intent, it should apply rational basis review. As discussed above, the statute would pass this level of review.

However, if the court believes that this law was motivated by religious animosity to Assembly and discriminated against it for issuing permits based on its unpopular religious beliefs, then it should apply strict scrutiny. As discussed above for due process, the law would likely fail strict scrutiny.

Takings Clause

The Assembly would argue that the retroactive change in the permit approval process after it has already received preliminary approval constitutes a taking of its property right in violation of the Takings Clause.

Under the Takings Clause of the Fifth Amendment, where the government takes or condemns private property, due process requires that it provide just compensation. Any permanent physical occupation of private property by the government is a per se taking of the property. However, a statute which limits the productive uses of the property is considered a regulatory taking. In order for a regulatory taking to occur, the government's action must take away all reasonable use or value of the property. Otherwise, the government's action that impacts, but does not take away, the value or use of the property need not be compensated.

The assembly wants to use its parcel of land in the city to develop a worship center and give its minister a place to live. It will argue that because it is a religious organization, its only purpose in owning the property is to conduct religious

activities. Because the ordinance prevents them from building a worship center to conduct their activities, it prevents them from beneficial use of the property and should be compensated.

However, the city would argue that the ordinance may have prevented (or more likely, merely delayed) the building of the center, but did not deprive the Assembly of every beneficial use or value of the property itself. The assembly is free to use it for other purposes that do not require the building permit, and are still free to use it for religious worship. Because the Assembly is still free to use the property for other purposes than building the center, the ordinance likely does not constitute a taking, and need not be compensated.

2. Assembly's Challenge of the Denial of its Retroactive Zoning Approval and Building
Permit

The Assembly will argue that the city's denial of its retroactive zoning application violated it right to procedural due process and substantive due process.

Procedural Due Process

The Assembly will argue that it did not receive procedural due process when its application was denied. Under procedural due process, before a plaintiff is deprived

property or liberty right, it must receive reasonable due process (including a hear, right to present its side and argue its case). For property, a taking of property without due process only occurs if there was a property right, i.e., an entitlement to the benefit or property interest.

In the present case, although Assembly will argue that it was already approved for preliminary zoning and that it would have been approved for final building if not for the newspaper, it will likely lose because it cannot demonstrate that it was deprived of a property right. Zoning approval was not yet complete, and preliminary approval did not create an entitlement to final approval. Therefore, because Assembly was not deprived of a property right or interest entitlement, no procedural due process is required, and the City's denial of the application was likely valid.

Substantive Due Process

As discussed above, in cases where a statute denies a plaintiff the exercise of a fundamental right, the state action should receive strict scrutiny. However, if the state action does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

The city's denial of Assembly's permit application would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. As discussed above, the members are still free to assemble where

they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

The denial of Assembly's retroactive application survives rational basis review because it is rationally related to the legitimate city interest of preserving development and city resources for necessary housing.

ANSWER B TO QUESTION 5

1. Validity of Ordinance?

Standing

First, Assembly will have constitutional standing whether as [an] organization or by individual members to sue in federal district court. In order to have standing, a party must have (1) an injury in fact; (2) caused by alleged unconstitutional conduct; (3) capable of redressibility. Here, the Assembly and its members have injury in fact, as they have been denied a permit to build, caused by the new ordinance;; and if the court rules in favor of Assembly, their grievance will be capable of redressibility. The ordinance caused them not to get their permit, and if the ordinance is invalidated, they will be able to participate in the lottery.

(a) Due Process argument. (Procedural and Substantive)

Procedural Due Process

The Assembly could first argue that the ordinance is invalid under procedural due process. The Fifth Amendment due process clause, as applied to the states via the Fourteenth Amendment, is applicable in this case to City (a State Actor). The due process clause guarantees that no person shall be denied life, liberty, or property without due process of law. Assembly will argue it was denied procedural due process in the denial of its permit under the ordinance. It will argue it had a right to be heard on the issue, particularly after it had already been granted a preliminary

zoning permit. It will argue the ordinance does not leave open any procedures to be heard.

In determining the need for procedural due process, courts look at (1) whether a fundamental life or liberty interest or property entitlement has been denied, (2) the importance of that interest; (3) whether the procedures claimed by Assembly would make the hearing more fair and accurate; and (4) balance those interests against the interests of governmental efficiency.

Assembly could argue that (1) their land and zoning permit is a property entitlement. Although they did not have a final permit, the preliminary permit gave them reason to claim an entitlement and believe they would receive a final permit. Also, they will argue they have a right to build on their land and the ordinance is denying them this.

(2) the Assembly will argue that their interest is important. They have invested money in the land, and they are a church that needs a place to worship.

(3) The assembly will argue that to have a hearing or at least a chance to repetition will greatly increase the fairness and accuracy of the permit procedure. As of now, City determines on its own, without hearing, who fits Aaffordable housing,@ and sets an arbitrary 5-acre minimum land size, and doesn't leave open for hearings for those with preliminary permits. The hearings, rather than an arbitrary lottery, will better determine who needs the permits more, who should be entitled to them, etc.

(4) The City will counter that its interests in efficiency outweigh the interests in procedure, particularly because no one truly has an Aentitlement@ to a building permit. The City will argue that it is facing a crisis in its municipal infrastructure, and that the only way to relieve it is to substantially slow down growth. If it were to having (sic) a hearing on every permit, this would drastically slow down the process with so many parties competing for limited spots. Plus, a lottery is fair and objective.

City, could, however, have a lottery for some, and leave open a few spots/permits to be reviewed by application.

Given City's interests, they could keep the lottery, but they should have allowed reasonable procedures and hearings in place for others who want to develop their land. Assembly could win here.

Substantive Due Process

In order to succeed on a claim of substantive due process, Assembly must show (1) that the ordinance denies applicants a fundamental liberty interest and did so deny them; and (2) is not necessary to achieve a compelling government interest.

Assembly will argue that the ordinance denies individuals the right to build on their property, [and] to decide how to develop their land. Assembly, unfortunately, will not be able to show this is a fundamental right. The Supreme Court has not recognized a fundamental economic right (but see below as applied to them).

Therefore, the Rational Basis test will apply. Assembly must prove that the ordinance is not reasonably related to a legitimate government interest. Assembly will fail here. Government will be able to assert that the extreme stress on the City's infrastructure is a legitimate government interest in the welfare of its people. City will also show that the ordinance was a rational way of solving the City's growth and infrastructure problem. By limiting building, it can stabilize and improve infrastructure to keep up with the growth.

Assembly will not succeed here.

Equal Protection

Assembly can argue that the ordinance, on its face, denies equal protection of the laws based on an applicant's housing to be built, those with final zoning approval, and the infrastructure of the land. In order to sustain an equal protection claim, Assembly must show that people are treated differently with regard to fundamental rights, or that Assembly is part of a suspect (or quasi) class.

Assembly will again try to argue that people are treated differently depending on the nature of their land, what they choose to build, etc. Again, this is not a fundamental right recognized by the supreme court, and rational basis will apply. (See before.)

Also, Assembly won't be able to make a reasonable argument as to suspect classification. The law in its intent, effect, or in its face, does not discriminate based on

race, national origin, alienage, gender, or illegitimacy (recognized protected classes by the supreme court). Therefore, rational basis applies and City again will succeed (see before).

(c) Takings Clause.

Assembly will argue that the ordinance acts as a taking of their real property for public use without just compensation. Under the Takings Clause, when a government entity (State Actor **B** as City is here) (1) takes property of another for (2) public use, it must provide just compensation.

Taking?

Assembly will argue that the regulation, in effect, is a taking because by denying building permits, the regulation leaves no viable use for the property (other than farming). Assembly will argue that those who want to build something other than housing and who do not meet the other requirements are left with no viable use for their property. The City is essentially taking their property because City is leaving them without use.

City will counter that there are other viable uses like parking, or farming, that there are some viable uses left, although severely limited. And that the limitations are outweighed by the benefits to the City in reducing the stress on its infrastructure and slowing growth.

Assembly may succeed on this issue if they can show that where their property is situated, it can not be made useful in any other way **B** that will stay a vacant property without earning potential.

If Assembly meets this prong it will also be able to show it was taken for public use as the City admits that it's being used for the City's purposes in slowing growth.

Assembly will receive just compensation if it succeeds.

2. City's denial of Assembly's Application

Assembly will argue again that it should have had a hearing, etc. (see above) and may succeed there.

However, Assembly may have an argument that it was denied substantive due process because the City used the ordinance to violate Assembly's right to worship/free exercise of religion.

Assembly will try to show that although the ordinance seems to be a law of general applicability on its face, it is really an attempt to interfere with its practice of religion under the First Amendment as applied to the states under the Fourteenth Amendment.

Assembly will argue that (1) City's intent in passing the ordinance was to prevent them from building a place of worship; and (2) the law had the effect of preventing them from building.

Obviously, they were denied the building permit, so they will be able to show prong #2.

In order to meet Prong #1, however, they will have to show that they were granted the preliminary permit and that only after the newspaper article, the lottery came into effect. They will have to prove that the City never had this ordinance in mind before learning of Assembly, the City passed the ordinance with the intent to prohibit Assembly's plans. Assembly could try to find witnesses or City council members, or minutes of meetings to help them.

If they succeed here, City will have to show that their discrimination vs. religion was necessary to achieve a compelling government interest. This will be nearly impossible to show, and Assembly will succeed. City would have to show Assembly was a cult, or illegal institution.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2004 California Bar Examination and two selected answers to each question.

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Question 5

The National Highway Transportation and Safety Administration (NHTSA), a federal agency, after appropriate hearings and investigation, made the following finding of fact: "The NHTSA finds that, while motor vehicle radar detectors have some beneficial purpose in keeping drivers alert to the speed of their vehicles, most are used to avoid highway speed-control traps and lawful apprehension by law enforcement officials for violations of speed-control laws." On the basis of this finding, the NHTSA promulgated regulations banning the use of radar detectors in trucks with a gross weight of five tons or more on all roads and highways within the United States.

State X subsequently enacted a statute prohibiting the use of radar detectors in any motor vehicle on any road or highway within State X. The State X Highway Department (Department) enforces the statute.

The American Car Association (ACA) is an association comprised of automobile motorists residing throughout the United States. One of ACA's purposes is to promote free and unimpeded automobile travel. ACA has received numerous complaints about the State X statute from its members who drive vehicles there.

In response to such complaints, ACA has filed suit against the Department in federal district court in State X, seeking a declaration that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution. The Department has moved to dismiss ACA's complaint on the ground that ACA lacks standing.

1. How should the court rule on the Department's motion to dismiss on the ground of ACA's lack of standing? Discuss.

2. On the assumption that ACA has standing, how should the court decide ACA's claim that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution? Discuss.

Answer A to Question 5

5)

1. ACA's Standing

Organizational Standing

An organization may bring suit on behalf of its members if it can establish the following:

1. It's [sic] members have suffered an injury in fact;

2. The injury is related to the organization's purposes; and

3. The court can grant relief without the presence of the individual members who have suffered the injury.

Injury in Fact

The requirement that the members have suffered an injury in fact ensures that the federal courts are only hearing real and live claims and controversies. In order to establish an injury where a statute is challenged based on its unconstitutionality, either the statute must have been enforced against someone or the failure to rule the statute invalid before enforcement must work an extreme hardship to the complaining individual.

Here, there is no evidence that the statute has been enforced against any of the ACA members. Though the State X Highway Department enforces the statute, the facts do not indicate that the department has enforced the statute against any of the ACA members. The facts do state that ACA has received numerous complaints about the statute from State X members who drive in State X where the statute is being enacted. Because there has been no actual enforcement of the statute, in order to obtain pre-enforcement review, the ACA must show that its members are going to be put to an extreme hardship if they are not granted a judgment on the constitutionality of the statute.

The hardship faced by the members if they are forced to continue acting under this statute until it is enforced is relatively light.

It is likely that the court will find that this case is not ripe for review because there is no evidence that the statute has been enforced against the ACA members. Furthermore, the hardship the members will suffer if they are not given pre-enforcement review does not rise to the level of extreme hardship to justify a premature ruling by the federal court.

Injury Related to Organization's Purposes

If the court does find the members of ACA have suffered an injury, ACA must next establish that this injury is related to the purpose of the organization. Here, the injury would be that the drivers are forced to drive without radar detectors. The stated purpose of the ACA is to promote free and unimpeded automobile travel. ACA will have no problem showing that the statute prohibiting drivers from utilizing radar detectors is related to free and unimpeded automobile travel. Not having a radar detector can rationally be viewed as being an impediment to free driving. Thus, the injury is related to the association's purpose.

Presence of Individuals is Unnecessary to Grant Effective Relief

ACA must show that it can bring suit challenging the statute and that the court can grant relief to remedy the injury suffered by its members without the individual presence of the members in the lawsuit. Here, the relief ACA is seeking is a declaration that the statute is invalid. If they are seeking injunctive relief, to keep the Department from enforcing the statute, then the presence of the members would not be necessary to fashion this relief. If the ACA is seeking an injunction this relief would be an effective means to remedy the injury suffered by the drivers. If, however, the association is seeking money damages because of the infringement of some free driving right , then they would need the presence of the drivers in the suit to grant this relief.

11th Amendment

State may also challenge the suit brought by ACA on grounds of the 11th Amendment. The 11th Amendment prohibits cases in federal courts against the states. Here, ACA is bringing an action against State X Department in the federal court. The ACA's suit might not be barred because they are seeking to have the statute ruled unconstitutional and are most likely seeking an injunction prohibiting further enforcement of it. It is unlikely that the 11th Amendment will bar this suit against the Department for a declaration of unconstitutionality.

Conclusion

The court will most likely find that ACA lacks organizational standing because its members have not suffered an injury in fact. There is no evidence the statute has been enforced against the members and the "hardship" suffered by the members is not sufficient to warrant pre-enforcement review. The case should be dismissed for lack of standing.

2,

Validity of State X Statute under Commerce Clause

Preemption

Where the federal government preempts a field, the state may not regulate it. Preemption can take place either expressly by the Legislature stating so in a statute, by the pervasive presence of the federal government in the certain field, or by a federal statute conflicts [sic] with a state statute directly or indirectly.

There is no evidence that the NHTSA intended to preempt the field of radar detector legislation. In the statute, they stated that its purpose was to allow apprehension of speeders by law enforcement officials and assumedly, for the protection of drivers. There is no express preemption of the field. The regulation by the federal government in this area does not seem to be so pervasive so as to imply that the federal government has preempted the field (as is the case with the FCC). This statute appears from the facts to be the only statute related to speed control devices.

The federal statute is limited to large trucks. It prohibits radar control devices in trucks over a certain weight. The state statute is more regulatory than the federal statute- it prohibits such devices in all vehicles. More extensive regulation granting more protection serves the purpose of the federal statute, it does not conflict with it.

Dormant Commerce Clause/Negative Implications of the Commerce Clause

A state may not regulate interstate commerce in a way that is discriminatory against interstate commerce or in a way that unduly burdens interstate commerce. Here, the statute does not discriminate against interstate commerce. The statute prohibits all drivers from using these radar control devices- it does not just prohibit out-of-state drivers from using these devices. Because the law does not discriminate against interstate commerce, to be invalid, ACA must show that the regulation places an undue burden on interstate commerce.

In order for state law that regulates either the channels, instrumentalities or those things that, in their aggregate, have a substantial affect [sic] on interstate commerce, the state must show that the non-economic state interest outweighs any burden on interstate commerce. Here, the interest is not economic. The interest of the state is presumably for the safety of drivers on the State X roads and highways. Speed devices like radar detectors arguably aid drivers in evading the laws that the state will argue were designed to protect drivers.

The safety of drivers on State X roads and highways is a legitimate, important state interest. This interest must outweigh the burden on interstate commerce by the prohibition

on speed control devices. The only burden suffered by interstate commerce is that interstate drivers will be subject to different rules. In other states, they might be permitted to use radar detectors, but in State X, they will not be able to. This might potentially create a substantial likelihood that drivers traveling on interstate highways, traveling between states, will be more likely to unknowingly violate this rule. In order to remedy this problem, the State could post signs at or near its borders that radar detectors are prohibited in State X. Once a driver knows of this prohibition, the driver can put the radar detector away or turn it off. The statute does not prohibit the possession of one within the state, but only the use of one.

Conclusion.

The prohibition of radar detectors in State X in any vehicle traveling on a road or highway within the state serves an important, non-economic state interest. This interest outweighs any burden placed on interstate commerce. The statute will not violate the Dormant Commerce Clause.

Supremacy Clause

The statutes, treaties, and Constitution of the United States are supreme. Where a state law conflicts with either federal statutes, regulations, or the federal Constitution, the state law is invalid.

In order for ACA to prove that the state law violates the Supremacy clause, it must show that the State X law either directly conflicts with the federal law, or frustrates or impedes the objectives and purposes of the federal law. Here, the State X law only regulates more vehicles than does the federal statute which is limited to trucks over a certain weight.

A state may regulate more extensively than a federal statute so long as this does not frustrate the objective of the federal statute. A state may not, however, pass a law that excludes conduct that is included in a federal law. Thus, for example, the State X statute could not read that trucks with a gross weight of five tons or more are exempt from the radar detector ban. This would expressly contradict the federal statute. Here, the State X law does not expressly conflict with the federal statute nor does it impede or frustrate the objective of the federal statute. The federal statute objective and the state statute objective are the same- both statutes aim to prevent drivers from evading law enforcement officials for violations of speed-control laws. The State X statute only prohibits more vehicles from using such devices--- it extends the protections the federal statute desired even further.

Conclusion

This law will not be invalid under the Supremacy Clause. It neither expressly contradicts nor frustrates or impedes the purposes of the federal statute.

Answer B to Question 5

5)

I. The Court should Deny the Department's Motion to Dismiss for ACA's lack of standing

A. Preliminary Jurisdictional and Venue Issues

Personal jurisdiction in State X is appropriate here, given that the subject action is to challenge the validity of a statute of State X. The Federal District Court for State X has jurisdiction because the ACA is raising a federal question: namely, whether or not the State X statute violates the United States Constitution as to either or both of [sic] the Commerce Clause and the Supremacy Clause. Venue in the Federal District Court for State X presumes that State X is a single-district state, and thus there is not a multiplicity of federal district courts from which to choose.

B. ACA has standing

The Federal courts have jurisdiction to hear cases and controversies. This means that there must be an actual dispute, not a hypothetical or moot question, and that the parties to the action are, respectively, the injured party and the party liable for the injuries.

Although the ACA itself has not suffered an actual injury, the Courts have, since the Sierra Club case, set forth a clear standard by which unincorporated associations can sue on behalf of their members and be found to have standing. There are three components that must be met: first, the purpose of the lawsuit must be directly related to the purpose of the association; second, individual members of the association would have the standing to bring the action on their own individuals[‘] behalves; third, the participation of individual members of the association is not required to prosecute the action. Each of these will be explored in turn.

i. The Purpose of the ACA

As noted in the facts, the ACA is an association comprised of automobile motorists residing throughout the United States. Among ACA's organizational purposes is the promotion of free and unimpeded automobile travel. Such an organization is clearly one that is concerned with a State that has adopted and enforced a statute that imposes different rules on drivers as they cross from state to state.

ii. The Standing of Individual Members

Also, as noted, members of the ACA have complained to the ACA about the relevant statute. We cannot determine, from the facts provided, whether any member of

the ACA has actually been cited for use of a radar detector in violation of the statute, nor can we determine whether ACA members have been cited for speeding based on being "clocked" by police-operated radar that would have been detected with the lawful use of radar detectors. However, a person with a reasonable basis for challenging a criminal statute is not required to first commit the crime and be convicted thereof before challenging the validity of the statute. On this basis, individual members of the ACA who own radar detectors and would use them when driving in State X would clearly have standing to sue; assuming that such persons exist, the next element of the standing analysis is satisfied.

iii. The participation of individual members

The final element of associational standing analysis is whether the individual members themselves are required to participate in the action. Here, the ACA is mounting a broad-based challenge to the statute; their claim is not tied to the enforceability of the statute against a particular person or in a particular set of circumstances. In these conditions, the ACA is fully capable of proceeding with its case absent the active involvement of any particular person or representative plaintiff.

Thus, the requirements of associational standing have been met, and the Court should deny the Department's motion to dismiss for lack of standing.

II. The Court should Uphold the validity of the Statute.

The ACA has identified two bases for its challenge of the constitutionality of the relevant State X statute: the Commerce Clause and the Supremacy Clause. Each will be discussed in turn.

A. The Commerce Clause.

Under the United States Constitution, Congress has the power to regulate interstate commerce. However, individual states, as separate sovereigns, have their own individual police powers to regulate conduct within the boundary of the state. The interplay between these two provisions - often conflicting provisions - requires in part of a fact-based analysis.

The ACA would argue that the subject statute clearly imposes significant restrictions on interstate commerce. They would argue that motorists driving through State X on their way from one state to another should not be expected to know the requirements of State X law, and thus face risk of [a] ticket or possible arrest.

State X will counter by noting that any impact on interstate commerce is, at best, minimal and tangential, and does not constitute an undue burden. The State will note that they do not ban the ownership or possession of radar detectors, only the use of radar detectors.

Additionally, State X will argue that its regulation is required to enable State X to use its

police power to provide for safe roads and highways. State X will cite to laws in other states, such as Virginia, prohibiting the use of radar detectors. State X will similarly note that other states validly impose regulations that are far more burdensome, such as laws regarding child safety seats.

State X will also note that no discriminatory impact exists against out-of-state residents. All motorists - both from outside State X and residents of State X - are subject to the ban. Presumably, State X will post appropriate signage at or near public roads that cross into State X advising motorists of the existence of the ban on radar detectors. This will further minimize the impact on out-of-state motorists.

On these bases, the Court is likely to agree with State X's contention that State X's regulation does not violate the Commerce Clause.

B. The Supremacy Clause.

In arguing that the relevant statute is in violation of the Supremacy Clause, the ACA is really arguing that by reason of the applicable NHTSA regulations on radar detectors, the Federal government has preempted any state legislation impacting this area. For the reasons noted below, this argument too will fail.

Federal laws and regulations can preempt state laws either expressly or through implication. Express preemption is readily apparent when it occurs; here, no evidence exists to indicate that the NHTSA's regulations promulgated on this topic state that they are exclusive, and thus no express preemption exists.

The federal government can also preempt by implication. If the scope of the federal action is such that it leaves no room for any additional state regulation, then state action is prohibited. Here, the NHTSA regulations only apply to trucks with a gross weight of five tons or more. The ACA will argue that by defining certain classes of vehicles which are not allowed to use radar detectors, the NHTSA also implicitly ruled that other motor vehicles are not prohibited from doing so.

This argument is likely to fail, however. Nothing implicit in the text of the regulation, as provided, implies any intent at reserving the arena for the federal regulatory action. Rather, the NHTSA's findings of fact are in no way limited to certain classes of vehicles, certain sizes, weights, etc. This would suggest, the State will argue, that NHTSA simply was not willing or able to extend its regulations further, but not that the individual states were prohibited from doing so.

Again, as noted above, many other states have similar or comparable statutes, regulating radar detectors or other areas. As such, the requisite intent to preempt is not likely to be found, and the Court will agree with State X that the regulation is not in violation of the Supremacy Clause.

* * *

Since the regulation is not invalid on any basis challenged by the plaintiff, assuming no facts inconsistent with those given, the statute will be upheld.

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

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Question 2

State X amended its anti-loitering statute by adding a new section 4, which reads as follows:

> A person is guilty of loitering when the person loiters, remains, or wanders about in a public place, or on that part of private property that is open to the public, for the purpose of begging.

Alice, Bob, and Mac were separately convicted in a State X court of violating section 4.

Alice was convicted of loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts in violation of section 4.

Bob was convicted of loitering for the purpose of begging on a waiting platform at a stop on City's subway system in violation of section 4.

Mac was convicted of loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers Building located in the business district of City in violation of section 4.

Alice, Bob, and Mac have each appealed their convictions, and their appeals have been consolidated in the State X appellate court. It has been stipulated that Alice, Bob, and Mac are indigent, that section 4 is not void for vagueness, and that the only issue on appeal concerns the validity of section 4 under the First Amendment to the United States Constitution.

How should the appellate court decide the three appeals, and why? Discuss.

Answer A to Question 2

2)

STANDING

Since the question states that the only issue on appeal concerns the validity of section 4 under the First Amendment, it is assumed that all standing requirements are met.

STATE ACTION

The constitutional provisions of the first amendment are only applicable to state action which deprives a citizen of his/her right to free speech. Here, State X passed a loitering law affecting speech (expression), and later enforced that law by their police. Therefore there is state action and Alice, Bob and Mac can allege their first amendment rights.

SPEECH

The first amendment is raised with respect to a citizen's rights for free speech or religion. Here, State X passed a law concerning loitering. This law concerns the right to free speech, however, because speech is not limited to words spoken or written, but can also apply to free expression or demonstrative speech. Since this law affects where a person can legally go (in public space) and what they can do in that public space, it does affect speech.

CONTENT-BASED

Speech regulations can be either content-based or content-neutral. Content neutral regulations on speech are viewed more favorably than content-based regulations, because there is no discriminatory purpose on the face of the regulation. Here, however, the regulation affecting Alice, Bob and Mac concerns only those on the property "for the purpose of begging." Since the statute concerns only those who have particular purpose, a particular message (i.e. "please give me money if you can spare it"), the statute is content-based and will have to survive stricter scrutiny.

OVERBREADTH

While the statute is not void for vagueness, it could be challenged by all three for being over broad. That is, it may not be narrowly tailored to serve the interest they are seeking to regulate. The statue seems aimed at prohibiting begging. However, it does not merely prohibit begging but "remain[ing] or wander[ing] about in a public place for the purpose of begging." This statute is arguably overbroad. Here, an officer can arrest someone, not for committing the actual act of begging, but for having that purpose. How can an officer, or judge, or a jury possibly know whether a person has the purpose of begging? This statute

invites abuse of indigent or undesirable people. Furthermore, the statute regulates "remaining" or "wandering about" in a public place. Again, this is overboard because it punishes not only the act of begging but the right of a person to remain in a public place or wander about there. Under this statute, an indigent could arguably be arrested for taking a walk on the sidewalk or sitting in a public park -- if the officer believes that he has the "purpose of begging."

INDIGENCE

It is unconstitutional to pass a statute that places an unreasonable burden on indigents with the respect to compliance (for example, unreasonable fines). Here, the statute & question do not say anything about fines or fees, so it is presumed that there is no undue financial burden on indigent people.

Alice should win her Appeal

SIDEWALK = PUBLIC FORUM

Alice should win her appeal because she was "loitering...for the purpose of begging" on the sidewalk outside the Public Center for the Performing Arts. First, a sidewalk is generally a public forum. In a public forum, a person is given greater leeway to exercise their rights of free speech. The city would have to have a strong justification for repressing Alice's right of self-expression on a sidewalk, such as public safety.

NO DANGER TO THE COMMUNITY

While Alice might not be able to loiter on the sidewalk begging in front of a Fire Station (for example) for public safety reasons, she should be able to do so in front of the public center. There is no indication that there is any danger to the community in letting her exercise her free speech rights. Rather, her speech rights are being suppressed likely because the well-to-do do not want to suffer a beggar when they go out to the theater. This is not sufficient justification to violate Alice's right of free expression.

Bob should lose his appeal:

SUBWAY PLATFORM = QUASI-PUBLIC FORUM

A subway is not a public forum, like a park or a sidewalk. To access a subway platform one has to pay money. Therefore, it is more like a private forum, to which the rider has a license to be on the property. However, the grantor of the license is still a public entity (the city). So the subway platform is like a quasi-public forum. It has elements of being both a public and a private forum.

POTENTIAL DANGER

A quasi-public forum faces a standard of scrutiny similar to the public forum. Here, there is arguably a potential for danger to both Bob and the public. Subway platforms can be crowded places, and the subway trains typically approach at dangerous speeds in close proximity to the waiting passengers. Furthermore, even the rails of the train are often electrified. Finally, the crowds of people on subway trains are often hot, sweaty, in a hurry, tired, and thus more likely to have short tempers. For all these reasons, regulating begging has more value in this forum than on the sidewalk. It is possible that the crowds might push or shove one another (or Bob) to get away from the beggar. Furthermore, allowing begging on the platform would further congest an already dangerously congested area as other beggars moved in to beg in a beggar-friendly zone. Therefore, the state and city have reasonable justification to regulate begging on the subway platform (provided, of course, the statute is not overbroad).

Mac should lose his appeal:

STATE ACTION

Even though Mac was arrested in a private building, he was arrested subject to state action, and state action is what is at issue in his case. The state passed the anti-loitering statute, and the state enforced that statute with its police powers.

PRIVATE FORUM -- OPEN TO THE PUBLIC

The Downtown Lawyers Building is a private building. The state could not regulate what kind of speech could occur in a completely private building, in a completely private setting. But in a setting where the private owner(s) invite the public to their private space (e.g. bringing in employees, or, as here, a lobby open to the public) the state has the right to regulate speech.

PUBLIC CONCERN

Mac should lose his appeal because there is a public concern at stake when a beggar begs in a private, customer-driven establishment. There is not the danger that inheres in the subway platform, but there is a strong potential for a loss of revenue due to the begging. Customers will tire of the begging and may stop frequenting the lawyers building. If beggars could beg in every establishment open to customers, the aggregated effect may be that people will go out less and business, the economy, tax revenues and social programs will suffer. Therefore, the state has sufficient reason to regulate Mac's type of begging (again, assuming that the statute is not overbroad).

Answer B to Question 2

2)

Validity of Section 4 Under the First Amendment

Alice, Bob and Mac have challenged their convictions under State X's loitering statute under the First Amendment of the Constitution. Although Alice, Bob, and Mac are indigent, the only issue on appeal is whether their rights under the First Amendment have been violated. Thus, there is no issue on appeal of whether the statute violates their rights under the Equal Protection Clause because they are indigent. There is also no issue of whether the statute is void for vagueness under the First Amendment because the parties have stipulated that is not void for vagueness.

Incorporation of the First Amendment Against State Governments

To challenge a statute on the basis that it violates their First Amendment rights, Alice, Bob, and Mac must demonstrate that there is some type of government action that has violated their rights. Under the due process clause of the Fourteenth Amendment, the limitations that the First Amendment places on federal government action have also been incorporated against the states.

Constitutional Standing

To bring a constitutional claim, a plaintiff must have adequate standing. This requires a showing of a personal injury; causation of that injury by state action; and redressability, which means that a favorable outcome in the case will result in the injury being redressed. Third party standing, which is the bringing of a suit by one person when another has suffered an injury, is prohibited in most circumstances. Similarly, generalized grievances are prohibited in most circumstances. A plaintiff must also show if she is seeking to prevent government action, that the controversy is ripe to be heard by the court, meaning that there is adequate factual development and it is an appropriate controversy for the court to hear. Finally, a case can be dismissed for mootness if the court will not be able to change the outcome, as a result of the Article III prohibition on courts issuing advisory opinions.

State X Government Action

Alice, Bob, and Mac must demonstrate that an arm of the State X government has taken some type of action which has violated their First amendment rights. Here, the state has convicted them of violating the anti-loitering statute. Thus, although it is unclear exactly what the penalty for conviction is, it is clear that Alice, Bob, and Mac have been penalized in some way by State X. Thus, the conviction constituted state action sufficient to allow Alice, Bob, and Mac to challenge the statute.

Implication of the First Amendment

The First Amendment prevents the government from limiting the rights of citizens to free speech. Although there are some circumstances in which this right can be limited, the government action must have sufficient justification. Here, the anti-loitering statute appears to be directed primarily at conduct, because it prohibits loitering, remaining, or wandering about in certain types of places. However, conduct, under certain circumstances[,] can also constitute speech. The statute also prohibits loitering for the purpose of begging, which may mean that people are penalized under the statute for what they are doing in specific areas. Thus, a person's right to both conduct as speech and to begging, which is a type of speech, may be limited under the statute. Therefore, the statute must satisfy the requirements of the First Amendment.

The Statute's Regulation as a Discrimination on Content and the Requirement of Strict Scrutiny.

If a state undertakes to regulate the speech of citizens in a way that discriminates on the basis of certain content, the statute must satisfy strict scrutiny to be upheld when the statute is enforced in certain areas. Similarly, if a statute regulates speech on the basis of the viewpoint it expresses, it also must satisfy strict scrutiny. A discrimination based on content means that certain types of speech are regulated or prohibited on the basis of what they say. Such an exercise of government power in choosing the types of speech that are appropriate is particularly disfavored under the First Amendment.

Here, Section 4 prohibits the activities of loitering, remaining, or wandering on certain property for the purpose of begging. Thus, the statute specifically prohibits activities associated with begging, which is a type of speech. If the statute only prohibited the activities of loitering or wandering, it might be argued that it was content neutral. Then, the statute could be upheld if it was demonstrated to be a reasonable time, place, or manner restriction enacted by the state to regulate the places or times at which speech might occur, rather than the actual content of the speech. But instead, this statute forbids speech related to begging. As a result, it can be argued that it is not content-neutral. The statute thus must withstand strict scrutiny to be upheld.

The Standard for Strict Scrutiny

To demonstrate that a restriction withstands strict scrutiny, the state has the burden of proving that the regulation is narrowly tailored to achieve a compelling government purpose. The regulation mus be the least restrictive means of the state achieving its purpose.

Alice's Case

Alice's Standing

Alice has standing to challenge her conviction under the anti-loitering statute. She has been personally injured by being convicted of the statute, which probably carries with it imprisonment, a fine, or some other type of punishment. The injury was caused directly by State X promulgating and enforcing a statute which violates her constitutional rights. Her injury is redressable, because if the appeals court decides on her behalf the conviction will be reversed. There are no ripeness or mootness concerns.

State Action

As discussed previously, the conviction in State X is adequate state action.

Alice Violated Section 4 on a Sidewalk, which is a Public Forum

Alice was convicted for loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts. The location in which Alice was convicted of violating Section 4 is important, because a state has different abilities to restriction[sic] First Amendment rights depending upon where those rights are being exercised. Here, Alice's activities took place in what is called a public forum. A public forum is an area which is traditionally available to the public as a place in which they may exercise their First Amendment rights to free speech. Sidewalks and parks are classic public forums. In addition, the sidewalk on which Alice's activities took place was adjacent to the City's Public Center for the Performing Arts. This appears to be a municipal building. Sidewalks near public buildings are particularly important public forums because those are areas in which people may express their views in an effort to influence the way the city is governed.

Applicable Standard for Content Specific Restriction of First Amendment Rights in a Public Forum is Strict Scrutiny

The fact that Alice's activities took place in a public forum is important for determining the standard the city must satisfy to demonstrate that its restriction of her activities did not violate the First Amendment. As discussed previously, the city has the burden of showing that its regulation is narrowly tailored to achieve a compelling government interest.

The Compelling Government Purpose

Here, the purpose the government is attempting to achieve is unclear. It may be to deter what is seen as nuisance when people ask others for money on the sidewalk. It also might have something to do with the state's interest in preserving its aesthetic environment. These are unlikely to be found to be compelling government purposes that outweigh the exercise of others' First Amendment rights.

If there is crime affiliated with these activities related to begging, that might serve as a government purpose for the statute. Although reducing crime can be a compelling government purpose, the statute will also have to be narrowly tailored.

The Narrow Tailoring Requirement

Because it is unclear what exactly the government's purpose is, it is difficult to tell how narrowly tailored the statute is. However, if the statute was enacted to reduce crime, there are certainly ways that the government could address that crime more specifically by prohibiting the actual criminal activity rather than the begging that creates an environment in which such criminal activity may take place.

Validity of Alice's Conviction

Alice's conviction under the statute is thus invalid, because her activities took place in a public forum. The city may not curtail such activities in a public forum on the basis of content without a compelling government purpose that the statute is narrowly tailored to effectuate. Alice was penalized for exercising her First Amendment rights in an unconstitutional manner, and thus her conviction should be reversed.

Bob's Case

Bob's Standing

Like Alice, Bob has a personal injury in his conviction. That injury was caused by application of the statute to his activities, and may be redressed through the reversal of his conviction. Thus, he has standing to challenge the statute.

Bob's Activities Took Place in a Semi-Public Forum

Bob was convicted of violating the statute on a waiting platform at a stop on the city's subway system. This is likely to be found to be a semi-public forum. Such forums are not always open for speech activities like a public forum. Instead, the standard applied to regulation of speech in a semi-public forum depends on the type of speech the City permits there. If the City permits other First Amendment activities in the semi-public forum, it may not discriminate against other First Amendment activities on the basis of content or viewpoint.

Applicable Standard is Also Strict Scrutiny

If a semi-public forum is open for speech, content or viewpoint neutral restrictions on speech must also satisfy strict scrutiny. However, the type of forum may make this standard easier to fulfill. Here, the government has a compelling interest in making the subway stop a place in which traffic may smoothly operate so that the subway station may

fulfill its duties in transporting people through the city. Thus, activities which may [sic] it difficult for traffic to operate smoothly may be restricted. However, because this statute targets only particular types of speech, it may not be the appropriate method of ensuring that traffic operates smoothly. Such a regulation would likely target particularly problematic conduct, and not types of speech. Therefore, this statute is not narrowly tailored to uphold the state's interest in making sure the subway stop operates effectively.

Validity of Bob's Conviction

Because Bob's conviction for speech at the waiting platform took place under a content-discriminatory statute that was not narrowly tailored to effectuate the government's compelling interest, it should be reversed.

Mac's Case

Mac's Standing

Mac's conviction was a personal injury that was caused by State X's enforcement of its statute and is redressable through the overturning of the conviction. Thus, Mac has standing to challenge his conviction.

Mac was Loitering in a Non-Public Forum, on Private Property

Mac's conviction was for loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers' building in the business district of city. Thus, Mac's conviction took place as a result of his activities on private property.

Mac's Conviction is not Subject to Strict Scrutiny unless the Building is Serving a Public Function

Mac does not have the same right to speak on private property that Alice and Bob had in public of[sic] semi-public forums. The sole exception to this is if the private forum is serving a public function, which means that the private forum is serving a role typically served by public buildings or areas. However, there are very few examples of private property which serve a public function, other than private company towns that replace a public municipal government. This appears to be a private office building which is not implicated in any function of governing. Thus, the building is not a public forum. Therefore, his conviction is not subject to strict scrutiny.

Validity of Mac's Conviction

Mac cannot challenge his conviction under the First Amendment because he was conducting his activities on private property on which he had no First Amendment right to speak. Therefore, his challenge to the statute will be unsuccessful and his conviction will

be upheld.

Validity of the Conviction

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 1

A State X statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as "gasohol." The statute is based on the following legislative findings: (1) the use of gasohol will conserve domestic supplies of petroleum; (2) gasohol burns more cleanly than pure gasoline, thereby reducing atmospheric pollution; and (3) the use of gasohol will expand the market for grains from which ethanol is produced.

State X is the nation's largest producer of grain used for making ethanol. There are no oil wells or refineries in the state.

Oilco is an international petroleum company doing business in State X as a major retailer of gasoline. Oilco does not dispute the legislative findings underlying the statute or the facts concerning State X's grain production and lack of oil wells and refineries. Oilco, however, has produced reliable evidence showing that, since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol.

Can Oilco successfully assert that the statute violates any of the following provisions of the United States Constitution: (1) the Commerce Clause, (2) the Equal Protection Clause, (3) the Due Process Clause, and (4) the Privileges and Immunities Clause? Discuss.

Answer A to Question 1

1)

Oilco is asserting that the State X statute violates the 1) Commerce Clause, 2) the Equal Protection Clause, 3) the Due Process Clause, and 4) the Privileges and Immunities Clause of Article IV.

Justiciability

Standing

In order to successfully bring an action, Oilco must demonstrate that they have standing. A party has standing where there is injury, the injury is caused by the defendant, and the court can provide relief. Here, Oilco will be injured by the legislation because they do business in State X and do not currently meet the State's gasoline regulations. Oilco could lose profits from loss of business. The loss of profits is directly caused by the statute's ban on non-ethanol based gasoline. The court can provide relief for Oilco by invalidating the statute. Thus, Oilco has standing.

Eleventh Amendment

The Eleventh Amendment prohibits a party from suing a state without the state's permission. It appears from the facts that Oilco is suing State X and thus would be barred by the Eleventh Amendment. If Oilco sues the appropriate official, the suit will not be barred by the Eleventh Amendment.

Ripeness

The courts will not hear a case unless there is some threat of immediate injury caused by the defendant. Here, the statute could result in a significant loss of profits for Oilco, so the State's argument for dismissal based on ripeness will fail.

Commerce Clause

The Commerce Clause grants the federal government power to regulate the channels and instrumentalities of commerce, and other activities that affect interstate commerce. If a valid federal law under the commerce clause conflicts with state law, the federal law invalidates the state law because of the Supremacy Clause. Even if the federal law and state law do not conflict, the federal law may preempt the state law by occupying the field. Where Congress is silent on a matter, a state has the power to regulate the local aspects of commerce as long as the regulation is not discriminatory and does not unduly burden interstate commerce.

Here, there are no facts suggesting that there is a federal law that either conflicts with the State X statute or preempts the field. Thus, State X's statute will be valid as long as it does not discriminate against out-of-state interests and does not unduly burden interstate commerce.

Discrimination against out[-]of[-]state interests

The Dormant Commerce Clause prohibits a state from discriminating against out-of-state interests. Discrimination can appear on the face of a regulation, or it can be discriminatory in its impact on interstate commerce. Here, the statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as gasohol. State X will argue that [t]he statute on its face does not discriminate against any out[-]of[-]state interests, as any other state meeting these requirements would not be prohibited from selling gasoline inside State X.

However, Oilco's strongest argument will be that the Statute has a discriminatory impact. Here, Oilco will argue that State X is the nation's largest producer of grain used for making ethanol. Oilco will also point out that State X has no oil wells or refineries inside State X. Putting these two facts together, Oilco will argue that by passing the statute, State X is promoting its own interests by encouraging the consumption of ethanol while harming out-of-state oil refineries and wells. Since State X has no oil refineries or wells, they will not be harmed by the statute at all. This, Oilco will argue, is discrimination against out-of-state interests and[,] thus, is violative of the Dormant Commerce Clause. Oilco will also point to the legislative finding that State X's statute will "expand the market for grains from which ethanol is produced", strengthening its argument that this regulation is merely economic protectionism, and violative of the Dormant Commerce Clause.

State X will counter by arguing the important interest exception: a state may discriminate against out[-]of[-]state interests where there is an important state interest in the regulation and there are no non-discriminatory options. State X will point to the legislative findings regarding the conservation of petroleum, and the reduction in pollution. These, State X will argue, are important state interests. State X will also argue that achieving these goals cannot be achieved by non-discriminatory means. State X will argue that in order to conserve petroleum and reduce pollution, State X must ban the sale of non-ethanol based gasoline inside the state.

Oilco will argue that there are available non-discriminatory means of meeting the state interests. Oilco can argue that a phaseout of non-ethanol based gasoline is a less discriminatory means of achieving their goals, and would provide time for out-of-state sellers of non-ethanol based gasoline to meet State X's stringent requirements.

State X may attempt to argue the market participant exception which allows a state to discriminate against out-of-state interests where it is a market participant. However, the

facts do not indicate that the regulation only applies when State X is purchasing gasoline. The effect of the regulation is to prohibit sale of all non-ethanol based gasoline to residents, and the State. Thus, the state will not successfully argue the market participant exception.

Because the statute discriminates against out[-]of[-]state interests, the court should find that the statute violates the Dormant Commerce Clause.

Undue burden on interstate commerce

Even if the court finds that the statute does not discriminate against out[-]of[-]state interests, the statute will be invalidated if it unduly burdens interstate commerce. Here, Oilco will argue that it is a major retailer of gasoline inside State X. The effect of the statute is to prohibit all sales of non-ethanol based gasoline inside the state. Oilco will introduce their evidence showing the reduction in sales and profits, and will argue that if every state enacted similar statutes, the effect would greatly burden interstate commerce.

State X will argue that the statute does not significantly burden interstate commerce, as Oilco is still free to sell their gasoline in other states or comply with State X's regulations. However, since the impact of the statute will burden interstate commerce, a court would likely find that the statute is violative of the Dormant Commerce Clause.

Equal Protection Clause

In order to assert an equal protection claim, Oilco will need to show some state action. State action exists where the act is an exclusive public function or there is significant state involvement. Here, the State X legislature passed a law. Thus, Oilco will easily be able to show state action.

The Equal Protection Clause of the 14th Amendment provides that the state must provide all citizens and organizations in their jurisdiction the equal protection of the laws. Where the regulation does not affect a suspect or quasi-suspect class, and where the regulation does not affect a fundamental right, the regulation must pass the rational basis test – that is, the regulation must be rationally related to a legitimate government interest.

Here, Oilco is an international corporation. The statute does not involve a suspect class – race or alienage – and it does not affect a quasi-suspect class – gender or legitimacy. The statute also does not affect a fundamental right such as 1st Amendment protections or the right to privacy. Thus, the rational basis test will be used in scrutinizing the statute. Under the rational basis test, a regulation will generally be upheld as long as it is not arbitrary.

State X will argue that there is a legitimate government interest involved – the conservation of domestic supplies of petroleum, and the reduction in atmospheric pollution. State X will

also argue that the prohibition of non-ethanol based gasoline is rationally related to the government interest, since the prohibition will reduce the amount of petroleum used in producing gasoline, and will also reduce the pollution because ethanol is cleaner than pure gasoline. Thus, the statute will pass rational basis, and the court will find no equal protection violation.

Due Process Clause

Substantive Due Process Clause

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The [S]ubstantive Due Process Clause prohibits states from infringing on a fundamental right. If the state infringes on a fundamental right, the action must pass strict scrutiny. Under strict scrutiny, the regulation must be necessary to achieve a compelling government interest. Where no fundamental right is involved, the regulation must pass rational basis – that is, the regulation must be rationally related to a legitimate government interest.

Here, the right to sell gasoline is not a fundamental right. Thus, the statute must pass the rational basis test. As explained above, State X will successfully argue that there is a legitimate interest in conserving petroleum and reducing pollution, and that the regulation passed is rationally related to achieve those goals. Thus, Oilco's claim under the Due Process Clause will also fail.

Procedural Due Process

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The procedural Due Process prohibits the taking of life, liberty or property without due process of law. Oilco may assert that the statute takes away their right to sell gasoline inside the state without an appropriate hearing. However, the Court will not find a procedural due process violation because the statute was validly passed by the state legislature.

Privileges and Immunities Clause of Article IV

The Privileges and Immunities Clause of Article IV prohibits states from discriminating against non-residents. The Clause does not protect against aliens or corporations. Here, Oilco is a corporation, and is not afforded protection under the Clause. Thus, any claim under the Privileges and Immunities Clause of Article IV will fail.

Answer B to Question 1

1)

Standing and ability to bring suit

The first issue is whether Oilco ("O") can bring a suit against State X asserting that the statute violates the US Constitution. To bring a lawsuit, O must meet the following requirements: (1) standing, (2) ripeness, and (3) mootness. O has standing because it has suffered present injury that can be redressed by a favorable court decision. In addition, the lawsuit is ripe because O has suffered injury and thus the court would not be rendering an advisory opinion. And finally, the lawsuit is not moot because O is suffering from a live controversy.

Protection of US citizens only?

While the facts do not clearly indicate whether O is a foreign corporation, assuming that it is a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, it should be allowed to challenge the constitutionality of the statute. The fact that O may not be a US corporation may preclude it from raising certain arguments, but it will not prevent it from bringing a lawsuit.

The following analysis in turn addresses each of the potential arguments.

1. The Commerce Clause

The issue is whether O can assert that State X's statute violates the Commerce Clause. The Commerce Clause provides Congress the power to regulate interstate commerce. The Dormant Commerce Clause or the negative implications of the Commerce Clause provides that even if Congress has not acted in a certain area, states may not be able to regulate those activities if they place an undue burden on interstate commerce. Under the Dormant Commerce Clause, O can make two separate arguments: (1) that the statute discriminates against out[-]of[-]staters, or (2) that even if the statute doesn't discriminate against out[-]of[-]staters, it places an undue burden on interstate commerce and is[,] thus, unconstitutional.

Statute discriminates out[-]of[-]staters

The first argument O can make is that the statute discriminates out[-]of[-]staters. Where a state statute discriminates against out[-]of[-]staters, the Dormant Commerce Clause requires that the state statute must be necessary to an important state interest. Here, although the state statute does not discriminate out[-]of[-]staters on its face, O can argue that because state X is the nation's largest producer of grain that is used in making ethanol

and because the use of gasohol will expand the market for grains, the statute in effect favors its in[-]state companies. Here, it's unlikely that a court will find that the statute discriminates against out[-]of[-]staters because it's neutral on its face- -it regulates in[-]state companies the same way it regulates out[-]of[-]state companies.

If, however, the court does find that the statute discriminates out[-]of[-]staters, State X must meet the intermediate scrutiny test for regulations that discriminate out[-]of[-]staters. State X must show that the statute is necessary to meet an important interest. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

Moreover, as indicated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of the country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

Market participant

State X may also try to argue that it is a market participant, thus has not violated the Dormant Commerce Clause. One of the exceptions of where a state can discriminate against out[-]of[-]staters is if it is a market participant. Here, the facts indicate that State X is the largest producer of grain used for making ethanol, but it's not clear on whether the state itself is actually a participant or simply that the companies within the state are the makers of grain. If it's only the companies within State X and State X itself does not produce any grain, it will not prevail in making the argument that it is a market participant.

Statute doesn't discriminate out[-]of[-]staters - balancing test

Where a state statute doesn't discriminate out[-]of[-]staters, in order to meet the constitutional requirements of the Dormant Commerce Clause, it must not place an undue burden on interstate commerce. In determining whether a statute places an undue burden on interstate commerce, courts will look at the state's interest and the cost of compliance. As discussed above, state X can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Morever, it will argue that since it doesn't discriminate out[-]of[-]staters, the cost to all companies to comply will be the same. O can argue that the cost of compliance is great because as indicated in the facts, its sales and profits has [sic] decreased substantially because of the limited capacity to produce gasohol. It's not clear from the facts whether other companies are also affected and to what extent they are affected. But assuming that other producers are able to produce gasohol without a great deal of problems - - that the

cost of compliance is not great - - then the statute will likely meet the requirements under the Dormant Commerce Clause.

2. The Equal Protection Clause

The Equal Protection Clause of the 5th amendment applies to the states through the 14th amendment. It provides that all citizens must be offered the equal protection of the laws.

As stated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

State action

The first is whether there is state action. In order to bring a challenge under the Equal Protection Clause, there must be state action. Here, State X has enacted a statute[;] this requirement has been met.

Classification

The Equal Protection Clause protects against different treatments of classes of persons or corporations. The first issue, therefore, is whether the statute classifies people differently. Here, O can argue that because the statute favors grain producers in State X, the largest producers in grain, it is treating the state companies differently than out[-]of[-]staters. State X, on the other hand, will argue that the statute is neutral on its face, it does not classify different companies[,] and thus the Equal Protection Clause does not apply. Here, because the statute does not treat any company based on a particular classification, a court will likely find for state X.

At best, O can argue that the classification is companies that produce grain vs. companies that, like itself, cannot produce grain for the ethanol. Even if O succeeds on this argument, it will be a rational basis scrutiny because this classification doesn't involve any fundamental right or suspect or quasi-suspect classification. O may argue that because its sales and profits in State X have decreased dramatically, it is impinging on a fundamental right to make a living. O will fail in this argument, however.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.

In sum, O will not be able to assert that State X has violated the Equal Protection Clause.

3. The Due Process Clause

The Due Process Clause also applies to the states through the 14th amendment and it also requires state action. As discussed above, State X has enacted a statute[;] this requirement has been met.

State X can advance several arguments under the due process clause - - under the takings clause, the substantive due process clause[,] and the procedural due process clause.

Takings Clause

The Takings Clause provides that a state may not take the property of anyone without just compensation. In order to invoke the protection of the takings clause, O must show that the statute impacted its profits and in substance amounted to a takings [sic]. Here, O can show with reliable evidence that since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol. This fact, along [sic], however, is not likely sufficient to show that there has been a taking. It appears that O is still making money. Simply because the profits have decreased, O hasn't satisfied the burden of showing that it amounts to a taking.

Where a state legislation doesn't amount to a taking, the state will not need to provide just compensation so long as it is substantially related to an important interest. As discussed above, State X will likely meet this burden. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

Substantive due process

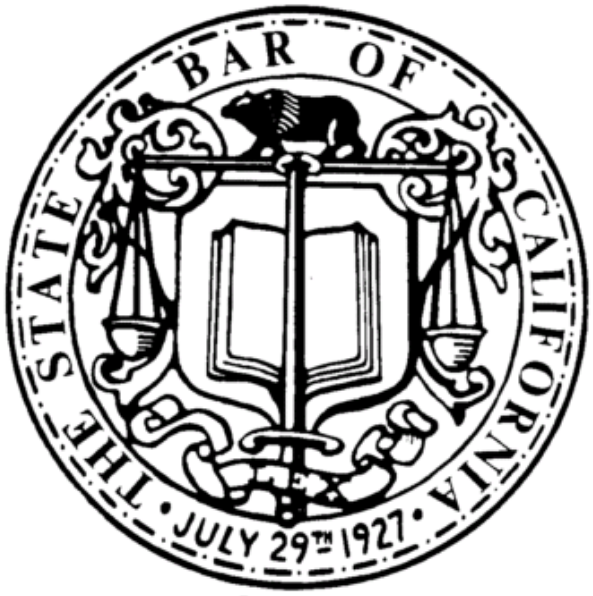
The substantive due process clause, which also applies to states through the 14th amendment, provides that the government may not take away life, liberty or property without the due process of law. To meet this requirement, it depends on whether the right infringed upon is a fundamental right. If it is not, then the rational basis test applied and so long as the statute is rationally related to a legitimate interest, it will be upheld.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.

Thus, O will not prevail under this argument.

4. The Privilege and Immunities Clause

The Privilege and Immunities Clause of Art IV offers protections to individuals against state's discrimination of out[-]of[-]staters. It provides that if a state action discriminates out[-]of[-]stater [sic] residents, the statute must be necessary to achieve an important interest. The P&I clause, unlike the Dormant Commerce Clause, however, does not offer protection to corporations. Because O is a corporation and not an individual, it will not be able to prevail under the P& I Clause.



California
Bar
Examination

Essay Questions and Selected Answers

July 2006

Question 2

In an effort to "clean up Columbia County," the County Board of Supervisors recently passed an ordinance, providing as follows:

> "(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.
> (2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.
> (3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.
> (4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a $5,000 fine, or by both."

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

Answer A to Question 2

The First Amendment protects the freedom of speech. It is imputed to the states through the Fourteenth Amendment.

Facial Attacks

Prior Restraint

Under the 1st Amendment, speech cannot be enjoined before it occurs. With regard to licenses & review panels, which determine whether speech should be allowed befor[e] it occurs, they may be valid under certain circumstances. They do not violate the 1st Amendment when they: 1) are based on definite criteria and are not left up to the discretion of certain persons; and (2) are appealable.

Here, the statute mandates that sexual material may only be sold if it is first submitted to the panel and the panel, in its sole discretion, determines the item is not pornographic. As indicated above, submission to a panel itself is not unconstitutional.

Howeve[r], the "sole discretion" of the panel is problematic. Sole discretion allows the panel to prohibit speech it does not like. It may even prohibit speech that it finds acceptable, but due to the person or business attempting to disseminate the material, deny it on those grounds. This discretionary review is inequitable and risks the danger of chilling speech. Because ther[e] is no set criteria for the review & it is left to the discretion of the panel, the section is unconstitutional as a prior restraint[.]

In addition, the statute does not mention any procedural safeguard. A person who is denied permission to sell must be able to appeal the decision. Because of the statute's lack of appellate review procedure, it is unconstitutional as a prior restraint.

Overbroad

A law is overbroad under the 1st Amendment when it prohibits more speech than is constitutionally allowed. Here, the statute prohibits "sexually graphic material." This would prohibit not only obscene material (which is unprotected & can constitutionally be prohibited – see below), but also the majority of R[-]rated movies which are released. Such R[-]rated movies may be sexually explicit at times, but they are protected under free speech. Therefore, the statute regulates too much & is unconstitutionally overbroad.

Vagueness

A law is vague under the 1st Amendment when one cannot tell which speech is prohibited & which is allowed. The speech prohibited under the statute – "sexually graphic material" – is unclear because you cannot tell what is allowed & what is not. For example, are nude

scenes in art films allowed? Nude scenes in pornographic films? A passage in a classic novel where the protagonist kisses his wife befor[e] going off to battle? Due to the vagueness of the statutory standard, it is impossible to discern which speech is allowed & what is prohibited. Therefor[e], the statute is likely to be found unconstitutionally vague.

Regulation of Speech

Content[-]Based Regulations

Again, the 1st Amendment protects the freedom of speech. Regulations based on the content of the speech – either its subject matter or its viewpoint – are subject to the highest standard of review, strict scrutiny. The content-based regulation must be necessary to achieve a compelling state interest, and must use the least restrictive means.

However, some content-based regulations concern unprotected speech and need not meet strict scrutiny.

Obscenity

Obscenity is a form of unprotected speech. It can be regulated, based on content, without meeting strict scrutiny.

There is a three-part test to determine whether material is obscene: 1) it appeals to the prurient interests of people in the community; 2) it is patently offensive to people in the community; and 3) based on a national standard, it lacks any redeeming artistic, literary, or scientific value.

Here, the statute may regulate obscenity without meeting the strict scrutiny test. The provision prohibiting the sale of "sexually graphic material" may be valid if "sexually graphic material" is defined as limited to obscene material as set forth above.

Profane & Indecent Speech

However, if the statute extends to all sexually graphic material, not merely the "obscene", the statute may be unconstitutional.

Under the 1st Amendment, profane & indecent speech is fully protected (with the exception of such speech disseminated on free broadcast media [like radio] & schools). Therefore, any content-based regulation is subject to strict scrutiny.

Here, the statute is regulating "sexually graphic material". This is a content-based regulation because it deals with the content[,] or subject matter, of the speech. Therefore, it must be necessary to achieve a compelling statute interest & use the least restrictive means.

Compelling State Interest

Generally, when indecent speech is involved, the interest is in protecting children from sexual material. This is of the utmost importance in providing a safe & moral environment in which to grow up. Therefor[e] it most likely qualifies as a compelling state interest. Note: merely regulating the morals of the community is not compelling.

Necessary & Least Restrictive Means

A law is necessary when it provides the only way to achieve the compelling state interest. Here, ther[e] are other ways to prevent the dissemination of indecent sexual material to children. For instance, the statute can limit the sale of sexual material to those over the age of 18. Or, a regulation can validly control the zoning & location of shops which sell sexual material so they are not near schools.

Therefor[e], because there are other options to achieve the compelling interest, least restrictive means have not been used. The law fails strict scrutiny and is therefore an unconstitutional violation of the 1st Amendment.

Punishment

The final issue is whether the provision of the statute which authorizes imprisonment and/or fines for the violation of the statute is valid.

First, for this provision to be valid, the substantive portions of the statute must be valid. Because the statute is unconstitutional as a prior restraint, overbroad & vague & does not meet strict scrutiny (unless the statute is limited to “obscene” material), the punishment clause is invalid.

However, the punishment clause raises the issue of compliance.

Collateral Bar Rule

The collateral bar rule applies when a person violates a statute. The rule states that if a person does not comply with a statute, the person cannot use the unconstitutionality of the statute as a defense in a criminal contempt proceeding. Therefor[e], even though the statute at issue is likely unconstitutional, a violation of the statute could result in punishment for contempt.

Thus, the best option is to comply with the statute for the time being, while appealing the decision of the panel and/or challenging the constitutional validity of the statute in court.

Answer B to Question 2

Videorama v. Columbia County

State Action

To bring a First Amendment claim, the plaintiff must assert state action, because the First Amendment only applies to the government, not private action. State action is present here because the ordinance was passed by the Columbia County Board of Supervisors, an instrument of the local government.

First Amendment Freedom of Speech

The First Amendment, applicable to the states through the 14th Amendment, provides that no government shall interfere with the right to free speech.

The Columbia County ordinance interferes with the right to free speech because it restricts the ability of video stores and individuals to sell, and correspondingly to buy, sexually graphic material. The ordinance imposes monetary fines and imprisonment for violation. Thus, the ordinance must be scrutinized under the First Amendment.

Overbroad

A statute may violate the First Amendment if it is overbroad. A statute is overbroad if it restricts protected speech as well as unprotected speech. Even if some of the speech restricted is not protected by the First Amendment, the statute will fail if it also draws unprotected speech.

In this case, the ordinance restricts both protected and unprotected speech. Obscene speech is a category of unprotected speech, and enjoys no protection at all under the First

Amendment. Obscenity is speech that (1) appeals to the prurient interest, as defined by a local standard, (2) is patently offensive, as defined by local law, and (3) lacks serious scientific literary, artistic, or political value, as defined by a national standard.

Some of the speech restricted by the Columbia County ordinance may be obscene speech. The ordinance targets sexually graphic material, and obscene speech is probably included in that category. The obscene material restricted by this statute presents a First Amendment problem.

However, the problem is that the ordinance restricts a broader category of speech, including some speech that is protected speech. Sexually graphic material that has serious scientific, literary, artistic, or political value is not obscenity and therefore is protected speech. The ordinance does not adopt the three part obscenity test, or make an exception for material that has serious value. Therefore, the statute is overbroad.

Unfettered Discretion

The First Amendment is also violated where an official is given complete discretion on whether to allow or prohibit speech. Requiring an individual or entity to obtain a license or authorization to engage in certain speech, before engaging in the speech, is a prior restraint. Prior restraints are disfavored because they quell speech before it is even uttered. However, a licensing scheme, even though a prior restraint, can be constitutional if (i) no official has complete discretion over whether to grant a license, (2) specific, articulated standards are used to grant the licenses, and (3) judicial review or some other appellate process is available as a check.

The ordinance fails this test because it gives “sole discretion” to the Review Panel. The statute does not provide any standards whatsoever that the Panel should use to evaluate requests. The only standard given is that “sexually graphic material” may be prohibited by

the Panel. That is not a standard at all, because it does not articulate the factors the Panel will use to decide requests to sell such material.

Moreover, the ordinance requires potential vendors to get authorization from the Panel before selling any sexually graphic material. Thus, the ordinance is a suspect prior restraint. Without the procedural safeguards listed above – no sole discretion, articulated standards, and appellate review – the ordinance's authorization scheme is an invalid prior restraint.

The statute gives no indication of any type of appellate review of the Panel's decisions. The Panel has "sole" and apparently final discretion. This kind of unchecked power over free speech violates the First Amendment.

Vague

The First Amendment also requires that laws restricting speech not be overly vague. A vague law is one that does not give fair notice of what speech it prohibits and what it allows. As such, it will deter protected speech, speech that is not meant to be restricted by the law, because people will fear that such speech is in fact prohibited.

The ordinance here is vague because it gives vendors no fair warning about what kind of material is "sexually graphic" and what is "not pornographic." As stated above, the ordinance provides no standards or factors or definitions that enable anyone to determine what exactly is prohibited. Instead, only the Panel knows what is prohibited, and only after they have reviewed the material and decided that it is or is not sexually graphic.

Since material is not clearly "sexually graphic" until the Panel decides that it is, the ordinance does not enable individuals to predict their own liability. They cannot predict ahead of time whether selling certain material will violate the ordinance or not. Since

violation could lead to both a hefty fine and imprisonment, people will err on the side of restricting their own speech to make sure they are not in violation.

As a result, video stores, magazine stores, and often individuals and entities that sell graphic material will all have to censor themselves until they obtain Panel approval. Moreover, Panel approval is required for each individual item, not for each vendor, so the self [-] censorship will be ongoing.

Because the ordinance will end up restricting protected speech, since it does not give fair warning of what is prohibited, it is unconstitutionally vague.

Content-based Restriction

A content [-] based restriction on speech is one that restricts speech according to what is being said or depicted or expressed, instead of according to the manner of the speech, or its time or place. Content-neutral time, place, and manner restrictions need only pass intermediate scrutiny to be constitutional. However, content-based restrictions must pass strict scrutinity.

The ordinance here is content [-] based because it restricts speech according to what it depicts – sexually graphic material. Although it does regulate the manner in which this speech can be sold, that does not make it a time/place/manner restriction. Because the restriction or the manner of sale only applies to sexually graphic material, the ordinance is targeting certain content. Therefore, it must pass strict scrutiny.

Strict Scrutiny

For a content-based law to pass under the First Amendment, it must be necessary to achieve a compelling state interest. The government has the

burden of proving that it passes this test.

Compelling State Interest

Columbia County's purpose in enacting this ordinance is to "clean up Columbia County." Presumably this means to regulate the distribution of sexually explicit material in order to have a more civil, professional, family-friendly atmosphere. The County may have had problems with children being exposed to sexually graphic material in stores or on the streets. The County may be concerned that an excess of such material may deter new residents, cause businesses to leave, harm young children, and even hurt Columbia's tourist industry. All of these concerns are valid state interests, and probably rise to the level of compelling. Assuming Columbia can prove that it has a compelling interest, it will next have to show that the ordinance is necessary to achieving those interests.

Necessary to Achieve That Interest

This requirement is more than just narrow tailoring. It actually requires that the law be the least restrictive means available for achieving the state's interests. If less restrictive alternatives are available, the state must pursue those alternatives first.

Columbia County will not be able to show that its ordinance is the least restrictive means for protecting children, cleaning up the town's image, and preserving its business and tourist industries. These interests could be accomplished by the use of content-neutral time [,] place and manner restrictions, such as requiring people to keep the material they are selling off of the streets, indoors, during normal business hours. Then children walking on the sidewalk would not necessarily run into sexually graphic material. The County could also require stores that sell such material to post warnings at the front door or window, to announce to customers that such material is sold inside. This would be a less restrictive

ban, although still content [-] based, because it would allow stores to sell such material without pre-approval from a Panel. It would also accomplish the County's goals by enabling residents to avoid that material if they want.

The County could also use zoning laws to regulate where adult-themed book and movie stores can operate. The Supreme Court has upheld the use of zoning in this way to control the secondary effects of such businesses. Zoning would be less restrictive than Columbia's current ordinance because it would not ban all sales or require pre-approval by a Panel. It would still allow Columbia to "clean-up" by regulating where such businesses can operate, and keeping other areas of the County free of them.

Because less restrictive alternatives are available, the ordinance will fail strict scrutiny, and Videorama will win its suit against Columbia.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

City has adopted an ordinance banning tobacco advertising on billboards, store windows, any site within 1,000 feet of a school, and “any other location where minors under the age of 18 years traditionally gather.”

The purpose of the ordinance is to discourage school-age children from smoking. The likely result of the ordinance will be to cause the removal of tobacco advertising from the vicinity of schools, day care centers, playgrounds, and amusement arcades.

The Association of Retailers (AOR) was formed to protect the economic interests of its member retailers. AOR had unsuccessfully opposed the adoption of the ordinance, arguing that it would cause hardship to store owners by depriving them of needed advertising revenue. AOR believes that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising.

AOR is considering filing a complaint for injunctive relief against City in federal district court claiming that the ordinance deprives its members of rights under the Free Speech Clause of the First Amendment.

What arguments could AOR reasonably make to show that it has standing, and that its First Amendment free speech claim has merit, and would it be likely to succeed? Discuss.

Answer A to Question 5

5)
I. Standing

The Association of Retailers (AOR) is an organization seeking to enforce the putative rights of its members. Normally, courts do not allow plaintiffs to represent the rights of third parties. Organizations, however, fall under an exception to this general rule (as do doctors suing on behalf of patients, or accused criminals suing to enforce potential jurors' right not to be peremptorily stuck due to their race). An organization will have standing to sue on behalf of its members if: (1) the organization's suit is related to an issue that is germane to the organization's purpose; (2) the organization has members that would themselves have standing to sue; and (3) it is not necessary that the organization's members themselves be party to the case.

Applying this test, it appears likely that the AOR could reasonably show that it has standing. As to the first requirement, the AOR "was formed to protect the economic interest of its member retailers." The AOR hopes to enjoin the application of the ordinance because it will lead to a diminution of retailers (shopkeepers) advertising revenue. The amount of advertising revenue lost due to tobacco advertising prohibition directly affects AOR members' economic interest, and thus the subject of the suit is sufficiently related to the organization's purpose.

As to the second requirement, it appears that at least certain of AOR's members would have the standing required to bring suit themselves. Standing generally requires (1) an injury, (2) causation, and (3) redressability. Courts will not find standing when plaintiff has not suffered a harm (or is not imminent danger of suffering a harm), the matter at issue cannot be considered to have caused the harm to plaintiff, or, if judicial action occurred, the harm could not be prevented/cured. Here, AOR members who run shops with windows that once featured tobacco advertisements have clearly suffered a harm–the City has passed the ordinance requiring them to remove the ads, and they have (presumably) lost the revenue they once earned from displaying said ads. It is beyond dispute that the City ordinance caused the harm, as but for the ordinance, the advertisements would remain in the storefront windows. Finally, injunctive relief granted by the Court would redress the harm–if it prevented the City from enforcing the ordinance, then AOR members could display the advertisements and resume collecting advertising revenue.

As to the third requirement, there does not appear to be any particular reason why any specific AOR member would have to be party to the litigation. The harm complained of is not particular to any one member, but rather to all members who had tobacco advertisements displayed. The organization itself could represent the aggregate harm to its various members. This is not a situation, such as fraud, where particular facts as to a particular member would play such an important role that the Court should not proceed without that member.

With these arguments, it is likely that the Court would find that AOR has sufficient standing.

II. First Amendment Free Speech Claims

At the start, AOR can predicate its Free Speech claims on the fact that the First Amendment applies to the states (and thus to municipalities) because of incorporation through the Fourteenth Amendment. To have a First Amendment Free Speech claim, AOR must show that there has been state action limiting its members' right to free speech. Again, that is not an issue here because the City (which is certainly a state actor) passed the ordinance at issue.

AOR has three options open to it in challenging the City's ordinance–it can claim (1) that it violates the intermediate scrutiny that Courts apply when the state regulates commercial speech; (2) that the ordinance is void for vagueness; and (3) that the ordinance is void for overbreadth. As we address these three options, we will determine why other avenues, though alluring, are unlikely reasonable.

A. Commercial Speech

The ordinance clearly regulates commercial speech, in that it only bans tobacco advertising (as opposed, say, to tobacco-related art) and cites store windows and billboards as primary locations of regulation.

While the state can outright ban false advertising, or advertisement for illegal purposes, neither is applicable here. There is no evidence that the tobacco advertising is in any way false or misleading, nor is there any evidence that tobacco is illegal in City. As such, the commercial speech at issue is subject to constitutional protection. Unlike non-commercial speech, the state can enact subject-matter based regulations for commercial speech (such as banning tobacco advertising) without triggering strict scrutiny (a showing of a compelling government interest and means necessary to achieve said interest).

Instead, the City must show: (1) that there is an important government purpose unrelated to the suppression of speech; (2) that the regulation directly advances that government purpose; and (3) that the regulation is narrowly tailored to achieve the purpose. If the City meets all three requirements, it can regulate commercial speech even by subject matter.

The City will argue that the health of children, and preventing the detrimental effects of smoking, is an important government purpose. That is essentially inarguable, and AOR should not contest it.

The City will further argue that the regulation directly advances that interest by decreasing children's media exposure to tobacco–that what children do not see, they will not be tempted to buy. AOR can challenge this by arguing that, in fact, the regulation only indirectly advances the government's purpose and that restricting actual access, rather than commercial references, to tobacco would directly advance the government's interest.

However, it cannot credibly be gainsaid that limiting the advertisements would diminish children's exposure to tobacco and directly advance the City's interest. Thus, the AOR will likely not be successful contesting this prong.

AOR's best argument is that the ordinance is not narrowly tailored, and that the ordinance prohibits more advertising than substantially required to achieve its purpose. AOR, however, cannot argue that the City can only regulate so far as necessary to achieve the purpose–that would be applying strict scrutiny rather than intermediate scrutiny. The City will respond that it has "narrowly tailored" the ordinance by limiting it to billboards, store windows, proximity to schools, and "locations" where minors "traditionally gather." That is not the most restrictive means of accomplishing its purpose, but it is more narrow than a blanket prohibition against tobacco advertising. This is a closer call, mainly because of the latter clause, but at least as to the billboards, store windows, and ads near schools, the ordinance is likely narrowly tailored enough. These places are either out in the open or particularly susceptible to children's presence, and thus a Court will likely apply the ordinance as to the specifically identified locations.

AOR is unlikely to prevent the application of at least parts of the ordinance on the grounds of commercial speech.

B. Void for Vagueness and/or Overbreadth

What AOR will be able to do, however, is have the ordinance enjoined in regards to the clause concerning "any other location where minors...traditionally gather." This is unconstitutional both because it is unduly vague (other than bars, offices and funeral homes, where don't minors traditionally gather?) and overbroad (even to the extent that there are more identifiable traditional gathering places, this language included far more than just playgrounds and fairs). This clause will be unconstitutional as applied to at least some of AOR's retailers, and thus the Court will likely consider enjoining enforcement of the non-specified places for advertisements.

Answer B to Question 5

5)

I. Does AOR have organization standing?

Standing requires that the claimant have an actual stake in the controversy. To assert standing, the claimant must have an injury in fact, the injury must be caused by the activity complained of, and the court must be able to redress the injury.

An organization may have standing if certain criteria are met. The organization must show that 1) its individual members have standing to assert a claim; 2) the claim is germane, or, related to the purpose of the organization, and 3) the individual members are not necessary to adjudicate the claim.

1. Do Members have standing in their own right?

Here, the members have standing in their own right because they have an injury in fact, can show causation, and the court can redress their problem. The members have standing in their own right because the ordinance prevents them from engaging in advertising, depriving them of revenue. Therefore, they have an injury in fact. Moreover, the loss of revenue is a direct cause of the City's ordinance. Finally, if the court finds that the ordinance is invalid, it will redress the injury.

2. The claim is germane to the purpose of the organization.

The AOR was formed to protect the economic interests of its member retailers. Here, the ordinance arguably is causing economic hardship to AOR members depriving them of needed advertising revenue. Therefore, the effect of the ordinance is to create the type of harm AOR was formed to protect against - harm to the economic interests of the member retailers. Therefore, it is germane to the purpose of the AOR to fight the ordinance as a violation of free speech that harms economic interest of its members.

3. The individual members are not needed for the court to decide the claim.

AOR is challenging a city ordinance on First Amendment free speech grounds. The court can decide whether the ordinance is a violation of the First Amendment and related issues of vagueness and overbreadth without need for the participation of the individual members of AOR.

Because AOR can show that its members have standing in their own right, that the complaint seeking injunctive relief against the City for enforcement of the ordinance is

related to AOR's purpose of protecting the economic interests of its members, and the members are not necessary to decide the matter, AOR can assert organizational standing.

II. First Amendment Speech Arguments

The protections of the First Amendment apply to the states and local governments through the 14th Amendment. Therefore, as a state actor, City may not violate free speech rights. Generally, a state must have a compelling interest in regulating the content of speech. However, commercial speech is afforded less protection by the First Amendment.

a. Commercial Speech

AOR may first argue that the ordinance does not meet the requirements for restraints on commercial speech. The City may regulate commercial speech if it is false or misleading. Here, there are no facts suggesting that the advertisements are false or misleading.

However, the City will likely argue that the very purpose of the ordinance was to protect minors because the advertisements for cigarettes were inherently misleading [sic] youth into believing that smoking is bad. AOR, however, will note that there is nothing misleading at all about advertisements for a certain product that say nothing aimed at minors, and that the State has offered no evidence showing that there is some attempt by the retailers to mislead youth into buying cigarettes.

Therefore, AOR has a strong argument that the City cannot regulate the advertisements as false or misleading.

i. Regulation of commercial speech generally

Where commercial speech is not false or misleading, the City may regulate the speech only if it meets the three part test set forth by the Supreme Court for calibrating the City's interest and the Retailers' commercial interests. The Supreme Court has applied an intermediate level of scrutiny to commercial speech regulation:

Any regulation of commercial speech must be 1) substantially related to an important government interest; 2) it must directly advance the interest, and 3) there must be no less restrictive means.

Is the ordinance substantially related to an important government interest?

The City will persuasively argue that there is an important government interest in discouraging school-age children from smoking. The state will note the fiscal costs of dealing with health related problems and the addictive nature of nicotine in relation to the maturity and intelligence of school-age children. Moreover, the City may try and analogize

the broad discretion given to the states under the Constitution to regulate the sale and distribution of alcohol.

AOR will argue that the state has an important government interest in regulating school-age smoking, but that the ordinance is not substantially related to that interest. However, AOR will not likely be able to show that an ordinance that is aimed at advertisements within 1,000 feet of a school is not substantially related to the interest of protecting minors from the dangers of smoking because there is a high concentration of youth near schools, particularly youth of young ages.

AOR may argue, however, that the provision in the ordinance prohibiting advertising at any location where youth under the age of 18 gather is not substantially related to an important government interest. AOR will argue that the City's interest is strong in protecting areas around schools where there is a definite and concentrated population of youth who are sent to that location for education. But, AOR will note that this interest decreases when the government is trying to protect gatherings of youth who are free to move about in public.

Does the Ordinance directly advance the government's interest in protecting youth?

By prohibiting the advertisement of tobacco near schools and other public places where minors gather, the ordinance directly advances the interests of the government's interest in discouraging school-age children from smoking. Assuming that the State can draw connections between the advertising and its effect on children, the ordinance directly advances the state's interest.

Is the ordinance the least restrictive means?

AOR has a strong argument that the ordinance is not the least restrictive means for promoting the state's interest in discouraging school-aged children from smoking. Specifically, AOR has already argued that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising. Moreover, AOR will argue that there could be regulations of the types of advertisements or size that would not prevent all advertising in windows or other locations where minors gather. Specifically, AOR will argue that the provision banning advertisement at "any other location where minors under the age of 18 years of age" is not the least restrictive means and that the portion should be struck from the ordinance.

b. Any regulation of speech, even if a valid regulation of commercial speech, still must not be overbroad, vague, or give unfettered discretion to enforcement agencies to be constitutionally valid.

Is the Ordinance overbroad?

A restriction on speech cannot prohibit substantially more protected speech than it may legitimately restrict. If the ordinance is found to prohibit substantially more speech than the City may constitutionally prohibit, then the ordinance will be found invalid and will not apply to any speech.

AOR will argue that the restriction on advertising at "any other location where minors under the age of 18 years traditionally gather" will prohibit substantially more speech than the City may constitutionally prohibit under the commercial speech clause. Specifically, AOR will argue that the City does not have an important interest in preventing advertising of tobacco at all places where minors gather. AOR will argue, as noted above, that while the City may have a strong argument that its interest in [sic] important in regards to advertising near school zones, the City's interest substantially decreases as the concentration of children goes down. However, this argument will bleed into AOR's stronger argument that the restriction banning advertising in areas where minors gather is vague, and, therefore, unconstitutional.

Is the Ordinance Vague?

A regulation is vague if it does not put the public on reasonable notice as to what is prohibited. Here, AOR has a strong argument that the ordinance is vague because it prohibits advertisements at any location where minors under the age of 18 traditionally gather. While the provision limiting advertisements within 1,000 feet of a school on billboards or store windows is specific, places where minors gather is not defined.

There is nothing in the ordinance that either specifies places where children traditionally gather or defines how to determine what in fact is a "gathering." How many children constitute a gathering? Therefore, AOR will likely be able to assert that the ordinance is unenforceable because of a vague provision.

Does the ordinance give unfettered discretion to enforcement?

A regulation restricting speech must be defined and clear. And, if it gives unfettered discretion to whoever enforces it, it will be found invalid.

Because the ordinance offers no guidance as to what constitutes a place where minors traditionally gather, it gives unfettered discretion to enforcement agencies to make their own definition. Therefore, AOR can make a strong argument that the ordinance gives unfettered discretion to City officials in determine [sic] who is in violation, and therefore, the ordinance should be invalidated.

Conclusion

Because AOR can show that the ordinance is vague in part, gives unfettered

discretion, and is not the least restrictive means of promoting the state's interest, it is likely to prevail in its claim to enjoin enforcement of the ordinance.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

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Question 4

Dan stood on the steps of the state capitol and yelled to a half-dozen people entering the front doors: "Listen citizens. Prayer in the schools means government-endorsed religion. A state church! They can take your constitutional rights away just as fast as I can destroy this copy of the U.S. Constitution."

With that, Dan took a cigarette lighter from his pocket and ignited a parchment document that he held in his left hand. The parchment burst into flame and, when the heat of the fire burned his hand, he involuntarily let it go. A wind blew the burning document into a construction site where it settled in an open drum of flammable material. The drum exploded, killing a nearby pedestrian.

A state statute makes it a misdemeanor to burn or mutilate a copy of the U.S. Constitution.

It turned out that the document that Dan had burned was actually a copy of the Declaration of Independence, not of the U.S. Constitution, as he believed.

Dan was arrested and charged with the crimes of murder and attempting to burn a copy of the U.S. Constitution. He has moved to dismiss the charge of attempting to burn a copy of the U.S. Constitution, claiming that (i) what he burned was actually a copy of the Declaration of Independence and (ii) the state statute on which the charge is based violates his rights under the First Amendment to the U.S. Constitution.

1. May Dan properly be found guilty of the crime of murder or any lesser-included offense? Discuss.

2. How should the court rule on each ground of Dan's motion to dismiss the charge of attempting to burn a copy of the U.S. Constitution? Discuss.

Answer A to Question 4

1. Murder or Any Lesser-Included Offense

Elements of a Crime

The four elements of a crime consist of (i) a guilty act, (ii) a guilty mind, (iii) concurrence, and (iv) causation.

For a person to be found guilty of a crime, the guilty act must be voluntary. Here, Dan appeared to only want to burn the document, not let it go and have it drift away. On the facts, it seems like he only let the document go involuntary when the heat of the fire burned his hand. So it appears that Dan may not have committed the requisite guilty act. However, if we frame Dan's actions on a broader level, Dan did voluntarily burn the document and set into motion the chain of events leading to the ultimate killing of the pedestrian. The element of a guilty act is satisfied.

As to concurrence and causation, Dan's intentional act of igniting the parchment document set into motion a chain of events: he let go of the burning document, it settled in an open drum of flammable material, and it caused the drum to explode and kill a nearby pedestrian. On the one hand, it appears that there is no proximate causation because it is arguably unforeseeable for someone to die from an explosion as a result of burning a document. On the other hand, courts are generally flexible when it comes to foreseeability, and there is a viable argument that the result was foreseeable because playing with fire is a dangerous activity. A court will probably find causation.

However, what we need to establish is whether Dan possessed the requisite guilty mind. The discussion below addresses this element.

Murder

At common law, murder is the unlawful killing of a human being with malice aforethought, which is established by any one of the following states of mind: (i) intent to kill, (ii) intent to do serious bodily harm, (iii) reckless indifference to an unjustifiably high risk to human life (i.e., depraved heart murder), and (iv) intent to commit a felony underlying the felony-murder rule.

Intent to Kill

From the facts, it does not appear that Dan knew any of the following facts: the nearby presence of the open drum with flammable material, the pedestrian's presence near the drum, or the pedestrian's identity. Therefore, he could not have formed a specific intent to kill the pedestrian. Dan cannot be found guilty of intent to kill murder.

Intent to Do Serious Bodily Harm

On the facts, Dan did not intend to do any harm, let alone serious bodily harm. He was merely burning the document as a form of symbolic speech and probably did not even want to let go of the document.

Reckless Indifference to an Unjustifiably High Risk to Human Life

Dan's act of igniting the document and letting it go did not reflect reckless indifference to an unjustifiably high risk to human life. No reasonable person would think that a burning document could ultimately kill someone. For example, Dan did not carry a dangerous weapon such as a gun and fire it into a crowded room.

Felony Murder

Under the felony-murder rule, a person can be found guilty of a killing that occurs during the commission of an underlying felony that is inherently dangerous, usually burglary, arson, rape, robbery, or kidnapping. Dan did not have the intent to commit any of these felonies.

Lesser Included Offenses

Voluntary Manslaughter

Voluntary manslaughter is an intentional killing committed with adequate provocation causing one to lose self-control. We have already established above that Dan cannot be found guilty of an intentional killing, so we need not determine whether it can be reduced to voluntary manslaughter. In any event, Dan was not even provoked to begin with.

Involuntary Manslaughter

Involuntary manslaughter is an unintentional killing that results either from (i) criminal negligence or (ii) misdemeanor-murder, which is a killing that occurs during the commission of a misdemeanor that is malum in se or inherently dangerous.

Criminal negligence exceeds tort negligence but is less than the reckless indifference of depraved heart murder. Significantly, for a person to be criminally negligent, he must have been aware of the risk. Here, Dan could have been aware of a general risk that results from a fire, which is an accidental burning of another object that occurs from a strong wind carrying the flame. On the other hand, Dan was not aware of the particular risk that an open drum of flammable material was nearby, which could kill someone. Dan cannot be found guilty of criminal negligence.

On the other hand, Dan may be found guilty of misdemeanor-murder, because he committed the misdemeanor of burning or mutilating a copy of the U.S. Constitution, and the commission of the misdemeanor caused the ultimate death of the pedestrian. On the other hand, the misdemeanor was not malum in se and not inherently dangerous. Dan should not be found guilty of involuntary manslaughter.

Conclusion: Dan cannot be found guilty of the crime of murder or any lesser-included offense.

(2) Dan's Motion to Dismiss the Charge of Attempting to Burn a Copy of the U.S. Constitution

(i) What he burned was actually a copy of the Declaration of Independence

Dan is being charged with attempting to burn a copy of the U.S. Constitution, but what he actually burned was the Declaration of Independence. At common law, factual impossibility is not a defense for attempting a crime. For example, if a person intends to shoot another with a gun and the gun happened to be out of bullets, the man is still guilty. However, legal impossibility is a defense to attempt. That is, if what the person was attempting to do was actually not a crime even though he thought it was, then he could not be found guilty of attempt.

Here, Dan's assertion that he actually burned the Declaration of Independence is a claim of factual impossibility. From the facts, we know that he had the specific intent to destroy a copy of the U.S. Constitution, so even though it was factually impossible for him to do it because he was holding the Declaration of Independence, he can still be found guilty of attempting to burn a copy of the U.S. Constitution.

Conclusion: The Court should deny Dan's motion to dismiss based on this ground.

(ii) The state statute on which the charge is based violates his rights under the First Amendment of the Constitution

The First Amendment protects free speech, and it is applicable to the states through the Fourteenth Amendment. The state action requirement is easily met here because it is a state statute making the act of burning or mutilating a copy of the U.S. Constitution a misdemeanor.

Symbolic Speech

Dan's act was a form of symbolic speech. For a regulation of symbolic speech to be valid and not violative of the First Amendment, the law must have a purpose independent of and incidental to the suppression of speech and the restriction on speech must not be greater than necessary to achieve that purpose.

Here, the state statute does not appear to have a purpose independent of and incidental to the suppression of speech. For example, the burning of draft cards was upheld, because it was found that the government has a valid interest in facilitating the draft, and that the suppression of the speech was incidental and no greater than necessary. Here, preventing the burning of the Constitution does not appear to serve any significant government interest other than to prevent people from showing their anger toward the government, which is within their rights under the First Amendment.

Unprotected Speech

The government may attempt to frame Dan's acts as unprotected speech that presents a clear and present danger. Such speech is intended to incite imminent unlawful action and is likely to result in imminent unlawful action, so that the state can regulate it. On the facts, Dan stood on the steps of the state capitol and yelled to a half dozen people entering the front doors while destroying what he thought was a copy of the U.S. Constitution, so arguably, he was trying to incite those people and get them enraged. On the other hand, there was no indication of encouraging harmful acts in his statement and burning a document in and of itself does not promote violence.

Moreover, even if the government can show that what Dan was specifically doing was inciting imminent unlawful speech, the government still cannot show that the state statute at issue is designed to restrain this kind of unprotected speech. The state statute merely bans burning the Constitution, but does not, for example, limit such acts to the steps of the state capitol, where the state might have an argument that doing such acts so close to government activity is dangerous and disruptive. The statute is overbroad and does not strive to only limit unprotected speech that is likely to incite imminent unlawful action.

Conclusion: The Court should grant Dan's motion to dismiss based on this ground.

Answer B to Question 4

Murder Charges Against Dan ("D")

The first issue is whether Dan may properly be found guilty of murder or any other lesser included offense.

Murder

Murder is defined as the killing of another human being with malice aforethought. In order to be found guilty of murder a Defendant must have committed a voluntary act and must have possessed the requisite mental state at the time of the act. A defendant will be guilty of murder if he committed the act (1) with the intent to kill, (2) with the intent to inflict great bodily injury, (3) if he acted in such a way as to demonstrate a reckless disregard for human life (often termed as having an "abandoned and malignant heart"), (4) or if the murder resulted during the commission of a highly dangerous felony.

Here, D's act of igniting the document constituted a voluntary act. The fact that the heat of the fire had burned his hand, and caused him to involuntarily let it go does not negate the fact that his act of burning the document in the first place was voluntary. However, an act, in and of itself, is not sufficient to convict D of a crime. The State must also prove that, at the time D committed the act of burning the document, he had the intent to commit murder.

On these facts, it is clear that Dan did not set the document on fire with an intent to kill. While an intent to kill may be inferred in cases where the D uses a deadly, dangerous weapon against a victim (a gun, knife, etc.), that is not the case here. Additionally, D did not act with an intent to inflict great bodily injury on anyone. Instead, his act of burning the paper was done to make a political point to those that were present nearby.

The State may try and argue that Dan's acts were done with an abandoned and malignant heart because, by igniting the document around individuals, he acted in a way that demonstrated reckless and unjustifiable disregard for human life. The State will not be able to meet their burden of proof under this theory either. Here, D's act of burning the paper is not the type of act that an individual could expect would lead to someone's death. The law demands more in order to show a reckless disregard for human life.

Felony Murder Rule

The state may try and argue that D should be convicted of murder based on the Felony Murder Rule ("FMR"). Under this rule, a D is liable for all deaths that occur during the commission of a highly dangerous felony, whether he intended to cause them or not. Instead, the intent is inferred from his intent to commit the underlying felony. In addition, the deaths caused during the commission of the felony must be foreseeable and must result before D has reached a point of temporary safety. Generally, the FMR has been reserved for deaths that occur during highly dangerous felonies, such as rape, arson,

kidnapping, robbery, and burglary.

Here, the issue is whether D can be found guilty of one of these underlying felonies so that the FMR applies. The only one that would be applicable would be the crime of arson. In order to show that D is guilty of arson, the State must prove that D (1) acted with the intent, or was at least reckless, (2) in burning, (3) the dwelling, (4) of another. Here it is clear that D did not intend to burn the nearby construction yard. Instead, the fire resulted because a wind blew the lit paper into an open drum of flammable material. However, the State may try and argue that the act of igniting a document on fire and allowing the wind to carry it away constituted a reckless act. However, the State will also have to prove that D burned a dwelling. Here, the paper did not cause a dwelling to burn, but rather flew into a construction site.

Thus, D could not be convicted of the murder of the Pedestrian based on the Felony Murder Rule because he did not commit a highly dangerous felony.

Voluntary Manslaughter

Voluntary Manslaughter is a killing of another human being while acting under the heat of passion. Voluntary Manslaughter is generally reserved for cases in which the D kills another because of an "adequate provocation". Here, Voluntary Manslaughter does not apply because there was no provocation which would have caused D to act the way that he did.

Involuntary Manslaughter / Misdemeanor Manslaughter

The remaining consideration is whether the State could properly convict D of involuntary manslaughter. Involuntary manslaughter is appropriate where the D is criminally negligent. Criminal negligence is a higher standard than is used in the tort context for negligence cases. In the criminal context, while D may not have been acting with an intent to kill, he nonetheless acted in a way that was so extremely unreasonable that a reasonable person in his shoes would have recognized that such actions are performed with a reckless disregard for the life of others. Here, the State will have to prove that not only was D's act criminally negligent, but also that the Death was caused by D's actions.

The State will likely fail on these facts because D's act of burning a document does not rise to the level of a criminally negligent act. D's conduct was not reckless in the sense that a reasonable person could have contemplated that burning a document could eventually lead to another person's death. Moreover, the State will have a tough time meeting the causation requirement because, while D was the but-for cause in P's death, the death was not foreseeable. Here, the death was caused by the explosion when the paper settled into an open drum of flammable material at the construction site. Thus, D could not, nor could a reasonable person foresee that such an act would result in a death due to such an explosion.

The State may also try and argue for misdemeanor manslaughter, which is appropriate

when a death is caused during the commission of a lesser-included felony or by those specified by state statute. Here, it is highly doubtful that the burning of the Constitution is the type of misdemeanor that would be included under such a rule. As a result, the State will not succeed on these grounds.

2. Dan's Motions to Dismiss

Attempt Charges vs. Dan

In order to prove attempt, the State must show that (1) D intended to commit the crime, and (2 he took a substantial step towards completing the crime. Regardless of the underlying crime, attempt is always a specific intent crime.

Here, the State will be able to show that D's burning of a document that he believed to be the U.S. Constitution demonstrates his intent to commit the crime. Additionally, because he actually ignited the document, the second element is also satisfied. The issue thus is whether D has any valid defenses to the charge.

Mistake of Fact

D's motion to dismiss is based on a mistake of fact defense. Namely, he is arguing that, because he actually burned a copy of the Declaration of Independence, not the U.S. Constitution as he thought, he should not be found guilty for attempt.

D will fail in this defense because mistake of fact is not a good defense to attempt. That is because, here, if the circumstances had been as D believed (to burn the Constitution), he would have been guilty of the misdemeanor. By way of analogy, a thief who attempts to receive stolen goods may not later argue that, because the police had secured the drugs and transferred them to him undercover, he cannot be guilty because the goods were no longer "stolen". The fact remains that, had the circumstances been the way he believed them to be, he would have been guilty of the crime of receipt of stolen goods. Here, D's mistake of fact may be a defense to the actual misdemeanor itself, but will not provide a defense to attempt.

First Amendment

The First Amendment protects an individual's freedom of speech. However, included in the First Amendment is a protection of expressive activities that constitute speech. Here, it is clear that D's act of burning the Constitution was an act of expression as it was intended to convey his political views regarding the problems inherent with government-endorsed religion and the commingling of church and state.

Statutes my limit expressive activity if they are unrelated to the expression that constitutes speech and are narrowly tailored to serve such goals. Here, the State may have a difficult time proving that this act is unrelated to expression because it seems to want to prevent individuals from burning or mutilating the Constitution as a way of

expressing their political views.

The State would likely try and analogize to the U.S. Supreme Court case of O'Brien. There, a statute made it a crime to burn draft cards. When the defendant burned his draft card as a way of protesting against the war, he was prosecuted under the statute. The Court held that the statute was constitutional because it was not aimed solely at curtailing individuals' ability to express their viewpoints. Instead, the County had an interest in the administrative matters of the draft and that draft cards were essential to the country keeping track of its draft members, soldiers, etc. Thus, because this statute was content-neutral, the Court applied intermediate scrutiny and found that the statute was narrowly tailored to a compelling state interest.

However, as noted above, no such interest appears to exist for the state's statute in this case.

D will likely point to the flag burning cases, such as Johnson, where the Court has held that statutes making it a crime to burn the U.S. flag are unconstitutional because they restrict speech under the First Amendment. In the flag burning cases, the Court has noted that these statutes are aimed at curbing an individual's right to express his views and thus warrant strict scrutiny. Because they are not necessary to advance a compelling interest, they are violative of the First Amendment.

The present case seems much closer to Johnson than O'Brien because the statute is aimed at expression rather than activities unrelated to expression. As such, it is unconstitutional because it impermissibly burdens the freedom of speech under the First Amendment. The State will have to meet a very high burden because strict scrutiny would be applied and thus it would have to show that the statute is necessary to advance a compelling state interest. Because no compelling interest appears to exist, the statute will be struck down.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

Dan's neighborhood was overrun by two gangs: the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

After threatening Dan for several weeks, Vic backed Dan into an alley, showed him a knife, and said: "Think carefully about your decision. Your deadline is coming fast." Dan was terrified. He began carrying a gun for protection. A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic.

Dan was arrested and put in jail. After his arraignment on a charge of murder, an attorney was appointed for him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant, who had been instructed beforehand by the police to try to get information from Dan.

1. May Dan successfully move to exclude his statement to Sid under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss.

2. Can Dan be convicted of murder or of any lesser-included offense? Discuss.

Answer A to Question 3

1. Dan's Motion to Exclude his Statement to Sid

5th Amendment

The 5th Amendment protection demands that Miranda warnings be provided to persons that are in the custody of government officials prior to any interrogation. The Miranda rights to remain silent and to counsel must be waived before any statement used against the person in court is obtained. Miranda is not offense-specific.

A person is in custody if they reasonably believe they are not free to leave. Interrogation is defined as conduct or statements likely to elicit an incriminating response.

In this case, Dan was in jail. He had been arraigned for murder and was being held, so he was clearly not free to leave. Thus, custody is satisfied.

As to interrogation, Dan was approached by Sid, and Sid informed Dan that he was a member of the Blues, a rival gang to the gang of Vic, and that the Blues had hired an attorney to assist Dan. He said that the lawyer needed Dan to inform Sid of what happened so that he could represent him. In fact, Sid was a police informant, who had been instructed by the police to try to get information from Dan.

Clearly, Sid was talking to Dan in such a way that was likely to elicit an incriminating response; he was asking him to give the details so that Dan would have better representation. He had lied to Dan and was tricking him into confessing.

However, the problem here is that Dan did not know that Sid was a police informant who was seeking a confession. The court has upheld the admissibility of statements obtained by police informants when the suspect did not know that the informant was working for the government. The rationale is that the coercion

factor is not so high, because the suspect does not know the police are involved. In other words, the suspect is free to not speak to the informant.

In this case, the court will have to weigh the fact that Dan did not know that Sid was a police informant against the devious nature of Sid's behavior in lying to Dan in determining whether the interrogation factor is met. Based on the prior cases admitting police informant confessions, interrogation is probably not satisfied and the confession will probably not be barred by the 5th Amendment.

6th Amendment

The 6th Amendment guarantees every person the right to counsel at all critical post-charge proceedings and events, including questioning. This right is offense-specific and must be waived prior to questioning.

In this case, the time frame for the 6th Amendment protection had been triggered, because Dan had been arrested, put in jail, and arraigned for murder, all before Sid approached Dan. In fact, Dan had been appointed an attorney by the court.

When Sid, a government informant posing to be a member of a rival gang interested in helping Dan, approached Dan and elicited the incriminating response, he violated Dan's 6th Amendment Right to Counsel. Sid initiated the conversation, and lied to Dan, tricking him into giving up the information. All the time, Sid was working as an informant. This equates to questioning by the government.

Because it was post-arraignment and the government sought to initiate questioning of Dan, Dan would have to first waive his right to have counsel present, or have his attorney present. Dan did not waive this right, because he did not even know Sid was a government informant, and his attorney was not present.

Because Dan's 6th Amendment right to counsel was violated, he can successfully move to exclude his statement to Sid from trial.

When he makes this motion, the government will have to prove by a preponderance of the evidence that the statement is admissible, a burden they will not be able to meet on the existing facts. Thus, the statement will be excluded.

2. Can Dan be Convicted of Murder or any Lesser-Included Offense

Murder is the unlawful killing of another human being with malice aforethought.

It requires actus reus, which in this case was Dan's act of shooing Vic.

It also requires causation, both actual and proximate. Actual cause is easily satisfied because "but for" Dan's act of shooting Vic, Vic would not have died. Proximate cause is the philosophical connection which limits liability to persons and consequences who [sic] bear some reasonable relationship to the actor's conduct, so as to not offend notions of common sense, justice, and logic. Proximate cause is also easily satisfied, because Dan shot and killed Vic without any intervening cause or unforeseeable event. If one shoots a human being, death is a logical and foreseeable result.

Malice is satisfied under one of four theories:

1. Intent to kill;
2. Intent to commit great bodily injury;
3. Wanton and Willful disregard of human life ("Depraved Heart Killing"); or
4. Felony Murder Rule.

Intent to Kill

Intent to kill can be satisfied by the deadly weapon doctrine: where the death is caused by the purposeful use of a deadly weapon, intent to kill is implied.

In this case, Dan used a gun, pointed it at Vic, shot Vic, and killed Vic. A gun is a deadly weapon, so intent to kill is satisfied.

Intent to Commit Great Bodily Injury

Even if intent to kill were not satisfied, intent to commit great bodily injury would be apparent because the least that can be expected to occur when one points a gun at a human being and pulls the trigger is great bodily injury.

Wanton and Willful Disregard

In addition, wanton and willful disregard for human life is satisfied because the use of a gun against another human being shows a conscious disregard for human life. Guns can, and frequently do, kill people. In fact, killing things is one of their main purposes. The use of a gun against another human being shows disregard for the human being's life.

Felony Murder Rule

The felony murder rule requires an underlying felony, that is not "bootstrapped" to the murder. In this case, Dan does not appear to have

committed any crime except for killing Vic, so the malice could not be implied under the felony murder rule.

Murder in the First Degree

Murder in the first degree at common law was the intentional and deliberate killing of another human being. It required deliberation, but deliberation can happen in a very short period of time.

In this case, Vic had "terrified" Dan, and Dan began carrying a gun for protection. Dan carried this gun for an entire week before he saw Vic. In obtaining the gun, or taking it from its storage place, putting it on his person, and carrying it around for an entire week, Dan acted intentionally and deliberately. When he saw Vic, he then pulled out the gun and shot and killed Vic.

These facts, especially the elapse of an entire week, are probably sufficient to show that Dan was intentional and deliberate in his use of the gun. It did not arrive there by chance, and once Dan saw Vic, he acted without pause.

Murder in the Second Degree

All murder that is not murder in the first degree is murder in the second degree.

If the prosecution was not able to establish Dan intentionally and deliberately shot Vic, because perhaps the jury believed that Dan did not deliberate before he shot Vic, then he could be convicted of second-degree murder.

Self-Defense

Self-defense is the use of reasonable force to protect oneself at a reasonable time. Deadly force may only be used to protect against the use of deadly force.

Dan will argue that he was engaged in self-defense when he shot Vic. Dan will point out that his neighborhood was run by two gangs, and as such it was very dangerous. He will testify that Vic was a Red, one of the gangs, and that he had tried to recruit Dan to the gang. When Dan refused, Vic said he "couldn't be responsible for Dan's safety," implying that Dan might be injured.

Vic then threatened Dan for several weeks, and finally backed him into an alley, showed him a knife, and told him that "Your deadline is coming fast." Dan will argue that the statement regarding Dan's safety, the threats, the knife and the deadline statement cumulate to show that Vic intended to kill Dan if he wouldn't join the gang, or at least that Dan reasonably believed Vic would do it.

Dan will argue that when he then saw Vic on the street, with his hand under his jacket, he was terrified and afraid that Vic might stab him with the knife he had threatened him with, and therefore he defended himself by shooting Vic.

The primary problem with Dan's defense is that he carried around a gun for a week before seeing Vic, and then when he saw Vic with his hand under his jacket he pulled out the gun and shot Vic, without Vic producing any weapon or making any threat at that time. The state will argue that Dan is not entitled to a self-defense defense because he was under no threat when he shot Vic.

Unreasonable Self-Defense

Unreasonable self-defense is a defense available to one who engages in good faith but unreasonable self-defense. It is a mitigating defense which takes a murder charge down to voluntary manslaughter.

Dan will argue that if self-defense was not appropriate because of the timing of the threats and the shooting, then he is at least entitled to an unreasonable self-defense defense. Dan will argue that he acted in good faith and really believed Vic would stab him.

This is a very colorable defense for Dan, because although the timing of self-defense was inappropriate, Vic had been threatening Dan for several weeks, and had recently shown him a knife and said "Your deadline is coming fast," so Dan's fear was likely reasonable.

Heat of Passion

Heat of passion is a defense when circumstances evoke a sudden and intense heat of passion in a person, as they would affect a reasonable person, without a cooling off period, and the person does not cool off. Heat of passion is a possible defense during a fight.

In this case, however, it is likely not viable because Dan had not seen Vic for an entire week before the shooting, which is sufficient time for a reasonable person to cool off from the last incident with the knife in the alley. For that entire week, Dan carried around a gun, and then when he saw Vic he shot and killed him, without any prior interaction on that occasion. It appears unlikely that Dan's response was "sudden" or "intense".

Involuntary Manslaughter

Involuntary manslaughter is established by a killing with recklessness not so egregious as to satisfy wanton and reckless disregard for human life, but more serious than common negligence.

Involuntary manslaughter could be established by the reckless use of a gun, but because Dan intended to kill Vic, Dan will be convicted of a greater crime, or, if his self-defense defense is effective, of no crime at all.

Conclusion

Dan will likely be tried for first-degree murder under the intent to kill theory, and will allege the defenses of self-defense and imperfect self-defense. Dan is likely to be found guilty of voluntary manslaughter, by use of an imperfect self-defense defense.

Answer B to Question 3

Dan's Motion to Exclude

Exclusionary Rule

The exclusionary rule prohibits the introduction of evidence obtained in violation of defendant's 4th, 5th, and 6th Amendment rights, and under the "fruits of the poisonous tree" doctrine, also prohibits any evidence found as a result of violating defendant's 4th, 5th, and 6th Amendment rights, with limited exceptions. Thus, if Dan's confession violated his 5th or 6th Amendment rights, the statement cannot be admitted.

5th Amendment Right

The 5th Amendment provides that a defendant should be free from self-incrimination. The right applies to testimonial evidence coercively obtained by the police. Under the 5th Amendment, before the police conduct custodial interrogation, the police must give the defendant his Miranda warnings. Miranda warnings inform the defendant of his right to remain silent and the right to an attorney. The 5th Amendment right is non-offense specific, meaning that even if the defendant exercises his rights, the police can question him about an unrelated offense. If the defendant asserts his right to remain silent, the police must abide by defendant's right, although they can later question him after a reasonable amount of time has passed. If the defendant unambiguously asserts his right to an attorney, the police cannot question him without either providing an attorney or obtaining a waiver of the right to counsel.

The 5th Amendment right to remain silent and to counsel only applies in custodial interrogation. A person is in custody if he or she is not objectively free to terminate an encounter with the government. A person is subject to interrogation if the police engage in any conduct that is likely to elicit a response, whether incriminating or exculpatory.

Dan will argue that he was subject to custodial interrogation because (1) he was in prison and not free to leave, and (2) the informant was planted in order to elicit statements from Dan. Clearly, Dan was in custody, as he was in jail. Dan may have a harder time proving he was subject to interrogation. Typically,

interrogation only occurs when the person is aware that he is in contact with a government informant. The prosecution will argue that Dan was not aware that Sid was a government informant, and believed that Sid was a gang member who was trying to help him. Thus, the prosecution will argue, the police were not required to give Dan his Miranda rights before commencing the questioning. The prosecution will argue that if Dan trusted Sid and willingly spoke to him, he cannot now claim that the statement constituted interrogation or was coercively obtained.

As Dan did not know that Sid was a government informant, he will likely fail in arguing that he should have received his Miranda rights before Sid questioned him. Thus, he will not be able to exclude his statement on 5th Amendment rounds.

Impeachment Purposes

Even if Dan's statement violated his 5th Amendment right, the statement may still be used to impeach Dan's testimony if he testifies at trial.

Fruits of Miranda

If the police obtained any evidence as a result of Dan's statement to the informant, these "fruits of Miranda" may be admissible. The Supreme Court has not conclusively determined whether such fruits are admissible, but they likely are.

6th Amendment Right

The 6th Amendment provides the right to counsel at all criminal proceedings. It applies once the defendant has been formally charged with a crime, and prevents the police from obtaining an incriminating statement after formal charges have been filed without first obtaining the defendant's waiver of counsel. The right is offense-specific, meaning it only attaches for the crime(s) for which the defendant has been formally charged. It does not prevent the police from questioning the defendant about unrelated offenses.

Here, Dan had been [under] arraignment on a charge for murder, so formal charges had been filed by the government. Thus, Dan was entitled to counsel at any post-charge police interrogation. Dan will argue that by subjecting him to interrogation by a police informant after formal charges had been filed without obtaining a waiver of his right to counsel, the police violated his 6th Amendment right.

The police will argue that Dan was not aware that Sid was a government informant, but this awareness is not necessary for a 6th Amendment violation. Once Dan's rights to counsel attached at his arraignment, Dan had a right to counsel during police interrogation to prevent the police from deliberately eliciting

an incriminating statement. The police used a government informant who lied to Dan about his identity, made a promise of a better attorney, and asked him about his involvement with the crime, in order to obtain a confession from Dan. The police did all of this without waiving Dan's right to have his attorney present during the interrogation. Dan's right to counsel under the 6th Amendment has been violated, and Dan is entitled to exclusion of the statement at his trial.

Like a violation of Dan's 5th Amendment right, the prosecution may use a coercively obtained confession to impeach Dan's testimony at trial.

Conclusion

Dan's statement to Sid likely violated his 6th Amendment right to counsel at any post-charge interrogation, because he had already been arraigned. The police should have obtained a waiver of Dan's right to counsel before sending Sid in, and it should not matter that Dan did not know that Sid was a police informant. However, because Dan did not know that Sid was working for the government, the questioning and subsequent statement did not likely violate Dan's 5th Amendment rights to Miranda warnings.

Thus, Dan will likely be successful in his motion to exclude his statement under the exclusionary rule as a violation of his 6th Amendment right.

Dan's Conviction for Murder or any Lesser-Included Offense

Murder

Murder is the unlawful killing of another human being with malice aforethought. Malice aforethought exists if there is no excuse justifying the killing and no adequate provocation can be found, and if the killing is committed with one of the following states of mind: intent to kill, intent to inflict great bodily injury, reckless indifference to an unjustifiably high risk to human life, or intent to commit a felony.

The prosecution will argue that Dan is guilty of murder because no excuse existed (duress is not an excuse to homicide), no adequate provocation exists, and he had any one of the three following states of mind: intent to kill, intent to inflict great bodily injury, or a reckless indifference to an unjustifiably high risk to human life.

The prosecution will argue that no excuse existed for Dan to kill Vic. The prosecution will argue that even though Dan may have felt he was under duress imposed by Vic, this does not justify the killing of Vic, for two reasons: (1) the duress was to join the Reds, not to kill Vic, and (2) duress cannot be used as an excuse for homicide. The prosecution will also argue that no excuse existed from Vic's actions toward Dan during the incident where he was killed that would

give Dan the reasonable belief that he was about to be killed or seriously injured. The prosecution will note that there is no evidence that Vic was even aware of Dan's presence, that Vic did not confront Dan with unlawful force, and that it was unreasonable that Dan thought he was about to be stabbed.

The prosecution will be required to show that adequate provocation did not exist for Dan's killing of Vic, and that Dan had one of the required states of mind here. Adequate provocation is discussed in detail below, but the prosecution will argue that even if Dan was subjected to a serious battery, he had a week to cool off from the provocation of that battery, and thus was not still under the direct stress imposed by that battery when he killed Vic.

The prosecution will also argue that Dan had any of the states of mind listed above. By pulling out his gun and pulling the trigger, Dan intended to kill Vic. This intent was evidenced by an awareness that the killing would occur if he pulled the trigger, and a conscious desire for that result to occur. The prosecution can also argue that if he did not intend to kill Vic, he knew or acted recklessly as to whether Vic would suffer great bodily injury as a result of the shooting. Finally, the prosecution can argue that by pulling the trigger, Dan was acting with a reckless disregard to the unjustifiably high risk to Vic's life that would occur from his actions. Dan, the prosecution will argue, clearly did not care whether Vic lived or died as a result of the shooting, and thus Dan had the requisite intent to be convicted of murder.

Because the prosecution can show that no excuse or adequate provocation existed, and that Dan acted with one of the states of mind required for murder, Dan can likely be convicted of murder unless he has a valid defense. In addition, if the prosecution can show that the killing was deliberate and premeditated, Dan may be guilty of first-degree murder. The prosecution will show that the killing was deliberate and premeditated because Dan was carrying a gun and shot Vic almost immediately after seeing him in the street.

Self-Defense

Self-defense is a complete defense to murder. Self-defense is justified when the defendant reasonably believes that the victim is about to kill him or inflict great bodily injury upon him. Deadly force may be used in self-defense if the defendant is not at fault, is confronted with unlawful force, and is subject to the imminent threat of death or great bodily harm.

Dan will argue that the defense of self-defense should completely bar his conviction for murder. Dan will point to the history between the parties as well as Vic's actions at the scene of the crime to establish that he was justified in using deadly force against Vic. Dan will argue that Vic had subjected him to a serious battery when he pushed him into the alley, showed him a knife, and threatened him. Dan will argue that this battery made Dan aware that Vic was a serious

criminal (and that Dan already had knowledge of Vic's criminality because he was involved in a gang), and that Vic would stop at nothing to injure Dan if Dan refused to join his gang.

With this history, Dan will argue that it was reasonable for him to believe that Vic was about to shoot him, because Vic was walking with his hand under his jacket, Dan will argue that the history between the parties and Vic's suspicious behavior made it reasonably likely that he was about to be stabbed, and thus he was justified in using deadly force in self-defense.

The prosecution will argue that even if the history between the parties made Dan afraid of Vic, that Vic had not confronted Dan with any unlawful force before Dan shot him. There is no evidence that Vic even saw Dan walking down the street. In addition, the prosecution will argue that even if Vic had plans to harm Dan, he wanted Dan to join his gang and would have only injured him if Dan refused to join the gang once again. While Dan was obviously not required to join the gang, this evidence will support the prosecution's defense that Dan's belief that he was about to be subject to immediate harm was unreasonable. At the very least, Vic probably wanted to talk to Dan one more time before inflicting harm upon him, so Dan was not subject to an immediate threat of death or bodily harm. The prosecution will argue that Dan should have waited until Vic produced the knife before shooting, or, at the very least, approached Dan in a threatening manner. Because Vic did not do these things, Dan cannot use the defense of self-defense.

Duress

Dan may argue that he was under duress, and this resulted in his killing of Vic. Duress is a good defense when the defendant is coercively forced under threats from another to commit a criminal act. Duress may have been a good defense if Dan was forced to join the gang and commit criminal acts. However, duress cannot be used to defend against homicide. Thus, this defense will fail.

Voluntary Manslaughter

Dan may try to get his charge lessened to voluntary manslaughter. Voluntary manslaughter is a killing that would be murder but for the existence of adequate provocation. Adequate provocation will be found where: the provocation is such that it would provoke a reasonable person, the defendant was in fact provoked, the facts suggest that the defendant did not have adequate time to cool off, and the defendant did not in fact cool off.

Dan will argue that Vic's repeated threats to him constituted adequate provocation. He will argue that being shoved into an alley, being shown a knife, and given basically a death threat is enough to provoke anger in the mind of a reasonable, ordinary person. Courts typically use an aggravated battery, as Vic

has committed here, as existence of adequate provocation. Dan will also argue that he was provoked, evidenced by carrying a gun for protection and living in fear of Vic.

However, Dan will have a harder time showing that a reasonable time to cool off could not be found, and that he did not in fact cool off. A week existed between Vic's aggravated battery of Dan and Dan's killing of Vic. While Dan may have still been frightened of Vic, a week is likely too long to find that Dan was still acting under the provocation supplied by Vic during the aggravated battery. Rather, Dan likely had cooled off, but was still upset by the incident and repeated threats.

It is likely that the prosecution can successfully argue that adequate provocation did not exist here because Dan was not acting under the direct stress imposed by the serious battery committed by Vic when he shot and killed Vic. However, if Dan can show such adequate provocation, his charge should be reduced to voluntary manslaughter.

Manslaughter

Dan may try to get his charge lessened to a manslaughter charge under the 'imperfect self-defense" doctrine. Dan will argue that even though he may be ineligible to use the self-defense as a valid defense because Vic had not confronted him with unlawful force, he reasonably believed that it was necessary to shoot Vic to avoid being killed or subject to serious bodily harm. It is more likely that a court will accept Dan's argument for a lesser charge of manslaughter under the imperfect self-defense doctrine, rather than accepting Dan's total defense of self-defense, because Vic did not do anything during the incident where he was shot to suggest that he was about to kill Dan or subject Dan to great bodily harm.

Thus, Dan may likely be convicted of murder, voluntary manslaughter, or manslaughter.

THURSDAY MORNING
FEBRUARY 28, 2008

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

To protect the nation against terrorism, the President proposed the enactment of legislation that would authorize the Secretary of Homeland Security ("the Secretary") to issue "National Security Requests," which would require businesses to produce the personal and financial records of their customers to the Federal Bureau of Investigation ("the FBI") without a warrant. Congress rejected the proposal.

Thereafter, in response, the President issued Executive Order 999 ("the Order"). The Order authorizes the Secretary to issue "National Security Requests," which require businesses to produce the personal and financial records of their customers to the FBI without a warrant. The Order further authorizes the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records.

Concerned about acts of terrorism that had recently occurred in State X, the State X Legislature passed the "Terrorism Prevention Act" ("the Act"), requiring businesses in State X served with National Security Requests pursuant to the Order to produce a copy of the records to the State X Department of Justice.

1. Is the Order within the President's authority under the United States Constitution? Discuss.

2. Assuming the Order is within the President's authority, does the Order preempt the Act? Discuss.

3. Assuming the Order is within the President's authority and does not preempt the Act, do the Order and the Act violate the Fourth Amendment to the United States Constitution on their face? Discuss.

Answer A to Question 2

1. Is the order within the President's authority under the United States Constitution?

Order 999

Order 999 was issued by the President after an identical piece of legislation proposed by him was rejected by Congress. The Order requires business[es] to produce the personal and financial records of their customers to the FBI without a warrant upon issuance of a "National Security Request" by the Secretary of Homeland Security. It is unclear what the use of such information so produced would be, other than the President's stated goal of protecting the nation from terrorism.

As an initial matter, assuming that the Order is valid (see below), it would not be a violation of the nondelegation doctrine. The President may delegate executive power as he sees fit to other members of the executive [branch].

Congressional Authorization

The President's power is at its apex when he acts pursuant to power given him by Congress. The U.S. Supreme Court has said that when he acts in the face of Congressional disapproval, he may only do so if the power he exercises is vested in him alone by the Constitution and denied to Congress. Where he acts in the face of Congressional silence on a matter, he acts in a "gray area". The case law is split as to whether Congressional rejection of a proposed power (but not the enactment of some act disallowing the President's use of that power) is silenced or disapproval, but the cases tend toward disapproval.

In this case, the President has issued Order 999 in the face of Congressional rejection of an apparently identical piece of legislation. The courts would likely treat such an action as occurring in the face of Congressional disapproval. Therefore, the court will only allow the Order if it is within the powers that only the President may exercise. If the court treats Congress' disapproval of the proposed legislation as silence, then the court will treat the Order as in the "gray area" of executive power and probably approve it if it is within the President's power. In this gray area, the court will likely look to the legislative history surrounding the defeat of the President's proposed legislation to divine some intent from the defeat.

Congress, on the other hand, could have authorized the act (assuming it is not unconstitutional under the 4th Amendment, see below). Congress has the power under the Commerce Clause to regulate the people, channels and instrumentalities of interstate commerce, as well as those things having a substantial effect on interstate commerce. The personal and financial information of individuals in America are most likely instrumentalities of commerce, and almost certainly have an effect on interstate commerce. So Congress does not have the ability to regulate in the field.

Congress is not bound by the Contracts Clause, so it does not pose a problem.

Given the fact that the power to make an Order such as this is not exclusively vested in the President, and the fact that he acted in the face of Congressional denial of his proposal to do so, the court will likely treat his act as outside his authority.

The President's Domestic Affairs Powers

The President has some domestic affairs powers reserved to himself. These include the appointment and removal powers, the pardon power, the commander in chief power, and the duty to execute the law. The President may make an argument that the latter two powers support the Order.

As an exercise of the commander in chief power, the President has the exclusive power to control the deployment of troops and their day-to-day control. There is a very weak argument that turning over financial records supports this role.

There is a better argument that the duty to execute the law supports the Order. In order to keep the nation safe, the President will argue, he must allow the FBI access to personal and financial records of all Americans. This is still a weak argument and there is no law to support it.

The President's Foreign Affairs Powers

The President shares foreign affairs powers with Congress, but has some reserved to himself, including the power to conduct foreign negotiations, to deploy troops overseas, and to make executive agreements.

The Order is not even arguably within his foreign affairs powers, as it concerns Americans' financial records at home, and gives them to the FBI, the government's domestic law enforcement agency.

Commandeering

Finally the Order poses a problem with commandeering; that is, the federal government's forcing the states to act. The Constitution as interpreted by the Supreme Court prohibits the federal government from requiring the states to enforce its laws. The Order forces law enforcement officials to "assist" the FBI. While the Congress could, for instance, condition spending to the states on such help, the President cannot force the states to do so. The Order violates the Constitution to that extent as well.

2. Does the Order Preempt the Act?

State X has passed an Act requiring business[es] in the state to provide the information they provide to the FBI under the Order to the state's DOJ as well. This section assumes that the Order is valid and treats it as federal law.

Preemption

Federal law can preempt state law in two ways, express and implied. In either case, where there is preemption, the state law is invalid under the Supremacy Clause of the Constitution. Express preemption occurs when the federal law by words states that it is the only regulation allowed and state regulation is prohibited. The Order does not contain an express preemption.

Implied preemption can occur in one of three ways, by direct conflict with state law, by so-called field preemption, and where the state law interferes substantially with the federal objective. Here, there is no direct conflict between the Order and the Act. The Act does not call for state business[es] to do anything they are prohibited from doing under the Order and vice versa. The Act merely requires businesses to provide a separate copy of their response to the Request to the state DOJ. This is not direct conflict.

Field preemption occurs when it appears from the legislative history of a federal law or from the law itself that it intends to be the only regulation in the area (for instance, environmental regulations typically provide that they are intended to fully occupy their fields). There is no legislative history for this Order other than the President's statement that it is to protect the nation from terrorism, and there is no language that a court might read as field preemption.

When a state law substantially interferes with the objectives of federal law, the state law will give way. Here, it does not seem like the Act interferes at all with the objectives of the Order. The Order provides that financial records go to the FBI (federal law enforcement) and the Act provides that a copy will go to state law enforcement. The Act is therefore not preempted.

Congressional vs. Executive Action

The above analysis assumes that an Executive Order can preempt a state law. The case law is unclear as to this point but it might be instructive to look to the President's authority to preempt state law under his power to make executive agreements with foreign governments. Because an executive agreement preempts state law, it is reasonable to assume that a court would declare an executive order to do so as well.

Contracts Clause

The Contracts Clause prohibits the states from substantially interfering with the obligation of existing contracts unless they have a substantial and legitimate reason for doing so and the means are reasonable and narrowly tailored to do so. Here, in the absence of the Order, the Act might have interfered with private contracts requiring businesses [to] keep their customers' records confidential. However, because the Order already breaks those contracts, and the Act goes no further, if the Order is valid, so is the Act.

3. Does The Order and Act Violate the 4th Amendment On Their Face?

The 4th Amendment applies to the federal government directly and to the states via incorporation by the 14th Amendment. The Order and Act call for the same information to be passed to equivalent agencies upon the same request. Therefore, the Order and the Act are essentially the same for the purposes of the 4th Amendment and will be analyzed together in this section.

The 4th Amendment

Purpose

The 4th Amendment prohibits unreasonable searches and seizures. The purposes [is] to prevent police and law enforcement misconduct. The Order and Act involve law enforcement collection of data without a warrant and therefore are generally within the scope of the 4th Amendment.

Use

The 4th Amendment generally provides that all evidence unreasonably seized be excluded (subject to some exceptions, for instance, for impeachment) from criminal prosecutions. The 4th Amendment is satisfied where a warrant has been issued and does not apply where there is an exception to the warrant requirement. The exceptions to the warrant requirement include searches incident to a lawful arrest, automobile searches, plain view, consent, stop and frisks, hot pursuit and evanesce. None of those exceptions apply here. There are also reduced requirements for so-called administrative warrants issued in highly regulated industries. However, that likewise does not apply here, as there is no warrant issued in a Request setting.

Government Action

The 4th Amendment only applies to government action. Here, the Order and Act require that private businesses turn over their records to law enforcement. In and of itself, this might not be considered government action, but the fact that the Order and Act [are] triggered by the Secretary's issuance of a Request (clearly government action) brings them within the scope of the 4th Amendment.

Reasonable Expectation of Privacy – Standing

The 4th Amendment prohibits unreasonable searches and seizures. The court has interpreted this to mean that it prohibits intrusions in areas where a person has a reasonable expectation of privacy. The facts do not state exactly what information is subject to the Requests. The case law is mixed on what sort of information is subject to a reasonable expectation of privacy. Pen registers (which record phone numbers dialed but not conversations) and bank account balances are not subject to the reasonable expectation of privacy, but it appears that the Requests go beyond those and will most likely be struck down if such information is used against an individual in a criminal prosecution.

Use of Information Discovered

In and of themselves, the Order and Act do not violate the 4th Amendment. However, any use of information in a criminal prosecution found thereby would violate the 4the Amendment, so, while the Order and Act are constitutional, they are essentially useless for criminal prosecution. For other purposes where the 4th Amendment does not apply (for instance, grand jury proceedings, parole revocation proceedings, immigration proceedings), the use of information discovered pursuant to the Order and Act is likely constitutional.

Answer B to Question 2

1) Is the Order Within the President's Authority Under the United States Constitution?

There are several potential sources of authority for the order in question. Unlike Article I, which vests specifically enumerated legislative powers to Congress, Article II, Section 1 vests "all" executive authority with the President. The President could claim that orders of this nature are inherently part of the "executive" power imbued in his office by the so-called "vesting" clause. This does not amount to an executive "police power," but it does allow the executive to take actions traditionally taken by heads of state. There is little case law on this clause, so it is uncertain whether it would provide sufficient justification for the President's actions.

The President could also seek to justify the order under his foreign affairs power. The President's powers in this area are plenary and expansive. The President would argue that the Order is designed to prevent and deter acts of international terrorism. Given the plenary and complete nature of the President's authority in this arena, this is a potentially solid grounding for the President's ability to enact the order.

Relatedly, the President could seek grounds for his order in his war powers. This claim would be based o the assertion that the United States is engaged in a "war" on terror. The Order would be seen as part of the President's efforts to defend the country from potential terrorist attacks. This grounding, however, probably goes too far. While the President's war powers are expansive, even in the case of a non-declared war, they are unlikely to justify an order of this nature. In dealing with the deployment and movement of troops, the President's powers are plenary. However, when dealing with civilian matters unrelated to the armed forces, his authority is greatly diminished.

Finally, the President could attempt to find a basis for his actions here in the "Take Care" Clause. The President is charged to ensure to "take care" that the laws be faithfully executed. Here, he would argue that terrorism, by its very nature, precludes and disrupts and disrupts the execution of the laws of the land. His Order would be seen as a necessary step to ensuring that the laws are indeed faithfully executed.

The President's actions here would be unaffected by the test for executive authority set forth in the Steel Seizure case. Under that tripartite formula, the President's powers are at their highest when acting pursuant to congressional legislation; they are lessened if there is no congressional legislation on the matter, and they are at their lowest when he is acting in the face of congressional legislation. In this case, the President's proposal was indeed rejected by Congress. However, if that rejection did not come in the form of legislation barring the President from taking such action, it is unlikely that the rejection would have much impact on his authority to enact the Order. The mere refusal to enact a bill does not put the President's actions in the third Steel Seizure category. Thus, it appears that the President's actions fall in the middle ground-with no congressional legislation on the matter.

Thus, in this case, the President appears to be operating in an area where he is not bound or backed by congressional authority. In such an arena, the President's actions are bolstered by past acts of the executive. Here, the "National Security Requests" operate in much the same way that national security letters operate in the current system – FBI or DOJ can issue such letters and demand documents in return, without a warrant. It is likely therefore that the bulk of the Order would appear authorized under some combination of the vesting clause, the foreign affairs power, or the Take Care Clause.

A contrary argument would be that executive Orders are only binding on officials within the executive branch. As such, since this order attempts to control the actions of those outside the executive branch (the businesses), it is unconstitutional.

In either scenario, the portion of the Order that allows the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records is probably unconstitutional. The Supreme Court has held that the 10th Amendment prohibits Congress from "commandeering" either state legislatures or state executive officials (Printz). In other words, Congress cannot compel state governments to take action. It may incentivize [sic] action, and it may make grants of funds contingent, but it cannot demand. While the cases themselves referred to congressional action, it is likely that executive action would fall under the same rubric. In this case, the Order authorizes the Secretary to "require" state and local law enforcement to assist in the collection of records. That requirement effectively commandeers state officials and is therefore unconstitutional (there is an exception for requiring state governments to produce records already in their possession, but that is inapplicable here, as the records are not in state government possession).

2) Assuming the Order is within the President's Authority, does the Order Preempt the Act?

By action of the Supremacy Clause, federal law may "preempt" state law. Federal law is the supreme law of the land and renders any contrary state legislation void. This preemption can take several forms. Preemption can be express – in other words, the legislation may specifically indicate that it is preempting state law (express preemption does not rule out implied preemption). In this case, however, there is no indication that the Order by its express terms preempts state law.

Preemption can also be implied. In other words, federal law can preempt state law if it is clear that the federal legislation was meant to occupy the entire field of regulation, if the state law poses an obstacle to carrying out the federal law, or if the legislation conflicts with the relevant state law. These principles are generally applied to congressional action. If they only applied to congressional action, then, by definition, an executive order like the one in this case could never preempt state law. Assuming, however, that executive orders can indeed preempt state law, there is no implied preemption in this case. There is no indication that the order was intended to occupy the entire field of regulation in this area. It is plausible that states would be allowed to

assist (indeed, the Order attempted to mandate that they would assist) and in any case, there are alternative means of obtaining business records, etc. (warrants). The law does not pose an obstacle to the enforcement of the federal act, nor does it conflict with it. Again, the Act appears to be an attempt to aid the federal government in carrying out its order.

Thus, under either theory, the Act is not preempted by the Order.

3) Assuming the Order is within the President's authority and does not Preempt the Act, do the Order and the Act violate the Fourth Amendment?

Order

The Fourth Amendment applies directly to the federal government and prohibits unreasonable searches and seizures. Unreasonable searches and seizures have been deemed to be those involving state action which intrude upon an individual's reasonable expectation of privacy.

In this case, the state action element is clear. The federal government is ordering businesses to produce the records of their clients.

The next question is whether there was a reasonable expectation of privacy in the customer records. Individuals have a reasonable expectation of privacy, for example, in their homes. However, there are other things in which an individual has no reasonable expectation of privacy. Generally, items passed on to third party businesses cannot reasonably be expected to be considered private. For example, there is no reasonable expectation of privacy in bank records. By analogy, therefore, it is unlikely that there is a reasonable expectation of privacy in business records. Generally speaking, an individual has no standing to sue for the seizure of his property that is in the possession of another. On occasion, the owner of property does have standing to sue, but given the fact there is no expectation of privacy in bank records, it is unlikely applicable here.

Assuming, however, that there was indeed a reasonable expectation of privacy, the search is only permissible if there was a warrant or if the search fell into one of the exceptions to the warrant requirement. Here, it is clear that there was no warrant. A warrant must issue on the basis of probable cause, specifically describe the place to be searched or the person or things to be seized and be issued by an unbiased magistrate. In this case, while there is arguably a description of the things to be seized, there is no indication of probable cause, and the issuing authority (the Secretary) is not an unbiased magistrate (in many senses, he is akin to a prosecutor who has an interest in the outcome of the investigation).

A search may still be reasonable, however, if it falls into one of the exceptions to the warrant requirement. However, none of the main exceptions appear to be applicable. This is not a search incident to a lawful arrest, it is not a Terry stop, it is not under the automobile exception, there is no consent, there is no hot pursuit, the items are not in

plain view, and this is not an inventory search. The government could attempt to argue that this falls under the "special needs" exception to the warrant requirement, but that does not appear to be applicable. The special needs exception is justified only in extreme situations where law enforcement could not carry out its duties in any other fashion (i.e., drunk driving checkpoints, airport security searches). In this case, while the threat of terrorism may pose an extreme danger, it is unlikely that this is the only way of protecting the public.

Act

The Fourth Amendment has been incorporated against the states through the due process clause of the 14th Amendment. Thus it applies against the states in the same manner as it does against the federal government, so the analysis is the same as above.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

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Question 4

In a recent statute, Congress authorized the United States Secretary of Transportation "to do everything necessary and appropriate to ensure safe streets and highways." Subsequently, the Secretary issued the following regulations:

> Regulation A, which requires all instructors of persons seeking commercial driving licenses to be certified by federal examiners. The regulation details the criteria for certification, which require a minimum number of years of experience as a commercial driver and a minimum score on a test of basic communication skills.
>
> Regulation B, which requires that every bus in commercial service be equipped with seatbelts for every seat.
>
> Regulation C, which provides that states failing to implement adequate measures to ensure that bus seatbelts are actually used will forfeit 10 percent of previously-appropriated federal funds that assist states with highway construction.

The State Driving Academy, which is a state agency that offers driving instruction to persons seeking commercial driving licenses, is considering challenging the validity of Regulation A under the United States Constitution. The Capitol City Transit Company, which is a private corporation that operates buses within the city limits of Capitol City, is considering challenging the validity of Regulation B under the United States Constitution. The State Highway Department, another state agency, is considering challenging the validity of Regulation C under the United States Constitution.

1. What constitutional challenge may the State Driving Academy bring against Regulation A, and is it likely to succeed? Discuss.

2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed? Discuss.

3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed? Discuss.

Answer A to Question 4

State Driving Academy Challenges

Standing

In order to bring a claim in federal court challenging this regulation each of the parties must have standing. In order to have standing the plaintiff must show (1) injury in fact, (2) that the defendant caused the harm, and (3) that a favorable opinion will remedy his harm. In this case, the state agency is likely to have standing because the regulation will require their instructors to obtain the federal certification and therefore they will incur greater expense because of the regulation. Moreover, a challenge brought against the US Secretary is proper because he is the one who issued the regulations. Finally, a favorable opinion invalidating the regulation would remedy the injury because they would no longer have to incur the expense to comply with the regulation.

Constitutional Challenges

State Action

In order for the constitution to apply there must be state action. State action exists whenever the government or a government official is acting or a private party with sufficient entanglement with the state is acting. In this case, the US Congress and the US Secretary of Transportation issued these regulations and therefore there is state action and the constitution will apply to such regulations.

Not Within Enumerated Powers

The State agency would argue that such regulation is not within Congress' enumerated powers and therefore would violate the constitution. Congress would argue that it has the power to regulate interstate commerce and therefore has the ability to regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce including those things within interstate commerce, (3) those activities that

have a substantial effect on interstate commerce. When Congress is using its commerce power to regulate an activity the activity must have a substantial effect on interstate commerce. If the activity is an economic activity then the court will uphold the regulation so long as in the aggregate all substantially similar activity is likely to have a substantial effect on interstate commerce.

In this case, the activity is commercial driving instruction. Congress is requiring that all instructors of persons seeking commercial driving licenses be certified by federal examiners. The regulation requires [a] certain minimum number of years of experience and a minimum score on a test of basic communication skills. In this case, Congress is not regulating an instrumentality of interstate commerce or a channel of interstate commerce but rather an activity. This activity is a commercial activity because it involves the provision of driving instruction for a fee. This commercial activity, although entirely intrastate, may be regulated by Congress so long as there is a reasonable belief that such economic activity would, in the aggregate, have a substantial effect on interstate commerce. In this case, since this [is] an economic activity, it is likely that such activity would have a substantial effect on interstate commerce because driving instruction provided to commercial truckers is likely to have an effect on the way that truck drivers drive on the road. If the truckers are taught more effectively then it is likely that they are going to [drive] safer when on the roads and therefore cause less accidents. Moreover, the safety of the highways has a substantial effect on interstate commerce. Moreover, in the aggregate if the instruction is not sufficient then our highways are likely to be unsafe and therefore will increase the cost of interstate commerce or reduce the amount of interstate commerce.

Since the activity is likely to have a substantial effect on interstate commerce the court will likely uphold regulation.

Delegation of Legislative Powers

This State may also challenge the regulation as an invalid delegation of legislative power. As a general rule Congress may delegate its legislative authority so

long as it provides reasonably intelligible standards. In this case, Congress has delegated its authority to the US Secretary of Transportation. This delegation will be valid so long as Congress has provided reasonably intelligible standards. In this case, Congress has said that the Secretary should do everything "necessary and appropriate to ensure safe streets and highways." While this guidance is broad the court is not likely to invalidate this as unintelligible because such broad delegations of authority have been upheld in the past. Therefore it is likely a valid delegation of legislative power.

10th Amendment: Commandeering

The State may challenge this regulation on the ground that it is commandeering state officials by forcing them to comply with a federal regulation. In this case, the State Driving Academy is a state agency; therefore their employees are state officials. The state would argue that by forcing them to comply with the regulation Congress is infringing on the state's inherent powers protected by the 10th Amendment. In this case, while the regulation does require the state officials to comply with the regulation, the regulation is not likely to violate the 10th Amendment because it is regulating both private as well as state actors. In prior cases, the court has upheld generally applicable regulations that require state agencies to comply so long as they were applicable to both private and public actors. In this case, the regulation applies to all commercial driving instructors, public and private, and therefore will likely not violate the 10th Amendment.

Capitol City Transport's Challenges

State Action

As mentioned above, there is state action in this case, so the construction applies.

Not Within Enumerated Powers

Transport would likely argue that this regulation is not within Congress' enumerated powers and therefore is unconstitutional. As mentioned above, under the Commerce Clause Congress has the power to regulate the instrumentalities of interstate commerce as well as those things within interstate commerce. Instrumentalities of interstate commerce include cars, planes, buses, etc. Moreover, Congress has the power to regulate an activity [that] has a substantial effect on interstate commerce.

In this case, the Regulation requires that every bus in commercial service be equipped with seatbelts for every seat. A bus is an instrumentality of interstate commerce because it is generally used to move people both within the state and between states. Even though Transport does not operate buses within interstate commerce (since it only operates within the City limits) the bus, itself, is an instrumentality of interstate commerce and therefore can be regulated by Congress under the Commerce Power. Moreover, commercial busing is an activity that has a substantial effect on interstate commerce because it is an economic activity that in the aggregate moves thousands of people and goods between states. So even though City itself does not move people in interstate commerce, the commercial activity of busing people within the city, in the aggregate, has a substantial effect on interstate commerce. If buses that operate in the country are safer then the roads and highways are likely safer and therefore there is going to be beneficial effect on interstate commerce.

Therefore the regulation is within Congress' enumerated powers.

Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

Equal Protection

Under the 5th Amendment Due Process Clause, the federal government is prohibited from making unjustifiable distinctions between its people. In this case, the plaintiff may challenge the regulation as a violation of equal protection because it distinguishes commercial buses from other buses. As a general rule, any classifications among economic actors is subject to minimum rationality review. In that case, the regulation is valid so long as it is rationally related to a legitimate government interest. In this case, the regulation is likely to be upheld because the regulation is rationally related to the legitimate interest of ensuring the safety of those instrumentalities of interstate commerce. Secretary may have concluded that commercial buses are more of [a] threat to safety and therefore needed to be regulated before other buses were regulated. Moreover, putting safety belts on buses makes them safer by ensuring less injuries when and if there is an accident. Therefore this challenge is likely to fail.

State Highway Department's Challenges

State Action

As recommended above, there is state action in this case, so the construction applies.

Not Within Enumerated Powers

The State Highway Department may challenge this regulation by claiming that the regulation is not within Congress' enumerated powers. Congress has the power to tax and spend for the general welfare. In addition, Congress has the power to condition federal funds so long as the condition is related to the purpose for which the funds were granted.

In this case, the regulation requires states to implement adequate measures to ensure that bus seatbelts are actually used by conditioning 10% of the previously appropriated federal funds that assist states with highway construction on the implementation of such measures. Under Congress' conditional spending power this

condition placed on the funds is appropriate so long as the condition is related to the purpose for which the funds are used. The funds are being used to assist with highway construction. Such funds are likely to be used to build better, safer and more highways. The condition on the funds is that the states must implement measures ensuring that buses have seatbelts. The purpose of the condition is to improve the safety of an important instrumentality of interstate commerce. In this case, the condition is clearly related to at least one of the likely goals of the federal funds. Therefore the regulation is not outside of Congress' enumerated powers.

Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

10th Amendment: Commandeering

The State Highway Department may challenge the regulation as invalid because it compels the state to legislate. As a general rule Congress cannot compel the state to implement legislation. Such regulations would be invalid and a violation of the 10th Amendment. However, Congress does have the power to condition its provision of federal funds on the states enacting certain regulation so long as the condition is not compelling the states to implement the regulation. In this case, Congress has conditioned only 10% of the federal highway funds on the implementation of such measures. 10% is only a slight percentage of the total and therefore it is unlikely that such an amount would constitute coercion of the states into implementing measures. If the state decides not to implement the measures it still will get 90% of the funds that were previously appropriated. Therefore the court is likely to find that such regulation is only inducing the states to act, not compelling them to act.

Therefore the regulation is not likely a violation of the 10th Amendment.

Answer B to Question 4

1. What constitutional challenges may the State Driving Academy bring against Regulation A, and is it likely to succeed?

Standing

It first must be determined whether the State Driving Academy (SDA) has standing to challenge Regulation A. Because of the requirement in Article III that federal courts only hear actual cases and controversies, the United States Supreme Court has imposed various requirements to determine whether a case is justiciable. Importantly, a litigant must have standing to bring a claim in federal court. This requires the litigant demonstrate injury in fact, causation, and redressability.

The SDA can demonstrate injury in fact based on Regulation A. The SDA offers its own driving instructions for persons seeking commercial driving licenses. However, the current federal regulation requires that the instructors at the SDA be certified by federal examiners, and meet specific criteria for eligibility. Thus, the SDA is injured because it cannot continue to offer driving instruction until it has complied with the federal regulations. Causation is also met, since the fact that the SDA cannot continue to offer instruction was caused by Regulation A. Finally, the SDA can also demonstrate redressability. If it succeeds in challenging Regulation A under the U.S. Constitution, it will be overturned, and the SDA will no longer have to comply.

As such, the SDA has standing to challenge Regulation A.

Improper delegation of legislative power

The SDA will first argue that the entire regulatory scheme is an improper delegation of legislative power. Congress may delegate its power to other branches, so long as intelligible standards are given and the power assigned is not uniquely confined to Congress (e.g., the power to declare war). It should be noted that although some

intelligible standard is required, the United States Supreme Court has not struck down a delegation of legislative power in nearly 30 years.

In this case, Congress authorized the United States Secretary of Transportation, an executive officer, to "do everything necessary and appropriate to ensure safe streets and highways." This does seem possibly overbroad. However, the facts indicate that, as regards Regulation A, specific details were given for the licensing scheme. The facts say that the criteria for certification were detailed, and lists the types of things required for certification. Based on the fact that the United States Supreme Court is hesitant to overturn delegations of legislative power, these criteria are likely sufficient.

As such, a challenge based on improper delegation of legislative power will likely fail.

Interstate Commerce Clause

In order for Congress to take action, it must exercise an express power granted to it in the Constitution or it must exercise an implied power, typically those necessary and proper to achieve those powers expressly granted. Article I of the Constitution grants Congress the power to regulate interstate commerce. The United States Supreme Court has interpreted this power broadly, and Congress may regulate interstate commerce in three different areas: (1) it may regulate the channels of interstate commerce, such as highways and rivers; (2) it may regulate the instrumentalities used in interstate commerce, as well as regulate to protect the persons and things engaged in interstate commerce; and (3) it may regulate activities which have a substantial effect on interstate commerce.

In this case, Regulation A requires that all instructors of persons for commercial driving licenses be certified by federal examiners. Regulation A is part of the overall scheme "to ensure safe streets and highways." The SDA will argue that this regulation is too broad, because it is not limited to those engaged in interstate commercial driving. Specifically, they will argue that the regulation also requires instructors to be certified

even when they're only instructing commercial drivers engaged in wholly intrastate commerce, and thus, the Interstate Commerce Clause cannot justify Congress' action here.

First, Congress will argue that Regulation A is a method of regulating the instrumentalities used in interstate commerce. Specifically, Congress will point out that those engaged in commercial driving are instrumentalities of interstate commerce, and thus regulating those who grant licenses to these drivers is entirely proper under the second prong mentioned above. However, Congress will also argue that the activity regulated has a substantial effect on interstate commerce.

Importantly, when Congress regulates an activity which may be entirely intrastate, it has to demonstrate that the activity has a substantial effect on interstate commerce. However, where the activity regulated is commercial or economic in nature, the regulation will be upheld if there is a rational basis to conclude that the activity regulated, in the aggregate, does have a substantial effect on interstate commerce. That test would easily be met in this case. It can rationally be assumed that commercial drivers within a state would impact commercial activities in interstate commerce – intrastate drivers could convey goods to interstate drivers, goods in interstate commerce could be moved by commercial drivers through the state, etc.

As such, Regulation A is constitutional under the Interstate Commerce Clause.

<u>Intergovernmental immunity/principles of federalism</u>

The SDA will next argue that Regulation A violates principles of intergovernmental immunity. Specifically, it will state that the federal government is targeting the states and forcing them to comply with federal regulations. The SDA will argue that Regulation A commandeers state official to enforce the regulatory scheme, since all state driving instructors must now comply with federal certification rules. However, state governments are not immune to federal regulation, and it should be noted that principles

of federalism are not violated where a federal law regulates both states and private individuals equally, without directly targeting states.

This argument will likely fail. First, Regulation A is not targeted only to states. The facts indicate that Regulation A is applicable to all instructors of persons seeking commercial driving licenses. Thus, Congress is not requiring states to regulate in a certain way, but merely requiring those engaged in a specific activity [to] meet certain requirements.

Next, Regulation A does not commandeer state officials. Although state officials must meet certain requirements before being permitted to instruct, the Regulation does not mandate that state executive officials enforce a federal law. It merely requires all persons engaged in commercial driving instruction, both private and governmental, follow the federal rules.

As such, Regulation A does not violate principles of intergovernmental immunity.

Preemption

Because of the Supremacy Clause of Article IV, a lawfully passed act of Congress may preempt or supersede state laws. Congress may expressly preempt state law, or impliedly do so. It does so impliedly where the state law prohibits obtaining a federal objective or interferes with a federal scheme.

In this case, the SDA will argue that Congress is intruding on areas left to the States under the 10th Amendment. However, this argument will fail. As demonstrated above, Regulation A is lawful under the Interstate Commerce Clause. If the SDA has conflicting licensing requirements for commercial driving instructors, its scheme will be struck down and Regulation A upheld under the Supremacy Clause.

Conclusion

As such, the SDA's challenge to Regulation A will fail.

2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed?

Standing

As indicated above, a litigant must have standing to bring suit in federal court, meaning it must demonstrate injury in fact, causation, and redressability**.** The Capitol City Transport Company (CCTC) can demonstrate injury from Regulation B because it requires CCTC to put seat belts in all of its buses. This is an economic detriment that CCTC will have to incur. Because this economic detriment is due entirely to Regulation B, causation is met. Additionally, redressability is also met, because if the regulation is declared unconstitutional CCTC will no longer have to comply.

As such, CCTC has standing to litigate the constitutionality of Regulation B.

Interstate Commerce Clause

CCTC will also likely argue that Regulation B exceeds Congress' power under the commerce clause. However, this argument will likely fail. Again, as indicated above, Congress may regulate interstate commerce in three different ways (see above).

Regulation B requires that every bus in commercial service be equipped with seat belts. This indicates that Congress is regulating instrumentalities of interstate commerce, since buses engaged in commercial service are being regulated and are an instrumentality. Additionally, Congress is protecting persons involved in interstate commerce, since the regulation require seat belts. However, CCTC will argue that the regulation is again overbroad**,** because it does not regulate only buses engaged in

interstate commercial activity. Once again, as indicated above, since this activity is economic, Regulation B will be upheld if there is a rational basis to conclude the activity, in the aggregate, has a substantial effect on interstate commerce. Such a rational basis is easy to see here. Buses engaged in commercial service, even if only within the state, will likely impact commercial activity coming into the state and leaving it.

As such, a challenge under the interstate commerce clause will fail.

Government action

The CCTC may also argue that the law infringes its substantive due process rights under the 5th Amendment, as well as its rights to equal protection (which is implied in the 5th Amendment). However, to properly allege a violation of due process or equal protection, some government action must be shown. This is easy here, since the act complained of is a federal regulation, which would count as government action.

Equal protection

Again, implied into the 5th Amendment is a clause providing that no one be deprived of equal protection of the laws. Where a law regulates on a suspect or quasi suspect clause, or infringes a fundamental right, strict scrutiny or intermediate scrutiny may be used. However, for all other activities or classes, only a rational basis test is used. Specifically, the claimant must demonstrate that the law is not rationally related to a legitimate government purpose. This test is very deferential to the government.

In this case, CCTC will argue that its equal protection rights are violated. Particularly, it will argue that the regulation targets only commercial buses, and not other buses. However, commercial buses are not a suspect or quasi suspect class. Additionally, no fundamental rights are infringed by Regulation B. Thus, only a rational basis review will be used to determine the validity of the law. The state purpose of these regulations is to ensure safe streets and highways. This is clearly a legitimate government purpose.

Additionally, the law is rationally related to this purpose because regulating commercial drivers, who would frequently be on streets and highways, is a manner of ensuring that the roads are safe for other drivers.
As such, an equal protection challenge to this regulation will fail.

Substantive due process

The due process clause analysis is similar to the equal protection analysis. However, we are not concerned with discrimination based on a group or class, but a law which equally deprives people of constitutionally protected rights. Where a law infringes upon fundamental rights, strict scrutiny must be used. However, for all other rights only a rational basis test is used.

The analysis is the same as the equal protection analysis above, and the law will be upheld.

Taking

CCTC may also argue that the regulation affects a taking of private property. The 5th Amendment provides that the federal government shall not take private property for public use without paying just compensation. The takings clause can apply both to physical takings as well as regulatory takings which deny owners the economic use of their property.

CCTC will argue that the law affects a taking, because it requires them to put in seat belts. Specifically, it will argue that Regulation B is [a] governmental act which requires them to pay money to install seat belts, thus decreasing the value of their overall business enterprise.

However, Congress will argue that in no way does the regulation deprive CCTC of all economically viable uses of its buses. To the contrary, it is simply making the buses

safer for their continued commercial use in which CCTC was making profits. And although the takings clause does apply to regulations, it typically applies to those regulations which limit the use of the land. In this case, the regulation only requires that CCTC install seat belts in its buses, which would in no way limit the use of the buses.

Conclusion

As such, Regulation B will be upheld under the US Constitution.

3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed?

Standing

Again, the 3 standing requirements must be met. The State Highway Department (SHD) can show that Regulation C injures it because the state will lose federal funding if it does not implement adequate measures for providing seat belts. Causation is met, since the funding will be cut due to the requirements of Regulation C. And finally, redressability is met, because a successful constitutional challenge will overturn the law, meaning SHD no longer has to comply.

Intergovernmental immunity

Here, a challenge based on violations of intergovernmental immunity might succeed. As stated above, the federal government cannot commandeer state executive officers or state legislatures to ensure enforcement of federal laws. Specifically, the federal government cannot force the states to enact laws or regulations.

In this case, Regulation C punishes states which fail to enact adequate measures under the federal scheme. The SHD will argue that this violates intergovernmental immunity,

since the federal government is requiring states to regulate and punishing them if they don't.

In response, Congress will argue that this is perfectly acceptable under its taxing and spending power. As indicated above, this is a successful argument, and a challenge based on intergovernmental immunity will fail.

The power to tax and spend

Article I of the Constitution grants Congress the power to tax and spend to ensure a common defense and provide for the general welfare. This essentially allows Congress to spend money for any purpose which is related to the general welfare of the United States. Of particular importance, under the Spending Clause, Congress may "attach strings" to congressional grants of money to require [that] States act in a certain way. Thus, although Congress may have no power to regulate a certain area, it can require states to regulate as a condition of receipt of federal funds.

In this case, Congress cannot constitutionally require states to legislate on the subject of commercial drivers' licenses. However, under the spending clause, it can incentivize [sic] states to so regulate by conditioning the receipt of federal funds on enacting proper measures under the federal scheme. Here, the facts indicate that Congress has indicated that states will forfeit 10% of federal funds for highway conditions if they fail to enact measures to ensure compliance with Congress' regulation of seat belts on buses. The SHD will argue that Congress has no power to require states to regulate, and thus this scheme is unconstitutional. However, as discussed above, Congress can properly condition receipt of federal funds on state compliance with federal regulations, and thus Regulation C is constitutional.

Conclusion

As such, Regulation C is constitutional.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2010 California Bar Examination and two selected answers to each question.

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Question 5

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.

2. A partial taking? Discuss.

Answer A to Question 5

1. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a total taking?

The Fifth Amendment of the Constitution prohibits the government from taking private property for public use without just compensation.

Taking

There are two types of takings: permanent physical occupation and regulatory takings. The former is not at issue because Paula's complaint contends the County is liable for a regulatory taking.

A regulatory taking is considered a "per se" taking if it deprives the owner of 100% of all economic viable use of the owner's property. Here, Paula owned 100 acres and 10 of those acres bordered a small lake in which she [was] seeking to develop to construct 30 homes thereon. However, the County denied Paula's application to develop the 10 acres on the basis that the 10 acres constituted protected wetlands. Thus, Paula owned 100 acres but only 10 of it was denied development. Because the County did not deny development of the entire 100 acres owned by Paula (rather, the County only denied development of 10 acres), Paula was not deprived 100% of all economically viable use of her property.

Denominator Problem

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paul lacks a vested right to develop.

Vested Rights

A private property owner has a vested right to develop when a government body has specifically approved, by individualized action, the development of a particular piece of property.

Here, although Paula has expended a substantial amount of expenditures in determining the feasibility for developing the 10 acres, she nonetheless has no "vested" right to develop because she lacks the requisite government approval. There are no facts indicating the government issued Paula any type of building permit or other individualized action specific to her property that would vest her rights to develop. Thus, because she has no vested right to develop the 10 acres, the value of the 10 acres is tantamount to its value as undeveloped wetlands, i.e., $200,000.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a total taking has not occurred is correct because Paula was not deprived of 100% of all economic viable use of the owner's property.

2. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a partial taking?

Taking

A regulatory taking does not have to be a "per se" taking to implicate the 5th Amendment. A regulatory taking is also considered a "taking" under the 5th Amendment if it does not pass the Penn Central Balancing Test. In the Penn Central case, the U.S. Supreme Court analyzed three factors in determining whether a "taking" has occurred: (1) the nature of the government action, (2) the private property owner's reasonable investment-backed expectations, and (3) the level of diminution in the owner's private property value.

1. Nature of Government Action

Here, a state law was enacted to protect wetlands to protect certain endangered species. It was not enacted to punish Paula. And it's probably safe to presume the state law is also applicable [to] other properties alongside the lake and that it was not similar in form to that of "spot zoning" – where the government singles out a piece of property and changes its use in a way that's distinct from other adjacent properties. Because the nature of the state law was to protect endangered species and not to single out Paula's property, this factor weighs in favor of the trial court's decision that a partial taking has not occurred.

2. Private Property Owner's Reasonable Investment-backed Expectations

Last year, Paula expended a "substantial amount" of money in determining the economic feasibility of developing 10 acres of the parcel. Thus, she invested a considerable amount in her expectation to develop eth property. The County may argue, however, that Paula's level of investment was not reasonable under the circumstances because she had no "vested right" (see heading Vested Rights under question 1 above) to develop her 10 acres. The County would argue she should not have spent a substantial amount at a point in time when the probability of her being able to develop her property was so speculative.

However, the facts state Paula did the economic feasibility study "in compliance" with County regulations. Thus, Paula has a strong argument that her investment was reasonable because the County required her to do an economic feasibility study. On balance, Paula's expenditure of a "substantial amount" was probably reasonable under the circumstances.

3. Level of Diminution in Value

Here, the parties stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not. Thus, Paula would likely argue that the level of diminution in the value of her property is great because of the difference in what her

property would be worth if the state did not prohibit her from developing her property. However, the $4,000,000 figure is a "would be" value and not an "as is" value. The court may weigh this factor differently if it was the case that Paula owned property worth $4,000,000 and, due to a state law, it is now worth $200,000. However, that is not the case. Here, Paula's property is worth $200,000 as it sits right now, undeveloped. Because Paula's property has not diminished in value, this factor weighs heavily in favor of the trial court's decision that a partial taking has not occurred.

Denominator Problem

A court's review of the trial court's decision that a partial taking has not occurred would have to grapple with the same denominator issue (as analyzed above and repeated below) as they would regarding the trial court's decision that a total taking has occurred.

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paula lacks a vested right to develop.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a partial taking has not occurred is correct because the factors under the Penn Central balancing test weigh in favor of the trial court's decision.

Answer B to Question 5

1. DID THE TRIAL COURT CORRECTLY RULE THAT COUNTY'S DENIAL OF PAULA'S DEVELOPMENT APPLICATION DID NOT CONSTITUTE:

A. A TOTAL TAKING?

TAKINGS CLAUSE

The 5th Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. Through the Doctrine of Selective Incorporation, this is made applicable to the states via the Due Process Clause of the 14th Amendment. In this case since the County is a state municipality Paula will challenge under the 14th Amendment clause.

A taking can either be physical, where the government physically occupies the land, or a taking can be regulatory, where a government regulation renders the land economically unviable. In either case, if there is indeed a "taking" and the taking is for public use the government will be required to pay just compensation.

PHYSICAL TAKING

As mentioned above, a physical taking occurs when the government physically occupies the land either in part or in total. If there is actually any "physical" occupation in any way, it will constitute an official taking. If the taking is for public use the government will be required to pay just compensation.

In this case the only governmental action is a regulatory statute preventing Paula from developing the 10 acres. There is no actual physical occupation, but rather a regulation affecting Paula's use.

Therefore, there is no physical taking.

REGULATORY TAKING-TOTAL

A regulatory taking occurs when a government regulation renders property economically unviable. For there to be a taking under the takings clause through, and unlike a physical taking, the regulatory taking must leave no economically viable use of the property.

Here the court concluded that there was no total regulatory taking of Paula's property when they rejected her application. Let's explore this further to see if indeed there was a total taking.

Paula owns 100 acres of land and had done so for many years. Paula has farmed the land, but the facts don't state how much of the land she actually farms. Presumably Paul also lives on the farm as well.

In this particular case, Paula is seeking to build 30 homes on 10 acres of her land sitting next to a small lake. The government is claiming that due to a state law the 10 acres is protected land and Paula is not able to build. It should be immediately noted that only 10 of Paula's 100 acres is being negatively affected by the government's regulation. Paula is still free to use the remaining 90 acres as she sees fit. She can continue to farm it, or even build the 30 homes on any of those remaining 90 acres. It's presumed that Paula's intentions in building the homes is for business purposes. Moreover, since the 10 acres abuts a small lake, Paula will likely be able to make a bigger profit on selling the homes as she'll be able to advertise that they are "waterfront property". The facts don't specifically state what type of condition the remaining 90 acres is. 90 acres is a lot of land and perhaps there is another equally viable place for her to build the 30 homes.

However, the government regulation is not a total taking here since there appears to be a lot of economically viable use of the land remaining. First, Paula has possession and can make use of 90 of the 100 acres presumably as she sees fit. The government regulation only affects 10% of Paula's land. Paula still has a lot of remaining of which [it] has tremendous economical use. Paula can continue farming the 90 acres of land,

and even perhaps the 10 acres in question. Additionally, she may even be able to move her development plans to those 90 acres as well. In this case the government regulation may not even affect her that much at all.

Since the regulation only affects 10% of the land, and there is still considerable economical use of the remaining 90 acres of land, the government regulation is not a total taking.

B. A PARTIAL TAKING

PARTIAL REGULATORY TAKING

A partial regulatory taking occurs where the government regulation affects some economic use of the land, but there still remains a sufficient amount of economic use.

Here, Paula will argue that by preventing her from building the 30 homes on the 10 acres the government regulation is rendering those 10 acres economically unviable. She will further argue that while in relation to the total 100 acres 10 acres is only 10%, but in relation to the 10 acres in question, the government regulation is preventing her from making any economic use of the land. By not allowing Paula to build the 30 homes on the 10 acres the government is preventing her from making a profit from her use of the land. The state law in question requires the 10 acres to be undeveloped, meaning Paula cannot build any structures on the land, or make any profitable use of it.

INVESTMENT BACKED OPPORTUNITIES

Paula will argue that the government regulation destroys her investment backed opportunity since she's invested a substantial amount of money in determining the economic feasibility of developing the 10 acres. While the facts don't say, Paula has perhaps entered into contracts with prospective buyers of the homes and/or even contractors to build the land. Further, Paula will argue that she complied with County regulations the entire step of the way in her pursuit of this endeavor.

The government will argue that she should not have invested that much money before researching if her prospective use was legal. In doing so she created her own detriment and will suffer the burdens of it.

BALANCE OF INTEREST

Finally, the court will likely balance the interest of both parties to determine if there is a substantial partial regulatory taking of which compensation should be paid.

Here, Paula's interests are obvious. She wants to be able to build 30 homes on the 10 acres of land so she can make a profit on them. Also Paula can argue that by building the homes she's providing adequate housing for the public. Alternatively, the government wants to protect endangered species from becoming extinct. Weighing the two factors, given the fact the Paula's interests are purely pecuniary, the government will likely prevail in this battle. Their interest protects more of the public at large while Paula's merely protects a few, if any.

In conclusion there appears to be [not] any total or partial taking. However, in the event the court finds that there was, the taking must be for public use.

PUBLIC USE

The government may only take land if is for public use. Here, the government regulation is to preserve endangered species. This is a benefit for the public at large since it preserves the wildlife for all to enjoy.

JUST COMPENSATION

Finally, in the event that there is a taking for public use, the government must pay just compensation. This is the market value of the land to the owner at the time of the taking.

In this case, if there is a taking the government will have to pay Paula $4,000,000 since the taking prevents her from developing her land as she wants to.

STATE LAW INVALID

Paula may try to argue that the state law guiding the government's decision is invalid.

10th AMENDMENT & PREEMPTION

Under the 10th Amendment, powers not reserved to the federal government are reserved to the states.

Here the state law protects certain wetland and endangered species. Paula will argue that the state law is preempted by federal law since under the federal property power, the federal government is in control of preserving the land.

In conclusion, the court did not err in ruling that the County's denial of Paula's development application did not constitute a total or partial taking.

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ESSAY QUESTIONS AND SELECTED ANSWERS
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Question 2

Out of a sense of patriotism, Charles enlisted in the United States Army. Charles had risen to the rank of Captain.

Shortly after that promotion, after serious reflection, Charles began to rethink his previous religious, philosophical, and political views. He modified the religious preference he listed on his Army records from "Christian" to "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You." Charles concluded that his belief did not prohibit his assignment to duty in Country A, but it did preclude his assignment to duty in Country B.

Federal law requires military personnel to accept any assignment to duty, but when Charles was assigned to duty in Country B, he declined to go, and was charged with refusing to deploy. Since the charges were brought, Charles has frequently criticized American involvement in Country B.

Charles wishes to raise a defense against the refusal to deploy charge based solely on (1) the Free Exercise Clause and (2) the Establishment Clause of the First Amendment to the United States Constitution.

What is the likelihood of Charles prevailing? Discuss.

Answer A to Question 2

The First Amendment prohibits the federal government from interfering with the free exercise of religion, and it also prohibits the federal government from establishing a religion. In general, because the First Amendment protections are so important, laws are subject to strict scrutiny, which means they must be necessary to achieve a compelling state interest. Additionally, there must be no less restrictive alternative.

(1) FREE EXERCISE OF RELIGION

MUST THE RELIGION PROTECTED BE A RECOGNIZED RELIGION?

As indicated above, the federal government cannot enact laws that interfere with the free exercise of religion. A necessary threshold question, therefore, is which religions are protected by the First Amendment Free Exercise Clause. The Supreme Court has indicated that the religion need not be a generally accepted or recognized religion, so long as the individual who practices the religion has a genuine belief in the religion.

In this case, Charles' new religion, "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You," is not a generally accepted or recognized religion. However, no facts indicate that Charles does not have a genuine belief in this religion. As indicated in the facts, he had rethought his views, which gives credence to the fact that Charles genuinely considered and believes in his new religion.

Accordingly, Charles' new religion qualifies as one which is subject to First Amendment limitations.

FREE EXERCISE OF RELIGION V. LAWS OF GENERAL APPLICABILITY

The Supreme Court has indicated that a law will be struck down as violative of a person's free exercise of religion only in the event that the law was enacted with the

purpose of interfering with the person's religion, and the law in fact does so interfere. Thus, laws of general applicability will not be struck down under the Free Exercise Clause. A good example of this is where the U.S. Government prevents mind-altering substances (i.e., drugs). In Native American religions, the Native Americans use peyote, a mind-altering substance, in the exercise of its religion. However, because the Supreme Court determined the law against drugs was one of general applicability and not directed at inhibiting Native Americans from practicing their religion, the law was upheld. Notably, two exceptions have been found: 1) The Amish do not have to send their children to school until age 16; and 2) people may still receive unemployment benefits if they quit a job due to religious beliefs. Neither exception is applicable here.

Rather, in this case, as is similar to the Native American peyote example, it appears the federal law is one of general applicability. Specifically, federal law requires military personnel to "accept any assignment to duty." Therefore, because the law was not enacted with the intent to interfere with religion [sic].

The law may, however, actually interfere with Charles' exercise of religion. Because he must accept any assignment to duty, and because he was charged with refusing to deploy, he therefore cannot exercise his religion which necessitates he refuse assignment to Country B. However, as indicated above, because the law was not enacted with the purpose of interfering with Charles' religion, it is one of general applicability and will be upheld.

NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST

Even if the federal law to "accept any assignment to duty" was enacted with the intent to interfere with religion, it may still pass muster under the Free Exercise Clause if it is necessary to achieve a compelling state interest. Of note, under this strict scrutiny standard, the burden is on the government to so prove the law passes muster.

Here, the law is necessary, as the U.S. military must maintain order with respect to its troops. There are hundreds of thousands of people in the U.S. military, and for

efficiency and administrative purposes alone, it would not make sense to allow individual military personnel to "pick and choose" where they are assigned. Indeed, the U.S. might have to forego a presence in dangerous areas if such was the case, as some military personnel may decline to go to war-torn parts of the world. Moreover, it is important that the military retain obedience from its troops and reduce tension, given the gravity of their missions and likelihood that American troops may be killed. Indeed, once Charles was assigned to duty in Country B, he frequently criticized American involvement in Country B, thereby disrupting efficiency and perhaps causing others to lose faith in the mission. Accordingly, the law is necessary.

There is also a compelling state interest - the protection and defense of the United States. Because national security and defense is such a profound interest to the United States, it qualifies as "compelling."

Moreover, there does not appear to be any less restrictive alternative. For example, the law could not allow some military personnel to accept some duties and reject others, while maintaining that others must accept any assignment (as such a law would be subject to equal protection claims).

Accordingly, because the law is necessary to achieve a compelling state interest, as maintaining order in troops in order to accomplish national security and defense, the law is valid. The government meets its burden in so proving.

Thus, given all of the above, Charles cannot successfully raise a defense based solely on the Free Exercise Clause.

(2) ESTABLISHMENT CLAUSE

As indicated above, the First Amendment prohibits the federal government from establishing a religion.

APPROVING ONE SECT OF RELIGION OVER ANOTHER

In the rare event that the U.S. government might establish one sect of religion over another, said law would be subject to strict scrutiny, as described above. Here, it does not appear that the federal government is approving one sect over another, as one must accept assignment to duty regardless of religious sect.

Therefore, the government is not approving one sect of religion over another.

LEMON TEST

The basic test the Supreme Court uses in determining whether the federal government has established a religion is the Lemon test, which is comprised of three inquiries: 1) was the law enacted for a secular purpose; 2) does the primary effect neither inhibit or advance religion; and 3) is there no excessive entanglement by the government? If all three inquiries can be answered affirmatively, the law passes the Lemon test, and accordingly, the Establishment Clause is not violated.

A) SECULAR PURPOSE?

As indicated above, the first inquiry is whether the law was enacted for a secular purpose. Here, the law that military personnel must accept any assignment to duty does not reference religion whatsoever. Moreover, it appears the purpose of the law was to maintain order and faith in the military missions, and not to establish a religion.

Accordingly, there is a secular purpose behind the law.

B) PRIMARY EFFECT?

It must be decided whether the primary effect is to advance or inhibit religion. The effect of the law is that a person in the military will have to accept assignment regardless of his religious preferences, and without taking said preferences into account. Thus, it cannot be said that the law advances or inhibits religion, as the fact that one has a religious leaning toward a particular assignment in a particular country is inconsequential as to whether the person is eventually assigned to a particular country.

Rather, the primary effect of the law is to maintain order and administrative military efficiency.

Accordingly, the primary effect of the law neither advances or inhibits religion.

C) EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION?

In order for a law to be valid under the Lemon test, there must not be excessive government entanglement with religion.

This inquiry may be Charles' best argument that the law should fail the Lemon test. Specifically, he can argue that the Army records list a religious preference. Accordingly, because he listed his religious preference, the military was on notice that his beliefs under his religion may conflict with assignment into particular countries.

However, the government can argue that any preference that Charles indicated has little to do with where he is eventually assigned to duty. Rather, military personnel are assigned where they are needed; where ongoing conflicts arise; etc. Thus, the law that a person must accept any assignment to duty, even if the military knows your religious preference/beliefs, does not excessively entangle with religion.

Accordingly, there is no excessive government entanglement with religion.

Thus, because the Lemon test is not satisfied, a court will likely find that the Establishment Clause has not been violated.

Charles will not succeed under either the Free Exercise Clause or the Establishment Clause.

Answer B to Question 2

1. Free Exercise Clause

Under the First Amendment's Free Exercise Clause, the federal government may not prohibit the free exercise of any religion.

Are Charles's beliefs religious?

The first question is whether Charles's nontraditional belief system is religious. A religion need not be a popular or generally recognized system of belief, like Christianity, but it must be religious rather than political or philosophical in nature. There is no single test for determining whether a belief system is religious, but courts look to factors such as whether the system has indicia of traditional religious beliefs like dealing with questions about the existence and nature of a higher power, life after death, holidays, rituals, and moral teachings for living one's day-to-day life.

Here, Charles's belief system seems to lack any of these traditional indicia of religious beliefs. The single belief that his religion espouses is one of noninterference, but that gives only limited guidance on how to live one's day-to-day life. There is no indication of beliefs in a god or gods, views on life after death, holidays, or rituals. Moreover, the fact that Charles's beliefs here are tied closely to the situation in particular countries (rather than, for example, a belief in nonaggression to all) and that Charles has been criticizing U.S. policy on this basis suggests that the beliefs are more political than religious.

A court likely would conclude that Charles's belief system is only political or philosophical, not religious, and therefore his Free Exercise Clause claim will fail on this basis alone.

Genuineness

Religious beliefs also must be genuinely held to qualify for First Amendment protection. Here, there does not seem to be any question that Charles genuinely believes in his principle of noninterference, and thus this requirement would be met.

Religious accommodation

The Free Exercise Clause generally does not require accommodation of religious beliefs. The government may require a person to comply with neutral laws of general applicability even if doing so violates that person's genuinely held religious beliefs.

Here, the federal law requiring military personnel to accept any assignment is a neutral law of general applicability. It does not target only the religious or single out one religion for disfavored treatment, and there is no indication that it was adopted specifically to disadvantage religious persons. To the contrary, it probably was adopted for purely secular reasons, to prevent soldiers from undermining military planning by refusing to serve when deployed.

Even if it were not a neutral law of general applicability, the statute would be lawful if it satisfied strict scrutiny -- that it was necessary to achieve a compelling governmental interest and the least restrictive means of doing so. Although strict scrutiny is a demanding standard and the burden of proof is on the government, this law has a good chance of surviving this standard. The federal government has a compelling interest in military readiness and discipline among the troops; indeed, raising an army is one of the federal government's most important functions. The law is necessary to achieve that interest because if soldiers could refuse deployments, it would become difficult if not impossible to plan troop movements adequately and to keep units that trained together intact for battlefield activities. Even allowing a few religious exemptions could severely complicate these efforts if, for example, the objecting soldier had a unique role. And here the fact that Charles is a Captain rather than a low-level soldier suggests that there would be disruption in the chain of command if the unit were deployed without him. Therefore, the law should survive strict scrutiny even if that were the standard.

(I should note that Charles might have a claim under the Religious Freedom Restoration Act, which subjects all Free Exercise Claims to strict scrutiny. Although the law was struck down as applied to States, most courts continue to find it valid as applied to the

federal government. This is beyond the scope of the question, but as explained above Charles likely loses even under strict scrutiny.)

Therefore, the government can require Charles to comply with this law even if doing so violates his religious beliefs. Charles is likely to lose on this basis alone as well.

Military exception

Finally, another barrier to Charles's claim is the fact that he voluntarily enrolled in the army. Soldiers give up many of their constitutional rights, to the extent that they are inconsistent with important military functions. And as noted above the military has a strong interest in enforcing its requirement that soldiers accept all assignments. While conscientious objectors -- those who are religiously or philosophically opposed to all use of military force -- have traditionally been exempted from military service entirely, those who object to some but not all wars have never been exempted. And because Charles enrolled voluntarily rather than through the draft, his claim to an exemption would be particularly weak.

Conclusion

Charles will not prevail on his Free Exercise Clause claim.

2. Establishment Clause

The Establishment Clause prohibits the federal government from establishing an official religion or preferring religion over irreligion. A federal statute passes muster under this clause if it (1) has a secular purpose, (2) does not have the primary effect of promoting religion, and (3) does not excessively entangle the government in religious or ecclesiastical matters.

Secular purpose

As noted above, the federal statue has a valid secular purpose of promoting military readiness and troop discipline. Because this has nothing to do with religion, Charles will not prevail under this test.

Secular effect

The primary effect of this statute also does not seem to be promoting religion. The primary effect is to keep military units intact no matter where they are deployed. Religious and irreligious soldiers are treated the same way regardless of their belief. In fact, if the rule was to the contrary and religious soldiers could refuse particular deployments, that would at least raise serious Establishment Clause questions about whether the government was promoting particular religious beliefs (although most religious-accommodation statutes have been upheld against Establishment Clause challenges). Therefore, Charles is likely to lose under this test too.

Excessive entanglement

There is no real risk of entanglement between the government and religion under the statute. The statute does not require the government to make any quintessentially religious determinations because it applies equally to all regardless of religion or belief. Again, the rule Charles seeks would raise more difficult questions than this one does if it required the government to decide whether a person had a genuine religious belief precluding a particular deployment. Therefore, Charles will lose under this test too.

Conclusion

Charles will not prevail on his Establishment Clause challenge.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

City recently opened a new central bus station.

Within the central bus station, City has provided a large bulletin board that is available for free posting of documents. City requires that all free-posted documents be in both English and Spanish because City's population is about equally divided between English- and Spanish-speaking people.

City refused to allow the America for Americans Organization (AAO) to use the bulletin board because AAO sought to post a flyer describing itself in English only. The flyer stated that AAO's primary goal is the restriction of immigration. The flyer also advised of the time and place of meetings and solicited memberships at $10 each.

Does City's refusal to allow AAO to use the bulletin board violate the rights of AAO's members under the First Amendment to the U.S. Constitution? Discuss.

Question 2 Answer A

Free Speech

Under the 1st Amendment as applied to the states via the 14th A, all persons have the right to free speech. While this right is not absolute, there are only certain instances when the government may infringe upon this right.

Strict Scrutiny

America for Americans Organization (AAO) will argue that strict scrutiny should apply. Normally when a government actor limits or regulates speech based on its content, it will have to survive strict scrutiny analysis. Under this, a law will only upheld if it is necessary to achieve a compelling government interest.

AAO will claim that the city is a government actor so the protections of the 1st A will apply. Further, they will say that the law regulates the content of their speech—that it must include parts in Spanish. The court will probably not agree because it is not regulating what they say, rather how they say it. Therefore, it will take it out of strict scrutiny analysis.

Time, Place, & Manner Restrictions

One way a government may validly regulate speech is by controlling the time, place, and manner of the speech. These regulations are put under less scrutiny because they are not limiting what the people can say but rather how and where they can say it.

Public Forum

A public form is a place that is traditionally open to the public and allows somewhat unrestricted speech. These include parks, sidewalks, open fields. The bus station bulletin boards are likely not considered a public forum.

Limited Public Forum

Limited public forums are not traditionally open to public speech, but the government opens them up to the public. Therefore, they receive the treatment of a public forum while open.

AAO will claim this is a limited forum because the boards, while not traditionally open to public speech, are open here to post documents for free. The court will likely agree.

While open to public speech, a limited public forum may only regulate the time, place, and manner of speech if:

1. Content neutral
2. Alternative channels of communication are available, and
3. Regulations are narrowly tailored to achieve a significant government interest.

1. Content Neutral

As mentioned, AAO will claim that the requirement that all posted documents be in both English and Spanish is a regulation based on the content of the speech. The city will claim it is content neutral because it doesn't matter exactly what you say, just how you say it. City will claim this regulates the manner of the speech.

AAO may counter by saying that since the organization has a primary goal of restricting immigration, the regulation goes to the content of their speech because they're speaking out and trying to make it clear that everyone in America should speak/read English. The court may agree with this point but will likely side with the city because the overall requirement that docs be in English and Spanish is not regulating content of the docs but rather the manner in which their speech is conveyed.

Therefore, the regulation is likely content neutral.

2. Alternative Channels

City will also likely show that AAO has other channels of communication available. They can post on other boards or directly hand out fliers. The English/Spanish requirement appears to only apply to this bus station's bulletin board.

3. Narrowly Tailored to Further Significant Interest

City will also argue that this final element is satisfied. They will say they have a significant interest in communicating with and including the Spanish speaking population, which make up about ½ of the people.

Because it is necessary to communicate with your residents, the court may agree with City that this is a significant interest. AAO may argue that City may have a significant interest in relaying government communications, but its interest shouldn't expand to private communications. Further, the burden it would impose on everyone to translate communications into Spanish would be immense, AAO will say.

Even if the court finds the interest in communicating significant, AAO will say this regulation is not narrowly tailored to it. They'll say they could achieve this in other , less restrictive ways, like making communications around heavily populated Spanish speaking areas be in both English/Spanish.

Narrowly tailored means a tight fit. However, because this is a central bus station, it is likely that many Spanish speaking people use it and therefore need the translation.

Therefore, so long as the court finds this regulation is content neutral and is narrowly tailored to a significant gov interest, it will likely be able to refuse to post AAO's flyer for not being in Spanish.

NonPublic Forum

The city may also try to argue this is a nonpublic forum, where speech has traditionally been able to be severely limited. Such places include military bases, airports, and gov buildings. The court has also found a bus advertising signs to be nonpublic.

City will argue this isn't like the inside of a bus where people cannot escape looking at the ads because this is at the station where they could just leave. Court will agree.

Gov can regulate speech in nonpublic forums [as] long as it is reasonable and viewpoint neutral.

Here, the law is likely reasonable due to the ½ Spanish speaking population. Also it is viewpoint neutral because it doesn't discrim on only one side of a viewpoint. It applies to all communications.

Commercial

City may also try to argue this is commercial speech so they can regulate more. That speech can be regulated if not false/misleading, directly advances substantial gov interest, and narrowly tailored into it.

However, even though it seeks membership, City denied it because not in Spanish too.

QUESTION 2
Answer B

Justiciability: In order for a matter to be justiciable there must be standing, the case must be ripe, and not moot. Here, AAO has not filed suit yet, however, it must have standing to raise any objections to the city's requirements.

Standing: standing requires that there be an injury in fact, causation and redressability. Here, AAO is injured as it cannot post its flyers in English only, without potential reprimand. Moreover, the city requirement directly causes its injury, and a court decision in favor of AAO would remedy it. However, an organization will not have standing unless 1) its members have individual standing 2) the interest is germane to the purpose of the organization, and 3) neither the remedy nor the claim would require individual member participation. Here, an individual member who would want to post only flyers in English would have standing, the interest is germane to the purpose of the organization as its primary goal is to restrict immigration and therefore, posting flyers in Spanish would be against its interest and finally, neither a claim or remedy by AAO would require individual member participation.

Ripeness: a court will not award pre-enforcement review for purposes of an advisory opinion. Here, the city has already implemented these requirements. It is unclear whether it is an actual ordinance, regulation or law, but assuming that there are reprimands for violating the city requirements, then the issue is ripe, as AAO would be violating the city requirements if it only posted the flyer in English.

Mootness: there must be a dispute at all times of the litigation. Here, if the city removed its requirement during the litigation the matter would be moot. However, because the city would be free to apply the restriction again whenever it wants there [sic] matter is not moot.

Government conduct: in order for there to be a constitutional violation, there must be government conduct. Here, the city is implementing the requirement; therefore there is government conduct.

First Amendment: the government may not restrict an individual's or organization's freedom of speech unless the speech is not protected or less protected.

Content-Based Restrictions: if a law restricts speech based on its content, whereby it is based on the subject matter or viewpoint of the speech, strict scrutiny review applies. The government must show that the law is necessary to achieve a compelling state interest and it must be the least restrictive means of accomplishing its purpose. Here, AAO will argue that the law is content-based, because it is only allowing flyers that are posted in Spanish and English, and therefore, it is restricting the AAO's message against immigration which would require only posting flyers in English, as posting flyers in Spanish would communicate to the Hispanic community, which is an immigrant population. This is a very far stretched argument. It does not appear that the restriction is based on the subject matter or viewpoint of the speech. AAO could post the same flyer in Spanish stating that its primary purpose is to restrict immigration and advise of the time and place of meetings. Therefore, this argument will fail.

Content-Neutral Restrictions: if a law is content-neutral, then the government must show that the law is substantially related to an important government purpose and is narrowly tailored. As discussed above, the restriction is not content-based, rather, it is content-neutral. The city will argue that the restriction is substantially related to the purpose of communicating to all individuals in its population. The city's population is about equally divided between English and Spanish speaking people, and therefore it is has an important purpose of making sure that messages posted on the board for free will be communicated to all its population. Moreover, the city has narrowly tailored the restriction by not requiring that people post the flyers in multiple languages, but only in two. A court will likely uphold the restriction.

Prior Restraint: if a law restricts speech prior to its communication there is a prior restraint and strict scrutiny applies. The law must be reasonably, narrowly tailored, and definite. Moreover, the government must seek a prompt injunction, and there must be a prompt determination of the validity of the law. Here, AAO will argue that this restriction is a prior restraint on speech. It will argue that because it is required to post flyers in two different languages and expend the money to have the English flyer translated into Spanish it is a prior restraint on speech. As discussed above, however, the restriction is not a prior restraint on speech. The restriction is allowing speech; however, it is requiring that it be posted in two different languages. This is not a prior restraint because it is not prohibiting speech.

Vagueness: a restriction is unconstitutional if it is vague and a reasonable person could not understand the type of speech that is being regulated. Here, the restriction is not vague; it is requiring that all free-posted documents be in both English and Spanish. Therefore, the restriction is valid.

Overbroad: the restriction is unconstitutional if it restricts more speech than is constitutionally allowed. Here, the restriction is not overbroad because it is only requiring free-posted documents to be in both English and Spanish; therefore, it is valid.

Symbolic Speech: the government may restrict symbolic speech when it is narrowly tailored to achieve an important state interest, and it is not directed at the suppression of speech. The burden of proof is on the government. Here, posting flyers will be deemed symbolic speech as they communicate a message. As discussed above, the government will argue that it has an important state interest because it want its entire population to understand the flyers that are posted. The restriction is narrowly tailored as it is only requiring the flyers to be in the languages that are dominant in the population, and the restriction is not directed at the suppression of speech. Rather, it provides the opportunity of communicating to the entire population. AAO will argue that the speech is directed at the suppression of speech, because it is directed at the suppression of AAO'S message against

immigration. However, this argument will likely fail as AAO can communicate this same message of its purpose in restricting immigration in Spanish; therefore, the restriction would not suppress AAO's message.

Public Forum: public forums are areas which the constitution requires that the government open to speech. These areas typically includes [sic] parks and sidewalks. Here, the restriction is taking place within the central bus station, wherein the city has provided a large bulletin board that is available for free posting of documents. Because the bulletin board is within the central bus station which is likely government owned this forum will not be deemed a public forum, as it is not a constitutionally required forum for the government to open up to speech. Nevertheless, if it were to be considered a public forum the following analysis would apply:

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the language.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

Designated/Limited Public Forum: this is a forum which the government is not required to open up to speech, but it has chosen to open up to speech regardless. The same analysis as the public forum applies as to designated public forums. Content-based speech must pass strict scrutiny, while in content-neutral speech the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication.

It is likely that the bulletin board within the central bus station will be considered a designated public forum. The government is not required to place a bulletin board in the bus station for organizations and individuals to post flyers, nor is it required to open the central bus station to speech at all; nevertheless it has chosen to do so.

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the speech. AAO can get the same message across in both languages.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

Nonpublic forum: A nonpublic forum is a forum wherein the government may constitutionally restrict speech. These include military bases, sidewalks next to a post office, ad space on buses, and solicitation for money in airports. The restriction, however, must be viewpoint neutral and must pass the rational basis test. Here, AAO would have to argue that the restriction is not rationally related to a legitimate government interest.

The city will argue that the central bus station is a nonpublic forum and that the government must not open it to speech. Although the central bus station is likely to be deemed a nonpublic forum, the city has changed the status of the forum by providing a large bulletin board and making it available for people to post their flyers and messages. By doing so the city transformed the public forum to a nonpublic forum. However, the city may also argue that because AAO is soliciting money ($10 for its membership) that it is a nonpublic forum as it can restrict speech of solicitation for money in bus stations as it can in airport. However, this argument is unlikely to apply since AAO is not directly soliciting money by standing at the central bus station and asking for money, rather, only if individuals show up at the time and place of the meeting would it ask for membership fees. At that point, the government would be unable to regulated [sic] the speech. Nevertheless, assuming that the court would deem that this is a nonpublic forum, which it will not, the following analysis would apply.

AAO would argue that the law is not rationally related to a legitimate purpose. However, the city can easily counter this by arguing that its purpose is to have its entire population be able to read the flyers. Therefore, AAO's argument will fail. AAO will then argue that the restriction is not viewpoint neutral as it restricts only anti-immigration speech and not pro-immigration speech. This argument will again fail, as AAO can post the same message of anti-immigration in both languages and it would not deter its purpose. Therefore, AAO would not prevail under this argument.

Freedom of Association: the government may not punish individuals for joining any association unless the individuals knows of the 1) unlawful purpose of the association, 2) the individual actively participates, and 3) the individual intends to advance the illegal purpose. Here, AAO's primary goal is the restriction of immigration. This is not an unlawful purpose; therefore, the government may not punish anyone for their freedom to associate with the AAO. AAO will argue that it is violating its freedom of association by restricting its message. It will argue that the requirement is unconstitutional because the AAO is an intimate association and it would chill its expressive activities. However, this argument is unlikely to prevail as argued above, because AAO's message of anti-immigration can be communicated in multiple languages and would not violate its freedom of association rights.

Equal Protection/Substantive Due Process: AAO would also have potential argument under the equal protection and substantive due process clause of the 14th Amendment. The equal protection requires that the government afford its citizens and organization equal protections of the law. If the law does not discriminate against a suspect or quasi-suspect.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 2

The Legislature of State X recently completed a study on the behavior of teenagers residing in the state that revealed a connection between an increase in the school dropout rate and an increase in the level of criminal activity. The study indicated that the connection was most pronounced among boys ages 15 to 18 years old.

Troubled by what it perceived as a breakdown in personal responsibility and social order among its teenagers, State X's Legislature has enacted a statute creating the State Forestry Corps ("Corps"). The Corps drafts boys ages 15 to 18 who have dropped out of school. It sends them to camps located on public lands administered by the State Forest Service. It also provides them with a comprehensive education leading to a high school diploma. To defray a portion of the costs, the Corps requires the boys to work on reforestation projects for a few hours each day.

Pete, age 15, has dropped out of school and, consequently, has been drafted into the Corps. Pete and his parents have filed a declaratory relief action attacking the validity of the statute under three provisions of the United States Constitution: (1) the Thirteenth Amendment's Involuntary Servitude Clause; (2) the Fourteenth Amendment's Due Process Clause; and (3) the Fourteenth Amendment's Equal Protection Clause.

What arguments could Pete or his parents reasonably make in support of their action, and how should the court rule on each? Discuss.

SELECTED ANSWER A

State Action

In order to prevail in their constitutional declaratory action under the 13th Amendment, 14th Amendment due process, and 14th Amendment equal protection against State X, Pete and his parents will need to show state action by State X in passing and enforcing the law against them.

The law in question regarding the compulsory forestry school was enacted by State X law and is applicable to Pete. Because the law was passed by State X, its procuring the law and enforcing it will constitute state action against Pete because he stands to be injured as well as Pete's parents so long as they can prove standing.

Standing

The constitution requires that each plaintiff have standing to seek any type of relief under its provisions. It requires (1) actual or certainly imminent injury in fact, (2) causation, and (3) redressability through judicial remedies.

Here, it appears that Pete has been actually drafted by the Corps against his will. Pete stands to face injury in fact because he is compelled against his will to enlist and it is certain that he will enlist if he takes no action. State X law caused the law to be passed and enforced; thus causation is clear. Further, a declaratory judgment deeming the law facially invalid as to Pete will save him from the injury of entering the Corps.

Pete's parents have standing, in their argument, because they are losing their son and being discriminated against in the fundamental right to parent and make choices for their minor child. By compelling Pete to work at the Corps, their fundamental right is arguably undermined and infringed as they cannot choose a school for their son. Thus, they can likely show injury in fact. The State X law caused injury, as above. Also, a declaratory judgment would save the parents from injury as it would give them the fundamental power to make parenting decisions for their child and not be compelled by the State.

11th Amendment Sovereign Immunity

States are protected from being sued in federal court (and in some state courts where states retain traditional sovereign immunity in their own courts) where the action seeks money damages from its treasury. However, declaratory judgments do not seek money damages and may be adjudicated.

Here, the 11th Amendment is not implicated because no plaintiffs seek money damages; rather, they seek declaratory relief and thus the action is not preempted by sovereign immunity concerns.

A. 13th Amendment

The 13th Amendment of the Constitution abolished involuntary servitude in all of the United States. It applies directly to states like State X. Further, it was construed to allow Congress to pass laws which abolish the badges of slavery, which continue to linger, and which allows Congress to make prophylactic legislation to correct existing badges of slavery in the several states. Laws which force servitude to other individuals or the state are invalid absent an exception in federal case law or other federal authority.

Here, Pete will challenge that the law violates the 13th Amendment because the law purports to require three hours of compulsory labor at the Corps per day and that it threatens to infringe on the constitutional mandate against involuntary servitude. The strongest argument against Pete is that, absent a narrow exception for the Amish, the Supreme Court has ruled that states have the right to mandate that all children under the age of 16 be enrolled in compulsory education. This embraces the states' rights to oversee education and welfare of its citizens guaranteed to the states under the 10th Amendment, which states that all states retain power not otherwise usurped by the federal government in the constitution. Thus, the state will argue that since the Corps is educational, and that the forestry work on projects is part of that education, and that because Pete is merely 15 years old, that the requirement is akin to that of requiring students to attend regular public school in a compulsory manner absent special circumstances. The state will argue that Pete is not Amish or that he has a special disability to set him apart from other participants and that he should be required to

attend school at the Corps. The goal of the program is educational, just like regular school.

Pete will argue that the Corps's education labor is not aimed at education, but rather at reducing state costs, and thus since the state gains pecuniary benefit the program's work mandate is akin more to slavery than it is akin to formal education. Pete will argue that the program is an alter ego of the state's goal of saving money at the hands of slave labor by him and similarly situated individuals.

Because of the prior Supreme Court mandates regarding the 13th Amendment, and because there is no prophylactic federal legislation to pre-empt education of this kind, Pete will have difficulty showing that the law, as applied to him, infringes on the 13th Amendment's mandates. This is because prior case law allows states to require school attendance under the age of 16. Since Pete is 15, he would need to show special circumstances and argue those to show that he should be an exception to the rule. While the cost-saving goal of the state brings some questions regarding slavery intent, ultimately it prepares Pete for the real world of jobs, which is likely reason enough. Also, the goal of the program is to avoid criminal activity through education for this critical class of young men.

Thus, on balance, Pete would likely fail under a 13th Amendment argument.

B. Due Process

Substantive Due Process

The Constitution guarantees certain fundamental rights to individuals that they will not be deprived of life, liberty, or property without due process of law. The Supreme Court has interpreted the 5th Amendment, applied to the states via the 14th Amendment, to extend other fundamental privacy rights to individuals as well, which give them rights to procreate, have children, and to raise those children as they please without interference from the state as to that right. When a state infringes on fundamental rights of individuals, such as the right to liberty or the right to privacy, the state must show that the law is narrowly tailored to serve a compelling government interest, the highest judicial scrutiny under constitutional law. This is substantive due process and applies here to State X's Corps law. The burden is on the state to meet the strict scrutiny.

Pete

Pete has a fundamental right to liberty in his person. This includes the right to free movement and not to be compelled in movement of his body by the state without due process of law. Pete has not been adjudicated a criminal or otherwise, and thus the compelled requirement that he attend Corps infringes on his fundamental right to move freely as he pleases has been infringed upon by the law. Because the right of liberty in movement is a fundamental right, the state must show that the Corps law is necessary to further a compelling government interest. Pete will also argue that he has a privacy interest in his body and personal choices.

Pete will argue that the law violates his liberty interest because it compels his movement and participation in the Corps program. He will argue that he is not a criminal and that his rights have not been sacrificed merely because he dropped out.

The state will argue that it has a compelling interest in educating its young men and women below the age of 16. The state will likely prevail on that point. The state will further argue that its concerns regarding criminality avoidance and preserving future peace is compelling. This is also correct as it is part of the state's interest in welfare to protect its citizens. The state will argue that it has rights to dictate the education of its youngsters under the age of 16 under Supreme Court decisions. The state will likely prevail on that point, because of the above rules.

However, Pete will argue that while the purpose of the law is compelling, the means are not narrowly tailored because the program reaches too far in undermining his rights of freedom. The program is at a remote camp, far from a regular school, and subjects students to daily labor that appears to be more physical than other students. Pete will argue that the school would do better to have a day program that is supplemented by the required work and not mandated daily, which is more like prison over the students.

Pete will have the most success on this argument. The state will argue that the means are narrowly tailored because of the woes of young men 15-18 through the study. However, the study does not show that compulsory physical labor is the answer to the problems facing State X teen boys; it is but one idea, and a relatively extreme one at

that. The state could have employed its goals in a less infringing fashion on the liberty of its students.

While schools are entitled to more deferential invasions of students' freedoms, such as to discipline as a parent, and to search the student upon reasonable suspicion, the compulsory work mandate does not fall within those categories because of its extreme nature. Because the state's means are not narrowly tailored, the law will be unconstitutional as applied to Pete.

Parents

Parents have a fundamental right in making decisions about how to raise their child. Laws that infringe on parents' right to choose and raise their children are subject to strict scrutiny above. Parents also have a fundamental right to keep a family together.

Here, the law infringes on the parents' rights to choose which school Pete attends because the decision is mandatorily imposed by the state. While the state may require attendance to school under 16, parents' fundamental interest in choice is still fundamental and must generally be deferred to by the state. Here, because the parents could have forced their child to go to school under state law at a different school or done homeschool, for example, the school's infringement by making the parental choice for them infringes on their fundamental right.

The State will argue that their rationale is compelling because of the study indicating criminality with dropout rates. However, as above, the means that it carries out is likely too broad. The parents will show that the concerns could have been met by allowing the parents to choose the schooling forum, rather than the state, and that it hurts their right to decide as parents. Thus, the law is not narrowly tailored.

Further, the parents will argue that they have a fundamental right to keep their family together. The law undermines that right by taking their boy away from them for months at a time. The state's broadly applied law could also apply to children who drop out for good cause, another basis for being too broad. Stripping families apart requires strict scrutiny and narrow laws that fit the purpose well. Here, the action is simply too broad for its extremity on hurting family relations.

Thus, because the parents' fundamental rights to parent and to keep the family together exist, the state failed to show that its law is narrowly tailored and the parents will be successful.

Procedural Due Process

Whenever a fundamental right is infringed upon, generally a plaintiff is entitled to a notice and pre-deprivation hearing prior to the state intentionally depriving that individual of life, liberty, or property. This is procedural due process. Once a fundamental right/liberty is identified, there is a three part balancing required to know whether additional process is necessary.

Here, both Pete and his parents are deprived intentionally of their rights to liberty and privacy (respectively). These are fundamental rights and under the 14th Amendment, State presumptively was required to give notice and hearing with fact finding by a neutral fact finder in determining the rights of the individuals prior to deprivation of those rights. Here, no such process was given to either Pete or his family and the law does not provide for one. In balancing, the court considers (1) weight of interest, (2) interest in additional procedures based on the interest, and (3) efficiency and cost to the government.

Here, the weight of interests is great. Pete faces compulsory servitude to the state as a student and the parents lost their right to parent and choose what is right for their son. A process should have been in place to avoid prejudice.

Further, society has a great interest in liberty of their movement, even for young students, and privacy right of parents is compelling. Without those choices, parents are stripped of their ability to raise their children and protect them.

On balance, an additional process would not be costly to employ by the state; they would simply need to give notice to Pete and his parents, allow for facts to be presented, and make sure that Corps was in Pete's interest and/or that he qualifies for the program. Safeguards should have been in place.

Thus, because fundamental rights were at issue, both Pete and his parents were entitled to due process of law.

Equal Protection

Where a state discriminates based on class either facially or actually and with intent to do so, this triggers equal protection. Laws that discriminate based on fundamental rights trigger strict scrutiny. Laws that discriminate based on sex must be narrowly tailored to serve an important interest with exceedingly persuasive justification. The burden is on the state. Other laws need only further legitimate state reasons and be rationally based and burden is on the challenger.

Pete

Pete will first argue that the law discriminates against him in his exercise of a fundamental right of liberty without adequate justification. Just as under the above arguments, the state will have to show a compelling interest. Here, because of lack of narrowly defined means and the broad requirement of all boys to attend between 15-18 who drop out, the discrimination as to the fundamental right is on the face of the law (boys are clearly required to join the Corps who qualify) and thus the law is unconstitutional as applied to Pete because it infringes on his assertion of his liberty rights. State will argue that it can do so and that it is justified under the above arguments, but it will likely fail.

Pete will then argue that the law is facially discriminatory against him and others based on their sex, males. Pete will argue that State's study and criminal reasoning are not exceedingly persuasive based on the fact that many girls drop out, yet are not included and that State's law is under inclusive, discriminatory, and lacks sufficient rationale.

The State will argue that its basis is important because it is aimed at lowering crime. This is likely sufficient. It will also argue that the study specifically showed that boys were the prime offenders who needed the Corps program specifically. However, the state fails to point to facts showing why girls are not treated alike. It appears no equal program exists for delinquent girls, but just for the boys. Also, manual labor is often a

stereotype attached to boys, that they can handle it and girls cannot. The State's law leaves many questions as to its unequal treatment of the boys over the girls, which may rest on stereotypes based on sex which the Supreme Court has clearly stated it does not support. Also, not all dropout boys offend. The State lacks some hard numbers showing recidivism and actual offender likelihood to justify its one-sided measures that are discriminatory. Only boys are impacted, not girls.

Thus, because there lacks an exceeding persuasive justification and because the law is under inclusive, it will fail equal protection and Pete will be successful in his action on these grounds.

Pete will also argue that because the law targets only boys between 15-18 that it discriminates based on age. He would be correct. However, the court only applies rational basis review for discrimination based on age and experience.

Here, the State's interest in protecting young men and the community through the Corps is a rational basis because it makes sense; saving boys from dropping out and avoiding the statistics of offending is legitimate and it is rational that a special school may help. Pete has the burden to prove otherwise, and it is unlikely that he can do so. This is because logic shows that boys who get through school will not offend as much.

Parents.

Like Pete, the parents will be successful in showing discrimination based on their assertion of the fundamental right to privacy. The law is too overbroad in its infringement and offends equal protection of the parents' fundamental right to choose Pete's school and parent him and keep the family physically together.

SELECTED ANSWER B

1. Thirteenth Amendment Involuntary Servitude Clause

The Thirteenth Amendment is one of the broadest amendments to the Constitution, applying not only to government actions, but also private actors. A regulation is unconstitutional under the Thirteenth Amendment if it compels one person to work for another, even if compensation is paid. Here, Pete will argue that he is being forced into indentured servitude because the Corps requires the boys to work on reforestation projects for a few hours each day. On the other hand, State X will argue that the work on reforestation projects are part of the education process for the boys. State X will argue that the work is only to defray a portion of the costs, and that it is only for a few hours per day. State X will try to compare the project to community service, where people are compelled to work on a community service project on a daily basis. Nevertheless, the boys have not committed a crime. The Corps and the work is not a punishment for the boys, but rather an attempt by State X to reduce criminal activity. It is therefore improper to compare the work to community service. Thus, the statute compels the boys into involuntary servitude and should be found unconstitutional under the Thirteenth Amendment.

2. Fourteenth Amendment's Due Process Clause

There are two prongs to the Due Process Clause of the Fourteenth Amendment. The procedural due process prong strikes down any law that deprives a citizen of a fundamental right without proper procedural safeguards. On the other hand, the substantive due process prong strikes down any law that denies a citizen a fundamental right. Here, Pete and his parents can challenge the State X statute under both the procedural and substantive due process prong.

Procedural Due Process – Deprivation of a Fundamental Right without a Hearing

Procedural due process requires the government to provide the proper procedural safeguards to prevent the erroneous deprivation of a fundamental right. Typically, procedural safeguards include notice, a hearing, and/or the right to have an attorney. When evaluating whether a particular law requires these procedural safeguards courts

look at the person's interest in the right, the court's interest inefficiency, fairness and accuracy. Here, the State X statute compels boys 15 to 18 years old to attend camps run by the Corps. Pete is 15 years old and was drafted by the Corps. By being forced to join the Corps and live on the camps in the State Forest lands, Pete has been deprived of his fundamental right of liberty. The right of liberty is the most tantamount of the fundamental rights, and Pete therefore has a very strong interest in receiving proper procedural due process.

State X will argue that with a high number of dropouts, it would be impossible to administer hearings for each student efficiently. State X would also argue that the hearings would not create a fairer or more accurate outcome as its study already linked school dropouts with criminal activity. Pete and his parents will argue that the statute is too broad, and a hearing should be held to determine whether Pete has a propensity to commit criminal activity, and therefore needs to join the Corps. Ultimately, because State X is essentially creating an educational juvenile detention system, at least a hearing is required before State X can deprive Pete of his liberty. Therefore, Pete could successfully challenge the statute under the procedural due process prong of the Fourteenth Amendment.

Substantive Due Process – Right of Liberty

As previously discussed, the statute violated Pete's right of liberty because it forces him to live on the State forest land, to receive their comprehensive education and to work on reforestation projects a few hours each day. There is no indication that Pete is free to come and go as he pleases. Instead, the facts tend to indicate that the boys must remain at the camp at all times until they reach the age of majority. Because this statute denies Pete his fundamental right of liberty, it must meet strict scrutiny. Strict scrutiny requires State X to prove that the statute is necessary to achieve an important government interest. Courts use the least restrictive alternative test – if there is a lesser restrictive alternative to the statute, then the court will strike the statute down.

Here, the state's interest is preventing criminal activity. This is a compelling state interest and State X may enact laws to further this interest. The statute creating the Corps, however, is not necessary to achieve this interest. State X will argue that it has

linked an increase in criminal activity with the dropout of boys aged 15 to 18. It will further argue that in order to prevent these boys from entering into illegal activities, it had to create the Corps to remove the boys as a threat to society. However, there are many other less restrictive alternatives State X could have used to decrease criminal activity. State X could invest more in its educational system, providing better education to boys at an earlier age to prevent them from dropping out. State X could provide the Corps as an option for parents that were having difficulty dealing with children. State X could set up a scholarship fund for graduating boys to encourage them to stay in school. All of these actions could decrease the dropout rate and thus criminal activity without depriving the boys of their fundamental right of liberty. The law therefore is not necessary and would most likely be found unconstitutional.

Substantive Due Process – Right of Privacy

Pete's parents can argue that the law unconstitutionally violates their rights to privacy. The Supreme Court has held that the "penumbra" of the Bill of Rights, incorporated and applied to the states through the Fourteenth Amendment, has created a fundamental right to privacy. Moreover, the Supreme Court has found that included in the fundamental right of privacy is the right of parents to control the upbringing of their children. Here, the State X law drafts boys who are aged 15 to 18. These boys are still in the minority, and their parents therefore still have a legitimate interest in their upbringing. In addition, the law compels these boys to attend camps on public lands administered by the State Forest Service. On its face, the law does not appear to give parents a choice once their boy drops out of school. The parents cannot refuse to send him to the Corps, nor can they take their own remedial actions – hiring a tutor, homeschooling, sending the boy to private or military school, etc. Control is taken away from the parents.

Because the law takes away the ability of the parents to control the upbringing of their children by compelling the boys to enter the Corps when they drop out of school, the law is unconstitutional unless it passes strict scrutiny. That is, the law must be necessary to achieve a compelling state interest. As discussed previously, while reducing criminal activity is a compelling state interest, the Corps is not necessary to

achieve this purpose. This statute therefore could also be successfully challenged by the parents under the Due Process Clause of the Fourteenth Amendment.

3. Fourteenth Amendment's Equal Protection Clause

A regulation that has a classification on its face is subject to constitutional attack under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that no state shall enact a law favoring one citizen over another. Here, State X has two classifications on its face: an age-based classification and a gender-based classification.

Age-Based Classification

The Supreme Court has ruled that age-based classifications are non-suspect classifications that are subject to the rational basis test. Under the rational basis test, the law will be upheld unless Pete or his parents can prove that the law is not rationally related to a legitimate government purpose. Here, State X completed a study on the behavior of teenagers, which indicated a positive correlation between school dropout rate and criminal activity. Moreover, the connection was most pronounced among boys 15 to 18 years old. The reduction of criminal activity is a legitimate government purpose. Because of the link between criminal activity and school dropout rate, State X decided to send boys aged 15 to 18 to camps in order to provide them with a comprehensive education, and to remove them as a threat for criminal activity elsewhere in the state. State X's law creating the Corps to draft boys aged 15 to 18 is therefore rationally related to the government's purpose of reducing criminal activity. If most 15 to 18 year-old male school dropouts become involved in criminal activity, sending them to the Corps should reduce criminal activity. Thus, the law will be upheld as constitutional if it is attacked as an age-based classification.

Gender-Based Classification

While age-based classifications are subject to the rational basis test, gender-based classifications required heightened scrutiny. In order to withstand a constitutional challenge, a gender-based law must be substantially related to an important government interest. Unlike the rational basis test, here the government bears the

burden of proving that the law is constitutional. As previously discussed, the statute aims to reduce the amount of criminal activity within State X by confining male dropouts to the Corps. Reducing criminal activity is an important government interest. The dispositive question is therefore whether the Corps is substantially related to State X's interest in reducing criminal activity.

As already discussed, the law is not necessary as it is not the least restrictive means of achieving the government's objective. The law also does appear not to be substantially related to the government's purpose. A study linked the dropout of boys ages 15 to 18 years old with an increase in criminal activity. There is no evidence, however, that this is a strong causal connection. For example, a 50% increase in dropout rate could only lead to a 1% increase in crime. State X must positively demonstrate a strong correlation between the Corps law and its purpose of reducing criminal activity. Without more evidence, it is unlikely a court would find that the law is substantially related to State X's interest and thus the law will likely be found unconstitutional.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

Question 5

For many years, the Old Ways Fellowship, a neopagan religious organization, received permission from the City's Building Authority to display a five-foot diameter symbol of the sun in the lobby of City's Municipal Government Building during the week surrounding the Winter Solstice. The display was accompanied by a sign stating "Old Ways Fellowship wishes you a happy Winter Solstice."

Last year the Building Authority adopted a new "Policy on Seasonal Displays," which states:

> Religious displays and symbols are not permitted in any government building. Such displays and symbols impermissibly convey the appearance of government endorsement of religion.

Previously, the Building Authority had allowed access to a wide variety of public and private speakers and displays in the lobby of the Municipal Government Building. Based on the new policy, however, it denied the Old Ways Fellowship a permit for the sun display.

After it was informed by counsel that courts treat Christmas trees as secular symbols, rather than religious symbols, the Building Authority decided to erect a Christmas tree in the lobby of the Municipal Government Building, while continuing to prohibit the Old Ways Fellowship sun display.

The Old Ways Fellowship contests the Building Authority's policy and its decision regarding the Christmas tree. It has offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. The Building Authority has turned down this offer.

The Old Ways Fellowship has filed suit claiming violation of the First Amendment to the United States Constitution.

What arguments may the Old Ways Fellowship reasonably raise in support of its claim and how are they likely to fare? Discuss.

QUESTION 5: SELECTED ANSWER A

OLD WAYS FELLOWSHIP'S FIRST AMENDMENT CLAIMS

The Old Ways Fellowship ("Old Ways") has several arguments to support its First Amendment Claims. The threshold question for all of its claims is whether there is government action. Government action occurs when the government acts, when a private entity takes on a public function, or when the government is entangled (encourages, participates in, or enables) in private conduct.

Here, Old Ways' claim is against the City Building Authority, which is a part of the City's Municipal Government. Thus, the First Amendment applies because state action is involved.

First Amendment Right to Freedom of Speech

Old Ways has several arguments related to its first amendment right to freedom of speech.

Content-Based Restrictions. Old Ways may also argue that the Policy is an invalid restriction of speech in a public forum. Here, the speech is occurring in the City's Municipal Government Building, which is open to the public, and has permitted public use for speech purposes for many years.

All content-based restrictions on speech conducted in a public or designated public forum are subject to strict scrutiny. Under the strict scrutiny standard, the government has the burden to show that a law is narrowly tailored, using the least restrictive means, to reach a compelling governmental interest. Content-based restrictions on speech arise when the government regulates either subject-matter based speech, or viewpoint based speech. Content-neutral speech conducted in a public or designated public

forum must further an important government interest, be narrowly tailored, leave alternatives for speech open, but need not be the least restrictive means available.

Here, Old Ways would first argue that its five-foot diameter symbol of the sun constitutes symbolic speech, as it symbolizes the religion organization's beliefs. It would then argue that the Building Authority's Policy on Seasonal Displays ("Policy") is a content-based regulation because it bars the use of "religious displays and symbols" rather than all symbols and/or displays. If it successfully shows that the Policy is content-based, the city has the burden to establish a compelling interest, and that the Policy is narrowly tailored to reach that interest.

The City will likely argue that the purpose of the policy is not to stop symbolic speech, but to avoid the appearance of government endorsement of religion, which likely qualifies as a compelling interest. It would then argue that completely barring religious symbols and displays is the least restrictive means of accomplishing this goal. Although such an argument may be persuasive in a vacuum, these facts do not indicate that the Policy is the least restrictive means available. Old Ways offered to put up a disclaimer along with its symbol, stating that the sun is not endorsed by the City, but the Building Authority rejected this offer. Such an option restricts Old Ways' speech less, while arguably avoiding government endorsement of religion, but the Building Authority will not allow it. The City's refusal to adopt a less restrictive alternative is a failure to meet the requirements of strict scrutiny.

Prior Restraint. Old Ways can also argue that the Policy is an impermissible prior restraint on speech. Prior restraints are subject to strict scrutiny because they put a barrier on speech before the speech can occur. One such type of prior restraint is a permit that permits speech. To be valid, a permit must further an important government interest, involve little to no discretion by the person or group issuing the permit, there must be clear criteria to obtain the permit, and there must be a procedure in place for timely resolution of the permit and/or an immediate appeal of a decision.

Here, the fact that Old Ways needs a permit to display its sun arguably constitutes a prior restraint. Old Ways would argue that the permit requirement is impermissible because the Building Authority does not have a clear description of what items are and are not permitted to be displayed, beyond a bar on the religious symbols. Because the Building Authority decided to put up a Christmas tree, Old Ways can argue that the standards are not applied in an equal way because certain religious symbols are permitted (the Christmas tree), while other symbols (the sun) are not permitted. Also, Old Ways can point out that the Building Authority uses discretion in determining what to erect in the government building, and that there is no set policy in place for review of a decision rejecting a display. The City may, again, argue that its interest in avoiding the appearance of government endorsement of religion permits the permit requirement, and that there is no discretion involved in the policy because the City completely bars the use of any religious displays and symbols. It will also argue that the Christmas tree does not constitute a religious symbol. However, it is unlikely that the City will prevail in these arguments because there is no set procedure in place for determining who gets a permit, nor an appeals process for rejection of the permit.

Overbreadth. A government regulation of speech is overbroad and invalid where it regulates more speech than intended.

Old Ways may also argue that the Policy is an overbroad regulation of speech. It is unlikely that it will succeed in this argument, however, as the Policy clearly applies to "religious displays and symbols" and there are no facts indicating that the Policy has extended to restrict speech beyond religious speech.

Vagueness. A regulation of speech is vague and invalid where it is unclear what speech is prohibited and what speech is not prohibited.

Old Ways could argue that the Policy is vague because it does not define exactly what constitutes a religious display and symbol. It can argue that because the Christmas tree is not considered a religious symbol, the Policy is vague because Christmas trees are

often interpreted to be religious symbols. Such an argument might succeed here. The Building Authority's position is that "courts treat Christmas trees as secular symbols," but the Policy itself does not include a description of what does and does not constitute religious displays or symbols. The lack of specificity in the Policy results in confusion, and thus Old Ways likely will succeed in challenging the Policy on vagueness grounds.

First Amendment Right to Freedom of Religious Expression

Old Ways can also contend that the new policy on seasonal displays unjustifiably infringes upon its freedom to exercise its religion. The general rule regarding freedom of expression is that neutral laws of general applicability that have the effect of infringing on freedom of expression do not violate the right to freedom of expression. However, when a law is not neutral, strict scrutiny applies, requiring the government to show that the law is necessary to further a compelling government interest, and that the law is the least restrictive means possible.

Here, Old Ways would argue that the Policy is not neutral because it bars religious displays and symbols specifically, not just any displays and symbols. Old Ways would also point out that the policy interferes with its ability to spread its Winter Greeting, which is an important aspect of its religion. Thus, strict scrutiny likely applies. As explained above, although the City may have a compelling interest in avoiding government endorsement of religion, the policy is not the least restrictive means available. Thus, Old Ways will likely succeed in challenging the Policy on freedom of expression grounds.

First Amendment Right That the Government Will Not Establish Religion

Old Ways can also contend that the Policy, in practice, establishes religion.

Establishment Clause. The government may not establish a particular religion under the Establishment Clause of the First Amendment. To determine whether government

action violates the establishment clause, the court applies what is called the Lemon test, which analyzes the government action under 3 prongs: (1) whether the government action has a secular purpose, (2) whether the action has the effect of promoting or inhibiting a particular religion or religion in general, and (3) whether the action results in excessive entanglement between the government and religion.

Secular Purpose. Here, Old Ways may concede that the purpose of the Policy is secular, and a court would likely agree. The Policy states outright that it is meant to avoid the appearance of government endorsement of religion, and so the first prong does not indicate a violation of the establishment clause.

Effect. Old Ways will argue that the effect of the Policy actually inhibits its religion and promotes a certain religion -- Christianity -- because the Building Authority permitted erection of a Christmas tree but no other religious symbols. The court would likely agree that the effect does promote Christianity and not other religions because the Christmas tree -- and only the Christmas tree -- is displayed. Had the Building Authority permitted other types of symbols along with the Christmas tree, the effect may not be to promote Christianity, but the winter season generally. Thus, this factor supports a finding that the Policy establishes religion.

Entanglement. Finally, Old Ways would argue that the Policy results in excessive entanglement between the government and religion. The City would argue that the Policy seeks to avoid religious involvement completely. Although the Policy appears on its face to attempt to avoid entanglement with religion, because the Building Authority erected the Christmas tree, the City's position is weaker, and the court may find that entanglement has occurred because the Building Authority has permitted an arguably religious symbol, but not others.

Balancing the three factors, it is likely that Old Ways' argument would succeed, and that the court would find that the Policy, as applied by the Building Authority, establishes religion, and is unconstitutional.

QUESTION 5: SELECTED ANSWER B

First Amendment: Freedom of Speech

Old Ways Fellowship will argue that the Building Authority's (BA) "Policy on Seasonal Displays" violates its right to free speech under the First Amendment.

State Action

In order for Old Ways to challenge the Policy under the Constitution there must be state action. Here, BA is the City's agency that issued the policy restricting religious displays and symbols from government property. Thus, since BA is a branch of the City, there is state action.

Content-Based vs. Content-Neutral

Old Ways' success under the First Amendment Free speech clause will depend on whether the Policy is found to be content-based or content-neutral. Here, BA adopted the Policy on Seasonal Displays which expressly prohibits "religious" displays and symbols on government property but does not appear to apply to non-religious displays. Old Ways will argue that the policy does not restrict groups or organizations from displaying other forms of artwork or paintings but directly is singling out religious displays and other secular symbols. Thus, the policy will likely be found to be content-based.

City may try and argue that the Policy does not single out a particular religion and thus it should be found to be content neutral but this is a weaker argument since religious content, by itself, is a category of speech and thus the policy will likely be found to focus on this content.

Strict Scrutiny

Laws that are content-based and restrict speech must pass strict scrutiny. The government bears the burden of showing that the law or statute is necessary to achieve a compelling state interest with no less discriminatory alternatives.

City/BA will claim that the policy is designed to prohibit the appearance of government endorsement of religion. City will further attempt to show that certain symbols are clearly religiously oriented and that simply by their presence in the Municipal building, this gives off the impression that the City endorses the religions associated with those symbols or displays. The prevention of endorsement of religion is likely a compelling interest since the First Amendment does not permit the government to favor one religion over another.

The weakness in City's arguments is that the law does not appear to be necessary, even if the City has a compelling interest in preventing the appearance of religious endorsement. Old Ways will argue that the City has a long history of allowing it to display its Winter Solstice display along with a variety of other public and private speakers and displays in the lobby. Old Ways will claim that the city is randomly choosing to single out religious displays by completely preventing them in government buildings via its new Policy. The law is likely not necessary to achieve the City's interest here.

As Old Ways will point out, there are less discriminatory alternatives in achieving the City's desired purpose. Old Ways offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. Presumably people that take the time to observe the displays in the Municipal building would also notice the disclaimer assuming it was prominently displayed beside the various displays. This would be sufficient to allow Old Ways to continue its time-honored tradition of wishing people a Happy Winter Solstice through its display while not suggesting that City endorses Old Ways religious beliefs. City could also hand out pamphlets at the entrances to

government buildings describing its policy of allowing the displays and putting the disclaimer there as well.

Thus, as strict scrutiny is a difficult standard to meet, it appears that BA will have a difficult time showing the policy is necessary when there are less discriminatory alternatives present. The law should be struck down as unconstitutional.

Time, Manner, Place

Even if the court were to find that the BA Policy is not content-based but rather is content-neutral because it does not single out any particular religion and appears to apply to all religions equally, Old Ways will argue that it is still an invalid time, place and manner regulation.

Time, manner and place regulations are permitted for content neutral and viewpoint neutral regulations depending on the type of location where the speech is being regulated. Traditionally, public forums are those that have historically been open to the public such as sidewalks and parks, while designated or limited public forums are those that the government has chosen to hold open to public speech but can close at any time. Public forums and designated/limited public forums must meet intermediate scrutiny, such that the law is substantially related to an important government and there must be other nondiscriminatory alternatives available.

Here, the Policy is affecting government buildings, including the lobby of the Municipal building. A lobby of a government building would not be a public forum but rather a designated public forum since it appears that City has for some time chosen to allow various organizations to put their displays and speakers in the lobby of the Municipal building. City could certainly close off the lobby to such displays if it wanted to.

Old Ways will argue that, while City may have an important interest, even a compelling interest as discussed above, in preventing the appearance of government endorsed

religion, the Policy is simply not substantially related to this interest. Furthermore City will have the burden of demonstrating the substantial relation. City will likely claim that the law is substantially related because it singles out displays from buildings that are government owned and that the Policy only focuses on the interior of government buildings. City will claim that there are other nondiscriminatory alternatives such as Old Ways displaying its displays outside the buildings or on the plazas in front of the building. This argument will likely fail however, because while Old Ways may indeed have other options for displaying its Winter Solstice display, it cannot join the other displays that are permitted to be inside the Municipal building and this particular location is where people have come to expect to see the Winter Solstice display each year.

Therefore, because the Policy still singles out only religious displays from government buildings, the City may have a difficult time prevailing on a time manner place argument since there are other less discriminatory options that would allow Old Ways to actually continue to display the displays inside the building while notifying viewers that there is no endorsement by City of any particular religion.

Symbolic Speech

Old Ways will argue that the policy impermissibly regulates symbolic speech. Symbolic speech can be regulated if it is done in a way that is unrelated to the suppression of speech and if there are other less discriminatory alternatives.

City will argue that by adopting the Policy it was not attempting to regulate Old Ways' right to free speech through the Winter Solstice displays. While there may be other alternatives, as previously mentioned, for Old Ways to continue this form of symbolic expression, City will likely lose on the ground that the Policy was related to the suppression of speech. The Policy directly bans symbols and displays with religious content. Thus, it would appear that the BA, in considering the adoption of the Policy, had a direct motive to regulate what types of displays would and would not be allowed.

Furthermore, Old Ways will argue that City continues to allow the display of Christmas trees in the buildings and that Christmas trees are typically associated with a religious holiday. Thus the policy may be found to impermissibly regulate only certain religious symbolic speech while other groups attempting to display Christmas displays will be allowed.

Since Old Ways' displays are not permitted in the buildings and the policy directly and expressly provides for this, the law will likely be found to be an unconstitutional restriction of symbolic speech.

Vagueness and Overbreadth

Old Ways may bring a vagueness or overbreadth challenge to the Policy. Laws are vague if one cannot tell what speech is banned and what is permitted. Overbreadth laws are those that impermissibly burden more speech than is allowed.

Here, the Policy could be struck down as vague because it does not define what exactly constitutes religious displays; thus it is insufficient to put one on notice as to whether its display is or is not affected by the policy. Furthermore, the policy may be overbroad in that it bans all symbols and displays, even if they do not have any religious meaning associated with them. Old Ways may or may not succeed on these grounds.

Free Exercise of Religion

The free exercise clause of the Constitution prohibits the government from preventing one's free exercise of his or her religion. Laws of general applicability are permissible while laws that target a specific religion must meet strict scrutiny.

Here, the Policy, while it does apply to all religious displays and symbols, does not appear to single out any particular religion. Nor is there any evidence of BA singling out Old Ways' particular religious beliefs as a motive for adopting the law. Thus, Old Ways

would have a better likelihood of success challenging the policy under the Establishment clause.

Establishment Clause

Old Ways will argue that the Policy respects an establishment of religion since the City is allowed to display Christmas trees while other religious displays and symbols are banned. The Establishment clause prohibits the government from respecting the establishment of a religion. If a law has a secular purpose on its face, it must meet strict scrutiny. Laws that are not secular on their face must pass the three part lemon test.

First the law must have a nonsecular purpose. Here, the law bans all religious displays and symbols. If the court finds that this is a secular purpose because it specifically targets religious displays, then this requirement will fail.

Second, the law must neither advance nor inhibit religion. The law appears not to advance religion since it bans displays to prevent government endorsement of religion so this requirement is satisfied.

Third, the law must lead to no excessive government entanglement with religion. Here, the problem is that the City policy is banning Old Ways displays while allowing the erection of a Christmas tree in the same space as where Old Ways displays were permitted. Thus, the court may find that the policy impermissibly entangles the government with religion if it finds that the City is really making space for its own preferred religious displays while forcing out other displays such as Old Ways that it finds unattractive or not interesting.

Thus, Old Ways may have a colorable claim under the Establishment Clause.

Professional Responsibility（PR）

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2002 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

QUESTION 3

Betty, a prominent real estate broker, asked her attorney friend, Alice, to represent her 18 year-old son, Todd, who was being prosecuted for possession of cocaine with intent to distribute. Betty told Alice that she wanted to get the matter resolved "as quickly and quietly as possible." Betty also told Alice that she could make arrangements with a secure in-patient drug rehabilitation center to accept Todd and that she wanted Alice to recommend it to Todd. Although Alice had never handled a criminal case, she agreed to represent Todd and accepted a retainer from Betty.

Alice called her law school friend, Zelda, an experienced criminal lawyer. Zelda sent Alice copies of her standard discovery motions. Zelda and Alice then interviewed Todd. Alice introduced Zelda as her "associate." Todd denied possessing, selling, or even using drugs. Todd said he was "set up" by undercover officers. After Todd left the office, Zelda told Alice that if Todd's story was true, the prosecution's case was weak and there was a strong entrapment defense. Alice then told Zelda that she, Alice, could "take it from here" and gave her a check marked "Consultation Fee, Betty's Case."

Alice entered an appearance on Todd's behalf and filed discovery motions, showing that she was the only defense counsel.

At a subsequent court appearance, the prosecutor offered to reduce the charge to simple felony possession and to agree to a period of probation on the condition that Todd undergo a one year period of in-patient drug rehabilitation. Alice asked Todd what he thought about this, and Todd responded: "Look, I'm innocent. Don't I have any other choice?" Alice, cognizant of Betty's wish to get the matter resolved, told Todd she thought it was Todd's best chance. Based on Alice's advice, Todd accepted the prosecution's offer, entered a guilty plea, and the sentence was imposed.

Has Alice violated any rules of professional responsibility? Discuss.

ANSWER A TO ESSAY QUESTION 3

Alice's Professional Responsibilities

Who does Alice represent?

Despite the fact that Betty, Alice's friend, requested that Alice represent her son in a "possession of cocaine with intent to distribute" matter, it should be noted that Alice's client in this situation is Todd. Todd is legally an adult, and it is Todd whom Alice has a professional relationship with – not Betty. Therefore, this could create potential conflicts for Alice.

Duty of Loyalty

An attorney owes his client a duty of loyalty. This duty arises in situations where the interests of a third party, the client or the attorney, might materially limit, or adversely affect the attorney's ability to effectively represent his client. When there is a possibility that this may occur at some point during the course of the representation, it is called a potential conflict of interest. When the conflict does in fact exist, it is called an actual conflict of interest.

In situation where this arises, under the ABA, an attorney should not undertake (or continue) representation unless (1) he reasonably believes the [sic] he can effectively represent his client despite the potential conflict of interest, or that an actual conflict of interest will not adversely affect his representation; (2) disclose the conflict to his client; (3) obtain the client's consent; and (4) the consent must be reasonable (in the opinion of an independent outside attorney). California has stricter requirements, requiring that the attorney obtain the client's consent in writing.

Betty's Involvement

Under the facts of this case, a potential conflict of interest exists. For starters, Betty is a friend of Alice's. This could affect Alice's judgment. However, if she reasonably believes that it would not, and meets the other requirements, this should be acceptable.

Second, Betty informed Alice that she "wanted to get the matter resolved "as quickly and quietly as possible'." This definitely creates a potential conflict of interest, since Alice does not know at this point what it is that Todd wants to do. She should have consulted with Todd, and informed him that his mother wanted to have the matter resolved quickly. Furthermore, she should have obtained his consent to continue with the representation.

Third, she is asking Alice to recommend to Todd to go to a drug rehabilitation center. As mentioned above, this also creates the potential for a conflict of interest, since she is unaware of what Todd wants at this point. Again, she should have disclosed this to him during their meeting, and obtained his written consent.

Lastly, Betty is paying Alice for her representation of Todd. This creates a potential conflict of interest, since a third party is paying for a client's legal fees. Alice should have informed Todd of this and obtained his consent. Furthermore, Alice must keep in mind that despite the fact that Betty is paying for Todd's legal fees, it is Todd who is her client. Alice should have also pointed this out to Betty at the time, so that all parties understand their relationship to another.

Actual Conflict of Interest

The duty to disclose to a client a conflict of interest and to obtain that client's consent is a continuing duty, and the duty of loyalty requirements must be met each time a conflict arises, before the attorney should continue representation. After consulting with Todd, Alice should have realized that an actual conflict on [sic] interest existed. Betty desired to have the matter resolved quickly. Todd, Alice's client, on the other hand insisted that he was "set up" and was innocent. The two interests are incompatible, since pleading innocent to such a charge would prolong the process of resolving the matter. Alice should have again disclosed her conflict of interest to Todd. Furthermore, Alice should have withdrawn from representation if she did not believe she could effectively

represent Todd or if she had failed to disclose the conflict and obtain his consent.

Todd's Guilty Plea

Alice's violation of her duty of loyalty to her client culminated in her advice that Todd accept the guilty plea. Clearly, Todd did not want to accept the plea, as he maintained his innocence. However, Alice, in attempting to comply with Betty's wishes, insisted that he accept it, informing Todd that it was his "best chance." Her actions were unacceptable and violated her professional responsibilities to Todd as an attorney. She should be subject to discipline and Todd would have a good chance at success if he were to sue her for malpractice.

Duty of Competence

A lawyer also owes his client a duty of competence. This duty requires that the lawyer have the legal knowledge, the skills, the preparation, and thoroughness necessary for effective representation of his client. If a lawyer does not have experience in a certain field of law, he can still undertake representation if he can learn the necessary knowledge within a reasonable time that does not cause delay to the client, or if he associates with an attorney that does have such experience.

Here, the fact that Alice had never handled a criminal case before would not necessarily preclude her from taking the matter, if she reasonably believed she could prepare herself for effective representation, or if she associated herself with someone who had such experience. Here, Alice associated with Zelda, an experienced criminal lawyer. Zelda assisted Alice in interviewing Todd. However, Alice should have made clear to Todd that Zelda was there merely to assist, so as to not lead him to believe that he was forming the same attorney-client relationship with Zelda as he had with Alice. While obviously, an attorney-client relationship had been formed between Zelda and Todd, the parties should have been clear that Zelda's scope of representation was limited to assisting in preliminary matters.

While Alice did associate with Zelda for the interview with Todd, she may have breached her duty of competence to Todd when she told Zelda that she "could take it from here." There is nothing in the facts that suggest that [she] had taken the time to learn the appropriate law in order to effectively represent Todd. Rather, it appears that she made this decision to continue alone, only after Zelda

informed [her] that if Todd's story was true, the prosecution's case was weak and that he had a good entrapment defense. If such was the case, Alice should have continued to associate with Zelda throughout the trial, or should have taken the time to learn the necessary knowledge if she believed she could have done so in a timely matter. Instead, she entered an appearance on Todd's behalf, and filed motions suggesting she was the only defense counsel.

Duty to Maintain the Proper Scope of the Relationship

In an attorney-client relationship, a client is the one that makes the substantive decisions regarding, among other things, whether or not to plead guilty. The attorney is the one who makes the decisions regarding procedural matters, such as which witnesses to depose, etc.

Here, the decision of whether or not to plead guilty to the simple felony possession was Todd's. Alice breached her duties owned to him, when she encouraged him to take the plea. While it was true that it was Todd that made the final decision, this was not an informed decision, but rather Alice's will. Thus, she improperly made a decision as to a substantive issue of Todd's matter.

Duty to Render Competent Advice and to Pursue Matter Diligently

A lawyer also owes his client a duty to render competent legal advice. If she is unaware of the current state of the law, she should research it. Furthermore, a lawyer owes his client a duty to pursue the matter zealously and diligently.

Alice breached all of these duties she owed to Todd. First, she failed to give him competent legal advice. She informed him that pleading guilty to the charge was his "best choice" without really understanding criminal law, or considering his options. Instead, she based her decision on Betty's wishes to resolve the matter "quickly and quietly."

Furthermore, she did not pursue his matter zealously, but instead, pursued it according to Betty's wishes and not Todd's interests.

Duty of Confidentiality

A lawyer also owes his client a duty of confidentiality. This duty requires that an attorney not use or reveal anything relevant to representation of a client without his consent, regardless of whether or not the client asked him to keep it confidential, or whether the attorney believes it would be harmful to the client or cause him embarrassment.

While the facts do not necessarily suggest that Alice breached this duty, Alice should be careful that she not reveal anything relevant to Todd's representation to any other party (excluding her agents assisting her in representation) INCLUDING BETTY. It is likely that Betty would like to know the progress of Alice's representation, however, Alice cannot divulge this information since Todd, and not Betty, is her client.

Fiduciary Duties

A lawyer also owes her client certain fiduciary duties, relating to among things, the fees of representation. Under the ABA, an attorney's fees must be reasonable. A lawyer is allowed to split fees with another attorney as long as he obtains his client's consent, and the fee is proportional to the amount of work done. In California, an attorney's fees must not be unconscionable. Furthermore, the lawyer can split fees with another lawyer, [as] long as he obtains his client's written consent. Unlike under the ABA, there is no proportionality requirement and referral fees are acceptable as long as it does not increase the overall fee.

Here, Alice has paid Zelda a consultation fee for assisting her in interviewing Todd. Before paying Zelda, however, Alice should have gotten Todd's written consent. If she had done so, then the payment to Zelda would be appropriate under the ABA if it proportionately represents the amount of work Zelda did in the interview. In California, upon consent, such a payment is acceptable regardless of the amount of work Zelda did, as long as it does not increase the overall fee.

Duty to Communicate with the Client

A major theme running through all of Alice's breaches also constitutes a breach in it of itself – Alice failed to communicate with Todd. Alice failed to communicate with Todd her conflicts of interest, her inexperience in the field of criminal law, and the options he had at plea hearing.

Duties Owed to the Court and Third Parties

Alice not only breached some duties to Todd, but she also breached duties owed to the court and third parties. Alice was not candid with the court, when knowing [she] allowed Todd to submit a guilty plea which she knew did not represent Todd's wishes, but rather those of her own and Betty. Furthermore, she breached her duties of dignity to the profession, in that she allowed herself to continue representation despite the countless conflicts of interest and breaches on her part.

ANSWER B TO ESSAY QUESTION 3

Question 3

Duty of Confidentiality

The duty of confidentiality arises any time a person seeks legal representation and discloses confidential information in the course of establishing an attorney-client relationship. The duty of confidentiality extends to all communications between the attorney and her client, whether or not the client has asked that they be kept confidential or whether or not use of them will damage the client. The duty of confidentiality attaches when a client seeks legal representation, whether or not it attaches. The duty of confidentiality extends to any information obtained in representing a client –whether from the client or her agents or other parties.

The facts are silent as to whether Betty thought she was entering an attorney-client relationship with Alice when she sought representation for her son, Todd. Perhaps Betty's statements to Alice were made in confidence, friend-to-friend. If so, then Alice likely did not even owe a duty of confidentiality to Betty at all. However, if Betty was impliedly seeking legal counsel from Alice—either erroneously thinking that Alice 's relationship with Todd would extend to her, or seeking approval of her goals for the litigation as a separate attorney, then an attorney-client relationship attached. If it is the case that Betty was seeking legal representation for Alice or reasonably thought a relationship attached to her, then Betty's communications with Alice that she wanted the matter resolved "as quickly and quietly as possible" and that she wanted Alice to recommend an in-patient drug rehabilitation treatment program to Todd were confidential information that Alice could not use in any way in her representation of Todd.

If Alice violated her duty of confidentiality to Betty, she is subject to discipline and civil liability.

Duty of Loyalty: Potential Conflict

The greatest duty that an attorney owes her client is to act with great loyalty. An attorney's duty of loyalty to a client supercedes her duty to all other people. If an interest of another client, the attorney, or a third party stands in the way of this duty or threatens to materially limit the representation of a client, then an actual or potential conflict of interest exists and the duty of loyalty is in danger of being compromised.

When Alice agreed to represent her friend Betty's son on criminal drug charges, she faced a potential conflict. First, Betty was seeking representation on behalf [of] her son, who was not at the meeting. Alice likely wanted to do a good job for her friend who was in a tight spot and she also likely felt that it was important to protect Betty's reputation as a prominent real estate broker in the area whose reputation likely matter[ed] to the success of her business. When approached by Betty, Alice should have realized that a potential conflict existed between her representation of her friend's son, Todd, and Betty both paying for the representation and attempting to direct the representation, as well as the feelings of loyalty that one feels toward a friend.

With the existence of this potential conflict, Alice should have determined whether she thought she could have provided Todd with effective representation, and whether or not Betty's payment for the services and influence as a friend and person seeking to direct litigation would materially limit her representation of Todd. Perhaps Alice could have provided adequate representation to Todd if she had explained to Betty that Todd would be the client and made each person's role in the litigation and representation clear. It seems that even if Alice tried to make Betty's limited role very clear, it would have been very difficult for Alice to honor Betty's wishes to get the matter resolved "as quickly and quietly as possibly" and to recommend an in-patient drug rehabilitation program and at the same time to reach a conclusion that would be the one that Todd wanted from the litigation. The potential conflict between the two parties is obvious. Alice likely should have realized that her effective representation of Todd would be materially limited by her friendship with Betty and Betty's payment for the services.

Even if Alice did reasonably believe that she could provide Todd with representation that would not be materially limited by Betty's influence, payment for the services, or friendship, Alice still breached the duty of loyalty. In addition to determining whether she believed she could provide Todd with adequate representation despite the existence of the potential conflict, Alice also should have (1) disclosed the actual or potential conflict to Todd, (2) received consent from Todd (in California, this consent should have been in writing), and (3) determined if such consent was reasonable.

Clearly, Alice did not disclose the potential conflict to Todd, nor did she receive consent – written or otherwise – from Todd. Even if Todd had consented, however, it is unclear whether such consent would have been reasonable. The reasonableness standard is whether or not a disinterested, independent attorney

would have counseled the client to consent to such representation. If it was impossible for Alice to keep Betty at bay (i.e. to keep her from interfering with Todd's representation), then the consent would not have been reasonable.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the potential conflict that existed. Alice is subject to discipline and civil liability.

Duty of Loyalty: Actual Conflict

An attorney also has a duty to keep her guard up for evolving conflicts of interest that arise as representation continues. While it is clear that Alice should not have taken on Todd's representation without adequately disclosing and obtaining reasonable consent regarding the potential conflict between Betty and Todd, she should have handled the actual conflict that arose later in the litigation differently.

When the prosecutor offered Todd one year of probation if he underwent a one-year period of in-patient drug rehabilitation, Alice should have realized that any recommendation she made to Todd about the program was an actual conflict. Alice was right to ask Todd what he thought about the program as an alternative to not reducing the charges. However, Alice responded to Todd's uncertain inquiries about what he should do by honoring Betty's wishes. Alice compromised her duty to Todd, which should have come before any other duty to any other party concerned in the matter. She recommended a course of action to Todd that Alice knew Betty wanted: a quick, hassle-free resolution with an in-patient drug rehabilitation program.

When Alice realized the actual conflict existed, she should have reevaluated whether or not she could continue the representation of Todd. In the unlikely event that Alice thought she could still proceed with the representation of Todd, Alice should have disclosed the actual conflict that existed, sought consent from Todd (in writing in California), and proceeded only if she determined that consent was reasonable. It seems that few disinterested attorneys would find consent reasonable in this instance, as Todd's interests in his liberty and having a guilty plea entered on the record against him was materially adverse to his mother's interest in a speedy resolution and getting Todd into an in-patient drug treatment program.

Knowing that she likely could not provide Todd with adequate representation because of the conflict and because of confidential information she obtained

from Betty, Alice should have withdrawn, as continuing to represent him would violate ethical duties of loyalty and confidentiality owed to clients.

As discussed above, if Betty was seeking an attorney-client relationship with Alice when she sought representation for Todd (not knowing that the relationship would only extend to Todd), Betty disclosed confidential information that would make it impossible for Alice to provide adequate representation to Todd while ignoring Betty's wishes. By acting on the information that Betty provided to Alice, Alice breached her duty of loyalty to Todd, her duty of loyalty to Betty if a relationship attached, and her duty of confidentiality to Betty by acting on information she gave Alice rather than Todd's wishes.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the actual conflict that arose during the course of litigation. Alice is subject to discipline and civil liability.

Client Decides Substantive Rights/Counsel Decides Legal Strategy and Procedure

The duty of loyalty also provides that the client must make all decisions regarding substantive rights, including such decisions as whether or not to testify in criminal prosecution or whether to accept or reject a settlement offer. Alternatively, the attorney makes decisions regarding procedure or legal strategy. Alice in effect usurped Todd's ability to decide whether or not to accept the prosecutor's "settlement" offer for a plea bargain. While at first blush it seems that Alice did allow Todd to make the decision as to whether he should accept the plea agreement, she did not provide him with all of the necessary information he needed to make that choice. Alice did not disclose that she was giving him advice based on his mother's wishes, rather than what Alice thought was the best possible choice for him.

Thus, Alice breached her duty of loyalty to Todd by not allowing him to make an informed decision as to his substantive rights. Alice is subject to discipline and civil liability.

Duty as a Fiduciary

An attorney owes her client a fiduciary duty to reach all agreements clearly and quickly. In California, the agreement must also be in writing, disclose how the fee is calculated, what services are covered, and the rights and obligations of the

client and attorney. In addition, fee splitting is generally disfavored under the Model Rules. In order to engage in fee splitting with another attorney under the Model Rules, (1) the fee must be reasonable, (2) the client must consent, and (3) the fee splitting must be proportional to the work done. In California, fee splitting is appropriate between attorneys where (1) the fee is not unconscionable, (2) the fee arrangement is disclosed in writing, (3) the client consents in writing, and (4) the fee is not increased in order to cover the split. In addition, California does not require a proportionality principle.

Under both standards, Alice's paying of Zelda with the check marked "Consultation Fee, Betty's Case" was improper. While it may have been reasonable, neither Betty nor Todd consented and the fee was not proportional to the work done because Zelda did no more than sit in on one meeting with Todd. Under California law, the fee was likely not unconscionable (the facts are silent here) and it is not certain from the facts whether the overall fee was increased in order to cover the split. However, it is fatal that the fee split was not disclosed in writing to Todd or Betty and no consent in writing from either was obtained.

Thus the fee splitting with Zelda was improper. Alice is subject to discipline and civil liability.

Duty of Competence

An attorney owes a duty of competence to act as a reasonable lawyer would with respect to the skill, preparation, and thoroughness required for adequate representation. This duty includes not taking on a case where the attorney is not knowledgeable in an area unless she will be able to seek help from an attorney with experience in the area without undue delay, burden or financial harm to the client. Alice had no idea how to handle a criminal case, much less on[e] that involved a serious drug felony. Alice did not disclose to Betty when she (Betty) sought Alice's representation for Todd that she had no criminal experience. It certainly would have been prudent to disclose her inexperience in this area to Betty at the time she accepted the representation. It may have been more prudent to recommend an attorney (i.e. make an appropriate referral, perhaps to Zelda who was familiar with such matters or alternatively to the State Bar so that they could suggest an alternate attorney) so that Todd could have counsel experienced in the area of criminal law, particularly serious drug charges.

While Alice was prudent in seeking help from Zelda, she only sought her help with respect to the first interview with Todd. Zelda only informed Alice that "if Todd's story was true" the prosecution had a weak case. However, Alice did not use Zelda to further inquire what kind of situation Todd would face if his story was not true. Zelda did not have the adequate knowledge to handle such a case. While consulting Zelda was proper, she should have sought more help from her in representing Todd, and she should not have shown herself as the only defense counsel on the case. In addition, she should have disclosed to Todd and Betty that she would need to employ Zelda's help to get familiar enough to take the case and obtained their consent to using Zelda (in California, in writing).

Alice is subject to discipline and civil liability for her breach of the duty of competence to Todd.

Diligence

Finally, Alice has the duty to zealously pursue [the] case to completion for client's best interests. She did not do this when she breached her duty of loyalty to Todd by honoring Betty's wishes over his. She did not use diligence is [sic] advocating zealously for what was best for her client. When she knew that Todd was unsure about what to do when the prosecution offered a plea bargain and when he insisted on his innocence, Alice should have zealously pursued whatever cause or goal Tood wanted rather than what Betty wanted.

Alice is subject to discipline and potential civil liability for breach of her duty to treat Todd's case with due diligence.

Duty to Communicate

Alice also has a duty to communicate with her client, keeping them abreast of the developments in his or her case. Alice should have kept in constant communication with Todd both inside and out of court about Zelda's involvement or lack thereof in the case, the actual conflict that emerged, and her inability to advise Todd adequately about the plea agreement.

Duty of Candor/Truthfulness, Fairness, and Dignity/Decorum

Alice owes a duty of candor and truthfulness to all third parties and to the court and her adversaries to state the law truthfully and pursue her representation of

clients with honesty and integrity. When the actual conflict between Betty and Todd arose during Alice's representation of Todd, she should have sought withdrawal of her representation of Todd from the court. In addition to being honest with her client and notifying him of the actual conflict that existed, Alice also should have been up front with the court and the prosecutor that she was unable to properly and adequately advise her client on the option of the plea agreement in exchange for one-year probation that included a year-long in-patient drug rehabilitation program.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2003 California Bar Examination and two selected answers to each question.

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QUESTION 4

In 1995, Lawyer was hired by the City ("City") as a Deputy City Attorney to handle litigation, bond issues, and zoning matters. In 1998, she was assigned by the City Attorney to perform the preliminary research on the feasibility of a new land-use ordinance. Subsequently, the City Attorney retained outside counsel to draft the ordinance, which established new zoning districts and created a wetlands preservation zone restricting development in designated areas.

In 2000, Lawyer resigned from the City Attorney's office and became employed as an associate attorney in W & Z, a private law firm. In 2002, W & Z was retained by Developer to represent it in connection with a condominium project in City, and Lawyer was assigned to the matter. Developer's project was within the wetlands preservation zone, and City had denied Developer a permit for construction of the project on the basis that the newly enacted ordinance would not allow it to be built as planned. Developer requested that Lawyer file a lawsuit challenging the validity of the wetlands provision of the ordinance as applied to its project.

Association, an organization of City landowners, independently approached Lawyer and requested that she file a lawsuit on its behalf challenging the validity of the wetlands provision of the ordinance. Developer encouraged Lawyer to represent Association, since a lawsuit by Association would put pressure on City to reach a compromise concerning Developer's project. Developer told Lawyer it would pay half of Association's legal fees.

What ethical issues confront Lawyer and W & Z? Discuss.

Answer A to Question 4

1. LAWYER'S DUTY OF LOYALTY/CONFIDENTIALITY TO FORMER CLIENTS

Lawyer ("L") was retained by City as a Deputy City Attorney for 5 years. L thus owes a duty of confidentiality to City as his [sic] former client. The duty of confidentiality means that L may not use or disclose any confidential information obtained through the representation of City in any matter. The duty of confidentiality is broader then [sic] the attorney client privilege because it covers communications from any source, and it is imposed regardless of whether the attorney is being compelled to testify.

Here L has resigned his [sic] position with City, but he [sic] is now employed by W & Z. He [sic] may not represent clients for W & Z in a manner that uses information obtained through his [sic] representation of City. Therefore by being assigned to Developer's case L should consider whether his [sic] duty of confidentiality to City is implicated.

The duty of confidentiality is designed to foster the full, open and candid communication of clients with their attorneys. If L violates this duty owed to his [sic] former client City, he [sic] will be subject to discipline.

2. W & Z'S DUTY OF CONFIDENTIALITY TO L'S FORMER CLIENT -- IMPUTED DISQUALIFICATION

Here the issue of confidentiality arises again because if one lawyer employed by a firm is unable to take on the representation because of a conflict of interest or confidentiality problem with a former client, the disqualification is imputed to the entire firm and no lawyer in the firm may take on the representation.

Here however, L's former client is a government employer. Because the government has a strong interest in employing qualified attorneys, special rules have been created to allow firms to represent clients against the government even if one of the attorneys in the private firm formerly represented the government.

If a lawyer is employed by a firm and has confidential information regarding a government matter obtained through previous representation of the government, the firm may properly represent another client against the government if:

1. The lawyer who previously represented the government is completely screened from handling any portion of the representation against the government;

2. The lawyer who previously represented the government shares in NO PART of the fees produced from the representation of a client against the former government client; and
3. The firm notifies the government of the possible conflict of interest so that the government can ensure that proper preventative measures are taken.

Therefore, if [sic] W & Z may properly represent developer if L is properly screened off of the case. Here, however, L has actually been assigned to the case of Developer against the City. Therefore the proper screening techniques have not been used. This will be improper for both L and W & Z if L formerly represented the City on a "matter" concerning Developer's case.

Does Developer's case involve a "matter" on which L formerly represented the City?

Although L formerly represented City, if L has no confidential information regarding the current pending representation against City, neither L nor W & Z would be disqualified. L will be deemed to have confidential information if L represented City on the same "matter" the current representation now involved.

Unlike the prosecution of a criminal, the drafting of regulations, ordinances or codes will not be considered a matter that would disqualify L from representing a private sector client against City. Part of L's duties were litigation though, so it is possible he [sic] could be deemed disqualified. Moreover, the private sector client is directly asserting a direct claim attacking the validity of the rules, precisely the work that L was performing for City. However L performed only preliminary research on the feasibility of the proposed ordinance; the actual drafting was performed by outside counsel. Therefore, even if this was considered a matter for which L could be disqualified, a strong argument exists that L probably did not obtain any confidential information.

Therefore L probably is not disqualified, but L must encourage W & Z to notify the government regarding the proposed representation to see whether City has any objection to L's participation in the case. If City does not object (L and W & Z should get consent in writing) then L may represent Developer so long as he [sic] does not use any confidential information obtained from City. If City does object, then L must be completely screened from the case, and take no part in the representation, and must receive no portion of the fees paid by Developer.

3. L'S DUTY OF LOYALTY TO CURRENT CLIENTS - - MAY L REPRESENT ASSOCIATION?

If it is proper for L to represent Developer ("D"), then L owes D a duty of zealous loyalty. This loyalty may not be compromised by an [sic] conflict of interest that L might have personally, economically or professionally. No lawyer may represent a client in any matter that is directly adverse to the interests of another current client.

Here Association ("A") has asked L to represent it in a suit challenging the validity of City's ordinance (all of the above discussion regarding loyalty and confidentiality to former clients applies to A). L is presumably already representing D in a suit regarding City's ordinance. Therefore A's proposed representation falls precisely within a matter that involves the subject matter of a current client.

Dual representation, or representation of two clients involving the same or similar subject matter may be permissible if:

I. The lawyer subjectively reasonably believes that the representation of both clients may be undertaken without compromising his professional judgment or threatening his zealous representation of either client;

II. Objectively, a reasonable uninvolved lawyer would agreed [sic] that the representation of both clients may be undertaken without compromising professional judgment or threatening zealous representation of either client; and

III. Both the current and future client consent after full disclosure and consultation of the possible conflict of interest. In California the consent must be obtained in writing.

Here L may subjectively believe that it is reasonable to represent both clients. Both D and A are challenging the validity of City's ordinance. Therefore the goals appear to be the same. As noted by Developer, A's suit may actually pressure City into settling his claim early. However, L must be extremely careful, because it is very, very likely that a conflict that does not currently exist may arise later in the representation. If the City wants to grant a special use exception or a variance to D, in order to make his suit go away, but leaving the ordinance intact, then D and A's interests are materially adverse and dual representation is improper.

An objective uninterested lawyer may agree dual representation is proper, depending

on D and A's final goals. It is likely that a third party lawyer would disagree.

Therefore L must fully advise D and A of the possible conflict, especially the likelihood of a waiver, variance or special use exception for D. If both clients consent (in writing in CA) after full consultation, and both the objective and subjective tests are satisfied, then L may undertake the representation. However it appears in this case that such representation would be inappropriate.

4. DUTY OF CONFIDENTIALITY TO CURRENT CLIENTS

In addition to the duty of loyalty implication discussed above, dual representation presents a confidentiality issue because L will necessarily obtain confidential information from both D and A if he [sic] undertakes dual representation. Therefore in the event that an actual conflict of interest arises later in the representation, then it would be improper for L to continue representing either D or A, because he [sic] has obtained confidential information that could potentially be used against the former client. Therefore the only proper remedy would be to withdraw, and it could possibly present substantial prejudice to withdraw late in the representation.

W & X are also prevented from continuing the representation of either D or A if L would be, because of the imputed disqualification rules. There is no screening procedure available for representation of current private sector clients with actual conflicts of interest.

The fact that L was approached by A independent of his [sic] employment with W & X will not allow W & X to represent D. L's employment with W & X prevents either L or W & X from representing D and A if the interests are adverse.

5. DUTY OF LOYALTY AND INDEPENDENT PROFESSIONAL JUDGMENT

Payment of a client's legal fees by a third party is proper only where the payment is consented to by the client, where the lawyer reasonably believes that the payment by a third party will not affect his independent, professional judgment, and so long as no confidential information is disclosed to the third party paying the fee.

Here D has offered to pay half of A's legal fees. L may only allow this arrangement if A consents, and if L reasonably believes that his decisions will be completely unaffected by D's payment. L must zealously, competently and single mindedly represent A if he takes on the representation. L must not make decisions on A's behalf, while considering the fact that L is paying part of the fee. Moreover L must not disclose any of A's

confidential information to D even though D is paying part of the fee.

Here, because of the possibility of an actual conflict between D and A, D's payment of A's fees is probably inappropriate.

Answer B to Question 4

Ethical Issues Confronting Lawyer and W & Z

The ethical issues that confront both Lawyer and her firm W & Z arise as a result of Lawyer's past employment with City and a possible conflict between clients. Because Lawyer is a member of W & Z, any conflicts that she may have are imputed to the firm. The ethical issues that arise, and the steps that Lawyer and W&Z can take to avoid them, are discussed below.

A. Lawyer for the Government Now in Private Practice

The Model Rules provide that a lawyer who has worked personally and substantially on a matter while working for the government shall not represent that matter in private practice. The issue, therefore, is whether Lawyer worked personally and substantially on a matter involving City's ordinance respecting the wetlands preservation zone.

It does not appear that Lawyer worked personally and substantially on the wetlands preservation zone ordinance. The facts provide that the city attorney merely asked Lawyer to do the preliminary research for the project, and that outside counsel actually drafted the ordinance. Conducting this preliminary research would probably not qualify as "personal and substantial" involvement.

Furthermore, the drafting of the wetlands ordinance does not qualify as a "matter" under the Model Rules. A "matter" involves an actual dispute between parties. Drafting an ordinance is not a "matter" because it does not involve a dispute between ascertainable parties.

Thus, because Lawyer did not work personally or substantially on any "matter" and [sic] there is no conflict between her employment with the City and her representation of Developer or Association's matters challenging the ordinance.

Duties of W & Z if there is a Conflict

Even assuming there is a conflict under the Model Rules between Lawyer's representation of Developer & Association challenging the ordinance and her employment with City, W & Z may still take on the representation if Lawyer is not the individual representing the parties.

Conflicts of an attorney in a firm are imputed to the entire firm. However, if an attorney

in a firm worked personally and substantially on a matter while employed with the government, the firm may take steps to prevent the conflict from becoming imputed to all other attorney[s].

The Model Rules provide that a firm in this situation can prevent imputation by screening the ex-government attorney from the matter, not sharing any fees from the matter with that attorney and notifying the government employee. If W & Z thus screens Lawyer from its representation of Developer, did not share fees with lawyer and notified City, they could represent Developer even assuming there was a conflict. However, because Association approached Lawyer personally and not W & Z, Lawyer may not be able to represent Association if there is a conflict.

However, because as explained above there should be no conflict between Lawyer's representation of Developer & Association and her work on the zoning ordinance for City, W & Z should be able to keep lawyer on the case.

Conflict Between Developer & Association

If an attorney's representation of a client may interfere with her representation of a present or former client, a potential conflict of interest is presented and the attorney must take appropriate measures to avoid such conflict.

Association approached Lawyer and asked her to represent them in a matter that would involve similar issues as her representation of Developer. Although both Association and Developer are seeking the same result — a declaration that the ordinance is invalid — potential conflicts may still arise. For example, Lawyer may learn information during her representation of Developer that may be pertinent to her representation of Association. However, an attorney's duty of confidentiality to her client would prevent attorney from disclosing such information during her representation of Association. Because an attorney also has a duty of loyalty to her client to always represent her client's best interests, her inability to use this confidential information could create a potential conflict with her duty of loyalty to her other client.

Lawyer may still represent both Association and Developer if she obtains proper consent. Developer has already expressed its interest in having Lawyer represent both it and Association. However, Lawyer should still explain the potential conflicts to Developer and Association. If Lawyer reasonably believes that she can represent both Association and Developer adequately discloses all potential conflicts to both Developer and Association and obtains their consent, she should be able to represent both clients

under the Model Rules. The consent of the clients must also be reasonable, meaning that a reasonable attorney would advise the client of consent. Here, because Developer and Association's interests are not in conflict, consent should be reasonable. Furthermore, the California Rules require that consent be in writing.

Thus, if Lawyer obtains the written consent of both Association and Developer to represent them both on a similar matter, the Model Rules and California Rules would permit such representation.

Payment of Fees By a Third Party

An attorney's duty is to her client and not any third party. If a client's fees are being paid by a third party, a potential conflict of interest is presented between the interests of the third party and the client.

Here, Developer has offered to pay half of the attorney's fees of Association because he believes that Association's case will advance his cause. However, accepting payment from Developer for Association's fees presents a conflict for Lawyer. Developer may attempt to direct the course of Lawyer's representation of Association in order to protect his own interests. However, taking direction from a client would violate Lawyer's duty of loyalty. Lawyer should probably not accept Developer's offer to pay Association's attorney's fees.

However, if Lawyer believes that accepting payment from Developer will not interfere with her representation of Association, she may be able to accept the payment after explaining the potential conflict to both parties. Lawyer should explain to Developer that she represents Association's interests in her representation of Association, and that Developer may not influence this representation. She must also explain the potential conflicts to Association. Under California Rules, she must obtain both parties' consent in writing. However, because she would be accepting payment from a current client in her representation of a second client, this consent may not be reasonable under the Model Rules.

Whether or not Lawyer accepts payment for her representation of Association from Developer, if an actual conflict arises during her representation of Developer and Association, she must withdraw from representing one or both of the clients in order to satisfy her ethical duties.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 5

Lawyer is an in-house attorney employed by ChemCorp, a corporation that manufactures chemicals.

Smith is a mid-level employee whose job is to ensure that ChemCorp's activities comply with applicable governmental safety regulations. Smith asked to meet with Lawyer on a "confidential basis." At their meeting, Smith said to Lawyer:

> "I think ChemCorp might have a serious problem. Last year I inspected a ChemCorp facility and discovered evidence of dumping of potentially toxic chemicals in violation of ChemCorp's internal policies and applicable governmental regulations. I told my supervisor about it, and he told me he would take care of the problem. My supervisor asked me to say nothing about the situation so they could avoid any legal hassles. I did not disclose the matter in my inspection report, despite internal policies and governmental regulations that require disclosure. I have discovered that the dumping is continuing, and I am very concerned about possible health threats because the dump site is located near several private residences and a river used for drinking water."

1. What ethical issues arise at the point at which Smith first asked to meet with Lawyer and later during their conversation? Discuss.

2. May Lawyer independently disclose the problem relating to the dumping of potentially toxic chemicals to governmental authorities? Discuss.

Answer A to Question 5

① Duty of Loyalty

As counsel for ChemCorp ("CC"), Lawyer owes a duty to act in good faith and in the Corp's best interests. This duty prohibits Lawyer from accepting representation that will result in a conflict of interest with another client. When such a situation arises, Lawyer may only accept the representation if he reasonably believes the potential conflict will not impact his ability to effectively represent each client, if he discloses the conflict to each client, if he gets consent from each client, and if the consent is reasonable. Consent is virtually never reasonable if each client's interest is opposed to one another.

Here, as soon as Smith asked Lawyer to speak on "a confidential basis," Lawyer should have told Smith that as in-house attorney to CC, he could not represent him in matters personal to him if they opposed CC's interests. Therefore, Lawyer should have advised Smith that he could not keep the conversation confidential if it related to his job at CC, and if it did, Smith should seek separate counsel.

However, if Smith advised Lawyer that he only wanted to talk in order to help the Corp to stay out of trouble, there was no loyalty issue in talking to Smith. The problem only arises once it becomes clear that Smith is primarily concerned about his own personal legal troubles stemming from the incidents.

Either way, Lawyer should have immediately warned Smith of these concerns and told him that it would be impossible for him to represent Smith at the same time he represented CC. Lawyer owed a duty of loyalty to CC which prohibited him from taking on another representation adverse to its interests.

Representation of Corp.

As Smith told Lawyer about the wrongful activity CC was engaged in, Lawyer, as in-house counsel for CC, owed a duty to go to the Supervisor and discuss the matter with him. If Supervisor either admitted to the wrongful activity or said that he was ordered to do so, Lawyer must continue to ascend the hierarchy of the Corp until he speaks with person making the decision. Lawyer's only duty runs to CC itself, so if he is ever told to sit back and permit the wrongful activity to continue, he must go directly to the Board of Directors and advise them that CC is violating the law and that it is within their best interests to stop.

Withdrawal

If Lawyer eventually discovers that CC's Board refuses to stop dumping illegally, the Lawyer may withdraw from his representation of CC. Permissive withdrawal is acceptable when the representation becomes financially burdensome to Lawyer, when the client has in the past engaged in a crime or fraud by using his services, when the client acts in a way

repugnant to him, or when the client refuses to stop engaging in conduct that the Lawyer tells him to stop doing. Withdrawal is mandatory if the client is presently using the Lawyer's services to engage in a crime or fraud. In such a case, the lawyer might have to make a "noisy withdrawal" by disclaiming work he prepared that furthered the crime or fraud.

There is no evidence here that CC is using Lawyer's services to further its illegal dumping scheme. Therefore, Lawyer need not resign.

However, if Lawyer goes to the Board, advises it to stop dumping, and it refuses, the ABA Rules would permit Lawyer to withdraw from its representation of CC. This is a relatively drastic measure, however, that should only be taken once Lawyer has done further investigation concerning Smith's allegations and the Board's knowledge of the illegal conduct.

After Smith Completed his Statement

At this point, Lawyer should again advise Smith that he owes a duty to the Corp, such that he cannot keep this information confidential. He should again advise Smith to get separate legal counsel if he is concerned about his civil or criminal liability. His interests are adverse to CC because Smith wants to end the dumping and possibly publicize CC's conduct, while CC wants to keep its conduct quiet. Therefore, under no circumstance should Lawyer give Smith any advise [sic] other than to seek separate counsel.

2. Duty of Confidentiality

While a lawyer owes a duty to disclose physical evidence of a crime that is in his possession, he must not disclose, use, or reveal any information relating to a representation, unless client consents.

Because Lawyer attained information highly relevant to his role as CC's counsel, he must not disclose the problem to the government, unless an exception to the duty of confidentiality applies. It is irrelevant that the source was a mid-level employee because Lawyer's duty extends to information attained from any source. He cannot tell this to the govt. because the dumping relates to his representation of CC.

Exceptions

A lawyer may only violate the duty of confidentiality if the client consents, if he's ordered to disclose information by law, if he does so to defend himself in a malpractice action or a suit to recover legal fees, or (under ABA Rules) to prevent a crime involving imminent death or serious bodily harm. The last exception is the only one that is arguably applicable here. It must be noted that the California Supreme Court has not found such an exception under its state law. While the CA evidence code has such an exception, the vitality of this exception is unclear in CA. Even if it did apply, it probably wouldn't apply here. Although the dumping creates a severe risk of serious bodily harm or even death, the risk is not of

an imminent nature. While others would argue that the harm from the toxic chemicals is an ongoing one, this exception is designed to deal with a case where an individual's safety is in danger from more obvious, and less latent, danger. Therefore, the duty of confidentiality prevents Lawyer from disclosing this information to the government.

Attorney-Client Privileges

The A-C privilege prevents the lawyer or client from having to disclose confidential communications discussed during the legal representation. The A-C privilege, however, has a wider crime-fraud exception, that would not require Lawyer to volunteer Smith's allegations, but would require him to disclose them if ordered to do so, since a crime is ongoing.

Answer B to Question 5

1. Ethical Issues Arising From Lawyer (L)'s Meeting With Smith (S)

Duty of Loyalty to S

A lawyer owes a duty of uncompromised loyalty to his client which forbids him from taking actions which might create competing obligations except in specifically enumerated situations. An attorney representing a corporation is in a particularly precarious position because his duty of loyalty runs to the corporation, and not to any individual employees.

When a lawyer's duty of loyalty might be compromised by a conflicting obligation, he is said to have a potential conflict. In such a situation, an attorney must make a reasonable determination that he can continue to effectively represent his client in the face of such a conflict, disclose the potential conflict to his client, and obtain the client's objectively reasonable written consent to the situation. On the other hand, when the attorney's obligations are in present competition, he is said to have an actual conflict. In this situation, the attorney must either decline representation, advise separate legal counsel, or withdraw.

Here, Smith (S) asked Lawyer (L) to meet on a "confidential basis." L should have immediately been alerted to the potential conflict between his duties to Chem Corp (C), and any duties that might arise with respect to S based on the conversation. Thus, before allowing S to confide in him at all, L should have fully informed S that L was not his personal lawyer, and instead owed obligations to C. By failing to do so, and allowing S to confide damaging information to him, L created an actual conflict, which will likely require him to withdraw from his representation of both S and C, lest L breach his newly-arisen, ongoing duties of confidentiality and loyalty to S. L will have a duty to withdraw properly by giving both S and C timely notice of withdrawal, and returning all papers to them in a timely fashion.

Duty of Confidentiality to S

An attorney owes an ethical duty of confidentiality to his client which requires him to maintain inviolate all information he obtains that is related to his representation of that client. The ethical duty is broader than the attorney-client privilege, which is an exclusionary rule of evidence forbidding the government from compelling a lawyer to reveal any communication made by the client to the lawyer in furtherance of the provision of legal services. Rather, the duty of confidentiality forbids the attorney from revealing anything related to his representation of a client, from whatever source that information is derived, unless the client consents to disclosure, disclosure is necessary to prevent a crime (see below for further discussion), or to establish a personal defense.

Here, L became ethically obligated to keep confidential the conversation he had with S by allowing S to meet with him on a "confidential basis" and confide in him regarding crimes that he had committed. S informed L that S himself had violated company policies and

govt. regulations by failing to disclose the substance of his investigation in his inspection report, and may therefore have subjected himself to criminal or civil liability, and workplace censure for his failure to do so. Since S likely would not have confided in L unless he believed L was, for the purposes of the conversation, his attorney, L has incurred a duty of confidentiality to S by failing to properly inform him of his (L's) loyalties.

Duty of Loyalty to C

As discussed above, L owes a continuing duty of loyalty to C. As soon as L was put on notice that his loyalty to C might be compromised, he should have disclosed the conflict to C's Board of Directors and sought their consent to meet with S. By failing to do, L breached his duty of loyalty to C, and set himself up for the ripening of an actual conflict that would require him to withdraw from his representation of C, lest he breach his newly–arisen duties to S. Now, L cannot properly and effectively represent C, because to do so would require that he breach his duty of confidentiality to S by revealing the damaging information S provided to him during their confidential conversation. As such, L must withdraw by giving C timely notice and promptly returning all papers, so as not to compromise his duty of loyalty to C or S.

Duty of Competence to C

An attorney owes a duty of competence to his clients which requires that he behave with legal skill, knowledge, thoroughness, and preparation reasonably necessary for effective representation. The duty of competence entails both a duty of an attorney to communicate with his client, and a duty to diligently and zealously pursue his representation to its completion.

In this case, L's duty of competence to C would require a number of actions which he likely has conflicted himself out of by meeting confidentially with S. A competent lawyer would thoroughly investigate S's factual claims – that a C facility was engaged in illegal dumping activities, and was put on notice of their discovery when S spoke to his supervisor – as well as the legal implications of any illegal dumping and the alleged cover-up. Moreover, a competent attorney would communicate his findings to C's board, so that C could make a fully-informed substantive decision as to what course of action would be most appropriate. However, to do any of these things that a reasonably competent practitioner would do would require L to breach his duties of confidentiality and loyalty to S, which he is ethically forbidden from doing.

Duty of Confidentiality to C

Because L owes a continuing duty of confidentiality to C, he will not be permitted to reveal anything related to his representation of C gleaned from his conversation with S. The ethical duty of confidentiality is a broad proscription applying to all information from whatever source derived, and since S's statements related to C's representation of C in that they might implicate C in a criminal or civil fraud, L cannot breach his duty of

confidentiality to C by revealing them.

Duty of Not Assisting in Crime or Fraud

To the extent that L would be required to assist either C or S in perpetrating a continuing crime or fraud, he would have an ethical obligation to terminate his representation to prevent his services form being used in such a manner. However, it is unclear whether any alleged crime or fraud continues to be perpetrated after L's conversation with S.

② May L Independently Disclose Information About Dumping?

Duty of Candor

As an attorney, L owes a duty of candor to the public and the legal system which requires him to produce evidence when he is reasonably certain that the evidence is the fruit or instrumentality of a crime. Here, however, L has not received any actual evidence, but only a confidential communication from his client concerning alleged illegality. Thus, L will not be ethically obligated to produce any evidence of alleged wrongdoing.

Duty of Confidentiality

Whether L may independently disclose the problem of C's alleged illegal dumping is another problem altogether, which will depend on which jurisdiction L is in.

Under the ABA Model Rules, an attorney is permitted to disclose otherwise confidential information in order to prevent immediate death or substantial bodily harm. Here, it is unclear whether S's revelation suggests any immediate danger, since S only opined that there were "possible health threats" because the dump site was located near private residences and potable drinking water. However, L could make the case that such dumping does pose an imminent threat because contamination will almost certainly lead to death or serious bodily injury, and is ongoing. Thus, in an ABA MR jurisdiction, L may be permitted to disclose the dumping.

In California, on the other hand, no exception to the ethical duty of confidentiality has been carved out for warnings of death or substantial bodily harm. The California Evidence Code does not explicitly include such info as being within the scope of the attorney-client privilege, but thus far, the courts of California have yet to recognize an exception for death/bodily harm like the ABA. Thus, if L is an attorney in California, he will most likely be forbidden from breaching his ethical duty of confidentiality to C & S by revealing information about dumping to government authorities.

Finally, under the Restatement of Law Governing Lawyers, L would be permitted to reveal confidential information not only to protect against death or bodily harm, but to prevent significant monetary loss. Since the dumping by C could arguably lead to significant monetary losses for either the government or private individuals, L might be permitted to

reveal the dumping in a Restatement jurisdiction.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 3

Two years ago, Lawyer represented Sis in her divorce. Last week, Sis made an appointment with Lawyer to assist her father, Dad, with an estate plan.

Sis brought Dad to Lawyer's office. Dad was 80 years old, a widower, and competent. In Sis's presence, Dad told Lawyer he wanted to create a will leaving everything he owned to his three adult children, Sis, Bob, and Chuck, in equal shares. Dad's assets consisted of several bank accounts, which he held in joint tenancy with Sis, and his home, which he held in his name alone. Sis then asked Dad whether he wanted to do something special about his house. Dad thanked Sis for asking, and told Lawyer that he wanted Lawyer to draft a deed that would place his house in joint tenancy with Sis.

At the conclusion of the meeting, Lawyer told Sis and Dad that his customary fee was $750 for drafting such a will and deed. Sis gave Lawyer a check for $750 in payment drawn on her personal account. Lawyer then drafted the will and deed as directed.

What ethical violations has Lawyer committed, and what should Lawyer have done to avoid those violations? Discuss.

Answer A to Question 3

The lawyer here has violated a number of ethical rules, as follows:

A. Duty to Identify & Disclose Conflicts Before Undertaking the Representation & Obtain Consent

Here, a potential conflict is presented at the very initiation of L's representation, when Sis (not Dad) first made the appointment and brought her father to see L.

The ethical rules (RPC) provide that a potential conflict arises when the lawyer's representation of one client may be materially impacted or limited either by his own interests, the interests of a former client, or other factors. In this situation, the lawyer may proceed only if he reasonably believes the representation won't be affected, and the client (or potential client) consents after full disclosure.

Relatedly, a lawyer can't take on representation that is or may be mat[erial]ly adverse to a former client in the same or a substantially related matter, absent full disclose [sic] and consent of the former client.

Thus, here both provisions are triggered:

(1) The representation of Dad to make a will is potentially adverse to Sis, L's former client. There is a risk to Dad that L's former relationship with Sis could affect his independent judgment. If L reasonably thought it would not, he still needed to fully disclose this conflict to D and obtain his written consent. Logically, to do that, L would have needed to exclude Sis from the discussions (see discussion later conc[ernin]g allowing Sis to be present, which raises other ethical issues).

Whether L also had to get Sis's consent, as a former client, depends on whether the prior represent of Sis is viewed as related to L's current representation of Dad. This test looks at whether there is a potential that the lawyer may have gained confidential information from Sis that could impact his representation of Dad, and also whether Sis and Dad are "adverse" in the current represent.

To be prudent, L should have also obtained Sis's consent to the representation of Dad.

B. Duty of Confidentiality & Preservation of Attny-Client Privilege

L also violated ethical obligations in proceeding to discuss the representation with Dad, while Sue [sic] (a third party) was present. This had the potential effect of disclosing client confidences to Sue [sic], and waiving the privilege. (Note that the attorney-client privilege attaches to initial consultations).

The facts suggest that there was some ambiguity concerning Sis's role. If Dad in fact desired to have Sis present during the discussions, to assist him, that would be permissible (assuming L disclosed ramifications) and there may have been a way to allow that without effecting a waiver. On the other hand, it appears Dad was competent, so there arguably was no need to have Sis present. Regardless, L needed to raise these issues with Dad at the outset, including a discussion of who was the client (Dad) and of the attorney-client privilege, and the possible impact of allowing Sis to "sit in" on the consultation on waiving any privilege. L also would have needed to discuss the fact that because Sis was an interested person in his estate distribution, the potential conflict of interest between Dad & Sis weighed in favor of excluding Sis from the consultation.

Initially, it appeared that Dad wanted Sis to share = with other siblings, so the conflict may have been less apparent. However, once she attempted to influence a disposition to herself, L was obligated (even if not before) not to continue with the consultation in Sis's presence (because at that point her interest conflicted with the client's objective of = distribution.

C. Duty as Advisor and General Duty of Competence

L also violated his ethical obligation to ①be competent in his representation, ②to fully advise the client, ③to act consistent with the client's objectives; and ④to exercise indep. judgment and not let a third pty improperly influence his judgment.

Here, L knew that the client's objective was, as stated, to leave everything to his children in = shares. The final result, contrary to that objective, was that he drafted a will and deed that did no such thing, but in fact conformed to the instructions of a third party, Sis.

L also acted incompetently in failing to explain to Dad what would need to be done to achieve Dad's objective. L would have needed to discuss how the bank accounts were titled (in jt. T w/ Sis) and determine whether that was consistent with Dad's objective of = division, and if not, to discuss options for those accounts that would ensure their distribution on Dad's death =, rather than all to Sis as a Jt. tenant. [This assumes Dad was true owner of funds]. Similarly, L failed to adequately explain the implications to Dad of placing a deed in Jt. T w/Sis on the house (that she would take sole ownership on Dad's death), to make sure that Dad fully understood and appreciated the consequences of holding title in that form, and that this form of title was consistent w/Dad's (not Sis's) objectives.

Finally, in simply acting as a scrivener for Sis's instructions, L failed to exercise independent judgment and improperly allowed his judgment to be influenced by a third party (and one with objectives contrary to the client's stated objective).

D. Duty of Loyalty; Acceptance of Pymt from 3d.

L also violated his duty of loyalty to the client, acted acted [sic] improperly in accepting payment from Sis. The RPC state that a lawyer should not accept payment from a third party for services to a client, unless the third party does not influence the lawyer's indep. judgment, and the client consents after full disclosure.

Here, there was no "informed" consent. Although Dad was present when Sis paid, L did not explain to either of them that he was working solely for Dad, even though Sis was paying. Furthermore, here it appears that there was an actual conflict, prejudicial to the client, in that L acted according to Sis' objectives and did not properly counsel Dad on his options.

E. Fee

A lawyer's fee must be reasonable in light of the services performed. Here, lawyer charged a flat fee of $750. Assuming this amount was reasonably related to the services performed, including their complexity, the lawyers' experience, & fees charged by others in the community for similar work, it would be proper even though in the nature of a "flat" rather than hourly based fee. California does not require fee agreements to be in writing unless amt is greater than $1000.

Summary of Options and What L Should Have Done

In summary, L violated ethical duties by undertaking representation when there was a conflict of interest, without disclosure and consent; by allowing Sis to "participate" when her interests conflicted with Dad's; by failure to adequately advise Dad and to act competently in achieving Dad's objectives. (And other viols. as stated above.) He should have:

① Made full discl. to Dad of past relat. with Sis, & got written consent assuming L reasonably believed he would not be influenced by Sis.

② L should not have conducted the initial consultation in Sis's presence, and at the least needed to fully advise & disclose to Dad the implications re: the attorney-client privilege, & Sis's conflicting & potentially conflicting interests w/Dad.

③ L should have fully explained to Dad the options and acts needed to achieve his objectives, including the consequences of jtly titled accounts/property.

④ L should not have accepted Sue's check without full discussion & disclosure.

④a L should not have let his judgement (apparently) be influenced by Sis.

⑤ Arguably, L should also have obt. Sis' written consent to repres. of Dad b/c both representations related to "property."

Answer B to Question 3

3)

I. Duty of Loyalty to Client

Lawyer had a possible and actual conflict of interest with Sis and Dad. Sis had worked with Lawyer in the past and she arranged the meeting. However the purpose for the meeting is for Dad to create a will. As such, the current client is Dad. Lawyer should have clearly indicated upfront that Dad was the client and that he would zealously advocate for him. Also since Sis paid the bill, [sic].

A lawyer has a duty of loyalty to his clients. He must not act if there is a conflict of interest - either potential or actual - unless he reasonably believes he can effectively represent the client. He must also inform the client of the potential conflicts and the client must consent in writing. A reasonable lawyer standard will also be applied to determine that he could fairly represent the client.

Here there are a few potential conflicts. Sis was an old client. She has an interest in the dealings with Lawyer and Dad. Lawyer must disclose the previous relationship without revealing any confidential information of the dealings with either Sis or Dad. A lawyer can represent an old and a new client as long as the matter is different. Since Sis brought Dad, consent would have been confirmed by Sis but Lawyer should have got the consent in writing. He also should have clearly indicated to her that Lawyer was representing Dad and not her for this matter even though she was paying the bill.

Dad, however, should have been informed of the potential conflict and given consent in writing. The potential of conflict is apparent in drafting a will where one of the takers under the will is present. Here Sis was involved in the meeting to discuss how the assets would be distributed. As such, Dad should have been informed upfront of the potential conflict with Sis and given his written consent. As the meeting progressed, it became apparent that there was an actual conflict and Lawyer should have again informed and received consent from both Sis and Dad. The assets that were being distributed involved several accounts that Sis held in joint tenancy with Dad. Dad indicated that he wanted to leave everything to his children. That would mean that something may have to be done with the accounts in joint tenancy which would affect Sis's interest.

Sis also prodded Dad about the house. This may be considered undue influence on her behalf and Lawyer should have been aware of that. He should have informed Dad have [sic] the various actions who could take with the house rather than just let Sis make the suggestions.

At this point he should have recognized that he could not adequately represent Dad with Sis present.

II. Duty of Confidentiality

Lawyer has a duty of confidentiality to both Dad and Sis. Any discussions that occurred during the meeting would be held in confidence. Since Sis was present, Dad did not have the opportunity to talk freely with his lawyer. Although he was not likely going to have to disclose any confidential material, it would have been in his client's (Dad's) best interest to have a confidential meeting without Sis present to disclose how he wanted the estate distributed.

III. Fiduciary Duty

Fee discussion upfront

Any discussion of fees should be held upfront. Lawyer did not tell Dad and Sis the fee for his services until the end of the meeting. This should be okay if there was no fee charged for the preliminary discussion. The fee must be reasonable. In California, the fee must not be unconscionable. He also must be clear of any extraordinary costs that he may be aware of that mean a higher fee.

Payment by Sis

Lawyer had a duty to inform Sis that although she was paying the bill, she was not the client and that Dad was. Lawyer should have also told Dad that Sis was paying the bill but that he was the client. He should have gotten this consent and understanding in writing.

IV. Competency

Lawyer has a duty of competency to zealously represent his client's desires. In dealing with Sis and Dad together he could not competently represent Dad. Drafting a will for distribution among three children is difficult. Dad specifically stated that he wanted to distribute his estate to all three children equally. In allowing Sis to have the house put in her name as joint tenant, Lawyer was violating the duty to adequately and competently represent his client Dad and his best interests. He should have had a separate meeting with Dad to ensure that all assets were accounted for and distributed according to his wishes.

V. Duty of Fairness to Third parties - Sis, Bob, Chuck

In addition to his client, Lawyer owes a duty of fairness to third parties. Here specifically those who would take under the will - Sis, Bob, and Chuck. During the course of conversations with Dad and Sis, it should have become clear to Lawyer that Sis was going to get all the property and Bob and Chuck would receive the short end of the stick. He owed this duty of fairness to ensure that Dad's will did reflect his desires and his estate went to all three equally.

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

After working for ten years as a deputy district attorney, Lawyer decided to open her own law practice and represent plaintiffs in personal injury actions. In order to attract clients, Lawyer asked her friends and family to "pass the word around that I have opened a solo practice specializing in personal injury law."

Lawyer's brother, Bert, works as an emergency room admitting clerk at a local hospital. Whenever he admits patients who appear to be victims of another's wrongdoing, Bert gives them Lawyer's business card and suggests that they talk to her about filing a lawsuit. Each time Lawyer is retained by someone referred by Bert, Lawyer takes Bert out to lunch and gives him $500.

One such referral is Paul, who suffered head injuries when struck by a piece of heavy equipment on a construction site at Dinoworld, a local amusement park. Recently Lawyer filed a personal injury action on Paul's behalf against Dinoworld. Dinoworld's attorney immediately filed an answer to the complaint. Lawyer and Dinoworld's attorney agreed to set the deposition of the Chief Financial Officer (CFO) of Dinoworld within the next ninety days.

Lawyer's brother-in-law holds an annual pass to Dinoworld. Two weeks ago, he invited Lawyer to a special "passholders-only" event at Dinoworld, at which Dinoworld's CFO led a tour and made a presentation. At the event, Lawyer declined to wear a name tag and avoided introducing herself. She asked CFO several questions about Dinoworld's finances, and made some notes about his responses.

What ethical duties, if any, has Lawyer breached? Discuss.

Answer A to Question 5

5)

Duty of loyalty: special concerns for prior government lawyers

A lawyer has a duty of loyalty to her client. This includes a duty to avoid conflicts of interest. Under the ABA rules, a lawyer who was a previous government lawyer, must avoid working on the same matter in private practice as she worked on as a government lawyer unless there is informed consent from the client and agency. In California, there is no such general rule; however, the rule does apply to former prosecutors representing defendants. There does not appear to be any conflict here, regarding Lawyer's new work. First, she is going into personal injury law. Therefore, she is unlikely to work on the same matters as she worked on as a prosecutor. Second, there are no facts in this problem that show any conflict of interest has arisen. Therefore, Lawyer has violated no rules, but she must be careful to avoid conflicts of interest.

Duty to profession: Lawyer's request of family and friends

Previously, lawyers were not permitted to advertise their services because it was considered unprofessional. However, the United States Supreme Court has since held that lawyers have a constitutional right to engage in truthful, non-misleading advertising. A lawyer may not, however, solicit clients in person or hire others to do so as her agents if she has no prior relationship with the person she is soliciting.

Here, Lawyer asks her friends and family to pass on the word that she has opened a solo practice. This does not appear to be direct, in person solicitation or requesting her friends to solicit. Rather, it appears to more [sic] just "getting the word out," which is really the same as advertising. She is simply letting her friends and family know, so that they can let others know, about her practice. There does not appear to be anything misleading about what she is asking them to do. They are not expected to make any representations about her practice, only to let people know that the practice exists. Therefore, this appears to be proper.

Duty to profession: getting clients from hospitals

In California at least, it is presumed to be misleading advertising to advertise at a hospital. Here, the facts show that Bert works as an emergency room clerk at a hospital, and that there, when he admits patients, he advertises Lawyer's business by giving people her business card. This is presumptively misleading because people are in an especial vulnerable state when they are very sick or injured. Therefore, Lawyer would have to somehow overcome the presumption that she has mislead [sic] people by advertising her services at a hospital.

A lawyer must also not use cappers to do what she could not do. As noted above, in person solicitation of people with known legal problems when there is no prior relationship with those people is prohibited, and it is prohibited if someone else does it for the lawyer as well. A lawyer cannot avoid the rules by having someone else do the act. Here, the facts show that Bert is soliciting clients for Lawyer; he is acting as a capper. He is suggesting that the injured people "talk to her about filing a lawsuit." This is direct solicitation. There is no evidence that Lawyer previously knew the people he is soliciting. The fact state [sic] that he does this "whenever he admits patients," which implies that Lawyer does not know any of the people solicited. This is improper solicitation, so the Lawyer has breach [sic] a duty to her profession.

Duty to profession: Sharing fees with non-lawyers

A lawyer cannot pay a fee to a non-lawyer to refer him. All a lawyer can do is pay regular costs for advertising or join a referral service.

Here, the facts state that "each time" Lawyer is retained after Bert refers someone, Lawyer takes Bert out to lunch and gives him $500. This is improper. First, it is improper because Bert is not a lawyer. He works as an emergency room clerk at a local hospital. Second, the lunch and the $500 are evidently consideration for his referral. Lawyer may argue that Bert is her brother, and that she is simply taking him out to lunch to be with him, and that there is nothing usual [sic] about a sister taking her brother out. However, the correlation of the lunches with the referrals would belie this assertion. Additionally, the brother-sister relationship does not explain the $500. No facts indicate that Lawyer should have any motive for giving Bert the money except that he made the referral. Therefore, this practice is improper and violates Lawyer's duty to her profession.

Duty of Competence

A lawyer owes her client a duty of competence. This means she must keep the client informed, and act with the legal knowledge, skill, thoroughness and preparedness necessary for the work. Here, the facts show that after being retained by Paul, Lawyer filed a personal injury action on Paul's behalf and that she and Dinoworld's attorney arranged for a deposition. Assuming all proper consultation with Paul regarding the filing of this suit, there does not appear to be any violation here. As long as there was a basis for the suit, Lawyer did the proper research before filing it, and Lawyer prosecutes it faithfully and vigorously, there is no violation of the duty of competence.

Duty of Loyalty: trip to Dinoworld

A lawyer has a duty of loyalty, including a duty to avoid making her client's interests adverse to her own personal interest.

Here, the facts show that after filing a lawsuit against Dinoworld, Lawyer accepted a special "passholders-only" invitation to the amusement park. This may or may not be a conflict of

interest. On the one hand, it seems like Lawyer is accepting personal benefits from Dinoworld. The facts imply that the ticket was free, but it sound [sic] like the ticket came from her brother-in-law. But Lawyer is getting a benefit from Dinoworld. She is receiving a special tour and is permitted to enjoy herself at Dinoworld's invitation. Arguably, this places her personal interest adverse to her client[']s. Lawyer would probably argue that this was a one-time event, and that it is not the sort of event that would compromise her representation with her client. This is probably true. However, on the whole, this action creates an appearance of impropriety, which a conscientious lawyer should avoid. Probably, Lawyer should have informed her client of her intent to go to Dinoworld and gotten Paul's informed consent. Then, Lawyer would not be putting Paul in a position where he could potentially question her loyalty and there would be some question as to whether he should trust her. Whether or not this was strictly a violation of the rules, probably not. Whether Lawyer could have avoided even the appearance of a problem, she could have, and probably should have proceeded accordingly.

Duty to Opposing Parties: duty to avoid deception

A lawyer has a duty of fairness to opposing parties. This involves avoiding making material misstatements of fact or omission where there is a duty not to omit.

Here, the facts state that at the event, Lawyer declined to wear a name tag and avoided introducing herself. This makes it sound like she was being deliberately deceptive as to Dinoworld's CFO, that she did not want him or her to know who she was. This is material omission. The CFO probably would have been more on guard about answering Lawyer's questions, or he or she would not have answered them at all, if he/she was aware who Lawyer was. Her efforts not to introduce herself seem to be motivated by a desire to ask the CFO questions and receiving unguarded responses. Therefore, she is deliberately deceiving the CFO in order to receive information. Lawyer will argue that she did not want to introduce herself or wear a name tag because she was simply trying to enjoy a day at Dinoworld without the lawsuit becoming the focus of the event. She will argue that this was to avoid any conflicts. However, this assertion is countered by her decision to ask the CFO questions. The facts that she chose to ask questions speaks to her motive not to wear a name tag. Therefore, Lawyer violated her duty of fairness to opposing parties in failing to identity herself.

Duty to 3d parties: Duty not to speak with parties represented by counsel

A lawyer had a duty not to speak to someone she knows is represented by counsel without the counsels' permission. When the "person" is a corporation, it is less clear who the lawyer may or may not speak to. This is because corporations tend to have many employees, some of who would be considered the "client" and others who would not. To determine who[m] is covered by this rule, who is the "client" of the other lawyer, courts look at the nature of the employee. People who (1) regularly consult with or supervise; (2) people who can bind the corporation with their statements; and (3) people whose statements may be imputed to the organization are considered the client, and a lawyer

must not speak with those people without the corporation's counsel's permission.

Here, the CFO is probably the "client" for purposes of this rule (and probably for most other purposes as well). The CFO is the Chief [F]inancial [O]fficer, and the person whose deposition will be given within the next 90 days. As the CFO, this person is the corporation's agent. This person's statements can be imputed to the organization, and this person can bind the organization. The CFO is one of the "highest" people in an organization. Therefore, Lawyer has a duty not to knowingly speak with him because Dinoworld has an attorney. The facts state that Lawyer and Dinoworld's attorney decided mutually that Lawyer could depose CFO within the next 90 days. This facts [sic] shows two points: first, it shows that Lawyer knows that Dinoworld is represented by counsel and that the CFO is a person who can bind the corporation. Otherwise, she would not want his deposition. Second, it shows that she did not have consent to speak with CFO. If she has consent to speak with him outside of the deposition, there probably would not have been a reason to schedule the deposition. Additionally, it is reasonable to assume that Dinoworld's attorney would want to be present when the CFO was giving information so she could properly prepare him/her. She would not want him/her to talk unwittingly to opposing counsel. Finally, no fact states that any permission was given. Therefore, Lawyer violated a rule by talking to the CFO without his/her attorney's permission.

Answer B to Question 5

1. Duty of dignity to legal profession

– Solicitation –

Neither a lawyer nor his agents may approach a party for potential representation in person, by telephone or in real time electronic manner for the purpose of pecuniary gain if that party is not an existing client or relative.

Here, Lawyer (L) through her brother Bert (B) contacted clients in person upon their arrival at a local hospital. In California, such activity is presumed to be improper solicitation. It is solicitation in violation of ethical rules in California to approach an injured person while they are in a vulnerable state. When an individual is being admitted to the hospital for injuries they are clearly vulnerable and solicitation is impermissible.

Such solicitation is a violation of ethics. B is definitely an agent/runner for L. B assesses each individual upon their arrival at the hospital and if B believes their injury is the result of another's wrongdoing, B gives them L's business card. Also, B is given lunch and money for these actions by L so he is clearly acting on L's behalf.

Thus, although L herself is not approaching these accident victims while in a vulnerable state, her agent B is and that is impermissible and an ethical violation.

– Referrals –

Payment to another by a lawyer for referral of a client is not permissible. Referral payments are an ethical violation.

Here, L pays B $500 each time L is retained by someone referred by B. B also gets lunch. This is especially improper because B is an emergency room admitting clerk and not a lawyer.

Thus, L is also in violation of the no referral rule.

– Advertising –

Generally, advertising of a lawyer's services is permissible if it is not false or misleading. All advertising must be labeled as advertising and at least one person responsible for the ad must be identified. General written advertising is also permissible (like direct mail).

Here, L's request of her friends and family to "pass the word around" could be advertising. This is problematic because it is not labeled as advertising or doesn't appear to be and it is unclear who is responsible for it.

Most significantly, L asks her friend[s] and family to pass the word that she is "specializing in personal injury law." Traditionally, the only specializations that were recognized were patent and admiralty law. However, certain other specialties are recognized if they are approved and if the lawyer is certified by the appropriate organization approved by the ABA or state.

Here, nothing indicates that L has received any special certification for her "specialty" in personal injury law.

Thus, this "ad" by her friends and family is both false and misleading. Therefore, L is in violation of the duty to advertise truthfully.

2. Duty of Candor/Fairness

A lawyer is also bound by a duty of candor and a duty of fairness to both the court and the other side or opposition.

– Represented Person –

One of the major issues of fairness and candor is to the other side and involves speaking to individuals who are represented by counsel without getting permission.

Here, L went to Dinoworld and approached Dinoworld's CFO. Without identifying himself, in fact purposely concealing his identity, D spoke with the CFO about finances and made notes about the conversation.

What makes this a problem is that L knew CFO was represented by counsel because L had already spoken with CFO's attorney about the deposition of CFO.

Thus, L had a duty to get permission from Dinoworld's attorney before speaking to anyone associated with Dinoworld, including the CFO. So, L knowingly spoke with a represented individual before obtaining permission from the attorney and thus violated her duty of fairness.

In conclusion, L is in violation of her duty to the dignity of the profession because of her solicitation, advertising and referrals. Also, she violated her duty of fairness by talking to a represented person without permission.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 California Bar Examination and two selected answers to each question.

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Question 4

Ann represents Officer Patty in an employment discrimination case against City Police Department ("Department") in which Patty alleges that Department refused to promote her and other female police officers to positions that supervise male police officers. Bob represents Department.

At Patty's request, Ann privately interviewed a male police captain, Carl, who had heard the Chief of Police (Chief) make disparaging comments about women in Department. Carl told Ann that Chief has repeatedly said that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise any male officer. Carl met with Ann voluntarily during his non-work hours at home. Ann did not seek Bob's consent to meet with Carl or invite Bob to be present at Carl's interview.

When Bob saw Carl's name as a trial witness on the pretrial statement, he asked Chief to prepare a memo to him summarizing Carl's personnel history and any information that could be used to discredit him. Chief produced a lengthy memo containing details of Carl's youthful indiscretions. In the memo, however, were several damaging statements by Chief reflecting his negative views about female police officers.

In the course of discovery, Bob's paralegal inadvertently delivered a copy of Chief's memo to Ann. Immediately upon opening the envelope in which the memo was delivered, Ann realized that it had been sent by mistake. At the same time, Bob's paralegal discovered and advised Bob what had happened. Bob promptly demanded the memo's return, but Ann refused, intending to use it at trial.

1. Did Ann commit any ethical violation by interviewing Carl? Discuss.

2. What are Ann's ethical obligations with respect to Chief's memo? Discuss.

3. At trial, how should the court rule on objections by Bob to the admission of Chief's memo on the grounds of attorney-client privilege and hearsay? Discuss.

Answer A to Question 4

As Patty's attorney, Ann has a duty of confidentiality, loyalty, fiduciary responsibility and competence to her. This means that she must work hard on her case and follow up any possible leads that Patty may give her and follow up on any reasonable requests made by Patty. As an attorney, however, Ann has a duty of candor, fairness and dignity to the court, her adversary and the public. Because Ann knew that the Police Dept. (PD) was being represented by Bob (B), she was aware that any contact with a police officer could possibly be a violation of these duties. She could have a potential conflict because at minimum, the appearance would be that she was doing something unethical or wrong, even if she wasn't. She could have an actual violation of these duties if she were, in fact, having ex parte communications with a represented adversarial party.

Ann could argue that B represents the PD in general, but not Carl personally, & therefore she was w/i her right to contact him. The PD will argue that because Carl is a police captain, he is in a position of authority that someone would naturally look to for advice & information. Further, a police captain is in a position to make decisions that could bind the PD organization & his decisions could affect the PD. Because there is no one single individual to look to as being the defendant, you must look to those individuals who appear to represent the organization, can bind the organization by their decisions, has [sic] a leadership position & would be someone that one would look to for answers. Carl meets these qualities and therefore Ann violated her ethical duty to not have ex parte communication w/ a represented party. She should have gotten Bob's permission to speak w/Carl[.]

The PD could also argue that Carl is the equivalent of an agent & Ann will also need to obtain Bob's permission to talk w/any agent or employee of a business that may have information about the case & who's [sic] answers & information could be of detriment to the organization or bind the organization to a particular thought or conduct. Again, because Ann did not get Bob's permission to talk to a person who she knew was represented by counsel, she violated the ethical rules.

Although Patty asked Ann to talk with Carl, Ann cannot blindly follow the requests of her client if the requests would be illegal or aid or further an illegal act or if they would violate an ethical rule. A duty of competence is not outweighed by her duty of fairness & dignity to the court and her adversary.

2. Ann's ethical obligations with respect to the Chief's memo

As previously discussed, Ann has an [sic] duty of fairness, candor and dignity to the court, her adversary & the public. This means that she is not to use or benefit from or seek out any evidence which she knows is illegally or fraudulently obtained or to which she knows is clearly a mistake and privileged information. If an attorney knows or has reason to believe that any evidence or property that comes into her possession has been obtained

thru illegal means or fraud, she has a duty to turn it over to the authorities or the court. She cannot destroy the evidence nor can she instruct her client to destroy it. She also has an obligation not to use the information.

Here, after reading the memo[,] Ann clearly saw that the material was confidential attorney[-]client information. She could also tell that it was a document that was made in the course of litigation and therefore work product. She therefore had a duty to turn the memo over to either Bob or the Court immediately.

Ann also has a duty of competence to Patty, however. If she had information that could aid Patty in her case, she had a duty to follow up on it. The balance against the privileged information and her duty to Patty, however, is a difficult position for Ann. The memo gives her information about Carl which will give her an idea as to how much she can rely on his credibility and will give her damaging proof and admissions to the Chief's discrimination against females that all but proves her case. Despite the importance of the memo to her case, however, Ann is not entitled to benefit from another party's mistake and the confidential work product. She violated her duty of Fairness & Candor by reading and keeping the memo, as well as her duty of dignity to the court.

3. Bob's Objections to the Admission of the Memo

An attorney has [a] duty of Confidentiality to his client. This means that any information that he obtains during the course of his representation must be kept confidential, no matter how or when the information was obtained. It exists whether the client specifically asked him to keep it confidential or not and whether or not the release of information would harm or embarrass his client. The attorney[-]client privilege protects an attorney from divulging any confidential information about his client to anyone else, including the court, unless the client consents, the information is with regard to an imminent danger of serious bodily injury or death (although CA does not specifically provide for this) [,] the court orders the information be disclosed, the attorney is defending himself in a malpractice or bar complaint charge or bringing an action against his client for payment of services or seeking an ethical opinion.

Here, Bob has a duty of confidentiality to the Chief under the same analysis as he would be to Carl as previously discussed. The Chief can be considered his client because of his role in the PD, as discussed previously about Carl. Bob has a duty to keep the memo confidential because he asked Chief to write it, it's information central to the case and obtained while he represented the PD.

The document can clearly be categorized as confidential information bet/ a client and attorney. As such, the court cannot order that it be disclosed and used without the consent of the PD, as only the client can consent to it be[ing] used. Ann cannot force Bob to disclose the attorney[-]client priv[i]lege.

The memo can also be considered work product because it was made at Bob's request in anticipation of litigation. Such work product is protected by attorney[-]client privilege and cannot be disclosed w/o one of the previously discussed conditions being met. Chief is clearly not going to consent, Ann cannot order the disclosure, there is no threat to anyone[']s safety or life, there is no suit against or on behalf of Bob and he's not seeking a legal opinion. The court should exclude the memo on grounds of attorney[-]client privilege.

Hearsay

Hearsay is any out out [sic] court statement that is being offered for the truth of the matter asserted. Hearsay is not admissible unless there is an exception.

The memo is hearsay because it is a statement by Chief made out[-]of[-]court and Ann wants to use it to prove that Chief and PD discriminate against women. It also has info about prior bad acts of Carl, which are not admissible to show that he did something wrong on this occasion.

If Chief testifies, this information is w/o his knowledge and he could potentially testify about same. Ann could argue that the memo is a stmt of a party opponent and therefore admissible. Ann could argue that the memo is an admission of fault by Chief & therefore also admissible. If a party makes an earlier out[-]of[-]court admission, it can be an exception to the hearsay rule and admissible.

Ann could also argue that the memo is a statement against interest made by Chief when he knew he was being sued. If a person makes [a] statement against his pecuniary interest, it is deemed reliable and admissible hearsay. The negative comments about women could clearly be construed as against his interests.

Chief could also argue that the memo contains prior bad acts about Carl[,] which is inadmissible character evidence. A party cannot offer evidence of prior bad acts to show that the person is guilty of the current act. Further, the issue of character cannot be admitted unless the suit itself deals with a person's character or it goes to their credibility. Then, the only thing they can discuss is the w's opinion about their reputation for truthfulness in the public. There is no evidence of that here at this time. Further, prior bad acts are only admissible in a criminal case to show motive, intent, mistake of fact, identity and common scheme or plan. It does not apply to civil cases.

Because the memo is protected confidential attorney[-]client privilege, it should be excluded. Even though Ann can show that there are several applicable exceptions to the hearsay rule, the ultimate test is whether the probative value of the memo outweighs the prejudicial affect to the PD. Here, the prejudice is high and the memo should be excluded.

Answer B to Question 4

4)

Question 4

1. Ethical violations by Ann (A) for interviewing Carl (C)

Ann's interview of Carl raised several ethical concerns:

Duty Regarding Communications with Parties or Employees of Parties Represented by Counsel

In the instant circumstance, C is an employee of an organization, the Department, which is represented by attorney Bob (B). The issue is whether it is permissible under the rules of professional conduct for A to interview C without notice t[o] B or representation by counsel.

To begin with, a lawyer may not have communications with a party who is represented by counsel when the counsel is not present or aware of the communications. In situations where, as where [sic], as here, a lawyer seeks to have communications with an employee of an entity represented by counsel, the lawyer must obtain consent from the organization's counsel if: 1) the employee works regularly or at the behest of counsel, 2) the employee has authority to bind the organization, or 3) the employee's actions may be imputed to the organization.

Here, since C is a police captain, he likely has sufficient seniority to bind the Department or for his actions to his actions [sic] to be attributed to the Department. Therefore, it was improper for A to interview him without the consent of Bob (B), who is counsel for the Department. A's actions were improper under the rules of professional conduct, regardless of the fact that C met with A voluntarily and after work hours.

Morever, where a party is not represented by counsel and it appears that person should be, it is the duty of the lawyer to so advise that party. Thus, A should have advised C that he ought to have the benefit of counsel in his communications with her.

Duty of Fairness to Third Persons

Furthermore, A likely violated her duty of fairness to third persons by interviewing C without notice to B or without the benefit of representation by counsel. In this situation, C acted at his peril and may well face negative consequences at work for his actions. In light of this risk, A should have advised C that he ought to have the benefit of counsel in his communications with her. By failing to advise B in this manner, A's conduct violated her ethical obligations.

2. A's Ethical Obligations Regarding the Chief's Memo

To begin with, the memo contains sensitive material that is protected both by the attorney-client privilege and work product privileges.

Attorney-Client Privilege

The attorney-client privilege applies to confidences between a client and counsel in the course of representation. The attorney-client privilege is an evidentiary privilege. Under the evidentiary privilege, one may not be compelled to testify about a matter falling under the privilege. Here, the memo was made by Chief in response to B's request for the summary of certain information that could be used to discredit C. As such, the communication is one between Chief and his lawyer B and falls within the attorney-client privilege.

Work Product Privilege

The work product privilege applies to all material made in anticipation [of] or preparation for litigation. Here, the memo was prepared at B's direction to aid at trial: specifically to discredit a potential witness. As such, the memo falls under the work product privilege.

Duty to Return Material Mistakenly Delivered

A lawyer is under an ethical duty to return material mistakenly delivered to her. Here, the memo was inadvertently delivered by B's paralegal, and B promptly demanded its return, leaving no doubt in A's mind that it was accidentally delivered to her. Moreover, the material clearly contains sensitive material that falls under the attorney-client and work product privileges. The sensitive nature of this material also should have alerted A to the unintentional delivery of this material to her. Since this material plainly was not intended for delivery to her, A is under an ethical obligation to return it.

Duty of Zealous Representation and Diligence

A lawyer has a duty to zealously and diligently represent her client. Absent the applicability a specific rule requiring an attorney to return material mistakenly delivered to her, A would be under a duty to use such material in connection with her obligation to zealously and diligently represent her client. However, in this circumstance, the rule requiring an attorney to return mistakenly delivered material trumps the duty of zealous representation and diligence.

3. Objections to Admissibility of Memo

a. Objection based on attorney-client privilege

As discussed above, the memo initially falls within the scope of the attorney-client privilege.

Waiver?

The issue is whether the accidental disclosure of the memo to A constitutes a waiver. In general, a privilege is waived if it is disclosed to a third-party. Here, if the disclosure were intentional, there is no doubt that a waiver would apply. However, in the instant circumstance, the disclosure by the paralegal was accidental and B promptly sought the return of the material. Moreover, A is under an ethical duty to return the material in all of the circumstances. In light of the accidental nature of the disclosure and the applicable ethical duty for A to have returned the material, a court would likely rule that a waiver has not occurred and allow the protection of the attorney-client privilege to remain intact.

b. Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the memo can be said to constitute double hearsay: the memo is itself an out-of-court statement and it contains references to some things that the Chief said out of court: to wit, that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise a male officer. As double hearsay, an exception to the hearsay rule must apply for each level of hearsay.

Admission

The Chief's statements may be admissible, despite the hearsay objection, because it [sic] can be viewed as an admission. The very essence of the plaintiff's claim is that women are discriminated against. All of Chief's statements that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise a male officer amount to admissions of discrimination. As an admission, the memo can clear both levels of hearsay. Therefore, the court could overrule a hearsay objection on this basis.

Offered Not for the Truth But for The State of Mind

A can argue that the Chief's statements are being offered not for the truth of the matters Chief allegedly said, but rather to show his state of mind. This argument can be

an additional basis for allowing the chief's statements, but it does not solve the hearsay problem inherent in offering the memo, which is another out[-]of[-]court statement, being offered for the truth that Chief said such things.

No Business Record Exception

A business record exception can apply where a party makes a records [sic] in the regular course of business and is under a duty to record. Here, the business record exception would not apply b/c Chief had no duty to make the memo and it was made for litigation, not in the course of business.

No Official Record Exception

Similarly, the official record exception would not apply b/c Chief made the memo for litigation, and it was not made by an agency.

Conclusion

In conclusion, the memo may be admitted and not barred by hearsay b/c it is an admission.

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Question 3

Alice is a director and Bob is a director and the President of Sportco, Inc. (SI), a sporting goods company. SI owns several retail stores. Larry, an attorney, has performed legal work for SI for ten years. Recently, Larry and Carole were made directors of SI. SI has a seven-person board of directors.

Prior to becoming a SI director, Carole had entered into a valid written contract with SI to sell a parcel of land to SI for $500,000. SI planned to build a retail store on the parcel. After becoming a director, Carole learned confidentially that her parcel of land would appreciate in value if she held it for a few years because it was located next to a planned mall development. At dinner at Larry's home, Carole told Larry about the planned mall development. Carole asked for, and obtained, Larry's legal opinion about getting out of her contract with SI. Later, based on Larry's suggestions, Carole asked Bob to have SI release her from the contract. She did not explain, nor did Bob inquire about, the reason for her request. Bob then orally released Carole from her contract with SI.

The next regular SI board meeting was attended only by Bob, Alice, and Larry. They passed a resolution to ratify Bob's oral release of Carole from her contract with SI. Larry never disclosed what Carole had told him about the proposed mall development.

Three years later, Carole sold her parcel of land for $850,000 to DevelopCo, which then resold it for $1 million to SI.

1. Was Bob's oral release of Carole from her contract with SI effective? Discuss.

2. Was the resolution passed by Bob, Alice, and Larry to ratify Bob's oral release valid? Discuss.

3. Did Carole breach any fiduciary duty to SI? Discuss.

4. Did Larry commit any ethical violation? Discuss.

Answer A to Question 3

1. Bob's oral release

Bob, a director of SI, entered into an oral agreement to release Carole, another director, from a contract into which she had entered with SI for the sale of land. The question is whether this release was valid.

Statute of Frauds

Contracts for the sale of land must comply with the statute of frauds, and modifications of such contracts must also comply with the statute. Here, the original contract was in writing, but Bob's release was oral. This statute requires a writing signed by the party to be charged. That requirement was not met.

However, courts have held that parties may rescind a contract without complying with the statute. This appears to have been such a rescission. Further, Carole's reliance on the release – by selling the land to another party – was probably sufficient to make the release effective.

Bob's authority to release SI

The release was valid only if executed by someone with authority to bind SI. On these facts, there is no indication that Bob had such authority.

The Board of Directors has the authority to oversee the management of a corporation and approve major business decisions. However, individual directors do not have such authority.

An officer or director may be given actual authority by the articles of incorporation or bylaws to engage in particular duties. Further, a board of directors can delegate certain responsibilities to a committee of directors (which can be a single director). There is no indication here, however, that Bob was delegated authority to enter into land sale transactions. Because these are significant business decisions, it would be inappropriate in any case to delegate them to a single director.

Finally, because making or rescinding land sale contracts is not one of the ordinary duties of a director, Bob had no implied authority as director to release Carole.

In his position as president, however, Bob may have had authority to execute the release. A president of a company may be given specific powers in the articles and bylaws. Again, there is no indication that Bob had such explicit powers. However, a president may also exercise implied or inherent powers necessary to do his job. A president would certainly have the authority to bind the corporation, for example, to ordinary services or employment contracts. Such authority is implied because it is necessary to exercise the

management powers of his job.

In this case, however, the land sale was a major capital investment. Such a major decision was probably not within the province of the president's authority and required Board approval. Therefore, Bob's release was probably not valid.

Board Resolution

The issue here is whether the subsequent ratification of the release was valid.

Quorum

Board actions are valid only if a vote occurs when a quorum of the Board is present. A quorum is normally defined as more than half the directors – in this case, 4 out of 7. Only three directors were present, however.

In its bylaws, a corporation can establish a smaller number for a quorum if it is more than 1/3 of directors. There is not indication, however, that Sportco had varied the normal rule in this case. Therefore, a quorum was not present and the Board's action was invalid.

Interested Director Transaction

As discussed below, this was an interested director transaction because Carole, a director, stood to profit from the sale of the land. Such transactions may be ratified only by a majority of non-interested directors. In this case, then four directors – a majority of the six non-interested directors – would have had to approve this transaction.

Further, to ratify an interested director transaction, the Board would need to know the facts of Carole's transaction in acco[r]dance with their duty of care. Here, Bob, Alice, and Larry did not know Carole's motives.

Because there was no proper ratification of an interested director transaction, the Board's action was invalid.

3. Carole's fiduciary duties

As a director, Carole had a duty of loyalty to the corporation. She had a duty to act in what she reasonably believed to be the corporation's best interest, and not to profit at the corporation's expense.

Here, Carole violated that duty in several ways. First, she used confidential information for her personal gain. This was a violation because she had a duty to keep confidences acquired in the course of her duties and not use them for personal profit.

Second, Carole usurped a corporate opportunity by selling the parcel to DevelopCo. Having learned that the parcel would appreciate in value, Carole had an obligation to let Sportco profit from that opportunity because it was part of Sportco's line of business – that is, finding suitable locations for its sporting good stores. Carole could only have taken advantage of the opportunity herself had she first offered it to Sportco & Sportco had turned it down. Here, however, Sportco was clearly interested in acquiring the land – since, after the land's value became apparent, Sportco brought it.

Finally, Carole's conduct in withholding her true motives from Bob was arguably fraudulent. Because of her fiduciary duty, Carole was obliged to disclose material facts. Carole's knowledge of the proposed mall development would certainly have been material in the Board's decision.

Carole also violated her duty of care as a Board member. She did not act in conducting the corporation's business affairs as a reasonably prudent person would in her own activities. Certainly passing up a valuable business opportunity that Sportco could have profited from was not prudent.

4. Larry's ethical violations

Conflict of Interest

Larry represented SI, not any individual director. By seeking Larry's legal advice on a personal transaction, Carole attempted to use Larry as her personal lawyer. This created at least a potential conflict of interest if Carole's interests should differ from SI's. In this situation, Larry could not represent Carole unless he informed both Carole & SI & both gave consent that an independent lawyer would find reasonable. By advising Carole without seeking such consent, Larry violated his duty of loyalty to each client.

Further, once it became apparent that Carole was seeking to profit at Carole's expense[sic], the conflict was direct. At that point, Larry should have sought Carole's permission to withdraw. Further, as discussed below he probably should have sought to withdraw from the Board as well. In failing to do so, he further violated his duty of loyalty.

Larry's Board Service

No per se rule exists barring a lawyer from serving on his client's board. However, such service may create problems with the duties of confidentiality and loyalty. Here, as a board member, Larry owed fiduciary duties to SI. He was therefore obliged to tell them material information he received relating to Carole's proposed rescission. He violated these by concealing the information. Further, he acted in Carole's best interest, not SI's, by voting to ratify the transaction. Larry should instead have disclosed the existence of a conflict (giving as little information as possible to avoid breaching his duty of confidentiality to Carole for all information arising out of the course of representation). He should then have sought to resign from the Board, and probably from representation of SI as well.

Duty of Loyalty

A lawyer has a duty to represent each client zealously & and put that client's best interests first. Larry did not do so in regard to SI because he did not advise SI how to enforce the contract with Carole – which would have been in SI's best interests.

Duty of Competence

A lawyer has a duty to thoroughly investigate his client's legal issues. Here, Larry failed to learn the facts of SI's transaction with Carole[.]

Duty of Communication

A lawyer must give a client the information necessary to make major decisions relating to the representation. Here, Larry withheld material information re: his consultation with Carole. SI needed this information in order to fully exercise its legal rights.

Because Larry could not fulfill duties to SI w/out breaching his duties of loyalty & confidentiality to Carole, he should have withdrawn from representation of both clients. In addition, he violated his board member fiduciary duties.

Answer B to Question 3

3)

I. Bob's Oral Release of Carole

Bob's Powers as President
A corporate officer, such as president, can only act under proper authority. In his capacity as president, Bob's release of Carole must have arisen under his express, implied, or apparent authority to bind SI.

Express Authority
A corporate officer acts with express authority to bind (unbind) the corporation when the board has formally conferred that authority to him. Here, the board did not not know abou[t] Carole's intention to be released from the contract. It neither held a vote nor a meeting to grant Bob the express authority to "bind" the corporation in this way. Thus Bob lacked express authority to release Carole from her contract with SI.

Implied Authority
A corporate officer has implied authority from the board to bind the corporation to relatively minor obligations that arise in the everyday course of business. Here, however, a sporting goods corporation had bought and was planning to develop a retail store on a parcel of land worth $500,000. SI only owned "several" sporting goods stores, so the addition of another one is a fairly important development. The facts suggest that this was a relatively major business initiative, and so would not fall within the scope of a corporate officer's implied powers. Thus, Bob as acting as president could not have released Carole from her contract under implied authority.

Apparent Authority
A corporate officer has apparent authority to bind (or unbind) the corporation when he is held out to a third party as having such authority, and the third party relies on that authority. Here, apparent authority is not likely, because Carole, as a board member would not precisely [sic] the metes and bounds of Bob's authority as president. She would thus not be able to claim detrimental reliance on Bob's release based on apparent authority.

Bob's Powers as a Director
Carol[e] might also claim that Bob released Carole from her contract based on Bob's position as a director. In order to bind a corporation, board action must consist of a unanimous vote of all members, or a majority of a meeting with quorum. Here, Bob acted unilaterally as a director; there was no meeting and no vote so he, acting as a single director, could not bind the corporation.

II. Validity of the Resolution Passed by Bob, Alice, and Larry

Quorum Rules for Binding Board Action

As mentioned, binding board action can only arise when there is a unanimous vote, or upon a majority of votes at a meeting with quorum. Here, SI's board has seven members, so quorum would constitute four members. Therefore, since quorum was not achieved, no business of the board meeting with only Bob, Alice and Larry could be binding.

Interested Directors

Even if there were additional board members at the meeting, only directors who do not have a personal interest in a transaction can be counted for quorum. Thus, any vote on whether to release Carole from the contract would have to exclude Carole, because she stood to gain considerably if the contract were released based on the appreciation of the land price. It is not clear if Larry should also be excluded. While he was privy to confidential information not shared with the other members of the board, he did not aim to materially gain from cancelling Carole's contract, unless Carole agreed to pay him. If so, then Larry should be excluded from any vote of whether to release Carole from her contract.

III. Carole's Breach of Fiduciary Duties to SI

Carole breached several fiduciary duties to SI.

Breach of Loyalty

Seeking Release from the Land Contract

A director owes a fiduciary duty of loyalty to the corporation, and must always act in the best interests of the corporation without regard for self-interest. Here, Carole sought release from a valid contract with SI for the land for $500,000. Her motivation in doing so was personal gain; after making the contract, she sought release from it because land prices were appreciating and she stood to gain a profit by retaining ownership of the land and selling to another buyer at a higher price. This behavior clearly contravened her duty of loyalty to SI, which was to obtain the land at the lowest possible price[.]

Since she breached her duty, Carole is liable both for any personal gain as well as material loss to the corporate [sic] as a result of her breach. Instead of selling to SI for $500,000, Carole sold the land to DevelopCo for $850,000; the resulting profit of $350,000 must be disgorged and returned to SI.

In addition, SI originally contracted to buy the land for $500,000 but ultimately paid $1 million. SI can thus recover the damages of $500,000 due to Carole's breach.

Not Disclosing Confidential Information of Land Appreciation

As part of her duty of loyalty to SI, Carole has a duty to communicate all information in her possession that could be used for the corporation's advantage. The fact that the land that SI had obtained via contract was appreciating in value was relevant to SI's business objectives, since it could have decided to keep the land and then sell it later for a substantial profit. Carole's withholding of this confidential information thus marked another breach in her duty of loyalty to SI.

Corporate Opportunity

Related to her duty to communicate information, under the duty of loyalty Carole must present any corporate opportunities to SI first, and can only pursue them upon the board's decision not to pursue them on behalf of the corporation. Here, Carole became aware of a corporate opportunity through obtaining information that the land she had sold to SI was going to appreciate because of the mall development. She thus had a duty to present this opportunity first to the board, and only pursue it if they refrained.

Carole might argue that this does not apply since SI is in the business of sporting goods, not real estate speculation, and that therefore the corporate opportunity did not lie within SI's line of business. Modern authorities, however, state that a corporation may take opportunities broadly defined, even those outside their traditional line of business. Here, then, Carole had a duty to inform SI of the mall development and likely appreciation in land values, and she breached that duty.

Breach of Duty of Due Care

A director owes a duty of due care to the corporation, and must make decisions in the best interest of the corporation as if it were her own business. Here, it was clearly a breach of the duty of due care for Carole to engineer a rejection of a land sale contract at a very favorable price to SI.

Business Judgment Rule

The business judgment rule will normally protect directors whose decisions, made in good faith and with good business basis[sic], nevertheless result in adverse consequences. Here, however, Carole's efforts to seek release from her contract were not made in good faith. She was self-interested and desired to retain the profit from land speculation to herself at SI's expense, and Carole thus cannot be protected by the business judgment rule.

IV. Ethical Violations by Larry

Representation and Service on a Board

Although it is discouraged, a lawyer is allowed to serve as a board member on an organization he represents if he can do so effectively and without jeopardizing his ethical duties to the client organization. Here, Larry performed legal services for several years for SI, which was his client. At the time he accepted his board position, because there was no apparent conflict with his duties as lawyer, this acceptance was permissible.

Duty of Loyalty – Conflicts between Clients
A lawyer owes a duty of loyalty to his client, and must act in his client's best interest. Here, Carole came over for dinner and sought advice regarding her plans to annul the contract. At the time, Carole informed Larry that she was seeking his legal advice, and a putative lawyer-client relationship between Carole and Larry formed.

A lawyer can take on a potential client conflict where 1) the lawyer believes he can reasonably and effectively serve all parties, 2) he informs each party, 3) each party presents written consent, and 4) that consent is reasonable. When Carole disclosed her plans, her interests became materially adverse to those of Larry's client, SI. At that point, Larry should have informed Carole that he could not represent her and urged her to seek independent counsel. His not doing so consti[t]uted a breach of his duty of loyalty to SI.

Duty of Communication
A lawyer has a duty to relay all helpful information to his client. Here, Larry learned that the land that SI had purchased was going to appreciate rapidly, and this information should have been related to his client. This duty, however, conflicted with his duty of confidentiality to Carole, which had attached because she sought legal advice from him. Though a close question, Larry's decision to honor Carole's confidence and not tell SI of the land value was probably correct.

Duty of Competence
A lawyer owes his client a duty of competence. Here, Larry did not disclose and breached.

Assistance in a Crime or Fraud
Under ethical rules, a lawyer must not assist a client in a criminal enterprise or fraud. Here, Carole approached Larry about cancelling the land sale contract because of Carole's desire to profit at the expense of SI. Larry's legal opinions led Carole to seek release from Bob, which involved breaches of fiduciary duties on behalf of Carole owed to SI. Larry might counter by noting that no actual fraud was perpetrated, since Carole never disclosed to Bob the reasons for seeking release. Nevertheless, Larry assisted in breaching a fiduciary duty, and thus breached ethical duties of his own.

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Question 6

Lou is a lawyer. While he was having lunch with a friend, Frank, he learned that Frank's sister, Sally, had decided to dissolve her marriage. At Frank's request, Lou telephoned Sally, told her that Frank had asked him to call, and offered to represent her. They set up an appointment for the next day.

During the appointment, Lou began the discussion by talking about his fee. Sally told Lou she had no money, but admitted jointly owning with her husband some art valued at $1,000,000. Lou agreed to accept a payment of fifty percent of any assets awarded to Sally in exchange for representing her. Lou and Sally memorialized the agreement in writing.

Over the next month, Lou found himself attracted to Sally and eventually asked her to go out with him. She accepted, and they began dating on a regular basis, including having consensual sexual relations with each other.

Soon after Sally filed for dissolution, her husband's lawyer called Lou and made a property settlement offer. Lou told the lawyer the offer was ridiculously low and he would not insult Sally by telling her about it. Sally learned about the offer from her husband. She thought it was a good offer and was incensed that Lou had turned it down. When she asked Lou about it, he told her he was looking out for her best interests.

What ethical violations, if any, has Lou committed? Discuss.

Answer A to Question 6

6)

Lou has potentially violated the ABA [R]ules of Professional Conduct and the model code of Professional Responsibility. He has potentially violated the California [R]ules of Professional Conduct, and where there is a distinction in the law, I will address it.

Here, Lou telephoned Sally at Frank's request to tell Sally that he would offer to represent her. The general rule is that an attorney may not instigate direct, in person solicitation for legal services unless they are talking to a former client or the person comes up to them. In this case, Lou was having lunch with Frank who asked him to call Sally because Sally is his [s]ister. While Lou did not directly make the contact with Sally in person, he is still not allowed to call Sally and offer her his services because they do not have a previous legal relationship. It is also immaterial that Lou told Sally that he is calling because her brother told him to. Lou should have told Frank that he cannot call Sally because it would be violating his ethical obligations. Lou could have told Frank to tell Sally to call him if she really needed help and was looking for legal representation. Thus, because Lou instigated client contact and solicited his services to Sally, he has breached his ethical obligations.

When Lou agreed to take 50% of Sally's assets she would be awarded after the dissolution, he is basically having an interest in the litigation. Generally, a lawyer may not have an interest in the litigation and thus, what Lou should have done is the following: 1. He should have given Sally consultation as to what fees are, 2. He should have given her informed consultation, 3. He should have given her the chance to see outside counsel if she wanted (in writing in CA), 4. He should have obtained her waiver or consent to this agreement (in writing in CA). However, a lawyer may have an interest in the litigation if, for example, it is a contingency fee arrang[e]ment.

Generally under the ABA rules, a lawyer may not engage in a contingency fee arra[n]gement with a client when the case is about a dissolution of marriage because it would violate public policy concerns. However, in California a lawyer may enter a contingency fee arrang[e]ment so long as the arrang[e]ment does not encourage the divorce. Since Sally is in need of a lawyer to have her divorce, it appears that Lou's representation is not encouraging the divorce. Thus, Lou should have given Sally consultation about the fee arrangem[e]nt, put the contingency in writing, he should have also told her and [sic] what his obligations are under his representation (written in CA), and he should have written what the amount of his services would be after he subtracts any court costs, and obtained her written consent to the arrang[e]ment. While the [sic] memorial[i]zed this arrangement in writing, Lou did not give Sally informed consent about the arrang[e]ment nor did he write down what his responsibility and liability is under his representation. Thus, Lou has breached his ethical obligations.

Lou agreed to accept 50% of any assets awarded to Sally in the divorce. A lawyer has a duty to not make his fee unreasonable or unconscionable. In this case, Sally had no money except she jointly owned art with her husband valued at 1 million dollars. Thus, taken into consideration that Sally and her husband may have a lot of money, some courts would find that 50% of Sally[‘s] divorce decree would amount to an unreasonable fee for Lou. Plus, it may also be uncons[c]ionable to take so much money from a client. In this event, what Lou should have done was determine what the normal percentage was for a contingency fee in the general area that he lived in. For example, he could have asked other lawyers and taken note of payment in divorce decrees. He should have also determined if this percentage would actually reflect the amount of work he would be doing. Additionally, Lou should also know that 50% may be too unreasonably high as his fee percentage and he should have offered Sally something more reasonable such as 33% or so. In conclusion, he has breached his ethical obligations by making his fee 50% of Sally’s assets as this is most likely far to[o] unreasonable and unconscionable.

Lou and Sally began a relationship during his representation of her case. Under the ABA rules, a lawyer may not engage in sexual relations with a client. However, in CA it is permissible so long as it does not affect the lawyer’s representation of their client. Here, they began dating regularly and had consensual sexual relations. One the one hand, while this is permissible in CA, it may have affected Lou’s duties as a lawyer because this is a divorce situation where Lou’s emotions may be entangled with the fact that his client is still married. Plus, Lou may be engaging in adultery since Sally only filed for the divorce after she started dated [sic] Lou, subjecting him to more potential ethical violations. Lou has a duty to place his client’s interest in front of his own and now Lou may be placing his emotional interests first. For example, when Husband’s lawyer called, Lou said that he would not take the property offer nor tell Sally about it because he did not want to insult Sally. Here, Lou may be protecting his relationship with Sally rather than being her loyal lawyer.

Also, when Sally asked Lou why he didn’t tell her about the offer, he said that he was looking out for her interests[,] which may not have been true. A lawyer has a duty of loyalty to their client to place their client’s interest first and Lou may have breached that duty by saying he was looking out for her interests when he was really looking out for his relationship with Sally. In this event, Lou should have consulted Sally about their potential conflict of interest (since Lou may place his interest in front of Sally’s best interest), he should have given her informed consent that he may not be able to put her interests first, and he should have asked her to seek another outside counsel’s advice (in writing in CA), then obtain her consent or waiver (in writing in CA). Lastly, if Lou could not reasonably represent her, he should have withdrawn from representation [so] as to not prejudice his client. For example, he could give Sally adequate time to find another lawyer and give her all the documents she would need to continue on her case.

Lou told Husband’s lawyer that he would not tell Sally about the settlement offer. Generally the lawyer is entitled [to] decide the technical and procedural decisions of a case while the client must decide on all the objectives and goals. One major goal is whether or not a client

wants to accept a settlement offer. Here, Lou had a duty to tell Sally about the settlement offer because it was her right as his client to know about it and decide if she should reject it or not. Lou cannot reject a settlement offer and since Lou rejected it, he has breached his duty to behave like a competent lawyer.

Lou did not tell Sally about the settlement offer. A lawyer has a duty to communicate with their client and tell them of all material aspects of their case, especially in a situation like this where Sally would have to know about the settlement offer. Here, Sally found out the settlement from her Husband, not her own lawyer. What Lou should have done is when he received the settlement offer, he should have consulted Sally as to its terms, explained the pros and cons of it and thus, allowed her to make the final decision. Then Sally could ask Lou want [sic] the best thing to do would be since Lou could give her consultation as to the legal implications of accepting a settl[e]ment offer. Yet, Lou just rejected the settlement and did not communicate any material terms of the settlement to Sally. Because Lou did not take these necessary steps, he has breached his duty as a lawyer.

Answer B to Question 6

6)

Applicable Law

An attorney in California is bound by the California Rules of Professional Conduct (RPC) and the California's Attorney's oath. The RPCs are similar but not identical to the ABA Model Rules[,] which govern a lawyer's ethical duties in the majority of jurisdictions. Because it is unclear in which state Lou is a lawyer this essay will apply the majority view of the ABA Model rules but also include distinctions in the California RPCs.

Lawyer-Client Relationship

A lawyer[-]client relationship is formed when the client intends to seek professional advice from the lawyer. In this ca[s]e once Lou and Sally meet for their appointment a lawyer-client relationship has been created because Sally has arrived in response to Lou's call that offered to represent her.

Telephone Call To Sally
Breach of Duty of Candor to the Public and Dignity of the Profession

A lawyer owes a duty of Candor to the Public and a duty to act in a way that does not bring his profession into disrepute. These duties may be violated by in person solicitations for profit.

In Person Solicitation

The [C]onstitution guarantees the right to free speech. However, the Supreme [C]ourt has ruled that this right is limited in the context of commercial speech. Specifically, they have ruled that the [F]irst [A]mendment does not protect false, misleading or inherently deceptive speech. One category of inherently deceptive speech is live contact by a lawyer of a prospective client for profit. Therefore state bar associations can constituti[o]nally regulate this conduct.

Under the Model Rules a lawyer is prohibited from engaging in in person, live electronic or telephone contact, for profit, with a person that is not a lawyer or with whom the lawyer has no preexisting personal, legal, or family relationship.

Here Lou telephone[d] Sally[,] which qualifies as a live telephone contact. Furthermore, he offered to represent her in her action to dissolve her marriage for which he was planning on charging her a fee and make [sic] a profit as later evidence[d] by their fee agreement. Finally, Sally was not a lawyer and Lou had no preexisting personal, legal, or family relationship with Sally. Although Lou was asked to contact Sally by her brother

Frank, who was Lou's friend, this contact was not sufficient to qualify as a preexisting personal, legal or family relationship. In fact up unti[l] the time of the phone call Lou had no relationship with Sally and she had no idea who he was.

Therefore, by engaging in this live telephone contact, for profit solicitation Lou violated his duty of candor to the public and the duty he owes to the dignity of the legal profession.

What Lou should have done is tell Frank to have Sally call him to ask for representation. In that case Lou would not have initiated the contact and would not have violated any ethical duties.

Fee

Breach of Fiduciary Duty to Client for an Improper Fee

A lawyer owes a fiduciary duty to his client to charge a proper fee that conforms to all the requirem[e]nts laid down by the ethical rules.

Fees Generally

Under both the California RPCs and the ABA Model Rules a fee must be reasonable. Reasonableness is determined by factors such as the time, skill, and expertise required by the lawyer, the difficulty of the issues, similar fees charged for similar work in that locality, and so forth. Here the fee is for 50% of any assets awarded to Sally. Sally had told Lou that she had no money but her and her husband had $1,000,000 worth of art. This would mean that Lou's fee was at least $250,000 assuming Sally had no other assets. However, it is likely that people with such a large amount of art also have other expensive assets such as cars and houses. Therefore, Lou's fee is likely to be greatly in excess of $250,000. Regardless a contingency fee of 50% is usually not a reasonable fee given that most contingency fees are 33% or less. Therefore, Lou's overall fee is unreasonable and violates the ABA Model Rules and the California RPCs.

A fee should be in writing under the Model Rules and must be written under the California RPCs unless it is for less than $1000, for a[n] existing client in a routine matter, exigent circumstances exist, it is waived, or it is for a corporation. This fee was in writing[;] thus in that regard it complied with the Model Rules and the California RPCs.

Therefore, because the fee is unreasonable it is an ethical violation. Lou should have charged a fee that was less than or around 33% or a fee that was charged for similar work in such a locality in order to have a reasonable fee.

Contingency Fee

A contingency fee is one that is a percentage awarded to the lawyer if and when the client prevails. A contingency fee must be in writing, must otherwise be reasonable, must

discuss how work not covered by the contingency fee will be paid, and must provide a formula for how the contingency fee was determined. Here the fee was in writing. However, the fee may not have been reasonable as stated above.

Furthermore, under the Model Rules a contingency fee may not be taken in a domestic relations matter. However, under the California RPCs a contingency fee may be used in a domestic relations matter as along as it does not incetivize [sic] divorce. Therefore, if Lou is in a state that applies the Model Rules this contingency fee is an ethical violation because it involves a domestic relations matter of a dissolution. However, if Lou is in California his contingency fee is likely not an ethical violation because he made the fee with Sally after she had decided to dissolve her marriage and thus did not incentivize [sic] her decision to seek a divorce.

Lou should not have charged a contingency fee if he was in a Model Rules Jurisdiction but rather should have found some other way for Sally to pay her fee, perhaps by asking Frank to loan her the money necessary.

Breach of Duty of Loyalty to the Client

A lawyer owes a duty of loyalty to their client. The lawyer must act with the utmost good faith and in a way she reasonably believes is in the best interests of her client[,] having no other considerations in mind. If the lawyer becomes conflicted and that conflict materially limits the representation the lawyer may continue the representation only if he informs the client in writing of the conflict, receives written consent that a reasonable lawyer would advise their client to give, and he reasonably believes that he can continue the representation without it being materially limited.

Stake in Subject Matter of Litigation

Under the Model Rules a lawyer breaches their duty of loyalty to the client by taking a stake in the subject matter of the litigation. However, one exception to this is contingency fees in civil cases. Here Lou has taken an interest in the subject matter of the litigation because his fee is based on the amount and kind of assets he recovers for Sally in her divorce proceedings. However, this is clearly a contingency fee as it depends on assets actually being awarded to Sally in the divorce, thus it is contingent on Lou's success. Therefore, it does not breach Lou's duty of loyalty. However, because as stated above it is a contingency fee in a divorce proceeding it may not be a valid contingency fee if Lou is in a Model Rules jurisdiction. In such a jurisdiction the court may consider it an interest in the litigation rather than a contingency fee and therefore an ethical violation.

Therefore, the fee agreement breaches Lou's fiduciary duty to his client Sally and possibly his duty of loyalty to her as well.

Consential [sic] Sexual Relations
Breach of Duty of Loyalty to the Client

The duty of loyalty that a lawyer owes a client is laid out above.

Model Rules

Under the Model Rules a lawyer breaches the duty of loyalty by entering into a consensual sexual relationship with the client, regardless of its effect on the representation. However, the Model rules do allow preexisting consensual relationships to continue as long as they do not materially limit the lawyer's ability to represent the client. Here Lou and Sally's relationship began after the[y] entered into the lawyer[-]client relationship. Therefore, under the Model Rules Lou breached his duty of loyalty to Sally by entering the relationship with her.

Lou should have never entered consensual sexual relations with Sally nor even asked her to go out with him. If Lou had really wanted to date Sally he should have asked her to consent to his withdrawal as her lawyer and then started to date her.

California RPCs

Under the California RPCs a lawyer may enter a non preexisting consentual [sic] sexual relationship with a client without breaching the duty of loyalty as long as he reasonably believes the representation of the client will not be materially and adversely affected, the relationship is not in payment of any of the client's obligations to the lawyer, and the relationship is not entered into by the client because of duress or undue influence. Here there appears to be no evidence that the relationship was in part payment of the fee because the written fee agreement predated the relationship and was for a large amount of money[;] additionally there is no evidence of duress or undue influence.

However, there is evidence that the relationship materially and adversely affect[ed] the representation. Lou later received a call from Sally's husband[']s lawyer and turned it down and refused to communicate it to Sally because it was ridiculously low and he did not want to insult her. His motive in not wanting to insult her may have been do [sic] to their personal relationship. Furthermore, his failure to communicate the offer to her was a breach of his duty of care that he owed to Sally as will be discussed below. If his relationship was causally related to his breaches of duty of care then certainly the representation was materially limited by the sexual relationship. This is further reinforced by the fact that Sally learned of the offer and though[t] it was a good offer. Because the relationship was materially limiting the representation it violated the California RPCs.

Lou should never have entered the relationship with Sally and certainly should have withdrawn after his feelings for her began to limit his representation of her. Lou should certainly have received Sally's informed written consent as to the continued representation, however, once he rejected the settlem[e]nt offer it appears that the representation was

materially limited and he could not reasonably continue the representation. Therefore, at that point he should have withdrawn.

Failure to Communicate the Settlement Offer and Rejection Thereof
Breach of Duty of Care Owed to the Client

A lawyer owes their client a duty of care. This duty requires that the lawyer act with the skill, knowledge, thoroughness, and preparedness reasonably necessary to effectively carry out the representation. If Lou rejected the offer and it was a good offer then he may have violated the duty of care because a reasonable lawyer would at least entertain a decent offer and communicate it to their client. We do not know anything about the terms of the offer but we do know that his client Sally believed that it was a good offer. Because of this and because of his failure to communicate the offer to Sally, as discussed below, Lou violated his duty of care.

A Lawyer's duty of care includes a duty to communicate with the client. The duty to communicate requires that the lawyer keep the client reasonably informed about the representation and respond to the client's reasonable requests for information. Here Lou failed to communicate the settlement offer to Sally as communicated by Sally's husband's Lawyer. Failing to inform a client of a settlement offer is a failure to keep them reasonably informed about the representation because a decision whether to settle or not is one that is solely in the purview of the client and the client cannot make that decision unless they are informed of that offer. Furthermore, Lou knows that Sally's husband's lawyers [sic] is ethically prohibited from communicating with Sally because she is a party adverse in the matter whom the lawyer knows is represented. Thus Lou must have known that there was virtually no way for Sally to find out about the offer. Therefore, Lou violated his duty to communicate and thus his duty of care.

A Lawyer's duty of care also includes a duty of diligence. That is[,] the lawyer must diligen[t]ly and zealously pursue the interests of his client. Here by failing to communicate the settl[e]ment offer and thus possibly losing the ability to settle, Lou has violated the duty of diligence because a diligent lawyer would at least communicate the offer to his client and discuss it with them.

Scope of Representation

The objectives of the representation are decided by the client subject to the lawyer's advice on the ethical rules and other law. The means of the representation are decided by the lawyer. The Advisory notes to the Model Rules state that decisions regarding the settlement of a civil case are considered to be objectives. Therefore, the decision to settle or not was one that should have been made by Sally rather than by Lou and Lou violated his ethical duty by not communicating the settlem[e]nt to her and by deciding on his own that the offer was ridiculously low and an insult.

If Lou felt that the settl[e]ment was inadvisable he should have counseled Sally on that fact rather than withholding information. If he thoug[t] such action was repugnant he may have sought permissive withdrawal to end the representation. However, he did none of these things and therefore violated the Model Rules and the California RPCs.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

Conclusion

Since offensive collateral estoppel is allowed under these circumstances, the court incorrectly denied Pat's motion for summary judgment on her contract claim.

Tort claim

Res judicata

For the same reasons as the breach of contract claim, res judicata will not apply to the tort claim.

Collateral estoppel

The issue of Busco's tort liability for the accident when the bus hit a tree was not actually litigated in Ed's action, which was solely for breach of contract because Ed was not hurt. Accordingly, collateral estoppel will not apply to Pat's tort action.

Conclusion

The court correctly denied Pat's motion for summary judgment on the tort claim.

Question 5

Marla is a manufacturer of widgets. Larry is a lawyer who regularly represents Marla in legal matters relating to her manufacturing business. Larry is also the sole owner and

operator of a business called Supply Source ("SS"), in which he acts as an independent broker of surplus goods. SS is operated independently from Larry's law practice and from a separate office.

At a time when the market for widgets was suffering from over-supply, Marla called Larry at his SS office. During their telephone conversation, Marla told Larry that, if he could find a buyer for her excess inventory of 100,000 widgets, Larry could keep anything he obtained over $1.00 per widget. Although Marla thought it unlikely that Larry would be able to sell them for more than $1.25 per widget, she said, ". . . and, if you get more than $1.25 each, we'll talk about how to split the excess." Larry replied, "Okay," and undertook to market the widgets.

During a brief period when market demand for widgets increased, Larry found a buyer, Ben. In a written agreement with Larry, Ben agreed to purchase all 100,000 widgets for $2.50 each. Ben paid Larry $250,000. Larry then sent Marla a check for $100,000 with a cover letter stating, "I have sold all of the 100,000 widgets to Ben. Here is your $100,000 as we agreed."

When Marla learned that Ben had paid $2.50 per widget, she called Larry and said, "You lied to me about what you got for the widgets. I don't think the deal we made over the telephone is enforceable. I want you to send me the other $150,000 you received from Ben, and then we'll talk about a reasonable commission for you. But right now, we don't have a deal." Larry refused to remit any part of the $150,000 to Marla.

1. To what extent, if any, is the agreement between Larry and Marla enforceable? Discuss.

2. In his conduct toward Marla, what ethical violations, if any, has Larry committed? Discuss.

Answer A to Question 5

5)

The Agreement Between Larry and Marla is enforceable because it was a unilateral contract fully performed by Larry and it was not subject to the Statute of Frauds[.]

Offer, Acceptance and Consideration:

The agreement between Larry and Marla is a unilateral contract. In order for there to be a unilateral contract there must be mutual assent (and offer and acceptance) and bargained for exchange (consideration). An offer is a communication between two persons or entities, and it is made where reasonable people would believe that acceptance of the offer would lead the participants to be bound by its terms. The terms of the offer must also be sufficiently definite. In our case, an offer was made by Marla to Larry to find a buyer for her widgets. As a finder, Larry would be entitled to the portion of the proceeds between $1.00 per widget and $1.25, and then a portion of the proceeds above $1.25. In this case the terms of the contract were sufficiently definite even though the portion of proceeds above [$]1.25 had not been definitively determined. Given their preexisting, ongoing relationship, and that both are merchants it is fair to assume that they could finalize the contract terms at a later date, after the sale of the widgets. A reasonable person would believe that Marla was inviting acceptance and wanted to be bound by the terms of her offer.

In this case, Larry accepted Marla's contract by performing. Marla's offer was for a unilateral contract. A unilateral contract is a contract that can be accepted only by full performance. It is clear from its terms that Larry could only accept Marla's offer by actual performance because her offer was conditional. He would only get a percentage of the proceeds "IF" he found a buyer. In this case, Larry accepted the contract when Ben agreed to purchase all 100,000 widgets for $2.50 each and the widgets were actually sold.

Consideration is present in a contract where the promissee incurs a detriment. That is, he does something that he does not have to do, or refrains from doing something that he does not have to do, or refrains from doing something that he is entitled to do. In this case, there is consideration because Larry, the promissee[,] incurs a detriment when he enters the market to look for a buyer. He is not required to look for a buyer in this case, but does so anyway. He incurs a detriment because it takes time away f[ro]m his other business pursuits (including his law practice).

Because there has been a definite offer made by Marla, Larry fully accepted through his performance, and consideration is present, a contract has been formed so long as no defenses can be raised.

Defenses

The agreement between Larry and Marla is enforceable because no defenses to formation can be raised. The Statute [of] Frauds is a requirement that certain contracts be in writing.

The writing must include the material terms of the contract and be signed. Contracts that are subject to the statute of frauds are contracts in consideration of marriage, surety contracts, contracts that cannot be formed in one year, and land sale contracts. None of these are relevant here. In addition, contracts for goods in amount greater than $500 are also subject to the statute of frauds. If a contract for goods in an amount greater than $500 is not in a signed writing, it generally is not enforceable.

In this case, the contract between Larry and Marla was not subject to the "goods prong" of the statute of frauds because Larry did not purchase the goods directly from Marla. Larry's role was that of a finder or marketer whose responsibility it was to find a buyer for Marla's widgets. He was incented [sic] to find a high price because he was entitled to keep anything over $1.00 per widget, and then a portion of the proceeds above $1.25 per widget. The arrangement would also benefit Marla because a high price for the widgets would benefit her as well, and she could rely on Larry's expertise as a broker. Marla would also not have to worry about the hassle of setting [sic] the goods and could concentrate on the core aspect of her business, manufacturing. One could argue that Larry purchased the goods from Mary because he received the purchase price from Ben directly and his business was as a broker of surplus goods. In this case he did not act as a broker, because he did not buy the goods from Marla directly. There is no indication that the goods were ever in his possession. Further, in a typical sales contract, a manufactu[r]er is not entitled to a percentage of the middleman's purchase price. Thus, the contract is more akin to that of finder who never "owned" the goods.

Ethical Violations

Operating a Business:

Larry did not commit an ethical violation when he formed and operated a business called Supply Source. A lawyer may own and operate a business that is separate and apart from the practice of law. For example, a lawyer may own a restaurant or a gas station. Lawyers may also operate a law firm that offers services related and incidental to the practice of law, but that are no[t] actually the practice of law. For example, a law firm may offer services relating to money management and accounting. In this case, we know that Larry was the sole owner and operator of a business called Supply Source, and that it operated independently from Larry's law practice and from a separate office. Because the business was run separately and apart from his legal practice, and it did not involve anything remotely related to the practice of law, it is permissible for Larry to own and operate the business. However, a lawyer who runs a business must be careful not to engage in business that would pose conflicts of interests with its clients. We will see below that Larry did not operate his business in a way to minimize conflicts.

Entering into a Business Relationship:

Larry committed an ethical violation when he did not follow proper procedures when he entered into a business arrangement. When a lawyer enters into a business arrangement

with a non-lawyer (and especially a client!), the lawyer must abide by a set of procedures. First, the lawyer should advise the other party to consult another lawyer and give him or her time to do so. Second, the lawyer must disclose and explain all the relevant terms of the contract in a way that the other party can understand. Last, the terms of the contract must be fair and not one-sided to the lawyer's benefit. In this case the terms of the contract seem to be fair. We can presume that they are fair because Marla set the terms of the contract and the contract was not negotiated by Larry. Second[,] there was no need for Larry to explain the relevant terms of the contract because they were self-explanatory and a lay person could understand them. However, Larry did not give Marla an opportunity to consult with a lawyer before entering into the contract. While Marla could have waived the right to consult a lawyer, Larry must still advice [sic] her that it may be beneficial. In this case, a lawyer may have been helpful. He may have advised Marla not to enter into a contract with Larry where all the terms have not been finalized. The fact that the terms have not been finalized is what caused the problem in the first place.

Duty to be an honest, upright member of the community

Larry should have been honest in his dealings with Marla. A lawyer had a duty to act in upright, honest manner in all aspects of his or her life. In this case, Larry should have disclosed to Marla the amount of money he received from Ben and made a good faith attempt to resolve the open issue in their contract. By ignoring that aspect of the contract and no[t] disclosing the amount he received, he seems to be acting in a deceitful manner. Not only [should] a lawyer abide by ethical considerations in the course of his practice, he must also abide by them in other aspects of his or [her] life.

Answer B to Question 5

5)

(1) Enforceability of the contract between Larry and Marla

Applicable Law: If this case involves the sale of goods (tangible personal property), widgets, Article 2 of the Uniform Commercial Code applies to the transaction. However, while the case does involve the sale of widgets, the contract is really for Larry's service in selling the widgets, therefore common law would likely apply. Indeed, the payment to Larry was for the sale of the widgets. He never purchased the widgets himself, but merely acted as a broker to Ben.

The issue is whether the agreement between Larry and Marla is legally enforceable, and therefore a contract exists. In order to form a contract there must have been an offer by Marla, acceptance by Larry, and some form of consideration for the agreement.

Offer: The first issue is whether Marla ever made an offer to Larry. An offer is made when a party manifests an intent to enter into contract and communicates such intent to an offeree. Here, Marla did call Larry at his Supply Source ("SS") office and stated that she wanted Larry to sell her excess inventory. Under common law, an offer must state a price term and the material terms of the contract. The material terms, the sale of widgets up to 100,000, were certainly state[d].

The issue is thus whether there was a price term. Marla did agree to give Larry all profits over $1.00, up to $1.25. However, there was no certain price term since Marla stated that any excess over $1.25 would have to be negotiated as to the amount Larry would receive. Therefore, the lack of a certain price term negates the enforceability of the contract. The parties did not have a meeting of the minds as to what Larry would be paid for the profits he received on the widgets over $1.25. Thus, the facts probably indicate that Marla intended to contract and not to continue to negotiate.

Under the UCC, however, the court only looks at the intention of the parties to determine if there has been an offer. The UCC does not require a price term and will imply a reasonable price term if one is not stated. However, if the parties are negotiating the price term there is no intention to contract under the UCC. There was likely an intend [sic] by Marla to enter into contract since she believed it unlikely that Larry could sell the widgets for more than $1.25 per widget. Although the price term is not certain, the court could infer a "reasonable" price term for any sale over $1.25.

If there is not offer[sic], the agreement would not be enforceable under contract law. However, if there was an offer, all the other elements for a valid contract (as discussed below) were satisfied and therefore there was an enforceable agreement.

Acceptance: Marla's offer to Larry was probably a unilateral contract, that is, one

that states a specific (and only) form of acceptance. Here, Larry could only accept Marla's offer by selling the widgets for at least $1.00 per widget and giving Marla $1.00 for each widget sold. His acceptance was only upon completion of his performance.

If the contract was a bilateral contract, Larry would have promised Marla he would sell the widgets. Failure to sell the widgets would have meant Larry could have incurred liability for breach of contract for failure to perform. There is no such liability under a unilateral contract, since there is only acceptance upon completed performance.

Consideration: Consideration is a bargained for legal detriment. The only issue as to consideration in this case is whether Larry's promise was illusory. However, this was not a bilateral contract, but a unilateral contract in which Larry could only accept by performance. His performance therefore would be consideration.

Statute of Frauds: The statute of frauds requires that some contracts be in the form of a signed writing (statute of frauds may be satisfied in other ways). The statute of frauds does not apply to this case however because it is for a service, Larry's sale of widgets, which can be completed within 1 year.

If this was a contract for a sale of goods of at least $500, the statute of frauds would apply. There was no writing. However, the statute of frauds can also be satisfied by full performance, which Larry did provide, by selling the widgets and turning payment over to Marla.

Again, as discussed above, this is a services contract, not a sale of goods contract and therefore not under the statute of frauds.

Quasi-Contract

Larry could still recover damages from Marla even if there was no contract, under quasi-contract principles. Quasi-contract is a principle used in contract law to prevent the unjust enrichment of a party. Here, Marla would be unjustly enriched if there was no formal contract and Larry expended his time and energy to find a purchaser for the widgets and was not compensated for his efforts. Therefore, the courts will allow Larry to recover for the fair market value of the services he rendered to Marla. The likely determination of the amount Marla benefited would likely be $25,000, but could include a reasonable amount for the remaining $125,000 over the agreement terms.

Conclusion:

There probably is an enforceable contract under which Larry can keep $25,000 and a reasonable amount of the additional $125,000 he received from the widget sales. Even if Larry cannot recover under contract, he can still recover under quasi-contract principles.

(2) Possible ethical violations committed by Larry

Attorneys owe several duties to many different parties, including their clients, adversaries, the court, and the public at large. Here, Larry regularly represents Marla in legal matters relating to her manufacturing business. Although Larry was not representing Marla in a deal for the sale of widgets, he still may have violated some of his duties to the profession.

Duty of Loyalty - business transactions with clients:

A lawyer owes his or her clients a duty of loyalty. The lawyer must act in a way they believe is for the best interest of the clients at all times (unless other ethical rules prohibit such, like placing a client on the stand who intends to perjur[e] herself.) Included in the duty of loyalty is fair dealing in business transactions with a client.

Both California and the ABA have rules regulating business transactions between lawyers and their clients. These rules require that for any transaction between a lawyer and a client, the lawyer should make sure the deal is fair to the client, express the deal in an understandable writing, allow the client to meet with independent counsel, and the client should consent to the deal in writing. Here, there is no evidence the deal entered into between Larry and Marla was not fair. The great increase in widget price occurred after the deal between the two was struck[.] However, there was no writing or opportunity for Marla (or suggestion by Larry) to consult independent counsel.

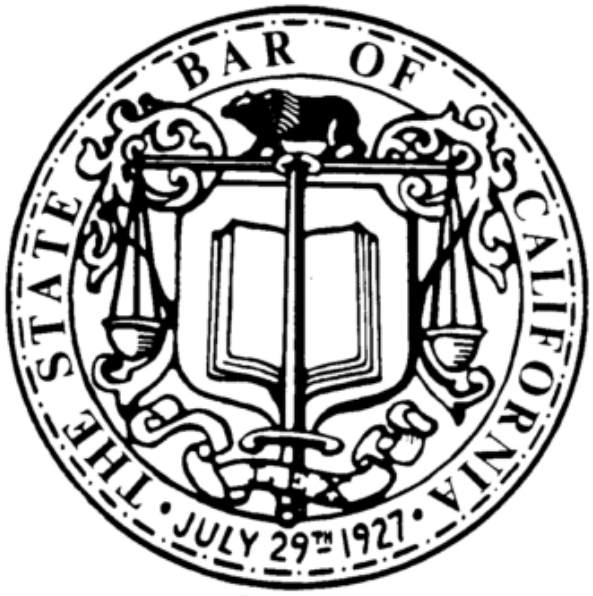
This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two endeavors are mixed in any manner by Larry.

However, since Larry has a regular and ongoing (at least prior to this incident) relationship with Marla, he should have satisfied the elements stated above and in failing to do so violated his duty of loyalty to his client Marla.

Duty to act honestly, without deceit or misrepresentation: A lawyer owes a duty to the public at large in all of his or her dealings to act honestly, without deceit or fraud and not to misrepresent. Violations of this rule harm the integrity of the profession. Here, it is unknown whether Larry truly believed he simply owed Martha the $100,000 dollars [sic] for the transaction for the widgets or if he attempted to deceive her as to the price he received in an attempt to keep the additional profits to himself. If Larry violated the agreement knowingly, he would have also violated his duty to the profession by acting in a dishonest manner. This is a clear violation and compounded by the fact that Larry represents Marla on a regular basis in legal matters.

Conclusion:

Larry likely violated his duty of loyalty and his duty to act honestly to the public at large in his dealing with Marla. Although he was not acting as her attorney at the time of the deal to sell the widgets and Marla was likely aware of such since she contacted him at his SS office, Larry still violated his professional duties. However, Larry probably did not violate his duties of confidentiality or loyalty if he revealed any information received during his representation of Marla in finding Ben, the buyer of the widgets.



California
Bar
Examination

Essay Questions and Selected Answers

July 2006

Question 5

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her $1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered $15,000 to settle the case without conceding liability. By this time, Lawyer had advanced $5,000 in litigation and living expenses, and Client had incurred $5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

Answer A to Question 5

Question 5

The issue is whether lawyer has committed any ethical violations in his representation of Client, either under the ABA Code ("Code"), the ABA Model Rules, or the California rules of professional responsibility. Based on the facts provided, Lawyer has committed a number of ethical violations, each of which will be discussed in turn.

Contingency Fee Agreement

In general, a lawyer is prohibited from taking a proprietary interest in the case he is working on. However, all 3 bodies of law discussed above recognize contingency fee agreements, or agreements in which the lawyer and client agree that the lawyer's fee will be paid out of any recovery the client receives. Lawyer and Client had such an agreement in this case.

Under the ABA Model Rules, a contingency fee agreement must be in writing, must state the percentage of the recovery the lawyer will take, must state what expenses will be paid out of the recovery and must state whether such expenses will be paid before or after the lawyer's percentage is calculated.

In addition, California law requires that the agreement state that the lawyer's percentage is negotiable, i.e. that it is not fixed by law, and that it state how other, non-covered expenses will be paid.

In this case, Lawyer and Client entered into a valid, written contingency fee agreement under which it was agreed that Lawyer would receive 1/3 of Client's recovery. Assuming that all of the above elements were also included in the agreement, it will be enforceable as a valid contingency fee agreement.

Expense Advances and Loans

Next, there is the issue of whether Lawyer violated any ethical duties by advancing Client's litigation costs and lending her $1000 in living expenses.

Under both the ABA Code and Rules and California law, a lawyer may advance an indigent client's litigation expenses, provided that the lawyer may later recover them as part of his contingency fee. In this case, therefore, Lawyer did not violate any ethical duties simply by advancing client's litigation expenses.

However, as stated above, the continency fee agreement must include how all expenses will be paid, and whether they will be paid, and whether they will be paid before or after the lawyer's percent is taken. Here, Lawyer and Client orally agreed on the advance, and it is not clear when it was to be repaid - before or after Lawyer's fee was deducted. Failure

to reduce this agreement to writing with precise terms therefore constitutes a violation of Lawyer's ethical duties.

The ABA Code and Rules prevent lawyers from making loans to their clients in excess of litigation expenses. However, California permits lawyers to make such loans, so long as the payment is actually a loan that must be repaid and not an outright gift. Additionally, the lawyer and client must enter into a written loan agreement, signed by both parties.

Here, Lawyer's loan of $1000 for living expenses would be banned under the ABA Code and Model Rules. Although California law is more permissive with respect to loans, Lawyer's actions would also constitute a violation of California's rules of professional responsibility, as he did not ensure that the loan agreement was reduced to writing and signed by Client. Furthermore, as with the litigation expenses, it is not clear whether Lawyer's loan will be repaid before or after his 1/3 of the recovery is calculated.

Lawyer's Assurance to Physician - Duty of Communication

Lawyers owe a duty of communication to their clients, according to which they must relate information about a case's progression and status to the client on a periodic basis so the client can make informed decisions regarding the case.

Here, Lawyer made a side agreement with Physician by sending Physician a letter stating that he would receive full payment from the recovery in the case. Lawyer did so without Client's knowledge or consent. Because this is an important matter that ultimately affects the amount Client will receive to compensate her for her injuries, she should have been informed of this agreement. Therefore, Lawyer violated his duty of communication by failing to disclose the contents of the letter to client first.

And again, because the agreement with Physician addressed the payment of expenses out of client's recovery, it should have been included in the terms of the contingency fee agreement.

Duty of Due Care/Competence

An attorney also owes a duty of competence, which means he must act with the care, skill, preparation and diligence of a reasonable practitioner under the circumstances.

Here, the facts state that the case would not settle for the amount Lawyer initially forecast due to Defen[d]ant Driver's strong case. If Lawyer was negligent, or failed to adequately investigate the case before arriving at his initial estimate, and if that error harmed his initial negotiating position, he may be found to have violated the duty of competence as well.

Duty of Loyalty

A lawyer owes a client a duty of loyalty, according to which the lawyer must act solely to further the client's best interests. He may not sacrifice the client's interests to his own or to those of a 3rd party.

In this case, the facts suggest that Lawyer pressured Client into accepting the settlement offer, even though she was reluctant to do so at first. Indeed, Client had already incurred $10,000 worth of expenses, and the offer was only for $15,000. Lawyer appears to have convinced her to accept by taking her out to dinner, engaging in sexual relations with her, and renegotiating their oral contingency fee agreement.

The facts also suggest that Lawyer's interests in so doing were not solely to ensure Client received the largest possible award, but also to ensure that he too would recover his expenses.

Under these facts, therefore, it appears Lawyer has violated his duty of loyalty to client by using undue influence to ensure that he is able to recover his continency fee, regardless of how much is left over for Client.

Consensual Sexual Relations

The ABA Code and Model Rules expressly forbid lawyers from engaging in consensual sex with their clients. California, by contrast, allows such relations where the Lawyer and Client are involved in a preexisting sexual relationship and where the nature of their personal relationship will not affect the Lawyer's care, judgment, skill, etc.

Here, Client and Lawyer engaged in consensual sex after drinking two bottles of wine with dinner. This would be grounds for an ethical violation under the ABA Model Rules and Code.

Under California law, the answer is slightly less clear. There is no indication that Client and Lawyer had a previous relationship. Furthermore, as discussed above, the circumstances indicate that Lawyer was using sex as a means to exert undue influence over client's decision to accept the settlement off[e]r. The presence of wine certainly doesn't help Lawyer's case.

Therefore, Lawyer will likely be found to have violated California's rules as well by engaging in consensual sex with client.

Substantive Decisions

Clients have a right to make substantive decisions about their cases, while lawyers typically choose the legal strategy to be employed.

Here, Client had a right to decide whether or not to accept the settlement offer, as this was

a decision affecting her substantive rights. Lawyer's exertion of undue influence over this decision therefore violated her right[.]

General Duty of Good Faith

Finally, Lawyer will likely be found to have violated his general duty of good faith by failing to pay Physician after expressly agreeing to do so earlier, albeit without Client's knowledge or consent.

Answer B to Question 5

The question asks what ethical violations the lawyer in this fact pattern may have committed. There are five events which might have given rise to ethical violations by the Lawyer (L): 1) The agreement to advance legal and living expenses; 2) The letter to the Physician (P); 3) Sexual relations between L and Client (C); 4) The settlement offer agreement decision by C; and 5) Failure to pay P.

1. Agreement to advance expenses

The issue is whether the lawyer committed any ethical violations regarding the advances from L to C. Under ABA rules, a lawyer may advance litigation expenses to clients unable to afford such expenses, but he may not advance living expenses for fear that a lawyer is buying a client. Under CA rules a lawyer may advance both legal and living expenses, but the lawyer must get any loans to a client in written form with the client's knowing consent that such funds are loans that must be paid back. Further, the advancement of legal expenses in both CA and ABA must be contained in the writing of any contingent fee agreement.

Here, the lawyer advanced living expenses[,] which is strictly forbidden under the ABA, so he could be subject to discipline. Also, the expense arrangement was oral[,] not in writing, so in CA, the lawyer has also violated the ethical code re: loans to clients.

In addition, in any contingency fee agreement, it must be explained in the writing whether the lawyer's percentage is pre- or post- expenses. On these facts, it is unclear whether L put such arrangement in the writing. L should be subject to discipline[.]

2. Letter to Physician (P)

The next issue is whether L committed any ethical violations re: his letter to P that P's fee would be paid out of the accident recovery. L potentially violated his duty of loyalty to C, his duty to communicate to C, overstepped the proper scope of his representation of C, and his duty of confidentiality to C.

Duty of Loyalty

A lawyer owes his client a high duty of loyalty - the lawyer must act in accordance with the client[']s best interest. Here, L assured P that P would be paid out of the recovery of [the] case without informing C of such agreement. This action possibly created a conflicting duty on L because L had sent a letter to P which P may have relied upon and considered a contract or surety created by L. Since L's duty of loyalty to P extends beyond the representation, L created a potential conflict in that he may have been personally liable if C did not pay P and hence he would have an incentive to ensure payment even if C had a good faith reason not to pay P. This potential conflict could have been overcome if

contin[gen]cing in the representation would have been reasonable (likely on these facts since there is no indication that C was not going to pay when the letter was sent) AND if L had gotten C's informed consent under ABA and written informed consent under CA.

Duty to Communicate

A lawyer also has a duty to keep a client informed about his representation, particularly of important points regarding the representation.

Here, the agreement with P was of great interest to C since the amount that P would receive was possibly a very substantial amount of any recovery that C could have expected. C was entitled to know from L that L had ensured the P that he would be fully compensated for treatment out of C's potential award.

Overstepping Scope of Representation

In general, clients are permitted to make any decisions regarding the ends of the litigation, while lawyers make decisions regarding the means of the litigation, such as legal strategy. Here, a decision regarding the use of any recovery funds are not clearly about legal strategy or means of representation, so the action of commit[t]ing C to payment of P is not clearly within the scope of L's duties. Although a lawyer is assumed the power to make an action on client's behalf necessary to the representation, this may be outside the proper bounds. At the very least, L should have gotten C's informed consent to enter into this agreement on C's behalf.

Duty of Confidentiality

A lawyer also has a duty to keep confidential any information related to the representation without client consent. The lawyer has the imputed authority to disclose any information reasonably necessary to the representation. Hence, although it is not clear whether he gave any confidential info related to representation to P, if he did give such information it would have been a breach of confidentiality to the extent it was not reasonably necessary to the representation of C.

3. Sexual Relations between L and C

The issue here is whether the consensual sexual relations between L an C violated any duties. Under the ABA standard lawyers are not permitted to engage in sexual relations with clients, consensual or otherwise, as presumptively creating a conflict between the lawyer and the client. In CA, consensual relations between lawyers and clients are discouraged, but permitted as long as no duress or illegality is involved. Here, sexual relations are stated to be "consensual", and so permitted under CA law, but still impermissible and a violation under the ABA.

4. Settlement Offer Agreement

The issue here is whether the L committed any violations in convincing C to enter into a settlement agreement with driver. The issues here are whether L acted improperly in convincing client and in counseling C not to pay P.

A client has the ultimate decision in whether or not to accept any settlement agreement as part of the ends of representation discussed above. However, it is appropriate for a L to persuade a client to accept a settlement as in her best interests as long as L is acting according to his duty of loyalty. The duty requires that L act in good faith with the client and make sure that the client's decision is informed and reasonable by apprising the client of her rights and what a settlement means regarding those rights.

Here, it is not clear whether the L is acting in the best interest of the client because of the guarantee that he made to P and because of his own interest in recovering expenses and his fee. However, if the L made a good faith evaluation about the merits and worth of the lawsuit, L may have satisfied his good faith determination.

There is a possibility, however, that the L did not obtain intelligent, knowing consent from C because L and C had been drinking. Any settlement decision should have been made when C was not impaired in judgment.

Counseling C to not pay P

In counseling C to not pay P, lawyer may have violated his duty of loyalty to client and his duty of loyalty to client and his duty of fair dealings and honesty to the public and to P.

Under duty of loyalty, a lawyer should not counsel acts that may subject a client [to] liability without a good faith belief that such decision is in client's best interest. Here, it seems as if L is more interested in getting expenses and fees than protecting C. L is liable for breaching his duty of loyalty to C.

In addition a lawyer has a duty of fair dealings and honesty to the public and specifically to P. A lawyer may not counsel criminal or fraudulent acts by their clients. Here, L has counseled C to break a contract with P, violating his duty to the public.

Finally, L has violated a duty of fair dealing to P since he has both counseled fraud and disbursed funds to C over which he knew P had a legitimate claim to and that C was preparing to violate. In addition L may be a surety for C's actions. L may be held liable for breaching his duty of fair dealing and fiduciary responsibility over settlement funds to P.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

However, even where the offender's conduct is found to interfere with the property right of the injured, the court must determine if the interference is unreasonable. Unreasonableness is determined by balancing the hardships - balancing the interests and needs of the homeowners against the interests in having the business continue operating. During this process, the court will look at many factors including: whether the homeowners purchased their land at a discount because of its near location to the shopping center (coming to the nuisance), the offender's right to use his property as he wishes, the value of the business to the community including the number of employees, whether the nuisance can be abated by modifications of the offender's business, the length of time the offender has been in business, the possibility of using the property for some other purpose, the offender's investment in the business, etc.

In this case, certain factors indicate that the use by FF will be considered unreasonable. The offender has only been in business for a short period of time. It is unclear from the facts whether HO purchased at a discount based on nearness to the shopping center, but because the business is new the court is unlikely to find that HO came to the nuisance.

However, other factors indicate that the use by FF will not be considered unreasonable: FF has a right to use his property as he sees fit; FF has a right to use the shopping center property for a restaurant. Further, FF has put considerable investment into the operation as a FF establishment by purchasing top of the line equipment. This is not an unusual use for such a property. Further, it does not appear that the business could be abated. We know that FF is complying with all health ordinances and that the business is operated using the best equipment.

While the facts of this case will present a close call, the court is unlikely to find that there is a nuisance that should be abated. This is particularly true if there are a few number of warm days. The interest in allow [sic] FF to operate its business outweighs the interest of the homeowners for the reasons discussed above. As such, the court will not grant an injunction. However, if the court finds that there is some level of nuisance, the court may require FF to pay some measure of damages to HO to compensate them for their injuries arising from their nuisance.

Question 2

Rita and Fred wanted to form a corporation to be named “Rita’s Kitchen, Inc.” (RKI) for the purpose of opening a restaurant. They contacted 75 friends who agreed individually to become investors in RKI. Five of these investors also agreed to serve on the RKI Board of Directors with Rita and Fred.

Rita and Fred entered into a five-year lease with Landlord for restaurant space, naming “Rita’s Kitchen, Inc., a corporation in formation” as the tenant. They signed the lease as “President” and “Secretary,” respectively.

Rita and Fred retained Art as their attorney to form the corporation. They told Art that 75 of their friends had committed to invest and become shareholders of RKI. Irv was a duly appointed representative of the 75 investors. Rita, Fred and Irv met with Art, and they agreed that Art would represent Rita, Fred, and all the investors. After extensive discussions with Rita, Fred, and Irv about the operation of the proposed business, Art agreed to prepare the necessary documentation to incorporate RKI.

Later, outside of Irv’s presence, Rita and Fred asked Art to draft a shareholder agreement that would specifically designate Rita and Fred as permanent directors and officers of RKI and set Rita and Fred’s annual salaries at 12.5% of the corporate earnings. Without further discussion, Art properly formed the corporation. He then prepared the shareholder agreement, including the terms that Rita and Fred had requested.

The 75 investors each purchased their shares of stock and signed the shareholder agreement. RKI operated for one year but failed to make a profit. RKI ceased operations and currently owes three months of back rent under the lease.

1. Can Landlord recover the unpaid rent from Rita and Fred individually? Discuss.

2. Is the shareholder agreement valid? Discuss.

3. What ethical violations, if any, has Art committed? Discuss, including distinctions, if any, between the ABA Model Rules and California authorities.

Do not discuss federal and state securities laws.

Answer A to Question 2

2)

1. Can the Landlord recover unpaid rent from Rita and Fred individually?

Liability of Promoters on Pre-Incorporation Contracts

Until such time as a corporation complies with all formalities of incorporation and files its articles of incorporation, it does not have a separate legal existence, and cannot enter into contractual obligations such as a lease. Prior to incorporation, it is typical for the corporation's promoters and/or founders to enter into contracts on its behalf. Here, Rita and Fred entered into the lease with the Landlord on behalf of Rita's Kitchen, Inc. ("RKI"), which had not yet been formed. Under the law, a promoter remains personally liable on a pre-incorporation contract unless there has been a subsequent novation (ie., all parties agree to substitute the corporation for the promoters as the party liable on the contract whereby the promoters are thereafter relieved of further personal liability) or unless the contract is explicit in providing that the promoter has no personal liability on the contract.

Here, there has not been a novation to relief [sic] Fred and Rita of liability. However, they would argue that they entered into the contract on behalf of RKI, a corporation in formation, and signed as officers, and therefore made it clear that it was only the corporation and not them personally who would be liable on the lease. Their arguments would not likely succeed because the lease was not explicit in stating that they would not be personally liable thereunder. In the absence of such explicit language, the most likely result is that the court would hold that Rita and Fred as promoters are and remain personally liable on the lease. Therefore, the landlord should be able to recover the unpaid rent from either or both of them.

Indemnification from Corporation

Note also that it is not clear where RKI has ever ratified the lease. If no corporate action was taken to ratify the lease, then the corporation would not be liable thereunder, unless it silently took the benefits of the lease. Here, if RKI did not ratify the lease, it could still be held liable because it took the benefit of the lease without objection.

Note that although Fred and Rita would be held liable for the unpaid rent on the lease, they would have a claim for indemnification against RKI for any amounts that they had to pay personally to the landlord. They will not be able to recover, however, if the corporation does not have sufficient funds to pay.

2. Is the shareholders agreement valid?

As a general matter, shareholders of a privately held corporation such as RKI can and often do enter into shareholders agreements dealing with their rights and obligations as shareholders. These types of agreements commonly provide for matters such as transfer restrictions, rights of first refusal, put and call rights, "tags and drags", preemption rights and registration rights in the event that the corporation becomes public in the future.

Shareholders agreements can also provide shareholders with certain veto rights regarding the overall management of the company. In the context of a closely held private corporation, shareholders can also enter into a shareholders agreement whereby they become the directors of the corporation by agreement, thus doing away with the need to have a separate board of directors. In such situations, the shareholders step into the shoes of the directors and owe each other and the corporation duties as fiduciaries.

It appears that the shareholders agreement in question is problematic for two main reasons. First, it prohibits shareholders from exercising their rights as shareholders to be able to elect and fire directors. Secondly, it prohibits the directors from being able to exercise their responsibility for setting their compensation and the compensation of officers in accordance with principles of prudence and good faith.

Rights of Shareholders to Elect and Remove Directors

Shareholders have the right to elect and fire directors, both with and without cause. An agreement that prohibits shareholders from being able to exercise these powers would be contrary to public policy and likely unenforceable. At the very best, shareholders must have the authority to fire directors for cause (ie, breach of duty of care, duty of loyalty, etc.). To the extent that the shareholders agreement prohibits shareholders for exercising their powers as shareholders by giving Fred and Rita permanent directorships, it is invalid. While shareholders can agree as to the election of directors, directors cannot make themselves permanent and unremovable by way of a shareholders agreement.

Rights and Duties of Directors

A director is a fiduciary, and obligated at all times to act in the best interests of the corporation. A director has certain powers and obligations granted under the corporation's code and at law.

Right to Appoint and Fire Officers

The Board of Directors has the power to appoint and fire officers. The shareholders agreement is problematic because it usurps the authority of the Board to make this determination by making Rita and Fred permanent officers. Officers owe a corporation duties of care and loyalty, and cannot by agreement be made unremovable. At the very least, they must be removable for cause. Therefore, the provision in the shareholders agreement which makes Rita and Fred unremovable as officers is invalid.

Duty of Care and Business Judgment Rule

A director owes the corporation the duty to act as a reasonably prudent person in the management of his of her own affairs, in good faith and in the best interests of the corporation. In exercising his or her duty of care, a director can rely on the business judgment rule if he or she acted in a reasonable, informed manner, with due care and diligence, in exercising his or her judgment.

Duty of Loyalty

A director owes the corporation a duty of loyalty as a fiduciary to act in the best interests of the corporation and to avoid self-dealing to his or her own benefit and/or to the detriment of the corporation.

Breach of Duty of Care and Loyalty

Under the law, directors cannot, as a general matter, agree in advance as to how they will exercise their powers as directors. Here, the shareholders agreement in essence does just that – it provides that the directors (recall that the Board of Directors is made up of five of the investors, plus Rita and Fred) agree in advance not to fire Rita and Fred as officers. This the directors cannot do and, for this reason also, this provision is invalid.

This provision is also likely in violation of the directors' duty of care, because it is improper to agree to never remove officers, as there may be good reason and justification to remove Rita and Fred at some point in the future. Likewise, directors have the duty and obligation to set their own compensation and officers' compensation in accordance with reasonable, good faith parameters, taking into account the needs of the corporation and ensuring that they do not commit a waste of corporate assets in setting compensation. Agreeing in advance to what Fred and Rita's compensation is going to be - at 12.5% of corporate earnings - may constitute a violation of this duty, because it is unclear whether this figure will or won't be a reasonable and proper amount as the corporation moves forward.

Likewise, making themselves unremovable and giving themselves a fixed salary as a percentage of earnings, regardless of whether it is appropriate in light of the corporation's then financial circumstances, constitutes a breach of Fred and Rita's duty of loyalty to the corporation, as they are clearly putting their personal interests ahead of those of the corporation.

For all of the foregoing reasons, the provisions in the shareholders agreement are invalid.

3. What Ethical Violations has Art Committed?

An attorney owes his clients various duties under the applicable rules of professional responsibility. Chief among these is the duty of care, the duty of loyalty and the duty of confidentiality. One of the chief difficulties Art faces is that he has not separately addressed or differentiated between the different clients he represents. He has acted to incorporate RKI, and is arguably counsel to the corporation, whereby he would owe the corporation itself duties of care and loyalty. He is also apparently counsel for Fred and Rita in their personal capacities as incorporators and as officers of the corporation. Finally, he has acted as counsel for the investors in drafting the shareholders agreement. Art's main ethical violation stems from failing to differentiate between the potential and actual conflicting interests of his various clients and failing to advise them to obtain separate counsel as appropriate.

Duty of Care/Competent Representation

Art clearly acted as counsel for the investors by meeting with Irv and representing the investors' interest in drafting the shareholders agreement. In so doing, he breached his duty of competence to exercise the skill, knowledge and diligence that would be expected of an attorney practicing in his community. As discussed above, the shareholders agreements contain provisions that are not in compliance with applicable corporate law and corporate governance principles. Art should not have drafted an agreement containing provisions that are invalid and, in so doing, likely committed malpractice. Likewise, in his role as counsel for Rita and Fred, he should have advised them that the provisions that they sought would not be enforceable, and breached his duty to them in this regard also.

Duty of Loyalty

An attorney is obligated to act in the best interests of his client and cannot take on representation that will result in him not being able to properly represent a client on account of conflicting duties and obligations owed to other clients (for example, where one client's interests are adverse to another's). If an attorney is of the view that he can competently represent all of his clients, he is required to disclose to all that he is representing everyone's interests and to seek the written consent of each client to such joint representation.

Here, Art failed to obtain the written, informed consent all parties to his joint representation of each of them and, in so doing, breached his ethical obligations. Moreover, he failed to seek further consent when it became apparent that Fred and Rita's personal interests as officers (ie, to be permanently appointed and to obtain a guaranteed percentage of corporate earnings) came into conflict with the investors' interests as shareholders in maximizing the return on their investment and fully exercising their rights as shareholders. When it became apparent to Art that Fred and Rita's interests were different than those of the investors (ie, when Rita and Fred spoke to him outside of Irv's presence), he should have alerted them to the fact that he was representing the investors and the corporation and that he could not separately seek to represent their interests. He should have advised Fred and Rita to seek separate, independent counsel to negotiate their compensation and tenure packages with the corporation. Art also failed to alert Irv, as he was arguably required to do, of the validity and desirability (or lack thereof) that Rita and Art had requested. Art therefore failed to fulfill his ethical responsibilities to all clients involved.

Answer B to Question 2

1. Can Landlord recover unpaid rent form Rita (R) and Fred (F)?

Promoter Liability

A promoter is a person who works prior to the incorporation of an entity to secure contracts and services for the to-be-formed entity. A promoter has a fiduciary duty to the other promoters and to the entity to be formed. A promoter can enter agreements on behalf of the to-be-formed entity but can be subject to liability on those agreements.

Adoption and Novation

A corporation does not become liable on a contract entered by a promoter until it adopts the contract. A contract can be adopted expressly by the corporation agreeing to be bound or impliedly by the corp. choosing to accept the benefit of the promoter's contract. Here, there is nothing to indicate that RKI expressly adopted the terms of the lease entered into by their promoters - R and F. However, RKI did accept the benefit of the lease by using the space for its restaurant. Thus, RKI will be bound on the lease.

R & F are also bound

The corporation's act of adapting a contract does not absolve the promoters from liability unless there is an express provision in the contract or a novation in which the corp. and the other party agree that the promoter will not be liable. Here, there is nothing on the lease to indicate R and F would not be liable. It only says they signed as Pres. and Sec. of RKI, "a corporation in formation". Further, there is no evidence of an agreement or novation after RKI was formed absolving them of their liability. Thus, there is no novation and R and F will still be individually liable on the lease with Landlord for the unpaid rent because they were promoters who were not relieved of liability.

2. Is the Shareholder Agreement Valid?

To have a valid shareholder agreement, there needs to be approval from the shareholders. Here, we are told that each of the 75 investors signed the shareholder agreement. Thus, the shareholder agreement is presumptively valid but the terms of the agreement must be examined.

Election of Directors

Directors of a corporation are elected by shareholders at the corporation's annual meeting. Here, the shareholder agreement specifically designated R and F as permanent directors and officers of RKI. By having this provision in the shareholder agreement, the agreement purports to strip the shareholders of their ability to elect directors annually. In this regard, it is invalid.

Removal of Directors

Along with the ability to elect directors, shareholders also have the ability to remove directors with or without cause. The provision of this shareholder agreement indicates that

R and F would be permanent directors. Because shareholders have the ability to remove a director, no director can be permanent. Thus, to the extent the shareholder agreement purports to make R & F permanent directors, it violates the right of shareholders to remove a director and is invalid.

Shareholders Can't Have a Predetermined Agreement of How They Will Vote if Elected Officers [sic]

Shareholders may have agreements for how they will vote on shareholder elections but can't agree to how they will vote as directors. To the extent this shareholder agreement commits R and F along with the 5 other investors who agreed to serve on the RKI board to elect R and F as officers and to set R and F's annual salaries at 12.5% of corporate earnings, it takes away their ability to act in their fiduciary capacity as duly elected directors and is invalid.

Board Decides Its Own Salaries

A board of directors is charged with the management of the company and makes decisions for the company on things such as their salaries. Here, the SH agreements purports to set R and F's salaries. Because the board, and not the shareholders, have the power to manage the company, the shareholders cannot set director and officer compensation. To the extent the SH agreement tries to do this, it is beyond the shareholder's powers and invalid.

Board Elects Officers

Another power inherent in the board of directors is the power to elect officers. Shareholders may have the power to elect directors but they can't elect officers. Thus, to the extent that shareholder agreement elects R and F as permanent officers of RKI, it is invalid because the directors, not the shareholders, are responsible for electing officers.

Thus, while the shareholder agreement as signed by all shareholders is presumptively valid, it is invalid to the extent it improperly elects directors and officers, it does not provide for removal of directors, it binds shareholders to how they will vote as directors, and it improperly sets director and officer compensation.

3. Art's Ethical Violations

Who Does Art Represent?

The first issue in deciding whether Art (A) committed any ethical violations is to determine who Art represents. Here, Art was originally approached by R and F to form the corporation. Also, A met with R and F as well as Irv (I) who was the duly appointed representative of the 75 investors. After meeting with R, F, and I, A agreed to prepare the necessary documentation to incorporate RKI. As a result, A potentially represents R & F, Irv and two other investors, and RKI, the corporation he helped form.

Duty of Loyalty

An attorney owes his client the duty to exercise his professional judgment solely for

the client's interests. If the interest of the attorney, another client or a third person may materially limit the attorney's representation or becomes adverse to the client's interests there is an actual or potential conflict of interest. When an attorney is presented with a conflict, he can only accept or continue the representation if he reasonably believes he can effectively represent all parties, he informs each party about the potential conflict, and the client consents to the representation in writing.

Without consent, an attorney should refuse to take the representation or withdraw from the representation.

A representing R & F and Irv and the Investors

Here, A has a potential conflict by representing both R & F as well as Irv and the investors. While A can say that R, F, and I all had the same interests and wanted to incorporate RKI, because he was representing multiple interests, he needed to be aware of potential or emerging conflicts.

When R & F approached A to draft the shareholder agreement without Irv being involved, A should have been suspicious. When he learned that they wanted the agreement to designate them as officers and directors and set their salaries, their interests were potentially conflicting with I and the investors. At that point, A should have disclosed the proposal to Irv and obtained written consent from I to draft the agreement as requested by R and F. It is also unlikely that a reasonable attorney would believe he could adequately represent both R and F and the investors.

In any event, A should have sought written consent from Irv. Because he did not, he violated his duty of loyalty.

Duty of Confidentiality

A lawyer also has a duty not to reveal anything related to a client's representation without consent. Thus, A can argue that he couldn't tell Irv about his conversation with R & F outside of his presence without violating his duty of confidentiality to R & F. If this is the case, A should have withdrawn from his representation of Irv and the investors and advised them to seek independent counsel re: the shareholder agreement.

Duty of Competence

A lawyer owes his client the duty to use the legal skill, thoroughness, preparation, and knowledge necessary and reasonable for the representation. Here, A had a duty to competently draft the shareholder agreement. For all the problems pointed out above about the shareholder agreement, A violated this duty.

Duty to Communicate

An attorney owes his client a duty to communicate about the matters of the case. Here, A had a duty to tell Irv about the provisions he was drafting in the agreement. Again, A would claim he could not communicate this to I without breaking his duty of confidentiality to R & F. As mentioned above, this again meant A should have withdrawn from the

representation of at least Irv and possibly R & F and urged the parties to seek independent counsel.

Art's Defense

Art will argue that any potential problems were avoided because the investors signed the agreement with the term R & F requested. However, the ends do not justify the means. A had ethical obligations to his client during the representation that he breached. Their later approval of the agreement does not equal informed consent to his breaches throughout.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

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Question 2

Acme Paint Company (Acme) was sued when one of Acme's trucks was involved in an accident with a car. June, an attorney, was retained to represent Acme. She has done substantial work on the case, which is about to go to trial.

Recently, June's three-year-old niece suffered lead poisoning after being in contact with lead-based paint. June became so upset that she joined a local consumer advocacy group, No Lead, which lobbies government agencies to adopt strict regulations restricting the use of lead-based paint. June also undertook to perform legal research and advise No Lead concerning its tax-exempt status.

In the course of reviewing Acme's records in preparation for trial, June found a memorandum from Acme's President to the company's drivers. The memorandum states:

> We know our paint contains lead and that it is a misdemeanor to transport it over roads abutting public reservoirs. The road our trucks have been using for many years runs alongside the City water reservoir, but it's the shortest route to the interstate, so you should, for the time being, continue to use that road.

June became outraged by the content of the memorandum. She believed that if an Acme truck were to have a mishap and paint spilled into the reservoir, lead could enter the public drinking water and injure the local population.

Because of her strong feelings, June anonymously disclosed the memorandum to No Lead and to the media. She also sent Acme a letter stating that she wished to withdraw from the representation of Acme. Acme objected to June's withdrawal. June filed with the court a petition for withdrawal.

1. What ethical violations, if any, did June commit by disclosing Acme's memorandum? Discuss.

2. What arguments for withdrawal from representation could June assert in support of her petition to the court, and how would the court be likely to rule? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 2

1. Ethical Violations Committed by June in Disclosing Acme's Memorandum.

Duty of Confidentiality

A lawyer owes their client a duty of confidentiality. This requires the lawyer not to disclose any of the client's information learned or discovered during their representation of the client. The confidentiality also extends to information gathered about the client in preparation of trial.

June, in violation of her duty of confidentiality, anonymously disclosed the Acme memorandum (from Acme president to company drivers) to No Lead and the media. She will be subject to discipline due to her disclosure because the material in the memorandum was confidential, meant for Acme employees only, and was only to be used by June in her preparation for trial.

Consent

A lawyer may disclose confidential materials if the client consents (in California ["CA"] the consent must be in writing). Here, there was no consent given by Acme because they didn't know of June's intention to disclose the memo and probably would not have consented anyway.

Prevention of a Crime/Fraud

A lawyer may sometimes disclose confidential information if it is to prevent a crime or fraud. Under the federal rules, a financial crime as well as a crime of bodily injury may be disclosed to prevent it from being committed. In CA, however, only a crime that would result in serious bodily injury may be disclosed, after the lawyer makes a good faith effort to try and prevent the harm from occurring.

Here, the crime that was committed was transporting paint containing lead over a road abutting a public reservoir, a misdemeanor. This would not invoke the status of a financial or injury crime so as to warrant disclosure to a court or public agency.

Therefore, June breached her duty of confidentiality to Acme by disclosing the memorandum.

Duty of Loyalty

A lawyer owes their client a duty of loyalty. She must act in the client's best interests and put the client before herself in making decisions that would affect the client.

When an event occurs that would make it difficult for a lawyer to represent the client, putting aside their feelings or position, this is called a conflict of interest. If the conflict is occurring then it is an actual conflict of interest. However, if there is a possibility of a conflict, then it is a potential conflict of interest. If an actual conflict of interest occurs, a lawyer may be forced to withdraw unless the conflict can be resolved effectively, the client is informed of all the potential negative effects of the conflict, and the client consents to the conflict. In the case of a potential conflict, the lawyer may continue if they feel they can effectively represent the client despite the conflict and the client consents after being informed of the potential conflict. In CA, [regarding] the consent for representation to continue after all conflicts, the consent must be in writing.

Actual Conflict of Interest

There is an actual conflict of interest due to the fact that June disclosed the memorandum intended for Acme company drivers. This is a breach of duty of loyalty because June has put her interest ahead of Acme's and has taken a position adverse to their interests by giving up confidential information of the company. In order for her to continue her representation, June must disclose that she was the one who put forth the letter to the media, explain all the negative repercussions of her continued representation (her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint), and obtain the consent of Acme officials. Although it is stated that Acme objected to June's withdrawal, the facts do not show that they were informed of the actual conflict, and, therefore, their objection to her representation may change after being informed of her breach of the duty of loyalty.

June is likely subject to discipline for her breach of the duty of loyalty.

Potential Conflicts of Interest

Intertwined in the actual conflict of interest with Acme are several potential conflicts of interest that will hinder June's future representation of Acme: her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. These will be disclosed in trying to obtain Acme's consent to continue her representation. But, it should be noted that these may very easily result in actual conflicts, and possibly may already be actual conflicts that breach her duty of loyalty, without Acme's consent.

Participation in a Consumer Advocacy Group
A lawyer is permitted to affiliate with a local consumer advocacy group to express their views and be an active member of society. However, if their involvement is adverse to the interests of their client, then potential or actual conflicts may result, which they should be aware of.

2. Arguments for Withdrawal by June.

Mandatory Withdrawal – Crimes
A lawyer must withdraw if their continued representation of the client will facilitate a continued crime committed by the company. Here, June is not participating in the crime, misdemeanor for transporting lead-based paint, despite the fact that she knows about it. Therefore, this would not be enough for her withdrawal from her representation.

She may, however, be required to notify the court of the crime if it pertains to a lawsuit in existence and her participation would lead to suborn perjury or false statements to the court. Here, however, the lawsuit is about an accident, not the transportation of lead-based paint, so June would not be able to disclose the misdemeanor to the court.

Mandatory Withdrawal – Conflict of Interest
As stated above, Acme and June have a conflict of interest. If she could not effectively represent Acme and if Acme will not consent to her continued representation in spite of the conflict, then June must withdraw from representation of Acme. Here, Acme objected to June's withdrawal even after the media and No Lead knew about the memorandum. This may hint that Acme may not consent to the withdrawal due to the fact that June has done substantial work on the case, which is about to go to trial.

Permissive Withdrawal
June's Interests
The court will permit an attorney withdrawal if their representation of their client is repugnant/disgusting to the lawyer. However, in assessing permissive withdrawal the court will weigh such factors as the interests of the court and the client before deciding.

On these facts, June is outraged by the practices and is clearly disgusted by Acme's transportation of lead paint. She feels so strongly because of her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. The court will take these into account in balancing them with the interests of Acme and the Court.

Acme's Interests
Acme's interests stem from the fact that June has done substantial work on the case, which is about to go to trial. This is a huge factor because Acme would be severely disadvantaged if they had to get new counsel to replace June at such a late stage in the trial process.

Court's Interests
The Court's interests are those of efficiency of the trail process, undue delay and fairness. Permitting June to withdraw would add more time to the trial process, which was about to happen. Also, the court might have to delay the case in order for new counsel to prepare adequately. And, if the trial commenced as scheduled with Acme obtaining new counsel, there is very little likelihood that they would adequately be able to represent their interests.

Therefore, unless Acme consents to the withdrawal by June, it is unlikely that she will be able to withdraw from her representation.

Answer B to Question 2

1. An attorney owes duties of Confidentiality, Competence, Loyalty and Fiduciary duties to her clients.

Duty of Confidentiality

Under the ABA Model Rules and the California Rules of Professional Conduct, the duty of confidentiality requires that an attorney preserve her client's confidences and not reveal any information regarding the client, regardless of its source. The duty of confidentiality attaches at the moment that an attorney-client relationship is formed; however, an attorney may also be prevented from revealing any confidences gained in consultation even if an attorney-client relationship does not result. Further, the duty of confidentiality endures after the attorney-client relationship ends. Finally, the client is the holder of the privilege.

In this case, June has breached her duty of confidentiality to Acme. June was reviewing Acme's records in preparation for trial and June found a memo that she subsequently and anonymously disclosed to a third party, No Lead. An attorney may reveal a client's confidential information where the client consents; however, there are no facts to suggest that Acme was aware of, or consented to, June revealing Acme's memo to No Lead. Under the ABA Model Rules, an attorney may reveal a client's confidential information if the revelation is necessary to prevent death or bodily injury. The California Rules permit disclosure only if the disclosure is necessary to prevent an imminent risk of death or serious bodily injury. Under both rules, the attorney must take steps before the disclosure is made. First, the attorney must notify her client that the behavior is illegal and/or dangerous. Here, Acme's letter, by its own terms, indicates that Acme was aware that the [behavior was] illegal. Second, the attorney must try to persuade the client from continuing to engage in or threaten the behavior. Here, June did not attempt to discuss Acme's policy with Acme before the disclosure. Finally, the attorney must tell the client that she intends to make the disclosure. Here, not only did June not tell Acme that she intended to make the disclosure, June made the disclosure anonymously in an attempt to hide the fact that she made the disclosure. Finally, California Rules permit disclosure only where there is an imminent risk of seriously bodily harm or death. In this case, the risk was not imminent because there was no increased likelihood that Acme's truck drivers would have the kind of accident feared in the next day, week, or month or even that the accident would ever happen. Because June disclosed a client's

information to a third party without the client's consent or a privilege to do so, June has violated her duty of confidentiality to Acme.

Duty of Loyalty

The duty of loyalty requires that an attorney be vigilant to potential and actual conflicts that will prevent or impede an attorney from fully representing her client's interests. An attorney may not represent clients with actual adverse interests because of the danger that the attorney will purposefully or inadvertently reveal or use confidential information gained from one client against the other client. Under California Rules, an attorney may represent clients with potential conflicts so long as the attorney believes that she can adequately and fairly represent the interests of both parties and both clients agree to the continued representation in writing.

Here, June represented Acme Paint Company stemming from an Acme truck accident with another car. The original cause of action was likely to be negligent driving and respondeat superior liability and June's representation was not likely to be very involved in investigating the dangers of lead paint. However, June was aware of Acme's business when she decided to get involved with No Lead. No Lead is a group which lobbies government agencies to adopt strict guidelines restricting the use of lead-based paint. June formed an attorney-client relationship with No Lead, undertaking legal research duties and advising No Lead on its tax status. While legal research and tax advice do not pose actual conflicts with June's representation of Acme at the outset of June's relationship with No Lead, nonetheless, there are potential conflicts because Acme makes paint that contains lead and No Lead is an activist group that targets the kind of business that Acme runs.

Because the interests of Acme were potentially adverse with the interests of No Lead, June was obligated to disclose the potential conflicts to both parties and obtain their written and informed consent to continue with the representation. In this case, June did not inform Acme of her affiliation with No Lead and she did not seek Acme's consent to continue the representation. The facts also do not state that June disclosed her relationship with Acme to No Lead. Because June continued to represent Acme and No Lead, whose interests were potentially adverse, without disclosure or seeking consent to the continued representation, June breached her duty of loyalty to Acme and No Lead.

Duty of Competence

An attorney owes a duty of competence to a client. A duty of competence means that the attorney will use her legal knowledge, training, and skill to diligently represent the client's interests. In this case, June was diligently preparing for trial when she discovered Acme's memo. Up to that point, June had not breached any duty of competence owed to Acme. However, once June discovered the memo, it is probable that June will no longer act in a diligent manner to pursue Acme's goals. Here, June was outraged by the content of the memorandum and

she subsequently breached her duty of confidentiality to Acme, acting on her outrage that was likely fueled by the injuries suffered by her niece. Since June was willing to engage in a breach of one of the most important duties that an attorney owes a client, confidentiality, as a result of the memo, it is doubtful that June will be able to set aside her feelings in any way that is sufficient to allow her to adequately and competently continue to represent Acme.

2. June's Argument for Withdrawal

An attorney may withdraw from representation where the withdrawal will not unfairly prejudice the client. An attorney must withdraw from representation where the attorney becomes aware of actual conflicts of interest or where the continued representation would foster the commission of a crime.

In this case, June will make several arguments for her permissive withdrawal. First, June will argue that the withdrawal is proper and should be granted because the goals of the client have become repugnant to her. June will argue that Acme paint contains lead and that Acme engages in transportation policies that are unsafe and present a risk of injury to the community. Further, June will disclose to the court that June has been personally touched by this issue where her three-year old niece suffered lead poisoning after coming into contact with lead paint. Because of the emotional reaction to her niece's injuries that stirred June to act by joining and providing legal services to a lead paint activist group, June can no longer separate herself from the issue in a way that would allow June to adequately represent Acme. The court will likely point out to June that Acme has asked her to represent them in an action that has nothing to do with lead paint content or safety issues where children are concerned. The court will also note to June that Acme is likely to be very prejudiced by her withdrawal from the case because the case is already at the stage of trial preparation. If Acme is forced to retain new counsel at this stage of litigation, Acme will be exposed to enormous costs relating to getting a new attorney familiar with the case sufficient to go into trial. Consequently, with only the argument that June now finds Acme to be engaged in activities that she finds repugnant, the court is not likely to allow her withdrawal and expose Acme to the costs of hiring a new attorney.

June may argue that she should be allowed to withdraw because Acme is engaged in an illegal activity. Here, Acme's memo states that Acme paints contain lead and that it is a misdemeanor to transport lead paint over roads abutting public reservoirs. The court is not likely to accept June's reason because, in this case, June's services are not being used to further a crime. The case that June is involved in may or may not involve an Acme truck on a road near a reservoir, but that fact would not change the underlying cause of action in the case from the most likely negligence claim. Thus, the court is likely to reject June's argument.

June will continue to argue that her withdrawal is now mandatory because she now represents two clients with adverse interests. Acme manufactures and delivers lead paint and No Lead is an activist group trying to influence legislation of Acme's activities. The court will point out that June is representing Acme in what is most likely a tort case where the elements of the cause of action that June is currently working with will likely have no reasonable relationship to the kind of paint that Acme makes or to the amount of lead contained in the paint. Further, June's activities for No Lead have consisted only of legal research and tax advice. It is unclear whether the legal research relates solely to the tax advice or covers questions relating to the amount of lead in paint; however, her research is most likely directed at influencing policies rather than researching tort claims relating to transportation of paint. As a result, the court is not likely to view the representation of Acme and No Lead as sufficiently adverse to allow June to withdraw at such a crucial time in the proceeding.

However, if June discloses to the court that June has become so emotionally involved in the issue that she can no longer adequately represent Acme as a company regardless of the cause of action, then the court will likely allow June to withdraw. The court will certainly allow June to withdraw if June discloses that she provided the confidential Acme memo to No Lead. However, if June discloses this information, Acme would also likely drop their objection to June's withdrawal. Even where the court allows June's withdrawal, June will be subject to ethical sanctions and she may even face malpractice liability for her work on Acme's case.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

Albert, an attorney, and Barry, a librarian, decided to incorporate a business to provide legal services for lawyers. Barry planned to perform legal research and draft legal memoranda. Albert intended to utilize Barry's work after reviewing it to make court appearances and argue motions on behalf of other attorneys. Albert and Barry employed Carla, an attorney, to prepare and file all of the documentation necessary to incorporate the business, Lawco, Inc. ("Lawco").

Carla properly drafted all required documentation to incorporate Lawco under the state's general corporation law. The documentation provided that: Lawco shares are divided equally between Albert and Barry; Lawco profits will be distributed equally to Albert and Barry as annual corporate dividends; Barry is president and Albert is secretary.

Albert and Barry opened their business in January, believing that Lawco was properly incorporated. In February, they purchased computer equipment in Lawco's name from ComputerWorks. The computer equipment was delivered to Lawco's office and used by Barry.

Carla, however, neglected to file the articles of incorporation until late April.

In May, Albert, without consulting anyone, contracted in Lawco's name to purchase office furniture for Lawco from Furniture Mart. On the same day, also without consulting anyone, Barry contracted in Lawco's name to purchase telephones for Lawco from Telco.

1. Is Lawco bound by the contracts with:
    a. ComputerWorks? Discuss.
    b. Furniture Mart? Discuss.
    c. Telco? Discuss.

2. Has Albert committed any ethical violation? Discuss.

Answer question number 2 according to California and ABA authorities.

Answer A to Question 6

1A) Lawco's Contract with Computer Works

Status of the Corporation

The first defense Lawco might raise against enforcement of this contract is that while it was entered into by Lawco, Inc., no such entity existed at the time the contract was formed. They might argue that because no corporation existed, the corporation is not liable on the contract. There are three scenarios under which a corporation might be bound.

If the corporation is a de jure corporation, it has been validly created by observing the formalities of incorporation and receiving its articles of incorporation from the state. While the second and third contracts discussed below were entered into by a de jure corporation, this first one was not, as attorney Carla had neglected to file the articles of incorporation with the state until April, two months later.

A corporation is a de facto corporation where the formalities have been entered into, and the corporation had a good faith belief that it is a corporation, but the paperwork has not been processed and the state has not actually issued corporate status. A corporation can rely on its de facto status in such a situation to enforce a contract that it might not otherwise be able to enforce. Here, A and B both believed that Lawco had been properly formed, though it had not yet been so. If they wanted to enforce the contract, they would depend on their de facto status. If they are trying to avoid being bound by it the de facto characterization might be considered, but the doctrine of corporation by estoppel is probably more appropriate.

Corporation by estoppel results when a corporation holds itself out to the public as a corporation, acts as such, and enters into contracts under that banner, but is not actually a corporation at the time. Such an entity is estopped from claiming that it was not in fact a corporation when it entered into those contracts, as it benefited from claiming that it was.

Adoption of Pre-Incorp Contract

Even if none of the doctrines above are successful, ComputerWorks (CW) will argue that the contract was a pre-incorporation contract and that Lawco adopted it by accepting and using the computers that it delivered. It will argue that such actions demonstrate its intent to profit from the contract.

Quasi-Contract

If no contract is found, CW will argue that Lawco benefited from the use of its computers after holding itself out as ready to contract and that under the doctrine of quasi-contract, should not be unjustly enriched. Under such a theory, CW will receive the value conferred upon Lawco.

Sue A and B personally

If none of the above work, CW can sue whomever signed the contract (A, B, or both) and claim that it was a pre-incorporation contract which was not adopted by the corporation and hold them personally liable.

1B) Lawco's contract with Furniture Mart (FM)

As described above, Lawco was a validly formed corporation when it entered into a contract with FM for furniture. The issue is whether or not Albert, by himself, had authority to enter into such a contract, or whether B's consent was required. This issue is best analyzed under the law of agency.

Agency

If FM can establish that A was acting as an agent of Lawco when he entered into the contract, then Lawco will be bound. An agent can have actual or apparent authority.

Actual Authority

Actual authority can be either express or implied. Actual authority is express when the agent and principal have agreed that the agent will act on behalf of the principal in a certain capacity. Authority can be implied to the extent that an agent's express authority requires it to do certain other acts as a matter of course in order to perform its functions as an agent.

In this case, A entered into the contract with FM. Under the articles of incorporation, A is the secretary of Lawco. While there is no evidence of express authority for A to purchase for Lawco, a corporation is not an individual and so must act through agents by necessity. Lawco will argue that as a 50% shareholder, A needed to have approval of B in order to enter into a contract to purchase assets for the corporation and that he was not an agent. It is much more likely that B will possess actual authority than A will, and this argument will probably fail.

Apparent Authority

If the argument for actual authority fails, FM will argue that, instead, A had apparent authority to act for Lawco. Apparent authority is authority that results from 1) an agent's position or title with respect to the principal, 2) where the principal has held the agent out in the past as its agent and has not published the revocation of authority, or 3) the principal ratifies the agent's actions after the fact.

In this case, FM will argue that because of his position as secretary of the corporation, even if A did not have actual authority to contract, they relied on his apparent authority to do so as the secretary of the corporation. This will be a weak argument, as the secretary is not usually expected to enter into contracts for a corporation. Although the facts are silent as to what happened after the contracts were entered into, if Lawco accepted the benefits of the contract with

FM, they will also argue that Lawco ratified the contract entered into by A when they accepted the furniture and used it.

Lawco will argue that A's role in the corporation was a 50% shareholder and secretary. It will argue that there was no express agency agreement, nor did it ever act in a manner that might hold A out as its agent. Futhermore, A's shareholder status grants him no right to enter into contracts on behalf of the corporation as that is a job for the officers and directors. Finally, A's role as a secretary is to take notes at meetings, and perhaps oversee documents. It is not to make unilateral decisions for the corporation or spend money.

Unlike the situation of B below, FM will not have access to some of the more persuasive arguments of apparent authority. Unless there is some manifestation of express authority in the corporate records, absent a decision by the officers or vote of all shareholders, they will probably not be able to bind Lawco under A's contract, unless Lawco takes some action after the fact to ratify A's actions. They may, however, be able to go after A personally for any damages due to breach on a contract he signed as a purported agent.

1C) Lawco's Contract with Telco (TC)

As described above, Lawco was a de jure corporation when B entered into the contract with TC on its behalf. As above with A, the issue will be whether B qualifies as an agent who might bind Lawco as the principal. Unlike A, however, who was the secretary of Lawco, B was the president. The president arguably has actual or apparent authority to enter into contracts for the corporation where the secretary is less likely to have such.

The same principles will be applied as above, but in this case, the facts probably dictate a different outcome. The president of a corporation is arguably an agent thereof by [the] very nature of his position. FM will argue that for a necessary business expense of the corporation, like securing furniture, the president had actual or at least implied authority to secure them. They will argue that the corporation cannot act on its own and that its president is the obvious choice to enter into contracts on behalf of it. They will also argue that Lawco accepted the benefit of B's actions and that in doing so it ratified B's actions.

TC will have access to more persuasive arguments than FM had above due to B's apparent authority as president, and will have a much stronger case to enforce its contract against Lawco than FM did.

2) Albert's Ethical Violations

Albert's Duty Not to Aid in the Unauthorized Practice of Law

A has a duty not to help a nonlawyer practice law. The practice of law includes advising or counseling clients, as well as arguing before the court. In this case, the facts state that B's duties are to perform legal research and to draft legal memoranda. A intends to review this work and use it to make court appearances

and argue motions. While B's legal research is probably not prohibited, his drafting of legal memoranda may be. The fact that A intends to review this work and basically attach his name to it after verifying its contents makes it a close call. Law clerks are able to engage in such activity before graduating from law school and passing the bar as long as they are appropriately supervised. A will argue that B's work is almost identical to that of a law clerk and that with proper supervision there is no breach of his duty.

Albert's Duty Not to Go Into Business With a Nonlawyer

A has a duty not to incorporate with a nonlawyer when he plans to practice law. Lawyers are allowed to form partnerships with each other, but they cannot form partnerships or corporations with another type of professional or nonlawyer such as a CPA. Here, A will argue that the actuality of the relationship is exactly like a lawyer – experienced paralegal. He is mistaken, however, in that the liability of Lawco, the ownership interests, and the division of power between A and B are almost exactly equal. A should not allow himself to enter into a business transaction with a nonlawyer like B who may try to exert influence on his decisions in legal matters as a result of his partial ownership in the venture. The fact that B is the president and A is the secretary makes this arrangement particularly suspect. B arguably has a persuasive role in determining the direction of the venture due to his office. Furthermore, he is the face of the venture that is in its very name offering legal services, yet he is not himself a lawyer. A has violated this duty.

A's Duty Not to Share Profits with A Nonlawyer

A has a duty not to share profits with a nonlawyer in his practice of law. Lawyers may hire paralegals or research assistants for salary, but arrangements under which a nonlawyer is entitled to a preset ratio of the profits is forbidden. In this case, Lawco's articles provide that Lawco's profits are to be distributed equally to Albert and Barry as annual corporate dividends. The form the profit sharing takes is not nearly as important as the fact that it exists. A will not be able to hide behind the fact that the distribution scheme is couched in dividends rather than an outright sharing. A has violated this duty.

Answer B to Question 6

1A) Contract with ComputerWorks

In [order] for Lawco to be bound, (i) the corporation must be validly incorporated, (ii) the doctrines of de facto corporations or corporations by estoppel must apply or (iii) the contract must have been adopted by the corporation after incorporation.

Valid Incorporation

A corporation is formed when the incorporator validly complied with the requirements of the state's general incorporation law. This typically requires the filing of the articles of incorporation. Since the articles were not filed until April and the contract was entered into in February, Lawco was not validly incorporated at the time of the contract.

Generally, a corporation is not liable for contracts entered into before it was incorporated until it adopts the contract. It can adopt the contract through (i) express adoption, such as a writing, or (ii) implied adoption, which may be accomplished by accepting the benefits of the contract without protest.

De facto Corporation

ComputerWorks could argue that Lawco is still liable on the contract since it was a de facto corporation. A de facto corporation may be found where (i) there is a valid general corporation law, (ii) the incorporation made a colorable good faith attempt to comply with the statute, (iii) the incorporator was not aware that the attempt to comply with the statute was invalid and (iv) the corporation took some action indicating that it considered itself a corporation.

In this situation, Carla properly drafted all the required documentation to incorporate Lawco. The state does have a general corporation law. Albert and Barry entered into the contract with ComputerWorks believing that the corporation was valid. The corporation took an action typical of a corporation by purchasing computer equipment in the corporation's name and having the equipment delivered to the corporation's office and used by a corporate employee.

This question of de facto corporation will revolve around whether Carla's neglect in delaying the filing of the articles negates her "good faith, colorable" attempt to comply with the corporation statute. Since Carla is a lawyer and knew her job was to prepare and file all the documentation necessary to incorporate Lawco, it is likely that this is not a good faith, colorable attempt to comply with the statute, and there is no de facto corporation.

Corporation by Estoppel

ComputerWorks can argue that Lawco should be estopped from denying the corporation existed since it received a benefit under the contract and would be unjustly enriched if the contract were not enforced. ComputerWorks can argue that there was (presumably) a promise to pay. ComputerWorks can argue that Lawco received a benefit by accepting and using the computers. It would be unjustly enriched by retaining the computers without paying for them. ComputerWorks can argue that it was foreseeable that it would expect to be paid for the computers and it was reasonable that it should be paid for the computers.

Adoption of the Contract

Finally, ComputerWorks could argue that Lawco should be bound on the contract since it adopted the contract after formation. A corporation adopts a contract after formation when it impliedly accepts the benefits of the pre-incorporation contract after incorporation. Here, Lawco retained the computers and probably continued to use them after formation in April.

The result is that the court would likely find that Lawco adopted the contract, or if not, that it should be estopped from denying the contract.

1B) Contract with Furniture Mart

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Furniture Mart in May.

Express Authorization by Articles

Second, there is the issue whether Albert validly bound Lawco when he contracted in Lawco's name with Furniture Mart. Albert is the secretary of the corporation and is thus a senior officer. The articles of the corporation would likely delineate the powers of the officer, and so Albert may be authorized under the articles.

Implied Authorization under Agency Law

If not, Albert may also be authorized under general principles of agency law to bind the corporation. Generally, an agent may bind a principal if he has express authorization, implied authorization or apparent authorization to do so. There is no evidence that Albert received express authorization to enter into the contract.

Albert would have implied authorization if (i) it was customary for someone in his position to bind the corporation, (ii) he reasonably believed, based on past behavior and actions, that he had the power to do so, or (iii) it was necessary for the performance of his duties that he be able to bind the corporation. It is also necessary that Albert acted within the scope of the authorization.

Since it is probably necessary for Albert's position as secretary that he be able to bind the corporation on such routine contracts as buying office furniture, he probably had implied authority.

He may also have had apparent authority if (i) the corporation "cloaked" him with the apparent position of being able to enter into the contract and (ii) Furniture Mart relied on this position.

In conclusion, even though he did not consult anyone, it is likely that the contract is valid since Albert had implied and apparent authority to enter into the contract. Since the contract is valid, Lawco is bound on the contract.

1C) Contract with Telco

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Telco in May.

Please see part (1)(B) for detailed discussion of agency law. Below is the application of the discussed legal principles to this situation:

Express Authorization by Articles

As President, it is likely that Barry was expressly authorized by the articles to enter into routine contracts, such as the purchase of telephones, for the corporation.

Implied Authorization under Agency Law

If not, Albert may have validly entered into the contract by express, implied or apparent authority. The facts give no indication of express authority. However, it is probably necessary for the president of a corporation to enter into contracts for routine items, so he probably had implied authority. It is also perfectly reasonable for another corporation to believe that the president has the power to bind the company, so Barry definitely had apparent authority.

In conclusion, even though he did not consult anyone, Barry had apparent and implied authority to enter into the contract, and Lawco is thus bound by the contract.

2. Possible Ethical Violations by Albert

Unauthorized Practice of Law

An attorney may be disciplined for aiding a nonlawyer to practice law. The practice of law consists of making decisions which require the exercise of legal judgment by the lawyer. However, activities related to law, which do not involve the "practice of law," may be performed by any nonlawyer. Also, under the ABA Rules and California law, a nonlawyer may practice law under certain very specific circumstances. For example, under ABA Rule, a nonlawyer may practice law under the direct supervision of a practicing lawyer who is licensed in that jurisdiction.

Albert is an attorney, and he knowingly decided to incorporate a business in which Barry, who is not an attorney, would perform legal research and draft legal memoranda. Not only did Albert know that Barry would be doing these things, he intended to use Barry's work to make court appearances and argue motions. There is no mention of Albert supervising Barry or reviewing his work before using it. Therefore, Albert can be disciplined for assisting Barry in the unauthorized practice of law.

Partnering with Nonlawyers

A lawyer is permitted to partner with a nonlawyer in a business providing legal services. A lawyer may hire a nonlawyer to work in such a business as long as they are not practicing law in an unsupervised way.

Here, Albert, a lawyer, and Barry, a nonlawyer, incorporated to form a business together. The business was specifically to provide legal services. The shares of business would be divided equally between Albert and Barry. Therefore, Albert may be disciplined for partnering with Barry to perform legal services, in a corporation in which they have equal shares.

Splitting Fees with Nonlawyers

A lawyer is not permitted to split fees with nonlawyers, except in certain very specific circumstances, such as employee benefit plans. Albert could argue that he was not splitting fees with Barry, and that fees for his services would be paid to the corporation. However, profits are distributed equally to Albert and Barry as corporate dividends. Therefore, Albert would be disciplined for splitting fees with Barry since his argument that fees are not split is illusory.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Alex is a recently-licensed attorney with a solo law practice. Alex was contacted by Booker, a friend during college, who is now a successful publisher of educational books and software. Booker asked Alex to perform the legal work to form a partnership between Booker and Clare, a creative writer of books for children. In a brief meeting with Booker and Clare, Alex agreed to represent both of them and set up the partnership for a fee of $5,000.

Because Alex had no experience with forming partnerships, he hired Dale, a recently-disbarred attorney, as a "paralegal" at a wage of $250 an hour. Although Dale had no paralegal training or certification, he had decades of experience in law practice, including the formation of partnerships. Alex notified the State Bar about hiring Dale and disclosed Dale's involvement and disbarred status to both Booker and Clare.

Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex paid Dale $1,000 for his work. Alex spent a total of two hours on the partnership matter, including the initial meeting with Booker and Clare, reading the partnership documents in order to learn about partnerships, and a final meeting to have Booker and Clare sign the documents.

What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 1

In interactions with clients, an attorney owes a client four overarching duties: the duty of confidentiality, the duty of loyalty, the duty of maintaining financial integrity, and the duty of competence. In the practice of law, a lawyer also owes a duty of decorum to the profession. Attorney Alex's (A) actions in this matter raise issues under the duties of confidentiality, loyalty, financial integrity, and competence, as well as some question as to the duty of decorum to the profession. With these general principles in mind, each action will be analyzed individually.

Duty of Loyalty: Representation of Multiple Clients

An attorney owes a duty of loyalty to his or her client, to exercise his or her time and professional judgment and efforts solely for the benefit of that client, without any interference from outside loyalties of interests. This duty does not equate to an absolute prohibition or the representation of multiple clients, particularly in such matters as a business transaction; however, a lawyer generally must not accept the representation of more than one client if he believes their interests to be materially adverse or that any loyalties or interest might prevent the fair and competent representation of either or both clients. The ABA rules require that a reasonable attorney in [a] like situation would also believe in his ability to represent both clients without material adverse effect. California does not have this reasonable attorney standard.

Initially there do not appear to be direct conflicts in a matter regarding the construction of a partnership, so A's initial agreement to undertake the representation of both clients might be reasonable. However, one of the clients is a friend of A's from college, [a] potential source of loyalty that would potentially hinder the representation of Clare, should the interests ever diverge. Moreover, Booker, as a friend, sought out A as a new attorney for this representation, which might engender feelings of indebtedness to A that might hinder his representation of Clare. If Alex feels that he can competently represent both clients and there are no present conflicts, there is no violation under California law. However, under the ABA standard a reasonable attorney might not accept representation of multiple clients with the potential that he would feel more loyal to one than the other due to pre-existing friendship. Thus, there may be a violation under the ABA reasonable attorney standard.

In addition to only taking on the representation if the attorney deems he can properly represent both clients, the attorney has a duty to disclose the potential conflicts, including the potential that he will have to withdraw from the representation if a conflict arises. After this, the attorney must obtain the client's informed consent to the joint representation. California requires this consent to be in writing.

Here, it is unclear as to whether A discussed the potential of conflicts under this duty. The facts state only that the meeting was "brief" and that A agreed to represent both clients for a fee of $5,000. There is no mention of informing the clients or obtaining their consent. There is, further, no mention of a written consent. Thus, A has likely breached

both ABA and California rules regarding the representation of both clients by not informing them of potential conflicts and obtaining their consent. A should have made the potential conflict much more clear and obtained clear consent from both, in writing, to satisfy both standards.

Duty of Confidentiality: Representation of Multiple Clients

The ABA requires a lawyer not divulge any information obtained from the client in the course of the representation intended to be kept confidential. California has no on-point rule for confidentiality, aside from the lawyer's oath to 'maintain inviolate client confidences'.

Though not apparent from these facts, the representation of multiple clients may raise issues regarding the duty of confidentiality to each, because a conflict my only arise when one client discloses something to the lawyer. When the lawyer cannot make a due disclosure to the other client regarding the conflict without violating the duty of confidentiality, the lawyer must withdraw.

Duty of Competence

A lawyer owes a duty of competence to a client to exercise the amount of research and inquiry as well as to possess sufficient knowledge and skill regarding the matter to render competent services. If an attorney is not familiar with the subject matter of representation, he may still represent the client if he can do sufficient research to familiarize himself with the subject area and such research will not result in undue expense to the client or delay in the matter. An attorney may also elect to associate or solicit advice from an attorney with experience in the area.

Within this duty of competence is a duty of diligence to zealously pursue the matter to completion.

The facts state that A is a recently-licensed attorney and has no experience with forming partnerships—the subject mater of the representation. The facts also state that A spent only a total of two hours on the partnership matter, which included reading other partnership documents and his initial and final meetings with Booker and Clare. Given his status as a new attorney and his lack of experience with this subject area, it would appear A neither possessed the requisite knowledge and skill necessary to competently represent the clients in this matter, nor did he do sufficient research or training to make himself competent in the area.

A would likely argue that he remedied this shortcoming by hiring Dale as a "paralegal", who had decades of experience in the practice of law, including partnership formation. Had Dale been a duly licensed attorney, this may have been proper. However, because (as will be discussed below) only an attorney may engage in activities that call for the judgment, training, and skill of an attorney, hiring a paralegal with a good deal of knowledge may ameliorate this shortcoming to some degree, but it is unlikely that it totally accounted for it. This is primarily because the only way Dale could provide

sufficient help to remedy the violation of the duty of competence would be by violating the rule against the unauthorized practice of law.

Thus, it is likely that A also breached his duty of competence in the matter by accepting representation in an area he was not familiar with, not doing sufficient research, and not associating with a more experienced attorney who could function as an attorney. A should have either declined the representation, or undertaken steps to make himself competent in the matter, if possible, without undue delay or expense.

Financial Integrity: $5,000 fee

Under ABA rules, an attorney's fee for work must be reasonable in light of the skill, experience, time, degree of specialty, and difficulty required for the task. California merely requires that fees not be "unconscionable".

A $5,000 fee for setting up a partnership does not appear reasonable in light of the time, degree of specialty, skill, and difficulty of the task. The facts state that A himself spent only 2 hours on the partnership matter, including the initial meeting and a final meeting in which documents were signed. After paying Dale $1,000 for his work, this leaves a charging effectively a fee of $2,000 per hour. Given A's status as a new attorney and that lack of difficulty or specialty required in setting up a simple partnership agreement between a publisher and writer, the fee arrangement would appear to violate both the ABA standard of reasonableness and the California standard of unconscionability.

Additionally, California requires fee agreements to be in writing unless the situation constitutes an emergency, the client is a regular client, the client is a corporate client, or the fee is under $1,000. Here, there does not appear to be any emergency or exigency warranting an exception to the writing requirement. Though Booker and A were friends prior, A is a new attorney and there is no prior attorney-client relationship between the two. Thus, Booker would not qualify as a "regular" client. Booker is obviously not a corporate client and the fees are for $5,000.

Thus, A has violated the California rule regarding client agreements being in writing.

Financial Integrity: Fee Splitting

Whether or not A has also violated his duty of financial integrity to his clients depends in some part on whether or not Dale qualifies as an attorney or not, which will be discussed below.

Fee Splitting With Attorneys

If Dale qualifies as an attorney, under the ABA standard, A may split fees so long as the fee-splitting is proportional to the work done on the mater and the client consents. Here, A did notify both Booker and Clare about 'hiring' Dale, though it is not clear he notified them as to the $250 per hour salary. If he did notify them, there may not be a violation under ABA rules. However, if he did not, he may have violated the ABA rule, given he ultimately paid Dale $1,000 for his services. Dale may have also violated the proportionality rule, given that in this case, Dale should have received the bulk of the

fee, rather than simply $1,000 worth, given A's minimal work on the matter and Dale's four hours meeting with the clients and preparing the documents.

Under California law, an attorney may split fees with another if the split is reasonable. Here, there is likely nothing unreasonable about the arrangement, except that A took too much of the fee.

Fee Splitting With Non-Attorneys

The facts state that Dale is currently disbarred. This would make him a non-attorney and lawyers are prohibited from sharing fees with non-attorneys. However, attorneys may share fees with such personnel as paralegals and legal secretaries so long as the lawyer is ultimately responsible for the work done by the personnel. This latter issue raises the primary issue with the hiring and use of Dale's services: the duty not to assist in the unauthorized practice of law.

Duty Not to Assist in the Unauthorized Practice of Law

A lawyer has a duty not to assist in the unauthorized practice of law. The practice of law is defined as anything that would call for the judgment, reasoning, or skill of an attorney. Here A has hired Dale, a disbarred attorney, as a "paralegal". An attorney may hire a currently-disbarred attorney to do work [as] a paralegal or legal secretary, but, like with the work of a paralegal or legal secretary, the individual must not engage in activities that call for the special skills of an attorney and the licensed attorney, A, must be ultimately responsible for the work.

The fact state that A hired Dale, who spent four hours preparing the partnership documents and meeting with Booker and Clare about them. A paralegal may meet with clients to obtain information, but must not engage in explanations that require the judgment of a lawyer in so doing, such as explaining legal options or ramifications. A non-lawyer may similarly prepare documents to some degree, but generally not much more than in the capacity of a scrivener. Here it would appear that Dale functioned as an attorney for Booker and Clare in both meeting with them and preparing the partnership documents.

A's reasons for hiring Dale as a paralegal—for his experience in years of practice—would also be more germane to functioning as an attorney. Also, the fee of $250 an hour seems more akin to that of an attorney's fee than the fee charged for a paralegal in a simple matter by a new solo practitioner.

Moreover, A must ultimately be responsible for the work done by the non-attorney and, in this case, the facts do not make any mention of his review of the final version of Dale's preparation of the documents, only that he was present at the final meeting in which the documents were signed.

Thus, A breached his duty to the profession and the client not to assist in the unauthorized practice of law.

Answer B to Question 1

What Ethical Violations Has Alex Committed?

Duty of Loyalty

A lawyer owes his client the duty of loyalty. This duty requires a lawyer to work in the best interests of the client, and not for the lawyer's personal interest or for the interest of any third party.

Potential Conflict of Interest

When a lawyer is presented with a potential conflict of interest, the ABA Model Rules and California's ethical provisions differ slightly in terms of what a lawyer must do in order to undertake the representation. Under the Model Rules, a lawyer may undertake the representation of a client if the lawyer has a reasonable belief that there is no significant risk that a conflict of interest will materially limit the representation, and the client gives informed consent. CA rules do not have a "reasonable lawyer" standard, but rather state that a lawyer can undertake the representation if the client gives written consent.

In this case, Alex was contacted by Booker, who was a friend during college, to form a partnership between Booker and Clare. There are potential conflicts of interest present in this representation, because Alex agreed to represent Booker and Clare jointly. Because Alex may be tempted by his friendship with Booker to work to the disadvantage of Clare, he should have informed Clare of his prior relationship with Booker. Moreover, he should also have made clear whether he represents only Booker and Clare, or if he is also representing the partnership itself.

There are no facts, other than his prior friendship with Booker, to indicate that he would work to the disadvantage of Clare. Under the ABA rules, a reasonable lawyer under the circumstances would likely believe that he could undertake the joint representation of Booker and Clare without a material limitation. Thus, if Alex informed Clare of his prior relationship with Booker, she could likely still consent to the representation. Similarly, in California the decision to undertake representation was proper if Clare consented to the representation.

Duty of Competence

A lawyer owes his client a duty of competence, which means that the lawyer must exercise the ordinary skill, diligence, and zeal in representing his client that an ordinary lawyer would under the circumstances.

As part of the duty of competence, a lawyer must be knowledgeable regarding the subject matter of the representation. However, in both CA and under the ABA rules, a lawyer need not be an expert in all maters to undertake the representation. A lawyer without prior experience in a field of practice may still take a case so long as the lawyer

either 1) does the work to become educated and competent without any extra expense to the client or 2) associate with competent counsel, who can help assist the lawyer.

Here, Alex had no experience forming partnerships. Thus, Alex either had to do the work necessary to educate himself regarding the law of partnerships, or he could also associate with another counsel who had such knowledge. In this case, Alex did not educate himself, but rather hired Dales as a "paralegal". Dale had decades of experience in law practice, including the formation of partnerships. Thus, Dale was a person with the requisite knowledge and skill to form the partnership between Booker and Clare.

However, Dale was a recently-disbarred attorney. Thus, Dale was not a licensed counsel and Alex could not associate with him without violating another ethical duty – the duty not to engage in the unauthorized practice of law, discussed below. A reasonable lawyer under the circumstances would not have associated with a disbarred attorney in order to satisfy his duty of competence.

Alex may argue that he eventually became informed by reading the partnership documents in order to learn about partnerships. However, Alex spent a total of two hours on the case, including the initial meeting with Booker and Clare and a final meeting to have Booker and Clare sign the documents. While there are no facts to indicate the precise number of minutes Alex spent learning about partnerships, it is clear for someone with no prior experience handling the formation of partnerships, Alex's cursory review of the documents prepared by Dale could not have satisfied his duty of competence. Thus, Alex violated his ethical duty by failing to become informed regarding the subject matter of the representation.

<u>Fee Agreement</u>

Under the Model Rules, all fees must be "reasonable". Except in the cases of a contingency fee, an oral fee arrangement will not violate a lawyer's ethical duty per se. The courts look to several factors in order to determine if a fee arrangement is reasonable, including the lawyer's reputation, knowledge, skill, the fee customarily charged for such work, whether the work involved particularly novel claims, and, in the case of a contingent fee, the amount of recovery by the plaintiff.

In this case, a $5,000 flat fee is likely unreasonable under these circumstances. Alex had no prior experience handling partnership agreements, and thus his per-hour fee should not be too high. Moreover, Alex spent only two hours total in working on this case. A fee of $5,000 – or even $4,000 if Dale was paid out of this fee – for two hours of work. Thus, Alex essentially charged Booker and Clare a fee of $2,500 or $2,000 per hour to form the partnership. Formation of a partnership is a relatively simple legal process and does not involve any complex or novel legal argument. Alex also has no prior experience and thus had no reputation for being a particularly efficient partnership lawyer. Thus, on balance, Alex's fee arrangement violated his ethical duties to Booker and Clare.

In California, a fee must not be "unconscionable," which is to say that it must not "shock the conscience." A fee agreement must also be in writing, unless the fee is less than $1,000, the lawyer is representing a corporate client, or there is a long history between the attorney and client. On these facts, none of those exceptions apply. While Alex had a prior friendship with Booker, that is insufficient to constitute a long history of representation such that any fee arrangement would be understood by the client. The facts also state that Alex represents Booker and Clare jointly, rather than the partnership. Thus, the $5,000 fee had to be in writing, and Alex violated his ethical duty with respect to this fee arrangement in California.

Moreover, for the same reasons that make the fee unreasonable under the ABA rules, this fee would also likely be unconscionable in California. To charge a client over $2,000 per hour – especially by a recently-licensed attorney – would very likely "shock the conscience" of the court.

Fee Sharing

Similarly, under both California and the Model Rules, a lawyer cannot share any part of his fee with a non-lawyer. This is considered a duty to both uphold the dignity of the profession, and a duty to protect the public. The facts are unclear whether Alex paid Dale out of pocket, or whether Dale's $1,000 payment came out of the fee paid to Alex. If in fact, Alex planned to pay Dale his fee by deducting it out of the $5,000 paid to Alex, then Alex breached his ethical duty. Even if, however, Alex paid Dale out of pocket, this still violated his ethical duty because he did not inform his clients as to how costs would be handled in this mater. Rather, Alex simply charged a flat fee without any further disclosures.

Under the Model Rules, a lawyer may also not pay a "referral" fee to any other lawyer. That is to say that a lawyer may not only be paid a portion of a fee when the lawyer has actually done some portion of work on the case. It should be noted that in California, unlike the Model Rules, a referral fee is not a per se violation of ethical rules, so long as the arrangement is disclosed to the client and no extra amount is charged to the client.

Thus, Alex may attempt to argue that Dale's payment was a valid referral fee under California law. However, as noted above, Dale was a recently-disbarred attorney. Thus, he is considered a non-lawyer and, as such, cannot share in any part of the fee arrangement.

Unauthorized Practice of Law

Part of the lawyer's duty to uphold the dignity of the profession, and also his ethical duty to protect the public, prohibit a lawyer from assisting in the unauthorized practice of law. Such practice is defined as a non-lawyer doing something which requires exercising the judgment ordinarily required by a lawyer.

In this case, Dale – a non-lawyer by virtue of his being disbarred – prepared partnership documents at the request of Alex. There are no facts to indicate what Dale actually did in the four hours he worked on the case. However, while the filing of a partnership

document with the state would not likely require the judgment of a lawyer, the actual drafting of the documents would very likely constitute the practice of law. Dale would have had to make arrangements between Clare and Booker regarding the sharing of profits and losses, how they would be compensated in the event of a dissolution and winding up, whether either of them would enjoy limited liability, and various other important considerations. Such work would require the skill and exercise of judgment required by a lawyer. Thus, Dale was engaging in the unauthorized practice of law.

Alex, therefore, will have violated his ethical duty if he failed to supervise Dale in his work. A lawyer may delegate certain tasks to an employee, such as a law clerk or paralegal, but must always supervise such work. Here, Dale spent four hours on his own. Alex did not supervise Dale's work at all. Rather, Alex simply delegated the work to someone whom he knew was a disbarred attorney. Moreover, Dale had no paralegal training or certification. Thus, Alex could hardly argue that he delegated this work to a paralegal.

As such, Alex violated several ethical duties. First, he violated his duty of competence, because he failed to represent Booker and Clare with the ordinary skill a reasonable lawyer would have under such circumstances. Second, he violated his duty to uphold the dignity of the profession, because he permitted a non-lawyer to engage in the unauthorized practice of law and share in the fee. Third, he violated his duty of loyalty, because he delegated work [to] a recently-disbarred attorney, and thus put his clients' partnership in the hands of someone who had already been deemed by that state bar to be unfit to practice law. Finally, he violated his duty to the public, because he permitted someone automatically deemed incompetent (even though Dale clearly had the requisite skill) by virtue of the disbarment to continue in the unauthorized practice of law.

Duty of Confidentiality

A lawyer owes his clients a strict duty of confidentiality. Model Rule 1.6 prohibits the disclosure of any information "relating to the representation." California does not have any direct rule on point, but the Cal Business Code states that a lawyer must "protect inviolate" the confidences of his client.

Here, Alex disclosed to the State Bar that he had hired Dale to work on the partnership. This information would be confidential – and thus could not be disclosed – under both the Model Rules and in California. However, there are certain exceptions to the ethical duty of confidentiality. One such exception permits disclosure of certain information in order to obtain an advisory opinion from the state Ethics Board. Thus, if Alex was revealing this information to the Bar for the purposes of obtaining advice regarding his ethical duties, then such revelation was proper.

Therefore, on these facts, Alex likely did not violate his duty of confidentiality because he was probably attempting to obtain some sort of advice regarding how he should proceed regarding hiring Dale.

It should be noted that the related issue of Attorney-Client privilege is inapplicable here. The Attorney-Client privilege protects compelled disclosure of confidential communications between attorney and client made for the purpose of obtaining legal advice. If Alex had been called to testify regarding what he told Booker and Clare regarding the formation of the partnership, such information could not be revealed without waiver of the privilege by Booker and Clare.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Betty formed and became president and sole shareholder of a startup company, ABC, Inc. ("ABC"), which sells a daily on-line calendaring service. ABC retained Lucy, a lawyer, to advise it about a new trademark.

As ABC was very short on cash, Lucy orally proposed that, in lieu of receiving her usual $200 per hour fee, she could become a 1% owner of ABC. On behalf of ABC Betty orally agreed. Lucy performed 20 hours of legal work and received her ABC stock shares. Years later, Lucy would sell her shares back to Betty for $40,000.

While Lucy was performing legal services for ABC, she discovered certain representations by ABC that were false and misleading and caused customers to pay for services they would never receive. She reported her discovery to Betty, who told her to ignore what she had found. After Lucy finished her legal work for ABC, she reported the false and misleading representations to a state consumer protection agency.

Betty sold all of her interest in ABC, including the shares previously held by Lucy, and formed and became president and sole shareholder of another startup company, XYZ, Inc. ("XYZ").

After Lucy had finished her work for ABC and closed that file, she was retained by a new client, Donna, in a trademark dispute with XYZ.

What ethical violations, if any, has Lucy committed? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 1

Attorneys owe their clients the duties of confidentiality, loyalty, fiduciary responsibility, and competence. They owe the public and the courts the duties of candor and truthfulness, fairness, and the obligation to uphold the dignity and decorum of the legal profession. Here, Lucy's conduct implicates the duties of confidentiality, loyalty, and fiduciary responsibility.

1. Lucy & ABC's Fee Agreement

Lucy and ABC have entered into a fee agreement whereby Lucy will receive a 1% ownership interest in ABC as the fee for her legal services, rather than her usual $200 per hour fee.

A. Requirement of Written Fee Agreements

Fee agreements between lawyers and clients must generally be in writing unless the fee to be charged will be less than $1,000, the work is routine work for a regular client, the client is a corporation or business organization, or the circumstances of the engagement make a written agreement impractical or impossible. Here, the agreement between Lucy and ABC does not appear to have been reduced to writing. The facts indicate that Lucy orally proposed the terms and that Betty orally agreed to them. However, ABC is a corporation. Therefore, it falls within the exception requiring the fee agreement to be in writing. Accordingly, Lucy has not breached any ethical duty by entering into what appears to be an oral fee agreement.

B. Accepting Ownership Interest in Client's Business As Fee For Legal Services

When a lawyer holds an ownership interest in a client's business, the duty of loyalty is implicated. The duty of loyalty requires an attorney to put his or her client's interest ahead of his own. When a lawyer holds an interest in a business that is also a client, the lawyer must be able to separate his or her own interest from that [of] the business, and must be able to put the business' interest ahead of his or her own interest. Generally, a lawyer is permitted to accept an interest in a client's business as part or all of the fee for legal services. However, consent must [be] in writing and [must] obtain independent legal counsel before entering into the transaction.

In this case, it is not clear that there was any consent by ABC in writing. Moreover, it does not appear that Lucy advised Betty or ABC to obtain independent legal counsel with regard to the transaction, nor does it appear that Betty or ABC obtained such advice. Accordingly, Lucy has violated the rules of professional conduct.

C. Reasonableness of Fee

Under the ABA Model Rules, a lawyer's fee must be reasonable, taking into account a number of factors, including the amount of work required, the complexity of the matter, the lawyer's skill and experience and other factors. Under the California rules, a fee must not be "unconscionable" (that is, it must not "shock the conscience"). Here, Lucy's "normal" fee was $200 per hour. The facts do not indicate Lucy's experience or skill level or what type of matters she normally handled, but a $200 per hour fee would likely be considered to be reasonable. The facts do not indicate any value of ABC at the time of the fee agreement or at the time Lucy performed the services for ABC. However, Lucy sold her shares in ABC back to Betty for $40,000 "years later." Had the shares

been worth $40,000 or anywhere in the ballpark of $40,000 at the time of the agreement and the time Lucy provided her services, they would likely be considered both “unreasonable” and “unconscionable” under the circumstances. Lucy performed only 20 hours of work to obtain certain trademark advice. Although trademark advice may be a specialized field that might justify a “premium” fee, if Lucy were given stock worth $40,000 to perform 20 hours of work, she would be receiving the equivalent of $2,000 per hour for her work, a fee that would most likely be considered both “unreasonable” and “unconscionable.” Accordingly, unless the value of the shares grew significantly, the amount of the fee would be a violation of the rules of professional conduct.

However, it is not clear what the value was at the time the agreement was entered into or when the services were provided. The facts suggest that all 20 hours of service were provided before Lucy received the stock. If that is the case, and if the stock only had a value of roughly $4,000 at that time, then the fee was not unreasonable or unconscionable, and the amount of the fee would not be a violation of the rules.

2. Lucy’s Report of ABC to the State Consumer Protection Agency

Attorneys owe their clients a duty of confidentiality. The duty of confidentiality requires a lawyer to keep confidential all information provided to the lawyer for the purpose of rendering legal services. The duty of confidentiality is necessary to ensure complete candor between clients and their attorneys, so as to facilitate effective legal advice. There are certain exceptions to the duty of confidentiality, such as when a lawyer is accused of malpractice, or is required to sue to collect a fee. Moreover, a lawyer who becomes aware that his or her client intends to commit an act that will cause great bodily injury or death may under certain circumstances disclose confidential information. Under the ABA Model Rules, a lawyer who is aware that a client intends to commit fraud that will cause significant financial injury can disclose confidential information to the extent

reasonably necessary to avoid the fraud if the lawyers' services were used in connection with the fraud. Under the California rules, there is no similar exception for information related to fraud.

Here, Lucy became aware that ABC had made certain representations that were false and misleading that caused customers to pay for services they would never receive. Although Lucy learned of these false and misleading representations during the course of her work for ABC, there is no indication that Lucy's services were used as part of any effort to mislead consumers.

A. Lucy's Report to Betty

Lucy properly reported her discovery to Betty. Under the ABA Model Rules, when a lawyer working for a business organization discovers misconduct that might damage the organization, he or she has an obligation to report that misconduct up the chain of authority within the organization. Under certain circumstances the lawyer may also be able to report that misconduct to the SEC if the organization is a reporting company and the CEO/CFO/CLO fail to act upon receiving the information. California permits but does not require a lawyer to report such misconduct "up the chain" and prohibits reporting it outside of the company, although with regard to securities law violations, federal law may preempt California law.

B. Lucy's Report to the State Consumer Protection Agency

However, it was a breach of Lucy's duty of confidentiality to ABC to report the misconduct to the State Consumer Protection Agency. Under the California rules, there is no exception to the duty of confidentiality to report fraud. Even under the ABA Model Rules, the exception would not apply here. As indicated above, Lucy's services were apparently not used to make the misrepresentations. Moreover, Lucy discovered evidence of past

misrepresentations in which consumers had already paid for services they would not receive. Therefore, it does not appear that disclosure of those past instances of misrepresentation were necessary to prevent or mitigate any further fraud.

3. Lucy's Representation of XYZ

A lawyer's duty of loyalty prohibits the lawyer from undertaking matters in which he or she has a conflict of interest except under certain circumstances. When a new client seeks to engage a lawyer in a matter involving a former client, the duties of loyalty and confidentiality are involved. A lawyer must not use confidential information obtained in a prior engagement in the new engagement. Generally, a lawyer may not undertake to represent a new client if there is a significant risk that representation of another client might have a material impact on the lawyer's ability to diligently and competently represent the new client. If a reasonable lawyer could conclude that he or she could undertake the subsequent representation without impact on the lawyer's ability to diligently represent the new client, and that the representation of the former client will not result in the use of any confidential information obtained in the prior engagement, the lawyer may undertake the new engagement so long as both clients are informed and [provide] consent in writing. The California rule is similar, but does not have a "reasonable lawyer" standard and requires only disclosures, not a signed consent.

Here, after completing her work for ABC and closing her file on that matter, Lucy is asked to represent Donna, in a trademark dispute with XYZ. Lucy has not previously had any attorney-client relationship with XYZ. It is true that XYZ is solely owned by Betty, the former president and shareholder of ABC, Lucy's former client, but corporations are separate legal persons. It is clear that Lucy's prior client was ABC, not Betty. The facts indicate that Betty engaged Lucy "on behalf of ABC." Moreover, Donna's dispute is with XYZ, not with Betty (or ABC). If ABC had merged or consolidated with XYZ, or if ABC had sold assets

(particularly its intellectual property, including any trademarks that Lucy was involved with) then it might be possible that Lucy would be in possession of confidential information belonging to ABC/XYZ that might be pertinent to her representation of Donna in her dispute with XYZ. However, the facts do not indicate this is the case, and assuming that XYZ is a separate company from ABC, there is no conflict of interest that would result in any ethical violation if Lucy undertakes the representation of Donna.

Answer B to Question 1

Financial Duties

Lawyers are governed by professional ethics in their practice of law. Lawyers have several duties to their clients, the court, the public, and the profession. One duty lawyers have to their clients is in the realm of finances. Such duties include the amount of fees and how fees may be charged to clients.

Fees

The ABA requires that fees must be reasonable, taking into account the lawyer's skill level, the amount of work involved in a case or matter, and the novelty of the service being provided.

In California, fees must not be unconscionable. Also, fee agreements must be in writing, unless the services are for a routine matter dealing with a business client or the matter is handled in an emergency situation.

It is permissible for lawyers to accept stock shares from clients in lieu of money payment, but the deal must be objectively reasonable to the lawyer and fair to the client at the time that it is made. However, in business dealings with clients, lawyers must only engage in a transaction so long as it is fair to the client and the client is advised to seek separate counsel before proceeding.

Fee Amount

In this case, Betty, as sole shareholder and owner of ABC, needed legal counsel in starting her business. Since she was short on cash, she offered to pay Lucy with stock shares, which would make Lucy a 1% shareholder in ABC. Lucy's regular fee is $200 per hour and she ended up doing just 20 hours of work for

ABC. When Lucy eventually cashed in her shares, she earned $40,000. The issue is whether this would be reasonable at the time the company was started and the deal between Lucy and Betty was formed.

The amount that Lucy eventually recovered was 10 times greater than the fees she would have collected in her work for ABC. Since Lucy probably had some idea of what the stocks were worth at the time she made this fee arrangement with ABC, it turns on whether the stock returns would have been unreasonable had Lucy sold the stocks around the time she made this arrangement. It is likely that the ABA rules may determine that a lawyer receiving a $40,000 payment for $4,000 of work is simply unreasonable. However, since the standard is whether it was reasonable and fair at the time of the contract or arrangement, Lucy may be able to show the stock prices spiked unexpectedly and that she did not act unfairly or unreasonably here.

In CA, however, the standard is unconsionability. Since ABC was a startup company and offered an online calendaring service, there are no facts to suggest that Lucy's receiving 1% of the stock would amount to a windfall, or even an unreasonable fee amount. In the case the company failed, Lucy would have received very little or nothing for her services. Since Lucy didn't know that the fees would be so out of proportion to her normal fees, the fee arrangement probably would not be deemed unconscionable in California and therefore would be upheld.

Fee Agreement

The other issue is that the fee arrangement was oral. In CA, all fee arrangements must be in writing, unless there is an emergent or routine matter being handled by the attorney. Since ABC is a new client, we have no reason to believe this work was routine. Also, it was not an emergency since Lucy merely

was handling some trademark work for ABC. Lucy should have reduced this fee agreement in writing.

Lucy also should have advised Betty to obtain separate counsel since the fee arrangement is tantamount to a business engagement between Lucy and Betty. That way, Lucy would protect herself and follow ethical rules by ensuring that Betty knew her rights and was prepared to continue with the fee arrangement, having received independent advice on the matter.

Duty of Confidentiality

Lawyers have an ethical duty to maintain confidential all communications related to the representation of their client. The source of the information is irrelevant to this duty, and the duty extends to clients even after representation has ended.

Should a lawyer receive information from or about a client that the client will be engaging in activity that poses serious risk of death or bodily harm to another, the ABA allows the lawyer to report this to authorities, notwithstanding the duty of confidence. In CA, the act must amount to a crime. In the case of financial crimes or fraud, CA does not permit reporting to authorities. In the ABA, reporting is allowed only if (a) the lawyer's services are being used to perpetrate the crime or fraud, and (b) reporting would prevent the financial crime from occurring.

Here, Lucy obtained confidences in her representation of ABC that were related to the representation; therefore she has a duty to maintain those confidences unless she is excused from that duty.

False Representations to Customers

In this case, Lucy learns that ABC is making certain false and misleading representations that caused customers to pay for services they would never receive. Here, this would amount to a financial fraud or crime since customers will be wrongfully led to believe they are receiving something they are not, after they turn over their money. In CA, Lucy may not report this to authorities such as the police or the District Attorney. In the ABA, Lucy may only report this to authorities if her services are used to commit the wrong, and she believes reporting will stop it.

Lucy only performed trademark work, so the likelihood that she was assisting in this fraudulent activity is slight. However, Lucy may argue that, without the trademark, the company couldn't have started [the] business, so she is responsible for assisting. Lucy could prevent the crime if she told authorities and ABC was required to stop operations or refund customer funds.

Reporting Up and Reporting Out

The ABA authorities permit attorneys to report within the corporation to higher authorities if they suspect wrongdoing or fraud. The ABA also allows attorneys to report to outside authorities, such as the SEC, for securities violations or fraud within a corporation. In CA, again, only reporting within is allowed. Reporting out is not allowed in any case; however, if the federal law requires or allows an attorney to report, federal preemption means she cannot be held liable for that.

Here, Lucy reported up when she told Betty of her concerns. However, this was probably futile since Betty is the sole shareholder and president of the company, and told Lucy to ignore what she had discovered. Lucy then went to the State Consumer Protection Agency. In the ABA, this would be permitted. And, if it were a federal agency, Lucy would be permitted to report out if the agency so

required. However, in CA, Lucy is not permitted to report out to prevent financial crime. The ethical rules in CA prohibit Lucy from doing anything but discussing her concerns with Betty. Since the agency she reported to was state-governed, and not federal, Lucy will be subject to discipline for violating her duty of confidentiality to ABC and to Betty.

Withdrawal

If an attorney's services are used to perpetrate a crime or a fraud, they must make [an] attempt to withdraw from the representation; this is mandatory withdrawal. Permissive withdrawal means that Lucy could attempt to withdraw from the representation if she finds the client's wishes or activities to be morally repugnant. If Lucy withdraws, she must provide timely notice to Betty and must return all materials obtained during the representation. She also must not divulge any confidences since the duty of confidentiality persists indefinitely.

Duty of Loyalty

Lawyers owe their clients a duty of loyalty. This means that if there is a conflict with the lawyer and the client, a past client, or any third party that materially limits the lawyer's ability to effectively represent the client, she must not take the representation or withdraw from it. Some conflicts can be waived upon informed consent from the client. In CA, this consent must be in writing.

In CA, the lawyer must be able to effectively represent their client. The ABA requires that the lawyer "reasonably believe" she can effectively represent the client, notwithstanding conflicts. This is an objective test and the lawyer's actions will be judged objectively. Therefore, representation of one client that compromises the confidences of another may make consent impossible, and would make representing both parties unreasonable.

Past Client Conflicting with Present Client

If a lawyer has represented a client in the past who is now on the opposing side in litigation, representation of the new client may still be permitted if written consent is obtained from the former client, and the lawyer may represent each client effectively without compromising her duties of confidence and loyalty to both. However, if the subject matter of the litigation is similar to the past representation of the former client, this will be deemed unreasonable and therefore a non-consentable conflict.

Lucy's Representation of Donna

Lucy represented ABC on trademark work. ABC has been sold, but Betty, the essential founder and controller of ABC, has now started a new company, XYZ. The work Lucy performed for Betty is regarding the same matter currently at issue in her representation of Donna—trademarks. However, it may not be related to anything that Lucy handled for ABC in the past, and, so, even though it is the same nature of work, it may not directly relate to her work with ABC.

Now, Lucy seeks to represent Donna, her new client, in an action against XYZ. Since XYZ is essentially run by Betty, Lucy must get consent by Betty to represent Donna. However, Donna must also be informed about the conflict. Lucy knows confidential information regarding misrepresentations [of] ABC, and, therefore, Betty, has made in the past. Since she may not reveal this information to Donna, Donna cannot be informed fully about how Lucy's representation may harm her. She may not understand fully the reasons behind the conflict, and therefore, consent is not possible.

Since Lucy cannot obtain fully informed consent from Donna, she must not take Donna's case and should withdraw.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the $1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. "There isn't a lot of money involved," she said, "but I want to teach David a lesson. David can't possibly afford the legal fees to defend this case, so maybe we can put him out of business."

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the $1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David's favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David's motion to dismiss on the grounds stated? Discuss.

2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? Discuss.

Answer A to Question 1

Patty instituted a suit via her lawyer Art for losses incurred due to Patty's inability to deliver a kidney on time owing to a traffic jam. The traffic jam occurred when David's truck skidded on an oily patch and became wedged across the roadway. There are two issues that need to be determined. First, the validity of the court's decision to dismiss Patty's cause of action for damages based on strict liability owing to an ultrahazardous activity. Secondly, whether David will be successful in recovering against Patty and Art in a claim of malicious prosecution.

1. David's motion to Dismiss based on Failure to State a Cause of Action

David has instituted a motion to dismiss for failure to state a cause of action upon which relief can be granted. In the alternative, David argues that damages would not have been recoverable against David for strict liability from malicious prosecution. A motion to dismiss based on a failure to state a cause of action upon which relief can be granted is a 12(b)(6) motion in federal court. This motion can be filed as a preliminary motion to the filing of a complaint or contained within the answer. Along with failure to include an indispensable party it can be raised at any time prior to trial or at trial itself. The motion charges that the plaintiff has failed to adequately state a cause of action upon which relief can be granted. It requires the judge to accept that all the facts that are stated by the plaintiff are taken to be true and then requires a determination as to whether there exists an adequate basis for relief. In other words, even if everything that plaintiff asserted in the complaint is true, would that be sufficient to allege a cause of action against the defendant?

In the current case, in order to determine whether the emotion to dismiss was appropriately granted in Art's favor, it is necessary to examine Patty's allegations against David. Patty's lawyer, Art, determined that a negligence claim would not be viable against David. Likely because there is nothing to indicate in the facts that David engaged in any activity whereby he breached the standard of care towards a

foreseeable plaintiff. There is nothing to indicate that he was negligent in driving his truck, but rather he skidded on an oily patch in the middle of the road and then his truck swerved to block all lanes of traffic. As a result, Art decided to pursue Patty's claim on a strict liability theory for transporting an ultrahazardous activity.

Strict Liability for an Ultrahazardous Activity

Strict liability for transporting an ultrahazardous activity is an action whereby the defendant is engaged in an ultrahazardous activity. This is where the activity is so dangerous that the danger of its harm cannot be mitigated even with the exercise of reasonable care. Secondly, the activity has to be one that is not of common usage in the community. In a strict liability claim for ultrahazardous activity, in jurisdictions that still retain contributory negligence, this is not a valid defense to a strict liability claim.

In the current case, David transports gasoline over long distances in a tank truck. In the current case, he was transporting gasoline through the City. It is important to note that transporting gasoline through residential parts of a city is inherently an ultrahazardous activity because of the dangers that can occur if any gasoline spills, owing to the fact that gasoline is highly combustible and can cause serious injuries and damage to property in a matter of seconds. No amount of care can mitigate against these risks, and transporting gasoline through a residential community is not a matter of common usage in the community.

However, in the current case, when David was transporting the gasoline across the bridge, he skidded on an oily patch. There is no indication that he is responsible for the oily patch, rather, it was already spilled on the road when he arrived at the scene. As a result he skidded on the spill and his truck wedged across the roadway and blocked traffic in all directions. This blockage caused a traffic jam to develop in both directions and the delay of two hours caused Patty to be late in making her organ delivery. Yet the crucial distinction in this case is that the ultrahazardous nature of the gasoline was not the cause of Patty's damages. Even if David had been transporting a truck filled

with benign materials, such as flowers or children's toys, he still would have skidded on the oily patch and his truck would have wedged across the highway and caused the traffic jam. For strict liability to attach for transporting ultrahazardous activity, the nature of the harm or loss has to emanate from the ultrahazardous activity. This is not met in this case. There is nothing about the inherently dangerous nature of transporting gasoline that is the cause of Patty's harm.

As a result, even if the judge was to take all of the allegations that Patty made in her complaint to be true, she has failed to state sufficient facts necessary to constitute a cause of action for strict liability for transporting dangerous materials. Therefore, the judge was correct to grant David's motion to dismiss.

Patty's Damages are not recoverable

Moreover, David claimed that the damages that Patty claimed in her complaint were not recoverable. In this case, Patty sought to recover the $1,000 fee she would have been paid had she been able to deliver the kidney while it was still viable.

As already noted, under strict liability the damages have to accrue from the inherent dangerousness of the activity - which in this case would have been transporting gasoline. However, in this case, the nature of Patty's damages resulted from the truck skidding on the oily patch, and as previously mentioned this could have occurred to any truck, even one transporting regular household goods. As a result, Patty is not entitled to recover for damages based on a theory of strict liability.

Her only viable claim would have been under a negligence theory which requires a duty under the applicable standard of care to all foreseeable plaintiffs (which under the majority Cardozo theory is to all plaintiffs in the zone of danger). There has to be a breach of the duty, causation (both factual and proximate), as well as damages. In this case, David would be held to the standard of care of a reasonable person driving a big truck along a bridge. The facts do not indicate that he was negligent in any manner,

such as driving too fast, or driving while distracted. As a result, Patty would be unable to establish a prima facie case for negligence and would be entitled to no damages. It is likely that Art realized that the negligence claim would be a non-starter and as a result he decided not to pursue the claim.

In conclusion, the court was correct to grant David's motion to dismiss for failure to state a cause of action and, in any event, the damages alleged were not recoverable because Patty failed to assert an appropriate and viable cause of action.

2. David's Suit for Malicious Prosecution against Patty and Art.

David decided to file suit for malicious prosecution against both Patty and Art. To establish a prima facie case for malicious prosecution, the plaintiff is required to show that there was an institution of civil proceedings against the plaintiff. Second, there was a termination of the proceedings in favor of the plaintiff. There also has to be a lack of probable cause. Moreover, the institution of the civil proceedings has to be for an improper purpose and the plaintiff has to show damages.

David's suit for Malicious Prosecution against Patty

In David's suit against Patty, David can show that Patty instituted a claim against him for strict liability based on transporting an abnormally dangerous activity. Since the judge granted the motion to dismiss, there was a termination in his favor.

The third prong requires David to show that the proceedings were instituted for an improper purpose. In the current case, when Patty came to Art for advice she was clear that she wanted to sue David for the loss of her fee, i.e., the $1,000 she would have received if she could have successfully delivered the kidney. In her mind, she believed that she had suffered damages and that David was to blame because he had caused the traffic jam on the bridge. As a result, it is unclear whether her motive to bring the suit was based on lack of probable cause. As a layperson, she likely did not have the legal knowledge to ascertain the proper basis for determining probable cause, and she

came to her lawyer for advice to determine the merits of her case. As a result, it is likely that the court will find that Patty's decision to bring suit against David was based on her relying on the legal expertise of Art and she might have honestly believed that there was sufficient probable cause to bring the action.

The fourth prong requires bringing the suit for an improper purpose. This requirement is likely met in this case, because Patty acknowledged that there was not a lot of money involved in the action; however, she wanted to teach David a lesson and try to run him out of business. As a result, the primary motivation behind the suit was not to recover damages, but rather to seek revenge and damage to David. This is an improper purpose because the legal system is not to be used in a civil proceeding in order to extract a revenge against a defendant or for an improper purpose.

Lastly, the plaintiff has to show sufficient damages. In the current case, David was forced to respond to an action for strict liability and although the matter was dismissed under a motion for failure to state a cause of action, this still might have resulted in David losing days at work because of the lawsuit. There is also the loss of professional and social reputation from being forced to defend against a lawsuit. However, David would have to present evidence of any such pecuniary loss in order to meet the damages prong.

In conclusion, David would likely not succeed in his suit for malicious prosecution against Patty because he cannot show that she instituted the proceedings without probable cause. Patty likely relied on Art's advice that there was a viable claim for strict liability and, as a result, she thought there was sufficient merit in the action to proceed to court.

David's suit for Malicious Prosecution against Art

David also filed suit against Patty's lawyer Art for malicious prosecution.

Again, the first two prongs are easily met, because Art was the attorney that brought the strict liability action against Patty and there was a termination in Art's favor with the court's decision to grant the motion to dismiss based on failure to state a cause of action.

In the current case, the third prong, whereby the plaintiff has to show that the action was brought with a lack of probable cause, is likely to bring David more success against Art. An attorney is held to possess the required duty of competence, whereby he has to possess the legal skill, knowledge, preparedness and ability to pursue the case. In this case, Art realized that a negligence action would not be successful, but he still decided to pursue a claim for strict liability. This was the only plausible claim that he could bring against David and if he failed to adequately research the facts of the case based on the elements of strict liability, then he will be held liable for bringing a cause of action based on lack of probable cause. On the other hand, if Art honestly believed, with sufficient preparation and research in the case, that a strict liability cause of action might be viable in this case, then arguably there is sufficient probable cause. However, as previously noted under the first part, there was no connection between the ultrahazardous nature of transporting the gasoline and the accident that occurred in this case, and, as a result, Patty would be unable to recover damages based on a strict liability theory. As a result, Art should have realized this and counseled Patty against filing suit, and therefore, David will be able to successfully demonstrate the lack of probable cause in a suit for malicious prosecution against Art.

The fourth prong requires the plaintiff demonstrating that the suit was brought for an improper purpose. In the current case, Patty told Art that she knew that there was not a lot of money involved in the case, but that she simply wanted to teach David a lesson and run him out of business. A lawyer is held to a duty of candor and fairness to the court and an adversary. He is required to properly research the cause of action to

ensure that there is a viable cause of action. A lawyer signs Rule 11 motions asserting that there is a proper factual basis to the claim and legal contentions are accurate and that a claim is not being brought for an improper purpose. In the current case, Art should have counseled Patty against bringing a lawsuit for an improper purpose and made her aware of the legal basis of the claim and whether there were sufficient facts to bring a cause of action. Attorney representation can be expensive, and Art should not have taken a frivolous claim simply as a means of earning fees and wasting time. As a result, David will be able to show that the cause of action was brought for an improper purpose.

As previously noted, as long as David can show damages in the form of lost wages from days missed from work owing to the need to defend the lawsuit or other pecuniary losses, he will have sufficiently demonstrated the damages prong.

In conclusion, David will be successful in a claim for malicious prosecution against Art. Even though his case against Patty is not likely to be successful owing to the inability to demonstrate that Patty consciously knew that there was a lack of probable cause to the action. However, as an attorney, Art will be held to a higher professional standard, and he had an ethical duty to ensure that he only brings suit where there is a sufficient legal and factual basis and that the suit is not being brought for a frivolous purpose or to waste time or embarrass an opponent. As a result, he should be entitled to damages, based on the damages he incurred due to the inappropriate suit brought against him for strict liability.

Answer B to Question 1

1. Patty (P) v. David (D) – Motion to Dismiss Suit for Strict Liability

A motion to dismiss for failure to state a claim looks at the facts in a light most favorable to the party it is being asserted against. The court will then see if sufficient facts have been pled to sustain a prima facie case of the cause of action alleged. The court does not evaluate the merits nor go beyond the complaint.

In the present case, P filed a claim of strict liability for ultrahazardous activity against D. Therefore, the elements of the claim must be evaluated in light of the complaint to see if grant of the motion was proper. Additionally, the court noted the case would be dismissed because the damages alleged were not recoverable.

Strict Liability – Ultrahazardous Activity

Strict liability is tort liability without fault. It applies in cases of products liability, ultrahazardous activities, and wild animals. Here, the allegation is one of ultrahazardous activity. The elements of strict liability are 1) an absolute duty of care, 2) breach of that duty, 3) causation, and 4) damages.

Absolute Duty of Care – Is the activity an ultrahazardous activity?

For there to be an absolute duty of care (a duty that may not be met by reasonable protective measures), a court must decide if an activity is in fact ultrahazardous. An ultrahazardous activity is one where the activity is 1) highly dangerous even with remedial measures, and 2) not within common usage within the community. This is a question of law to be decided by the trial judge.

In the present case, D was driving a tanker truck filled with gasoline. P will argue that this is a dangerous activity, because no matter how safe D behaves the tanker is a giant gas bomb waiting to explode. D can argue that it is not that dangerous because, as the facts show, there was no explosion when the tanker crashed. However, because the

court will view the facts in a light favorable to P, the tanker is probably sufficiently dangerous.

However, the second element poses a problem for P. The activity must not be in common usage within the community. Here, D's tanker truck was transporting gas. This is an activity in common usage within all US communities, because gasoline is the primary fuel for automobiles, which is the most common method of transportation in the US. Additionally, gasoline must be transported by some means to service stations. Tanker trucks are the most common, if not [the] exclusive method of delivering gas to service stations in the US. Therefore, driving a tanker truck is an activity of common usage in City.

Therefore, the duty element has not been met, because driving a tanker truck is not an ultrahazardous activity.

Breach: if the duty element had been met, any damage caused by the ultrahazardous activity would be sufficient breach. Here, the truck crashed and blocked traffic for 2 hours.

Causation

Causation has 2 parts: 1) actual (factual) cause and 2) legal (proximate) cause. Both must be met for the causation element to be sustained.

Factual Cause

The test for factual cause is the "but for" test. This asked but for the defendant's conduct the injury would not have occurred. In the present case, but for D crashing the tanker on the bridge, P would not have been late for her delivery, the kidney would have been viable, and P would have been paid $1,000. Viewing the facts in a light most favorable to P, factual cause is met.

Proximate Cause

Proximate cause is a question of foreseeability. First, the court must ask what is dangerous about the activity. Here, a tanker truck filled with gas is dangerous because it could explode or cause a fire. Second, the court will isolate the breach. Here, the breach was a crash that resulted in blocked traffic on the bridge. Lastly, the court will match up the danger of the activity to the breach; if they do not match up, then the injury is not the type of harm that would result from the ultrahazardous activity. Therefore, it would not be foreseeable. In the present case, the danger of explosion or fire does not match the breach of mere traffic jam. Thus, P's injury was not foreseeable.

Damages

Strict liability compensates damages from personal injury or property damages. In the present case, the type of harm is economic damages. Economic damages are those damages which result from the loss like lost wages or lost business opportunity. Therefore, there is not sufficient damage that P may be compensated for. While she may argue that the breach damaged the kidney. However, the kidney did not belong to her. At the very least it belonged to the kidney donor or the recipient. Additionally, one cannot have ownership interest in human tissue (see 13th Amendment). Thus, there is no personal injury or property damage that P has pled to sufficiently make a prima facie case.

Conclusion

The motion to dismiss was proper, because P did not sufficiently plead facts to sustain a cause of action of strict liability for an ultrahazardous activity. Tanker driving is not an ultrahazardous activity. There is no proximate causation between the crash and the loss of $1,000. Additionally, the damages requirement is not met because it is mere economic damages. Additionally, the trial judge was correct to assert that P's alleged damages are unrecoverable.

2. D v. P and Art (A) – Malicious Prosecution

Malicious prosecution is a tort that protects the interest of only having process instituted against a party for proper purpose and only when there is a valid case. The elements are 1) institution of legal proceeding, 2) termination of case in plaintiff's favor, 3) absence of probable cause, 4) improper ulterior purpose for bringing legal process, and 5) damages.

Institution of proceedings: Typically, malicious prosecution involves the institution of criminal proceedings. However, institution of civil proceedings will sustain a cause of action as well. Here, P (under the advisement and representation of A) filed a civil claim for $1,000 in lost damages in strict liability for an ultrahazardous activity (see above). A civil complaint was filed against D. This is sufficient to meet the first element/institution of legal proceeding.

Termination: The second element, termination of the case in plaintiff's favor, is met because the case was dismissed on failure to state a cause of action. This was a termination in D's favor, because he filed the motion to dismiss. The case was terminated on the granting of the motion.

Absence of probable cause

Probable cause is the reasonable belief that there was a valid cause of action. In the present case, P relied on A's advice as her attorney to form her basis of probable cause. A told her that he believed there was a plausible claim for strict liability. Reliance on counsel will sustain a finding of probable cause. Therefore, this element is not met, as to P.

A, on the other hand, probably did not have probable cause. As discussed above, the claim of strict liability lacked sufficient facts to make a prima facie case. The complaint was just so bad that an attorney with minimal competence could not have a reasonable belief that there was a valid cause of action based on strict liability. Therefore, this element is met as to A.

Improper purpose is any purpose except that of justice. Here, the just purpose would be to make P whole again, after the loss of her $1,000. This is the point of tort liability: to make the plaintiff whole. In the present case, she wanted to "teach D a lesson." P and A will argue that this is not improper because D should be a safer driver. D may argue that strict liability has no punitive damages; therefore, strict liability is not to punish. Therefore, teaching a lesson is an improper purpose.

Additionally, and more flagrantly, P believed that D could not afford the legal fees, and bringing the strict liability case would cause him to go out of business. A acquiesced in assisting her in the case. This is an improper purpose because the $1,000 was not a lot of money to her, but it would be a total loss of D's livelihood. This is not a proper basis for suit because it is merely to harass and damage D.

Defenses: A may assert that he would qualify for immunity based on the prosecutor exemption. However, this will not happen because of the exception for state prosecutors filing criminal charges.

Conclusion: D will probably prevail against A. However, he will probably not prevail against P, because she had probable cause.

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Question 2

Alex, an attorney, represents Dusty, a well-known movie actor. Dusty had recently been arrested for battery after Vic reported that Dusty knocked him down when he went to Dusty's home trying to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Paul, the prosecutor, filed a criminal complaint against Dusty. Suspecting that Paul was anxious to publicize the arrest of a high-profile defendant as part of his election bid for District Attorney, Alex held a press conference on the steps of the courthouse. He told the press: "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney."

Meanwhile, Paul received a copy of the police report describing Dusty's alleged criminal behavior. Concerned that the description of Dusty's behavior sounded vague, Paul asked the reporting police officer to destroy the existing police report and to draft one that included more details of Dusty's alleged criminal behavior.

Paul interviewed Dusty's housekeeper, Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vic down. Paul told Henry to avoid contact with Alex.

Paul has not been able to obtain Vic's version of the events because Vic is on an extended trip abroad and will not be back in time for Dusty's preliminary hearing. Confident that Dusty is nevertheless guilty, Paul has decided to proceed with the preliminary hearing.

1. What ethical violation(s), if any, has Alex committed? Discuss.

2. What ethical violation(s), if any, has Paul committed? Discuss.

Answer according to both California and ABA authorities.

Answer A to Question 2

1. A's Ethical Violations

As an attorney, under both ABA and CA authorities, A has a blanket duty of fairness to the tribunal and opposing counsel and a duty to maintain the dignity of the profession.

Extrajudicial Statements

A lawyer has a duty to not make any extrajudicial statements which he knows or should know will be disseminated by means of public communication which have any likelihood of prejudicing the proceedings. The exceptions to this duty revolve around permitting extrajudicial statements that do not contain a substantial likelihood of prejudice. The exceptions include making statements regarding any information contained in public documents, the results of any hearing, routine booking information, scheduling of public hearings, or in the case of prosecutors, requesting the public to come forward with any information or evidence of the crime or to aid in apprehension, and to possibly warn the public of any reasonable danger presented by a criminal on the loose. Additionally, a lawyer may make an extrajudicial statement when it is reasonably necessary to rebut a violative statement made by opposing counsel.

Public Dissemination

Here, A held a press conference in which he stated that his client was unquestionably innocent and that P was only pursuing the case because he wanted to make a name for himself by prosecuting a well-known movie actor as part of his bid for District Attorney. First of all, A had to know that his statements would be disseminated by means [of] public communications. In fact, not only did he know his statements would be disseminated, he specifically intended that they be. That is why he called the press conference. He did so to get his message out to as many people as he could.

Likelihood of Prejudice

Moreover, these statements present a strong likelihood of prejudice to opposing counsel. By making such statements, it creates disdain in the public eye with regard to P's conduct. It makes the public believe that he is only acting for the personal gain of

becoming an elected official as opposed to acting in their best interest to get criminals off the streets. A jury is going to be more likely to side against P in any later trial because they believe he is only prosecuting D because of the personal motive. Moreover, by stating that "any intelligent jury" will find D innocent, A was representing to the public as fact something which may not be so. By using his position in society and the words "any intelligent jury," it is likely that if a potential juror hears this statement he will be more likely to find in favor of D out of fear that he otherwise may be labeled as unintelligent.

Conclusion

None of the normal exceptions apply here. Moreover, since A held this press conference preemptively instead of in response to other extrajudicial violations, A is most likely to be subject to discipline under both the ABA and CA rules of professional conduct.

Dignity of Profession

A lawyer has a general duty to always uphold the dignity of the profession and to do nothing which would bring disdain to it in the public eye. Here, A has likely violated this duty by asserting that P is acting for an improper purpose without any actual knowledge of its truth. When a lawyer represents publicly, without justification, that another lawyer is dishonest or otherwise untrustworthy, it leads the public to believe that all lawyers are dishonest and untrustworthy. This detracts from the dignity of the profession and all lawyers must strive to avoid it wherever possible.

Improper Influence of Jury

A lawyer has a duty to not seek any improper influence over any jurors. Here, as stated above, A's statement basically amounted to a claim that only unintelligent people could convict his client. He thus is seeking to gain influence over potential jurors in any future hearings by these statements. However, he may not be subject to discipline on this basis alone because it is unclear whether a jury has been sworn or not. If a jury has not been sworn, then there are not really any jurors, in the literal sense, which could be improperly influenced. He would only be tainting the potential juror pool, but there is no

guarantee that a future juror would have heard this statement or, depending on how long before the trial, there's no guarantee that they will have remembered it. Moreover, there is likely to be actual cause to strike from the venire any person who has been influenced by the statement. Therefore, A is probably not subject to discipline merely because of this aspect of the statement unless a jury has already been sworn.

2. P's Ethical Violations

Fairness to Opposing Counsel

Though all lawyers must be zealous advocates of their positions, there remains a duty of fairness to opposing counsel which may trump zealousness in certain situations.

Allow Access to Evidence

A lawyer has a duty to not alter, destroy, or obstruct access to evidence or to counsel, aid, or encourage any other person to do so. Here, upon receiving a copy of the police report describing D's conduct, P asked the police officer to destroy the record and replace it with one that included more details of D's alleged criminal behavior. Although it may have been proper for P to ask the officer to include more details in a supplemental report, by instructing him to destroy the original report, P has obstructed A's access to such evidence. It is highly unfair to opposing counsel to destroy a substantial piece of evidence just because it does not clearly favor your position. Here, A had a right to see that report in its unaltered state and then to point out any discrepancies contained therein at trial.

Instructing Witnesses to Remain Silent

Related to the duty to allow access to evidence, a lawyer has a duty to not instruct or encourage a witness to remain silent about relevant knowledge unless that witness is the employee/agent of the lawyer's client and the lawyer reasonably believes that the witness' refusal to testify will not cause the witness any harm. Here, P interviewed D's housekeeper who witnessed the alleged criminal battery. The housekeeper, H, [said] D

did not knock down V as V had alleged. Thereafter, P told H to avoid contact with the opposing counsel, A. H clearly has relevant knowledge about the incident. He was a percipient witness of it and could accurately testify about what he saw. However, because H's perceptions were harmful to P's case, P instructed him to remain silent and not offer up his story to opposing counsel. This is most likely a violation of the rules of professional conduct because the exception does not apply. Though P may reasonably believe that H's interests will not be harmed by refusing to relate his story, P's client is the State and thus H is not an employee/agent thereof.

No Falsification of Evidence

Along with the duty of access to evidence comes the duty to not falsify evidence or put on false testimony and not counsel, aid or encourage anybody to falsify evidence or testimony. It is unclear exactly what occurred when P instructed the officer to destroy the report and draft a new one with more details. P could have legitimately felt the original report was vague and wanted the officer to include additional accurate details to avoid the vagueness. However, there is a legitimate possibility that P was impliedly asking the officer to exaggerate the details to make P's case more compelling. If this is the case, P is certainly subject to discipline as it was a direct encouragement to falsify evidence.

Special Duties of Prosecutors

Under both the ABA Model Rules and the CA Rules of Professional Conduct, because of the prosecutor's role as defender of the public, he is held to special heightened duties in a few areas. After all, his duty is to protect the public, but a criminal defendant is a member of the public as well and is owed at least some duty of fairness by the prosecutor.

Exculpatory Evidence

A prosecutor has an absolute duty to divulge any and all possible exculpatory evidence to the defense in sufficient time to allow proper preparation for the trial. Here, P

instructed the officer to destroy the original report. Exculpatory evidence is any evidence which weighs in favor of acquitting a criminal defendant. The facts indicate that the report was vague as to the details surrounding the alleged battery. Thus, it is not certain that the report was exculpatory in the sense that it stated that D was not responsible for the crime. However, that is not the standard by which exculpation is judged. The evidence must only have a tendency of favoring the criminal defendant. And if this report was so vague that P felt it necessary to destroy it, surely there was substantial probative value for D's case. A could have used this report to, at the very least, point out an inadequate investigation and discredit the police officer who arrested D.

Moreover, P interviewed H, who basically said D is innocent. This is direct exculpatory evidence. And even though it is not in P's possession because H is a live witness, he has a duty to disclose its existence to A.

Thus, by failing to inform A of H's existence and by instructing the officer to destroy evidence, P is likely to have violated his special duty to inform opposing counsel of any exculpatory evidence.

Absence of Probable Cause

The other special duty of prosecutors is to not proceed with a case in the absence of probable cause. Probable cause is facts sufficient to lead a man of ordinary caution to believe that a crime was committed and the defendant was the one who committed it. Here, P has filed a criminal complaint alleging battery by D against V. However, P has been unable to obtain V's version of the events because he has been overseas and he will not be back by the preliminary hearing. Moreover, the only witness P has spoken to, H, said that D is innocent. Thus, it appears that the only evidence of criminal conduct that P had was the vague police report which he requested the officer to destroy and embellish. This seems to be an absence of probable cause. If the only incriminating facts regarding the incident were those contained in the vague police report, it would not lead a reasonable person to believe that an offense was committed

by the defendant. P should not have filed suit and proceeded to the preliminary hearing without at least hearing V's testimony regarding the matter. P should have waited until V returned before filing suit. By failing to wait, P has violated his duty to not proceed with criminal cases in the absence of probable cause.

Answer B to Question 2

1. Alex's Ethical Violations

Duty of Fairness to Opposing Parties – Press Conference

A lawyer owes the opposing party a duty of fairness, which includes not making public, extrajudicial statements that have a substantial likelihood of materially prejudicing the case.

Alex held a press conference and told the press that "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney." Because Alex's statement was made to the press at a press conference, he knew that this extrajudicial statement would be widely publicized. This statement also has a substantial likelihood of materially prejudicing the case because his statement was inflammatory and may influence potential jurors to cause them to make up their mind or at least to have some pre-existing beliefs or bias regarding the case.

The one exception to this rule against extrajudicial statements is that a lawyer may make a public extrajudicial statement if necessary to protect his client from the undue influence of recent adverse publicity that was not self-initiated.

Alex might argue that he only made this statement to the press because he was trying to defend his client from what he believed was Paul's desire to publicize the arrest of a high-profile defendant as part of an election bid for District Attorney. However, Paul has not yet made any public statements regarding the case against Dusty, and, therefore, there is no recent publicity to defend Dusty against. Hence, this exception does not apply, and Alex has violated his duty of fairness to the opposing party.

2. Paul's Ethical Violations

As a prosecutor, Paul has many additional ethical duties that are particular to prosecutors, in addition to all of the professional responsibilities that all lawyers are subject to.

Duty of Fairness to Opposing Parties – Destroying Original Police Report

A lawyer owes the opposing party a duty of fairness, which includes the duty not to tamper with, alter, or destroy evidence.

Paul asked a police officer to destroy the existing police report describing Dusty's alleged criminal behavior. The original police report was a piece of relevant, material evidence for the case against Dusty. By asking the police officer to destroy the original police report, Paul violated his duty of fairness to Dusty.

Duty of Candor to the Court – Creating New Police Report

A lawyer also has a duty of candor to the court, which requires not making a false statement of material fact and not presenting false evidence.

Paul asked the police officer to draft a new report that included more details of Dusty's alleged criminal behavior. If Paul's request to include more details of Dusty's alleged criminal behavior required the police officer to make up details that he did not in fact remember, this would entail the creation of false evidence, in violation of Paul's ethical duties. Furthermore, even if the new police report only contained truthful information that the police officer remembered from the incident, if the police report is offered by Paul as the original, rather than disclosing that it was a second version created at his request, then Paul would be making a false statement of material fact and knowingly presenting false evidence, in violation of his duty of candor to the court and his duty of fairness to the opposing party.

Exculpatory Evidence

A prosecutor has a duty to disclose exculpatory or mitigating evidence to the defendant.

Paul did not disclose the original police report to Alex and Dusty. The original police report described Dusty's behavior in a vague manner, such that Paul was concerned about the police report in making his case. Therefore, this police report could be viewed as potentially exculpatory or mitigating evidence, and Paul, as prosecutor, had a duty to disclose it to the defense. His failure to do so violated his ethical duties as prosecutor.

Paul also did not disclose his interview with Henry, Dusty's housekeeper. Henry had witnessed the incident, and he told Paul that Dusty did not knock Vic down. Because this is exculpatory evidence, Paul had a duty to disclose the interview to Alex and Dusty. Paul might argue that since Henry was Dusty's housekeeper, Dusty is probably already aware of his version of events. Nonetheless, Paul has the duty to disclose all exculpatory or mitigating evidence to the defense, even if he suspects that the defenses might be aware of it. His failure to do so violated his ethical duties as prosecutor.

Duty of Fairness to Opposing Parties and Third Parties – Telling Henry to Avoid Alex

A lawyer has the duty not to tell a third party not to voluntarily speak with the opposing party, unless: (1) the third party is a relative/employee/agent of the lawyer's client, and (2) not voluntarily speaking will not be adverse to the third party's interests.

Paul told Henry to avoid contact with Alex, Dusty's lawyer. Because Henry is a third party, Paul may not ask him to refrain from voluntarily speaking to Alex. (The exceptions do not apply because Henry is not a relative/employee/agent of the state, whom Paul represents, and failing to speak to Alex may actually be adverse to Henry's interests because he is Dusty's housekeeper and may lose his job as a result.) Paul might argue that since Henry is Dusty's housekeeper, he probably has already spoken to Dusty himself. Nonetheless, Paul may not ask a third party to refrain from speaking with the opposing party's counsel, and by asking Henry to avoid Dusty's lawyer, Paul violated his duty of fairness, both to Dusty and to Henry.

Probable Cause

A prosecutor has the duty to only prosecute when there is probable cause.

During Paul's investigation of the case against Dusty, he found a police report where Dusty's behavior was only vaguely described, and he spoke to Dusty's housekeeper, who witnessed the incident and said that Dusty did not knock Vic down. Dusty claims that Vic simply tripped, and Paul has not been able to obtain Vic's version of events because Vic has been on an extended trip abroad. Based on these facts, Paul does not have probable cause to prosecute the case against Dusty. Paul might argue that the police report does not entirely clear Dusty's name because it is only vague, not exculpatory, and that Dusty's housekeeper was likely an interested, biased party who had reason to lie. However, Paul does not have sufficient evidence affirmatively establishing probable cause for finding Dusty guilty. Even though Paul subjectively felt confident that Dusty was nevertheless guilty, probable cause is an objective standard, and this standard has not been met on the facts. Therefore, Paul's decision to proceed with the preliminary hearing anyway, without having spoken to Vic or obtained other evidence of Dusty's guilt, violated his ethical duty to prosecute only when there is probable cause.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops and to fill their wells, immediately demanded that Diane stop construction. Diane refused. Six months into the construction, when the dam was almost complete, the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance and for a taking under the United States Constitution. After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, separately retained Lawyer and filed an application for a permanent injunction against Diane in federal court asserting the same causes of action and requesting the same relief as in the state court case. Personal jurisdiction, subject matter jurisdiction, and venue were proper. The federal court granted Diane's motion to dismiss Paul's federal court application on the basis of preclusion.

Infuriated with the ruling, Paul told Lawyer, "If the court can't give me the relief I am looking for, I will take care of Diane in my own way and that dam, too." Unable to dissuade Paul and after telling him she would report his threatening comments to criminal authorities, Lawyer called 911 and, without identifying herself, told a dispatcher that "someone is on his way to hurt Diane."

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.

2. Was the federal court's denial of Paul's application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.

3. Did Lawyer commit any ethical violation when she called 911? Discuss. Answer according to both California and ABA authorities.

Answer A to Question 5

I. <u>Was the State court's denial of Diane's neighbors' application for a permanent injuction correct?</u>

A permanent injunction is an equitable remedy which is appropriate where there is an inadequate remedy at law, the plaintiff has a protectable property interest, enforcement of the injunction is feasible, balancing of the hardships, and there are no applicable equitable defenses to enforcement of the injunction.

Inadequate remedy at law – A remedy at law is inadequate where monetary damages are insufficient to compensate the plaintiff, or where they are unlikely to be recovered because the plaintiff is insolvent. Furthermore, a legal remedy may be inadequate. In this case, the neighbors are going to argue that an award of monetary damages will be inadequate because they rely on the stream that Diane is diverting to irrigate their crops and fill their wells. While an award of damages would give them money, it would in no way help them in dealing with this problem. Furthermore, they will also argue that because the use and enjoyment of their real property is involved, this is a situation where their land is unique and legal damages will be inadequate because of the irreparable harm that will occur to the neighbors if they lose access to the water.

Protectable Property interest – A plaintiff may only seek a permanent injunction where they have a property interest that a court in equity will protect. While the traditional rule was very strict, the modern rule provides that an interest in property will suffice. The plaintiffs will argue that as landowners living downstream, they have a protectable property interest in the water. The court is likely going to accept this argument because they had been using the water before Diane came into the area and likely have at least some rights to continue using some of the water.

Feasibility of enforcement – Enforcement problems arise in the context of mandatory injunctions which requires the defendant to do something. Negative injunctions which

prohibit the defendant from performing certain actions create no enforcement problems. In the enforcement area, courts are concerned about the feasibility of ensuring compliance with a mandatory injunction and also with the problem of continuing supervision.

Under these facts, Diane's neighbors initially asked for a partial mandatory injunction and partial negative injunction, ordering Diane to stop construction and remove the dam. With regard to the mandatory part (removing the dam), Diane has to affirmatively take this action, rather than being required simply to stop building the dam. Because this is a mandatory injunction, this creates an enforcement problem for the court. It will have the problem of continually supervising Diane to make sure that she in fact takes the dam down. The part of the injunction regarding stopping construction is a negative injunction because all that is required is that Diane stop construction. As such it creates no enforcement problems. While the part of the injunction that requires Diane to take down the dam creates some enforcement problems, the court could solve this problem by couching it as a negative injunction.

Balancing of the hardships – In balancing the hardships, the courts will always balance the hardships if the permanent injunction is granted on the defendant with the hardship to the plaintiff if the injunction does not issue. The only time that courts will not balance the hardships is where the defendant's conduct is willful. Finally, in balancing the hardships, the court can take the public interest into account.

Was the plaintiff's conduct willful so as to prohibit balancing of the hardships – In this case, while Diane willfully continued the construction and used the dam to divert the water, there is no indication that when she was doing this that she knew that her conduct was wrong or was intentionally violating the rights of the plaintiffs. While the neighbors demanded that she stop, there is no indication that she believed that she was not entitled to continue. Consequently, the hardships should be balanced because the defendant's conduct was not willfully in violation of the plaintiffs' rights.

Balancing the hardships – The plaintiffs are going to argue that they will suffer great harm if an injunction does not issue. Under these facts, the plaintiffs need the water from the stream for their crops' irrigation and to fill their wells. Thus if a permanent injunction does not issue their crops are likely to die and they will not have a water supply in their wells. This is a great showing of hardship. The defendant is going to counter that she is trying to construct a free summer day camp for poor kids and that she cannot do so if she is forced to halt construction and if she cannot use the water diverted by the dam for her pond. However, in this case, these hardships do not seem so great compared to the hardships faced by the plaintiffs. There is no indication that she cannot get the water from her pond from somewhere else; furthermore, it seems likely that she could continue constructing her property in a way that does not interfere with the rights of the plaintiffs. The direct balancing of the hardships thus favors the plaintiffs.

Consideration of the public interest in balancing the hardships – Courts may also consider the public interest in balancing the hardships. Diane is going to argue that the public interest favors her because she is doing this project to create a free summer day camp for children who do not have a lot of money. This certainly indicates that her action is in the public interest. However, the neighbors can also make a public interest argument. Assuming that they sell their crops for consumption by the general public, they also have public interest factors on their side. Thus this factor does not seem to favor either side very strongly.

On balance, thus, it seems that the balancing of the hardships favors the plaintiffs when taking the direct hardships and the public interest into account.

Equitable Defenses – Courts in equity will not issue an injunction in favor of plaintiffs where they have unclean hands, where laches applies, or where the claim is barred by estoppel.

Unclean hands – is a defense in equity where the plaintiffs have committed acts of bad faith with regard to the subject matter before the court. In this case, there is no indication that the plaintiffs have unclean hands, so this argument by Diane will be unsuccessful as a defense.

Laches – Laches applies where a plaintiff or group of plaintiffs unreasonably delay in instituting a cause of action or claim against a defendant and this delay prejudices the defendant. In this case, Diane is going to argue that the plaintiffs' delay in this case was unreasonable. When Diane refused the neighbors' initial request to stop construction, they waited six months before filing an application with the state court for an injunction. Furthermore, she is going to argue that she was harmed by this delay because she continued construction and expended substantial funds during this delay. While Diane can make a pretty compelling argument, it does not seem that a delay of six months is enough time that the plaintiffs' claim should be barred by laches.

Estoppel – applies as a defense in equity where plaintiffs take a course of action that is communicated to the defendant and inconsistent with a claim later asserted, and the defendant relies on this to their detriment. In this case, estoppel will not bar the claim by the plaintiffs because once they became aware of the construction, they immediately indicated that they did not approve. They commanded Diane to stop so the plaintiffs' claim is not barred by estoppel.

Conclusion – The state court was incorrect in denying the permanent injunction because it appears that the permanent injunction should have issued because of the factors discussed above.

II. Was the federal court's denial of the permanent injunction correct?

Claim Preclusion (Res Judicata) – The equitable doctrine of res judicata stands for the proposition that a plaintiff should only have one chance to pursue a claim against the same defendant. This doctrine applies and bars relitigating of a claim where (1) the

claim is asserted by the same claimant against the same defendant in case #2 as in case #1, (2) where the first case ended in a valid final judgment on the merits, and (3) where the same claims are being asserted in case #2 as in case #1. In federal court these claims arise from the same conduct, transaction or occurrence.

Same Claimant Against Same Defendant in Case #2 as in Case #1 – In this case, second case, Paul is suing Diane in federal court. The facts indicate that he was one of the neighbors and a plaintiff in the first case in state court. Consequently this element is met, because Paul was also a claimant against Diane in the first case.

Case #1 ended in a valid final judgment on the merits – The facts indicate that in the first case, the court denied the application for a permanent injunction on the merits. The facts also indicate that the neighbors did not appeal. A judgment on the merits is clearly a valid judgment and because no appeal was made, this judgment is also final. Consequently, this element of res judicata is also met. The one issue that Paul may raise on this point is that if the time for appeal has not run in state court, he may argue that he could file a notice of appeal in state court. However, taking up this suit in federal court is improper because absent an appeal in state court, there has been a valid final judgment on the merits that the federal court should adhere to.

Are the same claims asserted in case #2 as were asserted in case #1? Under federal law there is a theory of merger whereby a plaintiff is deemed to have asserted all claims pertaining to a prior claim that arise from the same conduct, transaction, or occurrence. In this case, the facts indicate that Paul asserted the same causes of action and requested the same relief in the second case as in the first case. Consequently, this element is met. California follows the primary rights theory which gives the plaintiff a cause of action for each right that this invaded. However, in this case, because there is no indication that any of the causes of action are different than the ones in the first case, the result in California would not be different.

Conclusion – The court was correct to dismiss Paul's application for permanent injunction because the doctrine of claim preclusion (res judicata) precluded relitigating claims that had already been asserted in a prior case.

III. Ethical Violations of Lawyer in reporting Paul's communications to the 911 Dispatcher

Duty of Confidentiality – Under the ABA Model Rules, a lawyer has a duty of confidentiality to a client which precludes disclosing any information obtained during the representation. Under the California rules, while there is no express duty of confidentiality, a lawyer is required to keep his client's confidences and this is a strict duty.

In this case, Paul is going to argue that lawyer violated this duty when he revealed the information that he was told after the ruling to the 911 dispatcher. While he is correct that this raises an issue with regard to the duty of confidentiality, he may be incorrect that Paul has violated this duty because both the ABA Rules and the CA Code recognize that there are certain situations whereby the duty of confidentiality is overridden by other concerns.

Exceptions to the Duty of Confidentiality – Under the ABA Model Rules, a lawyer may reveal client confidences where he believes necessary to prevent reasonably certain death or serious bodily injury. The California Code has the same requirements but also requires that where reasonable a lawyer should first try to talk the client out of committing the act and then tell them that they will reveal confidences if they are not assured that the client will not commit the act. Under both the ABA and California rules, this type of disclosure of client confidences is permissive; it is not mandatory. Under the federal rules, there is also an exception to the duty of confidentiality where the client has used or is using the client's services to commit a crime or fraud which will result in substantial financial loss. California has no such exception, but this exception will not be applicable anyway because there is no indication that Paul will be using Lawyer's services if he acts against Diane or the dam.

Federal Rules – Under the federal rules, the main issue is whether Lawyer reasonably believed that his disclosure was necessary to prevent reasonably certain death or substantial bodily injury to Diane. If this is the case then he was entitled to reveal client confidences and will not have breached his duty of loyalty. The facts indicate that Paul

was infuriated with the ruling that the federal court had made in dismissing his claim and that he said “If the court can’t give me the relief I am looking for, I will take care of Diane in my own way and that dam too.” The question is whether the belief that he was going to get Diane made it reasonable to believe that she was threatened with death or serious bodily injury. Based on the facts of this case, this may not be met here because Paul had just lost his case and was upset. People often say things when they are upset, but don’t necessarily act on them. Lawyer will argue that he tried to talk Paul out of hurting Diane and that he only reported the comments then. However, under these circumstances, it seems like this disclosure may have been unreasonable and violated Lawyer’s duty of confidentiality, particularly because such a disclosure is permissive.

California Code – In addition to the federal requirements discussed above, before revealing any client confidences based on a reasonable belief of a reasonable threat of death or substantial bodily injury, Lawyer was required to first try to talk Paul out of committing the violent act against Diane and inform client of his intention to reveal the confidential communications. In this case, the facts indicate that Lawyer did this by trying to dissuade Paul and telling him that she would report his threatening comments to criminal authorities. However, as discussed above, given all of the circumstances this disclosure may not have been reasonable.

Attorney/Client Privilege – Under the attorney-client privilege, a lawyer may not reveal information intended by the client to be confidential which is given in order to get legal advice. However, in both California and under the ABA Model Rules, there is an exception where disclosure of confidential information obtained during the course of the attorney-client privilege is permitted to prevent death or serious bodily injury. This analysis while similar to the analysis above and the question is whether the statements made by Paul were for the purpose of legal advice; it seems like he was just telling Lawyer what he was planning to do so. The statements may not even be covered by the Attorney/Client privilege. Furthermore, these statements may fall within the exception for threats of death or serious bodily injury if the threat that Paul made against Diane was credible.

Duty to uphold justice – Under their duty to uphold justice under both the ABA Model Rules and the California Code, a lawyer is permitted to disclose client confidences where necessary to prevent reasonably certain death or substantial bodily harm. Lawyer will argue that this is why the disclosure was made. However, if this disclosure was unreasonable, this duty will not protect Lawyer from breaching her duty of confidentiality and potentially the Attorney-Client privilege.

Conclusion – Lawyer may have violated her duty of confidentiality and the attorney-client privilege under both ABA Model Rules and the CA Code if it is found that the threat made by Paul against Diane was not a credible one and just made in the heat of the moment without any reasonable chance of actually carrying it through. However, in her defense, Lawyer may argue that she did not disclose the identity of who was on their way to hurt Diane because she just told the dispatcher that "someone was on the way." However, this will not be dispositive on this issue of whether she breached ethical duties.

Answer B to Question 5

1. Denial of Diane's neighbors' application for permanent injunction

Permanent injunction

A permanent injunction is a court order mandating a person to either perform or refrain from performing a specific act. A permanent injunction is granted after a full trial on the merits. In order to obtain a permanent injunction, a claimant must establish the following elements.

a. Inadequate legal remedy alternative

A claimant must first establish that any legal remedy alternative is inadequate. In this case, the neighbors will argue that a money damages remedy would be inadequate because it would necessitate the filing of multiple suits. The harm that Diane is inflicting by constructing the dam -- i.e., stopping the flow of the water to neighbors downstream who rely on the stream to irrigate their crops and fill their wells -- affects multiple parties and is ongoing, therefore giving rise to multiple suits. Moreover, the neighbors will argue that a money damages remedy would be inadequate because it would be difficult to assess damages. It may be difficult, for instance, to establish how much damages they will sustain as a result of not being able to irrigate their crops. It may also be difficult to determine how much it would cost to obtain such water from other sources. Finally, the dam may be the neighbors' only source of water, and, therefore, the award of any amount of money damages may be inadequate (i.e., the stream is unique). Therefore, the neighbors will likely satisfy this element.

b. Property right/protectable interest

Traditionally, permanent injunctions only protected property rights. However, the modern view holds that any protectable interest is sufficient. In this case, the neighbors likely have a property right in the stream to the extent that the stream flows through their respective properties. Even if they do not have a property right, however, they still have

a protectable interest stemming from their right to use water from a stream that runs through their property. Thus, this element is likely satisfied.

c. Feasibility of enforcement

There is usually no enforcement problem in the case of negative injunctions (i.e., court orders mandating that a person refrain from performing a specific act). Mandatory injunctions (i.e., court orders mandating that a person perform a specific act) present greater enforcement problems. For instance, a court may be unwilling to grant a mandatory injunction if: (a) the mandated act requires the application of taste, skill or judgment; (b) the injunction requires the defendant to perform a series of acts over a period of time; or (c) the injunction requires the performance of an out-of-state act.

In this case, the neighbors seek both a negative injunction (i.e., order requiring Diane to immediately stop construction of the dam) and mandatory injunction (i.e., order requiring Diane to remove the dam). There will be little enforcement problem in ordering Diane to immediately stop construction of the dam. There will likewise be little enforcement problem in ordering Diane to remove the dam since both Diane and the dam are within the court's territorial jurisdiction, and the injunction does not require Diane to perform an out-of-state act. Therefore, the neighbors will satisfy this element.

d. Balancing of hardships

The court will balance the hardship to the neighbors if a permanent injunction is not granted against the hardship to Diane if a permanent injunction is granted. Unless the hardship to Diane greatly outweighs the hardship to the neighbors, a court will likely not grant a permanent injunction. In this case, Diane will suffer little hardship if the permanent injunction is granted because the pond was intended to be used for a free summer day camp. Therefore, the only economic harm she will suffer as a result of this injunction is the money she has already expended in constructing the dam and any additional amount she will incur in removing the dam if the injunction is granted.

However, the neighbors will suffer substantial harm if the injunction is not granted and the dam is completed. They rely on the stream to irrigate their crops and to fill their wells and will likely suffer substantial damage if they either cannot obtain substitute water from another source or must pay significant amounts to obtain any substitute. Thus, the hardship to the neighbors if a permanent injunction is not granted greatly outweighs the hardship to Diane if a permanent injunction is granted, and a court is more likely to grant the injunction.

e. Defenses

Diane may raise the defense of laches and argue that the neighbors delayed in bringing the permanent injunction action, thereby prejudicing her. The laches period begins the moment the neighbors know that one of their rights is being infringed upon. In this case, the neighbors knew six months before they filed an application in state court for a permanent injunction that Diane was constructing a dam and that such construction infringed on their right to obtain water from the stream. By waiting these six months to bring suit, Diane incurred substantial construction expenses in building the dam that could have been avoided if the neighbors had brought the suit sooner.

Thus, Diane will likely be able to successfully assert this laches defense.

In the end, a court may still grant the neighbors the injunction and order Diane to remove the dam. However, the court may require the neighbors to compensate Diane for any construction expenses that could have been averted if the neighbors brought the suit sooner.

2. Denial of Paul's application for permanent injunction

Claim preclusion

Once a court renders a final judgment on the merits with respect to a particular cause of action, the plaintiff is barred by res judicata (i.e., claim preclusion) from trying that same cause of action in a later suit. I will examine each element of claim preclusion, in turn, below:

a. Final judgment on the merits

The court must have rendered a final judgment on the merits in the prior action. For federal court purposes, a judgment is final when rendered. For CA state court purposes, a judgment is not final until the conclusion of all possible appeals. In this case, Paul is filing his case in federal court. Since judgment was rendered by the state court in the prior action, the judgment is considered final.

A judgment is "on the merits" unless the basis for the decision rested on: (a) jurisdiction; (b) venue; or (c) indispensable parties. In this case, the state court's decision did not rest on any of these grounds. Therefore, the judgment was on the merits.

b. Same parties

The cause of action in the later suit must be brought by the same plaintiff against the same defendant. In this case, Paul was one of the plaintiffs in the prior state court case, and the suit is brought against Diane, who was the same defendant in that prior case. Therefore, this requirement is also met.

c. Same cause of action

The cause of action in the later suit must be the same cause of action asserted in the prior suit. In general, if causes of action arise from the same transaction or occurrence, a claimant must assert all such causes of action in the same suit. However, under CA's "primary rights doctrine," a claimant may separate the causes of action into separate suits so long as each suit involves a different primary right (e.g., personal injury vs. property damage).

In this case, Paul is asserting the same permanent injunction claim based on nuisance and taking grounds that he asserted in the prior state court action. He is also requesting the same relief as in the state court case. He is not asserting a different primary right, and, thus, the "primary rights doctrine" is inapplicable. Therefore, this requirement is likewise met.

d. Actually litigated or could have been litigated

The same cause of action must have either actually been litigated or could have been litigated in the prior action. This requirement is met because the permanent injunction cause of action based on nuisance and taking grounds was actually litigated in the prior action.

In the end, Paul will [be] barred by res judicata (i.e., claim preclusion) from trying the permanent injunction cause of action against Diane in federal court, and the court was correct in granting Diane's motion to dismiss.

3. **Lawyer's ethical violations**

Confidentiality

Under both ABA and California rules, a lawyer has a duty not to reveal any information related to the representation of a client. However, several exceptions may nonetheless permit a lawyer to reveal such confidential information. First, a lawyer can reveal confidential client communications if the client gives the lawyer informed consent to do so. In this case, Paul has not given Lawyer such informed consent, and, therefore, this exception does not apply. Second, a lawyer can reveal confidential client communications if he is impliedly authorized to do so in order to carry out the representation. Again, this exception does not apply here.

Third, under the ABA rules, a lawyer can disclose confidential client communications if he reasonably believes it is necessary to prevent a person's reasonably certain death or serious bodily injury. Under the CA rules, however, a lawyer can disclose such information only to prevent a criminal act that is likely to lead to death or serious bodily injury. The lawyer must first make a good faith effort to convince the client not to commit the criminal act and, if the client refuses, then the lawyer must inform the client of his intention to reveal the client's confidences.

In this case, Paul told Lawyer that he "will take care of Diane in my own way" after becoming infuriated with the court's ruling on his permanent injunction application. On the one hand, Paul's statement is too unclear and ambiguous to provide any indication of what specific harm he intended to inflict on Diane. On the other hand, Lawyer will argue that he reasonably believed that Paul intended to inflict serious bodily harm on Diane, as evidenced by his infuriation after the ruling. Lawyer was so convinced that Paul intended serious harm to Diane that he told the 911 dispatcher that Paul was "on his way to hurt Diane." In the end, a disciplining body would likely hold that Lawyer was reasonable in his belief that Paul intended to cause death or serious bodily injury to Diane and, therefore, his disclosure of Paul's confidential communications was permissible. The killing or injuring of a person also constitutes a criminal act, and since

Lawyer first made a good faith effort to dissuade Paul from committing any harm against Diane, Lawyer's revelation of this confidential information would also not subject Lawyer to discipline in CA.

Fourth, under the ABA rules only (i.e., CA has no equivalent rule), a lawyer may disclose confidential client communications to prevent a crime of fraud that is likely to produce substantial financial loss to a person, so long as the client was using the lawyer's services to perpetrate the crime or fraud. In this case, Paul threatened to "take care… of that dam." While this threat may result in substantial financial loss to Diane, the threatened act did not involve the use of Lawyer's services. Therefore, this exception does not apply. Nonetheless, as discussed above, Lawyer should escape discipline for his revelation of client's confidential communications under the "death or serious bodily injury" exception.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name "ABC Legal Services LLP" ("ABC LLP"). They agreed to share profits and losses equally. Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. Inadvertently and unbeknownst to Able, Baker, and Charlie, Able's assistant never filed the appropriate documents.

Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of $1100 or 10% of his billings. David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space.

Able, Baker, and Charlie hired Jack as head of computer services. Jack had just graduated from college with a degree in computer science. Jack, in an effort to save ABC LLP the cost of Internet access budgeted at $500 a month, accessed and used the wireless network of an adjacent law firm for free. Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able's clients, which caused the client economic loss.

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able's client caused by the disclosure of confidential client information? Discuss.

2. May Able, Baker, and Charlie each be held personally liable for David's malpractice? Discuss.

3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

Answer A to Question 2

Limited Liability Partnerships:

The main benefit of an LLP is that the partners have limited liability – meaning that they are not personally liable for the debts and obligations of the partnership. To be properly formed, the LLP papers must be filed with the Secretary of State. Here, the ABC paperwork was not filed and the LLP was never registered. Without the proper paperwork, this venture is likely to be treated as a general partnership.

General Partnerships:

General Partnerships ("GP") are formed by two or more persons carrying on a business for profit. There are no filing requirements for forming a GP. GPs can be made up of general partners and limited partners. General partners have a duty to manage the business and can be held personally liable for partnership debts and/or obligations. Limited partners, however, are not liable for partnership debts and may lose their limited status if they engage in management. Absent any agreement each partner has an equal vote, profits are shared equally, and losses are shared as profits are.

A, B, and C are likely to be seen as general partners in a GP; thus they are entitled to an equal say in the management of the business and may be held personally liable for partnership debts.

Ethical Duties of Attorneys:

Attorneys owe a wide array of duties – to clients, the court, opposing counsel, and the public generally. The duties are established by ABA rules as well as state-specific rules. California's rules on ethical conduct of attorneys largely follows the ABA rules, but there are variances which will be noted if applicable below.

Duties to clients:

Attorneys owe clients the duties of confidentiality, loyalty, financial responsibility, and competence. Duties owed to the court and opposing counsel include the duties of

candor, fairness, and decorum. Attorneys must also ensure that all members of their firm, including staff, act in accordance with the ethical standards imposed. To the extent that one attorney has a conflict, such conflicts are imputed to the firm and are shared by all other attorneys unless the conflict arises from prior governmental work or a personal relationship with the opposing party's counsel, for example.

1. The disclosure of client information:

One of the most important duties owed to clients is the duty of confidentiality. This duty requires the attorney to act so as to not reveal any confidential information of the client – without consent, either express or implied. The facts do not indicate that any consent was given to the disclosure of this information in this case.

Here, the client information was revealed due to the use of an un secured wireless network which the firm used. Although the facts indicate that the attorneys were not aware of the use of the adjacent building's wireless network, we do know that they were surprised by the cost savings. If the attorneys were aware of unexpected savings, they should have spoken with Jack to determine why internet access was so much cheaper than expected. Because they did not so inquire, and consequently were unaware of the issue, Jack acted unethically by using another network for free. A, B, and C all had a duty to ensure that Jack's actions were proper and ethical.

Because ABC is likely to be deemed a GP, all general partners may be held liable for the debts of the firm. These debts can include the economic losses incurred from the disclosure of information and/or debts incurred if the client sues the firm for malpractice.

2. David's liability for malpractice:

Here the issue will be whether David is a partner of the firm or merely a lessee of an office. A, B, and C will argue that D was merely renting space from the firm, making him not a partner, and therefore not subjecting the firm to any liability for his actions. We do not have facts to indicate whether David ran his business under a separate name, kept his files in a separate room, used the same office staff, or contributed any money to the partnership. The first three factors would indicate a separate firm, while the final factor – buying into the partnership – would indicate that D had become a partner of ABC.

What we know is that David paid monthly rent. Absent other facts, paying rent indicates the D was likely a separate practitioner. If D was acting as a separate practitioner, the ABC firm partners would not be liable for this malpractice.

However, if there were facts to indicate the D was a partner of the firm, or that the malpractice occurred with regard to a firm client, the firm general partners may be liable for D's malpractice. In a LLP, as intended, partners are all liable only for their own malpractice, but in a GP, the general partners can be held liable for all partnership obligations. In a GP incoming partners are not liable for existing partnership debts, through the money they contribute can be used to pay off such debts. Outgoing partners of a partnership are liable for debts of the partnership until creditors have been given notice of their departure or 90 days have passed since their departure.

D's malpractice occurred shortly after he took up office space with ABC. If he were deemed to be a partner, and the malpractice occurred after joining the partnership, ABC general partners would be liable for partnership debts arising out of his malpractice.

3. Professional conduct:

The attorneys of ABC have violated a number of rules of professional conduct.

a. Management of Staff:

The attorneys have a duty to properly manage staff and ensure that all members of the firm are in compliance with the rules of conduct. Here, A gave partnership documents to an assistant for filing. While staff members of a firm frequently are in charge of filing court documents or making deliveries, it was likely imprudent to allow such an important document to be handled by an assistant. Because of the assistant's negligence the firm likely lost its privileges as an LLP. Attorneys cannot allow the unauthorized practice of law by non-attorneys. Here the documents likely did not need to be filed by an attorney, but the task was nonetheless important enough that it should have been done by a partner so as to ensure accuracy.

The attorneys were prudent in hiring Jack as a computer services manager as he was properly qualified with a degree in computer science. The use of non-attorneys does

not violate any ethical rules so long as fee sharing does not occur (payment of non-attorney salaries is not considered fee sharing.) The attorneys likely violated their ethical duties in their management of Jack, however. By not managing Jack properly and being unaware of Jack's use of an unsecured wireless network, A, B, and C breached not only their duties as managers, but also their duty of confidentiality to their client.

b. Duties to clients:

Attorneys owe their clients the duty of confidentiality – the duty to not reveal any confidential information without consent. Information may be revealed where necessary to defend oneself against a claim of malpractice or potentially if the attorney knows of conduct which will result in death or serious bodily harm which can be prevented through disclosure. The CA rules indicate that the conduct must be criminal; however the ABA makes no such distinction. Here, the requisite facts for proper revelation of client information do not appear. ABC breached its duty of confidentiality to its client by allowing the transmission of client information to a third party.

Attorneys also owe clients the duty of loyalty, which prevents attorneys from taking on representation or taking actions which are in conflict with current clients. Attorneys must always act in the best interests of their clients and with their interests at heart. It is unclear to whom the confidential information was revealed, but the ABC firm may have breached their duties of loyalty as well if the use of the network resulted in revelation of information to an adverse party.

Financial responsibility imposes on an attorney the duty to properly manage client funds and avoid commingling personal money. There are no facts indicting a breach of this duty by ABC.

The duty of competence requires that attorneys provide clients with professional, skilled, competent services. Here, by use of an unknown wireless server which allowed for the disclosure of confidential information, the attorneys of ABC have acted competently. A competent attorney would have ensured that information was not revealed, and would have properly managed all staff members.

Answer B to Question 2

Liability for Loss Due to disclosure of confidential information:

A partnership is an association of persons to carry on a business as coowners for profit. The partners are jointly and severally liable for the debts of the partnership, both in contract and in tort. A limited liability partnership is a partnership that registers as an LLP with the Secretary of State. As an LLP, the partners are liable for their own torts incurred in furtherance of the partnership but not for the torts of the other partners or the partnership.

Filing the documents to register the partnership as an LLP is a prerequisite to attaining limited liability status. By not doing so the partnership retains the status of a general partnership and, therefore the partners would be personally liable for all liabilities of the partnership to the extent the debt was not satisfied by the partnership.

They could argue they intended to be an LLP and treated themselves as such, so they should be deemed to be a "de facto LLP." However, this argument is likely to fail because filing is such a simple act and the "de facto" argument has been applied in the corporation, not the partnership contract. Also, an LLP by estoppel argument would fail because there are no facts to indicate Abel's client thought he was dealing with an LLP, and, even if he did believe that, this defense would not apply to a loss caused by a tort – i.e., negligence.

As partners A, B, and C are liable for failing to properly supervise Jack. Jack was their employee. His tapping into a wireless network directly caused the disclosure of client information. As his employee A, B, and C Legal Services is vicariously liable for the torts of their employee. Here Jack committed the intentional tort of conversion, the intentional taking of the personal property of another. He did this while working for the ABC LLP and with the intent of furthering their business. Therefore, even though the tort was intentional, ABC LLP is liable. Further they could be found liable for negligently hiring an inexperienced computer person and then failing to adequately supervise him. See the discussion of their failure to supervise and prevent breach of confidentiality

rules infra. Violating the rules does not show a personal liability but is evidence they breached their standard of care. Since ABC LLP is liable, the partners are jointly and severally liable for reasons discussed above.

David's Malpractice

A partnership is defined above. In order to prove the existence of a partnership, the primary element is whether the parties intend to share profits. Other indications are whether they share in losses and share in the management of the enterprise.

In this case David leased an office for a monthly rent that included 10% of his billings. While that relates to David's profits, it does not represent a sharing of profits because the amount is received as rent under a landlord-tenant relationship. Moreover, there is no indication of any sharing of losses or management responsibilities. There is no partnership between David and A, B, or C. Likewise, there is no indication that David otherwise held himself out as a partner of A, B, and C. One can be deemed to be a partner if he is deemed to have apparent authority by being held out as a partner. Since that is not the case here, ABC LLP is not liable for David's malpractice, and therefore ABC or its partners are not liable.

Breach of Rules of Professional Conduct

Lawyers have a duty to preserve the confidentiality of confidential client information. It may only be disclosed if expressly or impliedly authorized by client or permitted by the rules of professional conduct. None of the exceptions are relevant here, such as to present a crime involving death or serious bodily harm, serious economic loss (ABA rules only) or in response to a court order or order of the ethics committee.

Partners in a law firm have an obligation to put in place procedures to assure compliance with the rules of professional conduct.

They also have a responsibility to take any action to prevent or mitigate violation of the rules if they are able to do so.

Here ABC did not adequately supervise Jack or have any procedures in place to prevent violations of the confidentiality rule, resulting in a breach of the confidentiality rules. They breached the rules and may be disciplined accordingly.

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ESSAY QUESTIONS AND SELECTED ANSWERS
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Question 2

There was recently a major release of hazardous substances from a waste disposal site in County. Owen is the current owner of the site. Fred is a former owner of the site. Hap is the producer of the hazardous substances disposed of at the site.

As a result of the hazardous substance release, County has identified the site as a priority cleanup target, and has notified Owen, Fred, and Hap that they are the responsible parties who must either clean up or pay to clean up the site. County advised each responsible party of his degree of culpability. In the event each responsible party does not pay his share of the cleanup costs, County is entitled to impose joint and several liability on each of them.

In an effort to facilitate the resolution of County's demand, Owen, the wealthiest responsible party, arranged for Fred, Hap, and himself to meet with Anne, his tax lawyer. At the meeting, Owen offered to pay the attorney fees of all three of them in exchange for their agreement to be represented by Anne. Fred and Hap accepted Owen's offer and Anne distributed identical retainer agreements to each of them, which they signed.

What ethical violations, if any, has Anne committed? Discuss.

Answer A to Question 2

Anne's Ethical Violations

Duty of Loyalty

An attorney must not represent a client when there is a concurrent conflict of interest. A concurrent conflict occurs when the interests of one client are directly adverse to those of another or the representation of one client will be materially limited because of the interests of the attorney, a third party, another client or a former client. An attorney can nevertheless take on representation if she reasonably believes that she can competently and diligently represent the interests of all effected clients, discloses the conflict and gets informed written consent from the clients. The CA rules do not apply the "reasonably believes standard" and require written disclosure in situations where the conflict involves a former client.

Potential Conflict

Here, Anne is the longtime tax attorney of Owner (O). She agrees to represent O, Fred (F) and Hap (H) is a case where they are each being required by the County to clean up a hazardous substance spill. Anne has agreed to represent them as her joint clients against County. The County has made it clear that if each party does not pay his share, County will impose joint and several liability one each of them. This means that County can recover the full amount of the costs from either of them. Here, O is wealthier than F and H. We are not aware how wealthy F and H are. Due to County's decision to pursue joint and several liability in case each person does not pay, there is a potential conflict of interest. If either of the parties turns out to be insolvent or does not pay his share, the others are exposed to liability for the full amount, which likely will be a lot. Also, each party has been notified of his culpability. It might be that the parties each have an argument for why they are not at fault and for why another party is more at fault. For example, F is the former owner of the site and may want to argue that he does not have any responsibility for the spill. H produces the hazardous material that is dumped on the site. Thus, H might argue that he is not responsible for the release because O as the owner of the site has responsibility to prevent a release.

Thus, Anne must have realized that there was a potential conflict of interest between the parties and [it] must [be] determined whether she reasonably believed she could effectively represent O, F and H as her joint clients. Here, Anne might reasonably believe that she can do so because their interests are all aligned against County. However, because of each party's different involvement and responsibility for the spill, as well as the County's decision to pursue its claims under the theory of joint and several liability in case one party does not pay, Anne should have realized that she could not make arguments on behalf of each client without taking a position adverse to the others. However, if she reasonably believed that the conflict was consentable, she should have disclosed the conflict [to] the parties, preferably in writing, and received their informed written consent to proceed. Anne must have been careful not to disclose any confidential information about O and his finances since Anne had such information as O's tax attorney. If she could fully disclose the conflict without revealing O's confidential information, and the clients each gave their informed, written consent, then Anne could have proceeded to represent all three of them. However, the conflict would be unconsentable if Anne did not believe she could effectively represent them all. For the reasons discussed above, Anne might have believed that this conflict was not consentable and thus could not have advised the clients to consent.

Also, there is a potential conflict stemming from the fact that O is Anne's former client. [Anne] must not take on representation of a client in a matter that is the same as or substantially related to a matter in which she represented a former client if the former client's confidential information might be relevant. Furthermore, Anne cannot use any confidential information against O in this matter without O's consent. Since O has arranged for Anne to represent O, H and F, O has consented to the representation. However, Anne must be careful not to reveal any confidential information about O without O's consent during the course of her representation.

The fact that O is Anne's current client creates a conflict. Anne may feel a greater sense of loyalty to O to protect his interests because O is already her client and she likely wants to keep O as her client in her tax practice. Thus, Anne might not be able to effectively and fairly represent the interests of F and H. She must also disclose this conflict to F and H and only proceed if it is reasonable to do so and F and H provide

their informed consent. Given that this lawsuit is not related to Anne's tax practice, Anne might reasonably believe that she can fairly represent the clients' interests as joint clients, especially because they are all defending against County. However, given her loyalty to O, perhaps this conflict is also not consentable. It would be useful to know just how long O has been Anne's client. In any case, if the additional facts make it such that a reasonable attorney would not advise F and H to consent to Anne representing all three clients, the consent of F and H will not be effective.

Actual Conflict

An actual conflict can develop in the course of representation. If it does, Anne must revisit the process discussed above, disclose the conflict and only proceed if she has written, informed consent from the parties to proceed. If Anne proceeded with the representation despite the conflicts discussed above, she must be aware of any actual conflicts that might arise. For example, if any of the three parties decides to argue in his own defense that culpability lies with another one of the parties, Anne must realize that continuing with representation is no longer reasonable. At that point, she must disclose the conflict (subject to any limitations due to her duty of confidentiality) and advise the clients to seek independent counsel. Depending on how much confidential information she has at that point, she may be able to continue representing one of them. In this case, that party would likely be O because she already has confidential information about O due [to] previously representing O for tax purposes. However, if she learns confidential information from the parties and an actual conflict arises, she may have to withdraw completely and advise each of them to seek independent counsel in this matter.

Duty of Competence

A lawyer has a duty to competently represent her clients. She must use the skill, knowledge, thoroughness and preparation reasonably necessary for effective representation. Here, we are told that Anne is a longtime tax attorney. The case she is hired to work on involves a major release of hazardous substances from a waste disposal site and cleanup required by County. As a longtime tax attorney, she likely does not have much experience in this particular area of the law. The case relates to matters outside of the scope of a tax attorney's area of practice. However, Anne may

take on representation if she can become competent in the areas of the case by researching and preparing herself in the pertinent field. If she can do so without causing any harm to the clients or causing an undue delay, she may represent them in the matter. Also, she can associate with another attorney who has more experience in the specific area. If Anne takes these measures to prepare herself or associate with another competent attorney, she will not have violated this duty. However, if she proceeds to represent the clients in this matter without becoming competent in this particular area, she will have breached her duty of competence.

Duty of Confidentiality

Under the ABA, an attorney has a duty not to disclose confidential information related to the representation of that client. It does not matter from whom or how the information was acquired. In CA, this duty of confidentiality is recognized in the attorney's oath. There are exceptions for disclosing confidential information: 1) express consent, 2) implied consent, 3) disclosure ordered by court, 4) disclosure to prevent a crime or fraud likely to result in substantial financial loss when the attorney's services have been used to commit the crime or fraud, and 5) disclosure if the attorney reasonably believes it's necessary to prevent certain death or substantial bodily injury. CA does not recognize the exception for crimes and fraud and limits the disclosure to prevent death or bodily injury to situations where the act to be prevented is a crime.

During the course of representation, Anne must take care not to disclose the confidential information from one client to another without their consent, unless one of the other exceptions discussed above applies. Also, if Anne discovers an actual conflict of interest during the course of representation, she must take care to protect such confidences when making any disclosures related to resolving the conflict of interests. If Anne does not properly protect the confidential information from her clients, she will have breached this duty.

Attorney-client privilege

This privilege is an exclusionary rule of evidence. The plaintiff can refuse to testify and prevent his attorney from testifying as to confidential communications between them and their agents during the course of representation. The communications must have

been intended by the client to have been confidential and must have been made for the purpose of legal services. Under the ABA, this privilege lasts even after the client dies. Under the CA rules, the privilege ends when the client's estate is finalized after his death. There are exceptions to this privilege; the attorney may testify 1) to prevent a future crime or fraud when the client has used the attorney's services to commit the crime or fraud, 2) when there is litigation related to a breach of duties between the client and attorney and 3) when joint clients are later involved in civil litigation. CA also allows disclosure to prevent a crime that is likely to result in death or substantial bodily injury. The client holds this privilege and may waive it.

Under this privilege, Anne may not testify as to confidential communications between herself and the three clients unless the clients waive it. If the crime/fraud exception applies or the CA exception for death or bodily injury applies, then Anne can testify as to the confidential communications. Also, if the joint clients are later involved in civil litigation against one another, the clients will not be able to assert this privilege. Anne should make it clear to O, H and F that she may have to testify against them if they are later involved as adversaries in a civil case.

Fiduciary Duties of Attorney

Under the ABA, fees must be reasonable under the CA rules, fees must not be unconscionable. Thus, Anne must make sure that her fees meet these standards based on the amount of time and skill she will use and the level of difficulty in the case. Also, under CA rules, a fee arrangement must be in writing if it is for over $1000 unless the client waives the right to get a writing, there is an emergency, the attorney is performing routine services for an existing client, or the client is a corporation. Thus, the fee arrangement must be in writing to meet the CA requirements if it is for more than $1000 and the clients do not waive their right to a writing.

Receiving Payment from One Person for Representing Another

An attorney may receive payment from one person to represent another so long as 1) the client being represented is aware of this arrangement and provides written, informed consent, 2) the attorney's judgment and the effectiveness of representation will not be affected because of the interests of the person paying for the services, and 3) the

client's confidential information is protected. Here, O is the wealthiest of O, H and F. O offers to pay the attorney's fees for all three of them. Thus, F and H must be made aware of the arrangement. Also, Anne must ensure that her representation of H and F is not affected by the fact that O is paying for her fees. Because O is also a client in the case, the fact that he is paying the fees might interfere with Anne's judgment. Anne might feel a greater sense of loyalty and duty to O not only because O is her current client but also because O is paying for her fees. Thus, she might choose to pursue O's interests at the expense of the others. Thus, Anne may violate her duties of loyalty to F and H if she lets the fact that O is paying her fees influence her judgment. Also, as discussed above, Anne must protect the confidential information of all three clients. If she fails to, she will have violated this ethical duty.

Anne should have disclosed this conflict when she disclosed potential conflicts to all three clients and obtained their informed, written consent. F and H must have been made aware of this situation before agreeing to be represented by Anne and accepting O's offer for O to pay the attorney's fees. If Anne failed to inform the clients when they agreed to the joint representation, Anne has violated her duty to loyalty.

Duty to Communicate – Settlement

Anne also has a duty to communicate to her clients all material developments in the case and to keep them informed. Thus, Anne must communicate material information to all three clients and not rely on one of them to communicate it to the others. If she does [not] she will be found to have violated this duty.

The client has the power to decide whether to settle. Here, if there is a settlement offer by the County or any resolution that affects all three clients, Anne must communicate it to each of them individually, make sure that they understand it and only proceed with their consent. Anne cannot rely on the consent of only one client to proceed. Furthermore, she must clearly explain the terms of any settlement to each client and how it affects each of them.

Answer B to Question 2

Duty of Competence

A lawyer has a duty to the clients to provide competent representation. Competence is defined as the still, thoroughness, and preparation reasonably needed to provide adequate representation in a case. Whether an attorney is competent is dependent on the complexity of the case, the availability of other lawyers in the region to take the case, the circumstances the case was brought to the attorney, the ability of the attorney to research and become acquainted with the case without undue expense to the clients, and the ability of the attorney to consult with local counsel. Here, Anne may have violated this duty. The nature of this case is a complex environmental case arising under state and federal law, CERCLA liability. However, the facts state that Anne's area of expertise is tax. Environmental law requires significant technical training and experience and knowledge of the federal statutes and state statutes. There is no evidence Anne has practiced in this area in the past. Further, there is no evidence that other attorneys in the region are not competent to practice in this area of law. Further, there is no evidence to establish that Anne has attempted to consult with a local expert on environmental law in order to provide competent representation to the clients. Finally, no evidence establishes that Anne has done any research to become familiar with this area of the law. Therefore, under the circumstances she has probably violated her duty of competence by taking a case in an area of the law in which she is extremely unfamiliar.

Conflicts of Interest

Both the ABA and California Model Rules limit an attorney's representation of clients with conflicting interests. Under the ABA rules, an attorney may not represent a client if representation would be directly adverse to a client or there is a significant risk his representation of one client would be materially impaired by his duty to himself or another client, unless the attorney reasonably believes he can provide competent and diligent representation, does not involve a claim by one client against another in the same case, and is not prohibited by law. Under the ABA rules, an attorney only needs to get informed consent in a situation where an actual conflict exists. Anne may argue

that under the ABA rules no informed consent was necessary here because all the parties had the interest in avoiding liability from the county and therefore all of the interests were aligned at the time. Further, she will argue that this offense is a strict liability offense so none of the parties can absolve liability by placing the blame on another party.

However, it may be argued that the parties did have conflicting positions. As parties who were to be jointly and severally liable and had the right of contribution under the act, all parties wanted to shift the blame to the other party and recover from the prior landowners. Generally, environmental statutes allow the nonactive party to seek contribution from the active party; here Hap is the active party. Therefore because each side is trying to place the blame on the other party, it is likely that there is a current conflict of interest. If there is a current conflict of interest, the attorney must reasonably believe she can provide diligent and competent representation to all clients and must give full informed consent, confirmed in writing. The ABA suggests that an attorney notify the clients on the risks of the duty of loyalty, confidentiality, and the lack of privilege if a suit were to arise between the clients. There are two problems here. First it would be tough to argue that Anne reasonably believed she can provide competent and diligent representation to all clients. Given that all the clients are attempting to push liability on each other and will want to recover contribution from each other in the case, it is likely that a reasonable attorney would not believe that they would be able to provide competent and diligent representation. This is not simply a case where the parties are trying to avoid liability, but it also involves relative contribution if the county is to recover from one client. Further, given her continuing business with Owen, it would be tough for her to argue she could provide equal representation to F and H.

Under the ABA, it will also be unconscionable to receive this consent if Anne's duty of confidentiality to Owen prevents her from making a full disclosure of the potential conflicts of interest to the parties. There is no evidence that her duty to Owen will prevent her from fully disclosing the risks and circumstances of joint rep to the other clients because she represented Owen on a totally unrelated matter and the details of that matter are not necessary for full informed consent of the clients.

Further, Anne failed to get the informed consent of any of the clients confirmed in writing. She only distributed retainer agreements but did get the informed consent of any of the clients in a case of actual conflict between the clients. Therefore she has violated her duty for concurrent conflicts of interest under the ABA rules.

She also violated this duty under the California rules. California has similar requirements but extends the conflicts to potential conflicts as well as actual conflicts, requires disclosure of the risks of the conflicts, and the attorney only needs to believe in good faith that she can provide competent representation, not the reasonable attorney standard adopted under the ABA rules. Anne may be able to argue that she honestly believed that she could provide competent and diligent representation to all the clients and may be able to prevail here, which she would not under the ABA rules, which require an attorney's reasonable belief. However, under the CA rules, Anne failed to give full disclosure to the clients of the risks provided by joint representation and failed to get their written consent to these conflicts. Therefore Anne violated the ethical rules relating to joint representation under CA law also.

Therefore, Anne should withdraw from representing all three because she has received confidential information from H and F.

Fee Payor Interests

Anne violated her duties under both the California and ABA authorities by having Owen pay the fees for all three defendants. Under the ABA rules, an attorney may not have a party pay all of the fees for a group of clients unless the attorney reasonably believes it will not interfere with her professional judgment, confidential communications will not be shared with the party, and the nonpaying clients give informed consent. California has similar requirements but also requires that the informed consent be in writing. Here, Anne may run into a few problems. First, it may be argued that by having one of the joint clients paying the interest of all three clients in a joint liability context may interfere with her professional judgment. However, in offering to pay the fees Owen did not require that Anne exercise her judgment in a certain way or proceed in a certain way under the case. Therefore, the payment probably did not interfere with her professional judgment. Next, the payment probably did not interfere with the duty of confidentiality

to the other clients because the fee payor, Owen, did not request that confidential information be given to the other clients. Under the ABA rules, H and F need to give informed consent. There is no evidence of this. Although they both knew that Owen was paying, Anne never disclosed to them the risks of the fee payor interest. For that reason, informed consent was never given. In addition, under California law, informed consent must be given by F and H in writing. Since informed consent, even orally, was never given, Anne violated her duties under the ABA and California authorities.

Duty of Confidentiality

As a past attorney for Owen, Anne has a duty to Owen not to reveal information learned in the course of her past representations of Owen without the consent of Owen, where consent is implicitly given, or where another exception exists. Here, there is no evidence that Anne has revealed any information learned in the course of her past representations of Owen on tax matters. Further, it is unlikely she even came across this information. Therefore a violation of her duty of confidentiality has [not] been violated in this instance, unless she revealed this information. There is no evidence here that she had revealed any of this information but she needs to be sure she does not reveal any of this without the informed consent of Owen.

Further, Anne has a duty of confidentiality to all current clients, Owen, F, and H. In representation she may not reveal information learned in the representation of the other clients unless the clients give informed consent confirmed in writing or an exception exists. Before revealing any information and before jointly representing the clients, Anne should have the clients waive their right for the information to be kept confidential. If this is not done either before rep or during rep, she will probably be forced to withdraw because her duty of loyalty to the other clients requires her to do so.

Duty to Keep Reasonably Informed

Anne [as an] attorney has a duty to keep all clients reasonably informed as to the status of their litigation. Here, this may conflict with Anne's duty of confidentiality to the other clients. If Anne learns of a matter central to her representation of the group, her duty of loyalty to a certain client may conflict with the duty to keep the other clients reasonably informed. As stated above, Anne should inform the clients ahead of time of this duty

and require them to waive their duty of confidentiality so she can fulfill her duty to keep all clients reasonably informed. If a client refuses to waive the duty of confidentiality, she should withdraw from representing all clients.

Duty Not to Use Information of past Clients to Disadvantage

Similar to the duty of confidentiality, an attorney may not use any information to the disadvantage of past clients unless the information is public or the client has given informed consent confirmed in writing. Here, Anne should be sure not to use any information learned in the representation of Owen to the disadvantage of Owen, even if the information is not itself revealed. This is particularly tough situation for Anne if she does come across a situation where some information used in the past representations may be used to the disadvantage of Owen; she will need to be sure not to reveal this information or get Owen's informed consent.

Fee Agreement

The ABA rules do not require a noncontingent fee arrangement to be in writing, although they highly suggest doing so. Further, the ABA rules require the attorney to notify the client within a reasonable time of representation of the fee arrangement.

The California rules that all fee arrangements, including noncontingent fee arrangements, be in writing, unless the services are for less than $1,000, it is a corporate client, the client has received the services in the past, or it is otherwise impracticable to do so. Here, none of the exceptions are met, unless Anne plans on charging less than 1k. Further, the payor, Owen, is an individual, not a corporation. She should give a written disclosure of this arrangement.

Duty of Loyalty

Anne has a duty of loyalty to all clients, which includes the duty to put the interests of your client before all others. In a joint rep situation this is tough to do, but it is required that all clients get treated fairly. Here, Owen is a past client of Anne and Anne hopes for future representation of Owen on his tax matters. Therefore, it will be tough for her to treat all clients equally. She should withdraw from rep for this reason.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Bob owns 51 percent of the shares of Corp., a California corporation. Cate owns 30 percent. Others own the remaining shares.

Bob and Cate have entered into a shareholder agreement stating they would vote their shares together on all matters, and that, if they fail to agree, Dave will arbitrate their dispute and Dave's decision will be binding. Bob and Cate also executed perpetual irrevocable proxies granting Dave the power to vote their shares in accordance with the terms of the shareholder agreement. Attorney Al handled Corp.'s incorporation and drafted the shareholder agreement and the proxies.

Bob and Cate have been able to elect the entire board of directors every year. The board currently consists of Bob, Cate, and Bob's wife, Wanda. Bob and Wanda decided, as directors, to sell substantially all of Corp.'s assets to Bob's sister, Sally. Cate thinks the price is too low. Bob claims he no longer regards their shareholder agreement as binding. He has gone to Al for advice in the matter, and Al has agreed to provide it.

At the shareholders' meeting at which the matter is to be put to a vote, Bob announces he is voting his shares in favor of the sale. Dave says that since Bob and Cate disagree, he is voting the shares against the sale.

1. Is the shareholder agreement between Bob and Cate enforceable? Discuss.

2. Are the perpetual proxies executed by Bob and Cate enforceable? Discuss.

3. Would any sale of Corp.'s assets to Sally be voidable? Discuss.

4. What ethical violations, if any, has Al committed? Discuss. Answer according to California and ABA authorities.

Answer A to Question 5

1. Shareholder agreement between Bob (B) and Cate (C)

A shareholder's agreement is an agreement whereby shareholders agree to combine their votes for voting matters related to their rights as shareholders. The agreement is less formal than a voting trust and requires simply that the shareholders agree to the course of action. Where a voting trust is required to notify the Secretary of the Corp. the shareholder agreement need not be recorded by the Secretary. In addition, where a voting trust is only good for 10 years, a shareholder agreement has no durational requirement.

In this case, B and C have entered into a shareholder agreement stating they would vote their shares in agreement or else submit to Dave to arbitrate any disputes. Dave's decision would be binding. While B and C have entered into a valid shareholder agreement, as they can agree to arbitration to settle disputes, it is necessary to look at Dave in this instance.

It is not clear what, if any, relation Dave has to the corporation. If Dave is familiar with the corporation, then there would be no issues with him arbitrating disputes. If he is a true "outsider" he may not have the knowledge and ability to make the informed decisions in the corp's best interest. In this case, B and C would violate their fiduciary duties to the corp. and the agreement would be ineffective.

2. Perpetual Proxies

A proxy is an agreement between shareholders to have one vote on their behalf. The corp. must be notified and a proxy is valid for 11 months, unless otherwise agreed. An irrevocable proxy requires that the proxy be labeled irrevocable and must be coupled with an interest.

In this case, the proxies are perpetual and irrevocable. As stated above, an irrevocable proxy must be labeled such and be coupled with an interest. It is not clear here what, if any, interest Dave received as part of the proxy agreement, or if the proxies were

labeled irrevocable. If neither requirement was met, the irrevocable proxies would be unenforceable.

If both conditions were satisfied, it would be necessary to determine if the corp. was notified. In addition, proxies typically last for only 11 months. Because the facts state this is perpetual, it is likely that the courts would find this unenforceable.

3. Sale of Corp. Assets

Directors have a duty to manage a corporation. Directors also have fiduciary duties of Care and Loyalty in managing the corporation. Directors may be insulated from violating the duty of care by the Business Judgment Rule.

Duty of Care

Directors have a duty to manage a corporation as a reasonably prudent person would in handling his/her own affairs. Directors must act in the best interest of the corporation.

Here, it is not clear from the facts if Bob and Wanda, as directors, are acting in good faith as reasonably prudent persons would in their own affairs.

Business Judgment Rule

Directors are protected from liability under the Business Judgment Rule when they act in the corp.'s best interest and make a reasonable, innocent mistake.

Here, because it is not clear if Bob and Wanda acted in good faith, it is not possible to determine if this is a simple mistake.

Duty of Loyalty

A director has a duty of loyalty to his corporation, which means that without full disclosure and independent ratification, a director cannot engage in a self-dealing transaction or usurp a corporate opportunity.

In this case, Bob and Wanda, as directors, have voted to sell substantially all assets to Sally, who is Bob's sister. A self-dealing transaction is one that benefits the director or his family members. In order for the transaction to be valid, there must be independent ratification, as defined above. It would be impossible to obtain independent ratification as 2 out of the 3 Directors will not be independent. Both Bob and Wanda, Bob's wife, stand to benefit from the self-dealing transaction, and it does not appear that there was full disclosure, so independent ratification is impossible.

Controlling Shareholders

Controlling shareholders have fiduciary duties to other shareholders in a corporation. As defined above, the controlling shareholder has a duty of loyalty and care as fiduciary duties.

As described above, Bob will have violated his fiduciary duty of loyalty to the corp. by engaging in a self-dealing transaction. In addition, courts have held controlling shareholders liable for looting a corporation in the event the corp. is substantially sold to a 3rd party and that party loots the company. It is not clear here what Sally will do.

Fundamental Change

A corporation must hold a special meeting when a fundamental change is proposed for that corporation. A fundamental change would include selling substantially all assets to another corporation. Therefore, the corporation would be required to have a special meeting.

A special meeting requires that a special notice be mailed to shareholders. This notice must include the reason for the special meeting, date and time, and place. It is important because no other business can be discussed at a special meeting that was not included in the notice. In addition, holding the meeting is important because it gives rise to appraisal and dissenter rights whereby the corporation would be required to repurchase a dissenter's shares.

Because Bob violated his fiduciary duties as a director and controlling shareholder, and because the corp. was undergoing a fundamental change without a properly scheduled special meeting, any sale to Sally would be voidable.

4. Ethical Violations

A. Duty of Loyalty

Al owes a duty of loyalty to the corporation. Al has drafted the incorporation of the corp. and has drafted agreements on behalf of the corporation. Therefore, Al's client is the corporation.

Al has a potential conflict in that he represented the corporation and then drafted the shareholder agreement and proxy on behalf of 2 shareholders. This is permissible under ABA rules and CA rules whereby an attorney can represent multiple parties if he reasonably believes that he can provide necessary legal services without impact. The attorney must also get this consent in writing.

Al has another potential conflict by representing Bob at a later time. As stated above, an attorney can represent multiple parties if he reasonably believes that representation of both will not impact either party. He must get consent in writing. Al would have violated his duty of loyalty if he did not get consent in writing.

This potential conflict would become an actual conflict when Bob has gone to Al for advice and Al agreed to provide it. Al previously represented Bob and Cate in drafting a shareholder agreement and proxies. CA Rules of Ethics strictly prohibits an attorney from representing a client when that client is being represented by the same attorney. Only when the matter ends can the attorney represent another client whose interest is adverse to a current client.

Al will have violated his duty of loyalty.

Duty of Confidentiality

An attorney has a duty to keep all communications with a client confidential. When an attorney represents 2 parties, and one party then approaches the attorney for representation on a similar matter, the attorney will not be able to represent the client because he has confidential information from both clients.

Here, Al arguably represents both parties, as he has drafted a shareholder agreement and proxy for both Bob and Cate. Al should advise both parties to obtain separate Legal Counsel instead of continuing to represent them, as by doing so, he may disclose confidential information received by Cate in representing Bob.

Duty of Competence

An attorney should have the skill and training to be able to competently represent a client. If not the attorney should be able to receive such training in a reasonable time.

In this case, as described above, it is not clear if the proxies were drafted correctly; therefore Al may have breached his duty of competence.

Answer B to Question 5

SHAREHOLDER AGREEMENT

Shareholder agreements in which shareholders agree to vote their shares together are valid, although historically they were not permitted and voting trusts were required. They must be in writing and signed by both parties. Shareholder agreements are governed by regular contract principles, and are not revocable unless as a contract they would be revocable. A valid contract requires mutual assent and consideration. Bilateral contracts are contracts in which the parties exchange promises, and the promises can constitute consideration for the contract.

In this case, the shareholder agreement appears to be in writing, and signed by the parties. It was prepared by an attorney, Al, and so presumably has been validly drafted. In this case, the shareholder agreement is a mutual agreement for Bob and Cate to vote stocks together. It appears that there has been valid mutual assent to the contract, including offer and acceptance. Because the parties have exchanged promises to vote together, it is a bilateral contract. As a result, the contract is supported by consideration based on the exchange of mutual promises to vote together or have disputes decided by arbitration. Thus, Bob would be unable to revoke the shareholder agreement at will, and Cate could sue for damages or for specific enforcement of the agreement.

PERPETUAL PROXIES

PROXY GENERALLY - A proxy agreement must be in (1) writing, (2) signed by the party whose shares are affected, (3) addressed and delivered to the corporation's secretary, (4) clearly state they are delegating the authority to vote.

In this case, it appears that the requirements for a valid proxy agreement have been met. The agreement appears to be in writing, the problem notes it was executed so presumably is signed, it clearly states the procedures for the proxy, indicating that the

shares will be voted in line with the shareholder agreement. Although the facts do not indicate whether the proxy was filed with the corporation, because Al the attorney assisted, presumably the requirement was met.

IRREVOCABLE PROXY - A proxy is normally for a duration of 11 months, and will be revocable at will. To be irrevocable, a proxy must be (1) supported by an interest and (2) clearly state it is irrevocable.

In this case, it appears that the proxy agreement did state that it was irrevocable, and thus the agreement has met the second requirement. However, there is no indication that the agreement was supported by any interest. Normally, the interest must be some exchange for value or, for example, a situation where the record date holder sells his shares to the owner and executes a proxy, and thus the new owner's purchase creates an interest. In this case, there is no interest to support the agreement. Cate may argue that the exchange of promises provides consideration for the proxy in the form of the mutual promises, as was the case for the shareholder agreement, and therefore that the mutual promise is a sufficient interest to meet the element and make the proxy irrevocable. However, the exchange of promises is not a sufficient interest to support a proxy as being irrevocable because the promisor has no interest in the shares to which she is making a promise, and therefore this element has not been met. As a result, Bob is free to revoke the proxy agreement at will.

While the proxy agreement would be revocable because it is not supported by an interest, the shareholder voting agreement would not be. As a result, Cate could sue Bob to enforce the agreement and then Dave would have the power as the arbitrator to vote the shares under the agreement as he saw fit.

WOULD SALE OF CORP BE VOIDABLE

FUNDAMENTAL CORPORATE CHANGE - A fundamental corporate change includes a (1) merger, (2) consolidation, (3) amendment of the articles of incorporation, or (4) a

sale of all or substantially all of the business assets. A fundamental corporate change must be approved by a majority of all shareholders at a special noticed meeting in which notice of the change was given before the meeting. Additionally, the corporation must give dissenters rights of appraisal if the transaction is approved.

In this case, the sale of substantially all of Corp.'s assets is a fundamental change and thus must be approved by a majority of all shareholders in Corp.

DECISION OF DIRECTORS - All decisions of directors must either (1) be approved at a board meeting or (2) be approved by unanimous written agreement of the board. At a board meeting the majority of all directors must be present to have a quorum. A resolution will be adopted if a majority of the directors present approve. Before a fundamental corporate change is brought before a special meeting of shareholders, it must be approved by the board of directors.

In this case, the facts indicate that Bob and Wendy agreed to the sale, but that Cate disagreed. It is unclear if they met at a board meeting and the majority of directors, Bob and Wendy, approved. This would be a requirement that if not met, could lead to a rescinding of the transaction or allow Cate and other shareholders to sue Bob and Wendy for losses suffered as a result of the transaction.

DUTY OF LOYALTY OF DIRECTORS - A Director has a fiduciary duty of loyalty to a corporation to not engage in self-dealing or usurp business opportunities. Self-dealing includes transactions in which the director has a conflict of interest.

In this case, Bob is a member of the board of Corp, and thus has a duty to not engage in self-dealing.

CONFLICT OF INTEREST TRANSACTION - A conflict of interest transaction is one in which the director or his close relative is (1) a party to the transaction, (2) has a financial interest so closely linked to the transaction that would reasonably be expected to affect

her judgment, or (3) is a director, officer, employee or agent of the other party to the transaction and the transaction is of such importance that it would normally be brought before the board. If a Director enters into a transaction in which he has a conflict of interest without approval, that transaction can be rescinded and the director can be held liable for any losses to the shareholders.

In this case, Bob is engaging in a sale of Corp's assets to Sally, Bob's sister. Thus Bob, a director, is engaged in a transaction in which a close relative, his sister Sally, is a party to the transaction, and therefore Bob would have a conflict of interest in the transaction. Thus, unless Bob has the transaction approved, it could be rescinded. Furthermore, because Wanda is also a director, and Sally is also a close relative of hers, her husband Bob's sister, she would also have a conflict of interest.

CONFLICT APPROVAL - A conflict of interest transaction will be considered approved if (1) after full disclosure a majority of the disinterested directors, if more than one, approve; (2) after full disclosure a majority of disinterested shareholders approve; and (3) if it is fair under the circumstances.

DISINTERESTED SHAREHOLDERS - In this case, it is unclear if Bob fully disclosed. Even if he did, the transaction would not be considered to be approved by shareholders if Bob used his 51% of shares to approve the sale because he is not disinterested due to his conflict of interest created by his sister, Sally, being the purchaser. Thus, a majority of the outstanding, the remaining 49% would need to approve. Because Cate owns 30% of the shares, she could essentially block the transaction because she owns more than 50% of the disinterested shares. Thus approval by disinterested shareholders would not be possible.

DISINTERESTED DIRECTORS - Similarly, both Wanda and Bob are considered to have a conflict of interest. Therefore the only disinterested director is Cate. Cate would not approve the transaction and furthermore, for a transaction to be approved by the majority of disinterested directors there must be more than one disinterested director.

Thus, the directors could not approve the transaction because 2 of the 3, Bob and Wanda, are not disinterested.

FAIR - As a result, the only way the transaction could be upheld is if under the circumstances at the time it was entered into it was fair. In this case, Cate claims that the price is too low, but there is no indication if this is really the case. If Bob could show that the price was fair, and thus the transaction was fair then the conflict of interest transaction would be upheld despite the lack of approval from disinterested shareholders and directors.

ACTING AS SHAREHOLDER NOT DIRECTOR - Bob may argue that in voting to approve the sale he is acting as a shareholder, and not as a director and thus does not owe the same duties to the corporation. However, this argument will fail because (1) a director has a duty of loyalty to the corporation even when selling his own shares, and (2) Bob may also have a duty as controlling shareholder.

DUTY OF CONTROLLING SHAREHOLDER - While a shareholder is normally not liable beyond the value of their shares, a controlling shareholder may be liable towards other shareholders if she uses her power in a way to disadvantage the minority shareholders. This is because a controlling shareholder has a fiduciary duty to minority shareholders to not use their controlling share to the minorities' disadvantage.

In this case, because Bob owns 51% of the shares, he is a controlling shareholder. He has a fiduciary duty to not use his controlling share to gain unfair advantage over the minority shareholders. This would likely include selling substantially all of Corp.'s resources to his own sister, Sally, if the price was not fair. Thus, even if Bob is successful in arguing that he is not under a duty as a director when trading on his shares, as a controlling shareholder he would still be liable for breaching his fiduciary duty.

AL'S VIOLATIONS

DRAFTING ARTICLES AND SHAREHOLDER AGREEMENTS - When an attorney represents a corporation, he represents the organization itself and not the directors or officers. While an attorney may also represent the directors and officers separately, these representations are governed by normal rules of conflict of interest. A lawyer may represent two clients so long as he reasonably believes he can do so and that there is no conflict of interest between them. If there is a conflict of interest he must (1) reasonably believe he can adequately represent each of them, (2) disclose the conflict, under the Cal RPC such disclosure must be in writing, and (3) must get the clients' consent in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, there is no conflict of interest, potential or otherwise, between Corp and its shareholders. Therefore, Al did not violate any rules by drafting the agreement.

ADVISING BOB -

CONFLICT BETWEEN BOB AND CATE-

CURRENT CLIENTS- As noted previously a lawyer may not represent one client who has a conflict of interest with another client unless (1) the lawyer reasonably believes he can adequately represent each of them, (2) the lawyer discloses the conflict, under the Cal RPC such disclosure must be in writing, and (3) the client consents in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, it is unclear who Al represented in the drafting of the shareholder agreement and whether or not he continues to represent Cate. If Al does represent Cate

then agreeing to represent Bob in this matter constitutes a current conflict between clients, and Al would have to provide written disclosure and receive written consent. However, even if he did he would not be able to maintain representation because a reasonable lawyer would not believe he could adequately represent both Cate and Bob because their conflict is not just potential, it is an actual conflict.

FORMER CLIENTS- A lawyer may not represent a current client (1) in a matter that is the same or substantially the same as a matter he represented a former client, and (2) the current client's interests are adverse to the former client unless he gets written consent from the former client.

In this case, if Al represented Cate in drafting the shareholder agreement and proxy agreement then he would likely be in violation of this rule. Cate is a former client, and the matter now in dispute is whether the very agreements Al drafted for Cate are valid, and thus it is the same matter. Furthermore, Bob's position, that the agreements are not binding, is directly in conflict with Cate's interest. As a result Al could not represent Bob without Cate's approval because doing so would be in violation of his duty of loyalty to a former client.

Al could also be disqualified if he had gained confidential information in representing Cate, though that is unlikely here, considering he was drafting a shareholder agreement.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Similarly, Al's estate could argue that the deal was unconscionable, in that Betty took advantage of her superior position to extract a payment out of Al. Al's dependence on her created an element of unfair bargaining power, which Betty used to her advantage. It was improper for a doctor to make such a contract with a dying patient.

However, this argument will be rejected. The facts show no evidence that Betty in any way exerted pressure on Al. Indeed, Al's statement appears to be spontaneous.

Capacity

Al's estate can argue that Al lacked the capacity to enter into a contract. Al was an Alzheimer's patient. He most likely did not have the mental faculties necessary to enter into a contract.

Betty will counter that the statement was perfectly clear, and that it was made during one of Al's moments of lucidity. Therefore, at that moment, he did have the capacity to enter into a contract.

Question 4

Austin had been a practicing physician before he became a lawyer. Although he no longer practices medicine, he serves on a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. The committee develops recommendations, but its members do not personally engage in public advocacy. Austin is a close friend of several of the other physicians on the committee, though as a lawyer he has never represented any of them.

In his law practice, Austin represents BHC Company, a health insurance provider. BHC has been sued in a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay, and denial and reduction of reimbursements for medical services. Austin initially advised BHC that he was not confident it had a defense to the lawsuit. After further research, however, Austin discovered that a stated policy of the health care law is the containment of health care costs. He advised BHC that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He explained that he would argue for a modification of existing decisional law to allow such a result based on public policy.

When Bertha, counsel for the class of physicians, heard the defense Austin planned to assert in the lawsuit, she wrote him a letter stating that if he presented that defense she would report him to the state bar for engaging in a conflict of interest.

1. What, if any, ethical violations has Austin committed as an attorney? Discuss.

2. What, if any, ethical violations has Bertha committed? Discuss.

Answer according to California law and ABA authorities.

Answer A to Question 4

1. AUSTIN'S ETHICAL VIOLATIONS AS AN ATTORNEY

Duty of Competence

An attorney owes to a client the duty of competence. Under the ABA Rules, an attorney must possess the legal knowledge, skill, thoroughness, and preparation of an average member of the profession. Under the California Rules, an attorney must have the requisite diligence; learning and skill; and mental, emotional, and physical ability of an average member of the profession.

Here, the facts do not state Austin's particular area of legal practice. However, there is nothing in the facts to suggest that Austin is not competent in the present matter. Thus, Austin has not violated his duty of competence.

Duty of Confidentiality

An attorney owes to his client a duty of confidentiality, whereby the attorney may not disclose the client's confidential communications made during the representation either during or after the termination of the representation.

Here, the facts indicate that Austin has not represented any of the physicians in the medical association committee, nor has he represented any of his physician friends (to the extent that they are not part of the association committee). Thus, it does not appear as though Austin has obtained any confidential information from any prior representation of any of the parties involved in this action.

As such, it does not appear that Austin, as of yet, has violated any duty of confidentiality.

Duty of Loyalty

A lawyer owes to his client an ethical duty of loyalty. Pursuant to this duty, the lawyer owes to his client a duty of utmost trust and confidence. A lawyer may violate his duty of loyalty to his client if he has a concurrent or former conflict of interest with the client.

Concurrent Conflict

Under ABA Model Rule 1.7, an attorney must not represent a client where the attorney represents another client whose interests are directly adverse to the prospective client, or where there is a significant risk that the attorney's services will be materially limited due to the attorney's present or former personal relationships or interests or due to the attorney's representation of a former client. An exception to this rule exists where the attorney (1) reasonably believes that he can competently and diligently represent the client in the face of any such conflict; (2) the conflict does not require the attorney to advance a claim for the client in issue against another client in the same proceeding; (3) the representation is not prohibited by law; and (4) the clients give informed, written consent. The California Rules of Professional Conduct (CRPC) differ in three ways: (1) they apply to both present and potential conflicts; (2) they do not have a "reasonable belief" standard as under the ABA Rules; and (3) the attorney needs only give written disclosure to the client---as opposed to informed, written consent---where the conflict relates to the attorney's personal interests (actual conflicts between clients require informed, written consent). Finally, an attorney must obtain the client's informed written consent and comply with the above exceptions each time a potential conflict arises.

Austin's Service on a Local Medical Association

As a general rule, an attorney's mere service on a corporate board of directors or a local association does not in and of itself violate any ethical rules. However, such membership is highly discouraged due to the high risk such membership poses in terms of creating conflicts of interest in future client representation.

Thus, while Austin's membership in the association is not a per se ethical violation, it may cause a concurrent conflict to arise with respect to his representation of BHC, as described below.

Austin's Representation of BHC Company (BHC)

Here, Austin is presently representing BHC in defending a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay and denial and reduction of reimbursements for medical services. This poses a potential conflict of

interest between his representation of BHC and Austin's membership on the local medical association committee, as well as Austin's prior occupation as an attorney and close friendship with many physicians on the committee. The issue then becomes whether Austin's personal relationships and interests here create such a conflict as to pose a significant risk of material limitation on his services.

That Austin serves on a committee that specifically works to further the rights of physicians with respect to fair compensation by health care providers is in direct conflict with his defense of BHC in a matter involving delay and denial of reimbursements for medical services. Thus, Austin's personal interests do appear to pose a significant risk of materially limiting his representation of BHC, as it could be very difficult for Austin to put aside his personal beliefs and convictions in order to aid BHC's defense. This is further supported by the fact that the association my publicly ostracize Austin's representation of a perceived "enemy." Thus, Austin must meet the exceptions enumerated above.

Reasonable Belief (ABA)

There are no facts directly revealing Austin's reasonable belief that his personal interests will not impede his diligent and competent representation of BHC. In fact, Austin's initial advice to BHC prior to any research was that he was not confident that BHC had a defense. The facts are unclear as to Austin's motivation behind this statement, but to the extent that the statement was based on his personal beliefs rather than a disinterested professional legal opinion, this statement likely makes Austin liable for discipline.

After further research, however, Austin appears to have formed a reasonable belief that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He further expressed his belief that he could make an argument for a modication of existing decisional law to allow such a result based on public policy. This may reflect Austin's reasonable belief that he could in fact represent BHC competently and diligently. Thus, the "reasonable relief" requirement under the ABA rules could likely be met.

Assertion of Claim Against Another Client/Not Prohibited by Law

Because the facts indicate (as discussed in more depth below) that Austin has not represented any of the physicians in the committee previously, nor does he presently represent any of them now, Austin's representation of BHC will not require him to assert a claim on BHC's behalf against any of his present clients. Further, there is no indication that Austin's representation of BHC is contrary to any law.

Informed Consent

As stated above, under the ABA Rules, an attorney must obtain the client's informed, written consent from his client to proceed in the face of a personal conflict that poses a significant risk of materially limiting his services to another client. Under the CRPCs, the attorney needs only make written disclosure of the conflict.

Here, Austin likely fails to meet his ethical duty under both the ABA and California Rules. There are no facts indicating that Austin either obtained BHC's informed, written consent nor gave BHC written disclosure of his personal relationship with his physician friends, his prior occupation as a physician, or his membership in the medical association committee. Indeed, there are no facts that Austin made such disclosures at all, even orally.

Thus, because Austin neither obtained BHC's informed, written consent to proceed with the representation nor gave BHC written disclosure of his personal conflicts, Austin is subject to discipline under both the ABA and the California Rules.

Former Conflict

Under the ABA Rules, an attorney who has represented a former client may not thereafter represent another client in the same or a substantially related matter where the representation of the current client would be materially adverse to the former client, unless the attorney obtains the former client's informed, written consent. The California Rule is substantially the same.

Here, although Austin serves on the local medical association committee that works to further the rights of physicians to be compensated by health insurance providers, the facts indicate that Austin has never represented any of the other physicians in the committee.

Thus, for the purposes of the former conflict rule, because none of the physicians are former clients of Austin's, Austin has not violated his ethical duty of loyalty to BHC for purposes of the former conflict rule.

Duty of Candor to the Court

Under the ABA Rules, Federal Rule of Civil Procedure 11, and the California Rules, an attorney may not bring a claim that is not warranted under existing law or that is meant to harass or delay.

Here, Austin's initial belief that BHC did not have a valid defense may reflect Austin's belief that BHC did not have a valid claim that Austin could assert in good faith. However, the facts later indicate that after further research, he believed he could make an argument for a modication of existing decisional law to allow such a result based on public policy. Under the ABA Rules and the California Rules, an attorney is permitted to bring an action for a good faith proposal to modify existing law. Here, the facts do not indicate that Austin's belief that he could make an argument for a modification of existing decisional law was in bad faith or was intended to harass or delay.

Thus, Austin should not be subject to discipline for bringing an action to argue for a modification of present law.

2. BERTHA'S ETHICAL VIOLATIONS

Reporting Ethical Violations

Under the ABA Rules, an attorney must report another attorney's ethical violation to the state bar. Under the California rules, reporting ethical violations is only permissive (not mandatory), unless an attorney knows of the other attorney's misconduct and the attorney fails to report the conduct to prevent such conduct from occurring or continuing.

Here, Bertha has become aware of Austin's engaging in a conflict of interest. As such, under the ABA Rules, Bertha is required to report Austin's ethical violation to the state bar. In California, Bertha ordinarily would not be required to report Austin's violation, but she could if she were so inclined. Here, however, it appears that Austin intends to proceed with his representation of BHC in the face of a conflict. Thus, Bertha will likely be required to report Austin's continued violation of an ethical rule.

Threats to Obtain an Advantage in a Civil Case

Under the ABA Rules, an attorney may threaten criminal or disciplinary action against an attorney, so long as the charges are sufficiently related to the civil action. Under the California Rules, an attorney may not threaten criminal, administrative, or disciplinary action to gain an advantage in a criminal case.

Here, as discussed above, Bertha is likely under a duty under both the ABA and California Rules to report Austin's violation. Further, Bertha's letter to Austin is manifestly a threat, as she stated that she would report him if he presented a specific defense in the case. Under the ABA Rules, Bertha's threat to Austin likely does not violate an ethical duty, as the threat is reasonably related to the litigation, i.e., Austin's conflict of interest in this particular case. Under the California Rules, however, while Bertha may---and likely must---report Austin's conduct to the California State Bar, Bertha is nevertheless absolutely prohibited from using that fact as a threat to gain an advantage in this case.

Thus, while Bertha is likely not subject to discipline under the ABA Rules, she is subject to discipline under the California Rules.

Answer B to Question 4

1. Austin's Potential Ethical Violations

Duty of Loyalty

A lawyer has a duty of loyalty to his client. The lawyer must ensure that no personal interest or duty to a third party materially impairs his ability to loyally represent the client. Here, Austin's client is BHC Company, a health insurance provider. By the nature of its business, BHC is interested in minimizing the amount it pays to physicians, because the more that BHC compensates physicians, the less able it will be to successfully compete in the market for health insurance providers. Furthermore, BHC has an obvious interest in winning its law suit for both financial and reputational reasons.

Conflict of Interest Posed by Austin's Committee Membership

Austin has a personal interest outside of his legal practice in that he is a member of a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. As a former doctor, Austin seems to be passionate about this cause.

The fact that BHC has a diametrically opposite interest, which is to pay as little as possible to physicians, creates a conflict of interest. How can Austin be loyal to BHC when he is absolutely opposed to BHC's cause? Thus, in the face of this conflict Austin must decide whether it is reasonably objectively possible to represent BHC without materially impairing its interests, and if it is possible Austin must disclose and get BHC's written consent.

Is the Conflict Consentable?

The conflict is only consentable if Austin objectively and reasonably believes he can adequately represent BHC. Austin may believe this, saying he can compartmentalize his life outside the firm from his life as a lawyer. He may also argue that as a committee member he is working to change the health care laws, while as a lawyer he is working to ensure that his client complies with the law but is not forced to

pay beyond what the law requires. If Austin is successful in changing the law in his role as a committee member it may not hurt BHC because costs for all health insurance providers will rise equally so BHC will not be put at a competitive disadvantage.

On the basis of these arguments, the conflict posed by Austin's committee role is probably consentable provided that Austin discloses to BHC and gets its written consent. Austin may also have a duty to inform the committee that BHC is a client because that may appear deceptive to the fellow committee members if Austin does not disclose. However, in so disclosing Austin must make sure he has BHC's prior consent in order not to violate the duty of confidentiality (discussed further below).

Conflict of Interest Posed by Austin's Friendships

Austin is a close friend of several of the plaintiff's in the class action suit that he is defending on behalf of BHC. Friendship is a personal interest of the lawyer that could potentially be materially adverse to the lawyer's duty of loyalty to the client. Thus, Austin must decide whether he can objectively reasonably believes he can adequately represent BHC in the face of this conflict.

Once again, Austin will state that he can compartmentalize between his work life and his outside interests. However, Austin may be faced by the reality that his close friends will not accept this compartmentalization and will begin to distrust him. If Austin is faced with losing some of his closest friends, will he really be able to continue zealously representing BHC as his duty of diligence requires him to? Lawyers are often required to speak impassionately against the other side and BHC may want to employ a take-no-prisoners strategy in the litigation; perhaps by impugning the work done by the plaintiffs including Austin's friends. For example, Austin may be called on to cross examine a friend in front of the jury to make the point that the friend overcharges for low quality medical services.

Based on these considerations, Austin can not objectively reasonably believe his representation of BHC will be adequate, and disclosure and consent will not be enough. Therefore, Austin should withdraw from the representation.

Duty of Confidentiality

A lawyer has a duty of confidentiality to the client, and may not discuss any information relating to the representation. Here, it is difficult to believe that Austin could meaningfully participate on his committee without discussing information relating to the representation of BHC. Therefore, Austin has very likely violated his duty of confidentiality.

Duty of Candor and Truthfullness to the Court

As part of his duty to the court, Austin must disclose adverse legal authority and may not make frivilous arguments. Here, Austin wants to make an argument to modify existing court decisions based on public policy grounds. This is a good faith argument to overturn precedent based on a legal argument not previously made, and therefore Austin may ethically go forward with the argument even if he is not confident the court will accept it. Indeed, as part of his duties of competence and diligence Austin must make such arguments if he thinks they have a reasonable prospect of success, as long as he is careful to fully inform the court of previous decisions that control within the jurisdiction and go against his argument.

2. Bertha's Possible Ethical Violations

Duty to Report

Under the ABA model code, but not California rules, an attorney has an ongoing duty to report any ethical violation of another lawyer. Thus, by not reporting Austin's ethical violations immediately, Bertha has violated the ABA code.

It is important for Bertha to report because it is unfair to the court and to the clients on each side of the case if one client's lawyer has a conflict of interest, because it creates the possibility of a mistrial or other delays.

Duty of Fairness

A lawyer has a duty of fairness to both the court and to her adversary. Here, Bertha is flagrantly violating this duty by using the threat of reporting an ethical violation to stop a lawyer from presenting a valid defense. This is essentially blackmail; Bertha is telling Austin to throw his case or risk being reported for an ethical violation. This is

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
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Question 5

Attorney mailed a professional announcement to several local physicians, listing his name and address and his area of law practice as personal injury. Doctor received Attorney's announcement and recommended that her patient, Peter, call Attorney. Peter had become very ill; he thought the cause was breathing fumes from a chemical company near his home.

Attorney agreed to represent Peter in a lawsuit against the chemical company. At Attorney's request, Doctor agreed to testify as an expert witness on Peter's behalf at the trial. Attorney advanced Doctor expert witness fees of $200 an hour for her time attending depositions, preparing for trial, and testifying.

Attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Doctor was nevertheless willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Attorney did not know whether Doctor's testimony was true or false. He offered Doctor's testimony at trial, and Peter won a judgment.

After the trial, Attorney sent a $500 gift certificate to Doctor, with a note thanking her for recommending that Peter call him.

What, if any, ethical violations has Attorney committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 5
Answer A

What, if any, ethical violations has Attorney committed?

The attorney may be liable for ethical violations for: 1) mailing a professional announcement to physicians in the area, 2) paying an expert witness fee, 3) allowing the doctor to testify, and 4) sending the doctor a gift.

Mailing a Professional Announcement to Physicians in the Area

Both the ABA and California prohibit in person, live solicitation to individuals who the attorney does not have a familial or professional relationship with. However, attorneys are allowed to send professional announcements, letters, cards, etc. to people in the area. Moreover, the document must have certain information contained in it, such as the attorney's name or if it is a firm, a name of one attorney in the firm. It must also have an address listed for the attorney and/or any other relatable contact information. However, the document must be accurate and fair, the attorney is not allowed to guarantee success rates or hold himself out as a specialist unless he is certified by the proper authorities in the state.

Here, the attorney is not soliciting in person and is rather sending professional announcements to physicians in the area. This is not prohibited by the ABA or California rules. Furthermore, the attorney has included his name and address as well as his practice of law. The announcement is not misleading and is the accurate reflection of the attorney's information. Moreover, it is of no consequence that the doctor referred her client to the attorney. The attorney and the doctor have not set up a referral service and are not sharing in any of the fee. The doctor simply referred her injured client to the attorney based on the announcement she received. Therefore, the attorney will not be in violation of any ethical rules for sending out professional announcements.

Paying an Expert Witness Fee

Both the ABA and California rules permit attorneys to compensate expert witnesses for their time exerted on the case. However, the compensation cannot be hinged on favorable testimony from the witness. The compensation must also be reasonable in light of factors such as the expert's familiarity with the subject, his experience in the field and other similar factors.

Here, the attorney is advancing the doctor an expert witness fee of $200 an hour for her time attending depositions, preparing for trial, and testifying. These are all ethical reasons for the attorney to compensate the expert witness for. There are no facts to indicate that the attorney is paying for favorable testimony or that the fee being paid is unreasonable. Therefore, the attorney has not violated any ethical rules by compensating his expert witness.

Allowing the Doctor to Testify

An attorney is allowed to call witnesses to testify on his client’s behalf. However, there are some exceptions to this rule. One major exception to this rule is if the attorney knows that the witness will perjure him or herself. This is also a place where the ABA and California rules differ.

ABA

Under the ABA, an attorney shall not call a witness to testify if the attorney knows the witness will commit perjury. However, if the witness is the defendant in a criminal case he has a constitutional right to testify on behalf of himself. The ABA states that if her client insists on testifying and perjuring herself the attorney must attempt to persuade her not to. If the client still insists on testifying, then the attorney should attempt to withdraw as counsel if the court will allow it depending on how damaging it will be to the client. Finally, if the attorney is unable to withdraw he must carefully weigh

the balance of his duty of confidentiality with his duty of candor to the court. If the client persists on testifying then the attorney may advise the court about the perjury.

California Rules

Under California, the rule regarding witnesses who are not the clients are the same. An attorney is prohibited from calling a witness who he knows will perjure himself. However, the California rules differ from the ABA regarding a client who wishes to testify on behalf of himself and who wishes to perjure himself as well. In California, an attorney must make the same effort to attempt to persuade the client to not perjure himself. Furthermore, the attorney must try to withdraw as counsel if the court permits it. The big distinction is that in California an attorney is allowed to let his client testify in narrative fashion regarding the false information. He also is not required to breach is [sic] duty of confidentiality and warn the court of the perjury.

In this Case

Here, the doctor who is testifying is not the client and therefore the attorney under both the ABA and California rules is not permitted to call the doctor if he knows he will perjure himself. The facts state that the attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Nevertheless, the doctor was willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Although the scientific studies failed to find any risks of the fumes, this does not mean that the doctor is necessarily lying. An attorney has a duty to represent his client zealously and just because there is some evidence that states the fumes may not be dangerous there are no facts to indicate that the doctor is lying. The doctor is testifying based on her clinical experience and is allowed to testify even if it contradicts some of the scientific studies. The only way the attorney will not be allowed to call the doctor as a witness is if he knows that she will be committing perjury when she goes on the stand. In light of all the facts, the attorney has not breached any ethical duties by allowing the doctor to testify.

Sending the Doctor a Gift

Both the ABA and the California rules prohibit sending gifts to witnesses who testify on their behalf. The attorney is only allowed to compensate the expert witness for her services in the case such as depositions, preparing for trial and testifying. Moreover, a gift to an expert witness may compromise the witness's ability to be fair and not to give favorable testimony in anticipation of a gift. If the gift was intended for the doctor as a thank you for testifying it will not be allowed.

Referral Fee

Also, an attorney is not allowed to send a gift to a person whether they are a witness or not for referring someone to him. This would be a kickback or a referral service fee. These are explicitly prohibited unless the attorney satisfies certain criteria such as: 1) getting informed consent from the client, 2) having in the contract how the referral is to be split up, and 3) the referral must not be exclusive between the attorney and the referring party.

Here, the attorney has sent a $500 gift certificate to the doctor with a note thanking her for recommending that Peter call him. This violates both the referral arrangement stated above and also violates the ethical rules for compensating an expert witness. Thus, the attorney will be in violation for sending the doctor the $500 gift certificate.

Conclusion

In light of all the facts, the attorney has not violated any rules by his conduct except sending the $500 gift certificate to the doctor, of which he will be found to be in violation of the ethical rules both under the ABA and California.

QUESTION 5
Answer B

Ethical violations committed by Attorney in the representation of Peter (P).

A. Attorney advertising

i The applicable rules

The issue is what limits there are on an attorney's right to send out advertising for her services. The Supreme Court has held that attorney advertising is protected by the First Amendment as commercial speech. While states may prohibit in-person and over-the-phone solicitation entirely, states may only proscribe attorney advertising sent by mail, as it was here if it is either false or misleading. States may impose other regulations as well. For example, in California, all attorney advertisements by mail must announce on the cover of the envelope and on the ad within that this is attorney advertising. It must name an attorney responsible for the ad, as well as the attorney's address. It must list the attorney's area of law practice, and may include information about past results if the attorney makes clear that such results are not typical and that they are not a prediction of future results. A copy of the advertisement must also be held for two years.

ii. Rules applied to A's conduct

In this case, Attorney (A) mailed an advertisement for his services to local physicians. His mailing has First Amendment protection. There is nothing to suggest that the ad was false or misleading. Also, while it is true that the ad will be presumed false/misleading if it is sent to a hospital or some other place where prospective clients may be under undue pressure or distress, there is no indication that A sent the mailing to clients; rather, he sent it to their physicians, who would in such a vulnerable condition [sic]. Thus, A does not have a false or misleading ad, and he will not be liable on that count.

Further, we are told that the ad listed his name and address. However, we are not told whether the advertisement stated on the envelope and on the letter that this was an advertisement. If not, A may have committed an ethical violation.

Therefore, it appears that the mailing does not violate any rules of professional conduct under either ABA or California authorities.

B. Solicitation of prospective clients

i. The applicable rules

As noted, the ABA and California rules of professional conduct prohibit attorneys from soliciting clients for pecuniary gain in person or over the phone. There is an exception where the client and the attorney have an established relationship, are family members, or the client is a corporation.

ii. Rules applied to A's conduct

While none of these exceptions apply in this case, the attorney has not committed any ethical violation because he did not solicit clients over the phone or in person. Rather, he sent a broad mailing. This type of advertising is acceptable and does not constitute a violation of the rules.

C. Paying an expert witness's fees

i. The applicable rules

Under ABA Professional Rules, an attorney may not make any advance payments to a client in anticipation of litigation. Nor may an attorney give loans to the client, even if the client promises to repay. The only exception under the ABA rules is that an attorney may advance the costs of litigation to a client in order to facilitate the client's commencement of a claim. However, under the California Rules of Professional

Conduct (CRPC), attorneys may make loans to clients in anticipation of litigation, as well as fronting any legal costs associated with bringing the claim.

Additionally, clients/attorneys pay compensate an expert witness for his testimony/work so long as the payment is not given in exchange for specific testimony, such as testimony that is favorable to the client's case.

ii. Rules applied to A's conduct

In this case, A has advanced to Doctor (D) an amount of money intended to compensate him for his work as an expert witness. Under the ABA Rules, this probably [does] not constitute a violation of the ethical rules. The costs of hiring an expert witness are high, and many prospective clients would be unable to hire one. However, without the ability to hire an expert witness, the client might not know if he has a colorable claim against the defendant. Thus, advancing the costs of hiring an expert, as A has done here, probably would not violate the ABA Ethical Rules. These are the costs of litigation, and are probably covered under the exception under these rules.

With respect to the CRPC, it is even more likely that advancing D's fees will not constitute an ethical violation. The CPRC makes clear that attorneys may make loans to a client so long as the client has an obligation to pay the attorney back. Here, when Peter (P) wins on his claim, he will have to either pay A for the costs of hiring D as a witness, or the costs will be taken out of any contingency fee awarded to A from P's judgment against the chemical company.

Thus, under both the ABA and California rules, advancing costs to D is not a violation of the ethical rules.

D. Offering D's testimony at trial

i. The applicable rules

There are two sets of conflicting ethical rules that make resolution of this issue somewhat complex. First, A has an obligation to represent his client zealously, in good faith, and to make all colorable claims that support his client's case. This means that A has an ethical obligation to make every argument on P's behalf that A thinks is supported by the record. He should do so only in good faith, but he must be a zealous advocate at all times.

In contrast, all attorneys also have a duty of candor to the court. This means that attorneys should not offer false evidence into the record. Where there is authority that is controlling and on point, the attorney must bring such authority to the court's attention, even if the authority is detrimental to the attorney's position. Attorneys must conduct themselves honestly in court, and may not make any malicious, unfounded claims that the attorney knows have no support in the record.

As noted, these two duties often conflict, and may put attorneys in a precarious position.

ii. The rules applied to A's conduct

In this case, A learned during discovery that numerous scientific studies had failed to find any medical risk from the defendant's fumes. Nevertheless, D, the expert witness who has treated P and was hired by A to prove A's case, believes otherwise. D is willing to testify, on the basis of her experience and knowledge, that the fumes had harmed P. A has offered D's testimony at trial without knowing whether it is true or false. The question is whether this is a violation of A's duty of candor to the court.

In answering this question, it is important to analyze what A knew and didn't know at the time he offered D's testimony into evidence. First, it should be noted that only the studies A found in discovery were able to find no link between the chemicals and P's injury. We are not told whether there may be other studies out there that support such a connection that A has yet to find. In fact, if the list of studies reviewed by A is not exhaustive, there very well may be a study out there that supports such a

connection. Second, it is not clear who funded these studies, or whether the authors had some sort of bias that might discredit their findings. Further, we are not told whether this is a field of science that has been closed to further research, or whether it is a relatively new field that is still developing. It is possible that the chemical in question is relatively new, and therefore its consequences are only recently being analyzed/discovered. There might be other scientists (like D) that are using new techniques to study the connection between the chemicals and injuries, but the results just haven't been published yet. In sum, we can conclude that A has very little information that should convince him, one way or another, that D's testimony is false. There are many open questions about the chemical and a possible link between the chemical and P's injuries.

As noted, attorneys have a duty to represent their clients zealously and to make all colorable claims. The facts tell us that A did not know whether D's testimony was false or true, and this makes sense because D was the expert in the field. While it is unethical for an attorney to offer testimony that she knows to be false, there is no ethical problem under either the ABA rules or the CRPC if the attorney merely has doubts. This is especially true in light of the attorney's obligation to her client. The attorney has an obligation to represent her client vigorously. Thus, it would likely be an ethical violation of A's duty to her client were she to not offer D's testimony into evidence. Since A did offer the testimony on P's behalf, and A did not knowingly offer any false evidence in the process, A did not violate any ethical rules with respect to offering D's testimony.

E. Sharing fees with non-attorneys

i. Applicable Rule

Under the ABA rules, an attorney may not share legal fees with a non-attorney. In California, the attorney may share a fee if the attorney discloses the fee-sharing arrangement to the client and the client consents.

ii. The rules applied

In this case, we are told that A contacted D, a non-attorney, with a mailing advertisement, seeking potential clients. At first, there was no arrangement to share any resulting fees with D. However, after A won a judgment for P, he sent D a $500 gift certificate (the certificate). This is arguably an offer from A to D to share the fees from P's case. A was compensated for his work representing P, and presumably the money that paid for the certificate came from these funds. Thus, A has arguably violated the ethical rule against sharing attorney's fees with a non-attorney. However, A will argue that he gave D the money not for D's work at trial, but for D's recommending P to A as a client. While this may free him from a violation under the "sharing-of-fees" rule, it will support an argument that he violated another ethical rule, as discussed immediately below.

Note that had A disclosed the arrangement to P ahead of time, and had P consented, this would not have been an ethical violation under California's ethical rules. However, because A failed to do so, his conduct is a violation of both the ABA and the California rules of professional conduct.

F. Paying for Referrals

i. Applicable Rule

Under the ABA ethical rules, attorneys may not offer money or services in exchange for getting referrals for prospective clients for pecuniary gain. However, in California, the attorney may pay for a referral if the attorney discloses the referral to the client at the outset of contacting the client, and the client consents to the representation despite having this knowledge.

ii. Rule Applied

The same facts discussed above in section "E" (compensation for referral) are applicable here. However, as noted above, it is also significant that A included a note with the certificate, thanking D for recommending that Peter call him. This sounds like a tit-for-tat situation, in which A is compensating D for making a referral. Thus, one would argue that A gave the certificate to D as compensation for referring P's case to A. Holding A liable under this rule is just another way of characterizing the gift certificate that was given to D after P won his case. In this scenario, the money was given to D for D's work efore the case began, rather than for D's work during the trial that contributed to P's judgment and A's resulting compensation (as suggested in section "E", supra). As mentioned above, A's note to D supports the argument that the certificate was intended to compensate D for making the referral, which is a direct violation of the ABA and California rules.

Under the California rules, an attorney may compensate [a] third party who referred a client so long as the compensation is disclosed to the client and the client consents to being represented by the attorney. Because A did not get P's consent before sending the certificate, A's conduct violated the ABA and California ethical rules.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

Wendy and Hal are married and live in California.

A year ago, Wendy told Hal that she would not tolerate his drinking any longer. She insisted that he move out of the family home and not return until he completed an alcohol treatment program. He moved out but did not obtain treatment.

Last month, Hal went on a drinking spree, started driving, and struck a pedestrian. When Wendy learned of the accident, she told Hal that she wanted a divorce.

Hal has consulted Lawyer about defending him in a civil action filed by the pedestrian. He is currently unemployed. His only asset is his interest in the family home, which he and Wendy purchased during their marriage. Lawyer offered to represent Hal if Hal were to give him a promissory note, secured by a lien on the family home, for his fees. Hal immediately accepted.

1. Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian? Discuss. Answer according to California law.

2. Is Wendy's interest in the family home subject to payment of Hal's legal fees? Discuss. Answer according to California Law.

3. What, if any, ethical violations has Lawyer committed? Discuss. Answer according to California and ABA authorities.

ANSWER A TO QUESTION 2

1. **Is Wendy's Interest in the Family Home Subject to Damages Recovered for Injuries to the Pedestrian?**

California is a Community Property State

California is a community property (CP) jurisdiction. Thus, any property acquired by either spouse during the course of the marriage by either spouse's labor is presumptively community property. Property acquired before or after the marriage by either spouse, or during the marriage by gift, inheritance, or devise, is presumptively separate property (SP). In determining the character of a particular asset, it is helpful to look at (1) the source of the asset or the source of the funds used to purchase the asset, (2) any actions by the spouses changing the character of the property, and (3) any relevant presumptions.

The House

Source

The facts tell us that Wendy (W) and Hal (H) purchased the family house during their marriage. However, we don't know what funds were used to purchase the house. If W's or H's earnings were used (or a combination thereof), and those earnings were earned during the course of the marriage, then the house would be CP because spousal earnings are CP to the extent they're earned during the marriage.

However, if one spouse partially used inheritance money or other SP acquired before the marriage, then that spouse would likely have a SP interest in the home to the extent SP was used to purchase it.

However, without more, the best assumption is that spousal earnings were used to purchase the house. The facts say H is currently unemployed, but he may have been employed in the past (and thus had earnings). Further, we can assume W earned money somehow, likely from a job.

Actions

There is no evidence that the house was put in only one spouse's name, suggesting that the house was the separate property of that spouse. Pre-1975, if the house was in W's name, the married woman's special presumption would operate to render the house (or the share of the house in W's name) W's SP.

Modernly, if title was taken in only one spouse's name, a court would not likely hold that to be conclusive evidence that the house was that spouse's SP absent some manifestation by the other spouse that the house was intended as a gift.

If H and W took title to the house as joint tenants with a right of survivorship, each would have a 1/2 SP undivided interest in the whole during life. On death, the form of title would control. On divorce, under CA's anti-Lucas statute, the house would be treated as CP, with a right to reimbursement for any SP used by either spouse to improve the home.

Finally, there's no evidence of a transmutation changing the character of the house, which, after 1985, would have to be in writing.

Thus, absent any of these actions, it appears the house is still CP.

Presumption

All property acquired during the course of marriage is presumptively CP. Here, nothing rebuts that presumption.

Community Responsibility for Debts of One Spouse

All debts incurred by either spouse prior to or during the course of marriage are community debts. Tort obligations are "incurred" when the tort occurs, not when judgment is handed down. Thus, any obligations arising out of H striking the pedestrian were "incurred" when he hit the pedestrian.

W will argue that the marital economic community was not in existence when H hit the pedestrian because she had kicked him out of the house. The marital economic

community begins at marriage and terminates upon permanent physical separation when at least one spouse has no intent of continuing the marriage.

Here, W kicked H out of the house. However, she told him that he could return when he completed an alcohol abuse program. Thus, the marital economic community had not yet ended when H got in the accident because W was still open to the possibility of him returning. W will argue that H manifested an intent to never continue the marriage because he refused to go to treatment. In other words, W will argue that by rejecting the pre-condition to the continuation of the marriage--i.e. getting treatment--H effectively terminated the marital economic community. Indeed, W can point to the fact that 11 months after she kicked H out, he hadn't obtained treatment. Given this length of time, W can argue, it's clear that the community had ended.

However, the stronger argument is that the marital economic community continued until W told H that she wanted a divorce. If W viewed the marital community as over prior to the accident, she would have likely filed for divorce then. Instead, it appears the accident was the "last straw." Thus, the request for a divorce was the clearest signal by either party that the physical separation was permanent and there was no intent to continue the marriage.

Thus, the marital economic community had not ended when H struck the pedestrian, any obligation incurred because of the accident is a community debt.

Order of Payment

When a tort is committed during an activity for the benefit of the community, the debt will be satisfied first by CP, then by the tortfeasor's SP. The non-tortfeasor spouse's SP is not subject to the debt.

When a tort is not committed during an activity for the benefit of the community, the debt will be satisfied first by the tortfeasor's SP, then by CP. Again, the other spouse's SP is safe.

Here, H committed the tort against the pedestrian while driving drunk. This was not an activity for the benefit of the community--to the contrary, H was supposed to be seeking alcohol abuse treatment while he was living away from the family home. Thus, recovery would be taken out of H's SP before the CP.

However, on the facts, it doesn't seem as though H has any SP to satisfy the debt. Thus, any recovery will likely be against the H and W's CP.

Reimbursement to the Community

To the extent any CP--i.e. the house--is used to pay any obligation arising out of H's accident with the pedestrian, the community may be entitled to reimbursement from H. Where CP is used to pay an obligation arising out of spouse's tort that was committed not during an activity for the benefit of the community, the community is entitled to reimbursement for that payment if the tortfeasor's SP was available to pay (or if the order of payment was not followed). However, as mentioned, it doesn't appear H has any SP available to pay the debt and, thus, reimbursement may be unlikely.

Distribution of Debts on Divorce

At divorce, community assets are generally divided under the "equal division rule"--i.e. each spouse gets 1/2 of each community asset in kind.

However, a judge has more discretion as to the allocation of debts at divorce. Typically, a judge will allocate a tort debt to the tortfeasor spouse if the tort was incurred not during an activity for the benefit of the community. However, a judge may take into account ability to pay to effect a more just allocation of debts.

Here, on divorce, the judge would likely allocate any judgment based on H striking the pedestrian to H. H will argue that he's unemployed and can't pay, but it's highly unlikely a judge would saddle W with an obligation to pay H's tort liability post-divorce.

Conclusion

Thus, during the marriage, H and W's CP will be liable for damages recovered for injuries to the pedestrian. Even though H and W have filed for divorce, until community assets and debts are distributed, the community estate continues and the pedestrian can recover against it. However, as mentioned, on divorce, the debt will be allocated to H. Further, W may be entitled to reimbursement for CP used to pay the debt.

*Note: If the court decided that the marital community was terminated when H struck the pedestrian, then CP--i.e. the house--would not be liable for the debt because the debt would be H's SP.

2. **Is Wendy's Interest in the Family Home Subject to Payment of H's Legal Fees**

Equal Management

Each spouse generally has equal rights to manage community property. This includes the right to sell and encumber community property. However, with respect to real property, one spouse may not encumber community owned real property without the other spouse's consent. If one spouse, without consent, sells or encumbers community real estate, the non-consenting spouse has the power to void that transaction within 1 year.

Lien on the House

Here, H has given Lawyer a lien on the family home without W's consent. Thus, W has the power within 1 year to void the encumbrance.

H will argue that because he gave the lien on the house after W told him she wanted a divorce, he was only granting a lien on his 1/2 SP interest in the family home. However, there's no evidence that W actually filed for divorce or that divorce proceedings were held during which a judge divided the community estate. While the marital economic community may no longer exist because there has been permanent physical separation, the community estate lives on until it has been distributed.

Thus, a court would likely allow W to void the encumbrance on the community real property due to her lack of consent in making the encumbrance.

Timing of the Attorney's Fees

Furthermore, H sought legal advice after W told him she wanted a divorce. Because W asking for divorce terminated the marital economic community, CP--i.e. the family home--is not liable for the debts incurred by H after such separation.

Thus, any obligation owed to Lawyer based on legal services rendered to H cannot be satisfied out of CP because such an obligation would not be a community debt.

He would argue that payment of attorney's fees is an obligation arising out of the accident of the pedestrian, when the marital economic community still existed. However, the attorney's fees represent an entirely different event. Furthermore, contractual obligations arise when the contract was made. Here, any contract and/or agreement with Lawyer was made after the economic community ended. Therefore, W's interest in the family home is not subject to payment for the additional reason that CP is not liable for H's separate post-marriage debts.

Necessaries

Post-separation, a spouse can still be liable for obligations relating to necessaries that the other spouse incurred during the marriage. Necessaries generally refer to food, shelter, and medical expenses. Here, H's legal fees don't likely constitute necessaries and, as such, this theory cannot be invoked to hold W's interest in the family home subject to payment.

3. **Lawyer's Ethical Violations**

Obtaining Pecuniary Interest in Outcome of Case

Under the ABA, a lawyer cannot obtain a pecuniary interest in the subject matter of a case other than in the case of a contingency fee arrangement or an attorney's lien. However, in CA, attorneys' liens are impermissible.

Here, Lawyer effectively acquired an attorney's lien on H's family home. Thus, Lawyer will argue that this was permissible because the only purpose here was to secure payment. In CA, this would constitute an ethical violation. Under the ABA, it's less clear.

While under the ABA, an attorney's lien is permissible, if Lawyer knew that H couldn't rightfully encumber the family home, then it's possible that Lawyer committed an ethical violation because accepting the attorney's lien would constitute a violation of a third party's (W's) rights in the course of representing H.

Entering into Business Transactions with Clients

An attorney can only enter a business transaction with a client if (1) the terms are fair and reasonable, (2) the terms are communicated to the client in an easily understandable manner, (3) the client is advised to get independent counsel to represent him in the transaction and is given a chance to do so, and (4) the client consents.

Here, by taking a lien on H's family home, Lawyer entered into a business transaction with H. However, it's not clear that Lawyer ever advised H to seek independent counsel or that he adequately informed him of the material terms of the lien. Although H immediately accepted, he did so without knowing what would trigger enforcement of the lien (1 missed payment? total failure to pay? late payment? H's insolvency?). Thus, by failing to adequately inform H and encouraging him to seek independent advice, Lawyer likely violated the ethics rules.

Fees

Under the ABA, a fee must be reasonable. In CA, fees can't be unconscionable. Further, in CA, a fee agreement must be in writing unless it's (1) less than $1k, (2) with a corporation, or (3) for a routine matter involving an existing client.

Here, the lien agreement was essentially a fee agreement. However, the terms were not adequately disclosed to H. Further, there was no written fee agreement. Because a writing was likely required--there's no evidence H was an existing client or that Lawyer's services were valued at under $1k--this is a violation of CA rules.

Further, the lien was likely unreasonable and unconscionable. Because H was unemployed, it was extremely unlikely that he was going to be able to pay Lawyer's fees. If Lawyer knew that H was unemployed--which he likely did, considering he conditioned representing H on having a lien on the house--then Lawyer must have known that H wouldn't be able to pay. Thus, the fee agreement was unconscionable because it was akin to a mortgagee lending to a mortgagor knowing that the mortgagor was going to default and the foreclosure was inevitable. Lawyer must have known (a) that H wasn't going to be able to pay and (b) that the value of the lien on the home was worth more than the value of the services to be provided.

Thus, the fee arrangement likely constituted an ethical violation.

Violating Rights of Third Parties

Lawyers cannot violate the rights of third parties in the course of representing a client. To the extent the lien violates W's rights and Lawyer knew of this, he likely acted unethically. Furthermore, if Lawyer knew that H could not rightfully encumber the family house, then Lawyer arguably breached his duty of competent and candid representation by not informing H that he couldn't offer a lien on his house without W's consent.

ANSWER B TO QUESTION 2

1. **Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian hit by Hal under California law?**

The parties were married and live in California. Thus, their property rights as a couple, specifically with regard to the property acquired during the marriage, are governed by California community property law. Whether the house was community or separate property can be determined by the source of the asset, whether any presumptions apply, and the actions of the parties during the marriage.

Community Presumption

There is a community presumption regarding property acquired during the marriage that it is community property. This would apply to the family home given, as the facts state, it was acquired during the marriage. The presumption can be rebutted by a showing that the house was not actually acquired during the marriage, it was acquired during the marriage but with separate property funds, the house was a gift/devise/inheritance, or the house was the rent/issue/profit derived from separate property.

Their house was purchased during the marriage so it was not a gift or devise. Although it is possible that the house was purchased with separate property funds, there are no facts to indicate this was the case. Because it was purchased during the marriage, and there are no facts to rebut the presumption, the house is considered community property.

Judgments Against Spouses

A tort judgment against a spouse will subject both the community property and the separate property of the tortfeasor to the judgment. But once the community property is divided, debt cannot be recovered from the spouse who received her half of the community property from what she received under the divorce decree unless she was the spouse that incurred the debt or the debt was assigned to her. Thus, for a judgment

against Hal for drinking and driving, the community will be liable for this debt, and it can be satisfied from the community property.

For the Benefit of the Community

Although the community property is liable for the judgment by the pedestrian, the judgment must be satisfied first from the separate property of the tortfeasor spouse if the tort was not committed by conduct that was being performed for the benefit of the community. For example, if Hal was on his way to drop the kids off at school or to pay the mortgage on the house, this would be for the benefit of the community. In that case, the judgment would be satisfied first from community property, and if there was any deficiency, then from the separate property of the tortfeasor.

Here, Hal had been kicked out [of] the house for his drinking problem at the time of the accident. Wendy had clearly communicated her disapproval for Hal's drinking. The drinking, including drinking and driving, would actually harm, not benefit, the community. Although we do not know where Hal was headed, he had already been kicked out of the house and was, generally, involved in a drinking binge at the time. Therefore, his actions were not to the benefit of the community and can be satisfied first from his separate property assets.

But the facts state that his only asset, at the present time, is his interest in the family home. Because it appears he has no separate property from which to satisfy the judgment, the judgment will be satisfied from the community property home.

End of the Economic Community

The accident in which the pedestrian was hit occurred after Hal had been kicked out of the house but before Wendy told Hal she wanted a divorce. As stated above, the source of property or debt, whether it was incurred before, during or after the marriage, can indicate whether it is community or separate debt. The pedestrian's claim is a form of debt because, once rendered, the plaintiff can reduce it to a judgment and attach liens to the tortfeasor's property. Thus, the question arises whether the economic

community ended when Wendy kicked Hal out of the house, because if so, the injury and judgment would have occurred after the economic community ended and would be the separate debt of Hal. In this case, the judgment could not be satisfied from community property, including the house.

In California, end of the economic community occurs when there is physical separation and an intent not to carry on the marital relationship anymore. If the parties maintain the facade or marriage, although physically separated, the economic community will not be considered to be at an end. The economic community will certainly result, if the above elements are not satisfied, when the divorce decree is entered.

Here, Wendy kicked Hal out of the house one year ago. She did not say anything about ending the marriage or never wanting to see him again. She did tell him he could not return until he completed alcohol treatment. Thus, Hal being kicked out was not indicative of an intent to permanently end the marriage relationship, it was indicative of a temporary physical separation by Wendy for the limited purpose of motivating Hal to get treatment and save the marriage. Thus the economic community would not have ended simply when he left the house.

But, after having moved out and hitting the pedestrian while drinking, Wendy learned of the accident and told Hal she wanted a divorce. At this point, both elements would be met. Hal and Wendy would have been physically separated, and one spouse has indicated an intention not to resume the marital relation by telling the other she wants a divorce.

Because the economic community did not end until that time, when Wendy told Hal she wanted a divorce, and the accident and/or the cause of action that is the basis for any judgment accrued before that time, the judgment resulting would be a community debt because it was essentially incurred before the end of the economic community.

Debt

Debt incurred before or during the marriage can be satisfied from the community or from the tortfeasor's separate property. Debt incurred by a spouse for necessaries, including medical care, can be satisfied from community property or the separate property of either spouse, although indemnity may be available. Here, the debt is for tort judgment and, as stated above, can be satisfied from either community property or separate property of Hal, first from his separate property and then from the community property.
In California, for the purpose of debt for necessaries or medical services, end of the economic community can only occur on divorce. Judgment may not be able to be satisfied from Wendy's earnings if she kept them in a separate (versus joint) account from which Hal had no right of withdrawal.

CONCLUSION--Because the debt was incurred before end of the economic community, it is a community debt. Therefore, it can be satisfied from community property or separate property of Hal. Because the tort that is the basis of the judgment was not conducted for the benefit of the community, the judgment must be satisfied first from Hal's separate property. But because Hal has no separate property, his only asset is the house, it will be reduced to judgment and recovery sought from the asset that is the community home, which as above is classified as community property. Wendy may be able to seek indemnity.

2. **Is Wendy's interest in the family home subject to payment of Hal's legal fees under California law?**

As stated above, the economic community ended when Wendy kicked Hal out of the house and told him she wanted a divorce. Hal appears from the facts to have consulted the lawyer after that time. Debt incurred after the end of the economic community will belong to the debtor spouse.

Attorney Fees for Divorce Lawyer

Generally, a spouse may not unilaterally encumber community real property without a joint action on behalf of both spouses. Additionally, the spouse may not separately

encumber her half interest in the property. The one exception to this rule is for the spouse to satisfy attorney fees in the divorce proceeding between the spouses.

Here, because the lawyer is not representing Hal as a family attorney in his anticipated divorce proceeding with Wendy, this rule would not apply. The lawyer fees incurred by Hal after the economic community ended for the purpose of defending against the tort suit could only be satisfied from Hal's separate property.

Division of Assets on Divorce

Generally, assets are divided pro rata at divorce, 50-50, no cashing out one spouse to give the other an entire asset. The only general exceptions to this rule are: for a closely held corporation whose shares are community assets where one spouse is the CEO and division would destroy the business; a pension plan from which one spouse can take a cashout instead of receiving payments from the pension so the spouse, who no longer wish to have any connection can go their separate ways; or, for the family home when selling it and dividing the proceeds will uproot the children and cause them harm.

While this is the family home, there appear to be no children and no reason not to apply the binding pro rata division, 50-50, by sale of the house and splitting the assets.

This means that on divorce, the assets of the house will be split evenly between the parties. Once the divorce decree is entered, the proceeds from the house that Hal receives are going to be his separate property. Upon divorce, the legal fees of Hal's lawyer can be paid by his share of the proceeds.

But the question asks whether the payment of Hal's legal fees will be satisfied from Wendy’s interest in the home. Wendy has no interest in Hal's proceeds after divorce from sale of the community property house, and thus the proceeds subject Hal's interest, not hers, to liability.

CONCLUSION--because the attorney fee debt will have been incurred after end of the economic community, it will be separate debt of Hal, and does not subject any of Wendy's interest in the family home to liability for those fees. The exception for divorce attorney fees does not apply.

3. **What ethical violations has the lawyer committed according to both the ABA and California law?**

A lawyer is a fiduciary of the client. She has a duty of confidentiality (not to communicate information relating to representation), a duty of loyalty not to act on behalf of her own, a client's, or a third party's best interests that are adverse to her client's, financial duties, and duties of competence which are all owed to the client.

Duty of Loyalty

Under the duty of loyalty, the lawyer must not develop an interest or maintain an interest that is adverse to the client, whether it is the interest of the lawyer herself, an interest of one of the lawyer's other clients, or an interest of a third party with whom the lawyer is closely related.

Loyalty--Financial Assistance to Clients

Under the ABA rules, a lawyer is not permitted to lend the client money for the representation, with the exception of forwarding costs of litigation to indigent clients and forwarding costs associated with a contingent fee arrangement. Under the California rules, the lawyer can lend the client any amount for any reason, as long as she does not promise to satisfy the existing debts of the client in order to buy the client's business.

Therefore, from this perspective, the loan would be considered acceptable under the California rules but unacceptable under the ABA rules. Under the ABA rules, once the client becomes indebted to the attorney, the attorney's personal interest against the client in collecting the money and receiving payment for the debt may conflict with his duty to act for the sole benefit of the client. Under the California rules, because this is not a promise to satisfy pre-existing debt for the prospective client, this is acceptable.

Loyalty--Transacting Business or Developing Adverse Interest to Client

Whenever the lawyer enters into business with the client, the terms must be fair, the lawyer must disclose the terms (effect of the transaction) to the client in writing, allow for an opportunity for the client to consult with independent counsel and probably should suggest she do so if the lawyer's interest will be adverse to the client's in the litigation, and obtain consent from the client in writing.

This loan would essentially be such a transaction. The facts do not indicate the above elements are met. Additionally, there is a question whether it would be fair to encumber a client's sole asset in order to receive payment. But the above rules that specifically address lending a client money are going to govern whether the transaction is permissible. Regardless, even though the loan is permissible under California law, the attorney should ethically consider whether the terms of the loan are fair and suggest receiving independent legal advice if the client wishes to fund the representation in this manner.

Financial Duties

The reason the nature of the fee arrangement is important is to judge whether it is permissible for the lawyer to charge the client in this way. Under the ABA, the fee must be reasonable considering the experience of the lawyer, novelty of the case, difficulty of legal issues, time and effort required, etc. In California, it simply must not be unconscionable. The question is whether the lawyer has complied with the requirements for charging a fee, and whether the amount is justified.

Contingent Fee

A lawyer can enter into either an hourly fee arrangement or a contingent fee arrangement with a client, or potentially a flat fee arrangement. Under the ABA rules, contingent fee arrangements (lawyer forwards fees and sometimes costs in order for a stake in the recovery, if there happens to be one) are not available in criminal or domestic cases. They must include the percentage of recovery taken, the costs deducted from recovery, and whether they are deducted before or after. In California,

the agreement must also indicate that it is subject to negotiation with the lawyer and what costs will not be covered by the contingent fee arrangement.

Under ABA rules, this may be a criminal case, but considering the question implies a money judgment that could subject the house to liability, brought by a private party pedestrian; using contingent fee arrangement in this case would be permissible. But here, if the mortgage is being used as payment, and thus this is more likely to be considered an hourly fee arrangement.

Hourly Fee

The agreement, under ABA rules, must disclose the rate at which the fee is charged, the services it covers, and the respective duties of lawyer and client. In California, it must also be in writing unless it is for less than $1,000, with a corporate client, routine matter for regular client, or emergency renders this impossible.

CONCLUSION--There is nothing in the facts to indicate the lawyer has complied with any of the above requirements regarding the fee arrangement. He made the offer to encumber the property without explaining the calculation of the rate, providing a writing, explaining what services it would cover, etc. Additionally, the case appears to be a simple one, involving culpability for drunk driving. Depending on how much the house was worth, a lien on the home could be unreasonable or unconscionable under either California or ABA approach.

Duty of Competence

A lawyer has a duty of competence, to represent the client with the skill, knowledge, thoroughness and preparation necessary to carry out the representation effectively.

As stated above, the home is community property. It cannot be encumbered unless both spouses jointly enter into the transaction. The non-consenting spouse can recover the house even from a BFP, and set aside the transaction, if she has not agreed to it.

There is a one year statute of limitations, but if the buyer knew the seller was married and failed to seek consent from the other spouse, there is no statute of limitations.

Here, an attempt to encumber the community property house to satisfy the separate debt of Hal would be a failure of competence on the part of the lawyer. A lawyer of reasonable skill, knowledge, thoroughness and preparation would be aware of this and would not attempt to encumber property to pay his debts knowing it was community property not subject to this type of transaction without consent of Wendy. This would ineffectively carry out the representation.

CONCLUSION--Under ABA rules only, the lawyer has breached his duty of loyalty to the client by lending him money in regard to the transaction. Although, he may argue he is permitted to do so because he is permitted to forward costs of litigation to indigent clients and Hal is indigent because he is unemployed and has no assets but the house. But because the house cannot be encumbered this way without the consent of Wendy, and a lawyer of reasonable skill and knowledge would know this, the attempt to encumber the house without Wendy's permission may also be a breach of duty of competence, subjecting the lawyer to discipline, sanctions, and malpractice liability. There is also a question of whether the amount of the fee is reasonable or unconscionable in light of the nature of the litigation and employment of the lawyer.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2013 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

Carol, a woman with young children, applied to rent an apartment owned and managed by Landlords, Inc. Landlords, Inc. rejected her application.

Believing that Landlords, Inc. had rejected her application because she had young children, Carol retained Abel to represent her to sue Landlords, Inc. for violation of state anti-discrimination laws, which prohibit refusal to rent to individuals with children.

Landlords, Inc. retained Barbara to represent it in the lawsuit. Barbara notified Abel that she represented Landlords, Inc.

Abel invited Ford, the former manager of rental properties for Landlords, Inc., to lunch. Ford had participated in the decision on Carol's application, but left his employment shortly afterwards. Abel questioned Ford about Landlords, Inc.'s rental practices and about certain conversations Ford had had with Barbara regarding the rental practices and Carol's application.

During a deposition by Barbara, Carol testified falsely about her sources of income. Abel, who attended the deposition, suspected that Carol was not being truthful, but did nothing.

After the deposition ended and Carol had left, Barbara told Abel that Landlords, Inc. would settle the dispute for $5,000. Abel accepted the offer, signed the settlement papers that day, and told Carol about the settlement that night. Carol was unhappy with the amount of the settlement.

What, if any, ethical violations has Abel committed? Discuss.

Answer according to California and ABA authorities.

ANSWER A TO QUESTION 2

Any ethical violations Abel may have committed will have arisen out of his representation of Carol. Carol's rental application was denied by Landlords, Inc. (Landlord). Carol retained Abel as her attorney because she believed Landlords rejected her application because she has young children, which would be a violation of the state's anti-discrimination laws.

Abel's Lunch with Ford

Duty of Fairness

An attorney owes a duty of fairness to his opponent. In this case, Abel owes a duty of fairness to Barbara, Landlords' attorney.

An attorney may not communicate with the opposing party or its employees without the opposing party's attorney's consent or presence. While it may be permissible for an attorney to communicate with low level employees, communication with a high level employee requires the opposing party's attorney's consent. In this case, Abel invited Ford, Landlords' former manager of rental properties, to lunch. Abel knew Barbara was Landlords' attorney because she had notified him of her representation. Nonetheless, Abel did not ask Barbara's permission before he invited Ford to lunch. However, Ford had left his employment with Landlords shortly after Carol's application had been denied, so he was no longer an employee of the opposing party. On this other hand, he participated in the decision to deny Carol's application. Abel would argue he did not act unethically because a former employee may speak with whomever he or she wishes. Barbara would counter that Ford had just recently been a high level employee and Abel should have obtained her consent before speaking with Ford one-on-one. However, Abel likely did not commit an ethical violation because Ford was no longer an employee of Landlord.

Attorney-Client Privilege

The attorney-client privilege is an exclusionary rule of evidence. It is held by the client and may be invoked to prevent the attorney from disclosing information that arose out of the client seeking professional advice from the attorney during their relationship. A corporation is also protected by the privilege. Conversations between high level employees and the corporation's attorney are privileged. In this case, it is again important that Ford was no longer an employee of Landlord. By the time Barbara was retained by Landlords, Ford had apparently already left his job at Landlords. Thus, his conversations with Barbara would not be protected by the privilege because he was no longer a high-level employee such as a manager.

Carol's Deposition Testimony

Duty of Confidentiality

An attorney owes a duty of confidentiality to his client. Under the ABA Model Rules (ABA), an attorney may not disclose anything related to the representation without the client's consent. California does not have such a rule, but the Attorney's Oath requires a lawyer to "maintain inviolate" the secrets of his client. Abel owes a duty of confidentiality to Carol. In response to any ethical questions about not revealing his suspicions that Carol testified falsely at the deposition, Abel would likely claim that he could not say anything without violating his duty of confidentiality.

Exceptions

Under the ABA, there are exceptions to the duty of confidentiality to prevent substantial harm or death or great financial loss. California law limits the exception to substantial harm or death. Carol's false testimony related only to her sources of income which does not implicate substantial bodily harm or death. Likewise, even if she was trying to recover more from Landlord by lying about her income this probably does not

rise to the level of the serious financial loss exception recognized by the ABA. Further, these exceptions are permissive so they would not require Abel to disclose anything.

False Testimony

Under ABA, when a lawyer knows his client will give or has given false testimony the lawyer must counsel the client not to do so, attempt to withdraw from the case, and finally tell the judge if the attempt to draw is unsuccessful. In California, an attorney may not tell the judge but must allow his client to testify in a narrative fashion. Further, the attorney must counsel the client not to lie. Even though Carol's testimony was given during a deposition and not a trial, it was still given under oath and thus Abel should have counseled Carol not to lie (and attempted to withdraw and if he could not then have gone to the judge if ABA controls). However, Able will argue that he only suspected Carol was lying, he did not actually know. While Abel probably should have done further investigation to determine if his client was being truthful, he has not acted unethically by doing nothing because he did not know if Carol was lying.

Settlement

After the deposition Abel accepted Barbara's offer to settle with Landlords for $5,000 by signing it that day without telling his client. Abel did not inform Carol of the settlement until that night and Carol was unhappy with the amount.

Duty of Competence

A lawyer has a duty to competently represent his client. A lawyer must use the knowledge, skill, thoroughness, and preparation required to do so. Included in the duty of competence is a duty to communicate with the client.

Duty to Communicate

An attorney must keep his client up to date on the case. The attorney must give the client enough information so that she can make intelligent decisions going forward. In this case, Abel did not inform Carol of Landlord's offer to settle for $5,000. All settlement offers must be related to the client. While the attorney may make strategic decisions during the representation, whether to accept or reject a settlement offer is a substantive decision that must be made by the client. Thus, Abel acted unethically when he first did not tell Carol about the offer and second when he accepted it without her consent.

ANSWER B TO QUESTION 2

Abel's Ethical Violations

Abel's Lunch with Ford

Under both the ABA and CA rules, a lawyer cannot speak to a represented party. Abel was notified that Landlords, Inc. was represented by Barbara. A lawyer cannot speak to the employees of a represented person or corporation in the absence of opposing counsel. Here, Abel invited Ford, Landlord, Inc.'s former manager of rental properties, to lunch with him. Since Ford was a former employee and no longer employed by Landlord, it was not improper for Abel to speak with Ford to investigate the facts of his client, Carol's, case. A lawyer owes his client a duty to diligently advocate his client's case to completion and thoroughly investigate all facts and locate relevant witnesses who will support his client's case. However, in diligently advocating for one's client, the lawyer must conduct himself with integrity, honesty, fairness and good faith in respect to the public, his adversary, the court and to the legal profession.

Here, although Abel's lunch meeting with Ford was not a violation of any ethical duty, Abel crossed the line into unethical territory when he asked Ford about certain conversations Ford had with Barbara regarding the rental practices and Carol's application. Abel was aware that the information he was inquiring about was covered by Barbara's duty of confidentiality to Landlord, Inc. and would also be privileged and inadmissible in court or at a deposition under the evidentiary attorney-client privilege, if that privilege was invoked by Landlord, Inc. Although Ford was currently a former employee, at the time Ford had the conversations with Barbara, he was an employee of the corporation and was speaking within the scope of his employment relationship and those conversations were made in confidence to the corporation's attorney. By asking these questions to Ford without advising him that such information was covered by the attorney-client privilege, Abel violated his duty of fairness and honesty to his adversary and his actions reflected negatively on his integrity and respect for the legal profession.

Carol's Deposition

During Carol's deposition by Barbara, Abel suspected that Carol had testified falsely about her sources of income but Abel did not do anything to correct Carol.

Duty of Honesty and Candor to Tribunal and Adversary

A lawyer owes the court and his adversary a duty of candor, fairness and honesty. A lawyer cannot knowingly offer a false statement of law or fact to the court and upon learning of the falsity, the lawyer owes a duty to the court to correct the false statement. Here, Abel suspected that Carol testified falsely at her deposition. Deposition testimony is taken under oath under penalty of perjury and thus if Abel knew Carol had falsely testified or intended to testify falsely, then he would have allowed her to commit perjury which he has an ethical duty to try to avoid without prejudicing his client. Here, the facts do not indicate that Abel knew for certain that his client had testified falsely, nor do the facts show that Abel had knowledge that Carol had planned to testify falsely. Upon becoming suspicious of Carol's false testimony, Abel owed the court a duty to investigate whether or not the statement was false and to persuade his client to correct the false statement on her own. During the deposition, Abel should have asked to stop the deposition briefly to speak to his client in private, and should have persuaded her that if she was not being truthful, to go back into the deposition and correct herself and restate accurate information. Abel should have advised his client that she was under oath and that the deposition transcript could later be used against her and could ultimately harm her case if not corrected as soon as possible. If at that point Carol refused to correct her false testimony, and Abel was certain that she had committed perjury, he should have sought to withdraw as her counsel, as long as his withdrawal would not severely prejudice her case, because not doing so would continue to confer a falsity upon the court.

Duty of Confidentiality

Under the ABA and under CA, Abel would not be able to disclose the false statement to the court or to Barbara because doing so would breach his duty of confidentiality to Carol. A lawyer owes his client a duty to keep all confidential information related to the representation confidential and not to disclose such information without the client's consent. There are some exceptions where a lawyer is permitted to reveal confidential information, such as where a dispute arises between the lawyer and the client which allows the lawyer to reveal confidential information to the extent necessary to defend himself, or under the ABA and CA where disclosure of confidential information is necessary to prevent certain death or risk of substantial bodily injury or under the ABA where disclosure is necessary to prevent or mitigate fraud or substantial financial loss where the lawyer's services were used in furthering the fraud or financial injury. Here, no exceptions apply to allow Abel to disclose Carol's perjury so Abel's only option if she will not correct the false statement is to withdraw.

Settlement

Abel violated several ethical duties to his client by settling the case without his client's input and consent.

Duty to Communicate

A lawyer owes his client a duty to communicate by informing his client of all developments in the case and by informing his client of all settlement offers. The lawyer is free to make tactical decisions, such as trial strategy, but the client must make all decisions about the case, including whether or not to accept a settlement offer. A lawyer cannot accept a settlement offer without his client's approval and consent. Here, Abel accepted Barbara's settlement offer of $5,000 without informing Carol of the offer and obtaining her approval and consent to settle at that amount. By accepting the offer,

signing the agreement and telling Carol after the fact, Abel breached his duty to communicate to Carol.

Duty of Diligence and Duty of Competence

By accepting and signing the settlement offer without Carol's input and approval, Abel also violated his duty to diligently represent Carol to the case's completion as well as breached his duty of competence. A lawyer owes a client a duty to diligently see the case to completion and zealously advocate for the client. Here, Abel breached that duty by terminating the case right after his client's deposition, by accepting a settlement offer without his client's input. The facts do not indicate whether Abel had previously deposed Barbara's client, but if not, accepting the settlement before having the opportunity to do so, prevented Abel from learning more information that could have potentially increased the value of his client's case. Furthermore, since Carol was not happy with the settlement and probably would not have approved it, Abel did not zealously represent his client's interests.

A lawyer also owes his client a duty of competence, which requires the lawyer to represent his client with the knowledge, skill, preparation, experience and thoroughness that a competent lawyer would exercise under the same circumstances. A competent lawyer would not have accepted the settlement offer without consulting his client and without negotiating a larger amount and without being confident that his client was receiving a fair amount under the circumstances. Since Abel did not consult with his client nor try to get her a better offer, Abel breached his duty of competence as well as his duty of care.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 1

Patty was hit by a car, whose driver did not notice her because he was texting. Joe, a journalist, wrote a story about Patty's "texting" accident. Patty contacted Tom, a real estate attorney, and asked him to represent her in a claim against the driver. Tom agreed, and entered into a valid and proper contingency fee agreement. Tom later told Patty that he had referred her case to Alan, an experienced personal injury attorney, and she did not object. Unknown to Patty, Alan agreed to give one-third of his contingency fee to Tom.

Thereafter, Alan sent a $200 gift certificate to Joe with a note stating: "In your future coverage of the 'texting' case, you might mention that I represent Patty."

Patty met with Alan and told him that Walter, a homeless man, had seen the driver texting just before the accident. Alan then met with Walter, who was living in a homeless shelter, and said to him: "Look, if you will testify truthfully about what you saw, I'll put you up in a hotel until you can get back on your feet."

1. What ethical violation(s), if any, has Tom committed? Discuss.

2. What ethical violation(s), if any, has Alan committed? Discuss.

Answer according to both California and ABA authorities.

SELECTED ANSWER A

(1) <u>What ethical violations, if any, has Tom (T) committed?</u>

<u>Lawyer/Client relationship</u>

A lawyer owes duties to his client as soon as the relationship is formed. The relationship is formed even if the client never retains the lawyer but approaches him regarding legal representation.

Here, the relationship between P and T began as soon as she contacted him and asked him to represent her in a claim against the driver who hit her. Even though P never retained or ultimately 'hired' T, he owes her duties as his client from this point forward.

<u>Duty of Competence</u>

Under ABA and CA, a lawyer (L) owes his client the duty of competence, which requires using the requisite skill, preparation, thoroughness, and knowledge to adequately represent his client's interests. If an L is not competent in an area of law, he must become competent without undue expense or delay upon the client; otherwise, he should associate with an L who is competent in that area.

Here, T is a real estate attorney who was contacted by P regarding an injury she suffered after a car hit her. P's cause of action is a tort, likely negligence or battery, which is entirely unrelated to real estate. T should not have taken the case if he had no knowledge in this area of law. In fact, T 'later' told P that he referred the case to Alan. This is not 'associating' with an attorney to help with an area of law, nor is it becoming up to speed on the requisite area of law.

T has breached his duty of competence to P because he was not able to represent her interests in a tort claim and did not adequately respond by not taking the case or by the steps noted above.

<u>Referring P's Case to Alan</u>

<u>Duty of Confidentiality</u>

ABA: A lawyer has the duty to maintain all confidential communications acquired in the course of representation. In CA, there is no delineated duty of communication; however, the Attorney's Oath requires lawyers to maintain the client's secrets and confidences.

Here, T has contacted another attorney regarding information he has obtained from P in the course of representation – specifically that she was hit by a car and needs a lawyer, as well as her personal information. T has breached his duty of confidentiality by revealing this information to Alan.

Exceptions to duty of confidentiality – consent

If a client consents, a lawyer may reveal her confidences.

Here, T told P only afterwards that he was referring her case to Alan, an experienced personal injury attorney. While she 'did not object' she certainly did not consent to the disclosure in the first place because she was entirely unaware of it. Second, a non-response will not be considered affirmative consent to disclose. T will not be able to use P's failure to object as evidence of consent.

Duty of Communication

A lawyer has the duty to communicate with his client regarding all stages of representation, to return phone calls and inquiries promptly, and to communicate the ultimate strategy decisions to the client for her decision.

Here, T failed to communicate to P that he did not have the requisite experience to represent her and that he had referred her case to Alan. This is an important juncture for communication that T owed to P; he should have let her know he was unable to take the case but would be able to refer her to someone else.

Referrals & Referral Fees

Under the ABA and CA, a lawyer may refer a client to another lawyer with the informed consent of the client and as long as the referral agreement is 'non-exclusive.' Under the ABA, referral fees are prohibited; under CA, they are permitted as long as the client gives informed consent and the total fees are not increased due to the referral agreement.

Here, T has referred P to A but failed to tell P about the referral, beaching his duty to obtain her consent. Further, it appears T has obtained a referral fee for this referral paid by 1/3 of the contingency fees in this case (see below) which is absolutely prohibited under the ABA. In CA, fees are permitted if the total fees to P did not increase; however, without P's consent this was an improper referral. Further, if A and T have an 'exclusive agreement' to refer to each other, the referral agreement also breaches their duties.

Fee splitting among lawyers

Fee splitting is prohibited by both the ABA and CA with non-lawyers. However, under the ABA, a lawyer may split fees with another lawyer if (i) it is in proportion to the services rendered or both L's are jointly and severally liable, (ii) the total fee is reasonable, (iii) the client gives informed consent, and (iv) the total fee is not increased. In CA, an L may split fees with a non-lawyer if (i) the total fee is not unconscionable, and (ii) the client gives written consent.

Here, T has entered into a fee sharing agreement with A to give 1/3 of a contingency fee to T. Under the ABA, this is not going to be 'in proportion' to the services rendered by T because it is likely he will not be engaging in the litigation that is outside of his practice area. However, if T remains jointly and severally liable, he may rebut this requirement. However, there was no consent given by P per this fee splitting arrangement so the agreement violates the rules under the ABA regarding splitting. The total 'fee' will be determined reasonable because it is not 'increased' as a contingency fee.

This arrangement under the ABA is a violation of fee splitting because it was not consented to in writing by P and it is not in proportion to the efforts to be made by T.

In CA, lawyers may split fees in the fashion A and T did as long as the total fee is not unconscionable and there is written disclosure to P. While the total fee will be determined as a percentage of the contingency, it is clear that P did not consent to this arrangement because "unknown to P" A agreed to give 1/3 of the fee to T. T has breached the fee splitting rules under CA as well.

Contingency Fees

Contingency fees are fees to be paid as a percentage of a successful judgment. Under the ABA and in CA, contingency fee agreements must be (i) in writing, (ii) signed by the client, (iii) describing the duties of the lawyer and client, (iv) the percentage of fees to be taken for the lawyer, and (v) whether these fees are before or after legal fees have been paid. CA additionally requires the L to note that the fees are negotiable and to indicate how legal fees not covered by the contingency will be paid.

Here, T has entered into a contingency fee agreement with A, the subsequent attorney, not P, the client. P has not signed any agreements, no agreement in writing has been made, there is no description of duties and a percentage has not been indicated. This is a violation of a lawyer's duties regarding fees.

(2) <u>What ethical violations, if any, has Alan (A) committed?</u>

<u>Attorney-Client Relationship</u>

See above.

Here, A has obtained P's information from T regarding representing her in his capacity as a personal injury attorney. Therefore, because this is related to legal representation, A owes P duties as his client.

<u>A and T's fee arrangement</u>

Unknown to P, A agreed to give T 1/3 of the contingency fee to T, violating many of the same rules as T under this agreement.

<u>Referral fees</u>

See above.

A breached his duty related to referral fees under the ABA in relation to giving part of the contingency to T which is likely a 'fee' and under CA because this was without the consent of P.

<u>Fee splitting</u>

See above.

For the same reasons noted above, the fee splitting arrangement between A and T is prohibited by both CA and ABA.

Fees Generally

Under the ABA, fees must be reasonable and agreed upon by the client (consented to) in writing. In CA, the fees must be 'not unconscionable' and agreed upon (consented to) by the client in writing.

Here, it is unclear whether the contingency fee that A will be taking for this case is either reasonable or 'not unconscionable' under the ABA and CA respectively; however, because the fee was likely determined in advance of A ever meeting with P, A breached his duty to P regarding fees because they were not consented to by P.

Contingency Fees

See above.

For the reasons noted above, A also breached his duty regarding contingency fees to P for failure to get them in writing, with the required terms under both ABA and CA.

$200 gift from A to Joe

Duty of Fairness

A lawyer owes the duty to the legal profession to maintain the public confidence, dignity, and efficiency of the legal system and the profession. Additionally, even those actions by an attorney that are not specifically prohibited by the ABA or CA professional conduct rules, or the law, may still be prohibited if they reflect poorly on the profession.

Here, A sent money to a journalist asking him to write in his newspaper coverage of the 'texting case' that A represents P. While it is generally public information as soon as a case is filed who is being represented by whom, this is an improper action by A to have a news organization write something in his favor so he gets public notoriety or even advertisement for his services. This reflects poorly on the profession because not only did A ask to be mentioned, he seems to have 'bribed' the journalist by sending a $200 gift certificate. This is an unethical move that will be looked down upon as not maintaining the public confidence in the profession.

Advertisements

Solicitation

Out-of-court statements regarding a case

A lawyer may not make public statements that are substantially likely to materially prejudice the case. He may comment on those topics that are generally public knowledge (who the parties are, what the cause of action is) and he may conduct 'damage control' if his client has been prejudiced.

Here, A is looking to have information publically noted about his case in Joe's news organization. He has requested only the fact that he represents P to be printed; therefore, this will not be considered an improper public statement if published because it is public knowledge and does not risk prejudicing the case.

A's meeting with Walter (W)

Meeting with unrepresented persons

A lawyer, if meeting with a person who is not represented by an attorney, must not make any indications that he represents that person's interests or is impartial.

Here, A met with W after finding out he is a potential witness in the P's personal injury case. Upon meeting him, he must indicate that he does not represent W and is not impartial in the case, but rather represents the best interests of his client. It is not clear whether A clearly indicated his position, but by offering W a hotel until he gets back on his feet, W may feel his interests are being represented by A, in which case A has breached his duty to express partiality.

Duty of Fairness

See above.

A lawyer has the duty to refrain from altering or obstructing access to legally discoverable evidence.

Here, A has contacted a witness with personal knowledge of the accident and indicated he would put him up in a hotel. This may make W harder to find for the opposing party and unfairly influence his testimony, in effect, altering the evidence. A's actions also reflect poorly on the legal profession because it is not an honest or ethical action to pay homeless individuals to testify by baiting them with a hotel room until they are back on their feet – something that A may not ultimately do for W and creating a significant risk of biased testimony.

Improperly influencing a witness

A lawyer may not pay a witness for their testimony. If it is an expert witness, the expert witness's expenses for travel and time away from work may be paid for.

Here, A has effectively 'paid' a witness in this case by offering to pay W's hotel until he 'gets on his feet.' W is living in a homeless shelter, so moving to a hotel is a very serious and significant 'bribe' for W to do as A wants and W will be regarded as being paid to testify for P because he is receiving a direct benefit for his testimony. This is a violation of A's duty of fairness to opposing counsel and the legal profession by improperly influencing a witness and paying a non-expert witness to testify.

Perjury

ABA and CA: In a civil case, a lawyer must not call a witness whom he knows will perjure himself. An L may not encourage perjury as this violates both his ethical duty and the law.

Here, it is not clear that W will 'perjure' himself, as A has indicated that he wants him to "testify truthfully." However, A has made it seem that if W gives him the testimony that A desires, he will have a hotel until he gets back on his feet – a very big incentive for the witness to do as A desires. By A calling W as a witness whom he has in effect bribed, even with the caveat he told him to testify truthfully, A may be regarded as having suborned perjury should W state anything that is untruthful but bodes well for P and A.

SELECTED ANSWER B

TOM'S ETHICAL VIOLATIONS (Real Estate Attorney)

Agreement to Represent Patty

An attorney owes a duty of competence to his clients. An attorney should not agree to represent a client where the subject matter of the case is outside his area of knowledge, unless he can learn the relevant law without undue delay or expense to his client, or he can affiliate himself with an attorney who is experienced in that area of law. Here, Tom is a real estate attorney and he agrees to represent Patty in a personal injury suit. The suit is based on a personal injury claim because Patty was hit by a car whose driver was texting and thus did not notice her. Tom's experience in the area of real estate law does not relate at all to the area of personal injury. Thus, Tom must decline to take the case, learn about the relevant law, or affiliate himself with a knowledgeable personal injury attorney.

Here, Tom will argue that he referred the case to Alan, who is an experienced personal injury attorney, and thus did not violate the duty of competence. However, Tom did not merely affiliate himself with Alan and work with Alan on the case; rather, he referred the entire case to Alan, after entering into a valid representation agreement with Patty. Tom will argue that this may be deemed appropriate because Tom has no experience in the area of personal injury and thus is not competent to represent Patty in a personal injury suit. However, it would have been more appropriate for Tom to decline to take the case in the first place because, as a real estate attorney, he has no experience in personal injury law.

Tom acted appropriately in referring the case to a personal injury attorney, and thus did not violate the duty of competence; however, it would have been more appropriate for him to decline to take a case in the first place where the case necessarily requires knowledge of an area of law in which Tom has no experience.

Referral of Case to Alan for a fee

Under the ABA, an attorney may not refer a case to another attorney for a fee. Under California law, an attorney may refer a client to another attorney for a fee as long as the client is informed. Here, Tom referred Patty to Alan and accepted one-third of the contingency fee as a possible referral fee. Here, Tom did refer Patty's case to Alan, in breach of ABA rules. He also breached California rules because he failed to tell Patty that he made a referral to Alan until after the fact, and did not tell her at the time of the referral. Thus, he violated rules regarding referral of a client for a fee under both ABA and California.

Failure to Communicate to Patty that the case was referred to Alan

An attorney has a duty to communicate with is clients regarding the representation. Here, Tom referred the case to Alan without consulting with Patty first. Because Tom had agreed to represent Patty and had entered into a contingency fee agreement with her, and thus Patty was expecting Tom to be her attorney, Tom should have consulted with Patty and obtained her permission before referring the case to Alan. Because Tom failed to communicate with Patty when he failed to acquire her permission to transfer the case to Alan, Tom violated his duty to communicate with his client.

Contingency Fee Arrangement

A valid contingency fee agreement must be in writing, signed by the client, include the lawyer's percentage, the expenses to be deducted, and whether the lawyer's percentage will be paid prior to or after the expenses are deducted from the award. In California, the agreement must also include a statement as to how services not provided for under the contingency fee agreement will be provided, and that the lawyer's percentage is negotiable. As it appears that a valid and proper contingency agreement was entered into, no ethical violations arise from this agreement.

ALAN'S ETHICAL VIOLATIONS (Personal Injury Attorney)

Fee Splitting with Tom

An attorney may split fees with other attorneys outside of his firm, subject to certain restrictions. Under the ABA, the total fee must be reasonable; under California law, the fee may not be unconscionably high. Further, the client must be informed about the fee splitting and must consent to it. Finally, the fee must be split proportionately in accordance with the relative amount of work that each attorney performs.

Total Fee

Here, we do not know what the total amount of the fee was, but it appears that the total amount was the same amount agreed to under the original contingency fee agreement. We know this because Alan agreed to give one-third of his contingency fee to Tom, and thus Tom's share comes out of the original amount agreed on. Thus, if the original contingency agreement included a valid fee, then there should be no violation regarding the total fee due to the attorneys.

Informing the client

Here, Patty was not informed of the agreement between Tom and Alan. Because Patty should have been informed about the fee-splitting arrangement between Tom and Alan, the failure to notify her of the agreement constitutes a violation of fee-splitting rules under both the ABA and California law.

Proportionately splitting the fee

Here, Tom appears to be doing none of the work and Alan is doing all of the work in the representation of Patty's case. Under the rules on fee splitting, Tom should thus receive none of the fee and Alan should receive the entire fee. Because Alan has actually promised to give Tom one-third of his contingency fee, where Tom is not performing any of the work, Alan has violated the rules on fee splitting.

Alan has violated the rules on splitting fees with attorneys outside his firm, because he did not inform Patty that he was giving Tom one-third of the contingency fee, and

because the fee is not split in proportion to the amount of work that each attorney is actually performing in the representation.

Gift to Joe and Request that Joe Report Alan's Representation of Patty

An attorney has a duty of candor to the public. An attorney may not attempt to influence the press by granting gifts to journalists. Because a journalist has a duty to report fairly and in a manner that is not unduly affected by outside influences, an attorney's attempt to interfere with a journalist's duty of fair reporting constitutes a violation of the duty of candor. Here, Alan gave Joe a $200 gift certificate with a note stating that Joe might include the fact that Alan is representing Patty when Joe is covering the case. The gift certificate would appear to be a means of attempting to influence the journalist's coverage, in that Joe might feel compelled to actually include information favorable to Alan when reporting the case. The gift certificate might be seen as a gift, but it might also be seen as payment. Alan will argue that he is simply requesting that Joe include truthful information in his coverage, such as the fact of Alan's representation, and that the information does not influence the case in any way. However, because Alan made a gift and is attempting to influence the journalist's coverage of the case, he has violated a duty of candor to the public.

Advertising

Attorney advertising must abide by certain rules. An attorney cannot engage in real-time phone or live contact with prospective clients with whom he has no prior personal or business relationship. Any advertising must be labeled attorney advertising, it cannot make any misrepresentations or be misleading, and it must state the name of at least one attorney responsible for the material. In California, making any guarantees or warranties as to results is considered presumptively improper and constitutes a misrepresentation.

Here, Alan is essentially attempting to purchase advertising from Joe, by "paying" Joe with a gift certificate and asking Joe to essentially include Alan's name in coverage of the texting accident. This appears to constitute advertising, but in a way that makes it

appear that it is not advertising. The news article will be read by the public as impartial news, and will not be labeled advertising, even though Alan "purchased" the coverage regarding his relationship to the case. Alan will argue that the coverage merely states his representation of Patty, and the article does include his name as a responsible party.

However, if the coverage later states that Alan won the case for Patty, that may constitute a misrepresentation under California law, as the outcome may imply to the public that a certain result is guaranteed, even if it is the case that Patty's success is an anomaly and not indicative of typical results. Thus, depending on how Joe writes the coverage, including the information about Alan could pose an improper misrepresentation or otherwise be misleading to the public in violation of California rules.

Thus, because the coverage of Alan's representation of Patty in the case could be misleading in the message that it sends to the public, and because there would be no express indication in a news article that Alan is essentially advertising his services, Alan is violating the rules regarding proper attorney advertising by asking Joe to include Alan's name in Joe's coverage of the case.

Solicitation

An attorney has a duty not to solicit prospective clients. Solicitation is live or phone contact with potential clients with whom the attorney has no preexisting personal or business relationship. Alan has not violated any solicitation rules because newspaper articles and advertising do not constitute solicitation.

Offering to Put Walter Up in a Hotel

An attorney may pay reasonable expenses for a witness in connection with testimony at trial; however, any payment cannot be made in connection with the witness' testimony at trial. Here, Alan violated both of these rules.

Reasonable expenses

Reasonable expenses in connection with a witness' testimony could include travel expenses, a place to stay and meals during the time that the witness is required to be present at trial. However, here, Walter lives in a homeless shelter and Alan offered Walter a place to stay "until you can get back on your feet." This implies an indefinite period of time, and not just the time necessary for Walter to testify at trial. Because Alan is offering Walter a place to stay for a period of time that potentially exceeds the time of the trial, Alan has violated the rule that he may not pay expenses other than those that are reasonable in connection with a witness' attendance at trial.

Payment in connection with testimony

An attorney may not make the payment of reasonable expenses contingent on a witness' testimony at trial. Here, Alan stated that if Walter will testify truthfully at trial about what he saw, then Alan would put Walter up in a hotel until he can get back on his feet. It appears that Alan is making his offer to pay for a hotel contingent on Walter's truthful testimony at trial. Alan will argue that he simply wants to assure that Walter will testify truthfully, and that he is fulfilling his duty of candor to the court by ensuring truthful witnesses. However, because Alan conditioned his "payment" of a hotel stay to Walter on the nature of Walter's testimony, he violated an ethical rule, nonetheless.

Alan violated the rules regarding the payment of a witness' expenses in connection with testimony at trial because he offered to pay expenses that exceeded a reasonable limit, because he offered to pay for a hotel for an indefinite period of time, and because he conditioned the payment of expenses on the nature of Walter's testimony.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

Question 1

Three months ago, Dave was arrested for the burglary of a shoe store after a forensic investigation by the police department identified him as the burglar. Patty, a prosecutor, brought burglary charges against him.

A week ago, Patty saw a press release that the police chief was planning to issue to the media. It stated that Dave was a "transient" and had been "arrested for burglary by Inspector Ing, who is known for his ability to apprehend guilty criminals."

Four days ago, Patty received a report from a federal agency stating that the police department's forensic investigation identifying Dave as the burglar was unreliable.

Three days ago, Patty announced "ready for trial" at a pretrial conference.

Yesterday, Patty learned that two eyewitnesses had identified Dave as the burglar. Because she did not intend to use evidence from the forensic investigation, she did not disclose the federal agency report to Dave's attorney. Dave's attorney has never asked her to provide discovery.

This morning, Patty called the judge who will be presiding over Dave's trial to reassure him that there is ample non-forensic evidence to convict Dave.

What ethical violations, if any, has Patty committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 1: SELECTED ANSWER A

Prosecutors have numerous unique ethical duties as a consequence of their role as public representatives and their power to interfere in the liberty of private persons. In general, a prosecutor has a duty to seek justice, not to secure a conviction at any cost.

Press Release Suggesting That the Accused Is Guilty

A lawyer has a duty not to make any statements that she should reasonably expect to be publicly disseminated and that are substantially likely to prejudice a judicial proceeding. A prosecutor in particular must not broadcast or allow to be broadcast a statement that expresses an opinion regarding the guilt or innocence of a criminal defendant. If a prosecutor knows that an attorney or law enforcement agent under her oversight plans to make such a statement, the prosecutor must make reasonable efforts to prevent the statement from being issued.

Here, the chief of police planned to issue a statement declaring that Dave had been apprehended by a detective "who is known for his ability to apprehend guilty criminals." Patty saw this press release before it was issued and knew that the chief planned to issue it. She therefore should reasonably have expected that it would be publicly disseminated. Patty will likely argue that the statement does not pose any problems, because in it the police chief does not directly express an opinion that Dave is guilty (or innocent). This argument will likely fail. The police chief's statement announces that Detective Ing has a reputation for apprehending guilty parties, which suggests strongly that the chief believes that Dave in particular is guilty. Patty may also argue that she has no duty to prevent the statement because it is attributable to the chief, not to her. This argument will likely also fail. As a prosecutor, Patty has a duty to make reasonable efforts to prevent law enforcement from making public statements that will prejudice a proceeding in which she is counsel. The chief's planned statement suggests strongly that the chief believes that Dave is guilty. This statement would likely prejudice the public against Dave, perhaps making it more difficult to select an unbiased jury. Patty

therefore had a duty to make reasonable efforts to prevent the statement from being made.

Patty may argue that the other portions of the press release are not objectionable. For instance, a prosecutor generally may announce the name of a criminal defendant, the fact of an arrest, and the nature of the charges. That the police chief planned to announce that a person named Dave was arrested for burglary is therefore consistent with Patty's duties with regard to trial publicity, as is the chief's statement that Dave is a "transient." However, the statement that Dave was arrested by a detective who is known for apprehending "guilty criminals" suggests an opinion as to Dave's guilt, and amounts to a violation.

Patty's failure to prevent the chief's statement that Dave was arrested by a detective known for apprehending "guilty criminals" after learning that he planned to make it was a violation of her duty to avoid public statements that may prejudice a proceeding.

Prosecution Despite Lack of Probable Cause

A prosecutor's duty to seek justice requires that she never pursue a charge that she knows is unsupported by probable cause. Probable cause exists when the facts known to the prosecutor are sufficient to allow a person of reasonable prudence and caution in the prosecutor's position to seriously entertain the possibility that the defendant is guilty of the crime charged.

Here, Patty will argue that she has probable cause to pursue Dave's burglary charge to trial. She will note that two eyewitnesses have identified Dave as the burglar, and eyewitness testimony is usually sufficient to make out a prima facie case against an accused. The State Bar would likely point out that Patty did not learn of the eyewitness testimony until yesterday. Before that time, the sole evidence on which the charge was based was the police department's investigation. Four days ago, however, before Patty learned of the eyewitnesses, a federal report revealed that the forensic investigation

was unreliable. The State Bar will argue that, as of this time, Patty lacked probable cause because the sole evidence on which the charge was based had been revealed to be suspect. The State Bar would be correct. In the two days between receiving the federal report and learning of the eyewitnesses, Patty lacked sufficient facts as would justify a reasonable person in believing that Dave was guilty. Instead of continuing to pursue the charge, she should have conducted further investigation to learn whether Dave was likely to be responsible for the burglary charged. Patty may argue that the mere existence of a report calling into question the police department's investigation does not alone establish that the investigation was faulty. This is true, but it does not excuse her conduct. At minimum, the report called the investigation into question. Patty should have pursued that question rather than continuing to rely blindly on the forensic evidence.

Patty's continued pursuit of the burglary charge after receiving the federal report was likely a breach of her duty not to pursue a charge in the absence of probable cause.

Lack of Candor Before the Tribunal

A lawyer's duties to uphold the integrity of the profession and to avoid prejudicing the administration of justice require that she make no false statements to a court in the course of a proceeding. This duty applies to prosecutors as well as to all other lawyers.

Here, Patty announced ready for trial three days ago at a pretrial conference. The day before the conference, she had learned that the sole evidence on which the burglary charge was then based, the police department's forensic report, was unreliable. Rather than announce this fact to the court, however, she told the court that she was ready for trial. Patty may argue that this statement was not a misrepresentation. She may assert that she intended to proceed to trial on the forensic evidence despite the federal report, perhaps in the belief that the report was mistaken. Other facts in this case belie that assertion. After the pretrial conference, as soon as Patty learned that there were eyewitnesses to the charged crime, she abandoned the forensic evidence. This

indicates that she understood that the forensic evidence had limited value, and suggests that Patty did not truly believe that she was "ready for trial" when this evidence was all that was available. On the other hand, if Patty did believe that the forensic evidence was sufficient to proceed to trial, this fact reinforces the conclusion above that Patty breached her duty not to pursue a charge in the absence of probable cause.

Patty likely did not believe that she was ready for trial when she announced as much to the court, a breach of her duty of candor. If she did believe that she was ready when the only evidence available was the unreliable forensic evidence, her announcement of readiness for trial is a breach of her duty not to pursue a charge in the absence of probable cause.

Failure To Disclose Exculpatory Evidence to the Defense

The Due Process Clause of the United States Constitution imposes a duty on every prosecutor to disclose to the defense material evidence favorable on the issues of guilt or punishment. Evidence is "material" if the prosecutor's timely disclosure raises a reasonable possibility that the outcome of the trial would be different than if the evidence had been withheld. The duty to disclose exists even if the defense makes no discovery requests. A prosecutor is responsible for violating this duty even if she did not act in bad faith.

Here, Patty received a report from a federal agency suggesting that the police department's forensic investigation was unreliable. This evidence is favorable to Dave because he can use it to show that the forensic evidence deserves little weight. Patty will argue that the report is not material because she intends to rely on eyewitnesses, and does not plan to introduce the forensic evidence at all. She will assert accordingly that the defense will not be able to use the report to affect the outcome because it does not address the reliability of the eyewitnesses' testimony. This argument will fail. The report allows the defense to attack the reliability of the police department's entire investigation. By demonstrating that the forensic investigation was inept, the defense

will be able to suggest that the police handled the eyewitnesses ineptly as well. Because the defense can use the report to undermine the police department's investigation, a reasonable possibility exists that it could influence at least one juror to vote not guilty, calling for a mistrial. This is sufficient to give rise to a reasonable possibility that disclosure of the report could lead to a different outcome. Patty may also argue that she has no duty to disclose the report because the defense never asked for it. This argument will also fail. A prosecutor has a duty to disclose exculpatory evidence in her possession whether the defense asks for it or not.

Patty's failure to disclose the federal report is a breach of her duty to disclose exculpatory evidence to the defense.

Improper Ex Parte Contact with the Presiding Judge

A lawyer's duty of fair play to her opposing counsel requires that she not engage in any ex parte contact with a judge in order to influence the outcome of a proceeding.

Here, Patty called the presiding judge in Dave's trial to assure him that she has sufficient non-forensic evidence to prove the burglary charge. There is no indication that she announced to Dave's counsel that she intended to make this contact or that she invited Dave to speak with the judge at the same time. This was an improper ex parte contact. Moreover, it was likely intended to influence the judge in the proceedings. That Patty felt the need to reassure the judge that she need not rely on the forensic evidence suggests that she knew or suspected that the judge had misgivings about the forensic evidence. Her reassurance was likely intended to assuage those misgivings. Making this communication in the absence of opposing counsel was a violation of Patty's duty of fair play.

By contacting the presiding judge ex parte in an attempt to influence him regarding the strength of her case, Patty violated her duty of fair play to opposing counsel.

QUESTION 1: SELECTED ANSWER B

Patty's Ethical Violations

Attorneys have a duty to represent their clients with diligence, competence and zealous representation. The attorney must conform their conduct with their client, courts, opposing counsel and other parties within the rules under the Business and Professions code and Ethical codes of conduct. Generally, the ABA and California are the same but I will note when they are different.

Here, Patty as prosecuting attorney has a duty to zealously represent the state and conform her conduct with the professional rules and uphold the integrity of our legal system. Patty has potentially violated some of these rules which will each be discussed in turn below.

Statements to the Public/Media

Patty likely committed an ethical violation when she knew the police chief was planning to issue a press release to the media containing prejudicial statements about Dave that would adversely affect his right to a fair trial and impartial jury.

An attorney may not make extrajudicial statements that would inhibit a defendant's right to a fair trial. An attorney cannot make statements about a trial that would prevent the selection of an impartial jury or prejudice the defendant. It is important public policy that the community not be tainted by these statements to the media; otherwise a defendant will be unable to obtain a fair trial with an impartial jury. However, there are a few matters where an attorney may make a statement to the public such as any defenses to the crime charged and an attorney may respond to accusations by another attorney. In other words, the attorney can make statements in rebuttal of any prejudicial statements made by opposing counsel. Without allowing statements of rebuttal the jury selection would be tainted and prevent a fair trial for the defendant. Statements may also be

made when the police are still conducting an investigation and are seeking help from the public. For instance, looking for witnesses or information regarding persons of interest or whereabouts.

Here, Patty is a prosecutor bringing burglary charges against Dave. Patty is arguably responsible for statements by the police chief as he is the head of the department leading the investigation of the crime for which she is prosecuting. Patty knew of extrajudicial statements before they were made by the police chief because she saw the press release a week ago. As such, Patty has a duty to prevent any extrajudicial statements to the press by the police chief that would adversely affect Dave's right to a fair trial. Furthermore, Patty had knowledge of these statements and she knew of their potential prejudicial effect on Dave the defendant. Dave's attorney may argue Patty knew the police chief's statement contained prejudicial statements about his client because she knew the police chief was going to call Dave a "transient". Dave's Attorney will argue by telling the public Dave is a transient will have a prejudicial effect on the public. The public may infer guilt upon Dave because traditionally in our society being a transient indicates a lack of money and provides motive to rob a shoe store. Patty will counter argue statements as to the potential motive of the criminal act is a permissible statement. Patty cannot argue as a defense these statements were not made in an ongoing effort to solve a crime or gain information from the public and are thus permissible. It is possible the disciplinary boards or the court may not find the "transient" statement to have been so prejudicial as to be an ethical violation by Patty.

The second statement made by the police chief was that Dave was "arrested for burglary by Inspector Ing, who is known for his ability to apprehend guilty criminals." While the first part of the statement announcing Dave was arrested for burglary by Inspector Ing does not appear prejudicial, the police chief crossed the line with the statement "known for his ability to apprehend guilty criminals." This statement would have an extremely prejudicial effect on the public at large because he is stating Detective Ing only arrests those who are guilty criminals. Dave's right to a fair trial and impartial jury are tainted by such statements because it is telling the public by inference

of his arrest he is guilty. Again, as prosecuting attorney Patty had a duty to prevent the police chief from making prejudicial statements about Dave to the public because she had knowledge of his press release he was planning to issue.

In conclusion, it is likely Patty will be found in violation of the ethical code of conduct because she knew of the police chief's press release stating Dave was arrested by Detective known for apprehending guilty criminals.

Malicious Prosecution: Bringing Charges Without Probable Cause

Patty committed an ethical violation by bringing charges against a defendant without sufficient probable cause.

A prosecuting attorney has a duty to not bring malicious actions and may only bring charges supported by probable cause. If a prosecutor initially has probable cause to bring charges but later finds out there is no probable cause (lack of evidence, etc.) then the charges against the Defendant must be dropped. In order to have probable cause there must be facts sufficient to indicate the defendant committed a criminal act. The policy behind this rule is to uphold the integrity of our justice system by only prosecuting individuals when there are sufficient facts to constitute a cause of action. This rule also prevents undue costs and waste of the court’s time.

Here, Patty has made an ethical violation because she proceeded with the charges against Dave even after she learned the forensic investigation identifying Dave as the burglar was unreliable. Patty only initially brought the charges against Dave because of the forensic investigation identifying him as the burglar. This was sufficient probable cause because there was evidence indicating Dave committed a criminal act of burglary upon the shoe store. Thus far Patty has not committed a violation for filing charges against Dave for the burglary. However, four days ago, Patty received a report from a federal agency stating that the police department's forensic investigation identifying Dave as the burglar was unreliable. This negates probable cause to arrest Dave

because there does not appear to be any other evidence linking him to the shoe store burglary. Furthermore, it was a federal agency reporting to Patty that the investigation was unreliable. This should have been a clear indication to Patty that she did not have probable cause and thus charges against Dave should have been dropped. Patty committed a violation when three days later she announced "ready for trial" at a pretrial conference. There are no other facts to indicate Patty had any probable cause to link Dave to the burglary and thus she committed an ethical violation by bringing charges without probable cause.

In conclusion, Patty will be in violation of bringing charges against a defendant with lack of probable cause because she did not have any evidence linking Dave to the burglary and otherwise announced she was ready for trial.

Duty of Diligence and Competent Representation

Patty potentially committed a violation of diligent and competent representation when she knowingly carried out charges against Dave for burglary after learning she no longer had sufficient probable cause.

An attorney has a duty to competently and diligently represent a client with the required skill, knowledge and experience required for the matter.

Patty potentially violated her duty to represent the state diligently and competently because she did not drop the charges against Dave after a lack of probable cause. It can be argued it would have been diligent for Patty to drop the charges against Dave because once the jury is sworn in Dave cannot be charged again due to double jeopardy. If there was a lack of evidence it would have been prudent of Patty to drop the charges and await discovery of further evidence sufficient to support probable cause. This indicates a violation of her diligent and competent representation of the state (and essentially the shoe store) because she is prosecuting a defendant who may have committed the crime but will not be convicted due to a lack of evidence.

False Statement to the Court

Patty made a false statement to the court when she stated she was ready for trial at a pretrial conference but had insufficient probable cause to carry out the charges against Dave for burglary.

However, Patty will argue she did not commit a violation because she had probable cause when she learned that two eyewitnesses had identified Dave as the burglar. Patty will still be in violation because this information was obtained after she told the court she was "ready for trial" at a pre-trial conference. This may be considered a false statement to the court which is another violation of ethical conduct. By falsely telling the court she was ready for trial indicates she still had probable cause to charge Dave. However, Patty did not have sufficient probable cause at the pretrial conference because she received a report from a federal agency stating the forensic investigation identifying Dave as the burglar was unreliable. Again, no other evidence was apparent linking Dave to the shoe store burglary. Furthermore, Patty did not attempt to alert the court to this false statement and it was made knowingly because she knew the report made her forensic evidence unreliable. Thus, Patty made a false statement to the court when she told them she was ready for trial although she had lack of probable cause. By continuing trial this would result in a waste of the court's time and expenses of attorney fees upon the defendant not to mention the stress of facing criminal charges.

Although Patty will argue she had sufficient probable cause because she had two eyewitnesses to identify Dave as the burglar this evidence did not arise until after the statement was made to the court. Patty will not be able to retroactively rectify the fact she made a false statement to the court.

In conclusion, Patty made an ethical violation by giving the court a false statement that she announced she was ready for trial at a pretrial conference.

Disclosure of Evidence to Opposing Counsel

Patty will be in violation of providing exculpatory evidence when she did not disclose the federal agency's report to Dave's attorney.

A prosecuting attorney has a duty to turn over any evidence that is helpful to the defense even outside of discovery requests. This goes towards the policy of providing a defendant with a fair trial giving both parties the same evidence to use in arguing their case. A prosecutor has access to evidence and resources a defense attorney may not have, such as federal agency reports. An attorney who does not disclose such evidence will be found in violation of the codes of ethical conduct.

Here, Patty did not disclose the federal agency report to Dave's attorney. Dave's attorney is likely a public defender since Dave is a transient. The public defender's office may not have access to the federal agency report stating that the police department's forensic investigation identifying Dave as the burglar was unreliable. This evidence is beneficial and essential to Dave's case because it shows the prosecution has no probable cause to bring charges. Essentially the federal agency report making the evidence unreliable is a strong piece of evidence to argue Dave's innocence. Thus, as prosecutor Patty should have disclosed the evidence to Dave's attorney within a reasonable time of its discovery.

Patty will argue that she was not intending to use evidence from the forensic investigation so she did not disclose it to Dave's attorney. She will further argue that Dave's attorney has never asked her to provide discovery so she was not required to disclose the report and could not have committed an ethical violation where there was no duty to disclose. This defense will not stand because Patty as prosecutor had a duty to disclose the beneficial evidence to Dave's attorney of her own accord. Furthermore, Dave's attorney had no indication of knowledge of the report’s existence so he would not have known to ask for it. Thus, Patty remains in violation although Dave's attorney never specifically asked for the document.

In conclusion, Patty committed an ethical violation when she did not disclose the federal agency report which was of benefit to Dave's attorney.

Attorney Work Product Doctrine

Patty will argue the federal agency report is attorney work product doctrine and thus cannot not be turned over to Dave's attorney because of privilege. However, it is likely Dave's attorney can show undue hardship without the production of the federal agency report and thus Patty must turn over the report or will be in violation.

An attorney's work product of their thoughts, opinions, legal conclusions, labor or investigation by an agent falls under privileged information and is not discoverable by opposing counsel. However, when an attorney can show (i) a substantial need for the information or document and (ii) an undue hardship (such as excessive costs) and inability to reproduce the same document the court may grant an exception this rule. In California, the attorney needs to show a reasonable and compelling reason for the need to disclose the evidence. However, the information must be redacted (blacked out, crossed out) of any conclusions, opinions, thoughts about the case made by the attorney to whom the document belongs. This ensures the attorney's thoughts and any privileged information between themself and a client remains undisclosed to the opposing counsel.

Here, Dave's attorney will argue there was a substantial need for the information because it is proof his client is being wrongly accused for the shoe store burglary. Furthermore, Dave's attorney will have to show an undue hardship in obtaining the federal agency report and show he does not have access or it would be a great expense to duplicate the report. If the court were to grant the request then Patty's opinions, thoughts or legal conclusions about the case must be redacted or crossed out, thus keeping Patty's privilege intact and preventing inadvertent disclosures of client communications or her own legal conclusions.

In conclusion, it is likely Dave will have access to the federal agency document and Patty cannot use it in defense of her ethical violation of non-disclosure.

Extrajudicial Statements to a Judge

Patty committed an ethical violation when she made an out-of-court statement without the presence of counsel regarding the trial to the presiding judge.

An attorney may not make extrajudicial statements to the presiding judge regarding the case matter (outside of logistical issues) without the presence of other counsel or their knowledge. This prevents a prejudicial effect on the judge who will be presiding over the case and protects the defendant's sixth amendment right to a fair trial.

Here, Patty called the judge who will be presiding over Dave's trial to reassure him that there is ample non-forensic evidence to convict Dave. This is a statement out of court because Patty called the judge by telephone. Furthermore, Patty's statement was made to the judge without the presence of Dave's attorney. Patty's statement to the judge was regarding a matter for trial when she was telling the judge about evidence not yet admitted or presented at trial. Patty also "reassured" the judge there was ample non-forensic evidence to "convict" Dave. This statement puts in the mind of the judge Dave is guilty. Dave may waive his right to a jury trial and have a bench trial where the judge decides whether or not he is convicted. Thus Patty has given the judge information about the evidence not yet presented at trial. This was a clear ethical violation by making a prejudicial statement to the judge presiding over the burglary case and outside the presence of Dave's attorney.

In conclusion, Patty committed an ethical violation when she gave prejudicial information outside of trial to the judge that there was ample non-forensic evidence to convict Dave.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

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Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 3

Alice's and Bob's law firm, AB Law, is a limited liability partnership. The firm represents Sid, a computer manufacturer. Sid sued Renco, his chip supplier, for illegal price-fixing.

Renco's lawyer asked Alice for a brief extension of time to respond to Sid's interrogatories because he was going on a long-planned vacation. Sid told Alice not to grant the extension because Renco had gouged him on chip prices. She denied the request for an extension. Sid also told Alice that he'd had enough of Renco setting the case's pace, so he wasn't going to appear at his deposition scheduled by Renco for the next week, and that he'd pay his physician to write a note excusing him from appearing. Alice did nothing in response.

In the course of representing Sid, Alice learned that Sid planned a tender offer for the publicly-traded shares of chipmaker, Chipco. Alice bought 10,000 Chipco shares. By buying the 10,000 Chipco shares, she drove up the price that Sid had to pay by $1 million. When Alice sold the 10,000 Chipco shares, she realized a $200,000 profit.

1. What ethical violations, if any, has Alice committed regarding:

    a. The discovery extension? Discuss.

    b. The physician's note? Discuss.

    c. The Chipco tender offer? Discuss.

    Answer according to California and ABA authorities.

2. What claims, if any, does Sid have against Alice, AB Law, and Bob? Discuss.

QUESTION 3: SELECTED ANSWER A

Governing Law: California is governed by the California Rules of Professional Responsibility as well as certain sections of the business code. The ABA has promulgated its Model Code of Professional Responsibility as well.

(1) What ethical violations, if any, has Alice committed regarding (1) the discovery extension, (2) the physicians' note, or (3) the Chipco tender offer?

Discovery Extension:

Duty of Fairness: An attorney has a duty of fairness to the opposing party to act in good faith. While an attorney has no duty to accept all requests made by opposing counsel if not required, and while an attorney has a competing duty to her client to act in the client's best interests and should advocate for her client's interests zealously, denial of a good faith request for a short extension may be considered a breach of A's duty of fairness to opposing counsel.

Here, Alice ("A") represents Sid ("S") in suing Renco ("R"). R's attorney has requested a brief extension to respond to interrogatories. The reason for R's request is to go on a long-planned vacation. Without a showing that R's counsel has continuously attempted to delay the litigation by asking for continuances and extensions, A's duty of fairness likely requires her to accept such brief extension. Her denial is based on her client's order that it not be granted for no other reason than "because R had gouged him on chip prices". Because if R's counsel requested an extension from the court based on good reason it might well be granted, it is improper for A to require such unnecessary resort to the court. A has likely violated her ethical duties of fairness.

Duty of Loyalty: An attorney has a duty of loyalty to always act in her clients' best interests and not to engage in conflicts of interest or compete with the client.

Here, A will likely argue that her duty of loyalty to S requires that A not fail to acquiesce to her client's requests. However, the duty of loyalty does not extend this far. An attorney must not advocate for her client to the point that it causes her to make other ethical violations.

Scope of Decision-Making: While the client has the right to state which claims he or she wishes to pursue and make major decisions regarding settlement or whether to plea, etc., it is within the attorney's scope of authority to determine the proper strategy for effectuating these goals.

A should not allow S to "order" her to deny the extension based on no substantive reason. This is within A's scope of authority to decide, and A should not acquiesce to a bad-faith denial of a good-faith request. If A and her client cannot agree on the scope of representation, withdrawal from the case may be appropriate to avoid A being pulled into improper conduct.

Physician's Note:

Duty of Candor/Honesty: An attorney must not make any false representations to the court or opposing counsel, and must not allow her client to make any false representations to the court.

Here, A has stated that he is going to bribe his doctor to get a note to excuse him from appearing at his deposition. This will constitute a fraud upon the court because it is not true that D is unavailable. Further, there is no valid reason for S to fail to appear at his deposition. An attorney can breach his or her ethical duties by failing to speak when she has a duty to counsel her client against illegal or fraudulent activity and advise him that he or she cannot be a part of such conduct. Here, when A failed to respond to S's statement, she impliedly acquiesced in his proposal. This is an ethical violation because it will cause A to participate in a fraud upon the court and will violate her duty of candor.

Withdrawal: An attorney must withdraw from a case when she learns of conduct that will constitute a crime or fraud that will necessarily involve the lawyer's services. If it will not involve the lawyer's services, the attorney may but does not need to withdraw.

Here, paying one's doctor to write a false note excusing him from appearing may constitute such improper behavior that reflects poorly upon the profession. Such conduct is clearly in bad faith and relates directly to the representation, directly involving A. Thus, A should have withdrawn from the representation had she not been able to dissuade S from failing to appear at his deposition for a fraudulent reason because she will necessarily be involved.

Duty of Confidentiality: An attorney has a duty of confidentiality not to disclose any information related to the representation of the client. However, there is an exception to this rule which allows disclosure if the attorney learns that the client plans to commit a crime or fraud. Further, California imposes a duty on an attorney who has learned that his client plans to commit a crime or fraud to attempt to dissuade the client from his proposed actions and further, if that fails, to tell the attorney that the attorney plans to disclose the information to the appropriate authorities.

Here, it is unclear the length S plans to go to in order to get him a "note". However, this likely does not constitute an actual crime or fraud, so A likely has no right to breach her duty of confidentiality to her client. Since she has not, she has not violated this rule.

Duty to Diligently Pursue Completion of the Case: An attorney has a duty to diligently pursue a case to completion without allowing it to languish in the court system.

Here, by impliedly acquiescing in S's statement that he plans to fail to appear at his deposition, this will require a further scheduling out of a deposition at a time convenient

for the parties and court reporter. This is a bad faith delay of the case that constitutes breach of A's ethical duties.

Chipco Tender Offer:

Duty of Loyalty: As stated above, an attorney has a duty of loyalty to her client to always act in the best interests of the client. This includes not acquiring an interest adverse to the interest of the client. California allows an attorney to obtain an interest adverse to that of her client in certain circumstances.

Here, when A learned of S's plan to make a tender offer for the publicly traded shares of Chipco, she immediately purchased Chipco shares and then sold them for a $200,000 profit. A's acquisition of these funds constitutes a breach of A's duty not to obtain an interest adverse to her client's, because the price S had to pay on the shares was raised by one million dollars. A has caused serious financial injury to S by acquiring an adverse interest and essentially taken a profit that should have gone to S. In doing so, A has breached her ethical duties.

Conflict of Interest: An attorney has a concurrent conflict of interest when there is a substantial likelihood that her ability to represent her client will be materially limited by her own personal interests, her duties to another client, a former client, or a third party. An attorney may take on the representation despite the concurrent conflict of interest if the attorney can believes that she can competently and adequately represent the interests of the parties, and if she obtains written consent from all involved parties. California has no "reasonable lawyer" standard and does not require written consent, only written notice, when the interest is personal to the lawyer.

Here, in gaining a personal interest in Chipco, A may have created a conflict that will materially limit her representation of S. However, A may argue that this is a deal on the side and is unrelated to the subject of the litigation in which she represents S; and further, A may argue that ownership of the shares has no bearing on her representation of S. If the court determines that she has acquired a conflict of interest, A has breached

her duty by failing to get written consent. In California, she has further breached her duty by failing to give written notice to S.

Duty of Confidentiality: See above. In using confidential information S provided to her in telling her about the tender offer for her own benefit, A may have breached her duty.

(2) What claims, if any, does S have against A, AB Law, and B?

Limited Liability Partnership: A limited liability partnership is a special type of partnership that affords limited liability to all its partners, created by filing a Statement of Qualification with the Secretary of State. In a limited liability partnership, the individual partners are not personally liable for any damages sustained by the partnership itself.

A: See above.

A will be personally liable for her own torts.

B: See above.

Because B is a partner in an LLP, he has limited liability. Thus, S will have no claim against Bob ("B") A's partner.

AB Law:

Authority: A partnership is liable for its partner's actions if the partners have authority to act for the partnership. Authority may be actual (express or implied), apparent, or ratified. Actual authority exists where a reasonable person in the agent's position would believe he had the right to act on behalf of the business. This may be express, through an agreement, or implied, through actions or conduct. Apparent authority exists where a reasonable person in the shoes of the third party believed that the person had authority to act. Ratification occurs where no authority exists but the business has

adopted the contract through action such as accepting its benefits. A partner in a partnership has both apparent and implied authority to act on behalf of the partnership.

Here, as a partner of AB law, A has actual authority to act on behalf of the partnership. Her acts taken in the scope of her law practice will thus subject the partnership to liability. Thus, A will both be personally liable for her own torts, and S will further be able to collect against AB Law for her actions.

Unjust Enrichment:

Here, S will sue A personally and AB Law for likely malpractice for losses caused by her breaches of her duties. Her misconduct has led to a loss by S of 1 million dollars, and has resulted in a gain to A of $200,000. In equity, a court may under unjust enrichment theory disgorge profits made by someone and impose a constructive trust. A constructive trust is not truly a trust but is an equitable remedy imposed by the court which forces the wrongdoer to hold unjustly realized profits in trust for the benefit of the rightful owner. Because she has been unjustly enriched by action taken in breach if her duties to S, the court will likely impose a constructive trust on the profit realized by A and will thus force A as trustee of these funds to distribute them to their proper owner, S.

Intentional Interference with a Business Expectancy: Intentional interference with business expectancy occurs where a person knows of a business expectancy of another party and knowingly interferes with that expectancy, resulting in damages. Here, S had planned a tender offer with C. Her actions in purchasing Chipco shares may constitute an interference with this expectancy with S, although A will argue that this expectancy is not yet an enforceable contract and that she has a valid defense of fair competition. This will be balanced by the court.

QUESTION 3: SELECTED ANSWER B

Discovery Extension

Scope of Representation

A client usually determines the ends (goals) of a representation, whereas the lawyer generally determines the means (legal strategies). If a client is insisting upon actions that the lawyer does not wish to take, the lawyer may limit the scope of employment through informed written consent by the client. Here, it appears that Alice let Sid influence her legal decision-making by telling her to deny the request for an extension to respond to Sid's interrogatories. This type of decision should normally be decided by the lawyer because it falls into legal strategy. Although it is permissible for the lawyer to seek the client's input, the final decision should ultimately be left up to the lawyer. Alice let Sid control the litigation means.

Fairness to Opposing Counsel/Adverse Parties

A lawyer should treat opposing counsel and adverse parties fairly during the representation. A lawyer should not engage in certain actions if it is known to be for the purpose of harassing or making a task unduly burdensome for opposing counsel/adverse party. Here, Sid told Alice to reject the request to extend the time for answering the interrogatories. Renco's lawyer asked for a reasonable "brief extension" to respond since he was going on a long-planned vacation. This seems to be a reasonable request and is not an attempt by Renco's attorney to delay for an improper purpose. Sid's reasons for wanting to deny the extension, however, would be considered improper. He denied the request because Renco had "gouged hi on chip prices," so he was acting out of spite. He told this directly to Alice, so she knew his improper motives. She should have counseled him to allow the extension since it was a reasonable request and made clear that Sid's motives were improper. Because she did not do this, Alice violated her duty of fairness to Renco and its lawyer by furthering her client's improper purpose.

That being said, a lawyer does owe a duty to her client to diligently dispose of the case (work productively and not delay unnecessarily). If for some reason the extension requested was unreasonable, or it had been one of many requests for extensions, then perhaps Alice would be justified in denying the request. She has a duty to her client to make sure that his case is handled efficiently and effectively. The facts do not suggest this was the case, but if it was, then again it is possible she may not be in violation of an ethical duty.

Physician's Note

Duty of Candor

A lawyer owes a duty of candor to opposing counsel, adverse parties, and the court. A lawyer must not submit evidence that she knows to be false or make a false statement of fact or law that she knows to be untrue. If she makes such a statement without knowing it is false and later learns of its true nature, the lawyer has a duty to correct the evidence or testimony.

Sid told Alice he was not going to appear at his deposition for Renco the next week because he'd had enough of Renco setting the case's pace. He also told Alice that he was going to pay his physician to write a note excusing him from appearing at the deposition. Alice did nothing in response. Alice knows that Sid is not sick and that he just does not want to attend the deposition. He is going to get a fake doctor's note written to excuse him, so this would be false "evidence" or a false statement of fact being presented to the opposing side. Alice has a duty not to allow such false information to be presented to the other side. That being said, there is a conflict with her duty of confidentiality to Sid not to disclose his statements to her since they were made during and related to the representation.

A lawyer owes a duty of confidentiality to her client for anything related to the representation, even if not made by the client. Under the ABA, a lawyer may reveal confidences if the client persists in engaging in criminal or fraudulent conduct that will

result in death or serious bodily harm, or if the lawyer's services are being used to perpetuate a crime or fraud by client that will result in serious financial harm. California does not have an exception for financial losses. Neither of these exceptions appears to be present. Sid's actions will not cause harm to anyone to the extent of death or serious bodily harm. It may pose a financial burden on Renco because they have to pay the lawyer for time that was spent preparing and now it will be postponed, but the amount spent is not likely to satisfy the requirement of financial harm under the ABA. Therefore, since no exception applies, Alice cannot reveal Sid's confidences.

So Alice cannot reveal the confidences but she must not present false evidence. What she should have done is counseled Sid by trying to get him to show up for the deposition and not pay a doctor to make a false note. If that did not work, then she should have withdrawn from the representation since he was persisting in engaging in fraudulent conduct. If the withdrawal would be harmful to Sid, a court might not let her withdraw and it may request why she is choosing to withdraw. If that is the case, then Alice may reveal Sid's confidences regarding the letter. Because Alice did not take these steps and said nothing when Sid mentioned a fake doctor's note, she breached her duty of candor to Renco and its lawyer.

Duty of Fairness

Again, as mentioned earlier, Sid has improper motives for wanting to submit the doctor's note and not attend the deposition. He wants to regain control of the pace of the litigation and is acting out of spite toward Renco for the price he was charged for the chips. Alice should know based on the comments Sid has made to her that he only wants to delay the case for improper purposes. Because she is aware of this, Alice is violating her duty of fairness to opposing counsel and adverse party.

Chipco Tender Offer

Duty of Loyalty

A lawyer owes a duty of loyalty to her client. If the interests of another client, the lawyer, or a third party materially limit the lawyer's ability to effectively represent the client, then she has a conflict of interest. The lawyer must act in the best interest of the client. Tied with the duty of confidentiality mentioned below, a lawyer also cannot use information learned during the course of the representation to the disadvantage of her client.

Alice used the information she learned from Sid during the representation that Sid was going to make a tender offer to her advantage by purchasing shares of the stock and driving up the price. Alice benefitted by realizing a $200,000 profit while Sid had to pay $1 million more than he would have before she purchased the shares. Alice was looking out for her interests first and negatively impacted her client's interests in the process. Because she subordinated her client's interests to her own, Alice violated the duty of loyalty she owed to Sid.

Duty of Confidentiality

A lawyer owes a duty of confidentiality to her client. She must not reveal any information related to the representation that she learns, and she must not use that information to the disadvantage of her client.

Here, Alice learned while representing Sid that Sid planned to tender offer for the publicly-traded shares of Chipco. She used this information to Sid's disadvantage by purchasing 10,000 Chipco shares, which drove up the price that Sid had to pay. Although this purchase is unrelated to the representation, it involved information learned during the representation. The duty of confidentiality is broad and covers any information related to the representation. Alice may try to argue that this information is unrelated to Sid's illegal price-fixing claim against Renco, but it would likely be found to be covered by the duty of confidentiality. Price-fixing involves the market of that particular industry, and if Sid intends to make a tender offer for a competitor chipmaking company, it would affect the same market involved in the litigation that she is representing Sid for against Renco. Therefore, a court would find that the information is attenuated but still within the realm of the confidences covered by the duty of

confidentiality. Since Alice used the information against Sid to his disadvantage, she violated her duty of confidentiality.

Sid v. Alice, AB Law, and Bob

AB Law is a limited liability partnership (LLP). A limited liability partnership operates almost exactly the same as a general partnership except the partners in an LLP are not personally liable for the debts of the partnership like they are in a general partnership. Therefore, the partnership is liable for the negligent acts (but not intentional torts) of its partners but the other partners are not personally liable for different partner's negligent acts or debts of the partnership. A partner always remains liable for her own actions.

Alice

Alice obviously violated several of her ethical duties. The breach of the duty of loyalty that she committed against Sid by purchasing Chipco stock caused actual pecuniary harm to her client. This was an intentional act on Alice's part. Under her breach of the duty of loyalty, since she financially benefitted from her actions, realizing a $200,000 profit from buying and selling her shares of stock, she would be liable to Sid for profits realized as a result of her breach of the duty of loyalty. Therefore, Alice is personally liable for $200,000. She may also be liable for the harm caused to Sid by the breach. Sid had to pay $1 million more than he otherwise would have if Alice had not purchased the shares. But for Alice's purchase of the stock, Sid would not have had to pay $1 million more for the tender offer. It was also foreseeable to Alice that if she purchased the shares, it would drive the price of the stock up for Sid's tender offer. Therefore, she is also liable as the actual and proximate cause of Sid's loss due to her breach. Alice is personally liable for $1,200,000 to Sid.

As for a specific claim, Sid may be able to claim misappropriate. Alice was in a relationship of trust and confidence with him as a fiduciary. Sid had nonpublic information that most people would find material, meaning it was affect whether someone would purchase a stock or not. Sid did not tell this information to Alice for an

improper purpose and surely did not anticipate she would use the information to purchase stock. Therefore, Sid would not be a tipper and Alice cannot be a tippee. But she can be a misappropriator since she was in this fiduciary relationship with the source of the non-public material information and she purchased stock in reliance on that information. Therefore, she is liable to Sid for the same amount of damages mentioned above because they were profits that would need to be disgorged and harm caused from her misappropriation.

Bob

Because these actions were taken by Alice, even if the partnership is liable, Bob cannot be personally liable for the harm caused by Alice. It is a limited liability partnership, so partners are not personally liable for the debts of the partnership or torts of other partners. Therefore, Sid does not have any claims against Bob.

AB Law

A partner is an agent of the partnership and thus can bind the partnership to certain obligations. The partnership is also liable for the negligence or non-intentional torts committed by partners while in the scope of employment for the partnership.

Here, Alice was working as Sid's lawyer when she learned the information that she misappropriated from him. Her actions, however, would likely be considered beyond the scope of her employment as a partner. She took the information and used it for personal reasons. If she had, for example, not filed an important document on time resulting in a dismissal with prejudice, then Sid could sue for malpractice and the LLP would be liable because the claim arose from her duties as a lawyer. This harm caused to Sid was not because of Alice's actions as an attorney for Sid. Therefore, a court would likely find that the LLP is not liable for Alice's actions and Sid has no claim against AB Law. If the court did find her actions were within the scope of her duties as a partner, then AB Law would also be liable for the losses Sid incurred.