



California
Bar
Examination

Essay Questions
And
Selected Answers

February 2013



THE STATE BAR OF CALIFORNIA

OFFICE OF ADMISSIONS

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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.

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California Bar Examination

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts 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 the 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 that 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.

Question 1

Max imports paintings. For years, he has knowingly bought and resold paintings stolen from small museums in Europe. He operates a gallery in State X in partnership with his three sons, Allen, Burt, and Carl, but he has never told them about his criminal activities. Each of his sons, however, has suspected that many of the paintings were stolen.

One day, Max and his sons picked up a painting sent from London. Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources, from a small British museum.

Max believed the painting that they picked up was the stolen one, but he did not share his belief with the others.

Having read an article about the theft, Allen also believed the painting was the stolen one but also did not share his belief.

Burt knew about the theft of the painting. Without Max's knowledge, however, he had arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later.

Carl regularly sold information about Max's transactions to law enforcement agencies and continued to participate in the business for the sole purpose of continuing to deal with them.

Are Max, Allen, Burt, and/or Carl guilty of:

- (a) conspiracy to receive stolen property,
- (b) receipt of stolen property with respect to the copy of the stolen painting, and/or,
- (c) attempt to receive stolen property with respect to the copy of the stolen painting?

Discuss.

ANSWER A TO QUESTION 1

(a) Max, Allen, Burt, and Carl's liability for conspiracy to receive stolen property

Max

The issue is whether Max is liable for conspiracy to receive stolen property.

Conspiracy requires (i) an agreement, express or implied, to accomplish an unlawful objective or to accomplish a lawful objective with unlawful means, (ii) an intent to agree to commit conspiracy, (iii) an intent to achieve the unlawful objective, (iv) an overt act in furtherance of the objective of the conspiracy.

(i) Agreement

There was no express agreement among Max and any of his sons, Allen, Burt, and Carl that the paintings were stolen. Max has knowingly bought and resold paintings stolen from small museums in Europe, and operates a gallery in State X with his sons. Max never told them about his criminal activities; thus there was no way they could have expressly agreed to commit the conspiracy. However, Max and Ted have an agreement, because Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources.

There was no implied agreement among Max and his sons because there is no circumstance or conduct to indicate that they were in agreement. Max never affirmatively ensured that his sons were additionally compensated for keeping it a secret that they were undergoing criminal acts, nor had any of them given Max an indication confirming their understanding even if no explicit words were exchanged regarding the conspiracy. Here, each of his sons suspected that many of the paintings were stolen. However, Max had no idea that his sons might be aware. When Max picked up the painting that he thought was stolen, he did not share this belief with the others.

(ii) Intent to agree to the conspiracy

There must be at least two guilty minds to be liable for conspiracy. Under the minority jurisdictions, unilateral intent is sufficient if the guilty mind genuinely believed that the other non-guilty mind had the intent to agree to the conspiracy. There was no intent to agree to commit the conspiracy because Max never shared his beliefs with the others that he was dealing with stolen paintings. Here, Burt did not share his knowledge about the theft of the painting. Nor did Carl have an intent to agree, because he was solely continuing to participate in the business for the sole purpose of selling the information to the police. Thus, there could not have been an intent to agree to the conspiracy with either Burt nor Carl based on the majority rule. Under the minority approach, there is still no intent to agree because the facts indicate that Max did not tell Carl about his illegal activities and nothing suggests Carl shared his information with Max. Because there was no agreement in the first place among Max and any of his sons, Max did not have the intent to agree to commit the conspiracy.

Max and Ted have the intent to agree to the conspiracy, as evidenced by Max's arrangement to pick up the painting that Ted stole.

(iii) Intent to achieve the unlawful objective

There must be an intent to achieve the objective, which here is the intent to receive stolen goods. Max had the intent to receive the stolen goods because he has knowingly bought the paintings stolen from small museums in Europe.

(iv) Overt act in furtherance of the objective

There must be an overt act in furtherance of the objective, which is anything including mere preparation. Here, Max committed an overt act when he picked up the painting which he thought was the stolen painting.

Max is guilty of conspiracy with Ted.

Allen

See rule above.

(i) Agreement

Allen did not enter into an agreement to commit the conspiracy because even though he suspected that many of the paintings were stolen, and that he believed the one stolen by Ted was stolen, he did not share his belief with others.

(ii) Intent to agree

Allen did not intend to agree to the conspiracy because he did not share his belief that the painting may have been stolen with others. He only learned that the painting was stolen from reading an article and not from the other members.

(iii) Intent to achieve the objective

Allen may have had the intent to achieve the objective because he did nothing to stop the receipt of the stolen paintings.

(iv) Overt act

An overt act was the picking up of the painting sent from London.

Thus, Allen is not liable for conspiracy.

Burt

See rule above.

(i) Agreement

Burt made no agreement to enter into the conspiracy, because even though he suspected that they were stolen, and knew about the painting, he did not share his knowledge with the others. However, Burt has an agreement to enter into the conspiracy with Ted, because he arranged for Ted to send Max a copy of the stolen property and to retain the stolen painting itself for sale later.

(ii) Intent to agree

Burt had no intent to agree with the others, because he did not tell Max, and he arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later. However, Burt had the intent to agree with Ted, given that Ted was the other end of the deal and he arranged for Max to receive the stolen painting.

(iii) Intent to achieve the objective

Burt had the intent to achieve the objective because he knew the painting was stolen, and was going to sell it later at a more convenient time to gain a personal benefit.

(iv) Overt act

Overt act was committed when they picked up the painting from London.

Thus, Burt is liable for conspiracy with Ted.

Carl

See rule above.

(i) Agreement

Carl made no agreement to enter into the conspiracy.

(ii) Intent to agree

As discussed under Max's discussion, in the majority jurisdiction, because two guilty minds are necessary, there is no intent to agree since Carl was acting solely to sell the information to the police, and not to actually engage in the unlawful conduct. However, under the unilateral approach, one guilty mind, Max's guilty mind, would be sufficient for Max to be guilty of conspiracy. However, Carl would not be liable because he has no intent to agree himself.

(iii) Intent to achieve the objective

Carl has no intent to steal property, but is only participating to sell the information to the police.

(i) Overt act

Overt act was committed when the painting was received from London.

Conclusion

Because there is no agreement to conspire, neither are liable for conspiracy with each other, but Burt and Max are liable for conspiracy as a result of their individual agreements with Ted.

(b) Max, Allen, Burt, and Carl's liability for receipt of stolen property with respect to the copy of the stolen painting

Co-conspirators are liable for the target crime and any crimes committed in furtherance of the conspiracy. As above, anyone who was liable for the conspiracy would be liable for the crime of receipt of stolen goods. However, the target crime of receipt of stolen goods did not occur because it was a copy of the stolen painting. Thus, no liability for the target crime at this point.

Receipt of stolen property requires (i) receipt or control of stolen property, (ii) of personal property by another, (iii) with the knowledge that the property was obtained in a way that constitutes a criminal offense, (iv) with the intent to permanently deprive.

Max

Max knew the property was obtained in a way that constituted a criminal offense, because he arranged to buy the painting recently stolen by Ted, one of his criminal sources. A painting is personal property, and it was stolen by another, Ted. He had the intent to permanently deprive because his motivation was to resell the stolen paintings. However, he did not actually receive or come into control of the property because the one he received was actually not stolen. Thus, he is not liable.

Allen

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

Burt

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

Carl

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting. Further, Carl did not have the intent to permanently deprive because he was only working with the police so that the police could regain the stolen property and return it to its rightful owner.

Conclusion

Because no one actually came into receipt or control of the stolen property, they cannot be liable for the copy of the stolen painting.

(c) Max, Allen, Burt, and Carl's liability for attempt to receive stolen property with respect to the copy of the stolen property

Attempt requires the specific intent to achieve the criminal act and a substantial step in the direction of the commission of the act or dangerously close to the commission of the act.

Max

Max had the specific intent to receive stolen property. He believed that the painting was the stolen one. Even an unreasonable mistake would negate specific intent. However, if the facts were as he believed them to be, it would have been a crime, and thus, his intent cannot be negated. Mistake of fact is no defense. He committed a substantial step when he picked up the painting from Ted.

Allen

Allen also believed the painting was stolen because he read an article about the theft. Even if the stolen painting was not actually stolen, mistake of fact is no defense, and the

act would have been criminal had the facts been as he believed them to be, and thus, he is also liable for attempt.

Burt

Burt knew about the theft of the painting. He had specific intent to receive the stolen painting. But as to this copy, he had arranged for it to be simply a copy, and had told Max to retain the stolen painting for sale later. Thus, he had no specific intent to receive stolen property when he picked up the copy of the painting. Thus, he is not liable for attempt.

Carl

Carl suspected that many of the paintings were stolen. However, he did not have the specific intent to receive stolen property. He did not intend to permanently deprive because he was merely working with the police.

Conclusion

Max and Allen are liable for attempt, but Burt and Carl are not.

ANSWER B TO QUESTION 1

A. Conspiracy to Receive Stolen Property

The crime of conspiracy requires: (1) an agreement between two or more people to accomplish an unlawful or fraudulent purpose, and (2) an overt act taken in furtherance of the conspiracy. Under the majority rule, all parties to the conspiracy must agree to pursue the unlawful or fraudulent purpose; however, under the minority rule, the agreement of only one participant is sufficient to establish the conspiracy (for instance, in circumstances where one participant conspires in an effort to commit a crime and the other is an undercover law enforcement officer). Regarding the overt act requirement, nearly any act taken by any co-conspirators in furtherance of the unlawful objective will suffice.

Co-conspirators are liable for both conspiracy as a separate crime, for and all foreseeable crimes committed by any co-conspirators in furtherance of the unlawful objective. There is no doctrine of merger applied to conspiracy, and thus one may be convicted of both conspiracy and the underlying crime(s) committed in furtherance of it. A co-conspirator need not personally participate in an underlying crime committed by a co-conspirator in furtherance of the conspiracy, so long as the crime was a foreseeable result of the unlawful objective.

In this case, there was no express or implied agreement between M, A, B, and C to receive the painting stolen by and acquired from T. Agreement among co-conspirators need not be in writing and need not even be expressed orally, but rather can be implied from conduct and knowledge under the circumstances. However, there must be some evidence of an understanding and meeting of the minds among the parties of the conspiracy that they will pursue an unlawful objective for conspiracy liability to occur. Here, while M certainly had the requisite knowledge and intent to receive stolen property, he did not do anything to obtain the agreement of A, B, or C to do anything in furtherance of that objective. In fact, M never told any of his sons that he regularly

bought stolen paintings from Europe, nor did he share his belief as to the specific painting in question being the stolen one. Far from agreeing with them to receive stolen property, he was trying to shield them from that fact. Moreover, the mere fact that A, B, and C suspected their father's nefarious activities does not suffice to create an implied agreement between any or all of them and him to pursue that common unlawful objective, as they neither shared those suspicions and/or knowledge with M or with each other. Nor does it matter that A believed the painting was stolen (and that the one they picked up was the stolen one), as he never did anything, through words or conduct, to share that belief. The same is true for B and C -- though each independently suspected or knew of their father's activities, there is nothing to suggest that through words or conduct, an agreement was reached between M, A, B, and C (or any subcombination of them) to receive stolen property. Thus, there is no conspiracy liability for M, A, B, and C here.

Moreover, if evidence of an agreement existed, there would also be a question as to whether C's role sufficed to show an agreement among the co-conspirators. As noted above, under the majority rule, all co-conspirators must agree to pursue an unlawful objective. Thus, C's status as informant to law enforcement and participation for the sole purpose of continuing to deal with law enforcement would destroy his agreement to further the objective in question. As a result, under the majority rule there would be no conspiracy for this reason as well. Under the minority rule, however, the agreement of only one participant will do, and thus there would be an agreement, if evidence of it existed, notwithstanding C's status.

If evidence of such an agreement did exist, however, the overt act requirement would be satisfied. The four of them going to pick up the painting that T had sent from London would qualify as an overt act in furtherance of a conspiracy, as nearly any conduct that is in furtherance of the objective in question will qualify.

Further, if an agreement existed, the defense of impossibility would not be available to M and his sons. While a defense of legal impossibility would work (i.e., if the objective of

the conspiracy is not actually illegal, there can be no conspiracy liability for agreeing to commit a lawful act), here the defense would be factual impossibility (i.e., that though they had hoped to receive a stolen painting, it was not in fact the stolen one but rather a copy). Factual impossibility is not a defense to crimes in general, nor is it to the crime of conspiracy, and thus if evidence of an agreement had existed it would not prevent their guilt.

Lastly, M and T may well be guilty of conspiracy to steal and/or receive the stolen painting. M and T agreed for T to sell the stolen painting to M, and T took the act of sending the copy and arranging for payment in furtherance of the conspiracy. Similarly, B has conspired with T, and if he receives the stolen painting from T, he may face conspiracy liability for the theft and/or receipt or sale of the painting as well.

B. Receipt of Stolen Property

The crime of receiving stolen property requires that the defendant: (1) receive property that has been wrongfully taken from the rightful owner with the intent not to return it to its true owner, and (2) know that the property in question was wrongfully taken from its rightful owner. A defendant's knowledge may be express or implied under the circumstances, and, furthermore, the knowledge requirement may be met if the defendant under the circumstances is "willfully blind" to the fact that the property has been stolen.

In this case, however, the painting that M, A, B, and C received was not in fact stolen. Thus, they will not be guilty of having received stolen property based on their receipt of the copy. However, if B later does receive the true stolen painting from T, he would be guilty of this crime. With regard to receipt of the copy, however, B is not guilty for the reason that the copy was not stolen and for the additional reason that he knew that it was not the stolen item in question, and thus could not be found to have known or be willfully blind to the fact that it was stolen.

M, A, B, and C might also argue factual impossibility, as discussed above. However, since one of the prima facie elements of this crime is that the property is in fact stolen and that element is not met under these facts, there is no need to apply this defense here.

If M and his sons had received the authentic stolen painting, even in the absence of a conspiracy agreement among them, each of M, A, B, and C would be guilty of this crime. M and B plainly knew it was stolen, and A believed it was from the article, making his knowing receipt of the true article a crime (absent his immediately returning it to the authorities). C regularly sold information about M to the authorities, and thus also likely knew the painting was stolen. Thus, if they had received the true painting, each would be guilty of receipt of stolen property.

C. Attempt to Receive Stolen Property

Attempt is a specific intent crime. It requires: (1) that the defendant take sufficient action toward the completion of a crime, and (2) specifically intend to commit that crime. There is a split of authority as to the appropriate test to use for determining whether a defendant has done enough to constitute an attempt. While all courts agree that "mere preparation" for the crime is not sufficient to impose criminal attempt liability, some courts require that the defendant take a substantial step toward the commission of the crime. Other courts require instead that the defendant come dangerously close to succeeding in committing the underlying crime in question. Unlike conspiracy, the crime of attempt is subject to the doctrine of merger, meaning that if a defendant actually does commit the underlying crime, the attempt merges into the completed crime, and the defendant thus cannot be liable both for attempt and for the completed crime.

M and A: In this case, M knew the painting had been stolen and believed the copy was the real thing, and A also knew it had been stolen and believed that this one was the real thing. Thus, M and A each specifically intended to commit the crime of receiving stolen property. Moreover, each took a substantial step toward doing so, and came

dangerously close, by picking up the copy of the painting. But for B's dirty double-crossing of his father and brothers, M and A would have succeeded in committing this crime. Thus, each of M and A is guilty of attempt to receive stolen property, regardless of the fact that the painting they picked up was a copy.

M and A will argue factual impossibility, as discussed above. However, this defense will fail, as factual impossibility is not a defense in general, nor is it a defense to attempt. After all, if M had tried to pickpocket someone's wallet but that person had left their wallet at home, M would nonetheless be liable for attempted larceny. So it is here with regard to attempt liability.

B: B presents a different case. Clearly he took a substantial step toward and came dangerously close to committing the crime, but he did not specifically intend to commit the crime of receiving stolen property by taking the copy of the painting. He in fact knew that the painting they picked up was a copy, and had not been stolen, and thus lacked specific intent. Thus, B would not be guilty under these circumstances for attempted receipt of stolen property by taking the copy of the painting sent from London. As noted above, he may be guilty for other conduct -- such as actually receiving the true stolen painting if T sends it to him, or for receiving proceeds of the sale of the true stolen painting under his agreement with T.

C: C, however, did believe that the painting that he picked up with the others was in fact stolen, and thus, like M and A, would be guilty for attempt. The fact that he was participating with law enforcement would not change this fact. C might be able to obtain immunity from prosecution as a result of his assistance, but absent a grant of immunity, he would be guilty along with M and A of attempted receipt of stolen property.

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.

Question 3

In 2004, Mary and Frank orally agreed to jointly purchase a small storefront space in City for \$80,000. Mary contributed \$40,000 of her own money. Frank contributed \$40,000 he had embezzled from his employer, Tanner. Mary and Frank agreed to put the property in Frank's name alone because Mary had creditors seeking to enforce debts against her. They further agreed that Frank would occupy the property, which he planned to use as an art studio and gallery. They also agreed that, if and when he vacated the property, he would sell it and give her one half of the net proceeds. He then occupied the property.

In 2005, Tanner discovered Frank's embezzlement and fired him.

In 2012, Frank sold the property, obtaining \$300,000 in net proceeds. Frank offered to repay Mary her \$40,000 contribution, but Mary demanded \$150,000.

Mary and Tanner each sued Frank for conversion.

At trial, the court found Frank liable to both Mary and Tanner for conversion.

1. What remedy or remedies can Mary reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.
2. What remedy or remedies can Tanner reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.

ANSWER A TO QUESTION 3

(1) Mary v. Frank

Mary's Remedies. There are several possible remedies Mary can obtain for the tort of conversion.

Tort of Conversion. The tort of trespass to chattels or conversion occurs when the defendant wrongfully interferes with the plaintiff's right to possess property. This tort constitutes the trespass of chattels when the interference is not so severe as to constitute conversion. The damages for trespass to chattel are the cost of repairing the property. The tort of conversion occurs when the interference with the plaintiff's personal property is substantial and severe. The damages for conversion are the fair market value of the property at the time and place of conversion.

In this case, Frank is guilty of converting Mary's 1/2 interest in the storefront space as his own. He is liable for conversion, and the damages would be 1/2 of the fair market value of the storefront space at the time of conversion. In this case, the conversion occurred when Frank failed to give Mary her 1/2 of the net proceeds. Thus, under tort law, her damages would be 1/2 of the fair market value of the storefront space when Frank failed to give Mary her 1/2 of the proceeds. If the sale of the storefront space for \$300,000 was close enough in time to the conversion, then a court can find that Mary is owed \$150,000 for the conversion.

Purchase Money Resulting Trust. A purchase money resulting trust occurs when one party purchases property, but another party supplies the consideration. The other party must have supplied consideration before the purchasing party obtains title. In such a situation, the court imposes a resulting trust on the purchasing party, construing her as a trustee holding the property in trust for the beneficiary, which is the party who supplied consideration. Because the resulting trust is a remedy implied at law, the requirements to create a valid trust are not required.

In this case, there is a purchase money resulting trust between Mary and Frank. They orally agreed to purchase a storefront space for \$80,000, and each agreed to contribute \$40,000. The title was placed in Frank's name alone, but Mary supplied one-half of the consideration required to purchase the storefront space. If Mary can show that she contributed the \$40,000 before Frank took title, then she is entitled to a purchase money resulting trust as a remedy. Mary can likely show that she contributed money before Frank took title, since the full purchase price of real property is usually conveyed before the deed to title is transferred.

Pro Rata Resulting Trust. Where the party who supplied consideration for the purchase of real property did not provide the total consideration, but only partial consideration, the court will construe a resulting trust in an interest pro rata to the amount of consideration supplied by the party.

In this case, Mary only supplied one-half of the consideration for the storefront space. Thus, she will be construed as having a 1/2 interest in the storefront space. However, the storefront space itself has been sold. Equitable rights to property are cut off by a sale to a bona fide purchaser who pays value and has no notice of prior wrongdoing. There is no indication in this case that Frank did not sell the property to a bona fide purchaser. Thus, because Frank already sold the storefront space, Mary will be deemed as having a 1/2 interest in the net proceeds from the sale. Under a pro rata share of a purchase money resulting trust, her remedy would be \$150,000, which is 1/2 of the \$300,000 in net proceeds that Frank obtained for selling the property.

Constructive Trust. Similar to the resulting trust, a court can impose a constructive trust on the defendant, which construes the defendant as holding property in trust for the plaintiffs. This remedy applies where the defendant has wrongfully obtained title to the plaintiff's property, and the defendant's retention of such property would result in unjust enrichment. The plaintiff can trace the property to another form, as long as the trust res can be identified. Additionally, the plaintiff is entitled to any increase in value in the property to avoid unjust enrichment to the defendant. Where the property has been

commingled with other funds and withdrawals have reduced the account's balance below the plaintiff's claim, the plaintiff is entitled to the next lowest intermediate balance.

In this case, Mary would argue that she obtained a 1/2 interest in the storefront property when she contributed \$40,000 for its purchase. This 1/2 interest was wrongfully appropriated by Frank when he sold the house and retained all proceeds except for the \$40,000 he was willing to give Mary. Additionally, Frank's retention of the 1/2 interest would amount to unjust enrichment because he only contributed 1/2 of the purchase price himself (and those funds were embezzled). Furthermore, Mary can trace her 1/2 interest to \$300,000 in net proceeds that Frank obtained from selling the property, she is entitled to the increase in value under the remedy of constructive trust, and there is no indication that the funds have been commingled with other funds or withdrawn to a balance lower than \$150,000. Frank would argue that he is entitled to a greater interest because he did more work by occupying the property, improving it, and selling it. However, Frank is likely to lose this argument because of the oral agreement he had with Mary. Mary is likely entitled to a constructive trust, compelling Frank to pay her \$150,000.

Equitable Lien. Similar to a constructive trust, a court can impose an equitable lien on the defendant's property in favor of the plaintiff. This remedy is appropriate where the defendant misappropriated the plaintiff's property under circumstances giving rise to a debt or obligation owed to the plaintiff, the property can be traced to the defendant, and the defendant's retention of the property would result in unjust enrichment. Like the constructive trust, the defendant can trace the property to another form as long as the res can be identified. However, unlike the constructive trust, the plaintiffs are not entitled to any increase in value in the property under an equitable lien. Where the property has been commingled with other funds and withdrawals have reduced the account's balance below the plaintiff's claim, the plaintiff is entitled to the next lowest intermediate balance.

The analysis for whether Mary would be entitled to an equitable lien is the same as the analysis conducted above for a constructive trust because Frank's misappropriation of

Mary's 1/2 interest in the property gave rise to a debt owed to Mary for that amount. However, under the remedy of equitable lien, the court would impose an equitable lien in the amount of \$150,000 in Mary's favor on the net proceeds that Frank received.

Specific Performance & Replevin. Specific performance and replevin are remedies where the defendant retains possession of the property in question. They do not apply here since Frank no longer owns the storefront property.

Damages. When a plaintiff also sues for conversion, she may be able to obtain damages for lost use of the property during the time it is wrongfully appropriated by the defendant. Mary here may be able to obtain additional damages if a substantial amount of time has passed between the conversion and her ability to obtain a remedy in court.

Frank's Defenses.

Statute of Frauds. The statute of frauds requires that any interest in real property, other than a lease for one year or less, be in a writing, signed by the party to be bound and identifying the related material terms and conditions. In this case, Mary and Frank's oral agreement pertained to an interest in real property; thus, it must be in writing in order to be enforced. Frank will most likely be able to raise the defense of statute of frauds to defeat Mary's remedies. If this is this case, Mary may be able to argue that she is entitled to restitutionary damages instead of the remedies above. Restitutionary damages grant damages in the amount that the defendant is unjustly enriched by.

Unclean Hands. Unclean hands are a defense where the plaintiff has engaged in misconduct related to the transaction sued upon. In this case, Frank would likely argue that Mary had unclean hands in the transaction because she agreed to put the title in Frank's name alone to avoid creditors who were seeking to enforce debts against her. He would argue that her avoidance of her creditors is misconduct, is related to their agreement to purchase the storefront space, and thus, bars Mary from obtaining a remedy. However, Frank's argument is likely to fail because Mary's decision to put the

title in Frank's name alone was unlawful, and her motivation to avoid creditors was not illegal. Thus, Mary's right to remedies would not be barred by unclean hands.

(2) Tanner v. Frank

Tanner's Remedies.

Tort of Conversion. See rule above. In this case, Frank committed conversion when he wrongfully appropriated \$40,000 from Tanner, rendering him liable for damages to Tanner.

Purchase Money Resulting Trust. See rule above. In this case, although Tanner was unaware of it at the time, it contributed \$40,000 to the purchase of a small storefront space in City, which was then titled to Frank. If it can show that it contributed this \$40,000 before Frank obtained title, then Tanner is entitled to a purchase money resulting trust as a remedy. It is likely that Tanner can show this, since title to property is usually transferred to the buyer after the buyer conveys the full purchase price.

Pro Rata Resulting Trust. See rule above. Since Tanner contributed only 1/2 of the consideration for the property, it is entitled to a 1/2 interest in the property. As noted above, a sale to a bona fide purchaser cuts off equitable rights to title, and there is no indication that Frank did not sell the property to a bona fide purchaser. Because Frank already sold the property, Tanner has a 1/2 interest in the \$300,000 in net proceeds from the sale.

Constructive Trust. See rule above. In this case, Tanner would argue that it obtained a 1/2 interest in the storefront property when it unknowingly contributed \$40,000 to its purchase. The 1/2 interest was wrongfully appropriated by Frank when he embezzled it from Tanner in 2004. Frank's retention of the 1/2 interest contributed by Tanner would result in unjust enrichment because the \$40,000 did not belong to Frank, and Frank supplied no consideration from his own funds to the purchase of the property.

Furthermore, Tanner can trace its 1/2 interest to the \$300,000 in net proceeds that Frank obtained from selling the property, it is entitled to the increase in value under the remedy of constructive trust, and there is no indication that the funds have been commingled with other funds or withdrawn to a balance lower than \$150,000. Thus, Tanner is likely entitled to a constructive trust in 1/2 of the \$300,000 in net proceeds, which is \$150,000.

Equitable Lien. See rule above. The analysis for whether Tanner would be entitled to an equitable lien is the same as the analysis conducted above for a constructive trust because Frank's embezzlement of \$40,000 from Tanner gave rise to an obligation to repay Tanner. However, under the remedy of equitable lien, the court would impose an equitable lien in the amount of \$150,000 in Tanner's favor on the net proceeds that Frank received.

Frank's Defenses.

Laches. Laches applies where the plaintiff has unreasonably delayed in bringing a lawsuit, and that unreasonable delay prejudices the defendant. The time for laches begins running when the plaintiff first learns of the injury. In this case, Frank would argue that he initially embezzled the \$40,000 in 2004, and Tanner discovered the embezzlement in 2005, but that Tanner did not bring suit until 2012, which prejudiced Frank. While the seven years that Tanner waited between learning of its injury and filing suit amounts to an unreasonable delay, there is no evidence that Frank's ability to defend himself has been prejudiced. Thus, Tanner cannot successfully raise this defense, unless he can show that he has been prejudiced in his ability to defend himself.

ANSWER B TO QUESTION 3

What remedy or remedies can Mary reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail?

Mary's Remedies

Mary has several avenues she can pursue to try and recover damages from Frank.

Constructive Trust

The most promising remedy Mary can pursue against Frank is a constructive trust. A constructive trust is an equitable remedy whereby a court requires a person who wrongfully acquired title to property to hold that property as a forced trustee and to return it to its rightful owner. Although it will not defeat a bona fide purchaser, it does allow tracing. Moreover, a constructive trust will allow a person to recover any increase in value of the property. This remedy is generally only allowed when money damages would be inadequate.

Here, Mary will argue that she and Frank both owned the property and that he converted the property they owned when he sold it to another person. Because it appears that a bona fide purchaser bought the property, Mary will not be able to recover the house.

Tracing

However, a constructive trust allows a party to trace their converted property. Here, Mary gave Frank \$40,000, this went into a home, and then the home was sold for \$300,000. Mary will be able to argue that the money she put into the home can be traced to the home and then to the sale and that a constructive trust of one-half of the sale price should be placed on the \$300,000 proceeds that Frank gained from selling

the property. This is likely Mary's best argument because a constructive trust will make Frank the trustee and require him to pay the increased money over Mary's \$40,000.

Money Damages Inadequate

Mary will likely also be able to show that general tort damages are inadequate. Under general tort recovery from conversion, the individual is entitled to receive the market value of the item that was converted at the time it was converted. It could be argued that the \$40,000 was converted when Frank took the property, leaving Mary entitled to only \$40,000. Accordingly, damages would not be sufficient. Moreover, there is the risk, that without forcing Frank to be the trustee, he could spend the money, become insolvent, and leave Mary without any remedy.

Equitable Lien

Mary could also argue that an equitable lien should be placed on Frank's bank account. An equitable lien is also an equitable remedy whereby a person who acquires the personal property of another can have a court put a lien on that property. It is generally most useful when the property of another has been used to improve some other property or where the property has decreased in value and the owner of the property is seeking a deficiency judgment.

Here, Mary may argue that she should be entitled to an equitable lien, but this would be substantially less attractive than a constructive trust. For one thing, the value of the property, which can be traced, has increased significantly and can be secured through a constructive trust. For another thing, under the equitable lien theory tracing is not allowed. Thus, Mary would not be able to trace her money to the value of the increased value of the property that is now in the form of cash proceeds. Accordingly, this theory is less attractive to Mary.

Damages

As mentioned previously, Mary could be entitled to damages for conversion. But traditional tort damages for conversion allow recovery for the value of the property at the time it was converted. Here, it could be argued that the property was converted at the time that Frank took possession of the home. This would potentially limit Mary's recovery to \$40,000.

Restitution

Mary could also argue that she is entitled to restitution. Restitution is a remedy that is available to prevent a party from being unjustly enriched at the expense of another. Here, it could be argued that a court should split the \$300,000 that Frank received from the sale in half because if it was not for the contribution that Mary made, he would not have purchased the property and would not have later sold it at an enormous profit. For these reasons, restitution for the \$150,000 that Frank made in the subsequent sale may also be a viable option.

Frank's Defenses

Frank is likely to assert several defenses.

Adverse Possession

Frank may argue that he adversely possessed the property after occupying it for 8 years by himself and thus gained title to the full share. This will fail because he had Mary's permission to occupy the property.

Laches

Laches is a defense that arises because a party takes such a long time to bring a cause of action that it materially prejudices the opposing party. This defense will likely

fail. There is no indication that Mary waited an exceedingly long time to sell the property.

Statute of Frauds

Frank may also argue that Mary's agreement is barred by the statute of frauds. The statute of frauds is a defense that a party cannot assert to prevent a claim that a contract existed. It is applicable to an alleged contract to purchase or sell land, which must be in writing, signed by the grantor and include a purchase price. But this defense will likely not apply here. While the underlying issue involves an agreement regarding land, Mary is not suing to force the sale or purchase of property; rather, she is suing for money that was converted. Accordingly, this defense will likely not stand.

Unclean Hands

Frank's best argument will probably be unclean hands. The doctrine of unclean hands applies, especially in the equity context, to prevent a party from recovering where that party was involved in bad behavior relating to the underlying transaction. Here, Mary entered the agreement with Frank and put the property in his name for the purpose of avoiding creditors who were seeking to enforce debts against her. Accordingly, Frank could argue that Mary cannot recover in equity here because her own bad conduct was involved.

Who will likely prevail?

Under these facts, unless the court deems that Mary's conduct of trying to avoid creditors will bar her under the doctrine of unclean hands, she is likely to prevail. She will most likely seek a constructive trust or restitution for the additional money gained from the sale.

What remedy or remedies can Tanner reasonably obtain against Frank for conversion, what defenses, if any can Frank reasonably raise, and who is likely to prevail?

Tanner's Remedies

Tanner, like Mary, has several remedies it can seek against Frank.

Constructive Trust

See above definition. Tanner will argue that a constructive trust should be imposed because the money that Frank embezzled from them was used to purchase the property. Embezzlement consists of unlawfully obtaining title to the property of another by a person in lawful possession. Based on the facts here, Frank embezzled the \$40,000 from Tanner and thus obtained title to it.

Tracing

Under a constructive trust, tracing is allowed. Here, Tanner will argue that the \$40,000 was spent to purchase the property so title can be traced to the property, and when the property was sold, \$150,000 of the \$300,000 sale price can be traced to the original \$40,000. While it may be argued that a constructive trust does not apply here because this is an instance where the property of another was used to improve other property, that is likely not the case. The \$40,000 was used to purchase property that was kept in Frank's name and then sold with the proceeds going to Frank.

No adequate damages remedy

A problem may arise for Tanner in this instance if Frank can show that an adequate damages remedy would just be forcing him to pay back the \$40,000 that he had converted. This problem may prevent Tanner from successfully having a constructive trust set up to recover the \$150,000.

Equitable Lien

See above definition. An equitable lien may also be an option, but as mentioned previously, funds cannot be traced using an equitable lien. As a consequence, the money that was taken from Tanner would not be able to be traced to the home and then to the bank account. Accordingly, this option is not viable.

Damages

Tanner may just argue that it is entitled to damages for the money take. As mentioned, damages for conversion are the market value of the property at the time it was converted. Here, Tanner will be able to show that it is entitled to the \$40,000 that was taken from it.

Restitution

Tanner may also argue that it is entitled to either the \$40,000 or the \$150,000 under a theory of unjust enrichment. It would be clearly entitled to \$40,000 under this theory, but it may be able to argue that Frank would be unjustly enriched as a result of his fraudulent action if he is able to keep the money he made in addition to the \$40,000 that he stole.

Frank's Defenses

Laches

Frank's best defense against Tanner is Laches. See above definition. Here, Frank may be able to argue that Tanner found out about the embezzlement in 2005, but did nothing until 2012. On the other hand, Tanner may argue that it was not aware that Frank had any money to make a lawsuit worthwhile until it found out that the house was

sold for a significant profit. Because this is an equitable defense, a court will likely side with Tanner and not the wrongdoers.

Who will likely prevail?

Tanner will likely prevail on a theory of damages for the conversion limiting recovery to \$40,000 or restitution under which the recovery for unjust enrichment of Frank could be up to \$150,000. Either way, Frank's laches defense will likely not work.

FEBRUARY 2013

ESSAY QUESTIONS 4, 5 AND 6



California Bar Examination

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts 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 the 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 that 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.

Question 4

Darla is in the pest control business. She develops and produces fumigation gas for her own use. She also sells the gas to consumers. Some of her competitors do not sell gas to consumers because consumers sometimes do not follow safety instructions.

Darla sold a container of fumigation gas to Albert for use in ridding his apartment of insects. Although she had intended to produce gas of standard toxicity, she had unknowingly produced gas of unduly high toxicity. Albert used the gas and succeeded in killing all the insects in his apartment. Because he used the gas carelessly, some made its way into the apartment of his neighbor, Paul. The gas caused Paul to suffer serious lung damage and to fear that he would contract cancer as a result.

1. Is Darla liable to Paul? Discuss.
2. If so, may Paul obtain damages from Darla for fear of contracting cancer? Discuss.

ANSWER A TO QUESTION 4

Darla is in the pest control business and produces fumigation gas for her own use, and sells it to consumers. She unknowingly produced gas of unduly high toxicity which ended up causing Paul, a neighbor of the user Albert that bought gas from her, lung damage and fear of contracting cancer. Although Albert, who was in privity with Darla as he purchased the gas from her, was negligent in his use, there are several theories that Paul can employ to hold Darla liable for her personal injuries.

Paul can potentially sue Darla on theories of an abnormally dangerous activity that caused Paul harm, strict products liability, negligent products liability, implied warranty and express warranty and misrepresentation theories, as well as intentional tort theories.

Abnormally Dangerous Activity

A defendant will owe a plaintiff a strict duty of care, regardless of the conduct of the particular defendant, when the defendant undertakes an abnormally dangerous activity. An abnormally dangerous activity is one with a high risk of harm, that is not commonly found in the community, which has a risk that cannot be eliminated with due care. The utility is usually lower than the risk of harm. The defendant is liable if the dangerous character actually and proximately causes the plaintiff damages.

Here, Darla is in the business of developing and producing fumigation gas, which she sells to consumers. Fumigation gas contains toxins that carry a risk of harm inherently. Darla will argue this is not an inherently dangerous activity, because fumigation gas is safe in normal amounts of toxicity, and is commonly used to control pests. She will argue it is "common in the community." Paul can counter that toxic gas always carries with it a high risk of harm, and unduly high levels of gas is not common in the community. Paul will argue that the gas is so dangerous that D's competitors will not sell it to consumers for fear that warnings are not enough to abate the danger.

Darla can point out that the risk can be eliminated with due care, as people call pest control and have fumigation all of the time, and this is safe. Paul will argue that no matter the due care, chemicals always carry risk of harm to people.

Causation

Paul will argue that the dangerous character was the but-for cause of his harm, because but for the dangerous toxins, he would not have suffered lung damage and fear of contracting cancer. However, in terms of proximate cause, Darla will argue that Albert, the user of the gas, used it carelessly and the fact that the gas made its way to Paul's apartment was a supervening cause. Paul will counter that while this may have been a supervening cause, only unforeseeable intervening acts will break the chain of causation, and Albert's negligence was foreseeable, since Darla herself knew that "consumers sometimes do not follow safety instructions." It is likely that Albert's negligence does not absolve Darla here. Thus, the dangerous character of the chemicals can be said to be the actual and proximate cause of Paul's harm. If Darla's production of the fumigation gas is an "abnormally dangerous activity" then Darla is liable to Paul on this theory.

The issues of proximate cause and causation will be detailed below under the other theories of liability.

Strict Products Liability

A defendant is strictly liable in tort when the defendant manufactures, distributes, and/or sells a product that is unreasonably dangerous and thus "defective" and the dangerous character actually and proximately causes harm to a plaintiff.

Duty and Standard of Care

A defendant owes a strict duty of care to all foreseeable plaintiffs. The focus is necessarily on the character of the product, and not the actions or due care of the defendant, in a strict liability analysis.

First, it is necessary to see if P and D are proper parties. A proper defendant for strict products liability is a commercial seller of a product. This includes all parties in the chain of distribution. Here, Darla is in the pest control business. She develops and produces fumigation gas for her own use and sells it to consumers. She will argue that since she produces it for her own use, she is not a "commercial" seller and falls outside of the strict liability framework. However, Paul will rightly point out that since she "sells the gas to consumers" she is a proper defendant here.

Proper plaintiff-- Strict products liability does not require privity, or a contractual relationship between the defendant and the injured party. A proper plaintiff is thus a buyer, a user, or even a bystander that is harmed. Here, Paul was not a user or purchaser of the gas; his neighbor Albert was. Albert's careless use of the gas resulted in the gas making its way into Paul's apartment and causing him lung damage from breathing the fumes. Since Paul is a "bystander" harmed by the dangerous character of the product, Paul is a proper plaintiff and has standing to sue Darla.

Defect

The defendant, Darla, is liable for a defect in the product that is unreasonably dangerous. There are three types of defects in products liability: a manufacturing defect, a design defect, and a failure to warn defect which is a subset of a design defect.

Manufacturing Defect

A manufacturing defect is a defect caused during the manufacture of the product, whereby the product becomes unreasonable dangerous as a result of a problem during the manufacturing process. The defect is a result of a "one off" problem where the product emerges more dangerous than the other products that are manufactured with it.

Here, Darla may be liable for a manufacturing defect. She intended to produce fumigation gas of standard toxicity, which is presumably safe for human use when properly manufactured, as she is in the pest control business and sells to consumers. However, Darla unknowingly produced gas that was of unduly high toxicity, and sold it to Albert. Since this gas was "unduly toxic" this can demonstrate a product that was made to be unreasonably dangerous, as a result of the production process, and is different than the normal gas.

A manufacturing defect is demonstrated by the "Consumer Expectations Test" which essentially asks, would an ordinary consumer find the product to be more dangerous than they would anticipate? Here, while adult consumers are likely aware of the attendant dangers of toxic pest control fumes, Paul can argue that consumers do not expect that they will suffer serious lung damage as a result of someone spraying to kill some bugs in their apartment. This is likely a good argument for Paul. However, Darla can argue that consumers DO expect that fumigating can cause damage if they breathe in the fumes, and it is common sense that someone should not use too much gas. Darla will point out that the same is true for other items, such as household bleach. Paul likely has the better argument here, as consumers that spray for insects would probably not expect that the gas has "unduly high toxicity." Therefore, Paul has enough facts to prove a manufacturing defect here.

Design Defect

A design defect occurs when a product as designed is unreasonably dangerous, and is measured in terms of whether there is a "reasonable alternative design" for the product that makes it more safe without impairing its utility and function and without making it unduly expensive so as to price the defendant out of the market. It may be the case that Darla's product of the gas was a design defect in terms of the way the chemicals were used. If she used a different chemical combination, she may have been able to avoid the problem of accidentally making it too toxic. However, there are no facts to show this, and it appears that Darla simply made one batch of gas too toxic. There does not appear to be a reasonable alternative design, because pest control fumigation gas is inherently toxic.

Failure to Warn Defect

If there are either no warnings or inappropriate warnings on a dangerous product, this is a type of design defect. Here, it is not clear if there were warnings and what they were. However, because Darla's competitors do not sell the gas to consumers because they don't always heed instructions, there is some evidence that the gas does come with instructions. However, more facts would be needed to show that there were inadequate warnings here.

Causation

Actual Cause

There must be a showing not only that the product was dangerous but that the dangerous property actually caused the harm to the Plaintiff. The defect must have been present while the product was in Darla's control.

Here, but for the high toxicity levels, Albert's overuse of the product would not have caused the harm to Paul, or so Paul will argue. It is not clear if overuse of the normal gas would have caused the same problem. However, it is likely that the unduly high levels of toxicity caused the harm to Paul, when the fumes from Albert's apartment from Albert's spraying for bugs wafted into Paul's apartment. Therefore, Paul can likely argue that the dangerous defect was the actual, but-for cause of his harm.

It appears that Darla did have control of the product while it was defective, because it can be inferred that when she produced the gas with such high levels of toxicity this was the gas she sold to Albert, who used it and injured Peter.

Proximate Cause

The harm must also have been proximately caused, meaning that it was foreseeable that the harm would occur, and that the defendant created the scope of risks. A strict products liability defendant is liable for all foreseeable misuses of a product, so a misuse that is foreseeable will NOT cut off the chain of liability because it is not an unforeseeable independent or abnormal dependent event such as would break the chain.

Darla will argue that Albert's negligence was an independent intervening cause and she should not be liable for Albert's negligent use of the gas. However, it is foreseeable that users may accidentally use too much gas, or do this purposefully without understanding the true harm. In fact, this was so foreseeable that Darla's competitors have in fact refused to sell gas to customers, because customers sometimes do not follow directions. This demonstrates the danger of the product and the fact that consumers are likely to misuse the gas, and harm themselves or others. Thus, Paul will be able to show that Darla's product was the proximate cause of his harm, despite the fact that Albert was negligent.

Damages

Paul suffered serious lung damage as a result of ingesting the gas fumes. He also worried that he would contract cancer as a result. Typically, products liability actions will only allow a recovery of personal injury or property damage but Paul's emotional distress may also be parasitic to this. This will be addressed below. However, Paul did suffer his requisite damage to recover.

In sum, Paul can likely recover on a strict products liability theory.

Defenses: Assumption of the Risk?

Darla can invoke this defense, which means that one knows of a risk and voluntarily proceeds in spite of it. Paul did not know of the risks, and was an innocent bystander. Therefore, there is no defense.

Contributory Negligence

The plaintiff's conduct is not an issue and cannot be a defense in strict liability, because the focus is on the character of the property, not the parties' conduct.

Negligent Products Liability

Negligence focus on the conduct of the defendant, and not just the character of the property.

Duty

A commercial producer owes a duty of reasonable care to foreseeable plaintiffs, who are plaintiffs in the "zone of danger" per Cardozo in Palsgraf. Here, Paul was arguably in the zone of danger. Even though he was not a user, it is foreseeable that the fumes

could leak out and harm people that are nearby, including neighbors. Darla will argue it is not foreseeable that someone in a different apartment would be harmed; however it is foreseeable that the toxic gas can waft.

Standard of Care

Darla owed a duty to act as a reasonably prudent producer of fumigation gas would act under the circumstances. Since others in the pest control business do not sell gas to consumers, this is evidence of a lack of prudence on her part. She unknowingly produced high levels of toxins in her gas, and should have had safety controls, monitoring, and someone to check the gas before it went out. She likely breached her standard of care here.

The analysis of causation and damages is the same as above; therefore, Darla is likely liable for strict liability as well.

Contributory Negligence

Paul was not negligent here, and thus this will not reduce a potential recovery.

Paul can recover for negligent products liability.

Implied Warranties of Merchantability

A product is deemed merchantable for its intended purpose. Therefore, Paul may be able to argue a breach here, if the product was not fit for its intended purpose and was too dangerous. However, this is likely not the issue; the spray worked well and as intended, because it killed all of the bugs in Albert's apartment here. Therefore, Paul cannot recover on this theory.

Express Warranties/Intentional Torts/Misrepresentation

Here, it does not appear that Darla made any representations to Paul at all, since she did not interact with him. Therefore, he cannot recover on express warranty or misrep theory.

Darla may be liable for battery if she knew to a substantial certainty that she would cause Paul harm but there does not appear to be evidence of this.

(2) Can Paul obtain damages for fear of contracting cancer?

Proper damages for products liability in strict liability or tort involve personal injury and property damage only. Emotional distress can constitute a personal injury, but even if it did not, it is 'parasitic' to Paul's actual physical injury of lung damage so it would likely be awarded on this theory. If fear of contracting cancer is "emotional distress" which it likely is, then it is a proper measure of damages.

Damages must be foreseeable, certain, definite, and unavoidable.

Paul can recover if his emotional distress is reasonable and foreseeable. Here, it is foreseeable that Paul would fear contracting cancer after ingesting toxic gas and suffering severe lung damage. An average person would have this fear especially since it is certain that he developed severe lung damage.

Paul could face problems proving his damages with definiteness/certainty. It is difficult to quantify this measure, and Darla will argue as such. However, a jury would weigh his suffering, and the credibility and likelihood of his distress, and award a number. Juries award damages for pain and suffering routinely, and could award damages based on "fear."

Paul did not need to mitigate here, since he was not a wrongdoer, and he cannot easily mitigate fear, unless he sees a therapist to reduce his fear, which would also cost money and be a measure of damages.

Therefore, it is likely that Paul would also recover damages for fear of contracting cancer, if this constitutes "emotional distress."

ANSWER B TO QUESTION 4

1) Is Darla liable to Paul?

Paul may bring a variety of claims against Darla including a claim based on strict liability, products liability, and negligence.

Strict Liability

A claim for strict liability may be made when the defendant is engaged in an abnormally dangerous activity, in which case he/she owes a strict duty of care to the plaintiff, and that activity causes harm to the plaintiff. Whether an activity is considered an abnormally dangerous one requires a determination of whether the activity is common in the community and whether the defendant, taking all reasonable and proper measures to ensure safety of the activity, the risks involved in the dangerous activity cannot be completely protected against.

In this case, Darla is engaged in the business of developing and producing fumigation gas which she uses for her own purposes in addition to selling to consumers. While some of her competitors do not sell the gas to consumers because consumers sometimes do not follow the safety instructions, the use of fumigation gas to rid one's home or business of pests may arguably be considered a matter common in the community. In this case, Albert did in fact use Darla's gas to rid his house of pests and thus an argument can be made that while the risk danger of using the gas cannot entirely be protected against, it likely is a matter common in the community, thus, a claim for strict liability will likely fail if P brings one against D.

Strict Products Liability (SPL)

For a claim of SPL, a defendant must be a commercial supplier of a good who supplies a dangerously defective product into the stream of commerce that causes, both actually and proximately, the harm to the plaintiff that results in damages.

Commercial Supplier

In this case, D is in the pest control business in which she manufactures and distributes fumigation gas. While she does use it for her own use, she also sells the gas to consumers. In this case, she sold the gas to Albert who used it to kill the insects in his apartment. Thus, Darla would owe a strict duty to Albert, but also to Paul. The fact that the gas injured Albert's neighbor Paul, who was not in privity of contract with Darla for the sale of the gas is of no consequence because a commercial supplier owes a strict duty to all foreseeable consumers/users or people who may come into contact with the product. Here, despite the fact that Paul did not purchase and use the gas himself from Darla, this will not prevent him from pursuing a SPL claim against her. Because D may be considered a commercial supplier, this element is met.

Defective Product

A consumer may attempt to show that a commercial supplier supplied a dangerously defective product by claiming that the product contained either a manufacturing defect (using the consumer expectation test), a design defect (feasible alternative tests), or an inadequate warning defect (information defect, which is a subset of a design defect.). In this case, Paul should argue that there was a manufacturing defect in the fumigation gas because Darla had produced gas of unduly high toxicity, and the ordinary consumer would have expected the gas produced to be of standard toxicity.

Manufacturing Defect

As discussed above, using the ordinary consumer expectation test, Paul will argue that a reasonable consumer would not have expected Darla to supply the market (and here Albert) with fumigation gas that had an unduly high toxicity level as compared to the standard toxicity levels that are generally supplied. The fact that Darla produced the higher toxic gas unknowingly and unintentionally is of no consequence in a SPL suit because the supplier owes a strict duty of care to the reasonably foreseeable consumer (here Paul), and breach of that duty (by supplying the dangerously defective product) is enough to make out the prima facie case for duty and breach of the standard of care.

Inadequate Warning

Alternatively, because the facts indicate that some of D's competitors do not sell gas to consumers because the consumers sometimes do not follow safety instructions, there may also be an issue of inadequate warning here; however, there is no evidence that D did in fact fail to supply a warning against the dangers of using the gas, so P's best argument would be to argue that the product was dangerously defective on account of the manufacturing defect.

Causation-actual cause

The injury sustained by P must also be the actual cause of the supply of the defective product. In this case, D's supply of the product to Albert (A) actually caused the harm to P because but for the sale and use of the product in A's apartment, P would not have been harmed. Rather, the issue that D will argue here is that she is not the proximate cause (or legal cause) of P's injuries on account of A's misuse of the product.

Legal Cause (Proximate cause)

Proximate cause is a legal limit on a D's liability, whereby courts will only cut off a D's liability to P's when it exceeds the foreseeable scope of liability. In this case, D will argue that A's misuse of the product in that A carelessly allowed the gas to seep into his neighbor P's apartment, should absolve her of liability because a reasonable person using the product would ensure that it would not injure others. However, this argument will likely fail because a commercial supplier must take into account a user's foreseeable misuse of the product, and such a misuse occurred in this case. It is foreseeable that a user of highly toxic pest control gas may injure other individuals on account of his negligent use of it. Thus, because a court would reject the argument that A's negligent misuse was an intervening and superceding cause that should cut off D's liability to P, this element will also be met.

Damages

Finally, a P must have suffered some form of cognizable damages in order to affect a recovery. Because Paul suffered serious lung damage, a personal harm to his body, he will meet this requirement and his claim against D based on SPL will likely succeed.

Defenses--assumption of risk and contributory negligence

D might try and argue that P assumed the risk of being injured by A's use of the pesticide; however, for an assumption of the risk defense to work, the individual must have knowingly and voluntarily assumed the risk of the activity involved. Here, there are no facts to suggest that P assumed any risk whatsoever, let alone voluntarily accepted such risks. Thus, this defense will fail.

Alternatively, D will argue that A was contributorily negligent in allowing the gas to injure his neighbor; however, as discussed above, this defense will not work in a SPL case because the negligence of the user is not taken into account when there was foreseeable misuse of the product by the user.

Negligence claim against D

The prima facie case for negligence includes duty, breach of that duty by falling below the requisite standard of care, causation (actual and proximate) and damages.

Duty

Under the Andrews minority view, a person owes a duty to everyone; thus D would owe a duty to P in this case. However, under the Cardozo majority view, a person only owes a duty to all those foreseeable persons within the zone of danger. Under this view, D would also owe a duty to P because the fact that P's apartment was located next to A's apartment (from which the gas leaked out of and into P's apartment), it is likely that P was within the zone of danger as to the use of the toxic chemicals and also was a foreseeable plaintiff because D would reasonably foresee that someone's neighbor may be injured by use of the toxic chemicals, especially in the context of apartment homes

which are generally separated by walls and hallways from each other. Thus D owed a duty of care to P in this case.

Breach-Standard of Care

D owed a duty to P and the standard of the duty would be to act as a reasonably prudent manufacturer and supplier of toxic chemicals used for pest control. Here, P will argue that D's actions fell below the requisite standard of care because D negligently produced a much higher toxic gas than she had intended to produce, and a reasonably prudent supplier of such gas would either test the levels of the gas before placing them in the market and selling them or, at the very least, having certain safeguards available to ensure that the gas level of the product produced would not exceed certain specifications. Because P can argue that D likely breached its standard of care in this case, P will have to show that his injuries were also the cause of his damages as well.

Actual Cause

P will argue that but for D's supply of the negligently manufactured product to A, P would not have been injured. Because as discussed above this element is met, P must show that D is also the legal cause of his injuries.

Proximate cause

D will argue, again, that A was in fact the legal cause of P's injuries because of his misuse of the product, and that such misuse was an unforeseeable intervening and superceding cause of P's injuries and should thus absolve D of any liability to P. However, for the reasons discussed above, this argument will likely fail because it is entirely foreseeable that an apartment owner who shares his residency in close proximity to other tenants might injure those tenants by misusing a toxic substance in an attempt to kill the pests in his apartment. Thus, P will be able to succeed on this element as well.

Damages

Again, P must prove that he suffered damages that the law recognizes as compensable. Here, P suffered lung damage and because this is a form of personal injury for which the law provides a remedy, P will be able to easily meet this element.

Thus, P has also made out a prima facie case for negligence against D as well.

Defenses

Contributory negligence

A P's contributory negligence traditionally barred his claim for recovery against the D; however, many courts have adopted a form of comparative negligence to lessen the harshness of the result with regard to the complete bar on P's claim. In this case, D might try and argue that P was contributorily negligent because he should have been able to recognize the smell of the gas or that something was causing him discomfort in his apartment, and should have sought fresh air by going outside or moving out temporarily. However, there aren't any facts to suggest that the gas had an odor; for all intents and purposes, it might have been an odorless gas. Moreover, P might have been asleep while A used the gas and would not have noticed its effects on him. Because there is very little in the facts to suggest that P was contributorily negligent, this defense will likely fail for D to assert. Similarly, an assumption of the risk defense will also fail for reasons discussed above.

2) May P obtain damages for Darla for fear of contracting cancer?

The issue is whether P can recover damages against D for his emotional distress. The claim that P would bring against D is one for negligent infliction of emotional distress, since the elements of an intentional infliction of emotional distress are not applicable here.

Negligent infliction of emotional distress (NIED)

The elements for an NIED claim occur when a defendant negligently causes emotional distress to a plaintiff on account of the D's actions. Traditionally, an NIED claim required the P to suffer some form of physical harm, and not merely some intangible emotional harm out of fear that the courts would receive a large influx of junk cases for unsubstantiated claims. Here, P will likely be able to recover his emotional distress, i.e. fear that he will contract cancer from the exposure to the gas, because he has in fact suffered a physical manifestation of the harm in the form of the lung damage that he has seriously suffered. Thus, because P can show that he has suffered physical harm to his body, he will also be entitled to recover for his emotional distress as well.

Question 5

In March 2008, Pat, a citizen of State A, learned that Devon Corp. ("Devon"), a citizen of State B, may have been illegally releasing toxic chemicals into the air near her home.

In February 2011, Pat sued Devon in federal court, alleging a cause of action for negligence and seeking damages for a persistent cough. The court had subject matter jurisdiction over Pat's lawsuit.

During discovery, Pat requested Devon to produce all documents relating to reports by local residents about foul odors coming from its plant. Devon objected to Pat's discovery request, contending that the plant's odors came from legally produced and harmless chemicals, and that therefore the request sought irrelevant information. In further response, Devon provided a privilege log that listed a document described as a summary of all communications with local residents concerning odors that emanated from the plant. As a basis for refusing to disclose the document, Devon claimed the summary was protected from disclosure under the work product doctrine because it had been created by its counsel, who therein described the underlying facts of the residents' comments as well as counsel's thoughts about them. Pat filed a motion to compel Devon's production of the documents she requested. The court denied Pat's motion.

In October 2012, while the lawsuit was still pending, Pat learned from a scientific report in a newspaper that the chemicals Devon released cause lung cancer.

In November 2012, Pat amended her complaint to add a cause of action for strict liability and sought to require Devon to pay for preventive medical monitoring of her lungs.

Devon moved to dismiss Pat's strict liability cause of action on the basis that the applicable three-year statute of limitations had run.

1. Did the court correctly deny Pat's motion to compel? Discuss.
2. How should the court rule on Devon's motion to dismiss? Discuss.

ANSWER A TO QUESTION 5

1. The trial court incorrectly denied Pat's motion to compel. The scope of discovery is whether the request is reasonably calculated to lead the discovery of admissible evidence. As a general matter and absent any other exceptions, evidence is admissible if it is relevant. Relevance means it has any tendency to make the existence of any fact, that is of consequence to the determination of the action, more or less probable than it would be without the evidence.

Here, Pat requested Devon to produce all documents relating to reports by local residents about foul odors from its plant. Devon objected to the discovery request on the grounds that the plant's odors came from legally produced and harmless chemicals. Pat's lawsuit against Devon is brought under negligence theory and concerns Devon's release of toxic chemicals into the air. Pat's request is within the permissible scope of discovery. Although Devon contends that the odors are legal and harmless, that is not conclusive. During litigation, Pat may gather evidence to support her belief that Devon has been illegally releasing toxic chemicals. She is not required to merely accept Devon's assertion that it is not acting illegally. The reports by local residents may lead to relevant, admissible evidence. If Pat learns that other residents have likewise experienced a persistent cough or other symptoms, or developed cancer, she can use their testimony to rebut Devon's contention that the odors are harmless. Additionally, the reports of local residents are relevant to show that Devon had notice of the harmful effects of the chemical/odors on local residents. Moreover, the evidence could support Pat's assertion that her persistent cough was a reasonably foreseeable result of the chemicals/odors because Devon knew that the chemicals had similar effects on other residents. Therefore, Pat's document request should be granted unless a privilege applies.

In response to Pat's discovery request, Devon produced a privilege log listing a document described as "a summary of all its communications with local residents concerning odors that emanated from the plant," claiming it was privileged under the

work product doctrine. When a discovery request is within the permissible scope of discovery, but it seeks protected or privileged information, the responding party must provide a privilege log describing the privileged document with particularity and asserting why it is privileged. If the summary is in fact privileged, then Devon properly complied with the discovery rules by responding with a privilege log identifying its existence and explaining why it is not required to disclose it.

The work product privilege applies to all materials prepared by an attorney, or a client at the attorney's request, in anticipation of litigation. As the summary was prepared by Devon's counsel, the first requirement is satisfied. However, the facts do not state whether it was prepared in anticipation of litigation. If Devon's counsel prepared the summary before any litigation concerning the toxic chemicals began, then it may not be covered. Pat learned that Devon may be illegally releasing toxic chemicals in 2008, and did not sue until 2011. If there had been previous complaints, Devon very well may have prepared the summary in anticipation of future litigation, even if not specifically for Pat's case. In those circumstances, the work product privilege would nonetheless apply even if it was made before Pat's lawsuit was initiated.

Not all aspects of the work product privilege are absolute. Any mental impressions, opinions, theories of the case, and related information is absolutely privileged and is never discoverable. However, the remaining aspects of a document may be disclosed if the requesting party establishes: (1) there is a substantial need for the information; and (2) he or she cannot obtain the information from any other source. First, Pat can likely establish that she has a substantial need for the information. As explained above, this information will help support her claim that Devon acted negligently, and rebut Devon's contention that the chemicals/odors are harmless. However, Pat may have more difficulty meeting the second requirement. Devon could argue that Pat could simply interview local residents to determine whether they complained to Devon. However, the court will likely find that this would be an undue hardship because Devon could provide Pat with the names of residents who complained and what their complaints were, without requiring Pat to undergo all that effort. Based on the above analysis, the

underlying information in the summary is discoverable. The communications between local residents and Devon do not fall under the work product privilege because they were not made in anticipation of litigation. Rather, they were likely routine business records. Therefore, if the actual reports of communications that were used to compile the summary are separately available, the court should have ordered that the separate reports be produced to Pat. Then, Pat would receive the information she needed and no privileged information would be disclosed. Conversely, if there are no such separate individual reports in existence, then the court may order Devon to produce the summary with counsel's thoughts redacted from the document.

In sum, the court incorrectly denied Pat's motion to compel. First, the documents requested are within the permissible scope of discovery. Second, although the summary of the communications with residents may be privileged under the work product doctrine, the individual separate reports would not be and could have been produced. Finally, if there are no individual separate reports for each resident, then the court should have ordered that Devon produced the summary with counsel's mental impressions redacted because Pat has a demonstrated a substantial need for the information and that she is unable to obtain the information from another source.

2. The court should deny Devon's motion to dismiss. Civil Rule 15 allows a plaintiff to amend her complaint once before the answer is filed or anytime thereafter with leave of court. Rule 15 requires a court to freely grant leave to amend a complaint as justice requires. When a complaint is amended to include a new claim, it relates back to the date of the original filing as long as the claim arises out of the same transaction or occurrence. Here, Pat seeks to amend her complaint to add a cause of action for strict liability. Her strict liability claim arises out of the same occurrence -- Devon's alleged illegal release of toxic chemicals into the air -- as her negligence claim. Accordingly, her cause of action will relate back to the date of the filing of her complaint in February 2011. Pat discovered Devon's illegal release in March 2008, so her strict liability claim accrued, at the earliest, in March 2008. Accordingly, her strict liability claim was timely filed within the 3-year statute of limitations.

Further, Pat's additional request for relief -- that Devon pay for preventative monitoring of her lungs -- is valid. A party may amend his or her request for damages in the complaint. This new claim for damages relates to Pat's new strict liability claim.

Therefore, the court should deny the motion to dismiss and allow Pat to amend her complaint in the interest of justice because she just discovered the scientific report regarding lung cancer.

ANSWER B TO QUESTION 5

Denial of Pat's Motion to Compel

The Scope of Discovery

The scope of discovery under the federal rules includes all materials that are 1) relevant and 2) not privileged.

As to relevance, an item is relevant if it has a tendency to make the existence or nonexistence of a fact of consequence to the action more or less probable than it would be without the item.

As to privilege, the most commonly asserted privilege objections in discovery are attorney-client privilege and work product privilege. The attorney client privilege protects confidential communications between an attorney and her client from disclosure in discovery, and the work product privilege protects materials prepared by a party in anticipation of litigation. Materials protected by the attorney client privilege are absolutely privileged from disclosure in discovery.

Materials, for which the work product privilege is claimed, however, may sometimes be required to be disclosed. If the party seeking discovery can show that 1) the claimed work product materials contain information which is not reasonably available to him by any other means, and 2) his interests would be substantially prejudiced if he were not allowed access to those materials, the court may order disclosure. However, even if the disclosure of work product is ordered pursuant to this standard, the court may not order the disclosure of an attorney's mental impressions or legal theories, because such items are absolutely protected.

Devon's Relevance Objection

In response to Pat's request for Devon to produce documents relating to reports by local residents about foul odors from Devon's plant, Devon objected and refused to produce such documents on the basis that the odors came from legally produced and harmless chemicals and therefore the request sought irrelevant information. Such documents are properly discoverable because they are relevant and not privileged. Information about reports of odors from the plant by local residents are relevant to Pat's claim that the plant was illegally releasing toxic chemicals into the air, because it is more probable that the plant was in fact releasing chemicals if local residents reported that they smelled odors. Such reports may also be relevant to the issue of the quantities, types, and times the chemicals were released into the air, which is relevant to Pat's claim that she had sufficient exposure to the chemicals to cause her persistent cough.

Devon's claim that the documents are not relevant because the odors were "legally produced" and "harmless" should have been rejected by the court. A party may not avoid discovery by self-serving claims as to what its documents would show. Moreover, the issues at the heart of this claim are precisely whether 1) the odors were legally produced, as Devon claims, or illegally produced, as Pat claims, and 2) the chemicals are toxic, as Pat claims, or harmless, as Devon claims. Devon must produce documents that show what chemicals were released and how they were being produced so that Pat and her experts can evaluate for themselves the nature of the chemicals.

Therefore, to the extent Devon claimed a relevance objection to Pat's request, the Court should have overruled that objection and ordered Devon to respond in full to the request.

Devon's Work Product Privilege Objection

Devon has also produced a privilege log indicating that it has a summary of all communications with local residents concerning odors emanating from the plant, and has claimed that the summary is protected by the work product privilege because it was created by Devon's counsel. The mere fact that a document was created by counsel does not mean that it is protected by the work product privilege. Devon must also show that the document was prepared in anticipation of litigation. If Devon's counsel prepared the document, for example, as part of a report that was required to be given to the EPA on a routine basis, it would not be protected by work product. Devon bears the burden of showing that the document is entitled to work product protection.

In addition, even if the document is work product, Pat may be able to discover it if she can show that she cannot get the information by any other means, and she would be substantially prejudiced without it. This is a very fact specific showing. Pat's alternative means of finding out what residents have complained to the plant about regarding odors would be to walk the streets and interview the neighborhood, hire an investigator, place an ad seeking responses with such information, etc. Depending on the size of the area at issue, that may not be reasonably feasible or particularly productive. Moreover, it is possible that some residents who have been extremely bothered have moved out of the area entirely and would not be accessible through such an investigation. The best source of the information is likely what is contained in the plant's summary of complaints, and it would be very difficult for Pat to collect that information otherwise.

To the extent that the document contains verbatim reports of residents' complaints, the court should compel Devon to release it. To address Devon's claim that the document also contains counsel's thoughts about the residents' complaints, that information is mental impressions, and is absolutely protected against disclosure. The court should order Devon to produce the document for in camera review, so that the court can determine to what extent it does in fact contain such information. The court

could also order Devon to disclose the document with the work product material redacted.

Ruling on Devon's Motion to Dismiss

The issue here is whether the court should grant Devon's motion to dismiss the amendment to Pat's complaint adding a claim for strict liability and medical monitoring as barred by the statute of limitations, or whether the complaint relates back to the timely filed original complaint.

Relation Back Standard

An amended complaint filed after the statute of limitations has run "relates back" to the original complaint, and therefore is not time-barred, if: 1) the original complaint was timely filed; and 2) the new claims in the amended complaint arise out of the "same transaction or occurrence" as the claims in the original complaint.

Was the original complaint timely filed?

Here, it appears the original complaint was timely filed because Pat discovered her injury in March of 2008 and filed the complaint in February of 2008 for negligence. If the three year statute applies to personal injury complaints whether asserted under negligence or strict liability claims, the original complaint was timely filed within 3 years, and the first part of the relation back test is satisfied.

Do the new claims arise out of the same transaction or occurrence?

As to the question of whether the claims arise from the same transaction or occurrence, the answer is likely yes. Pat's negligence claim relates to the occurrence of Devon's release of chemicals into the air near her home. Her strict liability and medical monitoring claims arise from the same event - Devon's release of chemicals. She is

simply pleading a new theory of liability and requesting an additional remedy for the same conduct by Devon that was at issue in her original complaint.

Devon may argue that, even if the strict liability claim relates back, to the extent that Pat is making a claim for medical monitoring in her amended complaint, it does not arise out of the same transaction or occurrence because it concerns Pat's fear of lung cancer, not her persistent cough. However, a court would likely reject this argument, especially because Pat only recently learned of the potential for the chemicals to cause lung cancer by the Nov. 2012 news article, and filed her amended complaint within a month of learning that information.

Prejudice to Devon

Devon may argue its interests would be prejudiced by permitting the late amendment because it has been engaging in discovery for nearly two years on the basis of the allegations in the original complaint. However, a court would also likely reject this argument because Pat's allegations against Devon in both the original and the amended complaint concern the health effects of the released chemicals, and therefore the scope of the discovery and the preparation Devon must do to defend is not significantly changed by the amended complaint.

In sum, because the original complaint was timely filed, the amended complaint arises out of the same transaction or occurrence as the original complaint, and Devon would not be prejudiced in having to defend against the new claims, the court should deny Devon's motion to dismiss the amendment as time-barred.

Question 6

In 2011, Molly and Lenny started a computer software business. Molly prepared marketing materials and Lenny made sales calls. During the first year, Lenny sold 10 copies of certain software programs for \$50,000 each. The business had a net profit of \$480,000 and Molly and Lenny each received \$240,000.

In January 2012, Molly and Lenny hired an attorney to incorporate their business under the name "Software Inc." The attorney properly prepared all necessary documents to incorporate the business but carelessly failed to file them with the Secretary of State.

Lenny continued to make sales calls to sell the software. He also sold a five-year service contract developed by Molly. Due to brisk sales, Software Inc. projected income of about \$300,000 per year for the next five years from the service contracts alone. Software Inc. obtained a \$100,000 business loan from National Bank secured by the accounts receivable for the service contracts.

In May 2012, Lenny had an automobile accident, caused solely by his own negligence, on the way to visit a prospective buyer. The accident injured a pedestrian. As a result of the accident, Lenny stopped working and sales collapsed.

In July 2012, Software Inc. went out of business, leaving negligible assets and the unpaid loan to National Bank.

1. Is Software Inc., Molly, and/or Lenny liable to the pedestrian for the injury?
Discuss.
2. Is Software Inc., Molly, and/or Lenny liable to National Bank for the loan?
Discuss.

ANSWER A TO QUESTION 6

I. Liability to the Pedestrian

A. Lenny's Liability

This issue is whether Lenny is liable to the pedestrian for the automobile accident.

Generally, persons are liable for their own negligent conduct. While employers can be vicariously liable (discussed below) for an employee's tortious conduct, this liability is in addition to the employee's liability. However, if an employee was acting within the scope of their employment, to further the goals of the business, they could seek indemnification from the business.

Here, Lenny had an automobile accident, caused solely by his own negligence, on his way to visit a prospective buyer. The accident injured a pedestrian. Lenny will most likely be liable for the damages he caused. However, because he was on his way to visit a prospective buyer, Lenny could seek indemnification from Software Inc., because he was driving solely for the purpose of furthering Software's business by attracting a new buyer. In addition, his conduct was negligent, rather than intentional, which would prohibit indemnification. If, because of a failure to incorporate (as discussed below), Software Inc. is not actually a valid corporation, Lenny could still seek indemnification from the partnership between him and Molly, since he was still acting in furtherance of Software, the partnership (also discussed below). However, given Software's negligible assets, and its debt to National Bank, there may not be much to seek indemnification from.

Therefore, Lenny is liable to the pedestrian, but may be able to seek indemnification from Software, Inc.

B. Software Inc.'s, Vicarious Liability

This issue is whether Software Inc. is vicariously liable for Lenny's tortuous conduct.

A corporation/partnership/principal can be vicariously liable for the tortuous conduct of its agents if those agents act in furtherance of the principal, under the principal's control, and with the principal's express, implied, or apparent authority.

Here, Lenny had an automobile accident, caused solely by his own negligence, on the way to visit a prospective buyer. By driving to visit a buyer, it appears clear that Lenny was acting in furtherance of Software Inc. While Software Inc.'s corporation or partnership status will be discussed below, it is clear that Lenny was functioning as both a principal and as an agent. He was a principal in the sense that he was expressly authorized to make sales calls and presumably visit prospective buyers given that he started the computer software business and that he and Molly agreed to divide the work as such. He was an agent acting for the benefit of Software Inc. in driving to meet the buyer and further Software Inc.'s goals of collecting buyers.

Therefore, regardless of Software Inc.'s status, Software Inc. is probably vicariously liable for Lenny's tortuous conduct.

C. Molly's Liability

1. De Facto Corporation

This issue is whether Software Inc. had a de facto corporation status, such as to shield Molly from personal liability for Lenny's tortuous conduct.

A corporation is a unique organizational framework for a business, in which management is centralized, and shareholders enjoy limited liability. A corporation must file its articles of incorporation with the Secretary of Interior in order to be a valid corporation, and thus to enjoy this limited liability. However, a corporation that does not

file its articles of incorporation may nevertheless enjoy limited liability via de facto corporation. A de facto corporation 1) attempted to incorporate in good faith, 2) is otherwise eligible to incorporate, and 3) subsequently acted like a corporation in good faith.

In January 2012, Molly and Lenny hired an attorney to incorporate their business under the name "Software Inc." However, while the attorney properly prepared all necessary documents to incorporate the business, he carelessly failed to file them with the Secretary of State. It does not appear that Molly or Lenny knew that the attorney had failed to file the documents. Instead, Molly and Lenny continued to make sales and sell the software. In fact, they obtained a business loan from National Bank secured by its accounts receivable, thereby acting like a corporation in which corporation debts are secured by corporation profits. By hiring an attorney, and subsequently acting like a corporation, it appears that Molly and Lenny attempted to incorporate in good faith, and later acted as if they were a corporation in good faith, with no knowledge (or should have had the knowledge) that they were not actually a corporation. In addition, Software Inc. appears otherwise eligible to incorporate, but-for the failure to file the documents with the Secretary of State.

Therefore, it is possible that Molly will be shielded from liability if Software Inc. has de facto corporation status.

2. Piercing the Corporate Veil

This issue is whether Molly can be personally liable if the pedestrian pierces Software Inc.'s corporate veil.

Shareholders of a valid corporation may nevertheless be personally liable for corporation debts if the corporate veil is pierced. Courts allow a corporation's veil to be pierced when it is clear that there is such a commonality between the corporation and the shareholders, that the shareholders are actually the "alter ego" of the corporation,

and to not permit piercing would sanction a grave injustice. Failing to comply with corporate formalities and insufficient capitalization are common reasons courts have pierced a corporation's veil.

Here, if Software Inc. has de facto corporation status, Molly can be shielded from liability, unless Software Inc.'s corporate veil is pierced. There is no evidence that Molly and Lenny intentionally aimed for Software Inc. to act as their corporate alter ego. However, there is evidence that Software Inc. was severely under-capitalized. In 2011, Molly and Lenny made a net profit of \$480,000. However, instead of investing any of that profit back into the business, they instead each received \$240,000. In 2012, Software Inc. sold a five-year contract, and projected an income of \$300,000/year based just on service contracts. In addition it took out a \$100,000 loan. However, in July 2012, after Lenny stopped working for just two months, Software Inc. had only negligible assets AND its unpaid loan. It appears that either Molly and Lenny were taking dividends when the corporation could not pay its debts, or that Software Inc. was otherwise severely under-capitalized. Further, there are no facts to suggest that Molly and Lenny abided by any corporate formalities, such as holding a general meeting, issuing bylaws, or keeping accounting books. However, there is no information that they did not do these things either.

Therefore, it is possible that the pedestrian can pierce Software Inc.'s corporate veil and hold Molly personally liable.

3. General Partnership

This issue is whether if Software Inc. does not have a corporation status, they are instead a general partnership, and Molly can be held personally liable thereby.

A general partnership is a partnership between two or more people to go into business together. The formation of a general partnership only requires the intent to form a partnership. No documents need to be filed with the Secretary of State, unlike a limited partnership, a limited liability corporation, and a corporation. A general partnership only includes general partners who are personally liable for the debts and obligations of the partnership. The equal sharing of profits is presumptive evidence that parties intended to form a general partnership.

In 2011, Molly and Lenny started a computer software business. Molly prepared marketing materials and Lenny made sales calls. At the end of the year, the business had a net profit of \$480,000, and Molly and Lenny each received \$240,000. In 2012, Lenny and Molly continued to operate their software business in apparently the same way, with the same division of labor, as they had in 2011. They attempted to form a corporation, but their attorney negligently failed to properly file the forms. By sharing the profits equally in 2011, Molly and Lenny appeared to have presumptively formed a general partnership. In 2011, it appears that they operated as a general partnership, with an equal, but distinct division of labor. By sharing the profits, they implicitly agreed to also equally share the business's obligations, should there be any. When the attorney failed to incorporate Software, and assuming that Software is unsuccessful in obtaining de facto corporation status, Molly and Lenny continued to have a general partnership. It does not matter that they never formally agreed to form a partnership. Their sharing of the profits equally makes their relationship a general partnership until they agree otherwise. Thus, if Software Inc. does not have de facto status, Molly will be liable as a general partner. However, she will only be liable to the extent the business is without funds.

Therefore, Molly can be liable as a general partner.

II. Liability to National Bank

A. Software Inc.'s Liability for the Loan

This issue is whether Software Inc. is liable for the loan to National Bank.

Generally, corporations and partnerships are liable for the debts incurred during the normal course of business.

Here, National Bank issued a \$100,000 business loan to Software Inc., secured by Software Inc.'s accounts receivable. If Software Inc. has de facto status, then the loan was authorized by the corporation. If Software Inc. is a partnership, the loan was similarly taken during the course of business, for the purpose of the partnership, and was authorized by the partners. Regardless of Software Inc.'s status, the loan was received by Software, which subsequently enjoyed the benefits of the loan, and will thereby be held to have at least ratified the loan by accepting the loan.

Therefore, Software Inc. is liable for the loan, regardless of its status.

B. Lenny and Molly's Liability for the Loan

1. De Facto Corporation

This issue is whether Lenny and Molly can escape personal liability through de facto corporation.

This rule is discussed above, in section I.C.1.

Because Lenny and Molly made a good faith attempt to incorporate, and acted in good faith as if they were incorporated, they potentially could receive de facto corporation status, and thereby its included limited liability.

Therefore, Lenny and Molly could escape liability through de facto status.

2. Corporation by Estoppel

This issue is whether Lenny and Molly can escape personal liability through corporation by estoppel.

Even if a corporation fails to properly file its articles of incorporation with the Secretary of State, and even if a corporation fails to receive de facto corporation, a creditor may nevertheless be estopped from denying the existence of a corporation. If a creditor treated a corporation as such, and looked to corporate assets in making a loan, a corporation can be protected through corporation by estoppel.

Here, Software Inc. projected income of about \$300,000/year for the next five years from its service contracts. National Bank provided Software Inc. a \$100,000 business loan secured by the accounts receivable for the service contracts. National Bank believed Software, Inc. was a valid corporation. They could have done their due diligence to verify their corporation status. Further, National Bank only looked to Software Inc.'s assets, not Molly or Lenny's, in determining whether to issue the loan. Finally, they issued a business loan, underpinning National Bank's focus upon Software as a corporation. Because they treated Software as corporation in issuing the loan, they will be estopped from denying Software's corporation status in attempting to collect on the loan.

Therefore, Molly and Lenny could escape personal liability through corporation by estoppel.

3. Piercing the Corporation Veil

This issue is whether even if Software Inc. has de facto or corporation by estoppel, National Bank can go after Molly and Lenny personally by piercing the corporate veil.

This issue is discussed above, in section I.C.2.

Because Lenny and Molly failed to properly capitalize Software Inc., it is possible that National Bank could similarly seek to pierce Software's corporate veil.

Therefore, Molly and Lenny could be personally liable for the loan thru piercing the corporate veil.

4. Liable as General Partners

This issue is whether if there is corporate status, Lenny and Molly are liable as general partners.

This issue is discussed above in section I.C.3. General partners are personally liable for the remaining debts of the business.

Because Lenny and Molly originally functioned as a general partnership, if Software Inc. does not have corporate status, Lenny and Molly will be held to be general partners. Just as general partners get to share profits equally, they also must share the obligations equally.

Therefore, Molly and Lenny will each be liable for one half of the remaining obligation on the loan to National Bank.

ANSWER B TO QUESTION 6

Liability towards Injured Pedestrian:

Software Inc. v. Pedestrian

De Jure Corporation:

A de jure corporation is one that is properly formed. To form a de jure corporation the parties have to prepare the necessary documents required by the state for incorporation. Here, Molly and Lenny did not create a de jure corporation due to the fact that their attorney carelessly failed to file the documents. The fact that the corporation was not created does not mean that there are not other corporate like entities that could have arisen.

De Facto Corporation:

Molly and Lenny's strongest argument would be that they created a de facto corporation. A de facto corporation is where the parties take all the necessary steps to incorporate, but for some reason their attempt to incorporate was unsuccessful. If the parties have a good faith belief that a corporation was formed a court can find that a de facto corporation was created, which gives the parties all the same benefits and obligations that would arise under a normally created corporation. Based upon these facts a court would most likely find that a de facto corporation was created, Lenny and Molly took all the necessary steps to create a corporation and held themselves out to be a corporation and if it were not for the carelessness of their attorney in filing the paperwork they would be considered a corporation.

Liability of Shareholders in a De Facto Corporation:

Now that it is found that a de facto corporation was created we look to see if it is liable towards the pedestrian for the injuries suffered. The bonus of a corporation is that it protects its shareholders from liability, and therefore if a de facto corporation was formed Software Inc. might be liable for the injury, and possibly Lenny as it was caused by his negligence but Molly would be shielded from liability beyond what she had invested in the company.

Liability of a Corporation for Damages Caused by its Agents

A corporation can be liable for damages caused by its agents during the scope of their employment. In a corporation directors and officers are considered agents of the corporation and this is further demonstrated by the fact that they had the ability to bind Software Inc. to contracts and that they seemed to be the only two people working for the corporation. If the damages were created completely outside of the scope of their employment then a corporation will not be found to be liable for the damages but here based upon the facts Lenny was going to visit a prospective buyer and his driving to the meeting was within the scope of his employment.

What the corporation would have to argue is that while the accident occurred on his way to the meeting it did not benefit from Lenny's reckless driving and therefore the corporation would not be liable because the accident was caused by Lenny's negligence. This argument would most likely fail because a corporation can be held liable for negligent acts by their employees if they are not wandering too far from the scope of their employment and since Lenny was on the way to the meeting he was not wandering outside of the scope of employment and therefore the corporation can be held liable for the injuries caused to the pedestrian.

Lenny v. Pedestrian

The question would be whether Lenny could also be held liable due to his negligent acts. The Pedestrian would argue that Lenny negligently caused the injuries that he suffered and while as a SH of the corporation he might not be held liable he could still be held liable for negligently driving and causing the accident. The fact that Lenny was working in furtherance of the business interests of the corporation does not mean that he could not be held liable separately. Due to the fact that the accident was caused solely by his negligence Lenny could be found liable for the injuries to the plaintiff along with the corporation.

Molly v. Pedestrian

If a de facto corporation is formed then Molly cannot be held personally liable for the actions of the agents of the corporation. The only time a shareholder can be liable is if the plaintiff is able to pierce the corporate veil by showing that the corporation was merely an alter ego of the party or that it was underfunded. This is not the case here and therefore Molly would not be liable if a de facto corporation was formed.

General Partnership:

If the courts find that no de facto corporation was formed then Molly and Lenny would be in a general partnership with one another. A general partnership arises when two people agree to enter into a business venture for profit. That is demonstrated by the fact that previous to their attempted incorporation Molly and Lenny worked together selling software equipment and that they equally split their profits between each other. Under a general partnership the partners are not protected from liability like a shareholder of a corporation is. Therefore, if a general partnership is formed and a party brings a suit against one partner for damages arising out of their work for the partnership then all partners are personally liable for any award against the partnership. Therefore, unless Molly was able to argue successfully that Lenny's actions were

outside of the scope of the partnership then she would be held personally liable for any damages that are caused by the actions of Lenny. Because it does not seem likely Molly would be able to successfully argue that his actions were outside of the scope of employment, both Molly and Lenny would be personally liable for any injury suffered by the other party due to Lenny's accident.

Liability towards National Bank for Loan:

Corporation by Estoppel:

Even if a de facto or de jure corporation is not formed Molly and Lenny could argue that a corporation by estoppel was formed. Their argument would be that even if they were not a corporation the fact that National Bank dealt with them as if they were a corporation would estop them from denying that they were a corporation and holding the shareholders personally liable.

Software Inc. would be Liable

Software Inc. would be liable for the loan obtained from National Bank. The loan was taken out by them as a corporation and there does not seem to be any evidence to demonstrate that it was taken out for anything other than proper purposes. National Bank would try to argue most likely that Software Inc. is not liable for the loan because at this time Software Inc. only has negligible assets and therefore this would not provide much capital to repay the loan to National Bank.

Most likely Software Inc. would not be attempting to escape liability as they are already out of business and only have negligible assets so a recovery against them would not harm the corporation. This could lead National to make an argument to pierce the corporate veil because of undercapitalization but this argument would fail because the business was not undercapitalized; instead it was not able to fulfill the contract which was the basis on which National Bank loaned the money to them.

Because Software Inc. took out the loan and there is no evidence that it was used for any purposes other than to help the company they will be found liable to the bank for the loan and therefore National Bank will be able to bring an action against Software Inc., even though there is little for them to recover.

Molly would not be Liable

Unless a general partnership was formed as discussed above Molly will not be liable for the National Bank loan. The fact that National Bank acted as if it was dealing with a corporation would stop it from then asserting that it was in actuality a partnership and so therefore Molly would not be liable under a theory that it was merely a partnership.

As a shareholder in a corporation she is protected and there is no evidence to show that she did anything that would cause her to not be protected. National Bank might try to argue that it based its loan based upon the accounts receivable from the service contract developed by Molly but this argument would fail. She created the service contract within the scope of her employment and there is no evidence to show that she was at fault in any way for the failure of the business. Due to the fact that National Bank would not be able to show that Molly did anything that would make her liable for the losses suffered by Software Inc., a court would not find her liable to National Bank and she would therefore be safe.

Lenny would not be Liable

Due to the fact that Software inc. left negligible assets when it went out of business for National Bank to collect on they would most likely go after Lenny for the damages. Their argument would be the fact that the reason for the failure of the corporation was the fact that Lenny stopped working due to the car accident. They would argue that he was the person that created the revenue for the corporation through his sales calls and once he stopped working Molly did not have the experience

to continue running the business profitably and therefore by Lenny's actions the corporation went out of business. They would argue that his quitting was not in the scope of his employment and that it was in no way beneficial to the business and they would therefore argue that Lenny should be liable because their loss is due to Lenny's decision to not return to work.

Lenny would argue that even if his failure to go to work was the cause of the business to fail that does not make him liable for the debts entered into by the business. There is nothing here showing that Lenny or Molly did anything improper in obtaining the loan and that the loan was made with the corporation based upon the assets of the corporation and therefore Lenny should not be held liable.

Even though it seems like National Bank has an argument based upon the fact that the sole reason that the business failed was the fact that Lenny stopped going to work, this would not be sufficient to create liability on Lenny's behalf because the bank loan was entered into by Software Inc. and not with Lenny. Additionally, Lenny could argue that the loan was based solely upon the service contracts and not the sale of products, which was his main area of involvement. Alternatively, National Bank will argue that while it might have been prepared by Molly, Lenny was the one that sold the service contract and therefore it was his area of involvement. Even if the court found this they still would not find that Lenny had acted sufficiently in bad faith to find that he was liable to National for the loan.