

**JULY 1999 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Criminal Law

QUESTION

Al, Bob, and Charlie planned to bring 50 cases of whiskey ashore from a ship anchored in the harbor near their town and sell it to a local bar owner. They believed the whiskey had been produced abroad and was subject to a federal import duty. They also knew that smuggling items into this country without paying duty required by the Tariff Act is a crime. In fact, however, the whiskey in this shipment had been produced in the United States.

The three met at Al's house on Monday and agreed to bring the whiskey ashore by row-boat on Friday night. On Wednesday, however, Bob called Al to say that he and his wife were going to visit relatives that weekend and Bob would not be able to help bring the whiskey ashore. Al said that was all right, that he and Charlie could handle the boat and the whiskey, but that Bob would naturally be cut out of the profits on this job.

When Charlie learned from Al that there would be just the two of them he became apprehensive, but he was afraid of what Al might do to him if he tried to back out. Therefore, on Thursday, Charlie informed the police of Al's plan and did not show up on Friday night. Al was arrested on Friday night as he came ashore, alone, with the whiskey and was loading it into a truck he had stolen from a nearby Coast Guard parking lot.

Al, Bob, and Charlie have been charged with theft of the truck and conspiracy to import dutiable goods without payment of duty.

Al has also been charged with attempt to import dutiable goods without payment of duty. He has told Len, his attorney, that he plans to testify that he knew all along that the whiskey was produced in the United States.

Based on the above facts:

1. Should Al, Bob or Charlie be convicted of:
 - (a) Conspiracy to violate the Tariff Act? Discuss.
 - (b) Theft of the truck? Discuss.
2. Should Al be convicted of attempt to import dutiable goods without payment of duty in violation of the Tariff Act? Discuss.
3. If Al insists on testifying that he knew the whiskey was produced in the United States, what, if anything, should Len do? Discuss.

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ANSWER A

1. (a) The crime of conspiracy consists of the following three elements:
- 1) an agreement between two or more people to perform an illicit act;
 - 2) the intent to agree and the intent to carry through with the agreement to the illicit objective; and under the modern majority view
 - 3) an overt act in furtherance of the conspiracy - the overt act need not be substantial, and at common law this last requirement was dispensed with.

Al, Bob and Charlie met on Monday and formed an agreement to do an illicit act. At this point all three of them would satisfy the first two conspiracy requirements set out above. Under the common law, then all three would be guilty of conspiracy as of Monday night and subsequent attempts to withdraw would be irrelevant to their guilt. As of Wednesday, however, the facts do not state an overt act taking place in furtherance of the conspiracy. Therefore, in a jurisdiction employing the modern view of conspiracy; i.e., with an overt act requirement, Bob has a strong defense that he withdrew from the “conspiracy” prior to its becoming punishable in the eyes of the law.

Withdrawal - Bob

To withdraw from the conspiracy would generally require a communication to the co-conspirators that you will not take part in the planned crime (before it is too late to stop the crime), and that you neutralize any assistance already offered to the plot. The facts do not specifically state whether Bob had furthered the conspiracy, however, by agreeing and then providing only an alternative plan reason for why he was not participating - the prosecutor could argue that Bob did not neutralize his prior support of the conspiratorial objective. Rather, to avoid liability, Bob would've had to renounce the conspiracy - not merely state other plans.

Withdrawal - Charlie

As of Thursday, Charlie has an argument that he also withdrew from the conspiracy. At this point, a zealous prosecutor could say that an overt act had taken place - the phone call between Bob and Al - releasing Bob from his part of the plan. The overt act requirement mainly serves to provide concrete evidence that a conspiracy really exists - rather than mere puffery. If this is so, then by Thursday, Charlie's withdrawal is too late and he is guilty of conspiracy.

However, if the court finds that the first overt act hatched by this conspiracy is the theft of the Coast Guard truck (clearly qualifying as an overt act in furtherance of the conspiracy) then both Bob and especially Charlie may escape liability if their acts of withdrawal predated Al's theft of the truck. The facts do not tell us when the truck was stolen. Also, if the truck was stolen by Al, prior to the Monday agreement, Bob and Charlie could argue that it had nothing to do with the alleged conspiracy.

Charlie's repudiation/withdrawal is much more powerful than Bob's because Charlie notified the police and foiled the plan. While notification of the authorities is not necessarily required, it is,

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perhaps, the most salient method of withdrawal from the conspiracy. However, Charlie did not notify Al (or Bob) that he was withdrawing.

Charlie has an additional defense touched on in the facts of duress. If Charlie participated in the conspiracy only because he was afraid of what Al would do to him if he didn't, he might be able to argue that to excuse his liability. However, absent explicit threats backed up by reasonable plausibility, Charlie will lose on this defense.

Al's liability

Al clearly had the intent to agree, intent to carry through, made an agreement and performed an overt act - theft of the truck, bringing whisky ashore to be guilty of conspiracy. And since it appears that at the time of the agreement Monday, so did Bob and Charlie, Al can be convicted of conspiracy. However, if both Bob and Charlie are able to escape liability for conspiracy either by acquittal or in the eyes of Al's tribunal, Al cannot be liable of conspiracy. Conspiracy requires that two parties be potentially convictable - even if one is not in fact convicted for practical (not legal) reasons.

Further Al will argue that legal impossibility (discussed further below) makes it impossible to convict him of conspiracy. However, all that conspiracy requires is that the conspirators' objective be against the law - which was clearly the case here. Al, Bob and Charlie intended to import foreign whiskey in violation of the law - regardless of whether they would be capable. The fact that the particular whiskey was domestic is irrelevant (though worth arguing) to the conspiracy charge. Al is guilty.

(b) Bob and Charlie's liability for theft

Co-Conspirators will be liable for all foreseeable acts of other co-conspirators in furtherance of the conspiracy. It is perfectly foreseeable that Al would steal a truck for use in off-loading the imported whiskey. Thus, Bob and Charlie will be guilty of theft if they are found to be guilty of conspiracy. However, even if they were not capable of withdrawing from the conspiracy itself, if they did succeed in the eyes of the law in withdrawing prior to the theft of the truck, they will not be liable as co-conspirators for that theft. The withdrawal issue is discussed above, and we do not know when the truck was stolen. If we assume it was Friday, the night of the importation, then Bob and Charlie both have good arguments that even if they are guilty of conspiracy, they cannot be guilty of the theft of the truck because they effectively withdrew prior to its theft by their co-conspirator. If they were not found guilty of conspiracy they could still face liability as accomplices. See below.

Al is guilty of theft of the truck because the facts say he stole it.

Accomplice Liability for Bob and Charlie

At common law, principals and accomplices were distinguished, however the modern view treats all as principals. Thus anyone who aids, encourages, abets someone else in the commission of a crime will be guilty to the same degree as the principal. Here Al, the principal, is guilty of theft. Bob initially encouraged him to commit the whisky importation as did Charlie. This could

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constitute the requisite aiding/encouraging for liability. We would need to know if the theft was specifically discussed, planned. Again, withdrawal would be a possible defense.

2. Al will claim that because the whiskey he brought ashore was domestic, rather than foreign, he cannot be charged with any crime because it is not illegal to bring domestic whiskey ashore in this manner. This is an issue of factual versus legal impossibility. Although the distinction is not always clear, it is crucial; factual impossibility is not a defense, while legal impossibility is.

Al will argue that this is a case of legal impossibility - that what he did was not illegal under the law and thus the court would be trying him under a law that does not exist. Unfortunately for Al, the courts will find his act to be a case of factual impossibility - a fact unknown to the defendant made his actions seem legal - if the facts were as he believed them to be, he would be guilty of the offense. The crucial distinction is that Al's mistake was one of fact - the whiskey was domestic; not imported, rather than one of law - if for example, the law only applied to vodka. Thus Al's mistake of fact mitigates the charge somewhat to attempt.

Al's situation is analogous to attempted receipt of stolen goods. Here, a defendant can be convicted of the crime attempted receipt of stolen goods, even though the goods have previously been recovered by the police, and used against defendant in a sting operation.

The defendant, Al, must still have the specific intent to commit the crime charged because attempt always requires specific intent. Here, Al intended to import foreign whiskey in violation of law.

Next, the defendant must take a substantial step - here, rowing the whiskey in to shore - in furthering that intent. Al clearly qualifies

Finally, Al can be convicted of conspiracy, theft and attempt. Conspiracy does not merge with either the completed crime or attempt, rather it sits alone as a separate crime.

3. Len is confronted with a client who the facts tell us has told his lawyer he plans to commit perjury. Len, if he is aware that Al's proposed testimony is untrue, has conflicting obligations. First Len has a duty of loyalty to his client and a duty to vigorously represent him. In addition, Len must allow his client to make crucial decisions such as whether to testify and of course the substance of that testimony. However, as an officer of the court, Len also has a duty of fairness to the opposition and candor to the tribunal. The ethics rules provide some guidance in this situation.

First, if Len doesn't know or strongly believes Al's testimony to be false he should carry on as normal and present the best case he can.

However, if Len does know, he can:

- attempt to dissuade Al from testifying, Al can take the Fifth Amendment's protection and simply insist that the state prove its case.
- urge Len to tell the truth on the stand.

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If neither of these succeed, Len has an ethical responsibility not to present testimony he knows to be false.

He can attempt to withdraw, but will likely be unable during the trial. He may also put on A1 as a witness, but not participate in his testimony. A1 will simply present a narrative. Then in Len's closing (and opening) he should not refer to A1's false statements - thereby not "sponsoring" the false testimony.

The ethics code does not allow Len to inform on his client. His duty of confidentiality requires that he not reveal client confidential information unless it is to prevent a crime of death or substantial harm. Len may seek the aid of the judge, but should do so only as a last resort and with great caution.

ANSWER B

1. Al, Bill, and Charlie's Liability/Culpability

a) Conspiracy

The crime of conspiracy requires (1) two or more people with (2) intent to agree and (3) intent to commit a crime. Furthermore, in most jurisdictions, an overt act is also required for the crime of conspiracy. Whether Al, Bill, and Charlie (ABC) can be convicted of conspiracy depends on whether the requisite elements are met.

The first element is met because the agreement was between three people - A, B, and C.

The second element, intent to agree, has also been met. A, B, and C planned to bring 50 cases of whiskey ashore. The three met at Al's house on Monday and agreed to bring the whiskey ashore on Friday. The facts explicitly state that the three agreed, thus this element is met.

The third element, intent to commit the crime is the more troubling element. A, B, C agreed to bring ashore 50 cases of whiskey that they believed were produced abroad and subject to a federal import duty. Further they knew that smuggling items into the country without paying the duty required by the tariff act was a crime. Based on this information alone, they all intended to commit a crime and it appears all are guilty of conspiracy.

Mistake of Fact

However, A, B and C were mistaken about the origin of the goods. The whiskey was not produced abroad but rather was produced in the U.S. Therefore, the whiskey was not subject to a federal import duty. Because of their mistake of

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fact, A, B, and C were conspiring to commit an act that was not a crime in actuality.

For purposes of conspiracy, however, mistake of fact is not a sufficient defense. Had the whiskey been produced abroad as they believed, smuggling it in without paying a duty would have been a crime.

Overt Act

For conspiracy in most jurisdictions, an overt act in furtherance is required when A stole the trucks from the parking lot for the loading of the whiskey, this element was met.

Culpability and Withdrawal

Once a Conspiracy is established, a conspirator cannot withdraw from the conspiracy itself, but can effectuate withdrawal from future crimes committed. B and C both attempted to withdraw from the conspiracy and whether or not they successfully withdrew determines whether they can be convicted of the theft of the truck.

However, their attempts at withdrawal took place after the three requisite elements of conspiracy were met and thus A, B, and C can be convicted of conspiracy unless this jurisdiction requires an overt act. In that case, B can not be convicted of conspiracy because he withdrew before A stole the truck. On the other hand, it may be enough that the three met at Al's house to make the plans. The same reasoning applies to C.

Despite this point, it is most likely that all three can be convicted of conspiracy.

b) Theft of the truck

While A, B, C can all be convicted of conspiracy, only A can be convicted of theft of the truck.

Co-conspirators are liable for the acts committed by other co-conspirators if the acts are committed in furtherance of the conspiracy.

Here, A stole the truck because it was needed to load the whiskey once brought to shore. If C and B were still involved, each could be convicted of theft. However, B and C had effectively withdrawn.

Withdrawal

To withdraw from a conspiracy, a person must communicate that he is withdrawing before it is too late. It must be at a point where the plan could be abandoned.

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B called A on Wednesday and told A that he could not participate because he was going out of town with his wife. A accepted B's withdrawal and told him that he and C could handle it alone and that B naturally would be cut out of the profits. A's response indicates that he recognized and accepted B's withdrawal. Further, this was two days beforehand and the plan could have been abandoned. Thus B is not liable for the theft of the truck.

Similarly, C also attempted to withdraw. And although C did not tell A expressly, C did not show up Friday, at which point A still could have abandoned. C went further in his withdrawal and notified the police. C's effort to stop the conspiracy from succeeding is enough for his own withdrawal and thus C is not guilty of theft of the truck. A, however, stole the truck himself and therefore can be convicted of theft.

2. Should A be convicted of attempt to import dutiable goods without payment of duty in violation of Tariff Act?

A person cannot be convicted of an act that is not a crime. However, that person may be convicted of attempt if the reason it was not a crime is mistake of fact.

Mistake of Fact vs. Mistake of Law

If A had believed that failure to pay a duty on the whiskey constituted a crime but in fact it did not, A could not be found guilty. This is mistake of law.

However, in this case, A believed the goods were produced abroad and therefore subject to a duty, the failure to pay such duty constituting a crime. A is correct in all his beliefs except the fact that the goods were produced in the US and, therefore, not subject to the federal duty.

While A couldn't be convicted of the crime of not paying the duty, he can be convicted of attempt.

Specific Intent

Attempt is a specific intent crime and requires to A specifically intended to commit the crime. A believed the whiskey was produced abroad and intended to smuggle it in without paying a duty.

Thus A had specific intent.

A's mistake of fact does not relieve him of culpability for attempt. He attempted to commit a crime.

He had the specific intent for attempt and also committed an act in furtherance of the crime. He stole a truck, went to the ship and brought back the whiskey.

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A can be charged with attempt here.

Merger

There is no merger for conspiracy and thus A can be convicted of both conspiracy and attempt.

3. Len's ethical duty

As an attorney, Len is subject to strict ethical duties owing to his client, the court and the public.

He has a duty of candor and truthfulness to the court, which requires also that he not assist in hiding evidence and that he makes an effort to seek the truth.

L cannot assist in a crime. Perjury is a crime and thus L must not aid A in committing perjury.

L also has duties to A as his client. L must act competently, which includes following the rules and procedures of court.

Therefore L should counsel A that if A testifies, A must tell the truth. He should advise A of his Fifth Amendment right against self-incrimination but should A insist on testifying, which is the client's decision, L must advise him to tell the truth.

If A refuses to take L's advice, L's options depend on whether he is subject to California law or the ABA.

The ABA allows L to tell the judge about his client's perjury. L can violate his client's confidentiality in such a case to prevent the perjury.

In California, L cannot tell the judge but is required not to help A in his perjury. Thus L can allow A to take the stand but cannot ask A questions to help A's perjury. Essentially A will just narrate on the stand.

If L learned of the perjury after A's testimony, L would have to advise A to recant.