California Bar Examination

Essay Questions and Selected Answers

July 2019

The State Bar of California
Committee of Bar Examiners / Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

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CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Remedies / Constitutional Law
3.	Criminal Law and Procedure
4.	Professional Responsibility
5.	Contracts

ESSAY EXAMINATION INSTRUCTIONS

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 fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply 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 or no 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

In 2015, Priscilla was shopping at Grocery when a very large display of bottled soda products fell on her, bruising her head and entire body. She filed suit in federal district court against Grocery for negligently maintaining the display, and sought damages for medical expenses, pain and suffering, and lost wages. Grocery recognized that jurisdiction was proper and filed an answer denying liability.

Accompanying the complaint was a set of 26 interrogatories, which read in part:

25. Please provide the names and addresses of every Grocery employee who worked on construction of the soda display and every soda company employee who did so.
26. Please provide copies of every training manual Grocery has used in training its employees.

Grocery responded: "Objection. These interrogatories are flawed." Upon receiving the reply, Priscilla filed a motion to compel further responses.

Grocery made two discovery requests asking for:

a. An order requiring Priscilla to submit to mental and physical examinations.
b. All of Priscilla's tax returns since 1995.

Priscilla opposed both discovery requests and Grocery filed motions to compel.

Before Priscilla filed her lawsuit, Grocery hired Xavier, an expert on grocery store displays, to investigate the accident. His findings were unfavorable, and Grocery has not identified Xavier as a witness. Xavier is an independent contractor, but he works exclusively for Grocery.

Included in Priscilla's original set of interrogatories was a question seeking the names and opinions of all experts Grocery had hired for the litigation. In response to that interrogatory, Grocery replied: "Objection. Privileged." No information about Xavier was disclosed by Grocery.

1. How should the court rule on Priscilla's motion to compel further responses to her interrogatories to Grocery? Discuss.
2. How should the court rule on each of Grocery's motions to compel? Discuss.
3. Was Grocery's response to Priscilla's interrogatory about its experts proper? Discuss.
4. Should the court sustain Grocery's assertion of privilege with regard to Xavier? Discuss.

QUESTION 1: SELECTED ANSWER A

Priscilla's motion to compel further responses to her interrogatories to Grocer.

PROPER SCOPE OF DISCOVERY

A threshold issue is whether Priscilla's ("P") interrogatories were proper in scope. Under the Federal Rules of Civil Procedure, a litigant is entitled to discover all non-privileged information relevant to the subject matter of the litigation so long as the requests are not disproportional to the needs of the litigation. Relevance is defined broadly and is not limited to evidence that will be admissible at trial. To obtain relevant information, a litigant may use several discovery devices, including interrogatories, to another party. The party responding to interrogatories must provide written responses, under oath, within 30 days of service of the interrogatories. However, a responding party need only provide information within its possession, custody, or control after a reasonably diligent search or inquiry.

Here, P has asked for the names and addresses of every Grocery ("G") employee who worked on construction of the display. The identification of such employees is relevant to determining who created and maintained the display and, therefore, is relevant to P's negligence claim. However, the request is overbroad in seeking the addresses, if P is seeking home addresses. The disclosure of such information would likely be an unwarranted invasion of the employees' privacy, irrelevant and disproportional to the needs of the case. The part of that request is improper and should not be compelled.

P also has asked for the name and address of every soda company employee who worked on the display. A party responding to written discovery requests need only provide information within its possession, custody or control. G does not need to obtain information from the third-party soda company, unless G has the right to request that information from the soda company. The facts here do not indicate that G had that right, and, therefore, the request should not be compelled as to that part of the request.

In addition, P has requested copies of every training manual G has used in training its employees. On the one hand, G's training with regard to the construction and maintenance of such displays as the one at issue is relevant and therefore discoverable. P's request is not limited to any particular type of training or particular time period. G may have training materials from many years ago entirely unrelated to the creation of product displays, and the request would be overly broad and unduly burdensome as to those requests given the issues dispute. The court should not compel such unrelated materials.

TIMING OF WRITTEN DISCOVERY

In issue is whether the timing of P's interrogatories is proper. Under the Federal Rules, a party cannot serve written discovery, except for requests for production, before the Rule 26(f) conference. Here, P served her interrogatories with the complaint. This was premature, and G is not required to answer them, and the Court should not compel answers at this point.

PRESUMPTIVE LIMIT ON INTERROGATORIES

Another issue is whether P served too many interrogatories. Under the Federal Rules, there is a presumptive limit of 25 interrogatories, including discrete subparts, unless a

party receives leave of court. Here, P served 26 interrogatories, with the complaint. Accordingly, she has exceeded the presumptive limit without leave, and G is not required to answer interrogatory #26. The court should not compel an answer to that interrogatory.

NEED TO MEET AND CONFER

In issue is whether P met and conferred with G before filing her motion to compel. Under the Federal Rules, a party must attempt to meet and confer with the responding party in good faith in an effort to resolve any discovery disputes before moving to compel further responses. Any motion to compel must contain a certificate or statement of compliance with this requirement. Here, upon receiving the reply from G, P filed a motion to compel. There are no facts indicating that she tried to meet and confer, or that G was unwilling to do so. Accordingly, P's motion was improper or, at least premature, and the court should not grant it.

ADEQUACY OF OBJECTIONS

A party responding to written discovery requests, including interrogatories, must state his objections specifically. If an answer is only in part objectionable, a responding party must specify the part objectionable and answer the remainder. In this matter, G simply stated that "These interrogatories are flawed." This was not a proper objection to the relevance, scope, burden, or objectionable basis of the interrogatories. Having failed to make proper objections, G has likely waived his objections.

2. Grocer's motions to compel two discovery requests.

TIMING OF DISCOVERY

As noted above, written discovery cannot be served until after the Rule 26(f) conference. As such, G's two discovery requests may also be premature, but the facts do not clarify when G made his requests.

NEED TO MEET AND CONFER

As also noted above, a party must meet and confer before seeking to compel discovery responses. The facts here do not indicate whether G tried to meet and confer with P before filing his motions.

GOOD CAUSE FOR EXAMINATIONS

An issue is whether G properly requested mental and physical examinations of P. Unlike other discovery requests, obtaining a mental or physical examination of a party under the Federal Rules requires a court order based on a showing of good cause, unless the party consents. In this case, G did not seek a court order but appears to have served a request for an order directly on P. She opposed the request, implying her lack of consent. Accordingly, G was required to file a motion seeking an order for examination. In this context, the court may treat G's motion to compel as requesting such an order if good cause is shown.

G is likely to show good cause as to the physical exam. P has filed a negligence lawsuit seeking medical expenses and pain and suffering. By seeking such damages, she has put her physical condition at issue, and G should be entitled to obtain an independent medical opinion as to P's prior physical condition and the extent of her injuries. While P

may argue that such an exam is unduly intrusive that argument is unlikely to succeed for a physical exam, and the court should allow the exam. P would be entitled to have her attorney attend the examination to help protect her interests.

G is unlikely to show good cause as to the mental exam. While P has asserted pain and suffering, she has not expressly asserted emotional distress. G does not need to inquire into her emotional state to present evidence that would allow a jury to determine the amount of pain and suffering. Therefore, given the highly intrusive nature of such an exam, the court should not allow it here.

SCOPE OF DISCOVERY

Another issue is the scope of G's request for P's tax returns. While G is entitled to information about P's past earnings because she has claimed lost wages, thereby putting her earning capacity at issue, G's request for tax returns goes back 20 years. Requesting documents dating back that far has little probative value and the burden on P of obtaining and producing them is likely disproportional to the needs of the case.

3. Grocer's response to Priscilla's interrogatory regarding experts.

DISCOVERY OF EXPERT EVIDENCE

An issue is whether P is entitled to the names and opinions of G's experts. Under the Federal Rules, a party has an affirmative obligation to disclose basic information about its testifying experts, including the identity of the expert, the opinions to be offered, the factual basis for those opinions, and the expert's qualifications. Here, if G intends to offer X's testimony he must disclose this information, and P's requests for it would be proper.

PROPRIETY OF OBJECTIONS

As noted above, a party objecting to discovery requests must make its objections specific. Here, G has not provided sufficient information to know the basis of his objection. Merely stating "privileged" does not indicate whether he is asserting attorney-client privilege, work product protection, or some other basis. To assert a privilege, a responding party must provide sufficient information for the requesting party to test the validity of the assertion, usually by providing a privilege log. G has not provided any information. Accordingly, his objection is likely inadequate and risks waiver.

4. Grocer's assertion of privilege regarding Xavier.

In issue is whether G's expert, X, is merely a consulting expert. Information about a party's consulting expert, meaning one who is not going to testify at trial, is generally not discoverable except in very limited circumstances. Here, G hired X before the lawsuit was filed to investigate the accident and has not identified X as a witness. These facts tend to indicate that G obtained X merely as a consultant, and information about his opinions would not be discoverable. The court should deny discovery if merely a consulting expert.

Another issue is whether the attorney-client privilege applies to communications with X. To assert the attorney-client privilege, G must show a confidential communication between a lawyer and client made for the purposes of requesting or receiving legal advice. The privilege extends to agents, including independent contractors, of both the attorney and the client, if their communications are made in connection with the attorney-client relationship. In this matter, G has not shown the involvement of any

attorney or that any communications with X were in connection with requesting or receiving legal advice. Accordingly, the court should not sustain G's assertion of attorney-client privilege here.

QUESTION 1: SELECTED ANSWER B

Priscilla's motion to compel

Scope of discovery

Under the Federal Rules of Civil Procedure (FRCP), the scope of discovery extends to relevant evidence, or evidence that is reasonably calculated to lead to the discovery of relevant evidence. Further, discovery requests must be proportionate to the matter.

Here, Priscilla (P) has sought, in her interrogatories, the names and addresses of every Grocery (G) employee who worked on construction of the soda display. This information is relevant because P has sued G for negligently maintaining the display; employees of G who worked on construction of the display will very likely have relevant information regarding the methods used to construct the display and whether reasonable care was used. Therefore, this portion of the request falls within the scope of discovery.

Priscilla also sought the names and addresses of every soda company employee who worked on the display. Since this request was directed at G, and not the soda company itself, G may claim that it does not have possession or access to this information, or alternatively that it would be unduly burdensome to produce. If this is the case (i.e. G does not have this information in its possession), the court should not compel G to produce it.

Finally, P sought copies of every training manual G has used in training its employees. This is relevant because it speaks to whether G used reasonable care in training its employees to erect soda displays, thus bearing on its liability for negligence. G may

argue that the request is overly burdensome or beyond the scope of discovery because it seeks "all" training manuals and not just manuals related to erecting displays. Overall, the court would agree that at least training manuals regarding the displays are within the scope of discovery.

Interrogatories

After mandatory disclosures have been made, a party may direct interrogatories to another party. The FRCP limits the number of interrogatories to 25.

Here, there are two issues regarding P's interrogatories. First, the facts state that she filed the interrogatories "accompanying the complaint." This was premature, as mandatory disclosures had not yet taken place--and indeed, at this point G had not filed an answer.

In addition, P sent 26 interrogatories. This exceeds the maximum number of 25, and there is no indication that P sought leave from the court to send additional interrogatories. For these reasons, the court can find that the interrogatories were procedurally improper, and need not compel G to respond to them (or at least to interrogatory 26).

Objection

A party may object to an interrogatory. In so doing, the party must explain the basis for the objection.

Here, G simply responded "Objection. These interrogatories are flawed." It did not explain the basis for its objection or why it believed the requests were improper. Thus, G's objection itself was flawed and the court need not sustain it.

Motion to compel

If a party fails to comply with a good faith and permissible discovery request, the other party may file a motion to compel. Typically, courts request that the parties meet and confer to attempt to resolve the dispute before the motion to compel stage. A motion to compel will ultimately be granted in the court's discretion.

Here, there is no indication that the parties met and conferred. Rather, it appears P filed her motion to compel immediately after receiving G's reply.

Because both the interrogatories and the objection were improper as discussed above, and because the parties did not meet and confer, the court should not grant the motion to compel at this stage, but rather should order the parties to attempt to cure the procedural flaws discussed above and come to a resolution.

[2] Grocery's motions to compel

[2][a] Mental and physical examination

A mental or physical examination may be ordered against a party to the case, when that party's physical or mental condition is at issue, and for good cause shown.

Here, P is a party to the case. In addition, her physical condition is at issue; she has alleged that as a result of G's negligence, her head and body were bruised when the soda display fell on her. Further, she is seeking damages for medical expenses and pain and suffering. A physical exam would be relevant in helping to determine the scope and extent of P's injuries and the proper amount of damages. Thus, the court should

grant G's motion to compel the physical examination.

As to the mental examination, it is not clear whether P's mental condition is at issue. She has sought damages for pain and suffering, so G will argue that a mental examination is necessary to corroborate the extent of her pain and suffering. P will counter that she can testify about this at trial, and an invasive mental examination is beyond the permissible scope of discovery. Without further information, a court could go either way. On balance, without further facts as to P's allegations of pain and suffering, a court would probably allow P to testify at trial about her pain and suffering, and should not grant G's motion to compel on this point.

[2][b] Tax returns

Production of documents

After mandatory disclosures have been made and as part of the discovery process, a party may request the production of documents and information relevant to the claim.

Here, G has sought "all of Priscilla's tax returns since 1995." Since P has sought damages for lost wages, G will argue that the tax returns are relevant to determining the amount of lost wages. P will counter that producing tax years for the 20 years before the injury (which occurred in 2015) is unduly burdensome and not relevant to determining her lost wages now. Her wages in 1995 would very likely be different than her wages in 2015. Overall, a court would probably agree. The court may compel P to produce some tax returns for recent years to the extent necessary to determine lost wages, but would probably not order the production of 20 years of tax returns.

[3] Grocery's response to Priscilla's interrogatory about experts

Disclosure of experts

A party is required to disclose the names and identities of all expert witnesses who will testify at trial. Disclosure of experts hired simply to prepare for litigation (but who will not testify at trial) is not required.

Here, G hired Xavier (X), an expert on grocery store displays, to investigate the accident. Since his findings were unfavorable, G has not identified X as a witness. Since there is no indication that G is planning to call X to testify at trial, disclosure of X's identity is not required.

Privilege log

In response to a discovery request, a party may produce a "privilege log" that describes the privileged nature of information sought. The privilege log must identify with specificity the basis for asserting the privilege, so that the other side can properly assess whether the privilege was properly invoked.

Here, in response to the interrogatory, G simply replied, "Objection. Privileged." G did not explain the basis for the asserted privilege (work product, attorney-client etc.) or why it believed the information to be privileged. As such, P and the court cannot properly determine whether G's privilege assertion was proper. On these facts, the court should not sustain G's bald objection, but rather should order G to explain the basis of the asserted privilege.

[2] Grocery's assertion of privilege regarding Xavier

Disclosure of experts

The rule is as above. As analyzed above, because X was not retained to testify at trial, disclosure of his identity was not required by the discovery rules.

However, G need not disclose the information if it is protected by a privilege. While it is not clear what privilege G is asserting, G may attempt to assert work product privilege.

Work product privilege

Under the work product privilege, materials prepared by counsel in preparation for litigation may be protected from disclosure. Some materials, such as investigative reports, are discoverable if (1) the information cannot reasonably be obtained through other means, and (2) the party seeking disclosure will suffer substantial prejudice if the information is not disclosed. However, the mental impressions of an attorney, are absolutely protected.

Here, P has sought not only the name of all experts, but their opinions. G will argue that X's opinion is covered by the work product protection. This argument will not likely prevail, as X's findings were not work product prepared by a lawyer. There is no indication that X was working with a lawyer or that counsel had a hand in drafting X's findings. Instead X is simply an independent contractor working exclusively for G. Thus, P will argue that X's findings constitute an investigative report that does not qualify as privileged work product. A court will probably agree.

G will argue that P has not shown that the information cannot reasonably be obtained by other means. Instead, G will say that P can hire her own expert in grocery store

displays. Further, there is no indication that P will suffer substantial prejudice, as P again can hire her own experts. However, this does not matter, as X's findings likely do not qualify as privileged work product in the first place.

Overall, the court should not sustain G's assertion of privilege. At a minimum, for the reasons discussed above, it should require G to explain the basis for any privilege in a more fulsome way.

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QUESTION 2

Clear City is home to 50 churches, one of which burned down earlier this year. Fire investigators suspected that the cause was a burning candle.

Clear City has enacted an ordinance that prohibits burning candles in any church and authorizes the fire marshal to close down any church in which candle burning occurs. The Mayor told the press that Clear City would vigorously enforce the ordinance and that the fire marshal would randomly visit churches during their Sunday services to close down violators.

The fire marshal visited six churches last Sunday, but did not visit the Clear City Spiritual Church ("SC"). Two of the six churches visited were burning candles, but were only issued warnings, not shut down. Immediately after visiting the last of the six churches, the fire marshal publicly announced that it was likely no further warnings would be issued to churches caught violating the ordinance. The fire marshal also announced that, due to a lack of personnel, these random visits would not resume for "at least eight weeks."

The members of SC burn candles during Sunday services to signify spiritual light in the world. The day after the fire marshal's announcements, SC gave notice to Clear City's attorney that it would immediately sue Clear City in federal court seeking: (1) a temporary restraining order and a preliminary injunction to enjoin Clear City from enforcing the ordinance during the pendency of the lawsuit; and (2) a declaration that the ordinance violates the First Amendment.

Clear City's defense is that it has not taken any action and there is no controversy.

1. What is the likelihood of SC's success in obtaining a temporary restraining order? Discuss.

2. What is the likelihood of SC's success in obtaining a preliminary injunction? Discuss.

3. What is the likelihood of SC's success in obtaining declaratory relief in its favor?

QUESTION 2: SELECTED ANSWER A

This question triggers issues of Freedom of Religion under the First Amendment, associational standing, mootness, ripeness, and potentially conduct as speech under the First Amendment.

Preliminary Issues

A necessary prerequisite to SC's ability to obtain any form of relief is that standing exists and that ripeness and mootness can be cleared. Article 3 courts (federal courts) are courts of limited jurisdiction. Under the Constitution, they are not permitted to issue advisory opinions and may only issue opinions where cases or controversies exist. The defense of Clear City ("CC") is essentially that standing does not exist here--that there is no live action or controversy that may be appropriately assessed and provided a remedy. Each of the three questions below will require that there is standing before the remedy may be addressed. Thus, we must tackle the issues of standing, ripeness, and mootness before proceeding to the three questions below, as each of these has the ability to remove the "case/controversy" requirement and thus preclude Art. 3 jurisdiction over the case.

Standing

The issue here is whether there is either individual or associational standing. In order to have standing, one must have suffered a concrete and particularized injury in fact, there must be causation between the defendant's conduct and the plaintiff's injury, and redressability by a favorable decision of the Art. 3 court must exist. In addition, we should note that the association bringing the lawsuit here is exactly that--an association

and not an individual. There are additional rules in order to find associational standing. First, the individual members who make up the organization must have standing. Second, the lawsuit at issue must accord with the organization's purposes. Third, the association must be able to sue in its own right without requiring the active participation of its individual members.

Here, we should find that both individual standing and associational standing are satisfied. The requirement of injury in fact is probably the most tenuous link. SC has not been visited, issued a warning, or shut down. However, they engage in activity that is now prohibited under the ordinance and did so previous to the ordinance's creation. As such, the possibility that they will be reprimanded for their use of burning candles should constitute an injury in fact, as it interferes with the free exercise of their religion. (This finding is bolstered by the lurking First Amendment issues. It might not be so convincing in a non-religious context. See below.) We should note that the fire marshal's statement that they probably wouldn't keep issuing warnings is ambiguous. This could either indicate that the ordinance will not be enforced going forward, or that it will be enforced strictly and to the full extent of its reach. It is more likely that the latter is the correct response because it accords with the Mayor's press announcement that the ordinance would be vigorously enforced. This also increases the likelihood of an actual injury in fact occurring to SC directly.

Additionally, the causation between the defendant's conduct and plaintiff's injury is clear. Here, the defendant's action was to pass an ordinance that prohibits the burning of candles in churches, a religious activity. Without the passing and enforcement of that ordinance, SC would have been permitted to continue burning candles in their church at

their leisure.

Additionally, redressability is within the power of the court. Here, if the court finds the ordinance to be unconstitutional (as requested in the prayer for declaratory relief), the injury in fact imposed on churches in CC will cease.

Thus, we can conclude that an individual member of the church would likely have standing. We should then consider associational standing. In addition to the requirement that the individual members who make up the organization would have standing (satisfied directly above), the lawsuit in question must accord with the association's purpose. Here, the purpose of the association is not directly stated, but one could conclude that it is "to signify spiritual light in the world," the reasoning given for the burning of candles during Sunday services. Realistically, it is probably broader than this. The church's purpose is to provide spiritual guidance and so on, and one part of that is to signify spiritual light in the world to others who might consider joining and so on. Regardless, the nexus between the association's purpose and the lawsuit should be sufficient to satisfy this requirement.

The final requirement is that the association must be able to represent itself in the lawsuit without requiring the individual input of any of the particular members. There are no facts in the pattern that indicate otherwise. Thus, I assume this element is satisfied.

As such, there is both associational and individual standing here. Because SC is bringing the lawsuit, associational standing is most pertinent to our purposes. It is satisfied.

Ripeness

The issue here is whether the case or controversy here is actually ripe. The conclusion should be yes, but CC will argue that it is not. In order to be ripe, a lawsuit must be capable of actually being determined. Issues of ripeness arise with respect to proposed legislation, ordinances that have not yet been enacted, laws that have not yet been violated, and so on. In short, the injury is essentially to come, and the plaintiff is seeking a declaration that the ordinance (or otherwise) is invalid before harm can occur.

Generally, ripeness questions can also arise when there is a dearth of appropriate facts such that the court cannot appropriately answer the question. A case is less likely to be unripe when the question is essentially one of law. Here, the question is essentially one of law--is the ordinance compatible with the First Amendment? Thus, there is no need for a slew of facts before judicial review can be appropriately had.

SC will also point out that the ordinance has actually been enforced (at least in part), because the fire marshal has begun to make random visits and has begun to issue warnings. The ambiguity of the fire marshal's statement is again in issue here, because it is not entirely clear whether he means to ramp up or down enforcement after the eight weeks have passed. Because of the threat of interference with religion, and because the question here is mostly one of law, the court should find the issue to be ripe and to take up the case.

Mootness

The issue here is whether the case or controversy in question has been mooted. CC could claim that there is no controversy, because the fire marshal publicly announced that they would not seek any further warnings to issues caught violating the ordinance.

Additionally, he announced that the random visits would not occur for the next 8 weeks because of a lack of personnel. Thus, CC might claim that there is no longer any live issue in the case as there is no risk that SC will be caught burning a candle during a Sunday service and being closed down. If there is no live controversy, then a federal court cannot act on the issue.

However, there are two exceptions to the mootness doctrine. One exists where the problem in the lawsuit is capable of repetition, yet evading review. The best example of this is abortion. By the time a decision is made in federal court, typically 9 months have passed and the live issue has been resolved. However, if this standard were strictly followed, there would never be an opportunity to adjudicate on the issue. Here, SC could raise this exception, perhaps arguing that the fire marshal might just cease enforcement activity whenever a lawsuit is threatened. However, this doesn't exactly accord with the facts, as SC informed CC of its intent to sue the day after the fire marshal's announcements.

The better argument for SC is that this is an example of the voluntary cessation mootness exception. Where the conduct complained of by defendant pauses or is halted, such that the live controversy disappeared as a result of defendant's own free will, the case cannot be said to have been resolved. Rather, it is wholly possible that upon dismissal of the case the defendant will begin to once again engage in the conduct complained of. As such, voluntary cessation is an exception to the mootness doctrine. Here, voluntary cessation neatly fits the facts. The fire marshal indicated that there was a lack of personnel, so the random visits would stop for at least eight weeks. However, if many new personnel signed up the very next day, random visits could start again

immediately. Additionally, the fire marshal's decision to "likely" not issue any further warnings is voluntary. The ordinance giving him the authority to do so has not been repealed; this is simply a policy decision on his behalf. As such, this is a good case of voluntary cessation that should prevent the mootness doctrine from disposing of this case.

Potential Remedies

Above we have ensured that the case is an appropriate case or controversy under Article 3 such that it is permissible for a federal court to hear it. Now we must assess the remedies issues assigned.

One preliminary issue with respect to remedies is that the suit is being filed against Clear City, a municipality. Municipalities are not entitled to state sovereign immunity under the 11th amendment, and at any rate it appears that CC has not attempted to fight the suit on an immunity basis, so I will not consider that potential defense further.

(1) Temporary Restraining Order

The issue here is whether a temporary restraining order is appropriate. Temporary restraining orders are devices that are intended to be available only when there is a serious threat of immediate, irreparable injury to the plaintiff. Temporary restraining orders require the showing of two elements (1) likelihood of success on the merits for plaintiff, and (2) likelihood of irreparable injury to the plaintiff if not granted. Temporary restraining orders ("TROs") are also allowed to be issued before a hearing occurs--thus

ex parte--and in some cases without notice to the other party. Notice is not required if the plaintiff can show that provision of notice would potentially lead to the destruction of the item in question in a goods case or some other good reason why it might be inappropriate to furnish the defendant with a warning. Another good reason can also include simply documented unavailability of the defendant. Temporary restraining orders in federal court are good for 14 days. They can be extended for another 14 days with a showing of good cause, but all reasonable efforts must be made to secure a preliminary hearing before that point. When a preliminary hearing occurs, the court will determine whether or not to issue a preliminary injunction. If the court does not hold a hearing before both 14 day periods have passed, the TRO effectively morphs into a preliminary injunction.

Here, there is probably not a compelling case for a TRO. First, there is probably a likelihood that plaintiff can establish a likelihood of success on the merits (see section 3 below). However, it is unlikely that irreparable injury would occur without a TRO. The fire marshal's statement indicated that there would not be any random visits for eight weeks. Eight weeks consisting of 7 days is 56 days. A TRO would be good for, at maximum, 28 days. As such, there is no pressing need that requires a TRO be granted in order to prevent the SC church from being shut down.

SC's likelihood of success in obtaining a temporary restraining order is low, unless they can demonstrate some increased likelihood of irreparable injury (i.e., if the fire marshal suddenly hired 50 new employees and could carry out the ordinance in full).

(2) Obtaining a Preliminary Injunction

The issue here is whether SC will be able to obtain a preliminary injunction. The test for a preliminary injunction is much the same as that of a TRO. The plaintiff must establish a likelihood of success on the merits; a likelihood of irreparable injury if a preliminary injunction is not granted; and a balancing of the hardships of plaintiff and defendant/the public in plaintiff's favor in order to succeed. We should also note that in the case of a preliminary injunction it is appropriate to provide a bond, such that if a preliminary injunction is inappropriately awarded, the defendant can be compensated for the time in which he was precluded from acting in a particular way/possessing a particular good. We will assess each element below in turn.

Likelihood of success on the merits. See section (3) on declaratory relief.

Likelihood of irreparable injury if preliminary injunction not granted. Here, there is an increased chance of irreparable injury if the injunction is not granted, because the reality of litigation/trial is that the process is lengthy. The likelihood is that litigation will exceed 8 weeks of preparation and trial. Again, the ambiguity of the fire marshal's statement is pertinent. If they intend to ramp up ordinance enforcement when the 8 weeks end, then the likelihood of irreparable injury via the closing down of the church is significant. We should also note that the manner of enforcement of the ordinance is rather extreme. Rather than fining a church, they will be shut down. Shutting down surely gives rise to an inference of irreparable injury--even if the ordinance is later declared unconstitutional and the church is permitted to reopen, there is a likelihood that congregation members

will have gone elsewhere and the ability of the church to attract new members will have been greatly diminished. Because of the widened time scope of the preliminary injunction, likelihood of irreparable injury is probably satisfied here.

Balance of hardships between plaintiff/defendant and public. Here we must assess how the ordinance and its enforcement affect parties on either side of the case. If the ordinance is not enforced, the hardship imposed on the defendant and public is that occasionally a church (potentially) burns down. (Note that fire investigators weren't even sure if this was the cause of the church burning down.) While the loss of a church to a community is likely impactful, the fact remains that CC is home to 50 churches, so the public and the city are unlikely to be devastated by the loss of one. By contrast, to the plaintiff--an actual church--the potential for them to be shut down as a result of burning a candle imposes a significant hardship. This is so because of the likelihood of irreparable injury as discussed above (loss of congregation members, inability to attract new members). The balance of hardships thus comes out strongly in favor of plaintiff.

Because we aren't given facts about SC's financial situation, I will presume that they could afford to post the appropriate bond.

The likelihood of SC's success in obtaining a preliminary injunction is thus high.

(3) Obtaining Declaratory Relief

The issue here is whether declaratory relief is appropriate. Declaratory relief is that relief provided by a court that does not change the rights of a party but merely delineates those rights. Declaratory relief is an appropriate way to handle the question of whether

or not an ordinance is constitutional, and is especially appropriate in the context of a municipality because it does not run into any 11th amendment state sovereign immunity issues that might be implicated by a damages analysis.

To determine whether declaratory relief is appropriate, we must assess the merits of the constitutional challenge to the ordinance. Here, the challenge is that the ordinance violates the First Amendment. There are at least two ways in which this could violate the First Amendment under freedom of religion and potentially one under freedom of speech--regulation of symbolic conduct.

It should be noted that here the municipality is a government actor whose actions might be violating the First Amendment.

Freedom of Religion - Free Exercise Clause

The issue here is whether the ordinance inappropriately restricts SC's ability to freely exercise their religion. Under free exercise jurisprudence, a general statute of neutral applicability is valid even if it incidentally burdens religion. However, where it appears to regulate only religion, then the governmental conduct in question must pass strict scrutiny. Strict scrutiny requires the government to show that the law in question was necessary to achieve a compelling governmental purpose, and that there was no less restrictive alternative available.

Here, the law in question does not appear to be neutral and general. Rather, it is directed toward religious entities (churches) alone. As such, it must pass strict scrutiny. One could argue that there is a compelling purpose here in ensuring that churches are not burnt down. (This may not be an appropriate governmental purpose, as it could be argued under the Establishment Clause/*Lemon* test that this constitutes inappropriate

excessive entanglement of government and religion.) Another potential purpose the government could put forward is fire suppression/prevention for the health, safety, and welfare of their residents. Assuming arguendo that this is considered an appropriate government compelling purpose, then we must ask whether it was *necessary*--that is, whether it was the least restrictive means for accomplishing that purpose. CC is very unlikely to be able to fulfill this burden, because there are a variety of other ways a church could undertake to ensure its candles didn't lead to its burning down. Increased fire safety measures, the installation of sprinklers, the placement of fire extinguishers within the church, repositioning of candles in un-flammable areas, etc.--there are a variety of less restrictive alternatives as compared to shutting a church down entirely.

The ordinance probably violates the free exercise clause.

Freedom of Religion - Establishment Clause

The issue here is whether the ordinance inappropriately establishes or interferes with a religion. Generally, the Establishment Clause analysis proceeds by consideration of the Lemon test, which asks: (1) Was there a secular, non-religious purpose in enacting the law? (2) Was the primary effect of the law to advance or inhibit religion? (3) Was there excessive entanglement between the government and religion? Here, there was clearly a secular purpose in enacting the law--prevention of loss of churches through accidental burning down from unattended candles. This is not religious in nature merely because the place in which the government seeks to stop burning buildings is candles. There is probably a general compelling governmental interest in fire suppression/prevention for the health, safety, and welfare of its constituents.

The primary effect of the law, however, probably inhibits religion. Because a common

religious practice, burning candles, is here being prohibited by the government upon pain of being shut down entirely, the law seems to be overbroad in attempting to achieve its legitimate non-secular purpose. Because if the law were fully enforced many churches would be shut down, there is probably a failure on prong 2.

Third asks whether there is excessive entanglement between government and religion. This is a close call. It is possible that there is excessive entanglement here because the fire marshal seems to have an inordinate amount of discretion in deciding whether he is going to issue a warning or shut the church down entirely. For example, if the churches issued warnings were Catholic, but future Lutheran churches were immediately shut down, this would appear to be excessive entanglement of government and religion because it seems to send a message about the content of church services. This makes exercise of discretion very dangerous. Presuming that the fire marshal is going to strictly enforce the law going forward and decline to exercise discretion, this prong is probably not problematic, but from the fact pattern, the conclusion is unclear.

Because the second prong of the Lemon test is failed, the ordinance is probably improper under the Establishment Clause as well.

Freedom of Speech Issue - Symbolic Conduct

The issue here is whether the ordinance is permissible governmental regulation of conduct speech. This is probably permissible governmental regulation of conduct speech. The test for permissible conduct speech is a hybrid test closest in nature to intermediate scrutiny. It requires that the regulation of speech not be overbroad; that the purpose for regulating the speech not be purely to regulate the speech content, but for another unrelated governmental purpose; that the government have an important

purpose in regulating the speech; and that the regulation be narrowly tailored; and that it directly advance the government purpose.

Here, the regulation of symbolic speech--prohibiting candle burning--is not merely to regulate the content the speech communicates (signifying spiritual light in the world), but to prevent buildings within a municipality from burning down. The interest in fire suppression/prevention is probably an important government purpose because it affects the health, safety, and welfare of its residents. The question of whether the regulation is narrowly tailored is arguable--again, the enforcement mechanism seems somewhat strict--but it seems appropriate as it merely prevents open flame within the church while the point of the regulation is to prevent fires. Because of this, the regulation is probably not overbroad, though its enforcement mechanisms may be. The government purpose of fire suppression is probably directly advanced by eliminating the most likely source of flame/fire within the buildings in question.

The ordinance probably does not constitute a violation of the freedom of speech with regard to regulation of speech by conduct.

It is likely that SC will be successful in obtaining declaratory relief in its favor under a first amendment freedom of religion theory. The best theory for SC is probably a violation of the free exercise clause as strict scrutiny is extremely unlikely to be satisfied here. An establishment clause argument would probably also succeed. A first amendment freedom of speech argument would probably not succeed, so one of the other two should be used.

QUESTION 2: SELECTED ANSWER B

Whether Clear City Spiritual Church ("SC") is Entitled to a TRO to enjoin Clear City ("CC") from enforcing ordinance

Standing

The first issue is whether SC has standing to bring an action against CC. A party meets the elements of constitutional standing by showing (a) injury in fact (b) causation, and (c) redressability.

Injury in fact

Injury in fact means that the injury is concrete, not abstract, and is particularized. In other words, the plaintiff must show that *they* were actually harmed.

Here, SC can likely argue that it has suffered injury in fact. SC's practice is to burn candles during Sunday services to signify spiritual light in the world. CC is effectively trying to put that light out by prohibiting burning candles in any church. This has a concrete effect on SC in particular. This element is met.

Causation

But for CC's ordinance, SC would not be in a position where they are afraid to engage in one of their regular religious practices. This element is met.

Redressability

If the court prevents SC from enforcing the ordinance and eventually overturns the ordinance, it will provide SC with exactly the relief it seeks, allowing SC's members to continue lighting candles. Redressability is met.

Organizational Standing

CC might argue that SC's members are required to bring the action rather than SC. Indeed, it is SC's members who burn the candles. However, even if it were true that SC's members are the ones that suffer harm, SC likely has organizational standing here.

An organization has standing to bring a suit on behalf of its members where the members can be adequately defined and the organization can show that it adequately represents the members' interests. Here, the members are SC's churchgoers, and, as SC is the organization that leads the congregational worship and oversees Sunday services where candle burning takes place, it can represent the interests of its churchgoers effectively. SC has organizational standing.

Ripeness

A court may only hear a live case or controversy. That is, there must be an actual dispute over the rights and obligations of parties, such that resolution will clarify those rights and obligations. A court may not issue advisory opinions. Ripeness may exist even if one party voluntarily curtails their conduct where there is the ongoing possibility of a violation.

Here, CC argues that there is no controversy, likely because it is not currently enforcing the ordinance. The facts show that due to a lack of personnel, random visits to enforce the ordinance are delayed "at least eight weeks." Nonetheless, the ordinance is still in effect, and it is highly likely that at some point in the near future, SC will be paid a "visit" by the fire marshal. SC's argument holds considerable weight in light of the public statements made by the Mayor and fire marshal. The Mayor told the press that CC

would "vigorously enforce the ordinance," and the fire marshal announced that churches will likely no longer get the benefit of a warning if caught violating the ordinances. Accordingly, while SC may not have to worry about a fire marshal "visit" for at least eight weeks, the concern is still very much live. Furthermore, there is nothing to say that the fire marshal is true to his word. The Mayor's announcement to the press suggests that the CC has almost an inquisition-like desire to shut down churches burning candles. There's nothing to suggest that the fire marshal may gain personnel to start the sweeps earlier.

Accordingly, there is a live case or controversy such that ripeness exists.

Entitlement to a TRO

A temporary restraining order ("TRO") is a form of injunctive relief that a party may obtain with or without notice, which, if granted, immediately enjoins a party from taking a contested action until the parties can be heard on a preliminary injunction motion. In essence, TROs and PIs are designed to preserve the status quo during the pendency of an action. When a court grants a TRO, it will generally set the preliminary injunction hearing shortly thereafter (usually within 10 days). TROs are obtained ex parte upon a showing that giving notice to a party is likely to frustrate enforcement. Here, the TRO appears to be with notice as SC gave notice to CC's attorney that it would seek a TRO.

A TRO is only granted upon a showing of immediate harm. In determining whether to grant a TRO, the court looks at (i) whether the party will suffer irreparable or immeasurable harm if injunctive relief is not granted, (ii) the likelihood of success on the merits. (iii) the balance of the harm to the movant if the TRO is not granted against the burden to the nonmoving party in complying with the injunction, (iv) the public interest in

granting a TRO.

i. Irreparable harm

SC can meet this element because it is not seeking monetary relief, but rather declaratory relief declaring that the ordinance violates their First Amendment rights. A monetary value cannot be placed on the harm SC will suffer if its members are prohibited from practicing their religious beliefs. This element is met.

ii. Likelihood of success on the merits

This factor is explained below in the discussion of declaratory relief. The short answer is that this element will be met because CC would be considered a state actor, and has passed a law that facially discriminates against religion, and does not meet strict scrutiny.

iii. The balance of harms

This factor also favors SC. The harm SC will suffer due to a violation of the free exercise clause is profound, as its members would have to give up one of their regular religious practices, or otherwise practice secretly, in fear of government intervention, which evokes Soviet Union-type concerns. On the other hand, CC would be prohibited from enforcing an ordinance that may be unconstitutional, and even if it is not, the harm is small. Indeed, SC can point to the fact that the fire marshal has already explained that they will have to postpone random visits due to lack of personnel. If enforcement of the ordinance was that important to the city, then CC would find another way to continue enforcement, such as moving over personnel from other departments.

iv. Public interest

The public interest in allowing persons in the United States to exercise their First Amendment rights is paramount. On the other hand, there is no interest in allowing a government actor to enforce a questionable ordinance.

Immediacy of harm

While SC will easily satisfy the four-factor test for injunctions, the court may still refuse to grant the TRO because SC may not be able to show a risk of immediate harm. The fire marshal's announcement that random visits will not resume for at least eight weeks means that there is plenty of time to seek a preliminary injunction prior to any harm befalling SC. If the court accepts CC's statement that they will not enforce the ordinance for at least eight weeks, then it will likely not grant a TRO.

Accordingly, while the factors for a TRO all favor SC, SC still may lose its TRO application based on a lack of immediacy of harm.

2. Whether SC is Entitled to PI to enjoin CC from enforcing ordinance

On the other hand, SC is likely entitled to a PI.

Courts use the same four-factor analysis in determining whether to grant a PI. Additionally, a PI does not require a showing of immediate harm; only a showing that the harm is likely to occur if an injunction is not granted during the pendency of the action.

For the reasons stated above, SC can meet the four-factor test. Furthermore, if CC begins its sweeps in the next eight weeks, then the risk of harm is likely to occur during the pendency of the action, such that the PI is necessary to preserve the status quo.

3. Whether SC is likely to obtain declaratory relief

Government Action

The First Amendment applies only to government action. The First Amendment is couched on *Congress* not making any law that violates a person's rights. It is extended to state and local government through the Fourteenth Amendment due process clause.

Here, CC appears to be a state actor because it is a city. It has a Mayor, a fire marshal, and enacts ordinances that it seeks to enforce. The alleged First Amendment violation directly relates to one of those ordinances. Accordingly, government action has occurred raising First Amendment issues.

Free Exercise

A person has the absolute right to their religious beliefs, but religious conduct may be limited in some circumstances. The government may pass laws that limit religious conduct, but they are more likely to be upheld where the laws only incidentally limit religious conduct. Where a law is facially neutral, such that the prohibited conduct applies equally to religious and secular conduct, absent a showing or discriminatory motive, the law must merely meet rational basis scrutiny. This requires the proponent to prove that the law is not rationally related to a legitimate government interest. On the other hand, where a law is facially discriminatory, such that it is aimed at tailoring religious conduct, it is subject to strict scrutiny. This requires the government to show that the law is narrowly tailored to meet a compelling government interest.

The ordinance is facially discriminatory

Here, the ordinance applies only to burning candles in *any church*. On its face, it appears to target religious conduct because it only affects churchgoers.

The city could argue that the ordinance is not aimed at religious conduct, but is instead aimed solely at regulating burning or candles. But if that's the case, then CC could have drafted the ordinance to say that. The ordinance could have applied to burning candles in any building, or any place where members of the public meet, or similar. It does not say that; rather, it applies only to burning candles in churches.

Because it is facially discriminatory, strict scrutiny applies. The government must show the law is narrowly tailored to meet a compelling government interest.

Compelling government interest

The government can likely meet this because CC is home to many churches, and one of those churches burned down earlier this year, with the suspected cause being a burning candle. It can be presumed that people go to these churches, and CC has a compelling interest in protecting the safety of its citizens. Accordingly, CC meets this element.

Narrowly tailored

CC will lose on this element because the ordinance is not narrowly tailored. To be narrowly tailored, the government generally must use the least restrictive means. Here, CC completely prohibits the use of candles, and has invoked draconian enforcement measures and sanctions to enforce the ordinance. CC could have regulated in a less restrictive way, such as by regulating where candles are placed in churches, or the type

of candle used, or required other safety measures, such as burning candles over a non-flammable service. CC instead issued a blanket prohibition. CC fails this element.

Accordingly, the law does not meet strict scrutiny.

Rational basis

On the chance that the law is considered facially neutral, it is more likely to be upheld. SC would have to show that the law is not rationally related to the legitimate government interest. Courts generally give the state wide discretion under rational basis scrutiny. Accordingly, the ordinance would likely survive on the unlikely chance that the ordinance is found to be facially neutral.

Establishment Clause

The First Amendment also prohibits the government from favoring one religion over others or favoring religion over non-religion. The government must show (1) the law has a secular purpose, (2) its primary aim is not to advance or inhibit religion, and (3) the law does not excessively entangle government with religion.

Here, even if the law has a secular purpose, and even if the primary aim is to not to advance or inhibit religion, the government would fail on the third factor because it excessively entangles government with religion. As mentioned above, these draconian sweeps are Soviet-Union like. Because the ordinance applies only to churches, the practical effect is that the government is engaging in random, chilling sweeps of churches and churchgoers. The government's willingness to crash Sunday services is strong evidence that the government is excessively entangled in religion.

Conclusion

For the foregoing reasons, SC is likely to succeed on its declaratory relief action because CC likely violated the First Amendment by passing and enforcing the ordinance.

QUESTION 3

Delia entered a coin shop, pulled out a toy gun that appeared to be a real gun, and pointed it at the owner, Oscar. Oscar handed her a set of valuable Roman coins and she fled. Neither said a word.

Subsequently, the police received an anonymous email that stated, "Your coin robber is Delia, and she is trying to sell the stolen coins." Detective Fong followed Delia and saw her using a payphone in a public alley. The payphone was not in a phone booth. As he walked past her, he heard her say softly, "I have a set of 'hot' Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight."

Detective Fong then bought a "Bird Song Microphone" from a pet store, a parabolic microphone that promised to enable a listener to hear the chirping of birds from a distance of 150 feet. He went to Nell's house, which had a deck that overlooked the alley, and lied to Nell saying that he needed to go on the deck because he was investigating a terrorist plot and "lives are at stake." Nell let him onto the deck at 9:00 p.m. that night. He aimed the microphone at Delia, who was using the same payphone in the alley, and heard her say softly, "Fine, call your buyer and let me know if we have a deal for the hot coins."

The next day, Detective Fong put all of the above information into an affidavit for a search warrant for Delia's house, obtained a signed search warrant from a judge, searched Delia's house, and recovered the coins. Delia was arrested and charged with robbery.

Prior to trial, Delia filed a motion under the Fourth Amendment to the United States Constitution seeking to suppress her statements and the coins.

1. What arguments may Delia reasonably raise in support of her suppression motion, what arguments may the prosecution reasonably raise in response, and how should the court rule with regard to

    a) Delia's statement, "I have a set of 'hot' Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight." Discuss.

    b) Delia's statement, "Fine, call your buyer and let me know if we have a deal for the hot coins." Discuss.

    c) The Roman coins. Discuss.

2. Is Delia guilty of robbery? Discuss.

QUESTION 3: SELECTED ANSWER A

Delia's Motion to Suppress

OF = Officer Fong.

State Action

For a motion to suppress based on constitutional rights, there must be state action. All the actions here were undertaken by Fong, a police officer, so there was state action.

The Fourth Amendment

The Fourth Amendment states "the right of the people to be secure, in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, except upon probable cause, supported by oath and affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

The requirements of particularity and probable cause facially apply only to searches which are conducted pursuant to a warrant. However, the Supreme Court has held that, because it would not make sense for a warrantless search to be conducted to a lower standard than a search conducted with a warrant, the same requirements of particularity and probable cause apply both to warrantless searches and searches conducted pursuant to a warrant. Probable cause is slightly more stringent for a warrantless search, and in a marginal case, a warrantless search will be found not to be based on probable cause *(US v. Ventresca).* A warrantless search is presumptively unreasonable, unless an exception to the warrant requirement applies.

a) Delia's First Statement

The statement made by Delia was overheard by Officer Fong without a warrant. Therefore, *assuming that a search took place,* it would be presumptively unreasonable. I analyze this issue below.

Standing

Standing is a threshold inquiry which is not jurisdictional, but may nevertheless bar a defendant from arguing a suppression motion. A defendant must show that their own reasonable expectation of privacy was violated (that they have standing) in order to bring a constitutional claim.

Delia here has standing - the words she seeks to suppress are her own.

Probable Cause Based on Informants

In *Illinois v. Gates*, the Supreme Court relaxed the relatively strict constraints placed on information obtained from the informants which previously was codified in *Aguilar/Spinelli.* Originally, under *Aguilar/Spinelli*, information from an informant was evaluated on a two prong test: first, corroborating circumstances confirming the information contained in the warrant was required, and secondly, the informant's reliability, as well as the reliability of the information, would be evaluated. Probable cause could not be established unless the state could meet both prongs. *Illinois v. Gates* modified this test, holding that a strong showing on one of the prongs could compensate for a poor showing on the other. Furthermore, the facts would be evaluated

based on the totality of the circumstances, rather than in a prong-specific manner.

Here, OF's investigation was undertaken based on an informant's anonymous, uncorroborated tip. This would fail both *Aguilar/Spinelli* and *Illinois v. Gates* because, at the time the tip was received, there were no corroborating circumstances available to OF, other than the fact of the robbery. Presumably, Oscar would have provided a description of the robber which could be matched with Delia's appearance, but the facts are silent on whether this was actually available to OF. Regardless, the informant's reliability was not established, nor was the accuracy of the information ascertainable on anything other than innuendo.

However, *Illinois v. Gates* only governs whether probable cause could be established based on an informant's tip. It does not govern whether police may *investigate* based on the tip when there is no probable cause, in order to follow up on information that may or may not be true. Therefore, the information from the tip would not support probable cause by itself, but it is completely admissible to support further action by OF which does not violate any constitutional provision - which is, in fact, what happens.

Delia's Use of the Payphone

Is *Katz* Implicated?

In the seminal case of *US v. Katz*, the Supreme Court ruled on the constitutionality under the Fourth Amendment of police using technology to overhear a

conversation *inside a telephone booth*. The relevant holding, in Justice Harlan's concurrence, stated that action under the Fourth Amendment is a search if it 1) violates a subjective expectation of privacy by the defendant 2) which society is prepared to recognize as reasonable.

OF's actions here took place without a warrant. Therefore, *if the actions were a search*, it would be presumptively unconstitutional. We must therefore determine whether a search took place at all.

Subjective Expectation of Privacy

Delia will certainly argue that she has a subjective expectation of privacy in the contents of her own conversation. She certainly did not want her conversation to be overheard by OF. However, subjective expectations of privacy are based on the conduct of the parties, not their subjective thoughts. Delia's speech was in an alleyway which was "a public alley", where anybody could go. The payphone she used was not enclosed. Delia could argue that her actions manifested an intention on her part to be especially careful about being overheard (she spoke "softly"). But this will not be enough to establish a subjective expectation, given that the conversation took place in a public space.

Objective Expectation of Privacy

Furthermore, Delia's conduct is not one which society is prepared to recognize as reasonable. It took place in a public thoroughfare, and the law is settled that police officer may conduct investigations from locations where they have a right to be.

Furthermore, it is unclear whether Delia has a recognizable expectation of privacy in her conversations in the first place. When a party speaks to another, they run the risk that the other party will disclose the contents of their conversation (*Hoffa v. US*). However, it could be argued that this only applies to disclosures from that party, such as when the party wears a wire. In this case, Delia's conversation was overheard by a third party, OF. If OF had taken special measures to overhear the conversation (considered in Part II) it might be argued that Delia had an objectively reasonable expectation of privacy, but against this will be held the fact that the entire conversation took place in a public space. Although, in some cases, courts have been willing to hold that an objective expectation of privacy was violated when listening devices were surreptitiously placed in a public space, this is not the case here - OF simply walked past Delia. Therefore, there is no objectively reasonable expectation of privacy, and OF's overhearing Delia was *not a search at all*.

Because OF's behavior was not a search, it does not matter that the informant's information could not establish probable cause. Nor does it matter whether the overhearing of the conversation was a "fruit" of the original informant's tip. Because there was no action subject to the Fourth Amendment at all, there can be no constitutional challenge to OF's action here.

Conclusion

The motion will fail with respect to the first statement.

b) The Second Statement

The second statement raises a number of different issues from the first.

Standing

Rules above. Delia has standing; the statements are her own.

Use of a Listening Device

OF uses a "Bird Song Microphone" to listen in on Delia's conversation, presumably because Delia might be suspicious if he listens in on her again.

The Supreme Court precedent most closely on point, with respect to technology assisted searches, is *Kyllo v. United States*, which holds that when police use technology which is not in general public use, to obtain information from the interior of a home which they would otherwise not be able to obtain unless they made a physical intrusion, then there is a search.

However, *Kyllo* is not entirely on point here. The technology here is in general public use, because it was purchased from a pet store. Furthermore, there was no intrusion into a constitutionally protected area through the use of the bird microphone, because

Delia was not at home when she used the payphone. (It is possible that there was a search, however, and that there was a reasonable expectation of privacy. I consider this below).

Another relevant precedent is *Dow Chemical*, which considered the constitutionality of an aerial search using a high powered camera. The Supreme Court in that case did not hold that a search had taken place at all, although it was willing to grant that the use of the camera in that case could, in some cases, transform action which did not otherwise violate the Constitution into a constitutional search.

Since the microphone here was in general public use, it is likely that the use of the microphone would not transform the search into a constitutional violation by itself. Persons in a public space can generally be held to assume the risk that other private individuals, using generally available technology, might listen in on their conversations. Therefore, the use of the microphone, by itself, will likely not raise a constitutional violation.

Pretextual Entrance Into Nell's House

A different issue is raised by the location from which OF conducted the search.

Consent

Consent, for purposes of the Fourth Amendment, is governed by *Schneckloth v. Bustamonte*. A court will evaluate the totality of the circumstances in determining whether consent was voluntary or not. However, consent is not a waiver - it need not be

knowing or intelligent in order to be valid.

Here, two separate issues are raised by OF's entry into Nell's home. First, Delia will need to argue that the consent was invalid because it was procured by a lie on the part of OF. It does not matter that OF stated that he was "investigating a terrorist plot" or that "lives were at stake" - although these raise issues of exigency, the entry here would not be justified by exigency, but rather by consent. Besides, entry based on exigent circumstances is only unconstitutional when police gain entry via an actual or threatened violation of the Fourth Amendment, and there was no violation here because *Nell's* house was not searched by OF.

Rather, Delia will argue that the consent was not voluntary because it was procured falsely. Police are allowed to lie when they obtain consent, however, so the entry here will likely not be held to be have been obtained through involuntary consent. It is possible, however, that the egregiousness of OF's assertions to Nell could change this result.

A larger problem is raised, however, by standing. Even if Delia were to argue that the entry into Nell's house is somehow improper, Delia does not have standing to object to an entry into Nell's house because only Nell can assert a possessory interest in her own home. Therefore, for purposes of challenging the later search, Delia will likely have to presume that OF was where he had a right to be, and that when he aimed the microphone at Delia, Delia's rights with respect to OF are the same as if Nell had aimed the microphone at her.

Subjective Expectation of Privacy

I next turn to whether, given a police officer on the deck of a nearby house aiming a device which is in general public use at the defendant, such action constitutes a search.

The rules are the same as before (*Katz*).

The analysis for the subjective expectation is before. Delia will argue that she "spoke softly", but this alone cannot establish a subjective expectation of privacy, given that the conversation took place in a public alley.

Objective Expectation of Privacy

The analysis for an objective expectation of privacy differs here, however. The listening in on Delia's conversation took place not through OF listening to her as he walked by her, but through his use of a microphone at a distance of 150 feet. This could change the objective analysis.

Courts have sometimes been willing to hold that action by the police transforms activity which would not be a search in one context into a search in a different context. For example, installing a listening device in a public area can be held to violate an objective expectation of privacy, on the theory that an individual who has a conversation in a public place may assume the risk that bystanders will be listening to him, but if the conversation takes place in the public space when no bystanders are nearby, the expectation of privacy may be different.

In this case, the conversation which was overheard was still taking place in a public alley, but Delia was presumably not aware, at the time of the call, that any individual

was in the vicinity. This presents a slightly more difficult argument than before, but a court will still likely hold that OF"s activity here was not a search.

If OF's activity was a search, however, it would be presumptively unreasonable, because there was no probable cause based on the informant's tip. There is no exception which applies here - there was no consent, nor was this a search incident to arrest or a search justified by exigency.

Fruits

As before, whether probable cause can be based on the informant's tip need not be considered if the activity in question by the police is not a search at all, since police are entitled to investigate wrongdoing even on the basis of speculative tips. However, if OF's action is considered a search, the fruits doctrine may apply.

The fruit of the poisonous tree doctrine bars evidence which was obtained as the result of an earlier illegal action if the "taint" from the previous illegality is not held to be cleansed. Assuming that probable cause could not be established from the informant's tip, then the "taint" from the tip would extend to any searches which were conducted as a result. It would not matter whether the actual listening in by Fong was reasonable or not.

There are three exceptions to the Fruits doctrine: attenuation, independent source and inevitable discovery. Because Fong’s actions depend entirely on the tip, there is no independent source, and there is no argument that Fong would eventually have discovered Delia's wrongdoing. There is no argument for attenuation, either, since there

is no intervening event or large lapse of time between the tip and Fong's action. Therefore, if Fong's action is considered a search, then the fruits doctrine could result in suppression.

Conclusion

It is likely that Fong's activity was not a search, and, thus, suppression will fail. There is a very weak argument that a search took place; if one did take place, then the statement could be suppressed.

c) The Roman Coins

***Leon* - Searches Pursuant to a Warrant**

The doctrine of *United States v. Leon* holds that a search conducted pursuant to a warrant will not be held unconstitutional if the warrant is later held to be unsupported by probable cause. There are some exceptions to *Leon*, such as where the police knowingly uses false information to support the warrant, or if the magistrate abandons their neutral and detached role.

Here, it could be argued that the information from the informant did not support probable cause. However, the subsequent actions by OF did not depend on the warrant, because they were arguably not searches, and they *do* support probable cause (which is that quantity of suspicion which would justify a reasonable person, using nontechnical standards, to conclude that evidence of wrongdoing can be found, for a search, or that the defendant has committed a crime, for an arrest.)

There is no bad faith underlying the warrant here, and no facts indicate that the

magistrate was biased. Therefore, *Leon* will bar the suppression of the Roman coins.

II. Delia's Liability for Robbery

Robbery

Robbery is aggravated larceny - a trespassory taking (caption) and carrying (asportation) of the personal property of another, from the person's presence, by force or fear, with the intent to deprive the owner of it permanently.

Here, Delia entered the shop and took Roman coins from Oscar. There was, thus, a taking and carrying away of the property, and Delia can be presumed to have had the intent to deprive Oscar of the coins permanently, since she was making arrangements to sell the coins. The primary issue is whether the coins can be held to have been taken via force or fear.

Delia pointed a gun at Oscar. Although this was a toy gun, it "appeared to be a real gun", and there are no facts indicating that Oscar subjectively knew that the gun was false (otherwise he would not have given the coins to Delia). Furthermore, it was objectively reasonable for a person in Oscar's position to believe that the gun was real. Therefore, Delia used a threat of force to take the coins, and meets this requirement. It does not matter that the threat was not verbalized - pointing the gun would reasonably have been understood to mean a threat of force, without words being used.

Delia is, therefore, guilty of robbery.

QUESTION 3: SELECTED ANSWER B

1. Suppression Motion

4th Amendment

The 4th Amendment protects the person, property, and effects of individuals from unreasonable and unlawful searches and seizures. The 4th Amendment has been incorporated to apply to states through the 14th Amendment. The remedy for a violation of the 4th Amendment is suppression of the information received that is a fruit of the invalid search and seizure, known as the fruit of the poisonous tree. There are exceptions to when the remedy applies.

Here, Delia (D) is alleging that three pieces of evidence were collected in violation of her 4th Amendment protections and is seeking suppression.

State Action

State action is when the state or an agent of the state acts. Here, the action taken is by a police and a detective; thus all are employees of the state and state action is met.

A. "I have a hot set..."

Standing - Reasonable Expectation of Privacy

A person must have standing to bring a suppression claim. They must have a reasonable expectation of privacy (REP) in the item searched or they must be subject to a seizure. A person can have a reasonable expectation in a private conversation. Persons do not have a reasonable expectation of privacy in Open Fields or for information in Public View.

Here, Fong (F) follows D into a public alley. Persons do not have a reasonable expectation in alleys that are public. There is no evidence that this alley is within the curtilage of P's home, which a person does REP for, because it is public.

The Supreme Court (SCOTUS) has found that person does have REP for a conversation in a public telephone booth if the booth is enclosed and the conversation could not otherwise be heard. In that case, the dispositive fact was that the police bugged the telephone booth and the person was attempting to keep the conversation private. Here, the facts are very different, the payphone was not in a phone booth, but was out in public view and anyone passing by could hear. The fact the conversation was spoken in low tones does not matter for this determination.

Thus, there is no REP and the remedy of Suppression is unavailable for the comment "I have a set of hot Roman coins...."

Warrant Requirement

In the unlikely event SCOTUS expanded the definition of REP to include this case, the police would only be able to collect this information through a valid warrant (discussed below) or warrant exceptions. Exceptions include searches made incident to valid arrest, searches for weapons in a Terry stop, and searches in plain view.

There is no warrant here, so F would need an exception.

Plain View

An officer may search and seize evidence that is in plain view when they are lawfully present, the item is in plain view, and its illegality is readily apparent.

Here, the officer could argue that the conversation was in plain view, anyone in the alley

could hear it. The officer was legally in this public place. And the illegality of the conversation was readily apparent.

Thus, this exception would apply.

Conclusion: There is no REP in this public conversation in a payphone without a phone booth, thus suppression is not merited.

B. Fine, call your buyer...

REP

See rule above. A person does not have a reasonable expectation of privacy in the home of another when they are not an overnight guest. A person does not have REP when they consent to a search. A person does have a reasonable expectation of privacy from searches to an otherwise private place when the search is effected through technology not available to the public and which enhances natural senses (Kyllo).

N's Home

Here, the first issue is that F is on the property of Neil's house. He gained access to this property by lying, however, an officer is permitted to lie in order to access a premise through consent so long as the lie is not based on a show of authority. For example, an officer is not permitted to lie about having a warrant. But they are permitted to pretend to be a drug buyer to gain consent and enter the home of a drug dealer. Here, it is unclear if F's lie is a lie based on authority. However, regardless of the validity of the consent, the officer is on N's deck. D has no expectation of privacy in a home that is not her own (See Rakas).

Thus, she has no REP based on this objection.

The Bird Song Microphone

Here, the second issue is that F uses a Bird Song Microphone from a pet store to listen to the conversation of D in the public alley. In Kyllo, the court found that the use of a thermal heat detector was impermissible when it was used to access the movement of people in a home. Here, D will say that like in Kyllo, F is using an object that enhances his natural perception to search D. The microphone is parabolic and enables a listener to hear birds (and all things) from a distance of 150 feet. However, this argument will fail because the microphone is readily available to the public.

Furthermore, unlike in Kyllo, the microphone is being used to search D in a place she has no REP. Kyllo was a search in a home. See discussion above. D is in the same alley as the first comment and because it is in public and there is no booth, she has no expectation of privacy for the conversation she puts out into the public.

Thus, there is no REP.

Warrant Requirement

See rule above.

In the unlikely event SCOTUS finds this is a search, there is no warrant and an exception must be applied.

Plain View

See rule above.

For similar reasons, F will argue that they validly heard the conversation. However, in this instance, D may be able to challenge the lawfulness of F's presence when he heard

the conversation because he was on N's property. See discussion above under N's Home, because this is likely a consensual permission to enter the property of N, and F is likely validly on the premises when he sees the conversation.

Thus, Plain View would likely work.

Exigence

A officer may make an otherwise unlawful search when there is an emergency or a hot pursuit of a felon.

Here, there is no emergency. F lied about the terrorist plot and the fact that lives are at stake.

This exception will not apply.

Conclusion: no REP for this conversation, thus it is not suppressible.

C. Roman Coins Physical Evidence

REP

See rule above. A person has REP in their home. The home is sacred under the 4th Amendment.

Here, F searches D's home. Thus the search must be pursuant to a warrant or an exception.

Warrant Requirement

See rule above. A warrant must be supported by probable cause, a signed affidavit, state the place and items to be seized with particularity, and it must be approved by a neutral magistrate.

There is an affidavit, and the warrant is signed by a judge. If they are a neutral magistrate, this is valid. The items to be seized and place searched are particular. The search identifies D's home and identifies that the coins should be seized.

Probable Cause

Probable cause requires sufficient facts that would lead a reasonable officer to believe that the commission of a crime was probably happening or has happened. The officer can use their own personal knowledge, lawfully obtained evidence, and the evidence of a reliable and verifiable informant to have grounds for probable cause. Facts alone may not be enough, but taken together, can lead to probable cause.

Here, the police received an anonymous email that stated D is the coin robber and she is trying to sell stolen coins. The informant is anonymous so the reliability and verifiability of the information are hard to obtain. SCOTUS has allowed such informants when the information is particular and the officer verifies it through independent investigation. Here, this is likely a valid tip, as F follows up on the tip by following D in public and overhearing her conversation which confirms the tip.

Furthermore, F has the other evidence, that was validly obtained as described above. F has the phone conversation that was in public about the "set of hot Roman coins for sale that need to go to a discreet collector. I will call back at 9..."and "Fine, call your buyer and let me know if we have a deal for hot coins." Both are likely independent grounds for a warrant as they are strong evidence of the crime of possessing and selling stolen goods, as the "hot coins" indicate. An officer may use their experience and expertise; thus, an officer who knows that hot coins may be a sign of stolen goods can rely on this information.

There is probable cause.

Thus, the search of D's home was pursuant to a lawful and valid warrant. The search does not appear to exceed the scope of the warrant.

Exceptions

Good Faith Reliance on Warrant

In the event that the court finds the statements to be collected in violation of the 4th Amendment, the probable cause would be undercut as the information would be fruits of the poisonous tree of suppressed evidence. However, an officer may rely on a warrant if a reasonable officer would not find that there is no reasonable belief, but that there is probable cause. An officer may not rely on this exception if they acted in bad faith.

Here, as described above, all of F's conduct is within the bounds of the 4th Amendment; thus if new law makes the searches invalid that support the warrant, the officer will still be relying in good faith upon a warrant that a reasonable officer would believe is not wholly lacking probable cause. There is no indication that F acted in bad faith, even the fact that he lied is something that officers routinely do as part of investigations, although this lie seems more egregious.

Thus, this exception would apply.

Conclusion: The roman coins are not suppressible, because they were collected pursuant to a valid warrant.

2. Robbery

Robbery is the crime of larceny by physical force or threats of imminent physical force to

the person of another.

Threats of Force to the Person of Another

The threats of force must be imminent and create the apprehension of the fear of physical force; economic force is not enough. The force must be directed at another person's person.

Here, D threatens O with a gun. It is a toy gun, but a reasonable person would have the fear of imminent physical force because it appeared to be a real gun. D did not use words to threaten, but actions are sufficient and pointing a gun at someone would certainly be threatening. The gun was directed at the person of O because D points the gun at him.

Thus, the larceny was achieved through threats of force to O's person.

Larceny

Larceny is the trespassory, taking, carrying away, the property of another, with the intent to permanently deprive.

Trespassory

Trespassory is the interference with another's property; it does not request permanent deprivation like conversion does.

Here, D enters a coin shop and takes the valuable Roman coins. Thus, D is interfering with the coin shop’s ownership of the coins by taking them without permission. The

owner Oscar (O), only gives them in response to the threat of violence.

Thus, the taking is trespassory.

Taking and Carrying Away

The D must physically take the personal property and carry it away, the slightest movement suffices as carrying away, including putting it in one's purse or taking something from a shelf.

Here, D takes the coins and leaves the stores.

Thus, she takes it and carries it away.

The Personal Property of Another

Personal property is a removable object and includes objects and money.

Here, D takes a valuable set of Roman coins. Coins are tangible objects and they belong to another, to O.

Thus, this element is satisfied.

Intent to Permanently Deprive

A D must specifically intend at the time of the taking to permanently deprive the true owner of their property. This intent may be later negated and still be found to be intent so long as the intent was held at the time of the actus reas. Intent may be inferred from the circumstances.

Here, D entered the shop, pulled out a toy gun and pointed it at O, takes the coins and then flees. These facts create the inference that she intends to permanently at the time. Furthermore, there is subsequent evidence from the telephone booth conversation that

she has a set of hot coins that she wishes to sell. This is strong evidence that at the time of the taking she meant to permanently deprive.

Thus, all of the elements of larceny are met.

Conclusion: D is guilty of robbery

QUESTION 4

Larry is an associate lawyer at the ABC Firm (ABC). Larry has been defending Jones Manufacturing, Inc. (Jones) in a suit brought by Smith Tools, Inc. (Smith) for failure to properly manufacture tools ordered by Smith. XYZ Firm (XYZ) represents Smith. Larry has prepared Jones' responses to Smith's discovery requests.

Peter is the partner supervising Larry at ABC in the Smith v. Jones case. Peter has instructed Larry to file a motion to compel discovery of documents that Smith claimed contains its trade secrets. Larry researched the matter and told Peter that he thought that the motion would be denied and may give rise to sanctions. Peter, who had more experience with trade secrets, told Larry to file the motion.

Larry also told Peter about a damaging document that Larry found in the Jones file that would be very helpful to Smith's case. Larry knows that the document has not been produced in discovery. The document falls into a class of papers that have been requested by Smith. Larry knows of no basis to refuse the production of the document. Peter told Larry to interpose hearsay, trade secrets, and overbreadth objections and not to produce the document.

Larry recently received an attractive job offer from XYZ.

1. May Larry ethically follow Peter's instructions to file the motion? Discuss.

2. What are Larry's obligations in relation to the damaging document? Discuss.

3. What ethical obligations must Larry respect with regard to XYZ's job offer? Discuss.

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

An attorney owes his clients the duty of loyalty, confidentiality, competence, and financial responsibility. A lawyer also owes third parties, the public, and the court the duties of fairness, dignity, and candor.

I. FOLLOWING PETER'S INSTRUCTIONS TO FILE THE MOTION

FILING THE MOTION

The issue here is whether Larry, who is an associate lawyer at ABC, must follow the supervising partner Peter's instructions to file a motion to compel discovery of documents that Smith claims contains trade secrets. The second issue is whether there is a questionable issue of law as to whether it is proper to file the motion to compel.

A lawyer owes the duty to supervise attorneys and staff that work under the lawyer and ensure they do not commit any ethical violations. A lawyer who is being supervised still must follow the ethical rules despite being told otherwise from supervising attorneys. If there is an arguable question of law/duty regarding the ethical violation, then the lawyer may rely on supervising attorneys for advice and instruction. If there is no questionable issue of law or duty, the attorney must adhere to the ethical rules of the ABA and California, even if it goes against what the partner says. If the attorney violates the rules, both the associate lawyer and the partner will have committed ethical violations. Here, Peter has instructed Larry to file a motion to compel discovery of documents that Smith believes contains trade secrets. Larry believes that the motion would be denied and may give rise to sanctions. It appears that Larry is less experienced in trade secrets than Peter, who is a partner and has likely been a practicing attorney longer

than Larry. Thus, there appears to be a questionable issue of law; therefore, Larry can rely on Peter's advice as a supervising attorney and file the motion to compel.

If Larry does further research and discovers that there are no grounds to file the motion, and therefore no questionable issue of law, then Larry must not file the motion to compel despite Peter's instructions. If Larry does further research and learns that there are no grounds to file the motion to compel, he will be violating the duty of competence to Jones. The duty of competence requires an attorney to act with the legal knowledge and skill necessary to perform for the client. In California, the duty of competence is looked at under a reckless standard; a lawyer will not violate the rules for a single issue that breaches the duty of competence. Here, if Larry knows the motion to compel should not be filed, and files it anyway because of Peter's instructions, he is violating his duty of competence to Jones. He is also violating the duty of fairness to Smith, the opposing party, and the duty of candor and dignity to the court.

Because there likely is a questionable issue of law, Larry may rely on Peter as the supervising attorney and file the motion. However, if Larry further learns that the motion to compel discovery is unwarranted and may give rise to sanctions, then he cannot rely on Peter's instructions and must not file the motion; if he does, he will have committed an ethical violation.

RESEARCHING TRADE SECRETS

There is a possibility that Larry has violated the duty of competence for failing to familiarize himself with trade secret law adequate enough to represent Jones. The duty of loyalty requires an attorney to act with the legal skill and knowledge necessary to

represent the client. If the area of law is unfamiliar to the attorney, they have a duty to familiarize themselves with the area of law in order to adequately represent the client. Though Larry is an associate, he still must familiarize himself with trade secret law in order to competently represent Jones, or must associate with a lawyer who has sufficient experience in trade secret law. Here, Peter appears to have adequate knowledge of trade secret law to assist Larry. However, Larry may need to speak with someone else at the firm or conduct further research to ensure that the trade secret law is properly followed in relation to filing the motion to compel. Under California rules, Larry likely has not violated the duty of competency since California follows a reckless standard and does not punish for a single isolated event of incompetency.

Additionally, there is a possibility that Larry will violate his duty of competency if he files the motion, knowing that sanctions are likely, and the court imposes trade secrets, thus hurting his client Jones. This may give rise to reckless behavior. As such, Larry could violate the duty of competency under both ABA and California rules for filing a motion he thinks will bring sanctions.

II. LARRY'S OBLIGATIONS IN RELATION TO DAMAGING DOCUMENTS:

PRODUCING DAMAGING DOCUMENTS

Here, the issue is whether Larry will commit an ethical violation if he fails to produce the damaging document he has discovered.

A lawyer owes a duty of fairness, dignity, and candor to the court and opposing party. Simultaneously, a lawyer owes the duty of confidentiality and loyalty to their client. A lawyer has a duty to follow court orders, including discovery request, and to not assert frivolous litigation claims or defenses. Here, Larry has found a damaging document that

has not been produced in discovery. The document is damaging to Larry's client, Jones. However, the document falls into a class of papers that have been requested by Smith. Larry has a duty to turn over the document to Smith because it has been requested by Smith. This does not violate the duty of loyalty to Jones because the duty of loyalty does not ask an attorney to withhold evidence from a proper discovery request. Additionally, while the duty of competency requires attorneys to fight zealously for their clients, it does not allow an attorney to assert false, misleading or frivolous defenses. Here, there does not seem to be a reason for Larry to claim hearsay, trade secrets, or any other defense to keep the document from being produced to Smith. Thus, Larry has a duty to turn over the document to Smith. If Larry were to assert these frivolous claims to try and avoid turning over the document, Larry will be violating his duties of candor, fairness and dignity to the court and Smith. Additionally, asserting a false claim is likely considered reckless, as it could lead to sanctions on Larry, Peter, ABC, and Jones. As such, Larry will likely be violating his duty of competence to Jones if he asserts a frivolous and false defense to try and protect the document. Therefore, Larry must turn over the document.

As explained above, if there is a questionable issue of law, an attorney may rely on a supervising partner to determine how to proceed. Here, Larry knows of no basis to refuse the production of the damaging document. Even though his supervising attorney, Peter, is ordering Larry to refuse to produce the document, Larry must go against Peter's wishes and produce the document in order to avoid committing an ethical violation.

DUTY REPORT VIOLATIONS OF OTHER LAWYERS

The issue here is whether Larry must report Peter's ethical violation to the bar.

The ABA rules require that an attorney report any ethical violations of another attorney or judge to the bar. Here Peter has committed an ethical violation by refusing to produce the document and making up frivolous and meritless defenses to avoid producing the document. Therefore, Peter has breached his duties of fairness, candor, and dignity to the court and to Smith. Thus, Larry must report Peter's actions to the bar. California does not follow the same rule, so Larry will not need to report Peter's violations to the California bar. However California has a duty to self-report violations, malpractice claims, or other ethical violations/cases that may arise. Larry may need to self- report if he commits any ethical violations under California rules.

III. XYZ'S JOB OFFER

At issue here is whether Larry must disclose his job offer from XYZ to Jones in order to avoid committing any ethical violations.

CONFLICT OF INTEREST - DUTY OF LOYALTY

A lawyer owes their current clients the duty of loyalty. A conflict of interest may give rise to breaching the duty of loyalty. A conflict of interest exists when a lawyer represents two clients in the same suit as adverse parties or when there is a significant risk that the lawyer's personal life, duties to current clients, or duties to former clients may materially limit the attorney's ability to act in the best interests of his client. If there is a conflict of interest, an attorney may still represent the client if the attorney reasonably believes he can still represent the client without breaching any duties and acting in the client's best

interests and the client is aware of the conflict and gives informed, written consent. The attorney cannot represent the adverse clients in the same case in a tribunal, and the representation cannot be prohibited by law. In California, the client's consent must be in writing.

Here, Larry is representing Jones in a suit against Smith. Larry works for ABC, who is representing Jones, and Smith is represented by the firm XYZ. Larry has received a job offer from the law firm XYZ, which is directly adverse to his client Jones in a current case. This creates a conflict of interest for Larry. Even if Larry decides not to take the job from XYZ, he still must disclose the job offer to Jones, as it gives rise to a conflict of interest. Here, a conflict of interest has occurred because there is a significant risk that Larry's personal life will impact his duty of loyalty to Jones. (Additionally, there is the potential that, should Larry accept the job with XYZ, it could impact his duty of confidentiality to Jones.) Larry may reasonably believe that he can still represent Jones competently and diligently without violating his duties of loyalty and confidentiality despite the job offer from XYZ. Even if he reasonably believes this to be the case, Larry must still disclose the conflict of interest to Jones. He must get Jones' informed, written consent before proceeding with the representation. Additionally, in California, the disclosure must be in writing and the client must confirm in writing that they are consenting to the representation. It is unlikely this conflict of interest would be prohibited by law. If Larry does not reasonably believe that he can continue representing Jones due to the job offer, even if he does not take the job offer, then he must cease representing Jones and allow another attorney at his firm to take over the case. He will likely need to be screened off from the case, and not share in a portion of fees earned

from the Jones v Smith case.

In California, an attorney must disclose, in writing, to his client any personal relationship the attorney may have with another party, witness or lawyer in the case. Here, Larry has created a personal relationship with XYZ because of the job offer. Because of this personal relationship, he must disclose, in writing, the relationship to Jones.

CONFLICT OF INTEREST - DUTIES TO FORMER CLIENTS

At issue here is what duties Larry will breach if he accepts the job offer from XYZ. If Larry leaves ABC and goes to XYZ, he will now be adverse to former client Jones and ABC. This gives rise to a conflict of interest. A lawyer owes the continuing duty of confidentiality to former clients. A lawyer's conflict may be imputed to the firm if it is not personal in interest. Here, if Larry took the job, Larry's conflict with Jones at his new firm XYZ would not be personal and would therefore be imputed to the firm since he worked significantly and substantially on the case Jones v. Smith. Larry has learned significant confidential information from Jones about the case. If Larry were to go to XYZ, then he must be screened off from the case, not share in any fees earned from the case, and XYZ must give notice to ABC. Under the ABA rules, Larry may be allowed to take the job if he is properly screened, shares no fees from the Jones v Smith case, and does not give any confidential information about Jones to XYZ or Smith; additionally, notice must be given to Jones. In California, if an attorney has worked on the same matter in a substantial way, the conflict cannot be cured from screening off the client. Therefore, in California, Larry would likely not be able to take the job because XYZ would have to stop representing Smith, since Larry's conflict would be imputed to the firm.

QUESTION 4: SELECTED ANSWER B

<u>May Larry Ethically Follow Peter's instructions to file the motion</u>

Associate attorney's duties with regard to following a supervising attorney's instructions

Under both the ABA Model Rules (MR) and the California Rules of Professional Conduct (RPC), an attorney that is working under the supervision of a partner or other attorney has a duty to abide by the instructions that the supervising attorney gives, while still maintaining her duty to maintain independent professional judgment and to avoid committing a clear ethical violation.

Here, it could be argued that, by filing this motion to compel, L is bringing a frivolous claim in violation of the MR and RPC.

Duty to avoid frivolous claims

Under both the MR and the RPC, an attorney must not bring a cause of action or claim that has no basis in law or fact, or where the attorney has no good faith argument for an extension of existing law or a change in existing law.

Here, Peter (P) is instructing Larry (L) to file a motion to compel discovery documents that Smith (S) claimed contain trade secrets. It could be argued that if L files this motion after doing the research and believing that the motion will be denied, filing that motion

would constitute a frivolous claim and would thus violate both the MR and the RPC. However, on the other hand, L could argue that he only "thought" that the motion would be denied and "may give rise to sanctions," not that it absolutely would be denied. He could note that, because it wasn't absolutely clear that this would be denied, there is a basis in law for obtaining the discovery and that the claim is therefore not frivolous. He can further note that P is much more experienced with trade secrets, and he told L to file the motion. Note that the efficacy of following P's instructions in this instance is discussed in more detail below.

On balance, a court is likely to find that this is not a frivolous claim because there is some basis in law for making the request.

Duty with regard to following P's instructions

This balance between following the instructions of the supervising attorney and maintaining that independent professional judgment turns on whether the action sought by the supervising attorney is clearly an ethical violation or whether it is a reasonable question of law or fact. If the reasonable minds of attorneys would differ as to whether the action ordered by the supervising attorney would constitute a violation of an ethical duty, then the attorney must abide by the supervising attorney's instructions and will not be liable for an ethics violation. If no reasonable minds would differ as to the propriety of an action, or if it is clearly a request for a violation of an ethical rule or law, then the associate attorney must refuse to take the action.

Here, Larry (L) has been instructed to follow through with filing this motion to compel. As noted above, this may constitute a violation of the duty to avoid frivolous claims.

However, L has an argument that reasonable minds could differ as to whether this is a frivolous claim, as well as whether this request could lead to sanctions. Furthermore, he could note that, because reasonable minds could differ, in this instance, he was under a duty to follow his supervising attorney's instructions.

Conclusion

On balance, a court is likely to agree that this is an arguable question of law in which reasonable minds could differ, and L therefore did not violate any ethical duties by following P's instructions and filing the motion to compel.

Duty to report ethical violations

Under the MR, an attorney has a duty to report any ethical violations that they know another attorney has committed. The RPC does not have a corresponding duty to report ethical violations of others, but it does impose a duty on attorneys to self- report when they know that they have committed ethical violations.

Duty to report others under MR

Here, it could be argued that L violated MR's duty to report by not reporting P for ordering him to file this motion to compel, a possible frivolous claim. However, as discussed above, this is likely not a frivolous claim, and if it is, he did not know it with a certainty, so he is not under a duty to report.

Duty to self-report under RPC

Furthermore, under the RPC, it could be argued that L has a duty to self- report after filing the possibly frivolous claim. However, again, this is a close call, and likely not a

frivolous claim, so L was not under a duty to report.

As such, L has not violated his duty to report ethical violations under the MR or under CA.

Larry's obligations in relation to the damaging document

Duty of Confidentiality

Generally speaking, under both the MR and the CA, an attorney must not disclose any information relating to the representation of a client unless authorized by the express written consent (informed written consent in CA, informed consent confirmed in writing under the MR), or unless impliedly authorized in order to carry out the representation.

Here, L has discovered a document that contains information relating to the representation of Jones. However, this information has likely been legitimately requested in discovery, and one situation in which an attorney is impliedly authorized to disclose such information in order to carry out the representation is in response to a discovery request.

Therefore, L would not be violating his duty of confidentiality to Jones by turning this document over in disclosure.

Duty of Diligence

Under both the MR and CA RPC, an attorney owes a client a duty to provide reasonably diligent and prompt representation. Under the RPC, an attorney must be committed and dedicated to their client's cause. However, this duty does not require an attorney to

press for every available advantage. And as discussed below, an attorney must not violate the duty of fairness in an effort to zealously advocate for their client.

Here, L may need to balance the need to protect his client's interests against disclosing this information. He must be dedicated to protecting his client's interests. However, this duty may give way to the duty of fairness to opposing counsel, as discussed more below.

Duty of Fairness

The duty of fairness requires that an attorney act with fairness to opposing counsel during the courts of litigation. This requires that an attorney not knowingly obstruct another party's access to evidence, nor alter, conceal, or destroy evidence, or counsel or instruct another to obstruct access to evidence, or conceal, alter, or destroy evidence in the course of litigation.

Here, L has discovered a damaging document in the Jones file. He knows that the document has not been produced in discovery, but he also knows that it falls into the class of papers that have been requested by Smith, and he knows of no basis for refusing to produce the document. It could therefore be argued that, by failing to disclose this document, and by "interposing hearsay, trade secrets, and overbreadth objections" in order to not produce the document, he is intentionally and knowingly obstructing Smith's access to evidence. Although L could argue that P told him to do this and that he should trust P's judgment on this issue, it should also be noted that L himself "knows of no basis to refuse the production of the document."

A court is therefore likely to find that L has violated his duty of fairness by obstructing Smith's access to the evidence.

Duties following a supervising attorney's instructions

See rule above.

Here, claiming hearsay, trade secrets, and overbreadth with regard to this document could be a frivolous claim. L can only avoid liability for violating an ethical duty if this is a question of law in which reasonable minds would differ. If they would not, then L has a duty to avoid committing the ethical violation.

Duty to avoid frivolous claims

See rule above.

Here, L clearly "knows of no basis to refuse the production of the document." When P instructed L to "interpose hearsay, trade secrets, and overbreadth," L likely should have executed some research to determine whether this would be an adequate basis for claiming that they should not be required to turn over the document. If not, then no reasonable minds could differ as to whether or not they had an obligation to do so. Following P's instructions in this instance would constitute making a frivolous claim, and therefore violating both the MR and CA RPC.

For this reason, L must either turn over the document or refuse to offer those objections.

Duty of candor

Under both the CA RPC and MR, an attorney owes a duty of candor to the court, and must not knowingly make a false statement of law or fact to the court. If such a false statement is made and the attorney learns of it, an attorney must promptly correct such false statements.

Here, if L files these objections, or raises them in opposition of a motion to compel, then it is possible that he is violating his duty of candor to the court. This would be the case if the documents do not legitimately contain hearsay, trade secrets, or if the request for the document is not overbroad. In such a case, making those claims would be false statements of law and fact, and L will have violated his duty of candor to the court.

For this reason, L should exercise great caution in ensuring that he does not violate his duty of candor.

Duty to report

See MR and RPC rules above.

MR duty to report

Under the MR, L may have a duty to report P if L refuses to file those objections and P follows through with them, because they may constitute a violation of the duty of candor and the duty of fairness.

CA duty to self- report

Under the RPC, L will not be under a duty to report P if P files such objections, but L would be under a duty to self- report if he does so.

Larry's ethical obligations with regard to XYZ's job offer

Duty of loyalty

Under both the MR and the RPC, an attorney owes all clients, past and present, a duty of loyalty and independent professional judgment. When there is a substantial risk that the attorney's representation will be materially limited due to their own interests, or the interests of past or present clients, then a conflict of interest may exist that could hinder the attorney's ability to provide competent and diligent representation. If a conflict of interest exists, then the attorney may be in breach of their duty of loyalty.

Duties of loyalty and confidentiality of past clients

An attorney owes continuing duties of both loyalty and confidentiality to past clients, even after the representation of those clients has ceased. The duty of confidentiality to past clients means that an attorney may not reveal information relating to the representation of that client, regardless of the source, unless authorized by the express written consent of the client. The duty of loyalty to past clients means that the attorney may not participate in an action against that client, or use information relating to the representation of the client, unless under the MR, the client provides informed consent confirmed in writing, or under the CA RPC, the client provides informed written consent.

Here, L has been in the process of representing Jones in a suit between Jones and

Smith. L is now entertaining an offer to join XYZ, the firm that is currently representing Smith in the same suit against Jones. Regardless of whether L takes on the case or works on it personally, L is under an absolute duty not to use or disclose any information relating to his representation of Jones.

Conflict of Interest - When moving to new firms Past and Present Client Conflicts

Under both the MR and the RPC, where an attorney has worked on the same or substantially similar matter for one client, and then moves to a new firm that is working on the same or substantially similar matter for the adverse party of that representation, a conflict of interest exists. That conflict of interest is imputed onto the other attorneys in the firm, and the firm must not take on the case, regardless of who works on it, unless (1) the former client gives informed written consent (under CA) or informed consent confirmed in writing (under the MR), or (2) the new attorney is properly screened.

Informed Written Consent/Informed Consent Confirmed in Writing

Note while informed consent confirmed in writing only requires an attorney give full disclosure orally before the client provides written notice of consent, informed written consent requires that the disclosure of the conflict is in writing, and the client's consent is also in writing.

Screening procedure

An alternative for the firm exists where the new attorney is properly screened. This requires that the new attorney with the conflict does not work on the case in any way, does not have access to the case files nor discuss the case with any of the parties working on the case, and is not apportioned any fee for that case. Additionally, the firm

must provide notice of the decision to screen and the screening procedures put in place to the former client, and must certify compliance with those screening procedures if requested by the former client.

Here, if L wants to take the job at XYZ, he should let them know that this is a likely consequence of taking the new work. The firm will either need to inform Jones of the new conflict or implement appropriate screening procedures. However, as discussed in more detail below, this will not work under the CA RPC.

California exception for personal and substantial work

Under the CA RPC, a new lawyer's conflict is imputed into the entire firm, and the entire firm may not take on or continue a case, even with appropriate screening procedures or informed written consent, if the new and conflicted attorney worked substantially and personally on the same matter for the other client.

Here, it could be argued that L worked personally and substantially on the Jones v. Smith case. Although just an associate, "he has been defendant Jones" and prepared Jones's responses to Smith's discovery requests. He has consulted significantly with P, the partner, on issues involving sensitive materials.

It is therefore likely that L's conflict will be imputed to XYZ, and he should inform XYZ that this could cause problems with their representation. The best course of action would be to seek a delay in hiring until after the conclusion of the case.

Duty of confidentiality

See rule above. The duty of confidentiality applies to past clients as well as present ones.

Therefore, L will have a continuing duty to maintain confidentiality to Jones, even if he is able to take on the new work at XYZ.

QUESTION 5

Sam owned a classic 1965 Eris automobile. Only 500 such cars were made and they are considered highly valuable.

Sam and Art, a classic car specialist, signed a valid written contract. The contract stated in its entirety:

> Art will serve as Sam's exclusive agent in selling his Eris car. Upon successful sale, Art will earn a commission equal to 10% of the sale price.

A few days later, Sam showed his Eris to Bob, who had learned of the car when he saw a "For Sale" sign Sam had decided to place on it while parked in his driveway. Bob, wanting to add the Eris to his personal collection, mailed Sam a signed letter later that day offering to pay $250,000 for the car. When Sam received the letter, he telephoned Bob and said he accepted the offer. They agreed to meet the following week for payment and exchange of title. Sam then called Art and said he was terminating their agreement.

The next day, Charlie saw an advertisement for Sam's Eris in a classic car trade publication. Art had placed the ad prior to Sam terminating their agreement. Charlie drove to Sam's house and offered $300,000 for the car and said he would mail a written contract to Sam that day. Sam said he would "think about it." He did not inform Charlie of his agreement with Bob. When Charlie's contract arrived, Sam signed it, placed it in a stamped envelope addressed to Charlie, and dropped it in the mailbox.

Sam died in his sleep that night. His will left all his property to his only relative, a nephew named Ned.

Ned wants to keep the Eris. As a result, Bob and Charlie filed timely claims against Sam's estate seeking title to the car. Art filed a timely claim seeking a 10% sales commission.

What contract rights and remedies, if any, do each of the following parties have against Sam's estate:

1. Bob? Discuss.

2. Charlie? Discuss.

3. Art? Discuss.

QUESTION 5: SELECTED ANSWER A

Bob's Rights and Remedies

Applicable Law

Contracts for the sale of goods are governed by the Uniform Commercial Code (UCC). Goods are defined as movable, tangible things identifiable at the time of delivery. All other contracts are governed by the common law. Here, B attempted to contract for the sale of a 1965 Eris automobile (the car). The car is a tangible movable thing and so the UCC governs this contract.

Formation

This raises the issue of whether Bob (B) and Sam (S) entered into a contract. The formation of a contract requires mutual assent and consideration.

Mutual Assent

Mutual assent requires offer and acceptance. An offer must evince an objective intent to enter into an agreement, lay out sufficiently certain and definite terms such that the contract is capable of being enforced, and must be communicated to the offeree. Under the UCC, the key term for an offer to be sufficiently definite is the quantity term, and all other terms may usually be filled in by the court. Advertisements are not typically treated as offers.

Here, S had posted a sign on the car stating it was for sale. This was not an offer but rather an invitation to deal, that is a solicitation for offers. B responded to this solicitation

by mailing a signed letter "offering" to pay $250,000 for the car. We do not know if "the car" was the language used, so it is possible the offer does not describe the subject of the agreement with sufficient definiteness. However, it probably does in context, since all that is required is a sufficiently clear intent to agree. Since S was not selling any other cars this language would probably suffice. The letter was actually received by Sam, so this constitutes a valid offer.

An acceptance of an offer may be made by any means reasonable prior to the offer's termination. Here, after receiving B's offer, S called B and accepted the offer orally over the phone. The parties then agreed on the location where the final exchange would occur. This oral acceptance was sufficient to create a contract, even though the initial offer was in writing (but see the statute of frauds discussion below).

Consideration, the final element of contract formation, requires that there be (1) a bargained for exchange (2) of legally valuable detriment. A bargained for exchange requires the promise induce the detriment and the detriment the promise. To be of sufficient value, the detriment need not be economic, or even very large. Here, S agreed to relinquish title to his car and B agreed to pay $250,000. It was sufficiently bargained for in that each promise induced the other. Therefore, there was sufficient consideration.

B and S entered into a contract for the sale of S's car for $ 250,000.

Defenses to Formation

This next raises the issue of whether the contract is enforceable, and particularly whether it satisfies the Statute of Frauds.

Statute of Frauds

Even where a contract is formed, it may not be enforceable if it falls within the Statute of Frauds and no exception applies. Among the contracts covered by the Statute of Frauds are goods sale contracts where the price paid is $500 or more. Here, the contract was for the sale of a car at a price of $250,000, well in excess of the minimum to be covered. Therefore, to be enforceable the Statute of Frauds must be satisfied or some exception must apply.

To satisfy the Statute of Frauds, there must be some writing evidencing the existence of a contract and its essential terms, which is signed by the party against whom it is being enforced. Here, B sent a signed letter to S offering to purchase the car at a stated price. Had S sued B for breach of contract this would have satisfied the statute, however S never signed the letter, nor any other document. Rather, he accepted the contract over the phone. The "For Sale" sign is insufficient, both because it does not suggest a contract between S and B and was not signed. B might argue that S's contract with A shows he intends to sell the car, but that contract does not prove that S had a contract to sell the car to B (indeed it probably shows the opposite). Therefore, there is no writing which appears to satisfy the Statute of frauds and make the agreement enforceable against S.

The UCC contains certain exceptions to the Statute of Frauds which B may argue make the agreement enforceable. These exceptions include (1) where one party has partially performed on the agreement (but only to the extent of that partial performance) (2) where promissory estoppel applies (3) where the contract is for specially manufactured goods, after substantial performance has begun and the goods cannot

reasonably be resold and (4) a merchants' confirmatory memo.

Here, the first three exceptions clearly do not apply. The part performance exception only applies to the extent goods have already been either paid for or delivered, and only for the goods actually paid for and delivered. Here, there was an agreement but no delivery of goods or payment, so the exception does not apply. The facts do not suggest any detrimental reliance has taken place, so estoppel will not save the agreement. Finally, the contract was for the sale of unique goods, not for the manufacturer of such goods. Additionally, even if this did apply, it would protect S, not B.

The only possible exception is the merchants' confirmatory memo. Under the UCC, where one party sends a signed writing memorializing their oral agreement, and the counterparty does not object within 10 days, the counterparty will be deemed to have accepted and the writing may be used to satisfy the Statute of Frauds. If the party orally accepts, this will also satisfy the statute. Here, the memo was sent and S replied by accepting over the phone, so the confirmatory memo exception might apply.

However, the exception only applies where both parties to the agreement are merchants. The UCC defines as one who deals in goods of the kind sold, or otherwise holds himself out as possessing specialized knowledge, skill or expertise in such goods. Here, B might be a merchant, but there are no facts to suggest S is. B has some expertise in classic cars, since he has a personal collection. However even this might not suffice since it is personal, and he does not deal in the goods of the kind (here classic cars). Nor did he appear to hold himself out as having specialized knowledge, and he may not have such knowledge simply by owning a classic car collection. S is even less likely to be a merchant. There are no facts suggesting he knew more than

most about cars. The fact he hired an agent to sell his car affirmatively suggests he is not a merchant. Therefore, the confirmatory memo exception does not apply

Because the contract falls within the Statute of Frauds and cannot satisfy it, the agreement between S and B is unenforceable.

Dead Man Act

The facts do not state if the jurisdiction in question has a Dead Man Act. This kind of act generally precludes the use of oral statements of a deceased against the descendant's estate to prove the existence of an agreement. Here, the only evidence of B's contract with S was S's oral statement over the phone. Therefore, if the jurisdiction had such an act, B would be further barred from proving the existence of his contract with S in a subsequent suit against Ned (N).

2. Charlie's Rights and Remedies

Applicable Law

For the same reasons discussed above, the UCC is applicable to Charlie's (C's) contract with S.

Formation

The threshold issue is whether S and C formed a contract. The rules governing formation are discussed above.

Mutual Assent

Here, the advertisement placed by Art (A) was merely an ad, and did not constitute an offer. However C's subsequent oral statement to S offering to buy the car for $300,000 would constitute an offer. It specifies the quantity (the car) and was communicated to S.

S did not immediately accept, but said he would "think about it." Later, he received a contract from C. He signed the contract and placed it in the mailbox.

Under the mail box rule, an acceptance is deemed effective when it is mailed. At this point, a valid contract is formed even if the offeror has not yet received the acceptance. By placing the contract in the mail box, S has accepted the offer and it became effective when he did so.

N might try to argue no contract was formed because S's initial response, that he would think about it, terminated the initial offer, because it constituted a rejection. However, this was not a rejection but rather a deferral of a response. Even if it were, the subsequent written contract would constitute a new revived offer that S accepted.

N might next argue that the offer terminated prior to acceptance. An offer is assumed to be valid for a reasonable time if it does not specify a particular date on which it terminates. An offer terminates by operation of law upon the death of either the offeror or offeree. Here, S died immediately after mailing his acceptance. Had he not mailed his acceptance his death would have terminated the offer, but by mailing the acceptance a contract was formed.

A contract, unlike an offer, does not terminate at the death of one of the contracting parties unless the contract is for specialized services. A sale of goods contract certainly does not. Here, the death of S did not terminate the acceptance or the formation of S's contract with C.

For the same reasons stated above, consideration exists for the agreement between S and C. Therefore, a contract was formed between them.

Defenses to Formation

Statute of Frauds and Dead Man's Acts

The Statute of Frauds is equally applicable to the contract between C and S. However, unlike the contract between B and S, this contract likely satisfies the statute. S signed the written agreement and accepted. Assuming the contract C sent contained all the essential terms (quantity, a description of the subject matter, the parties), which there is every reason to think it did, this writing will satisfy the statute and the agreement will be enforceable.

Because the agreement is in writing and signed by S, any Dead Man's Act would not preclude enforcement of the obligation.

There are no other defenses to either formation or performance which appear in the facts, therefore, C will be entitled to some remedy should N refuse to deliver the car.

Remedies

This raises the issue of what remedies C may be entitled to.

Replevin

Replevin is a legal restitutionary which allows a party to obtain a court order (even before trial in certain circumstances) allowing the party to retake chattels to which he has a lawful right. To be available under the UCC, the chattels must have been identified in the contract, the amount of time between contracting and the order being sought must not have been too great, and damages must be an inadequate remedy. Damages are inadequate where the subject matter of the contract is unique. The order must also be able to be enforced by the Sheriff.

Here, the car is an identifiable good to which C has a contractual right. The contract was formed mere days before, so the amount of time which has elapsed is not too great. The car is also unique, since there are only 500 in the world. Therefore, C will likely be able to replevin the car from N should N refuse to perform.

C may be able to do this even before a full trial on the merits is had. If N is given notice and a hearing before the order is issued (and potentially even if not), and C posts a bond ensuring against losses incurred by N if the taking is wrongful, C may obtain the order before the case is decided. However, N may post a bond in response ensuring against the disappearance or loss of the car and may then keep the car until the merits are resolved.

Specific Performance

Specific performance is a court order requiring a party to perform on a contract or face contempt proceedings. To obtain specific performance on a contract, the party must show (1) certain and definite terms (2) that legal remedies are inadequate (3) that enforcement would be feasible and (4) that the party has, or is willing to, fully perform its obligations under the contract. Here, the contract is, presumably sufficiently clear, as discussed above. If C tendered the purchase price he has performed. The remedy would be enforceable, since it would simply require transfer of the car. The only question is whether legal remedies are inadequate. If the court were willing to make replevin available as a remedy, then legal remedies would not be inadequate. If replevin was unavailable for some reason, for instance the sheriff could not locate the car, then the car would be considered sufficiently unique to award specific performance.

Damages

C might alternately seek damages. Expectation damages are intended to place the non-breaching party in as good a place as they would have been had the contract been performed. Here, assuming C could not cover, the damages would be equal to the difference between the contract price and the market price of the car, plus incidental damages and consequential damages, less expenses saved. There is no evidence in the facts of what the market price would be, or of any incidental or consequential damages, however C would be able to recover whatever was avoidable and foreseeable at the time of contracting.

3. Art's Rights and Remedies

Applicable Law

Unlike the above contracts, the agreement with A is governed by the common law. The contract is for the service of selling a car. While the underlying object is a good, the agreement's primary focus is the services rendered, especially since A is not the one actually buying the car. Therefore, the common law applies.

Formation and Defenses

The facts state that a valid contract was formed between S, so presumably mutual assent was present. The agreement was in writing so the Statute of Frauds would be satisfied (and is not applicable in any event because it could be complete in less than a year). There are also no obvious other defenses to formation, save consideration.

Consideration

N will argue that he is not obligated to pay A because the contract is illusory. For

consideration to exist, each party must have obligations under the agreement. Future contingencies are sufficient to support consideration.

Here, A agreed to serve as S's exclusive agent in selling the car. He would receive a 10% commission for his services. S clearly incurred legal detriments, both by making A his exclusive agent and offering to pay him if there was a successful sale. N will argue that A was not obligated to do anything under the agreement.

Where parties enter into an agreement where one will act as the selling agent of another, courts typically do not find them illusory. Instead, they imply a term that the agent must use their best reasonable efforts in carrying out the agency to save the contract. Here, a court would likely reach a similar conclusion regarding the contract between S and A, and find it enforceable.

Breach

Length of Employment

This raises the issue of whether A was an at will employee or was to work for S until the car was sold. The key term in an employment or services contract is duration. Without such a term a contract is created, but will be deemed an at will employment relationship terminable by either party at any time. Here, the agreement did not state a specific term. N will argue this means S did not breach by ending the relationship. A will respond that the term was for the completion of a particular task, and that he was employed until that task was complete. He will point to the fact that the relationship was exclusive to support this conclusion. It is unclear how a court would rule on this point. Given how short the contract is, the court would likely permit parol evidence concerning prior performance to assess, and may also look to industry custom.

If the court found it was an at will employment arrangement, S, by terminating A, ended it and is not entitled to payment because a "successful sale" had not occurred. However, even if this is the result, A will still probably be able to recover under a quantum meruit theory for the amount of time and money he has already put into selling the car.

Anticipatory Repudiation

If the court instead found that the contract lasted until the task was completed, S would have anticipatorily repudiated the contract and would be in total breach. A party materially breaches a contract when they unambiguously give notice to the other party that they will not perform, and the agreement is executory. If this happens the counterparty need not perform further and may sue. Here, S told A that he was not going to honor the contract. Neither party had completed performance and the repudiation was unambiguous, therefore S likely breached the contract.

A might alternately not accept the repudiation and instead seek his portion of the compensation for the sale to C. A party may elect not to accept the repudiation but instead keep performing under the contract and wait until performance is due. Here, C came to S because of A's efforts (through an ad A placed). A will argue that he acquired a buyer for the car and so, under the terms of the contract, even absent a repudiation, S's duty to perform (now N's) became absolute upon signing the enforceable contract with C.

N might argue that no "successful sale" occurs until the car is actually transferred. Even if this is true, N cannot wrongfully prevent the occurrence of a condition precedent.

Remedy

Damages

As discussed above, expectation damages, which are the default, place the party in as good of a position as they would have been in had the breach not occurred. To be recoverable damages must be sufficiently certain and calculable. Finally, a party must take reasonable steps to mitigate damages, although in a services contract they need not accept substantial.

Here, A will be entitled to whatever 10% of what the sales price would have been equal to, assuming he can prove with sufficient certainty both that amount and that a sale would have occurred. A's costs saved after the repudiation would be deducted from this, but if he received the 10% he is entitled, past advertising expenses would not be recoverable.

He may also seek to recover on a reliance measure of damages if expectation damages are too uncertain. Reliance damages seek to place the party in as good of a position as they would have been in had the contract not been made. Here, A would be entitled to the expenses he has incurred up to this point in trying to find a buyer. This includes the cost of the advertisement he placed in the newspaper, as well as any similar efforts, and the reasonable value of the time he has worked on the project.

QUESTION 5: SELECTED ANSWER B

Applicable Law

In contracts, contracts that are for the sale of goods are governed by the UCC, while contracts for anything else (i.e. services) are governed by the common law. Only one of these can be applied (all or nothing rule) and when the contract is mixed, the one that is applied is determined by the primary purpose test.

1. BOB v. SAM'S ESTATE

Applicable Law

See rule above. Here, Bob is asking for a claim based upon an alleged contract for the purchase of a car from Sam. A car is a tangible good, thus this contract is governed by the UCC.

Contract Formation

In order to form a valid contract, there must be the following: mutual assent (offer and acceptance), consideration, and no defenses.

Offer - Sam's Sign

An offer requires that the offeror objectively manifest terms that indicate to a third party the intent to be bound by the contract, such that the offer creates in the offeree the power of acceptance. Under the UCC all essential terms must exist, which would only be the quantity. A court will gap fill the rest of the provisions.

Advertisements are typically not considered offers, but are usually considered offers to deal.

Here, the ad was a for sale sign that had been placed in the car when parked on the driveway. This is not going to be considered an offer, but is instead an invitation to deal. This is clear because Bob understood it as such as demonstrated by the fact that he actually went to speak with Sam and sent Sam an acceptance. As such, this was not an offer, but simply an invitation to deal.

Offer - Bob's Letter

See above for offer rule. Further, the type of offer matters as to the type of contract that exists. A bilateral contract is the exchange of promises, while a unilateral contract is asking for the other party to perform

Here, Bob sent Sam a signed letter that offered to pay $250k for the car. This is clearly a valid offer under the UCC as it contains the subject matter of the deal (the car) and even includes the price and the parties. Therefore, there is nothing left even for the UCC to gap fill. One could argue that simply offering for the "car" may not make the quantity term specific enough, but based on the prior interactions that the parties had between each other, this was a clear term and thus this was a proper offer.

In addition, this was an offer for a bilateral contract as Bob was asking for a promise from Sam to give him the car, in exchange for a promise from Bob to give Sam money.

Acceptance - Sam's Phone Call

An acceptance requires an intent by the offeree to be bound by the terms of the offer. There must be a clear manifestation of assent to properly accept an offer. In the case of a bilateral contract, the offer can be accepted by either a return promise or by beginning performance.

Here, Sam accepted the contract over the phone by saying "he accepted the offer" and promising to perform, which is a proper way to accept a contract.

Therefore, this was a proper acceptance.

Consideration

Consideration is evidenced by a bargained-for exchange between two parties. It is usually evidenced by a detriment to the promisee or a benefit to the promisor.

Here, there was clearly bargained for consideration between these two parties as Sam (offeree) was incurring a legal detriment by giving his car to Bob and Bob (offeror) was getting a benefit by receiving Sam's car.

Therefore, there was consideration.

Defenses

However, in order to be a valid contract, there must be no defenses to the formation of the contract. Here, there might not have been a proper contract because it may need to satisfy the Statute of Frauds.

Statute of Frauds

When the Statute of Frauds applies, it requires that the contract be in writing, signed by the party to be charged and contain the terms of the deal. The Statute of Frauds applies in several situations, including in the UCC for sales of goods that exceed $500.

Here, the contract was for the sale of goods, and was for $250k, which far exceeds the amount required to apply the Statute of Frauds. Therefore, the Statute of Frauds

applies.

Next, the Statute of Frauds requires that the contract be in writing, signed by the party to be charged and contain the essential terms of the deal. Here, this is not satisfied because the only writing that exists between Bob and Sam was Bob's offer to Sam. While this certainly contained the essential elements of the deal, it fails because it doesn't have the other requirements.

First, it is not signed by Sam. It is necessary that Sam be the one to sign it as Bob is trying to enforce this contract. Thus, Sam is the one to be charged under the contract. Sam could argue that his letter offer to Bob was signed, but that doesn't help him as 1) that was just an offer, not the contract, and 2) Bob is not the party to be charged here. In fact, there is no writing at all other than the offer that would be the contract between these parties.

Therefore, this contract violates the Statute of Frauds and should fail.

Statute of Frauds Exceptions

The Statute of Frauds can be overcome in limited circumstances where perhaps this was an order for specialty goods, one party has already performed, or there was promissory estoppel.

Here, however, none of those things occur here as there is no indication that the car was ever delivered to Bob and while this is certainly a special car, this was not a specialty ordered good, but one that was already in existence when the order was placed. Finally, promissory estoppel doesn't apply as there is no evidence that Bob did anything in terms of relying on the promise (i.e. setting up a person to get the car,

finding a storage space, etc.).

Therefore, because the Statue of Frauds exceptions don't exist, this will not be an enforceable contract.

Conclusion

In sum, Bob and Sam did not enter into an enforceable contract because it did not conform with the Statute of Frauds and no Statute of Frauds exceptions exist.

2. CHARLIE v. SAM'S ESTATE

Applicable Law

See rule above. Here, Charlie is asking for a claim based upon an alleged contract for the purchase of a car from Sam. A car is a tangible good, thus this contract is governed by the UCC.

Contract Formation

See rule above.

Offer - Ad in Publication

See rule above on ads and offers. Here, this was still clearly not an offer as it was just an invitation to deal with an indication that the car was for sale. Further, this is shown by the evidence that Charlie simply saw the ad and went over to Sam's house in order to see the car and make an offer. Therefore, this was not an offer (note that it doesn't matter that Art put the ad in the paper as that was done by Art while he was Sam's agent).

Offer - In Person

See rule above for offers.

Here, we clearly have an offer that satisfies the UCC requirements as the car is clearly identified (quantity term). In addition, the offer indicated a willingness by Charlie to enter into a deal and even contained a money term. Therefore, this was a proper offer.

Offer - Written Contract

Note that this written contract actually just restated the oral offer that Charlie had made earlier and therefore, it is also a continuation of the same offer.

UCC Firm Offer?

In the UCC world, a merchant can have an irrevocable offer held open for a stated number of days (not to exceed 90) if they send the offer in writing and sign it. A merchant is one who deals in the goods at issue regularly. Here, there is no evidence that Charlie is a merchant. Rather, it appears that Charlie is just a collector who wanted to buy this particular car. Therefore, this was not a firm offer that could be held open.

However, that does not mean that the offer lapsed or anything by the time acceptance became an issue. Rather, the offer was still good and was in the power of Sam to accept.

Acceptance - Think About It

See rule above for acceptance. When Sam said that he would "think about it," this was not an acceptance. Rather, this was an indication that he was open to the offer and that he would like to think more about it. Further, this was not a rejection that would terminate the offer, but rather was just an expression that he needed more time to think

about whether or not to accept. Therefore, no contract had formed at that point.

Acceptance - Mailbox

See rule above for acceptance. Under the mailbox rule, an offer is accepted when placed in the mailbox by the offeree. The actual receipt of the acceptance by the offeror does not make a difference under this rule.

Here, Sam received the contract from Charlie and decided to accept it. He accepted it by signing it, placing it in an envelope, and then putting it in the mail to send back to Charlie. The offer was therefore accepted when Sam placed the offer into the mail and the receipt of the acceptance is of no consequence.

Further, it does not matter that Sam died in his sleep that night. The offer was accepted when he placed it in the mail and that is when the contract came into existence. A good contract is not terminated imply because one of the parties dies (this is of course subject to various exceptions).

In sum, when Sam placed the signed letter in the mailbox, a valid acceptance was sent and his death does not impact that.

Consideration

See above for consideration. Here, the analysis is the same. Sam (offeree) is incurring a detriment by sending his car to Charlie, while Charlie is incurring a benefit by receiving the car. There was clearly a bargained for exchanged here as evidence by the fact that Sam even indicated that he wanted to think about whether or not to accept the offer.

In sum, there was consideration for the contract.

Defenses

See rule above. Again, here, there is a Statue of Frauds question as this applies here.

Statue of Frauds

See rule above. Here, contract again is subject to the Statute of Frauds as this is a UCC contract with a price of $300k, which far exceeds the $500 minimum. Therefore, SOF applies.

Further, here, the requirements are met. First, we have a writing as we know that Charlie mailed a copy of the contract to Sam which contained the essential terms of the deal (car, price, parties, etc.). In addition, as the party to be charged, Sam needed to sign it and, here, Sam did sign it before sending it out. Therefore, this is a contract in writing with the essential terms and the party to be charged signed it.

Therefore, this does not violate the Statute of Frauds.

Conclusion

In sum, Charlie and Art entered into a valid contract for the sale of Sam's Car. However, the remedies are now an issue provided that Sam's estate does not honor the sale.

Remedies

Specific Performance

Charlie may want to sue for specific performance of this contract in order to receive the car provided that S's estate does not follow through with the contract. Specific performance is an equitable remedy that allows a court to force that the contract be

performed.

Specific performance requires: (1) a valid contract; (2) no defenses; (3) clear/definite terms; (4) all conditions precedent are satisfied; (5) it is possible for the court to enforce; and (6) legal remedy inadequate.

Valid Contract

Here, this exists as discussed above.

No Defenses

This is satisfied as no valid contract defenses exist. See above.

Clear/Definite Terms

This is satisfied as the contract concerns a specific car that exists and which we know where it is. Therefore, this will be found to exist.

Conditions Precedent

This will be found to exist provided that Charlie pays Sam's estate the amount that he owes. That is likely considered a concurrent condition (C gets the car and pays at the same time). Therefore, no condition precedent exists.

Enforcement

This is feasible as the court will simply need to oversee the transfer of the car from S's estate to C. This is entirely possible and easy as it only needs to happen once.

Inadequate Legal Remedy

In order to grant specific performance, the legal remedy (money damages) needs to be inadequate. This will most often be granted in situations in which the subject matter is

rare or unique.

Here, C will argue that simply getting money will not be enough as what he really wants is this car. Further, this is a rare/unique car as there were only 500 of these particular cars made and they are extremely valuable to collectors. Further, C can point out that it is rare that these cars even come on the market, therefore, the odds of this coming on the market again may be unlikely and this may be C's only chance to get this particular car. S could try to argue that 500 cars means that they aren't all that rare and that C can just be compensated with expectation damages, but this is likely to fail due to the unique nature of the car and that fact that it is so rare and may not come on the market again.

Conclusion

In sum, the court should grant specific performance to C.

3. ART v. SAM'S ESTATE

Applicable Law

See rule above. Here, this contract is for a service (i.e. Art will help Sam to sell his car), thus this contract is governed by the Common Law.

Contract Formation

See rule above. Here, the facts state that there was a valid agent contract between Art and Sam. Therefore, that contract is good.

Revocation

A contract can be revoked by a party and that means their relationship ends and the non-breaching party can sue for damages. However, a revocation is only good going

forward and can't be revoked in a services contract for services already provided.

Here, since Art had already placed the ad in the paper before S terminated the contract, and Art's ad led to the sale of the car, a court will likely find that the contract was not properly revoked at that time and that therefore, the contract is in existence.

Performance - Condition Precedent

Generally, under the common law, a party performed by providing "substantial performance." However, a condition precedent to a contract means that it must be strictly met in order for performance on the contract to be required. Courts typically construe provisions in a contract as promises rather than express conditions. However, an express condition can exist if it is clear that is what the parties intended per the contract language.

Here, the contract between Art and Sam contained an express condition -- "upon successful sale" that triggered Sam's duties to Art. Therefore, this condition needed to be strictly met before S owed anything on the contract to Art.

Here, the successful sale occurred (as discussed above) between C and S. Therefore, this condition has been properly met and this triggers S's duty to perform on his end of the contract. Therefore, S will have to pay the 10% of the sale price to Art.

S's estate should pay Art 10% of the $300k purchase price - $30k.

Damages

If S's estate refuses to pay the 10%, Art will be able to request expectation damages that would give him the benefit of the bargain. Here, Art expected to get per the terms of the damage 10% of the purchase price - $30k. This means that Art could properly sue S's estate for that amount.