



California
Bar
Examination

Essay Questions
and
Selected Answers

July 2003

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

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

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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 credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Corp is a publicly held corporation whose stock is registered under Section 12 of the Securities Exchange Act of 1934. The following sequence of events occurred in 2003:

- January 2:** Corp publicly announced that it expected a 25% revenue increase this year.
- March 1:** A Corp director (“Director”) sold 1,000 Corp shares for \$25 each.
- June 15:** Corp learned that, because of unforeseen expenses, its revenues would decrease by 50% this year, contrary to its January 2 announcement.
- June 16:** A Corp officer (“Officer”) consulted his lawyer (“Lawyer”) for personal tax advice. Officer mentioned, among other things, the probable devaluation of his Corp stock.
- June 17:** Lawyer telephoned his stockbroker and bought a put option for \$1,000 from OptionCo. The put option entitled Lawyer to require OptionCo to buy 1,000 Corp shares from Lawyer for \$20 per share.
- June 18:** Corp publicly announced that its revenues would decrease by 50% this year. Its stock price fell from \$30 to \$5 per share.
- June 19:** Lawyer bought 1,000 Corp shares at \$5 per share and required OptionCo to buy the shares for \$20,000 pursuant to the put option.
- July 1:** Director bought 1,000 Corp shares for \$5 per share.

1. In each of the foregoing events, which of the actions by Director, Officer, and Lawyer constituted a violation of federal securities laws and which did not? Discuss.
2. Did Lawyer violate any rules of professional responsibility? Discuss.

Answer A to Question 1

Publicly Held Corporation

Corp is a publicly held corporation and is thus subject to federal securities laws. The two laws at issue in this question are Rule 10(b)5 and Rule 16(b).

Director Liability for violating Rule 16(b)

Rule 16(b) prohibits a director, officer or 10% shareholder of a publicly traded corporation on a national stock exchange or with assets of over \$10,000,000 and 500 shareholders from purchasing and selling or selling and purchasing stock of the corporation in less than 6 months. This is deemed short swing trading. The policy behind prohibiting short swing trading is that short swing trading is against the interests of the corporation.

Corp is entitled to recover the maximum difference between an[y] sale and purchase during this 6 month period.

On these facts, Director sold 1,000 corp shares for \$25 each on March 1. Less than 6 months later on July 1, director purchased corp shares for \$5 per share.

The corp is entitled to recover $\$25 - \$5 = \$20$ multiplied by 1,000 shares or \$20,000 dollars from this violation of Rule 16(b).

Officer Not Likely Liable for violating Rule 10(b)(5)

Rule 10(b)(5) prohibits the use of an instrumentality of inter-state commerce in any scheme to defraud, make material misrepresentations or omissions or in any other way use fraud in the purchase or sale of securities. An insider must either disclose inside information or not trade in the securities. An insider may also be liable for tipping information regarding the company for an improper purpose.

On these facts, officer had a fiduciary duty to Corp. That duty included not disclosing private information regarding Corp. Officer violated his fiduciary duty to Corp when he improperly mentioned the probable devaluation of Corp stock on June 16th prior to public disclosure of this information on June 18th.

However, Officer is only liable for a 10(b)(5) violation if he tipped this information to his lawyer for an improper purpose. An improper purpose would be personal gain of Officer either by pecuniary gain or by gifting to Lawyer. It is unclear whether Officer used a telephone to speak with Lawyer or whether he met him in person. Thus, the instrumentality of inter-state commerce requirement may be lacking as well. The facts tell us that Officer was seeking tax advice, then he mentioned the devaluation. There is no other indication of personal gain by Officer resulting from telling Lawyer about the devaluation.

Officer is not likely liable for tipping for an improper purpose and thus did not violation[sic] Rule 10(b)(5).

Lawyer Not Liable under Rule 10(b)(2) but is Liable for Misappropriation

A tippee is only liable if the tippee knew that the tipper was giving them non-public information for an improper purpose. As detailed above, it is unlikely that Officer will be liable for tipping for an improper purpose. Thus, Lawyer is not liable under this section.

Note that if Officer had an improper purpose, it would be easier to find Lawyer satisfied the other tippee requirements because Lawyer should have known that the information from Officer was private information regarding Corp. Lawyer knew that Officer had a duty not to disclose such information. Nonetheless, Lawyer traded on such information.

Misappropriation Liability

Some courts would find that Lawyer is liable for misappropriation of non-public (insider) information in the purchase or sale of securities.

Lawyer used the insider information to purchase a put option from Option Co[.] prior to the public announcement on June 18th. This bound Option Co. to purchase 1,000 Corp shares from Lawyer at \$20 per share. Lawyer then purchased Corp shares at the discounted rate of \$5 per share after the public announcement (June 19th). Lawyer profited at \$15 per share multiplied by 1,000 shares=\$15,000. This \$15,000 was ill gotten gain from misappropriating non-public information about Corp's revenue decline.

2. Lawyer's Violations of Rules of Professional Responsibility

Lawyer violated the duty of loyalty to Officer, the duty of confidentiality, the duty of care, and engaged in deceitful, dishonest/fraudulent conduct that both negatively reflects on Lawyer's ability to practice law and that harms the dignity of the profession.

Duty of Care

A lawyer has a duty to act as a reasonable lawyer of ordinary skill, judgment and preparation. Here, Lawyer's actions were patently unreasonable. Use of a client's corporation information fell below the standard of care of a reasonable attorney.

Duty of Loyalty

A lawyer has a duty to act in the best interests of the client and not to personally benefit at the client's expense. This includes a duty not to self-deal. Lawyer took advantage of a breach of Officer's fiduciary duty to keep Corp's information private for personal gain. Lawyer benefitted from the insider trading. Lawyer may also have created professional and legal liability for his client by using this information. Lawyer breached the duty of loyalty to

Officer.

Duty of Confidentiality/Confidential Communications

A lawyer has a duty to keep all communications from his client related to his representation of the client confidential. Courts interpret “related to the representation” quite broadly. Officer consulted Lawyer about personal tax advice. The equity value of Corp may have been related to this representation. This includes using any of such confidential communication. As discussed above, Lawyer used such confidential communication to do insider trading. Lawyer violated his duty to keep Officer’s information confidential.

Attorney-Client Privilege

The attorney-client privilege is a more narrow evidentiary exception that prevents a court from obtaining information told to a lawyer by his client related to the litigation at issue. Here, there is no pending litigation discussed. Under the ABA rules, an attorney may disclose confidential communication to prevent a future crime involving death or serious bodily injury. California does not have a clear exception for death. On these facts, Officer’s statement regarding Corp’s shares would not likely fall under the attorney-client privilege.

Duty Not to Engage in Deceit, Fraud in Personal Dealings

A lawyer has a duty not to use deceit or fraud in private dealings. Here, the facts show that Lawyer deceitfully misappropriated insider information and used fraud to obtain a lucrative option from Option Co. Lawyer should be subject to discipline for these private acts as well.

Duty to Maintain Dignity of Profession

A lawyer also has a duty to maintain the dignity of the profession. For all of the reasons mentioned above, Lawyer violated this duty. A lawyer who acts with deceit and fraud in his private dealings stemming from improperly used information from a client lowers the reputation of the entire profession.

Answer B to Question 1

Director's Actions

The Director ("D") may be liable for violations of federal securities law based on his sale and purchase of 1,000 Corp stocks during 2003. The Corp stock is an equity security, and therefore, is subject to federal securities laws. There are two bases for D's liability under federal securities law: violation of Rule 10B-5 and violation of Section 16B. Please note that D may also be liable for common law violations of his duty of loyalty as a corporate director, but that issue is not to be addressed here.

Rule 10B-5 Liability

Rule 10B-5 makes it illegal to use deceit or any fra[ud]ulent scheme in connection with the purchase or sale of a security. Here, the issue is whether D used deceit and/or fraud when he sold Corp stock on March 1, and when he bought it at a lower price on July 1.

Rule 10B-5 Elements

The elements of Rule 10B-5 are as follows: (1) use of the instrumentalities of interstate commerce (which gives the federal government jurisdiction over the transaction); (2) a fraudulent scheme or device, which includes (a) misrepresentation of a material fact and (b) insider trading; that is, trading on the basis of material inside information; (3) in connection with the purchase or sale of a security; (4) with scienter, which must be at least recklessness; and (5) reliance by the person on the other side of the transaction, which is presumed in cases of misrepresentation and insider trading. Any person may be liable for insider trading, and plaintiffs include both private persons on the other side of the transaction and the SEC. In addition, "materiality" means that which a reasonable investor would want to know in making his investment decision.

With these elements in mind, I shall assess D's liability under Rule 10B-5.

March 1 Sale

D sold 1,000 Corp shares for \$25 on March 1. This transaction will fall under the jurisdiction if D used the instrumentalities of interstate commerce, which includes the telephone, US mails or internet. Here, I will assume that he did so. Note that if D had not used interstate commerce, he could still be liable under state securities laws. In addition, since D actually sold his shares, the transaction is "in connection with a purchase or sale" and, thus, D will be liable if he used fraud or deceit in this sale with necessary scienter.

Misrepresentation of a Material Fact. The main issue is whether the Corp's public announcement that it expected a 25% increase in 2003 constituted a misrepresentation of a material fact for which D may be liable. Surely, an investor would consider it material that the revenue increase would not happen, and would instead decline.

If the corporation recklessly made that announcement in order to pump up its stock price, then D, as a corporate director, would be liable. However, the facts indicate that D sold his stock on March 1, many months before the Corp learned that its revenues would actually decrease by 50% during 2003. In addition, the facts also indicate that the revenue decrease was due to “unforeseen expenses”. If anything, Corp was negligent in making a bold revenue prediction that was reversed six months later. Therefore, Corp, and hence, D, did not have the necessary scienter to be liable under Rule 10B-5.

Insider Trading. For D to be liable for insider trading, he would have to had traded on material inside information. Since D is a corporate director, he is considered an “insider”. Therefore, he may not trade on material inside information. The critical issue is whether D possessed any material inside information when he sold his shares on March 1. If D, in fact, knew on March 1 that Corp would not have a 25% revenue increase, and that revenues would drastically decline, then he may not trade based on that information.

Again, the facts indicate that D sold his shares 3 ½ months before the Corp learned that it would suffer a serious revenue decline, and, thus, probably did not trade on the basis of inside information. However, if he did suspect that the Corp would not reach its revenue target of 25% in his capacity as a corporate insider, then he would be liable under Rule 10B-5.

July 1 Purchase

On July 1, D purchased 1,000 Corp shares for \$5. Since the revenue decrease of 50% had been publicly and accurately disclosed a few weeks earlier, D is not liable under Rule 10B-5.

Rule 10B-5 Conclusion

Because the revenue decline was due [to] “unforeseen expenses”, D probably did not have material inside information, nor possess the necessary scienter to be found liable under Rule 10B-5. However, if the court did find him liable, he would have to disgorge his profits made or losses averted.

Section 16B

D may be liable under Section 16B of the ‘34 Act, which holds “insiders”: directors, officers and 10% shareholders, strictly liable, if they make a “profit” on the purchase and sale of their corporation’s stock within a 6 month period. Section 16B applies to public companies, that is, ones that are traded on a public exchange and/or meet the number of stockholders/asset test. Here, Corp is a public company, registered under Section 12 of the ‘34 Act, and thus, Section 16B applies to D’s actions.

March 1 Sale D was an “insider” when he sold his 1,000 shares of Corp stock for \$25/share on March 1, and, thus, must comply with Section 16B. The facts do not indicate that D

bought or sold any Corp shares before this date, so I will focus on the subsequent transaction. If D bought shares within 6 months following this sale for a lower price, then he is strictly liable under Rule 16B.

July 1 Purchase On July 1, 4 months following his sale of Corp stock, D purchased 1,000 shares for \$5 per share. Since this occurred within 6 months of his sale, D is strictly liable and must disgorge his “profit.” Here, D’s profit is calculated by the difference between the sale price and purchase price multiplied by the number of shares, which totals \$20,000 (1,000*(25-5)).

Officer Liability

The Officer’s (“O”) only action was consulting his Lawyer (“L”) for personal tax advice on June 16, and mentioning that the value of Corp stock would probably go down, since the Corp had just learned that its revenues would decrease the day before.

Rule 10B-5 - Tipping

The elements of Rule 10B-5 are discussed above. As indicated, O did not purchase or sell any securities. Instead, the only basis for his liability would be “tipping”. A corporate insider is liable for “tipping” if he has a fiduciary relationship with the corporation and discloses material insider information, at least recklessly, to a “tippee”, who trades on the basis of that information. Here, O would be the “tipper” and Lawyer would be the “tippee.” A tipper can be liable even if he discloses only to make a gift to the tippee or to enhance his reputation. A tippee will not be liable unless the tipper is first found liable.

O did disclose material insider information to Lawyer, but it does not appear that he did so recklessly, that he intended to make a gift to Lawyer, or wanted to enhance his reputation. Instead, O consulted L for personal tax reasons. As a client, O had every reason to expect that L would keep this information confidential. If, however, O disclosed this information to L to make a gift, use it to pay for legal services, or to enhance his reputation; or if he was reckless in disclosing this info (by shouting it in a public place), he would be liable. However, the facts indicate that O was careful and confidential in disclosing this info.

Therefore, since O was not reckless in disclosing the inside information to L, and [sic] therefore, is not liable under Rule 10B-5.

Section 16B

Although O is an “insider” of a “public company” for Section 16B purchases, since O did not purchase or sell any securities, he has no liability here.

Lawyer Liability

Unbeknownst to O, L traded on the basis of the material inside information about Corp’s

unexpected revenue decline that had not been made public as of June 17. On June 17, L bought a “put” option that entitled him to sell Corp shares for \$20 per share. He presumably did so fraudulently in order to personally benefit from the inside information. The issue, is however, whether he is liable under Rule 10B-5 or Section 16B.

Rule 10B-5 L’s liability would be based on his status as “tippee”, since the facts do not indicate that he is an insider of Corp. As discussed above, a tippee is not liable if the tipper is not liable. Since O was not liable as a tipper, L is not prevented from trading on the basis of inside information.

Misappropriation theory. The Supreme Court had found non-insiders liable under a misappropriation theory, where the person uses and trades on inside information that he knows or should know is inside info. Here, L clearly knew that it was inside information since Corp did not publicly disclose its revised revenue forecast until June 18. Therefore, he could be found liable for the misappropriation theory, and be subject to sanctions by the SEC. He would have to disgorge his profits of \$15,000 from the put option, which he made on June 19, when he purchased shares for \$5,000 in toto and sold them for \$20,000.

The misappropriation theory does not apply to individual actions under rule 10B-5.

2. L’s Professional Responsibility

L violated several rules of professional responsibility when he traded on the inside information, including the duty of confidentiality, duty of loyalty, duty of fairness and duty to uphold the law.

Duty of confidentiality

A lawyer may not use or reveal anything learned in the course of representing his client without the client’s consent. Here, O was L’s client, who revealed confidential information to L about the possible devaluation of Corp stock. O did not consent for L to use this information or reveal it to anyone. Although it does not appear that L revealed this information, he certainly used it and therefore, violated the duty of confidentiality. He should not have traded on this information.

Duty of loyalty

A lawyer also owes a duty of loyalty to his client, and may not let personal interests, or the 3rd party or other client interfere with his representation of his client. Here, there is a conflict of interest between O and L. L may not use O’s confidential information for his own benefit, which L did so when he purchased the put option.

Duty of Fairness/Candor

A lawyer also owes a duty of fairness and candor to the public and 3rd parties. Here, L

violated that duty by “misappropriating” the inside information and trading on it to his own advantage. By using this info, he acted unfairly to OptionCo, forcing it into a bad deal.

Duty to Uphold the Law

A lawyer also has a duty to uphold the law. Here, L violated the laws of securities trading and committed several breaches of his ethical duties when he used inside information. If he were in California, he would be required to “self-report” this fraudulent activity.

Question 2

In 1993, Polly and Donald orally agreed to jointly purchase a house on Willow Avenue. They each contributed \$20,000 toward the down payment and jointly borrowed the balance of the purchase price from a bank, which took a first deed of trust on the property as security for the loan. Polly paid her \$20,000 share of the down payment in cash. Donald paid his \$20,000 with money he embezzled from his employer, Acme Co (Acme).

Polly and Donald orally agreed that the house would be put in Donald's name alone. Polly had creditors seeking to enforce debt judgments against her, and she did not want them to levy on her interest in the house. Polly and Donald further orally agreed that Donald alone would occupy the property and that, in lieu of rent, he would make the monthly loan payments and take care of minor maintenance. They also orally agreed that if and when Donald vacated the property, they would sell it and divide the net proceeds equally.

Donald lived in the house, made the monthly loan payments, and performed routine maintenance.

In 1997, Acme discovered Donald's embezzlement and fired him.

In 1998, Donald vacated the house and rented it to tenants for three years, using the rental payments to cover the loan payments and the maintenance costs.

In 2003, Donald sold the house, paid the bank loan in full, and realized \$100,000 in net proceeds. Donald has offered to repay Polly only her \$20,000 down payment, but Polly claims she is entitled to \$50,000.

Having made no prior effort to pursue Donald for his embezzlement, Acme now claims it is entitled to recover an amount up to the \$100,000 net proceeds from the sale of the property, but, in any case, at least the \$20,000 Donald embezzled. Donald has no assets apart from the house sale proceeds.

What remedies, based on trust theories, might Polly and Acme seek against Donald as to the house sale proceeds, what defenses might Donald reasonably assert against Polly and Acme, and what is the likely result as to each remedy? Discuss.

Answer A to Question 2

Polly's Remedies Against Donald

Constructive Trust

A constructive trust, an equitable remedy, is a court-ordered obligation for one party who has been unjustly enriched at the expense of another to return the relevant property or assets to the injured party. To be entitled to an equitable remedy, a plaintiff must show that all legal remedies are inadequate. One of the situations in which a constructive trust has been used as a remedy by courts is that of an invalid oral agreement (i.e., one unenforceable at law) that is induced by fraud. Here, Polly and Donald entered into an oral agreement concerning the house they purchased together. Any agreement concerning the land must comply with the Statute of Frauds. Because the agreement between Polly and Donald was oral, it violated the Statute of Frauds [and] is therefore unenforceable at law. However, Polly can successfully argue that the agreement was induced by Donald's fraud. It appears from the facts that Donald made the oral promise to equally split proceeds from the sale of the house in order to get Polly to put up \$20,000 for the down payment and that he never planned to abide by this agreement. When Donald ultimately sold the house for \$100,000, he reneged on the agreement he had made with Polly, offering Polly her initial investment of \$20,000. This resulted in unjust enrichment to Donald. Finally, Donald has no assets apart from the house sale proceeds. Where a defendant is insolvent, damages are not available and a court will look to equitable remedies such as a constructive trust. Because of Donald's fraud, unjust enrichment at Polly's expense, and insolvency, a court could feasibly impose a constructive trust on half of the proceeds from the sale of the house in favor of Polly.

Purchase Money Resulting Trust

Where one party has provided all or part of the consideration for purchase of property, but title to the property is taken in another party's name, a resulting trust will be imposed in favor of the party that has provided the consideration. Where the title holding party sells the property to a third party, the party providing consideration may impose a resulting trust on the consideration the title-holder received in exchange for the property. Here, Polly supplied half of the downpayment for purchase of the house, but title was taken in Donald's name only. Therefore, half of the house was held in a purchase money resulting trust for Polly. When Donald sold the house, half of the consideration he received for it (\$100,000) would be subject to a resulting trust of which Polly is beneficiary. Polly would therefore be able to prevail on a purchase money resulting trust theory as well.

Donald's Defenses

Donald could assert a number of equitable defenses to the equitable remedy of constructive trust.

Unclean Hands

The unclean hands defense asserts that the plaintiff should not be entitled to equity because she herself has engaged in a wrong in the transaction for which she claims injury. Here, Donald could claim that Polly's having creditors seeking to enforce debt judgments against her, and thereby asking Donald to put the house entirely in his name, constituted unclean hands. However, Polly's debt issues are unrelated to Donald's fraudulent conduct. There is no suggestion that Polly engaged in any wrongful conduct in her dealings with Donald. Therefore, this defense will likely fail.

Laches

The laches defense asserts that a plaintiff cannot bring an action once an unreasonable amount of time has passed after the injury and the delay has somehow prejudiced the defendant. Here, Donald will argue that he and Polly had agreed that, upon Donald's vacating the house, the property would be sold and the net proceeds divided equally. Donald vacated the house in 1998. However, at that time, Polly did not insist on the house being sold. After renting the house for five years, Donald finally sold it in 2003. Donald will argue that Polly's claim was actionable in 1998, but that she waited five years before bringing it. Donald will argue that five years is an unreasonable amount of time to wait before bringing the lawsuit and that he will be prejudiced by the delay. However, Polly can argue that the substantial part of the injury to her was sustained not in 1998, when Donald vacated the house and did not immediately sell it, but in 2003, when Donald sold the house and withheld Polly's rightful half share of the proceeds. This agreement will be successful, as Polly did not sustain a sustainable financial injury until Donald's 2003 withholding of the sale proceeds. Therefore, Donald is unlikely to prevail in establishing the laches defense.

Acme's Remedies Against Donald

Constructive Trust

Acme could seek the imposition of a constructive trust on Donald's proceeds from the sale of the house. Where a party has obtained property through fraudulent conduct, courts will impose a constructive trust on the defrauding party's property to prevent unjust enrichment. Here, Donald used funds he had embezzled from Acme to purchase the house and was thereby unjustly enriched. Aside from the proceeds from the sale of the house, Donald is insolvent. Therefore, a court could rightfully impose a constructive trust on Donald's half of the proceeds from the sale of the house.

One issue is whether the constructive trust would be imposed only to the extent of the \$20,000 Donald embezzled from Acme or to the extent that Donald benefitted from the embezzlement, i.e., the full amount (or at least his half share) of the proceeds from the sale. Where a party is unjustly enriched at another's expense, restitution will be in the amount of the benefit to the unjustly enriched party. Because Donald benefitted at least \$50,000 from the sale of the house, and because this benefit would not have been possible

without the \$20,000 Donald initially embezzled from Acme, Acme will be entitled to Donald's half share in the net proceeds from the sale of the house. Acme is not entitled to the full \$100,000, however, since this would lead to an inequitable result for Polly, who put up half of the downpayment and entered into an agreement with Donald for half of the proceeds.

Purchase Money Resulting Trust

Acme could also assert the remedy of purchase money resulting trust. Here, Acme unknowingly provided the consideration for Donald's purchase of the house. Title to the house was taken in Donald's name only. Donald therefore held his interest in the house in resulting trust with Acme as the beneficiary. When Donald sold the house, one half of the consideration Donald received would likewise be held in a resulting trust with Acme as the beneficiary. A court would likely award this remedy to Acme.

Donald's Defenses

Unclean Hands

There is no plausible basis on which to assert that Acme had unclean hands. To the contrary, Donald embezzled funds from Acme. Acme was a victim of Donald's fraud and perpetrated no fraud of its own.

Laches

Donald will assert that, because Acme discovered Donald's embezzlement in 1997 but did not bring the action until 2003, that the laches defense applies. Laches applies when an unreasonable time elapsed between the injury and the action and where this delay would result in prejudice to the defendant. Here, Acme let six years elapse between its discovery of the injury and its action against Donald. A court would likely conclude that six years is an unreasonable length of time which prejudiced Donald, since Donald likely proceeded on the reasonable belief that Acme did not plan to press charges for the embezzlement. Therefore, Donald's laches defense against Acme will likely be successful.

Answer B to Question 2

Polly:

Polly will assert a theory based on resulting trust. A resulting trust arises when one person takes title in his or her name for the benefit of the person who paid for the property. The presumption is that the one who paid for the property could not have meant to make a gift of the property to the one who takes title. The presumption does not apply when the parties are closely related; however, there is no evidence here that Polly and Donald are related, married, or otherwise within that presumption.

Here, both Polly and Donald contributed to the purchase price, yet title was taken in Donald's name alone. From that point on, Polly made no more payments on the property. However, she and Donald did have an oral agreement that in lieu of paying rent, he would make the monthly loan payments to the bank on their deed of trust. So she contributed to the purchase price, while title was taken in Donald's name alone. Therefore, equity should consider title to be in the name of both Polly and Donald.

Therefore, when Donald sold the property, Polly had a right to her portion of the proceeds. Their other oral agreement about vacating the property, selling and splitting the net proceeds, would not even be a factor. Polly is entitled to her share on the basis of the resulting trust.

Donald's Defenses:

First, Donald may argue for application of the "unclean hands" doctrine. This is an available defense to any equitable action. It states that someone may not avail himself of equity where the person's behavior was wrongful in that particular transaction on which the person is seeking relief.

Here, Polly and Donald made their original agreement in order to defraud creditors of their right to enforce their judgments against her. That is why they took title in Donald's name alone. So Polly should not be allowed to now seek an interest in the property due to her "unclean hands."

But the unclean hands doctrine is not available as a defense where the defendant profited from the plaintiff's wrongful behavior. Here, Donald did profit—he got title to the property, and it was not levied by Polly's creditors. Since Donald received a benefit, he will not be allowed to assert unclean hands, despite Polly's wrongful behavior.

Donald will also assert the statute of frauds as a defense. The statute of frauds requires that any contract for the sale of an interest in land must be in writing. Here, the oral agreement that Polly and Donald initially made was not in writing. However, that contract was not a contract relating to the sale of an interest in land—it was only a contract about how they would jointly purchase the house. Therefore, the statute of frauds is no bar to the

action.

Polly:

Polly can also assert a constructive trust theory. A constructive trust is imposed on a person to prevent unjust enrichment by that person where, for example, the property is obtained or held wrongfully.

Polly would seek to impose a constructive trust on the proceeds of the sale, which should have been split between them on the basis of their agreement to sell and divide the proceeds whenever Donald should move out.

Donald vacated the property in 1998 and the property should have been sold then and the proceeds divided. That did not happen. Therefore, when it was sold (in 2003) the proceeds should still have been divided. Donald is wrongfully holding Polly's half of the proceeds, and so a constructive trust should be implied on Donald to hold those proceeds and convey them to Polly.

Donald's Defenses:

Donald may assert a defense of laches. Laches is an equitable remedy, available in all cases where the plaintiff is seeking equitable relief. It bars an action where the plaintiff has unduly delayed seeking relief, causing prejudice to the defendant.

Donald will argue that he breached their oral contract in 1998, when he moved out and began renting to tenants. It was not until 2003 that Polly sought relief for the breach.

However, the unjust attachment stems from the 2003 sale of the property, not the initial breach by not selling the house in 1998. Polly could have (and likely did) waive any right to immediate sale of the property upon vacating. But she still remained entitled to her share of the proceeds, at whatever time the sale occurred. So Donald's laches defense will probably fail.

The same outcome is likely for any statute of limitations defense Donald might raise, based on the same analysis.

Donald may also argue for the statute of frauds as a defense. This was a contract for the sale of an interest in land. Therefore, it needs to be in writing.

But again, this contract was collateral to the sale of an interest in land. It did not involve the actual sale, only an agreement of what to do with the property and the proceeds of that property at a certain time upon the happening of a certain condition. The statute of frauds will probably not work as a defense for Donald either.

The bottom line is that Donald has the title in the property and/or its proceeds as a result

of his own wrongful behavior. In all likelihood, a court will not allow him to profit from his own wrongdoing, and so Polly will be successful. She will get \$50,000, not just \$20,000.

Acme:

Donald wrongfully converted the \$20,000 of Acme when he embezzled it and used it to purchase the Willow Avenue home. Therefore, Acme could seek a constructive trust on the premises, and therefore the proceeds of the sale of the home.

Since Donald wrongfully used Acme's funds to acquire title to the property, Acme will argue that those funds should be traced to the property itself. Therefore, a constructive trust should be imposed in its favor on the entire property. This is not a case where Donald used the embezzled funds to benefit property he already owned—he acquired his interest in the property due to the embezzled funds.

But a court in equity would probably not allow Acme to impose a constructive trust on the entire property. What is more likely is that (due to Polly's interest) the court would impose a constructive trust on only Donald's portion of the ownership interest. Therefore, if Donald owns one-half of the house, the constructive trust would be on one-half of the proceeds, or \$50,000.

It is also possible that instead of a constructive trust, the court might impose an equitable lien on the property (and consequently the proceeds). Since Donald (and Polly) both contributed other funds to the purchase of the home, Acme's equitable lien would only give it an interest in the property to secure the repayment of the funds Donald misappropriated—\$20,000. If an equitable lien is imposed, then Acme would get that amount from the proceeds: \$20,000.

Donald's defenses:

The two biggest defenses available to Donald against Acme are laches and any applicable statute of limitations.

Laches (as indicated previously) is about unreasonable delay causing harm or prejudice to the defendant. Laches begins to run from when the plaintiff has reason to know of the injury. Here, the embezzlement occurred in 1993, but Acme is only now suing in 2003. If laches begins to run from 1993, there is probably prejudice to Donald; he has purchased the property and made additional payments and maintenance on it. Therefore, laches would likely bar the suit.

But Acme only discovered the embezzlement in 1997, at which time it fired Donald from its employ. If laches begins to run from this date (as is more probable), then there is less reason to apply the defense. Donald has not really been prejudiced from that time until the present. The most likely outcome is that laches will not prevent the relief being sought by Acme.

An applicable statute of limitations also could run from either date, 1993 or 1997. There is no requirement of harm to defendant, so if the applicable statutory period has expired, that would be a complete defense for Donald.

Question 3

Dan was charged with aggravated assault on Paul, an off-duty police officer, in a tavern. The prosecutor called Paul as the first witness at the criminal trial. Paul testified that he and Dan were at the tavern and that the incident arose when Dan became irate over their discussion about Dan's ex-girlfriend. Then the following questions were asked and answers given:

17. What happened then?
- [1] A: I went over to Dan and said to him, "Your ex-girlfriend Gina is living with me now."
- Q: Did Dan say anything?
- [2] A: He said, "Yeah, and my buddies tell me you're treating her like dirt."
- [3] Q: Is that when he pulled the club out of his pocket?
- A: He sure did. Then he just sat there tapping it against the bar.
- [4] Q: Tell the jury everything that happened after that.
- [5] A: I said that he was a fine one to be talking. I told him I'd read several police reports where Gina had called the police after he'd beaten her.
- Q: Do you believe the substance of those reports?
- [6] A: You bet I do. I know Gina to be a truthful person.
- Q: How did Dan react to this statement about the police reports?
- A: He hit me on the head with the club.
- Q: What happened next?
- [7] A: I heard somebody yell, "Watch out— he's gonna hit you again!" I ducked, but the club hit me on the top of my head. The last thing I remember, I saw a foot kicking at my face.
- Q: What happened then?
- [8] A: Dan must have kicked and hit me more after I passed out, because when I came to in the hospital, I had bruises all over my body.

At each of the eight points indicated by numbers, on what grounds could an objection or a motion to strike have properly been made, and how should the trial judge have ruled on each? Discuss.

Answer A to Question 3

1. The evidence is relevant. Logical relevance consists of a tendency in reason to support or contend a fact or issue of consequence in the case. Here, the statement is offered to show Dan's motive for attacking Paul. The statement is also legally relevant, meaning that it is not excluded on any extrinsic policy grounds and its probative value is not substantially outweighed by its prejudicial impact, confusion of the issues, misleading the jury, waste of time, etc.

The defense will likely object to hearsay. Hearsay consists of an out-of-court statement offered for the truth of the matter asserted. The statement is not an admission. An admission occurs when a party to the action admits a fact of relevance to the action. Here, Paul is not a party to the action. He is merely a witness for the prosecution. The prosecutor will argue that the statement is not offered for the truth of the matter asserted, but to show its affect[sic] on the recipient's state of mind. In other words, we don't care if the exact words themselves are true (whether Gina is in fact living with Paul), we are trying to explain why Dan would have become incensed enough to attack Paul.

The trial court should rule that the statement is not hearsay because it is not being offered for the truth of the matter asserted.

2. The evidence is relevant. It is logically relevant because it is being offered to show Dan's angry state of mind. It is legally relevant because there are no policy reasons for excluding it, and its probative value is not outweighed by its prejudicial impact.

The defense will object on hearsay grounds. The prosecutor will argue that Dan's statement is an admission. It is a statement by a party, and it tends to admit that Dan was in fact angry with Paul, a fact of consequence in this action. Admissions are not hearsay under the federal rules. However, contained within Dan's statement is another hearsay statement, a statement by Dan's buddies.

Thus, the defense would object to hearsay within hearsay. The prosecutor should respond that the statement by the buddies is not being offered for the truth of the matter asserted, but to show Dan's state of mind. In other words, it is immaterial whether Paul was in fact treating Gina like dirt, what matters is that Dan was told he was, and this made Dan angry.

Because the prosecutor has an adequate response to both hearsay objections, the statement should be admitted.

3. The defense will object to this question as leading. Leading questions are not allowed on direct examination. Because Paul is being directly examined by the prosecutor, the prosecutor may not lead Paul, subject to certain exceptions inapplicable here, such as Paul being declared a hostile witness, foundational questions, etc. This is a question of consequence in the matter, and the prosecutor's question suggests the answer sought by the prosecution. As such, it is leading, and should have been objected to and sustained

by the judge.

The question did call for relevant evidence. The evidence called for was both logically relevant (whether Dan had a club with him and brandished it) and legal relevance (no policy reasons and it is very probative).

4. The defense could object to this question on a variety of grounds, but would probably object to the question as vague and calling for a narrative response. Under the federal rules, direct questioning of witnesses is to proceed by question-and-answer. The attorney is supposed to give some structure to the question-and-response process. He may not simply ask an open-ended question a broad [sic] answer and allow the witness to answer as he sees fit. He also may not ask a question that has no degree of specificity with respect to the information sought. Here, "Tell the jury everything" provides no guidance to the witness as to the information sought.

5. "I said that he was a fine one to be talking."

This statement is relevant. It is logically relevant because it tends to show further Dan's anger towards Paul and it is legally relevant, because it is probative and there are no policy reasons for excluding it.

The defense will object that the statement is hearsay. It is not an admission, because Paul is not a party to this action. The prosecutor will again argue that it is not being offered for its truth, but simply to show its effect on Dan. In other words, it is not offered to show whether Dan has a right to be talking or not, but to show further its effect on Dan's state of mind and why Dan became angry enough to attack Paul. This is a close call, but the judge should probably admit the statement because it is not offered for its truth.

"I told him I'd read several police reports where Gina had called the police after he'd beaten her."

The defense will object to relevance. The statement is logically relevant (it tends to show Dan's violent nature). However, it is not legally relevant. Its probative value is substantially outweighed by the danger of prejudice. Here, there is no evidence that Dan was convicted of abusing Gina. This would be admissible. Here, the jury may be misled into thinking that Gina's calls are sufficient proof of Dan's guilt, and this is improper prejudice. The judge should exclude the evidence on legal relevance grounds.

The defense will also object on the grounds of the best evidenced rule. This rule requires that the contents of a writing be introduced where: (1) the writing is of consequence in the matter; or (2) a witness's knowledge comes from the writing and the witness testifies as to the actual contents of the writing. Here, Paul is testifying to the contents of the police reports. He's testifying that the reports stated that Gina called the police and told them that Dan beat her. The prosecutor must introduce an original or accurate copy (unless he establishes they were unavailable) of the reports into evidence to show this evidence. The

best evidence rule objection should be sustained.

The defense may also object on the grounds of hearsay within hearsay. The entire second sentence is an out-of-court statement by Paul, and is thus hearsay (not an admission because Paul is not a party). Unlike previous statements by Paul, this statement is arguably being offered for the truth of the matter asserted. It is being offered to show that Dan beat Gina. The prosecutor might argue that this is untrue, we don't care whether Dan beat Gina, we only care that Dan was upset about being accused in public. The judge might accept this as justification or it might not (even if it accepted the prosecutor's motivation, the jury might still take it to show that Dan is a "girlfriend beater", and this further supports exclusion of the evidence as more prejudicial than probative).

The police reports and the statements within the police reports also constitute hearsay. While the police report is admissible as an official record, because the statements are written by individuals with a duty to accurately convey the information in them, Gina's statements are still hearsay. They do not fit within the official record or business record exception, because Gina is not under a duty to convey the information. She had no obligation to make the calls to the police. Thus, Gina's statements are hearsay and must be excluded. (Note: the federal catch-all exception would also not allow introduction of Gina's statements.)

Finally, the defense might object that this is character evidence. Character evidence is evidence of one's proclivity to act in conformity with a specific character trait on the occasion in question. Here, the defense will argue that the evidence is being introduced to show that Dan has a character trait of violence, and that he acted in conformity with that trait here. This argument should be sustained. The prosecution may not introduce affirmative evidence of specific acts until the defendant has opened the door to such evidence, by either supporting his own character, or attacking the victim's character. Here, there is no evidence that either has occurred, and the evidence should be excluded as improper character evidence.

6. This evidence is relevant. It is logically relevant, because, if admitted, it would bolster any statements by Gina in the case. There are no policy grounds for its inclusion, and it is probative.

However, the defense will object that this is improper character evidence. A party may not bolster or support the credibility of its own witness (a hearsay declarant is a witness, and may be impeached or have her character attacked as any other witness) until the witness's credibility has been attacked. Here, the prosecutor has offered opinion evidence by Paul to support Gina's credibility and character trait for truthfulness. The prosecutor may not do this until and unless the defense attacks Gina's credibility.

The defense should object on character grounds and the judge should sustain the objection.

7. “Watch out—he’s gonna hit you again!”

The statement is relevant. It is logically relevant because it tends to show that Dan hit Paul, and more than once. It is legally relevant because its probative value outweighs its prejudicial impact and there are no policy grounds for its exclusion.

The defense will object to this statement as hearsay. It is an out-of-court statement, and it is being offered for the truth of the matter asserted. However, the federal rules allow the admission of certain out-of-court statements that are admittedly hearsay when the circumstances surrounding the statement inherently support the reliability of the statement made. This applies to excited utterances, present sense impressions, statements of physical condition, and present state of mind. Here, the prosecutor will argue that the statement is an excited utterance. The statement was made spontaneously while under the stress of excitement, so there was little chance to fabricate the substance of the statement. Even though we do not even know the identity of the declarant, the statement is admissible. (Note: The statement would also qualify as a present sense impression, as it was made concurrently with one’s sensory (visual) inputs and thus is inherently reliable because there was no time to consider what one was saying).

“The last thing I remember, I saw a foot kicking at my face.”

The defense might object to this statement as not based on personal knowledge and lacking foundation, meaning that the statement is made under circumstances that indicate that Paul may not have the best recollection of the events. However, this is not a valid objection. The defense should cross-examine Paul about his ability to accurately recall these occurrences, however.

8. This statement, if admitted, is relevant. It is logically relevant because it indicates further malicious attacks by Dan and damages. It is legally relevant because it is probative and no policy grounds exist for its exclusion.

The defense will object that the testimony is not based on personal knowledge, is speculative, and there is a lack of foundation to support the statements. Paul has not indicated he personally observed the kicking, he is merely speculating that that is what occurred. Without more foundation, this objection should be sustained. Paul’s statement about the bruises all over his body, however, are based on personal knowledge and admissible.

Answer B to Question 3

① “Your ex-girlfriend is living with me now.”

Relevance - to show that D became angry because P was living with D’s ex-girlfriend.

Hearsay - Hearsay is an out-of-court statement offered at trial to prove the truth of the matter asserted.

D could object on hearsay grounds because the statement was made by P, outside of the court.

However, the prosecution could successfully argue that the statement is not being offered for its truth. The prosecution is offering the statement to show that it provoked a reaction in D which led to his assault on P. It is offered for its effects on the listener, not for its truth.

Admission– The prosecutor may also argue that if the statement were considered hearsay it would still be admissible under the exception for admissions of a party-opponent. This argument would lose, however, because P is not a party. He is a complaining witness but the government is the party.

② “Yeah, and my buddies tell me you’re treating her like dirt.”

Relevance - to show D’s anger over P’s treatment of the ex-girlfriend.

Hearsay - An objection could be made because this is an out-of-court statement offered for its truth.

Not for its truth - However, the prosecution could successfully argue that the statement is not offered for its truth but rather to show D’s state of mind, or motive for the alleged assault.

Exceptions

Admission - Even if considered hearsay, the statement is admissible because it is being offered against a party (D) by his opponent (the prosecution).

State of Mind - In addition, the statement would be admissible to prove D’s state of mind when the statement was made. The statement tends to show that D was feeling ill will towards P and that this motivated the assault.

③ “Is that when he pulled the club out of his pocket?”

Relevance - to show that D assaulted P with a club.

Leading Question - A leading question is one that suggests the correct answer to the

witness. Leading questions are permissible where questioning a hostile witness, clarifying background information, or where a witness has a difficulty remembering.

Here, P is not a hostile witness, he was called by the prosecution as their first witness. As none of the other circumstances are present, the leading question here (it suggested the right answer was yes) was impermissible and should have been disallowed.

Assumes Fact Not in Evidence - The question is also objectionable because it assumes facts not in evidence, namely, that D had a club, and that D the club [sic] from his pocket.

④ “Tell the jury everything that happened after that.”

Narrative - This question is objectionable because it calls for a narrative. The lawyer must interrogate the witness, not merely call him to the stand and let him tell a story.

Compound - The question could be construed as compound because it calls for the witness to answer what should have been multiple questions all at once.

⑤ a. “I said he was a fine one to be talking.” b. “I told him I’d read several police reports where Gina had called the police after he’d beaten her.”

a. Is hearsay because it is an out-of-court statement offered for its truth and no exceptions apply.

a. Is also objectionable because it is irrelevant—it has no tendency in reason to make a material fact more or less probable.

403 - Undue Prejudice - Even where evidence is relevant, it may be excluded by the court due to its probative value being outweighed by its danger of unfair prejudice, confusing the issues, misleading the jury, or delay.

Here the evidence should be excluded under 403. The probative value is slight if existent and the danger of confusing the issues (D assaulting P versus D assaulting Gina) is great.

b. The Police Reports

Relevance - to show that D is a violent person or to show the effect this statement had on D.

Hearsay - The statement was double hearsay: ① It is the statement by P at the bar ② relaying the content of police reports. In order for double hearsay to be admissible there must be an exception or exclusion for each level of hearsay.

① P’s Statement - The prosecutor could argue it is non-hearsay because it is offered to show its effect on D, not for its truth.

② The Police Reports - Police reports may be admissible as business records if made by someone in the course of their employment with a duty to make such recordings. However, police reports are not admissible as a business record in a criminal case, as we have here. Further the reports contain a hearsay statement by Gina, who was under no duty to make accurate statements.

Therefore the statement should be stricken.

Best Evidence Rule (BER) - Where the contents of a document are at issue or a witness testifies to something known only from reading a document, the BER requires production of the original document or a valid explanation for its absence.

Here, P testified to contents of police reports. His only knowledge appears to derive from reading the reports. Thus the BER requires their production or an explanation.

Character Evidence - Evidence to show conduct in conformity therewith is inadmissible unless the defendant first opens the door by bolstering his own credibility.

Here, the defendant D has put on no evidence. Also, the prosecution could only rebut by opinion or reputation evidence, not by extrinsic evidence of specific acts, as P testified to.

Relevance - To show Gina told the truth and that therefore D is a violent person.

Personal Knowledge - P lives with Gina and is thus familiar with her character for truthfulness.

⑥ "I know Gina to be a truthful person."

Improper Bolstering of a Witness/Declarant

P improperly testified to Gina's character for truthfulness. A party may bolster the credibility on a witness/declarant with reputation/opinion evidence of truthfulness only after the credibility of the witness has been attacked.

Here, Gina has not testified, nor did D attack her credibility as a declarant, thus the testimony should be stricken.

⑦ "Watch out—he's gonna hit you again!"

Relevance - to show D attacked P

Hearsay - out-of-court, and offered for its truth, therefore it is hearsay.

Exceptions

Excited Utterance - A statement made concerning a startling event while under the stress of the exciting event is admissible as a hearsay exception.

Here, the statement concerned a startling event, an assault with a club, while the declarant was under the stress of the event. The statement appears to have been made in between blows and under great excitement.

Present Sense Impression - A statement made describing an event while the event is occurring or immediately thereafter is admissible as an exception to the hearsay rule.

Here the out-of-court statement was made while the declarant was observing the attack on P. Therefore the statement is admissible.

⑧ "D must have kicked me more after I passed out . . . "

Relevance - to show D assaulted P.

Lack of Personal Knowledge - A witness may only testify to things they have personal knowledge of.

Here, P testified to what happened after he had passed out. A person obviously has no personal knowledge of events taking place while they were unconscious. Thus the testimony should have been stricken.

Question 4

Paula is the president and Stan is the secretary of a labor union that was involved in a bitter and highly-publicized labor dispute with City and Mayor. An unknown person surreptitiously recorded a conversation between Paula and Stan, which took place in the corner booth of a coffee shop during a break in the contract negotiations with City. During the conversation, Paula whispered to Stan, "Mayor is a crook who voted against allowing us to build our new union headquarters because we wouldn't pay him off."

The unknown person anonymously sent the recorded conversation to KXYZ radio station in City. Knowing that the conversation had been surreptitiously recorded, KXYZ broadcast the conversation immediately after it received the tape.

After the broadcast, Paula sued KXYZ for invasion of privacy in publishing her conversation with Stan. Mayor sued Paula and KXYZ for defamation.

1. Is Paula likely to succeed in her suit against KXYZ? Discuss.
2. Is Mayor likely to succeed in his suit against Paula and KXYZ? Discuss.

Answer A to Question 4

1. Paula v. KXYZ

Paula can attempt to bring a suit against KXYZ for invasion of her privacy on several theories including false light publication, intrus[t]ion upon seclusion, and public disclosure of private facts. The question asks how likely she is to succeed in these suits and each is treated separately below.

A preliminary first amendment concern is appropriate. The Supreme Court has recently held that a broadcaster cannot be held liable for the broadcast of illegally obtained information even if it is aware of the illegality of the recording so long as the broadcaster was not a party to the illegality and the information involves a matter of public concern. Here, the facts suggest that KXYZ was not a party to the illegality which was the surreptitious recorder's acts, and even though it could be aware that the information was not legally obtained, because the subject matter of the statement involves the Mayor as well as the highly publicized labor disputes that Paula was involved in, KXYZ will argue that this is a matter of a public concern and they are protected by the First Amendment in making their broadcasts. Now, special attention will be paid to each of the causes of action.

FALSE LIGHT

An action for false light publication can be brought where the plaintiff shows that there has been widespread dissemination of information that places plaintiff's beliefs, thoughts, actions in false light that would be objectionable to a reasonable person. Here, Paula would claim that KXYZ's actions in immediately playing the recording of her private conversation with Stan placed her in false light because it imputed to her the belief that Mayor was a crook.

The widespread dissemination element is met in this case because KXYZ broadcast the information over the airwaves.

There is an issue as to whether the dissemination of the information placed Paula's beliefs, thoughts, or actions in a false light in such a way that would be objectionable to a reasonable person. KXYZ would argue that a reasonable person would not object to having their claim that the mayor is a crook be publicized because the corruption of the mayor is something that Paula herself wanted to correct. Paula will argue that taking the statement out of context and publishing it makes it seem like she is making a very broad accusation of the mayor. Moreover, Paula would argue that publishing such a statement puts her in jeopardy of potential tort liability, which is the case here, as Mayor has sued her. Upon hearing the arguments of both sides, a court would probably consider the statements disseminated by KXYZ as not being objectionable to a reasonable person because they do not distort Paula's opinion of the mayor but rather accurately represent them because they played the taping of her speaking.

As a defense, KXYZ would argue that the publication of this information is protected by the First Amendment to the Constitution. The First Amendment is incorporated through the due process clause of the Fourteenth Amendment and binds the states as well. Therefore, a state - - as a state actor - - cannot enforce a cause of action where the underlying conduct being adjudicated is protected by the First Amendment unless certain standards are satisfied. In a false light case, KXYZ would argue that because the corruption of the mayor is a matter of public concern and also because the labor dispute between the labor union and the city has been highly publicized, the public has a right to be informed about both the mayor and the labor union's interactions. If the court finds that the subject matter of the broadcast implicating the mayor in corruption and involving negotiations between the Labor Union and Mayor indeed involves a matter of public concern, the court will require Paula to show actual malice on the part of KXYZ to recover. Here, Paula would emphasize their immediate broadcast of the information and claim that such highly reckless broadcast without checking the accuracy of the recording or ensuring that there might be some basis to it constitutes reckless disregard for the consequences of their broadcast. This is a close question, but a court would probably ultimately decide that the broadcasting of the information was short of reckless for false light purposes.

In conclusion, because there was not a material misrepresentation of Paula's views in the broadcast, a court will probably find that the broadcast did not place her views in a false light and Paula will not recover on this theory.

INTRUSION UPON SECLUSION

An action for intrusion can be brought where a plaintiff can show that a defendant intruded, by an act of prying or intrusion objectionable to a reasonable person, into a space where the plaintiff had a reasonable expectation of privacy. The tort provides a remedy for the privacy of the plaintiff, so therefore the truthfulness of any information gained as a result of the intrusion does not exonerate the defendant. Here, Paula will have to show that KXYZ intruded upon her by taking a private conversation she had with Stan and that the information that KXYZ broadcast was taken from a place where Paula had a reasonable expectation of privacy. Because KXYZ did not itself intrude upon Paula, Paula will have to pursue KXYZ on an agency theory. If Paul is not successful in linking KXYZ to the intrusion, then she cannot hold them liable for this tort.

The primary obstacle for Paula is in asserting that KXYZ is the party responsible for intrusion in this case. The tort does not protect the plaintiff's privacy interest as a result of the broadcast of the information, which KXYZ clearly did; rather, the tort provides relief for intrusion upon the privacy interest of the plaintiff. Paula will argue that KXYZ is vicariously liable for the surreptitious recording made by the unknown recorder of the information, the party most appropriately liable for intrusion. Here, Paula would have to draw a connection between KXYZ and the recorded [sic], perhaps by showing evidence that the recorded [sic] was an employee of KXYZ. If, for example, KXYZ by prearranged agreement paid the person to stakeout and follow Paula and record her conversation, Paula might be able to claim that there was an employer-employee relationship upon which vicarious liability could

be grounded. However, the facts suggest that the recorder acted on his own and sent the conversation anonymously to KXYZ. If the court believes that there is no relationship between KXYZ and the recorder, then KXYZ cannot be found liable for intrusion because it was not the party responsible for the intrusion.

Whether or not KXYZ is found to be vicariously liable, it is helpful to discuss the remaining elements of the tort. The first element of intrusion will be difficult to satisfy for Paula. Under the law of intrusion, an intrusion occurs by some act of prying or meddling that is objectionable to a reasonable person. For example, someone using binoculars or high powered camera lens from across the street to spy on or take photographs of someone in a private place is a sufficient act of intrusion. Here, Paula will claim that the “surreptitious” recording of her conversation constitutes an act of intrusion. Paula will argue that a reasonable person would object to other people prying into their conversations. On the question of intrusion, KXYZ will emphasize that there is no intrusion where someone speaks in public. KXYZ will claim that it is not reasonable for a person to object that someone is listening to them when they speak in public, rather, KXYZ will argue, the speaker assumes the risk of an “uninvited ear” whenever they speak in public. This is a close question on intrusion, but because the facts suggest that the recording is surreptitious, a court will probably find that such secretive and intrusive recording of a conversation is sufficient to satisfy the first element of the tort.

On the question of whether Paula had a reasonable expectation of privacy in her place of seclusion, there will be difficulty. The tort of intrusion only protects the privacy interest of the plaintiff where they have a legitimate expectation of privacy in the place upon which their privacy was intruded. Here, Paula was in a coffee shop directly across the street from where contract negotiations were taking place. Paula will emphasize that she was in “the corner booth” of the coffee shop and that she was “whispering” to Stan when she made the statement, all suggesting that she subjectively intended, and that a reasonable person would objectively act that way, to keep the subject matter of her conversation private. KXYZ would argue, like on the intrusion element, that statements made in public, even if the speaker subjectively intends to keep them relatively secret, are not objectively reasonably private. KXYZ will emphasize that a speaker assumes the risk of “an unreliable ear” when they make statements in public. Paula will counter that she took reasonable precautions to keep her statement private despite being in public by being in a corner booth and by whispering. Again, this is a close question, but because the facts suggest that Paula made an effort to keep her statement quiet and between her and Stan, a court could find that she had a reasonable expectation of privacy in the corner booth and in her statement.

PUBLIC DISCLOSURE OF PRIVATE FACTS

An action for disclosure can be brought where a plaintiff can show that a defendant caused widespread dissemination of information in which plaintiff had a reasonable expectation of privacy and which a reasonable person would object to. Because the interest protected by this tort is the privacy of the plaintiff and not the subject matter of the information

disseminated, truth is not a defense to the tort because even if the information is truthful, the injury to the plaintiff's privacy is still unremedied. Here, as discussed above, the primary obstacle for Paula is showing that she had a reasonable expectation of privacy in the contents of her statement.

Here, KXYZ clearly caused widespread public dissemination of the statements Paula made about the mayor. By broadcasting it over the airwaves, this element is met if the dissemination would be objectionable to a reasonable person. Here, KXYZ would argue that Paula was a public figure trying to settle the labor dispute with the city in the favor of her union. KXYZ would emphasize that the labor dispute has been highly publicized already and that it is a matter of public concern. These arguments, however, emphasize the subjective feelings of Paula regarding the information rather than what would be objectionable to a reasonable person. Nevertheless, a reasonable person attempting to put forward a cause, KXYZ would argue, would not object to the disclosure of information pushing for that cause. Paula will counter that the information disclosed would certainly be objectionable to a reasonable person because of the potential tort liability that could arise to the speaker if such information were widely disseminated. Here, in particular, Paula can show that she is being sued by Mayor for defamation and without KXYZ's disclosure of the statement, she would probably not be sued. This, again, is a close question but a court could reasonably find that the disclosure of the information here would be objectionable to a reasonable person because of the potential tort liability the speaker assumes and thus Paula will have satisfied the first element.

The second element is more problematic for Paula because she must show that the facts were private to her and that a reasonable person would consider them private. Here, Paula is a labor union leader and she ardently pushes for the positions of her union through publicity and in her negotiations with the City. The alleged disclosure even concerns a contract to build the new union headquarters, something directly related to the public nature of Paula's position. KXYZ would emphasize this and say that the content of the statement is not private because it has to do with Paula's public actions, negotiating with the city and acting as president of the labor union. A court could find that, despite the private nature of the conversation in the coffee booth corner, the subject matter of the statement here is not private but rather a public matter because it involves the City and the labor union which is currently publicized a great deal. Only if the court finds that the statements contained private information to Paula, would an action for disclosure lie.

2. Mayor v. Paula & KXYZ

As a public figure, the mayor must prove additional elements in his case in order to recover for the tort of defamation. As the actions between the Mayor and Paula and the Mayor and KXYZ are of a different nature and have different defenses, they will be treated separately.

The common law elements for defamation include: (1) a defamatory statement, meaning a statement which a reasonable person would take as being harmful to a person's reputation, (2) that the statement be "of or concerning" the plaintiff, meaning a reasonable

person would understand it to refer to the plaintiff, (3) that the statement be “published,” which requires only communication to a third person but may also include more widespread dissemination, and (4) damages, which may be presumed under certain circumstances.

When the plaintiff is a public figure, he must allow show [sic] (1) falsity of the statement as well as (2) some degree of fault on the part of the alleged defamer.

Mayor v. Paula

In Mayor’s case v. Paula, he would focus on the actual conversation she had with Stan in the coffee shop. The allegation that Mayor is a “crook” is clearly defamatory particularly in the context of alleging that the Mayor required a payoff as a condition for allowing the union to build a new headquarters. A reasonable person would surely find that such a statement of alleged fact would be considered harmful to the reputation of the target of the speech. Moreover, it is clear from the content of the statement that it concerns the Mayor, a reasonable person hearing the statement would know that it refers to Mayor because it specifically calls him a “crook.” Third, the statement was published because Paula made the statement to Stan. Regardless of the subsequent broadcast of the information by KXYZ, Paula’s making the statement to Stan is sufficient publication for a tort to lie as between Mayor and Paul. There might be an issue as to whether Paula can be held liable for subsequent damage which occurs to Mayor as a result of the broadcast because Paula is not responsible for that part of the injury to Mayor’s reputation.

Because this is spoken defamation, it is considered slander. In particular, Paula’s statement would be considered slander per se because it was a statement relating to the Mayor’s profession and it was also a statement involving the moral turpitude of the Mayor. Slander per se exists where the alleged defamatory statement concerns a loathsome disease, the unchastity of a woman, the moral turpitude of the defamed person, or the defamed person’s business or professional capacity. The effect of slander per se is that damages are presumed and need not be pled, although plaintiffs often will anyway. Here, Mayor need not prove special economic damages from the tort although he almost certainly will want to, particularly to avoid damages being called too speculative because of the problem of KXYZ’s broadcast which enlarged the damage to Mayor. This would not be a problem if Paula and KXYZ were found jointly & severally liable for the entire undivided injury to Mayor, although it is not clear that they would be jointly & severally liable because two distinct acts of defamation could be argued to have occurred, one in the coffee shop and then the second on the airwaves. Only if it can be shown that Paula created a foreseeable risk that the information would be let out and that the broadcast was within that scope of risk created by Paula’s statement, then the limiting principle of proximate cause would not cut short Paula’s liability and allow her to be held responsible for the entire injury.

Having established the basic elements of the tort, Mayor will still have to argue falsity and, because he is a public figure, actual malice on the part of Paula. He will almost certainly not be able to do so, although more facts are necessary to reach a determination. Under New York Times v. Sullivan, a public figure trying to collect damages for defamation must

prove the falsity of the information claimed to be defamatory. It is unclear whether the mayor is in fact a crook, but if he did require a payoff for the permission to build new labor headquarters, then he could not collect damages in this case. Moreover, Mayor will have to show that Paula acted with malice in making the statement, either reckless disregard for the truthfulness of the information itself or reckless disregard as to the consequences of making the statement. Here, because Paula can show that she was taking pains to keep the information between her and Stan private, a court will probably not find her statement to be malicious. If she had used a bullhorn, for example, and made the statements in front of City Hall, then malice might be more appropriately found, but liability would still only lie if the statements were false because Mayor is a public figure. The idea behind the heightened requirements is that the First Amendment protects rigorous debate and exchange of ideas over public issues.

Mayor v. KXYZ

As discussed above, Mayor would have to make the same showing as to KXYZ to recover. Because the broadcast involved the Mayor and defamed him, he has satisfied the basic requirements for defamation. However, special First Amendment concerns arise that further protect KXYZ.

First, KXYZ under the Constitution may broadcast even illegally obtained information if it is truthful so long as KXYZ was not a party to the illegality and the information conveyed was a matter of public concern. Here, the facts take special pains to say the recorder, although surreptitious, was not related to KXYZ. Unless Mayor could connect KXYZ to the taping, they cannot be held liable for the publication of the information.

Second, the falsity of the information might not be able to [be] proven by the Mayor, which alone would relieve KXYZ of liability.

Third, the Mayor may be able to show malice on the part of KXYZ because they broadcast the information so quickly upon receiving the recording. This might be interpreted as reckless disregard for the consequences of broadcasting the defamatory material and if Mayor can show the other [e]lements as well as the falsity of the statement, he might be able to recover by showing this level of actual malice. KXYZ would of course counter that at worst such behavior was merely negligent and should not expose them to liability given the First Amendment protections.

Answer B to Question 4

1. Paula v. KXYZ

Invasion of Privacy – Generally

Paula is suing KXYZ for invasion of privacy for publishing her conversation with Stan. This tort consists of four branches of causes of action. They include: (1) misappropriation, (2) intrusion, (3) false light, and (4) disclosure of private facts. These four causes of action are discussed next.

Misappropriation

To prove a prima facie case of misappropriation, plaintiff must show that the defendant used plaintiff's name or likeness for plaintiff's commercial advantage. Misappropriation is considered an invasion of privacy tort because a person's name or likeness is a matter within plaintiff's control. When another person takes that name or likeness and uses it for their own gain, an invasion into plaintiff's private affairs occurs.

Here, Paula could claim that KXYZ's publishing of the tape misappropriated her name or likeness. Paula is the president of a labor union. Stan is the secretary of the same union. These are—or potentially are—high profile positions in any community. Thus, KXYZ could use a salacious scandal involving these two figures to help boost its ratings. In this case, Paula would argue that KXYZ replayed the tape for precisely that reason. The fact that the conversation had been surreptitiously recorded made the dialogue even more intriguing, which would also help KXYZ's attempts to publicize itself and draw attention to its station. For this reason, Paula would argue that the station used her name and reputation (and even Stan's, if he pled this cause of action) for its own commercial advantage.

Thus, Paula's misappropriation claim has some merit because KXYZ's likely intent was to use this conversation—and its participants – to boost its audience.

Defense to Misappropriation – Newsworthiness

Newsworthiness is a defense to misappropriation. The newsworthiness doctrine states that a person's name or likeness can be appropriated for public consumption if it involves a matter of public concern.

Here, because the union was involved with a bitter and highly-publicized labor dispute with the Mayor and because the conversation involved a discussion about the Mayor, KXYZ would likely claim that it was privileged to replay the tape for those reasons.

Thus, because the tape did involve a matter of public interest, KXYZ's defense in this situation is likely valid.

Defense to Misappropriation – Freedom of Speech

A radio station also possesses a First Amendment right to broadcast issues involving a public matter. The courts have ruled that a radio station may replay a tape that was surreptitiously recorded and not violate a person's rights to privacy. This defense is related—and often intimately commingled with—the newsworthiness defense, but it should be noted here for the sake of thoroughness because of the importance of the First Amendment in American constitutional jurisprudence. This defense also arises in the defamation context, but it might be applied here as well.

Here, KXYZ will argue that beyond mere “newsworthiness,” the courts have previously ruled that a radio station may replay surreptitiously recorded conversations and not be liable for the airing. While this has been handed down in a defamation context, KXYZ might argue that it should apply here as well.

Thus, KXYZ might have a pure freedom of speech defense based on court precedent in a related area.

Intrusion

To prove a prima facie case of intrusion, plaintiff must show that the defendant invaded a space within which plaintiff had a reasonable expectation of privacy. This tort typically involves cameramen taking pictures of persons in their private homes or even Peeping Toms. However, it can be applied to surreptitiously recorded conversations as well. But the issue is whether KXYZ did the intrusion, or whether the anonymous person was the tortfeasor.

Here, KXYZ did not actually physically intrude on an area where Paula had a reasonable expectation of privacy. KXYZ is not the entity or person that recorded the tape. KXYZ merely replayed the tape, which was recorded by an anonymous individual. Certainly, the anonymous person may be liable. However, even the anonymous person would argue that because the conversation took place in a corner booth of a coffee shop, it was in a public place where neither Paula nor Stan had a reasonable expectation of privacy. Paula would respond that she “whispered” her comments. However, courts have held that whispered comments in a public area are not afforded a reasonable expectation of privacy (though they have done this in a Fourth Amendment search and seizure context). Even if KXYZ could be held liable under an “agency” theory for the intrusion of the anonymous individual, this argument concerning the public place would prevail in KXYZ's favor.

Thus, KXYZ would prevail on Paula's intrusion claim.

Defense to Intrusion – Public Place with No Reasonable Expectation of Privacy

As discussed immediately above, KXYZ would defend that even if it could be held liable under an “agency” theory for the anonymous person's actions (which may not be possible

under these facts), that Paula's comments in a public restaurant, even if whispered, were not private. The Court had held that "whispered" comments in a public area are not afforded a reasonable expectation of privacy, though it has done this in a Fourth Amendment context.

False Light

To prove a case of false light, plaintiff must show that defendant attributed to plaintiff actions she didn't take, views she doesn't hold, or even comments she didn't make. False light is a watered down version of defamation because it includes material that doesn't necessarily harm plaintiff's reputation, but it merely misportrays her beliefs or actions.

Here, Paula was not portrayed in a false light. Her conversation with Stan was accurately recorded. Her view[s] regarding the Mayor are her views and were not portrayed falsely.

Thus, Paula's false light cause of action is lacking.

False Light – Constitutional Considerations

It should also be noted that false light is likely subject to the same constitutional considerations as defamation. Meaning that plaintiff, if she were a public official or figure and the issue involved a matter of public concern, would have to demonstrate falsity (a prerequisite for false light in the first place) and fault, which would include actual malice if plaintiff were a public figure.

Here, Paula is most certainly a public figure. She is the president of the labor union and is involved in a highly publicized dispute with the Mayor. Paula may very well be an all-purpose public figure because of her position as president of the union, but at the very least, she is a limited-purpose public figure because of the controversy between the union and the Mayor. Thus, Paula might likely need to prove actual malice, which is clear and convincing evidence that KXYZ knew or had a reckless disregard for the falsity of the information. However, here, the conversation recorded truthful information.

Thus, Paula would likely not be able to prove falsity, as discussed, or fault.

Defense to False Light – Truth

As discussed above, Paula's views regarding the Mayor were accurately recorded. There is no false light here.

Private Fact

To prove revelation of private fact, plaintiff must demonstrate that defendant revealed private facts about plaintiff that were facts that a reasonable person would object to being revealed in a public fashion.

Here, Paula would argue that her views regarding the major [sic] were private views that she did not want exposed to the rest of the world. This argument is somewhat diminished by the fact that Paula and Stan (and the union) were in a bitter and highly-publicized dispute with the Mayor. However, Paula would respond that even in bitter disputes a reasonable person would not want their private views toward the other person revealed to the world-at-large. Paula has a good argument in this regard. However, KXYZ might contend this was a newsworthy event and, additionally, that Paula's dislike for the Mayor is likely well-known. This would be a reasonable argument, if KXYZ could prove it.

Thus, Paula may have a cause of action under the private fact doctrine.

Private Fact – Constitutional Considerations

Again, it should be noted, as per the discussion above, that constitutional considerations are likely applied to the private fact cause of action (or at least some commentators and courts have so held). However, where – as here – there is not fault on KXYZ's behalf involving actual malice and because the material recorded was ostensibly truthful, Paula's cause of action suffers in this regard.

Defense – Truth

It should be noted that truth is no defense to private fact causes of action. In fact, what makes the private fact cause of action so unique is that the private facts may very well be truthful (in fact, they almost always are, which separates private fact from false light).

2. Mayor v. Paula

Defamation – Generally

To prove a prima facie case of defamation, plaintiff must demonstrate that defendant (1) made defamatory comments, (2) of or concerning the plaintiff, (3) published, (4) to third persons, and (5) that plaintiff suffered damage to her reputation. These issues are discussed next. Also, when the issue involves a public official, then the official must prove (6) falsity and (7) fault under a constitutional standard.

Defamatory Material

Defamatory material is material that harms plaintiff's reputation when it is published to the outside world.

Here, Paula was quoted as saying that the “[M]ayor is a crook who voted against us allowing us to build our new union headquarters because we wouldn't pay him off.” Certainly, such comments are harmful to the Mayor's reputation, especially when they are released over a radio station.

Thus, in and of itself, the material here is certainly “defamatory” in the limited sense of how this term is defined.

Of or Concerning Plaintiff

The defamatory material must be of or concerning the plaintiff, or be reasonably construed to be of or concerning the plaintiff if the plaintiff’s name is not explicitly mentioned.

Here, Paula refers directly to the “mayor.” However, there may be other communities in the area with mayors. However, Mayor will likely be able to show that because of the controversy between the union and himself, that a reasonable person would construe the comments as being about him.

Thus, this element is satisfied.

Published

The defamatory material must be published to a third person.

Here, Paula “published” her comments to Stan, the secretary of her labor union. Paula might claim that this conversation was privileged between two officers of a union and that, thus, it was not “published” in the normal sense of the term. However, this is likely not an adequate defense. Since Paul revealed her comments to a third person capable of understanding those comments, she “published” the material. Also, it should be noted that Paula ran the risk of others hearing her comments in a public restaurant as well.

Thus, Paula published her comments.

To Third Persons

The comments must be published to a third person, not just to herself.

Here, as discussed, Paula published to Stan (and ran the risk of publishing to others in a public restaurant).

Thus, this element is satisfied.

Damage to Reputation

General damages are presumed when the comments involve libel, which are written statements. However, they are not presumed when it involves slander, which are oral comments. However, damages for slander per se are presumed when the comments involving [sic] the plaintiff’s professional reputation.

Here, Paula’s comments to Stan were oral. However, they also involved the Mayor’s

professional competence and integrity, which would likely fall under a slander per se exception, which would then make damages presumed.

Thus, damages based on slander per se would likely be shown here.

Falsity

The Mayor would need to prove falsity as part of his prima facie case against Paula.

Here, the Mayor may have a problem showing falsity if in fact the comments are true (of course, this goes without saying). But, if the facts later demonstrate that this was a false accusation and that Paul was saying this to spite the Mayor, he can win this element.

Thus, we would need more facts here to satisfy the Mayor's burden on this element.

Fault

Because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, again, the issue depends on whether Mayor can show that Paula's statements were false and, if so, whether she acted in knowledge of that fact or in reckless disregard of the fact when conveying her comments to Stan.

Thus, again, more facts are needed here.

Conclusion

The Mayor may not have a problem showing the traditional common law elements of defamation, but more information is needed to determine whether he satisfies the constitutional elements. If he can show falsity (perhaps not!) and fault on Paula's behalf (again, perhaps not, but more facts are needed), then he has a cause of action. Otherwise, his case may be weak.

Mayor v. KXYZ

Defamatory Material

As per above, the material here is defamatory insofar as it hurts the Mayor's reputation when it was revealed. A similar analysis as applied to Paul applies here.

Of or Concerning Plaintiff

Again, as per above, the material here likely concerns the Mayor. Although he is not mentioned by name, because of his dispute with the union, Paula's comments could reasonably be attributed as being about him.

Published

Here, most certainly, the comments were published by KXYZ over its airwaves.

To Third Persons

Again, here, using the same rule discussed above with regards to Paula, the tape was replayed over the airwaves and played to KXYZ's listening audience. This most certainly qualifies.

Damage to Reputation

Unlike the situation with Paula, the issue here is whether the tape, when replayed over the air, is slander or libel. The courts have held that such tapes replayed over the air (along with other planned comments over the radio or comments over television) are generally libel. Thus, here, damages would be presumed, assuming the other elements are true. However, because this is also slander per se, proving that this qualifies as libel is not essential. General damages would likely be presumed either way.

Falsity

Again, Mayor would have to prove falsity as part of his prima facie case. The same problems arise here as arise above in the discussion regarding Paula.

Fault

Again, because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, the same problems arise with respect to the radio station as applied to Paula. The Mayor must show that KXYZ knew or had a reckless disregard for the truth regarding the tape-recorded comments.

Thus, more facts are needed for Mayor to prove his case.

Defense – Privilege and Newsworthiness

The courts have held that a radio station is privileged to replay tapes secretly recorded over its airwaves involving matters of public concern. These holdings are most likely premised on the fact that some comments are generally newsworthy and of public importance. Thus, KXYZ can claim this privilege in its defense.

Defense – Truth

It should be noted that because Mayor is a public figure, as discussed, he must prove falsity. This burden [sic] removes the burden of KXYZ proving truth as a defense.

Conclusion

Due to the absence of some critical facts that would help Mayor's case, along with the privilege and newsworthiness defense discussed above, KXYZ may likely win this suit, if for no other reason than Mayor may not meet his prima facie case.

Question 5

Lawyer is an in-house attorney employed by ChemCorp, a corporation that manufactures chemicals.

Smith is a mid-level employee whose job is to ensure that ChemCorp's activities comply with applicable governmental safety regulations. Smith asked to meet with Lawyer on a "confidential basis." At their meeting, Smith said to Lawyer:

"I think ChemCorp might have a serious problem. Last year I inspected a ChemCorp facility and discovered evidence of dumping of potentially toxic chemicals in violation of ChemCorp's internal policies and applicable governmental regulations. I told my supervisor about it, and he told me he would take care of the problem. My supervisor asked me to say nothing about the situation so they could avoid any legal hassles. I did not disclose the matter in my inspection report, despite internal policies and governmental regulations that require disclosure. I have discovered that the dumping is continuing, and I am very concerned about possible health threats because the dump site is located near several private residences and a river used for drinking water."

1. What ethical issues arise at the point at which Smith first asked to meet with Lawyer and later during their conversation? Discuss.
2. May Lawyer independently disclose the problem relating to the dumping of potentially toxic chemicals to governmental authorities? Discuss.

Answer A to Question 5

① Duty of Loyalty

As counsel for ChemCorp (“CC”), Lawyer owes a duty to act in good faith and in the Corp’s best interests. This duty prohibits Lawyer from accepting representation that will result in a conflict of interest with another client. When such a situation arises, Lawyer may only accept the representation if he reasonably believes the potential conflict will not impact his ability to effectively represent each client, if he discloses the conflict to each client, if he gets consent from each client, and if the consent is reasonable. Consent is virtually never reasonable if each client’s interest is opposed to one another.

Here, as soon as Smith asked Lawyer to speak on “a confidential basis,” Lawyer should have told Smith that as in-house attorney to CC, he could not represent him in matters personal to him if they opposed CC’s interests. Therefore, Lawyer should have advised Smith that he could not keep the conversation confidential if it related to his job at CC, and if it did, Smith should seek separate counsel.

However, if Smith advised Lawyer that he only wanted to talk in order to help the Corp to stay out of trouble, there was no loyalty issue in talking to Smith. The problem only arises once it becomes clear that Smith is primarily concerned about his own personal legal troubles stemming from the incidents.

Either way, Lawyer should have immediately warned Smith of these concerns and told him that it would be impossible for him to represent Smith at the same time he represented CC. Lawyer owed a duty of loyalty to CC which prohibited him from taking on another representation adverse to its interests.

Representation of Corp.

As Smith told Lawyer about the wrongful activity CC was engaged in, Lawyer, as in-house counsel for CC, owed a duty to go to the Supervisor and discuss the matter with him. If Supervisor either admitted to the wrongful activity or said that he was ordered to do so, Lawyer must continue to ascend the hierarchy of the Corp until he speaks with person making the decision. Lawyer’s only duty runs to CC itself, so if he is ever told to sit back and permit the wrongful activity to continue, he must go directly to the Board of Directors and advise them that CC is violating the law and that it is within their best interests to stop.

Withdrawal

If Lawyer eventually discovers that CC’s Board refuses to stop dumping illegally, the Lawyer may withdraw from his representation of CC. Permissive withdrawal is acceptable when the representation becomes financially burdensome to Lawyer, when the client has in the past engaged in a crime or fraud by using his services, when the client acts in a way

repugnant to him, or when the client refuses to stop engaging in conduct that the Lawyer tells him to stop doing. Withdrawal is mandatory if the client is presently using the Lawyer's services to engage in a crime or fraud. In such a case, the lawyer might have to make a "noisy withdrawal" by disclaiming work he prepared that furthered the crime or fraud.

There is no evidence here that CC is using Lawyer's services to further its illegal dumping scheme. Therefore, Lawyer need not resign.

However, if Lawyer goes to the Board, advises it to stop dumping, and it refuses, the ABA Rules would permit Lawyer to withdraw from its representation of CC. This is a relatively drastic measure, however, that should only be taken once Lawyer has done further investigation concerning Smith's allegations and the Board's knowledge of the illegal conduct.

After Smith Completed his Statement

At this point, Lawyer should again advise Smith that he owes a duty to the Corp, such that he cannot keep this information confidential. He should again advise Smith to get separate legal counsel if he is concerned about his civil or criminal liability. His interests are adverse to CC because Smith wants to end the dumping and possibly publicize CC's conduct, while CC wants to keep its conduct quiet. Therefore, under no circumstance should Lawyer give Smith any advise [sic] other than to seek separate counsel.

2. Duty of Confidentiality

While a lawyer owes a duty to disclose physical evidence of a crime that is in his possession, he must not disclose, use, or reveal any information relating to a representation, unless client consents.

Because Lawyer attained information highly relevant to his role as CC's counsel, he must not disclose the problem to the government, unless an exception to the duty of confidentiality applies. It is irrelevant that the source was a mid-level employee because Lawyer's duty extends to information attained from any source. He cannot tell this to the govt. because the dumping relates to his representation of CC.

Exceptions

A lawyer may only violate the duty of confidentiality if the client consents, if he's ordered to disclose information by law, if he does so to defend himself in a malpractice action or a suit to recover legal fees, or (under ABA Rules) to prevent a crime involving imminent death or serious bodily harm. The last exception is the only one that is arguably applicable here. It must be noted that the California Supreme Court has not found such an exception under its state law. While the CA evidence code has such an exception, the vitality of this exception is unclear in CA. Even if it did apply, it probably wouldn't apply here. Although the dumping creates a severe risk of serious bodily harm or even death, the risk is not of

an imminent nature. While others would argue that the harm from the toxic chemicals is an ongoing one, this exception is designed to deal with a case where an individual's safety is in danger from more obvious, and less latent, danger. Therefore, the duty of confidentiality prevents Lawyer from disclosing this information to the government.

Attorney-Client Privileges

The A-C privilege prevents the lawyer or client from having to disclose confidential communications discussed during the legal representation. The A-C privilege, however, has a wider crime-fraud exception, that would not require Lawyer to volunteer Smith's allegations, but would require him to disclose them if ordered to do so, since a crime is ongoing.

Answer B to Question 5

1. Ethical Issues Arising From Lawyer (L)'s Meeting With Smith (S)

Duty of Loyalty to S

A lawyer owes a duty of uncompromised loyalty to his client which forbids him from taking actions which might create competing obligations except in specifically enumerated situations. An attorney representing a corporation is in a particularly precarious position because his duty of loyalty runs to the corporation, and not to any individual employees.

When a lawyer's duty of loyalty might be compromised by a conflicting obligation, he is said to have a potential conflict. In such a situation, an attorney must make a reasonable determination that he can continue to effectively represent his client in the face of such a conflict, disclose the potential conflict to his client, and obtain the client's objectively reasonable written consent to the situation. On the other hand, when the attorney's obligations are in present competition, he is said to have an actual conflict. In this situation, the attorney must either decline representation, advise separate legal counsel, or withdraw.

Here, Smith (S) asked Lawyer (L) to meet on a "confidential basis." L should have immediately been alerted to the potential conflict between his duties to Chem Corp (C), and any duties that might arise with respect to S based on the conversation. Thus, before allowing S to confide in him at all, L should have fully informed S that L was not his personal lawyer, and instead owed obligations to C. By failing to do so, and allowing S to confide damaging information to him, L created an actual conflict, which will likely require him to withdraw from his representation of both S and C, lest L breach his newly-arisen, ongoing duties of confidentiality and loyalty to S. L will have a duty to withdraw properly by giving both S and C timely notice of withdrawal, and returning all papers to them in a timely fashion.

Duty of Confidentiality to S

An attorney owes an ethical duty of confidentiality to his client which requires him to maintain inviolate all information he obtains that is related to his representation of that client. The ethical duty is broader than the attorney-client privilege, which is an exclusionary rule of evidence forbidding the government from compelling a lawyer to reveal any communication made by the client to the lawyer in furtherance of the provision of legal services. Rather, the duty of confidentiality forbids the attorney from revealing anything related to his representation of a client, from whatever source that information is derived, unless the client consents to disclosure, disclosure is necessary to prevent a crime (see below for further discussion), or to establish a personal defense.

Here, L became ethically obligated to keep confidential the conversation he had with S by allowing S to meet with him on a "confidential basis" and confide in him regarding crimes that he had committed. S informed L that S himself had violated company policies and

govt. regulations by failing to disclose the substance of his investigation in his inspection report, and may therefore have subjected himself to criminal or civil liability, and workplace censure for his failure to do so. Since S likely would not have confided in L unless he believed L was, for the purposes of the conversation, his attorney, L has incurred a duty of confidentiality to S by failing to properly inform him of his (L's) loyalties.

Duty of Loyalty to C

As discussed above, L owes a continuing duty of loyalty to C. As soon as L was put on notice that his loyalty to C might be compromised, he should have disclosed the conflict to C's Board of Directors and sought their consent to meet with S. By failing to do, L breached his duty of loyalty to C, and set himself up for the ripening of an actual conflict that would require him to withdraw from his representation of C, lest he breach his newly-arisen duties to S. Now, L cannot properly and effectively represent C, because to do so would require that he breach his duty of confidentiality to S by revealing the damaging information S provided to him during their confidential conversation. As such, L must withdraw by giving C timely notice and promptly returning all papers, so as not to compromise his duty of loyalty to C or S.

Duty of Competence to C

An attorney owes a duty of competence to his clients which requires that he behave with legal skill, knowledge, thoroughness, and preparation reasonably necessary for effective representation. The duty of competence entails both a duty of an attorney to communicate with his client, and a duty to diligently and zealously pursue his representation to its completion.

In this case, L's duty of competence to C would require a number of actions which he likely has conflicted himself out of by meeting confidentially with S. A competent lawyer would thoroughly investigate S's factual claims – that a C facility was engaged in illegal dumping activities, and was put on notice of their discovery when S spoke to his supervisor – as well as the legal implications of any illegal dumping and the alleged cover-up. Moreover, a competent attorney would communicate his findings to C's board, so that C could make a fully-informed substantive decision as to what course of action would be most appropriate. However, to do any of these things that a reasonably competent practitioner would do would require L to breach his duties of confidentiality and loyalty to S, which he is ethically forbidden from doing.

Duty of Confidentiality to C

Because L owes a continuing duty of confidentiality to C, he will not be permitted to reveal anything related to his representation of C gleaned from his conversation with S. The ethical duty of confidentiality is a broad proscription applying to all information from whatever source derived, and since S's statements related to C's representation of C in that they might implicate C in a criminal or civil fraud, L cannot breach his duty of

confidentiality to C by revealing them.

Duty of Not Assisting in Crime or Fraud

To the extent that L would be required to assist either C or S in perpetrating a continuing crime or fraud, he would have an ethical obligation to terminate his representation to prevent his services from being used in such a manner. However, it is unclear whether any alleged crime or fraud continues to be perpetrated after L's conversation with S.

② May L Independently Disclose Information About Dumping?

Duty of Candor

As an attorney, L owes a duty of candor to the public and the legal system which requires him to produce evidence when he is reasonably certain that the evidence is the fruit or instrumentality of a crime. Here, however, L has not received any actual evidence, but only a confidential communication from his client concerning alleged illegality. Thus, L will not be ethically obligated to produce any evidence of alleged wrongdoing.

Duty of Confidentiality

Whether L may independently disclose the problem of C's alleged illegal dumping is another problem altogether, which will depend on which jurisdiction L is in.

Under the ABA Model Rules, an attorney is permitted to disclose otherwise confidential information in order to prevent immediate death or substantial bodily harm. Here, it is unclear whether S's revelation suggests any immediate danger, since S only opined that there were "possible health threats" because the dump site was located near private residences and potable drinking water. However, L could make the case that such dumping does pose an imminent threat because contamination will almost certainly lead to death or serious bodily injury, and is ongoing. Thus, in an ABA MR jurisdiction, L may be permitted to disclose the dumping.

In California, on the other hand, no exception to the ethical duty of confidentiality has been carved out for warnings of death or substantial bodily harm. The California Evidence Code does not explicitly include such info as being within the scope of the attorney-client privilege, but thus far, the courts of California have yet to recognize an exception for death/bodily harm like the ABA. Thus, if L is an attorney in California, he will most likely be forbidden from breaching his ethical duty of confidentiality to C & S by revealing information about dumping to government authorities.

Finally, under the Restatement of Law Governing Lawyers, L would be permitted to reveal confidential information not only to protect against death or bodily harm, but to prevent significant monetary loss. Since the dumping by C could arguably lead to significant monetary losses for either the government or private individuals, L might be permitted to

reveal the dumping in a Restatement jurisdiction.

Question 6

In 1998, Tom executed a valid will. The dispositive provisions of the will provided:

- “1. \$100,000 to my friend, Al.
2. My residence on Elm St. to my sister Beth.
3. My OmegaCorp stock to my brother Carl.
4. The residue of my estate to State University (SU).”

In 1999, Tom had a falling out with Al and executed a valid codicil that expressly revoked paragraph 1 of the will but made no other changes.

In 2000, Tom reconciled with Al and told several people, “Al doesn’t need to worry; I’ve provided for him.”

In 2001, Beth died intestate, survived only by one child, Norm, and two grandchildren, Deb and Eve, who were children of a predeceased child of Beth. Also in 2001, Tom sold his OmegaCorp stock and reinvested the proceeds by purchasing AlphaCorp stock.

Tom died in 2002. The will and codicil were found in his safe deposit box. The will was unmarred, but the codicil had the words “Null and Void” written across the text of the codicil in Tom’s handwriting, followed by Tom’s signature.

Tom was survived by Al, Carl, Norm, Deb, and Eve. At the time of Tom’s death, his estate consisted of \$100,000 in cash, the residence on Elm St., and the AlphaCorp stock.

What rights, if any, do Al, Carl, Norm, Deb, Eve, and SU have in Tom’s estate? Discuss.

Answer according to California law.

Answer A to Question 6

1. AL

Al was initially provided with \$100,000 under the valid 1998 will.

Codicil

A codicil is a supplement to an existing will executed with full formalities according to the statute of wills that revokes only inconsistent provisions of the prior will and adds new provisions. Both the codicil and prior will (consistent) are valid and deemed executed as of the date of the codicil.

Thus, by executing a valid codicil in 1999, T revoked the inconsistent paragraph 1. At common Law T may have been required to also make additions, but that is not the law in California.

Revocation

A will, and codicils, can be revoked expressly by a subsequent will or by physical act.

Expressly

A will can be revoked by a subsequent holographic express revocation. For a valid holographic will the Testator must sign and the material provisions must be in T's handwriting.

Here, Tom wrote the words "null and void" in his own handwriting and signed the codicil. Therefore he likely revoked the codicil expressly.

By Physical Act

Tom also may have revoked by physical act, which can be done by crossing out language of the existing will or writing null and void so long as language of the revoked instrument is touched.

Here T wrote the words across the face of the codicil touching the language and therefore it likely also could be interpreted as revocation by physical act.

Therefore the codicil was validly revoked. . . .

Revival

Where a codicil to a will is revoked the validly executed will remains valid. Whether the inconsistent provisions are thus revived depends on evidence of the intent of the testator.

Al will point to the statements by Tom to several people that T said, "Al doesn't need to worry, I've provided for him."

However, SU will likely argue it is unclear whether these statements were made near time that T revoked the codicil. They were made, however, after T and Al reconciled, so likely Al can use these statements and their later reconciliation to show he intended to revive the will.

Dependent Relative Revocation

T likely cannot rely on Dependent Relative Revocation, which provides that where the T revokes a will under mistaken belief that a prior gift is valid the revoked will will be revived. This does not aid Al because he does not want the gift in the codicil revived, as there is no gift for him there.

Therefore, if the codicil is revoked, Al likely prevails under the existing valid will and will get the \$100,000.

2. Carl/The Stock

Whether Carl will take the AlphaCorp stock depends on whether Tom's initial gift was specific or demonstrative, because specific gifts generally are deemed if they do not exist when the T dies.

Specific vs. Demonstrative

Specific gifts are gifts of specifically identified property, like a piece of real estate or a watch. Demonstrative gifts are a hybrid of specific and general in that the T intends to make a general devise but identifies the source from which the devise should come.

Stock has proved difficult to characterize. Gifts of "my 100 Shares of ABC" are generally deemed specific, while '100 shares of ABC' are demonstrative.

Here, T gives Carl 'his OmegaCorp Stock'. This is more like a specific devise because it is phrased in the possessive which suggests T intends to give specific stock.

Ademption

Under the doctrine of ademption specific devises that are not present when T dies are adeemed by extinction. This rule of ademption is not applied to demonstrative gifts. Instead, such gifts are satisfied out of other property.

Here, the OmegaCorp stock has been sold and thus not present when T dies. Thus, if this is a specific devise, the gift to Carl is adeemed.

Change In Form, Not Substance

Carl may argue that the gift is not adeemed because it is still present. He could argue that Tom's purchase of the AlphaCorp stock with all the proceeds was a change in form not substance.

Intent of the Testator

Carl could also argue that in California if the T did not intend ademption to apply it will not be applied. Here, Carl is Tom's brother, a natural object of T's bounty and there is no indication of bad blood between the brothers. Therefore T can be argued there was [sic] no attempts to adeem.

Acts of Independent Significance

Carl may also argue that the doctrine of Acts of Independent significance applies. This allows blanks in a will to be filled in by acts that are not primarily testamentary. Selling stock has a lifetime motive and thus is not primarily testamentary. However, there is no blank in the will here, which expressly identifies OmegaCorp stock, not just 'my stock.' Therefore this argument will fail.

Norm, Deb & Eve/The Residence

Lapse

Under the common law doctrine of lapse, a beneficiary who predeceased the testator did not take the gift. It lapsed. Here, Beth died in 2001, one year before Tom. Under common law her gift would lapse.

Anti-Lapse Statute

In California, there is an anti-lapse statute that will save gifts to beneficiaries who predecease if:

- 1) they are related to T or to T's spouse;
- 2) they leave issue.

Here, Beth is T'S sister and thus is related. Further, she leaves issue, one child, Norm, and two grandchildren, Deb and Eve, who are the children of her predeceased other child. Therefore, California's anti-lapse statute applies.

Under California's anti-lapse statute, the gift goes directly to the decedent beneficiary's issue, not to devisees under the will.

Here, Beth's issue are Norm and Deb and Eve (the issue of her issue). Under California intestacy law, which applies Modern Per Stirpes [sic], the gift would go to Beth's issue.

Deb and Eve may then take by representation for their deceased parent. Thus Norm would take $\frac{1}{2}$ and Deb and Eve would split $\frac{1}{2}$, for $\frac{1}{4}$ each.

4. Remainder/SU

SU will take all the remainder of the estate less costs for administration, etc. Here, if Earl's gift is adeemed, SU takes the AlphaCorp stock. If Al's gift in will 1 is not revived somehow, SU takes that as well.

Answer B to Question 6

Rights of AI

A valid codicil may, expressly or impliedly, by conflict revoke a gift in a prior will. The codicil here expressly revoked the gift to AI.

Revocation of Codicil

In California, revocation by be [sic] express by a new instrument or by physical act of revocation by the testator, including mutilation, tearing, burning, etc that is intended to revoke. Writing "null and void" across the text of the will was a physical act of destruction and was coupled with the signature indicating that Tom performed the act. Because it was probably intended by Tom as a revocation of the codicil, the codicil was revoked.

Revival of the gift to AI

Generally, revocation of a later instrument will not revive an earlier will. However, in California, where revocation is by physical act, a former instrument is revived based on testator's intent to revive the prior instrument, whole or in part. This intent may be shown by extrinsic evidence.

Comments to Several people

AI will wish to use the comments to other people that Tom provided for AI to show that Tom intended to revive his original bequest to AI. Hearsay is a statement made out of court offered for the truth of the matter asserted. Here, AI would be offering these statements for the truth of the matter. However, an exception to the hearsay rule exists for state of the mind of the declarant. Normally, this exception only applies to current state of the mind of the declarant. Normally, this exception only applies to current state of mind or future intent. However, and [sic] a testimony exception exists for prior statements concerning the declarant's will. Because Tom's statements are being offered to show that Tom intended to revive the gift, Tom's testamentary intent, it falls within the exception [to] the hearsay rule [sic] and will be admissible.

Given this evidence of intent, under California law, Tom's bequest to AI will probably be reinstated by revival.

Holographic Codicil & republication

In California, a holographic will or codicil is made when the testator writes the testamentary provisions in his own handwriting and signs the instrument. Thus, AI may also argue that by writing "null and void," then signing, created a valid holographic codicil that republished the original will with AI's gift.

Dependent Relative Revocation

Al may also argue that his gift is valid under the doctrine of Dependent Relative Revocation. Under this doctrine, when a gift is cancelled, but [sic] it appears that the testator only did so in the mistaken belief that another valid bequest to that person made [sic] by a new instrument. This doctrine generally applies when a new larger gift is found invalid. Here, however, no new gift was made, thus Al cannot depend on this theory to validate his gift.

Conclusion

Because Al's gift was either revived or republished as part of a holographic codicil, Tom's gift to Al of \$100,000 will be enforced.

2. Rights of Norm, Deb and Eve to Elm St. Residence

When a bequest in a will is made to a person who predeceases testator, that bequest is said to lapse. Under common law, a lapsed gift failed and fell into the residue of the will. However, under California's anti-lapse statute, when a bequest is made to [a] close relative, the [sic] presumes that the testator intended for the issue of the dead devisee to stand in the deceased shoes and receive the gift. Thus because Beth was the sister of Tom the anti-lapse statute should apply with the bequest going to Norm, Deb, and Eve.

Note that SU may argue that the anti-lapse statute does not apply because Tom's revocation of his codicil was by a holographic instrument (the writing of "null and void", signed by Tom, see analysis above, re: Al) after the death of Beth. The anti-lapse statute does not apply when the will is executed after the death of the devisee. Here, however, the putative holographic codicil is undated, and Tom made his comments about providing for Al in 2000 before Beth's death. Thus this argument will likely fail.

Assuming that Norm, Deb, and Eve, Beth's issue, receive Elm St. under the anti-lapse statute, it will be distributed per capita with representation as defined by the intestacy code. In this case, it will be equivalent to the common law, per stirpes method: Norm will have an undivided $\frac{1}{2}$ interest in Elm St., Deb and Eve $\frac{1}{4}$ undivided interests, each as tenants in common.

3. Ademption of Stock gift to Carl

When a bequest of specific property is no longer owned by the testator at death, the bequest is adeemed, and falls into the residue of the estate. Here, SU, the residuary beneficiary, will argue that the gift of "My OmegaCorp" stock was a specific gift, and should thus be adeemed.

At common law, an exception exists when the new property was clearly intended to replace the property mentioned in the will. However, this exception is more likely to be applied to items such as autos or homes than stock. However, Carl will argue that when Tom

replaced OmegaCorp stock with AlphaCorp stock, that the value of the property was not changed and that Tom intended that Carl still receive the stock.

In addition, some common law courts would fudge the classification of a bequest from specific to demonstrative, if they thought it necessary in [sic] for justice and equity. Thus, such a court would classify the stock bequest as a demonstrative gift. Carl would then be entitled to the current market value that the OmegaCorp stock would now have (or the shares purchased for that amount).

In California, however, whether a gift is adeemed is determined solely by [sic] the intent of the testator at the time of the sale of the asset as to whether the new asset was to be a replacement and the bequest not adeemed. Carl would argue that when [sic] Tom directly exchanged the proceeds of the OmegaCorp stock for the AlphaCorp stock, and the act was done for reasons of making a better investment, and not with the intent to redeem. Carl would be able to produce intrinsic evidence in support of this assertion.

Overall, as discussed above, it appears that Carl has a reasonable chance of receiving the AlphaCorp stock, or at least the value of OmegaCorp stock.

4. Rights of SU

SU, as residuary devisee, will have the rights to anything remaining. As stated above, it appears that this will be nothing with the possible exception of the AlphaCorp stock or some remnant of that.

Abatement

As only the property mentioned in the will is available, the estate may not have sufficient funds to pay all of these bequests along with any debts or cost of administration of the estate. In that case, those debts would first come out of any general bequests, and from those, first from non-relatives. Thus regardless of how the gift to Carl is classified, Al's gift will be abated first. If that is insufficient, then the classification of Carl's gift made by the court would be relevant. If found to be a demonstrative gift, it would be abated next. If a specific gift, the abatement would be to both Carl and "Beth"'s [sic] gift proportional to the total size of their gifts.