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Bar
Examination

Essay Questions
and
Selected Answers

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2005 CALIFORNIA BAR EXAMINATION

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

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

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Question 1

In 1998, Henry and Wilma, residents of California, married. Henry had purchased shares of stock before marriage and kept these shares in his brokerage account. The shares in the account paid him an annual cash dividend of \$3,000. Henry deposited this income in a savings account held in his name alone.

In 1999, Wilma was hired by Tech Co. Wilma was induced to work for Tech Co. by the representation that successful employees would receive bonuses of company stock options. Later that year, Wilma was given options on 1,000 shares of Tech Co. stock. These stock options are exercisable in 2006, as long as Wilma is still working for Tech Co.

In 2003, because of marital difficulties, Wilma moved out of the home she had shared with Henry. Nevertheless, the couple continued to attend marriage counseling sessions that they had been attending for several months. Later that year, Henry was injured in an automobile accident. Afterwards, Henry and Wilma discontinued marriage counseling and filed for dissolution of marriage.

In 2004, Henry settled his personal injury claim from the automobile accident for \$20,000. The settlement included reimbursement for \$5,000 of medical expenses that had been paid with community funds.

Henry had a child by a prior marriage and, over the course of his marriage to Wilma, had paid out of community funds a total of \$18,000 as child support.

1. When making the final property division in Henry and Wilma's dissolution proceeding, how should the court characterize the following items:
 - a. Henry's savings account? Discuss.
 - b. Henry's personal injury settlement? Discuss.
 - c. Wilma's stock options? Discuss.

2. Should the court require Henry to reimburse the community for his child support payments and, if so, in what amount? Discuss.

Answer according to California law.

Answer A to Question 1

1)

California is a community property state. All property acquired during marriage is presumptively community property (CP). All property acquired before marriage or after permanent physical separation, or during marriage by gift, will, or inheritance, is separate property (SP). Upon divorce, marital CP assets are distributed 50-50 unless certain exceptions apply.

In determining the time for final property division, the probate court will look at when there was a permanent physical separation and an intent not to resume marital relations. This is when the economic community is considered to be at an end.

Here, the economic community did not end when W first moved out of the home due to marital difficulties, early in 2003. The couple continued to attend marriage counseling sessions, suggesting that they were still hopeful of a possible reconciliation. At the point, they did not have the requisite intent to not resume marital relations. The economic community ended later in 2003 when H & W discontinued marriage counseling and filed for divorce. Only at that time was it clear that there was a permanent physical separation and an intent not to resume marital relations.

1.a. Henry's savings account

Property acquired before marriage is that spouse's SP. All income, rents, and profits from SP earned during marriage is also that spouse's SP. Upon dissolution of marriage, the spouse who owns the SP will take it in its entirety. Although the character of property might change, what was initially SP will remain SP unless there has been a transmutation. No transmutation occurred here.

Henry purchased shares of stock before marriage and kept these shares in a brokerage account. Because the shares were purchased before marriage, they are his SP. The income from these shares, the annual cash dividend of \$3,000, is also Henry's SP. Furthermore, the income from the shares was deposited into a savings account held in his name alone. This suggests that the funds were not commingled with CP. In addition, it is assumed that W had no rights to withdrawal on the account.

Because the income deposited into H's savings account had as its source the stock he had purchased before marriage, all income in the savings account--assuming it was solely for such income and did not contain any commingled CP funds - - is H's upon divorce. W has no right to the income in the savings account.

b. Henry's personal injury settlement

A personal injury settlement that results from an injury sustained during marriage is presumptively CP. Legal relevance is placed upon when the injury occurred, and not on when settlement was awarded. Upon divorce, however, the injury settlement belongs to the injured spouse: it is treated as the injured spouse's SP. The community is, however, entitled to reimbursement for medical expenses paid with CP when SP was available.

Here, H was injured in an automobile accident that occur[r]ed in 2003, while he was still married to W. As stated above, at the time of the accident, H & W were no longer living together but were still attending marriage counseling sessions. Because there is no indication that H & W intended not to resume marital relations at this point, the economic community was not yet at an end. There was, at this point, no permanent physical separation. Because of these facts, the injury occurred at a time when H & W were still married and the settlement is thus CP during marriage.

On the given facts, the settlement was paid to H in 2004, after H & W had discontinued counseling and had filed for divorce. Thus, the economic community was at an end. Nevertheless, what is legally relevant is that the injury arose during marriage, and not the time the settlement was paid.

At the outset, upon divorce, the \$20,000 will be awarded to H as the injured spouse. It is treated as his SP. However, because \$5,000 of medical expenses were paid with CP, the community is entitled to reimbursement. Because H received an annual cash dividend of \$3,000, it can be assumed that he had \$5,000 in his separate savings account at the time the medical expenses were paid. Thus, because CP funds were used to pay his medical expenses at a time when H had SP available, the community is entitled to reimbursement.

The net result is that H will receive \$15,000 of the settlement. The community receives a reimbursement of \$5,000 which will be divided 50-50 between H & W.

c. Wilma's stock options

Stock options earned during marriage are CP to the extent that CP contributed to them. The court will apply the time rule to determine the pro rata share of contribution of CP and SP. Applying the time rule, a fraction is given whereby the numerator is the number of years that have elapsed between the granting of the options and the date the economic community of the marriage ended. The denominator is the number of years that have elapsed between the granting of the options and the year in which they are exercisable.

Here, the 1,000 shares of Tech Co. stock were awarded to W in 1999. The economic community of H & W ended in 2003. Thus, four (4) years of CP labor creates the numerator. The options are exercisable in 2006. Thus, the denominator will be 7.

The remaining 3 years, from 2004 to 2006, will be treated as W's SP.

Because 4 years out of 7 are attributable to CP, upon dissolution of marriage the community will be entitled to 4/7 of value of the stock options, while 3/4 will be W's SP.

2. Henry's reimbursing the community for his child support payments

Child support payments from a prior marriage are considered a spouse's premarital debt, regardless of whether the payments started before marriage or began during the marriage. Although CP and the debtor spouse's SP are both liable for any premarital debts of the debtor spouse, if CP funds are used during the marriage to make child support payments arising out of a prior marriage, and it is determined that the debtor spouse had available SP funds at the time, then the community may be entitled to a reimbursement upon divorce.

Here, H's child support payments arose out of a prior marriage. H had a child by a prior marriage – not the marriage to W. During the course of his marriage to W, H had paid out of CP funds a total of \$18,000 as child support. However, on the given facts, H had SP available to make those payments. He received \$3,000 annually in cash dividends from his stocks. Between 1998 and 2004, that amounted to \$15,000 (\$3,000 multiplied by 5 years). Moreover, he received \$20,000 as settlement for the personal injury claim which, although CP at the time received, is treated as his SP upon divorce.

Thus, because CP funds were used to make the child support payments, the community is entitled to reimbursement. H should be required to reimburse the community at least \$15,000 which is the amount he had accrued in his personal savings account during the course of the marriage. This amount can be offset from his personal injury settlement claim which will be treated as SP upon divorce. The amount is also \$15,000, after the \$5,000 has been deducted to reimburse the community. Furthermore, because half of the \$5,000 will go to H, that makes an additional \$2,500 available to reimburse the community for the child support payments.

In summary, on the given facts, H should be required to reimburse the community for \$17,500 for his child support payments.

Answer B to Question 1

1)

California is a community property state. As such, all things acquired between the date of marriage and date of separation are community property and are subject to a 50/50 division upon divorce. Separate property consists of assets acquired before the marriage or after the separation, as well as gifts, inheritances, and devises, and all the profits or rents thereon. Henry and Wilma were married in California in 1998, thus their divorce is subject to the community property system. In analyzing each of their assets it is important to keep in mind the source of the property and whether any subsequent changes in the character of the asset may have transmuted the property from community to separate or separate to community.

Henry's Savings Account

Henry purchased shares of stock before his marriage to Wilma and kept these shares in a brokerage account. These shares were thus Henry's separate property b/c he acquired them before marriage. The shares in the account paid him an annual cash dividend of \$3,000, which he deposited into a savings account in his name alone. The cash dividends are also Henry's separate property b/c all rents and profits garnered from separate property are separate property as well. This is true even though there is a presumption that all things acquired between the date of marriage and the date of separation are community property. The rule that rents and profits upon separate property is separate in nature trumps that presumption.

An asset which begins as community property may be transmuted into community property if a spouse manifests an intent to change the asset's character. Here[,] however, Henry has kept both the stock and the cash dividends in an account in his name alone. Therefore, he has not manifested an intent to transmute these stocks from separate to community property. Furthermore, after 1985 a transmutation must be in writing, signed by the spouse losing their interest, and state expressly that they are transmuting the property. Since none of that happened here, everything in Henry's savings account is his separate property.

Personal Injury Settlement

Personal injury settlements awarded during the marriage are community property. However, upon divorce the personal injury settlement will be awarded solely to the injured spouse unless equity demands otherwise. Here, Henry's right to his personal injury settlement arose during the marriage b/c Henry and Wilma were not legally separated at the time he was injured. To be legally separated, the couple must be living physically apart and manifest an intent not to resume the marital relationship.

Here, Henry and Wilma were living apart as of 2003. However, the couple continued to attend marital counseling sessions. Because the couple was still in marital counseling, they obviously did not have an intent not to resume the marital relationship. Rather, counseling suggests that they were trying to work things out. During this time period, Henry was injured. Henry may argue that he did not receive the actual settlement until 2004, at which point he and Wilma had filed for dissolution. However, since his injury and therefore his right to a claim arose during the marriage, the personal injury award will be considered to have arisen during the marriage.

Luckily for Henry, upon dissolution the personal injury award will be awarded to him entirely despite its initial community property characterization, unless equity demands otherwise. Wilma will argue that equity demands otherwise here b/c the community paid for \$5,000 of Henry's medical expenses. The community is obligated to pay for all of a spouse's "necessaries." This includes food, shelter, and medical expenses. Because the community had no choice but to pay for Henry's medical bills, a court would probably find that \$5,000 of the settlement should be awarded as community property. Under such an analysis, Wilma is entitled to \$2,500 (one half of \$5,000). Henry is entitled to \$2,500 and the remaining \$15,000 of the \$20,000 as his separate property.

Wilma's Stock Options

If a stock option is awarded during the marriage, then the community has an interest in it. This is b/c stock options are considered incentive compensation, meaning that they reward work currently going on. Therefore, if a stock option is awarded during marriage it is based at least in part upon past and present work in the hope that the employee will keep up the good job. Where the spouse is awarded the stock option during the marriage but exercisability occurs after the date of separation, a special formula must be used to extract the community's interest.

Here, Wilma was awarded the stock option in 1999 in recognition of her success as a new employee for Tech Co. She was married to Henry at that time and thus the community has an interest. Henry and Wilma separated in 2003 and the date of exercisability is 2006 (so long as Wilma is still working for the company.) The formula for extracting the community's interest mandates that the years between the date of the award and the date of separation be used as a numerator while the total number of years between the date of the award and the date of exercisability be used as a denominator. That comes to 4/7. Therefore, the community will be entitled to a 4/7 interest in the 1,000 stocks should they become exercisable.

Another issue is whether Henry can compel Wilma to exercise her stock options. In order to exercise them, Wilma must still be working for Tech Co. in 2006. At some point before 2006, Wilma may decide she no longer wishes to work for Tech Co. and therefore lose her interest. A court will not compel Wilma to continue working for Tech Co. The community merely has an expectancy in the stock options should she decide to eventually exercise them.

Whether the court should require Henry to reimburse the community for his child support payments

Where one spouse owes child support or alimony from a prior marriage, separate property funds should be used first to pay these costs. However, if separate property funds are not available, then the community is responsible for making these payments. Here, Henry had a child by a prior marriage and over the course of his marriage to Wilma he paid out \$18,000 in child support from community funds. That comes to \$3,600 per year. Since Henry had \$3,000 cash dividends coming to him each year as separate property, those funds should have gone to the child support payments first. Only \$600 per year of community funds should have been used (for a total of \$3,000 during the marriage). Therefore, the community is entitled to \$15,000 reimbursement for these child support payments. This means that Henry is entitled to \$7,000 and Wilma is entitled to \$7,000.

Henry may counter that the community is not entitled to reimbursement b/c he had co-equal powers to spend and incur debt with Wilma over the community property. This is true, however equity still demands that the community receive reimbursement since Henry should have depleted his separate property funds first.

Wilma could also make the argument that one spouse may not unilaterally make a gift of community property and that she may void such gifts while Henry is still alive. This is true. However, child support is more in the nature of an obligation than a gift. Therefore, this argument will be less successful.

Question 2

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as “Secure, Gated Luxury Home Sites.” Developer then entered into a ten-year, written contract with Ace Security, Inc. (“ASI”) to provide security for the subdivision in return for an annual fee of \$6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of \$600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modern Protection, Inc. (“MPI”), another security service. About the same time, Cora’s next-door neighbor, Seller, sold the property to Buyer. Seller’s deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full \$6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than \$600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual \$600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora’s theories and Buyer’s defenses? Discuss.

Answer A to Question 2

2)

Question 2

Cora (C) will assert three different theories: (1) that there was a covenant, the burden of which ran to Buyer (B), and the benefit of which runs to C, (2) that there was an equitable servitude, the burden of which runs to B, and the benefit of which runs to C, and (3) that a negative reciprocal servitude can be implied from a common scheme initiated by Developer (D). C will sue under a covenant theory to obtain damages in the form of the series of \$600 payments, or will sue under an equitable servitude theory to require B to pay the \$600.

C will assert that he had no notice of either the covenant, equitable servitude or common scheme, and therefore should not have to pay. He will also allege that even if he did have notice, that the assignment of the contractual rights from Ace Security (ASI) to Modern Protection[,] Inc. (MPI) extinguished any obligation he had or notice of an obligation to pay for maintenance of security services.

Cora's Theories of Recovery

1. Covenant

Cora will assert that the original deed between Developer and Seller created a covenant, the burden of which ran to B, and the benefit of which ran to C. A covenant is a non-possessory interest in land, that obligates the holder to either do something or refrain from doing something related to his land. For the burden of the covenant to run, there must be (1) a writing that satisfies the statute of frauds, (2) intent of the original contrac[t]ing parties that the covenant bind successors, (3) Horizontal privity between the original parties, (4) Vertical privity between the succeeding parties, (5) the covenant must touch and concern the burdened land [,] 5 [sic] Notice to the burdened party. For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

Running of the burden

Writing

For the burden to run to B, there must be a writing that satisfies the statute of frauds. Here, the original deed was properly written and recorded. Developer inserted the clause covenanting payment in all of the deeds given to the original 10 purchasers. Therefore, there is a writing satisfying the statute of frauds.

Intent

For the burden to run, the original contracting parties must have intended that the benefit run to successor in interest to the land. Here, the deed on its face evidences an intent that the burden run. It specifically says that the “heirs, successors and assigns” of the deed will be bound to pay the security fees. Therefore the[re] is an intent that the successors– such as B – be bound by the covenant.

Horizon[t]al Privity

For the burden of a covenant to run, there must be horizontal privity between the parties. This requires that the parties be successors in interest – typically this is satisfied by a landlord-tenant, grantor-grantee, or devisor-devisee relationship. Here, the relationship is one of seller-buyer. D was the original seller of the land, and S was the purchaser. S was a successor in interest in the land of D. Therefore there was horizontal privity between the original contracting parties.

Vertical Privity

Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, S sold the property to B. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.

Touch and Concern

Defense by C: B may argue that the covenant here does not touch and concern the land. For the burden to run to a party, the covenant must touch and concern the land, that is, it must burden the holder, and benefit another party in the use and enjoyment of their own land. C will argue that this is not the case here.

B will argue that personal safety of house occupants is not necessarily related to the land. Contracts for security services often are used in matters outside of the home. However, this argument will likely fail. C can argue that the safety services are needed to keep the neighborhood safe. In fact, C and others specifically bought homes in the community because of representations that there would be security services available to keep the land safe. The use an[d] enjoyment of the land would be difficult, if not impossible, without the knowledge that the parties will be safe in their homes. Therefore, C can show that the covenant does in fact touch and concern the land.

Notice

Defense by C: B’s primary defense will be that he was not given notice of the covenant. The burden of a covenant may not run unless the party to be burdened has notice of the

covenant. Notice may be (1) Actual, (2) by inquiry, or (3) By Record. The latter two types of notice are types of constructive notice.

-Actual Notice

B will argue that he did not have actual notice of the covenant. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. Here, there is no indication that B was told of the covenant in the deed. Therefore, he did not have actual notice.

-Inquiry Notice

A party may be held to be on inquiry notice, if it would be apparent from a reasonable inspection of the community that a covenant applies. C will argue that B was on inquiry notice of the covenant. However, this argument will likely fail.

A reasonable inspection of the community would not have revealed the covenant to pay \$600. B might have discovered that the community was protected. There were advertisements claiming that the community was gated and secure. There were probably fences or other signage. However, this notice would be inadequate to tell B that the homeowners themselves were obligated to pay for the security service. The payments for security services may have simply been imputed to the home price, or the funds may have come from elsewhere. Either way, a reasonable inquiry would not have informed B of the existence of the covenant.

-Record Notice

C will argue that B was on record notice of the covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in his chain of title.

B will argue that he is not on record notice because the covenant was not in his specific deed. This argument will probably fail. A party taking an interest in land, or an agent of theirs, will typically perform a title search. Therefore, they will be held to be on constructive notice of any covenants, easements or other obligations. A simple title search by B would have revealed that the deed from P to S contained a covenant binding successors to pay for the security services.

Therefore, B was on record notice of the existence of the easement.

Running of the Benefit

For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

The analysis here will be the same as for the running of the burden, except that horizontal privity will not be required (even though it is present). The original agreement was in writing. The original contracting parties intended that the benefit run. The benefit arguably touches and concerns the land. Furthermore, D and C were in a non-hostile nexus, therefore the requirement of vertical privity is satisfied.

Conclusion: Because the requirements for running of the burden and running of the benefit are present, C can enforce the covenant against B, and will be entitled to damages for B's failure to pay for the security services.

2. Equitable Servitude

C may also attempt to enforce the requirement in the deed as an equitable servitude against B. The requirements for an equitable servitude are less stringent than those required for a covenant – for the burden of an equitable servitude to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties to bind successors, (3) the servitude must touch and concern the land, and (4) notice to the party to whom the covenant is being enforced. If the equitable servitude is enforced, it will allow the party enforcing it to obtain a mandatory injunction. In this case, enforcement of the servitude would require B to make the \$600 payments to MPI.

The analysis for an equitable servitude will be the same as that for the running of the burden of a covenant. There was a writing, there was intent by the original parties, the servitude touches and concerns the land, and arguably, there was notice to B. Therefore, given the forgoing [sic] analysis, C will be able to enforce an equitable servitude against B, and obtain a court order compelling him to pay the fees (subject to any defenses: see below).

3. Reciprocal Servitude Implied from Common Scheme

C may also attempt to enforce the payment of the security fees as a reciprocal servitude based on the original common scheme. A reciprocal negative servitude can be implied from a developer's actions where a developer develops a number of plots of land with a common scheme apparent from the development, and where the development party is on notice of the requirement.

C can argue that there was a common scheme to create a secure and gated community. There were advertisements at the time that the land was developed indicating that a major selling point of the development was that the development would be secure. To that end, the developer entered into a contract with ASI. It is apparent from developer's actions that a common scheme, including maintenance of security in the development, was intended.

The analysis for notice of the common scheme is the same as above – it may have been predicated on actual or constructive notice. Here, B was on record notice of the scheme. Therefore, C can successfully hold B to payment of the security fees on an implied

reciprocal servitude theory as well.

Buyer's Defenses

Notice

As noted above, one of B's primary defenses will be that he was not given notice of any covenant or servitude. This argument will fail in most courts, because of the fact that B was on record notice of the covenant, based on a deed in his chain of title.

Touch and Concern

As noted above, B may argue that the covenant at issue does not touch and concern that land. This argument will fail, because the security arrangement will clearly benefit the homeowners in their use and "peace of mind" concerning their homes and personal safety.

Assignment of the Contract from ASI to MPI

B will allege that even if he was obligated to pay ASI based on notice in his deed, he was under no obligation to pay MPI, because of the assignment of the contract. This argument will fail.

Here, ASI has engaged in both an assignment of rights and a delegation of duties. All contract duties are delegable, if they do not change the nature of the services to be received by the benefitted party (here, B). Unless B can show that the security services received from MPI will be materially different from those he would receive from ASI, then he cannot allege that the delegation and assignment excuses his duty to pay. There is no reason to think that MPI is any less capable of performing security services than MPI.

Furthermore, once contract rights are assigned and delegated, a party must pay the new party to the contract once he receives notice of the assignment. B knows that he has to pay MPI, therefore he cannot allege that he is not making payments because he doesn't know who to pay.

Answer B to Question 2

2)

What theories might Cora sue Buyer for his refusal to pay the annual \$600 fee to MPI, what defenses could Buyer raise, and what is the likely outcome on each theory?

Cora will argue that the Buyer is bound by a covenant that runs with the land. Cora will further argue that this covenant requires Buyer to pay MCI the \$600 per year.

Covenants

A covenant is a promise relating to land that will be enforce[d] at law. Enforcement at law usually gives rise to money damages. Equitable servitudes, which will be discussed later, are enforceable in equity, which often means with an injunction.

Cora will argue that a valid covenant was created when each lot owner signed the deed with Developer that contained the clause that each purchaser, including heirs, successors, and assigns, will have to pay an annual fee of \$600 to Ace Security. This covenant was in writing[;] Developer recorded all the deeds.

Will the burden of the covenant run?

Cora will argue that even though Seller was the person who initially signed the deed containing the covenant, the burden of the covenant should run to Buyer. The burden of a covenant will run to a successor in interest if 1) the initial covenant was in writing, 2) there was intent from the initial people creating the covenant that it would run to successors, 3) the covenant touches and concerns land, 4) there exists horizontal and vertical privity, and 5) the successor in interest had notice of the existence of the covenant.

Writing:

The initial covenant was in writing because it was included in the deed that each lot purchaser signed in the contract with Developer. Therefore, this requirement has been met.

Intent:

There also appears to be intent that the covenant bind successors in interest. This is because the deed which Developer and Seller signed contained the phrase "hereby agree on their own behalf and on behalf of their heirs, successors, and assigns." This is clear evidence that the original parties intended the burden to run.

Touch and Concern:

A covenant will be considered to touch and concern land if it relates to the land and affects each covenant holder as landowners. Here, the covenant was to provide security and maintenance within the subdivision. This probably will be considered to touch and concern land because the safety and maintenance of the subdivision has a clear impact on each landowner's use and enjoyment of his or her lot. The covenant was not to provide personal security to the landowners, but rather to secure the land that was conveyed in the deed. Therefore, the covenant likely will be considered to touch and concern land.

Horizontal and Vertical Privity:

There must also be horizontal and vertical privity in order for a successor in interest to be bound by the burden of a covenant. Horizontal equity deals with the relationship between the original parties. Here, the original parties are Developer and Seller. There must be some connection in this relationship, such as landlord-tenant, grantor-grantee, etc. Here, Developer owned the large tract of undeveloped land that was eventually turned into the ten lots. Then, Developer conveyed one of the lots that it owned to Seller. This will satisfy the requirement of horizontal privity.

Vertical privity relates to the relationship between the original party and the successor who may be bound by the covenant. Vertical privity will usually be satisfied so long as the relationship between the two parties is not hostile, such as when the new owner has acquired ownership by adverse possession. Here, Seller sold the property to Buyer. Therefore, this will satisfy the vertical privity requirement.

Notice:

The final requirement for the burden of a covenant to run to successors is notice to the successor in interest. A successor will be deemed to be on notice of the covenant if there is 1) actual, 2) inquiry, or 3) record notice of the covenant. Actual notice is if the successor was actually aware of the covenant. Inquiry notice is where the successor would have discovered the existence of the covenant had she inspected the land as a reasonable person would have. Record notice occurs when the successor would have discovered the covenant if an inspection of the records had taken place.

Here, there is no evidence that Buyer had actual notice of the covenant at the time that she bought the land from Seller. Also, it is unclear whether Buyer was on inquiry notice. If Buyer had inspected the land prior to purchase, Buyer may have noticed that the land was being maintained and secured by a company. If Buyer had seen this, she should have also probably concluded that each landowner was partially paying for this maintenance and security service. Therefore, Buyer may be deemed to be on inquiry notice.

Even if Buyer did not have actual or inquiry notice, Buyer clearly had record notice of the covenant. This is because the covenant was in writing and was included in the deed of

each of the original purchasers from Developer. Furthermore, Developer promptly recorded all of these deeds. Therefore, if [B]uyer had went [sic] to the record office and looked up the land that she was buying, she would have discovered the covenant.

Therefore, Buyer will be considered to be on notice of the covenant.

Buyer's possible defenses to enforcement of the covenant:

Buyer may argue that [s]he should not be bound by the covenant because the covenant does not touch and concern land, she was not on notice of the covenant, and that she should be excused from performing under the covenant because of Ace Security's assignment to MPI.

Touch and concern:

As discussed earlier, the covenant will likely be considered to touch and concern land. Buyer may argue that the duty to provide security to the landowners is primarily there to protect the landowners personally rather than to protect the actual land. Buyer will further argue that because the covenant relates to personal protection of the landowners, it does not relate to land and therefore should not be deemed to touch and concern land. If the covenant is deemed not to touch and concern land, the covenant will not bind successors in interest.

However, because the contract with Ace Security was for the security and maintenance of the subdivision, Buyer's claim will likely be rejected. Even if Buyer can convince the court that the Ace Security had promised to protect the individual landowners rather than the land, Ace Security's promise to maintain the property clearly related to land. It would not make sense for Buyer to argue that Ace Security's duty to maintain relates to maintenance of the landowners rather than maintenance of the land.

Therefore, Buyer's argument that the covenant does not touch and concern land will be rejected.

No Notice:

As discussed earlier, Buyer may argue that she did not have notice of the covenant and, therefore, should not be bound by the covenant. Buyer will point to the fact that the deed between Seller and Buyer did not mention the covenant to pay for security services. However, this argument will fail because Devel[o]per properly recorded each of the deeds which contained the covenants. As a result, if Buyer would have checked the records she would have discovered the covenant.

Thus, this argument by Buyer will also fail.

Contract Defenses:

Buyer may also make some contract arguments.

What law governs?

The contract between Developer and Ace Security will be governed by the common law because it is a contract for services, not goods. Even though the contract cannot be performed within 1 year (because the contract is for 10 years) the statute of frauds has been satisfied because the contract was in writing between Developer and Ace Security.

Third Party Beneficiary

Cora can claim that he [sic] is a third party beneficiary of the original contract between Devel[o]per and Ace Security. Cora will point out that in the initial contract between Devel[o]per and Ace Security, it was clearly Developer's intent that performance of the security services go to the purchasers of the land rather than to Developer. He will also claim that his rights under the contract has [sic] vested because he has sued to enforce the contract. Because Cora can show that all of the landowners are third party beneficiaries, Cora will have the ability to use under the contract.

Invalid Assignment to MPI:

Buyer may also argue that even if the original covenant runs to her, she should no longer be bound by the covenant because of Ace Security's assignment of the contract to MPI.

An assignment can include all of the rights and obligations of the original contracting party. In general, an assignment and/or delegation will be valid unless 1) the original contract specifically says that all attempted assignments or delegations will be void, or 2) the assignment or delegation materially changes the risks or benefits associated with the original contract.

Here, there is nothing in the original contract between Developer and Ace Security that states that assignments will be void. Furthermore, there is nothing in the covenant that Seller signed with Developer that limits the covenant only to performance by Ace Security. Therefore, this will not be a valid reason for invalidating the assignment and excusing Buyer's need for performance.

Also, it does not appear that Ace Security's assignment to MPI will in any way impact that obligations [sic] to Buyer or the benefits that Buyer will receive. Ace Security was originally required to provide security and maintenance for the subdivision. This is not a personal service that only Ace Security can effectively provide. Rather, security service is a task that any competent security company can handle. Therefore, the fact that performance will now be coming from MPI rather than Ace Security will not negatively impact Buyer's benefits from the contract.

Moreover, the assignment will not effect [sic] Buyer's obligations under the contract either. Under the initial contract with Ace Security, Buyer was required to pay \$600 per year. After the assignment to MPI, Buyer is still required to pay only \$600 per year. Therefore, Buyer's obligations after the assignment will not be changed in any way. Therefore, the assignment from Ace to MPI will be considered valid and Buyer will not be excused from performing as a result of this assignment.

MPI's threat to suspect [sic] service unless it receives assurances that it will be paid the full \$6,000 each year for the balance of the contract

Buyer may also argue that even if they are bound by the covenant, MPI is not entitled to assurances that it will be paid the entire value of the contract for the remainder of the contract term. As common law, a suit for breach of contract could not be brought until the date for performance has passed. Cora will argue, on behalf of MPI, that they are entitled to assurances of future performance because of Buyer's anticipatory repudiation.

Anticipatory Repudiation

Generally, a suit for breach of contract can only be brought when the date for performance has passed. However, is [sic] a party to a contract unambiguously states that he cannot or will not perform under the contract, a suit may be brought immediately for breach of contract.

Here, Buyer has steadfastly refused to pay any fee to MPI. It is unclear whether the time has passed in which Buyer was required to pay MPI. Regardless, Buyer's clear statement that it will not pay MPI will be considered an anticipatory repudiation. Thus, Buyer will be able to immediately bring suit.

Also, because of the anticipatory repudiation, Cora or MPI would be entitled to immediately bring suit. Because they could immediately sue Buyer if they so chose, it only makes sense to allow MPI to seek assurances that Buyer and the other landowners will continue to perform under the contract.

Equitable servitude

An equitable servitude is much like a covenant except that an equitable servitude is enforceable in equity, rather than at law. Here, Cora may prefer to have the court declare an equitable servitude, so that the court will enjoin Buyer to pay the \$600 each year for the 10 year length of the contract. This will ensure that Cora will not have to pay more than \$600 in any year.

In order for the burden of an equitable servitude to run with the land, there must be 1) a writing, 2) intent, 3) touch and concern[sic], and 4) notice to the successor in interest. All of these have been discussed earlier and have been satisfied. Therefore, this could be

considered to be an equitable servitude.

Cora may wish to get an injunction requiring Buyer to pay \$600 per year for the 10 year length of the contract. Cora will first need to show that Buyer has breached his obligations under the contract.

Under an equitable servitude, the court may require Buyer to pay \$600 per year for the remainder of the contract.

Buyer's defenses

Buyer could make the same defenses as in the covenant situation. As stated earlier, all of these defenses will likely be rejected.

Common Scheme Doctrine

Even if Cora's other attempts to enforce a covenant or equitable servitude fail, Cora may be able to show that Buyer should be bound by the common scheme doctrine. Cora would need to show that the original developer had a common scheme for the entire subdivision and that this scheme was clear to anyone who inspected the area and the records. Cora's argument may succeed because of the fact that Developer recorded the covenant between all of the original purchases from Developer.

Conclusion/Likely Outcome:

Cora will likely succeed in showing that there was a covenant between all of the original landowners. Cora will also be able to show that the burden of this covenant should run to Buyer. Cora will also be likely able to show the existence of an equitable servitude.

Question 3

Alice is a director and Bob is a director and the President of Sportco, Inc. (SI), a sporting goods company. SI owns several retail stores. Larry, an attorney, has performed legal work for SI for ten years. Recently, Larry and Carole were made directors of SI. SI has a seven-person board of directors.

Prior to becoming a SI director, Carole had entered into a valid written contract with SI to sell a parcel of land to SI for \$500,000. SI planned to build a retail store on the parcel. After becoming a director, Carole learned confidentially that her parcel of land would appreciate in value if she held it for a few years because it was located next to a planned mall development. At dinner at Larry's home, Carole told Larry about the planned mall development. Carole asked for, and obtained, Larry's legal opinion about getting out of her contract with SI. Later, based on Larry's suggestions, Carole asked Bob to have SI release her from the contract. She did not explain, nor did Bob inquire about, the reason for her request. Bob then orally released Carole from her contract with SI.

The next regular SI board meeting was attended only by Bob, Alice, and Larry. They passed a resolution to ratify Bob's oral release of Carole from her contract with SI. Larry never disclosed what Carole had told him about the proposed mall development.

Three years later, Carole sold her parcel of land for \$850,000 to DevelopCo, which then resold it for \$1 million to SI.

1. Was Bob's oral release of Carole from her contract with SI effective? Discuss.
2. Was the resolution passed by Bob, Alice, and Larry to ratify Bob's oral release valid? Discuss.
3. Did Carole breach any fiduciary duty to SI? Discuss.
4. Did Larry commit any ethical violation? Discuss.

Answer A to Question 3

1. Bob's oral release

Bob, a director of SI, entered into an oral agreement to release Carole, another director, from a contract into which she had entered with SI for the sale of land. The question is whether this release was valid.

Statute of Frauds

Contracts for the sale of land must comply with the statute of frauds, and modifications of such contracts must also comply with the statute. Here, the original contract was in writing, but Bob's release was oral. This statute requires a writing signed by the party to be charged. That requirement was not met.

However, courts have held that parties may rescind a contract without complying with the statute. This appears to have been such a rescission. Further, Carole's reliance on the release – by selling the land to another party – was probably sufficient to make the release effective.

Bob's authority to release SI

The release was valid only if executed by someone with authority to bind SI. On these facts, there is no indication that Bob had such authority.

The Board of Directors has the authority to oversee the management of a corporation and approve major business decisions. However, individual directors do not have such authority.

An officer or director may be given actual authority by the articles of incorporation or bylaws to engage in particular duties. Further, a board of directors can delegate certain responsibilities to a committee of directors (which can be a single director). There is no indication here, however, that Bob was delegated authority to enter into land sale transactions. Because these are significant business decisions, it would be inappropriate in any case to delegate them to a single director.

Finally, because making or rescinding land sale contracts is not one of the ordinary duties of a director, Bob had no implied authority as director to release Carole.

In his position as president, however, Bob may have had authority to execute the release. A president of a company may be given specific powers in the articles and bylaws. Again, there is no indication that Bob had such explicit powers. However, a president may also exercise implied or inherent powers necessary to do his job. A president would certainly have the authority to bind the corporation, for example, to ordinary services or employment contracts. Such authority is implied because it is necessary to exercise the

management powers of his job.

In this case, however, the land sale was a major capital investment. Such a major decision was probably not within the province of the president's authority and required Board approval. Therefore, Bob's release was probably not valid.

Board Resolution

The issue here is whether the subsequent ratification of the release was valid.

Quorum

Board actions are valid only if a vote occurs when a quorum of the Board is present. A quorum is normally defined as more than half the directors – in this case, 4 out of 7. Only three directors were present, however.

In its bylaws, a corporation can establish a smaller number for a quorum if it is more than 1/3 of directors. There is no indication, however, that Sportco had varied the normal rule in this case. Therefore, a quorum was not present and the Board's action was invalid.

Interested Director Transaction

As discussed below, this was an interested director transaction because Carole, a director, stood to profit from the sale of the land. Such transactions may be ratified only by a majority of non-interested directors. In this case, then four directors – a majority of the six non-interested directors – would have had to approve this transaction.

Further, to ratify an interested director transaction, the Board would need to know the facts of Carole's transaction in accordance with their duty of care. Here, Bob, Alice, and Larry did not know Carole's motives.

Because there was no proper ratification of an interested director transaction, the Board's action was invalid.

3. Carole's fiduciary duties

As a director, Carole had a duty of loyalty to the corporation. She had a duty to act in what she reasonably believed to be the corporation's best interest, and not to profit at the corporation's expense.

Here, Carole violated that duty in several ways. First, she used confidential information for her personal gain. This was a violation because she had a duty to keep confidences acquired in the course of her duties and not use them for personal profit.

Second, Carole usurped a corporate opportunity by selling the parcel to DevelopCo. Having learned that the parcel would appreciate in value, Carole had an obligation to let Sportco profit from that opportunity because it was part of Sportco's line of business – that is, finding suitable locations for its sporting good stores. Carole could only have taken advantage of the opportunity herself had she first offered it to Sportco & Sportco had turned it down. Here, however, Sportco was clearly interested in acquiring the land – since, after the land's value became apparent, Sportco brought it.

Finally, Carole's conduct in withholding her true motives from Bob was arguably fraudulent. Because of her fiduciary duty, Carole was obliged to disclose material facts. Carole's knowledge of the proposed mall development would certainly have been material in the Board's decision.

Carole also violated her duty of care as a Board member. She did not act in conducting the corporation's business affairs as a reasonably prudent person would in her own activities. Certainly passing up a valuable business opportunity that Sportco could have profited from was not prudent.

4. Larry's ethical violations

Conflict of Interest

Larry represented SI, not any individual director. By seeking Larry's legal advice on a personal transaction, Carole attempted to use Larry as her personal lawyer. This created at least a potential conflict of interest if Carole's interests should differ from SI's. In this situation, Larry could not represent Carole unless he informed both Carole & SI & both gave consent that an independent lawyer would find reasonable. By advising Carole without seeking such consent, Larry violated his duty of loyalty to each client.

Further, once it became apparent that Carole was seeking to profit at Carole's expense[sic], the conflict was direct. At that point, Larry should have sought Carole's permission to withdraw. Further, as discussed below he probably should have sought to withdraw from the Board as well. In failing to do so, he further violated his duty of loyalty.

Larry's Board Service

No per se rule exists barring a lawyer from serving on his client's board. However, such service may create problems with the duties of confidentiality and loyalty. Here, as a board member, Larry owed fiduciary duties to SI. He was therefore obliged to tell them material information he received relating to Carole's proposed rescission. He violated these by concealing the information. Further, he acted in Carole's best interest, not SI's, by voting to ratify the transaction. Larry should instead have disclosed the existence of a conflict (giving as little information as possible to avoid breaching his duty of confidentiality to Carole for all information arising out of the course of representation). He should then have sought to resign from the Board, and probably from representation of SI as well.

Duty of Loyalty

A lawyer has a duty to represent each client zealously & and put that client's best interests first. Larry did not do so in regard to SI because he did not advise SI how to enforce the contract with Carole – which would have been in SI's best interests.

Duty of Competence

A lawyer has a duty to thoroughly investigate his client's legal issues. Here, Larry failed to learn the facts of SI's transaction with Carole[.]

Duty of Communication

A lawyer must give a client the information necessary to make major decisions relating to the representation. Here, Larry withheld material information re: his consultation with Carole. SI needed this information in order to fully exercise its legal rights.

Because Larry could not fulfill duties to SI w/out breaching his duties of loyalty & confidentiality to Carole, he should have withdrawn from representation of both clients. In addition, he violated his board member fiduciary duties.

Answer B to Question 3

3)

I. Bob's Oral Release of Carole

Bob's Powers as President

A corporate officer, such as president, can only act under proper authority. In his capacity as president, Bob's release of Carole must have arisen under his express, implied, or apparent authority to bind SI.

Express Authority

A corporate officer acts with express authority to bind (unbind) the corporation when the board has formally conferred that authority to him. Here, the board did not know about Carole's intention to be released from the contract. It neither held a vote nor a meeting to grant Bob the express authority to "bind" the corporation in this way. Thus Bob lacked express authority to release Carole from her contract with SI.

Implied Authority

A corporate officer has implied authority from the board to bind the corporation to relatively minor obligations that arise in the everyday course of business. Here, however, a sporting goods corporation had bought and was planning to develop a retail store on a parcel of land worth \$500,000. SI only owned "several" sporting goods stores, so the addition of another one is a fairly important development. The facts suggest that this was a relatively major business initiative, and so would not fall within the scope of a corporate officer's implied powers. Thus, Bob as acting as president could not have released Carole from her contract under implied authority.

Apparent Authority

A corporate officer has apparent authority to bind (or unbind) the corporation when he is held out to a third party as having such authority, and the third party relies on that authority. Here, apparent authority is not likely, because Carole, as a board member would not precisely [sic] the metes and bounds of Bob's authority as president. She would thus not be able to claim detrimental reliance on Bob's release based on apparent authority.

Bob's Powers as a Director

Carol[e] might also claim that Bob released Carole from her contract based on Bob's position as a director. In order to bind a corporation, board action must consist of a unanimous vote of all members, or a majority of a meeting with quorum. Here, Bob acted unilaterally as a director; there was no meeting and no vote so he, acting as a single director, could not bind the corporation.

II. Validity of the Resolution Passed by Bob, Alice, and Larry

Quorum Rules for Binding Board Action

As mentioned, binding board action can only arise when there is a unanimous vote, or upon a majority of votes at a meeting with quorum. Here, SI's board has seven members, so quorum would constitute four members. Therefore, since quorum was not achieved, no business of the board meeting with only Bob, Alice and Larry could be binding.

Interested Directors

Even if there were additional board members at the meeting, only directors who do not have a personal interest in a transaction can be counted for quorum. Thus, any vote on whether to release Carole from the contract would have to exclude Carole, because she stood to gain considerably if the contract were released based on the appreciation of the land price. It is not clear if Larry should also be excluded. While he was privy to confidential information not shared with the other members of the board, he did not aim to materially gain from cancelling Carole's contract, unless Carole agreed to pay him. If so, then Larry should be excluded from any vote of whether to release Carole from her contract.

III. Carole's Breach of Fiduciary Duties to SI

Carole breached several fiduciary duties to SI.

Breach of Loyalty

Seeking Release from the Land Contract

A director owes a fiduciary duty of loyalty to the corporation, and must always act in the best interests of the corporation without regard for self-interest. Here, Carole sought release from a valid contract with SI for the land for \$500,000. Her motivation in doing so was personal gain; after making the contract, she sought release from it because land prices were appreciating and she stood to gain a profit by retaining ownership of the land and selling to another buyer at a higher price. This behavior clearly contravened her duty of loyalty to SI, which was to obtain the land at the lowest possible price[.]

Since she breached her duty, Carole is liable both for any personal gain as well as material loss to the corporate [sic] as a result of her breach. Instead of selling to SI for \$500,000, Carole sold the land to DevelopCo for \$850,000; the resulting profit of \$350,000 must be disgorged and returned to SI.

In addition, SI originally contracted to buy the land for \$500,000 but ultimately paid \$1 million. SI can thus recover the damages of \$500,000 due to Carole's breach.

Not Disclosing Confidential Information of Land Appreciation

As part of her duty of loyalty to SI, Carole has a duty to communicate all information in her possession that could be used for the corporation's advantage. The fact that the land that SI had obtained via contract was appreciating in value was relevant to SI's business objectives, since it could have decided to keep the land and then sell it later for a substantial profit. Carole's withholding of this confidential information thus marked another breach in her duty of loyalty to SI.

Corporate Opportunity

Related to her duty to communicate information, under the duty of loyalty Carole must present any corporate opportunities to SI first, and can only pursue them upon the board's decision not to pursue them on behalf of the corporation. Here, Carole became aware of a corporate opportunity through obtaining information that the land she had sold to SI was going to appreciate because of the mall development. She thus had a duty to present this opportunity first to the board, and only pursue it if they refrained.

Carole might argue that this does not apply since SI is in the business of sporting goods, not real estate speculation, and that therefore the corporate opportunity did not lie within SI's line of business. Modern authorities, however, state that a corporation may take opportunities broadly defined, even those outside their traditional line of business. Here, then, Carole had a duty to inform SI of the mall development and likely appreciation in land values, and she breached that duty.

Breach of Duty of Due Care

A director owes a duty of due care to the corporation, and must make decisions in the best interest of the corporation as if it were her own business. Here, it was clearly a breach of the duty of due care for Carole to engineer a rejection of a land sale contract at a very favorable price to SI.

Business Judgment Rule

The business judgment rule will normally protect directors whose decisions, made in good faith and with good business basis[sic], nevertheless result in adverse consequences. Here, however, Carole's efforts to seek release from her contract were not made in good faith. She was self-interested and desired to retain the profit from land speculation to herself at SI's expense, and Carole thus cannot be protected by the business judgment rule.

IV. Ethical Violations by Larry

Representation and Service on a Board

Although it is discouraged, a lawyer is allowed to serve as a board member on an organization he represents if he can do so effectively and without jeopardizing his ethical duties to the client organization. Here, Larry performed legal services for several years for SI, which was his client. At the time he accepted his board position, because there was no apparent conflict with his duties as lawyer, this acceptance was permissible.

Duty of Loyalty – Conflicts between Clients

A lawyer owes a duty of loyalty to his client, and must act in his client's best interest. Here, Carole came over for dinner and sought advice regarding her plans to annul the contract. At the time, Carole informed Larry that she was seeking his legal advice, and a putative lawyer-client relationship between Carole and Larry formed.

A lawyer can take on a potential client conflict where 1) the lawyer believes he can reasonably and effectively serve all parties, 2) he informs each party, 3) each party presents written consent, and 4) that consent is reasonable. When Carole disclosed her plans, her interests became materially adverse to those of Larry's client, SI. At that point, Larry should have informed Carole that he could not represent her and urged her to seek independent counsel. His not doing so constituted a breach of his duty of loyalty to SI.

Duty of Communication

A lawyer has a duty to relay all helpful information to his client. Here, Larry learned that the land that SI had purchased was going to appreciate rapidly, and this information should have been related to his client. This duty, however, conflicted with his duty of confidentiality to Carole, which had attached because she sought legal advice from him. Though a close question, Larry's decision to honor Carole's confidence and not tell SI of the land value was probably correct.

Duty of Competence

A lawyer owes his client a duty of competence. Here, Larry did not disclose and breached.

Assistance in a Crime or Fraud

Under ethical rules, a lawyer must not assist a client in a criminal enterprise or fraud. Here, Carole approached Larry about cancelling the land sale contract because of Carole's desire to profit at the expense of SI. Larry's legal opinions led Carole to seek release from Bob, which involved breaches of fiduciary duties on behalf of Carole owed to SI. Larry might counter by noting that no actual fraud was perpetrated, since Carole never disclosed to Bob the reasons for seeking release. Nevertheless, Larry assisted in breaching a fiduciary duty, and thus breached ethical duties of his own.

Question 4

Dan was charged with arson. The prosecution attempted to prove that he burned down his failing business to get the insurance proceeds. It is uncontested that the fire was started with gasoline. At a jury trial, the following occurred:

The prosecution called Neighbor, who testified that fifteen minutes after the fire broke out, he saw a blue Corvette speed from the scene.

The prosecution next called Detective Pry. Pry testified that he checked Motor Vehicle Department records and found that a blue Corvette was registered to Dan. Pry also testified that he observed a blue Corvette in the driveway of Dan's house.

The prosecution then called Scribe, the bookkeeper for Dan's business. Scribe testified that, two months before the fire, Dan told Scribe to record some phony accounts receivable to increase his chances of obtaining a loan from Bank. Scribe then testified that she created and recorded an account receivable from a fictitious entity in the amount of \$250,000, but that Bank denied the loan anyway. Scribe further testified that, two days after the fire, Dan again told her to create some phony accounts receivable, but that she refused to do so.

The prosecution called Jan, the night janitor at Dan's business, to testify that the evening before the fire, as Jan was walking past Dan's office, Jan heard a male voice say, "Gasoline is the best fire starter." Jan knew Dan's voice, but because the office door was closed and the voice muffled, Jan could not testify that the voice was Dan's.

Assume that, in each instance, all appropriate objections were made.

Should the court have admitted:

1. Detective Pry's testimony? Discuss.
2. Scribe's testimony? Discuss.
3. Jan's testimony? Discuss.

Answer A to Question 4

4)

State v. Dan

Admissibility of Detective Pry's Testimony

Logical Relevance

To be admissible, evidence must first be relevant. A piece of evidence is logically relevant if it has any tendency to make a fact of consequence in the case more or less likely to be true than it would be without the evidence.

Detective's Pry's testimony regarding what he learned from checking the DMV records is admissible because it tends to make it more likely that Dan was the one who committed the arson. Neighbor has already testified that he saw a blue [C]orvette speeding away from the scene of the arson. It is likely that the [C]orvette was driven by the one who had committed the crime. Therefore, if Dan also drove a blue [C]orvette, it would tend to make it more likely that Dan is guilty of the crime.

Detective Pry's testimony regarding the blue [C]orvette that he observed on Dan's driveway is also admissible. Since a witness saw a blue [C]orvette speeding away from the scene, the fact that Dan owns and possesses a blue [C]orvette makes it more likely that he committed the crime. The officer's testimony regarding seeing the car in Dan's driveway is also relevant because it tends to support the theory that Dan still possessed the car and had not sold it to someone else before the crime was committed.

Therefore, Detective Fry's testimony is logically relevant.

Legal Relevance

To be admissible, evidence must also be legally relevant. Evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice to the jury.

Here, the evidence is legally relevant. The evidence has some probative value in making it more likely that Dan was the one who committed the arson, and there is little risk of undue prejudice. Evidence is only prejudicial if it is likely to lead the jury to draw improper conclusions about the defendant's guilt or innocence. The fact that Dan possessed a blue [C]orvette like that driven from the crime scene may hurt Dan's case, but it will be because the jury drew the reasonable conclusion that Dan may have been driving the car scene [sic] by neighbor, not because of any prejudicial effect.

Thus, the evidence is legally relevant.

Personal Knowledge

For the evidence to be admissible, Detective Pry must be competent to testify regarding it. A witness is competent if he has personal knowledge about the facts that he is testifying to.

In this case, [P]ry is competent to testify to the fact that he saw a blue [C]orvette in Dan's driveway, because he observed that himself and had personal knowledge of it. However, Pry's testimony regarding the DMV records will be inadmissible because Pry's only knowledge that the [C]orvette was registered to Dan came from the DMV records, and the DMV records have not been produced at trial, under the best evidence rule described below.

Best Evidence Rule

Under the best evidence rule, if a witness's sole knowledge of facts comes from a written document, then the fact must be proved from the written document unless the absence of the document is explained and excused.

On these facts, Pry's only knowledge of the fact that a blue [C]orvette was registered to Dan came from reading the DMV records. Therefore, the best evidence rule applies and Dan's ownership of the car must be proved with the DMV records themselves, rather than by Detective Pry's testimony regarding the contents of the records.

For this reason, Detective Pry's testimony regarding the contents of the DMV records should not have been admitted into evidence. Instead, the prosecution should have proved Dan's ownership of the car by introducing the DMV records themselves into evidence.

Hearsay

Another objection that Dan could make to the admission of the evidence is hearsay. Hearsay is an out[-]of[-]court statement offered into evidence to prove the truth of the matter asserted. The DMV records are hearsay because they are the out[-]of[-]court statements of DMV employees who prepared the report and it is being offered to prove the truth of the matter asserted – namely, that Dan was the registered owner of a blue [C]orvette.

Therefore, the evidence will be inadmissible unless a hearsay exception or exemption applies.

Business Records Hearsay Exception

Under the business records hearsay exception, the records of a business may be admitted into evidence if they were regularly prepared in the ordinary course of business by business employees with a duty to the business to maintain accurate records. Business is defined

to not only include for-profit businesses but also nonprofits and government agencies.

The DMV records could be admitted into evidence under the business records hearsay exception. As part of its business of regulating motor vehicles, the DMV regularly maintains records of the cars that are registered as owned by a certain person. These reports are prepared by DMV employees who have a duty as part of their job to maintain accurate records. Therefore, the statements in the DMV report are admissible under the hearsay exception for business records.

Government Records Hearsay Exception

The contents of the DMV records could also be admitted under the hearsay exception for government records. For this hearsay exception to apply, the records must have been maintained by a government agency and must be: (1) a record of the activities of that agency, (2) a report prepared in accordance with a duty imposed by law, or (3) a report of an investigation duly authorized by law. Government records of the police investigation regarding a crime are not admissible against the defendant in a criminal trial, but other government records are admissible.

In this case, the DMV records would qualify as records of the activities of the agency. When a person buys a car, they go to the DMV and register as the owner of the car, and the DMV makes the appropriate changes in its records. Therefore, it would qualify as a record of the activities of the DMV. It would also qualify as a report prepared in accordance with a duty imposed by law because the DMV is likely under a duty imposed by the state legislature to maintain vehicle ownership records.

Therefore, the contents of the DMV report would also be admissible under the hearsay exception for government records.

Conclusion

Detective Pry's testimony regarding observing a blue [C]orvette in Dan's driveway is admissible because it tends to make it more likely that Dan committed the arson and Pry had personal knowledge.

However, Pry's testimony regarding the contents of the DMV records should have been excluded because the best evidence rule required that the records themselves be produced rather than allowing someone else to testify to their contents. The prosecution should have instead introduced the DMV records themselves into evidence. The records would have been admissible under the hearsay exceptions for business records and government records and could then have been considered by the jury to help establish Dan's guilt.

Admissibility of Scribe's Testimony

Logical Relevance

Scribe's testimony is logically relevant because it tends to establish motive. If the jury believes Scribe's testimony, then it will establish that Dan's business was failing and that his previous desperate attempts to obtain financing through fraudulently obtained bank loans had failed. This would make it more likely than it would otherwise be that Dan would turn to other illegal measures, such as committing arson, to escape his precarious economic situation.

So the evidence is logically relevant.

Legal Relevance

Although Scribe's testimony is logically relevant, it could still be excluded at the discretion of the judge if its probative value was substantially outweighed by the risk of improper prejudice.

Dan would argue that this testimony is highly prejudicial and should be excluded. The testimony involves prior bad acts of Dan – specifically by inducing Scribe commit [sic] fraud in connection with a bank loan by falsifying the accounts receivable of the business and trying to do so a second time. Thus, Dan would argue, the evidence would be highly prejudicial because it would lead the jury to draw the improper inference that because Dan had done other bad things in the past, he was just a bad guy and is likely guilty of this crime as well.

However, the prosecution could successfully counter by pointing out that while the evidence does present some risk of undue prejudice, it is also quite probative of the issue of Dan's guilt. Scribe's testimony established that Dan was desperate for money because of his failing business and had resorted to illegal conduct in the past to try to get money. This established motive and makes it much more likely than would otherwise be the case that Dan is the one who committed this arson.

Although the evidence does present some risk of undue prejudice, it does not substantially outweigh the high probative value of the evidence. Therefore, Scribe's testimony is legally relevant and should not be excluded on this basis.

Character Evidence

Another issue presented by Scribe's testimony is character evidence. Character evidence – evidence of prior bad acts of the accused offered to prove the bad character of the defendant to show that he acted in conformity with the bad character – is generally inadmissible in a criminal case. However, character evidence may still be admitted if it is offered for some other purpose, such as to show motive, intent, modus operandi, or common plan or scheme.

Here, the evidence of Dan's prior activities in connection with falsifying the company's records is admissible for the non-character purpose of establishing motive. The evidence

is not being offered to prove that Dan is a bad guy in general. Rather, it is being offered for the specific purpose of showing that Dan had a strong motive to burn down his business because he was in financial trouble and his other efforts to obtain funding had failed.

Therefore, the judge should admit Scribe's testimony. However, the judge should also issue a limiting instruction informing the jury that they may only consider Dan's prior bad acts in establishing motive and may not infer from them that he had a bad character and so is likely to be guilty for that reason.

Personal Knowledge

Scribe is competent to testify regarding what he heard and did because he had personal knowledge of it. Scribe was there when Dan told him to falsify the books and did so himself, so Dan has personal knowledge.

Thus, this requirement for admissibility is satisfied.

Hearsay

A final issue is whether Scribe's testimony is inadmissible hearsay. Hearsay is out[-]of [-]court statement offered to prove the truth of the matter asserted, and is normally inadmissible unless an exception to the hearsay rule applies or the statement is exempted from the definition of hearsay under the Federal Rules of Evidence (FRE).

The prosecution would argue that Scribe's testimony regarding Dan's out[-]of[-]court statements and Scribe's out[-]of[-]court statement is not hearsay at all, because it is not being offered for its truth. A statement is not considered hearsay if it is being offered for some purpose other than its truth, such as to prove the mind of the speaker and the listener. Under this argument, Dan's statements to Scribe are not being offered to prove that the bank loan was really rejected, but to show that Dan believed that the business was desperate for money and was willing to do anything to get funds. Similarly, Scribe's out [-]of[-]court statement refusing to falsify the books a second time is being offered for the non-hearsay purpose of proving the listener's state of mind – that Dan knew his fraud scheme would not work and thus was likely to try some other way to get money.

Because the prosecution has a strong argument that Scribe's testimony is not hearsay at all, the testimony should be admitted into evidence.

Hearsay Exemption for Admissions by a Party Opponent

Furthermore, with regard to Dan's statements to Scribe, the statements will be admissible for their truth because the hearsay exemption for admissions by a party opponent applies.

Under this hearsay exemption, the statements of an adverse party in a proceeding are not considered hearsay, regardless of when they were made.

Thus, in this prosecution the prosecutor is offering the evidence against Dan, so Dan is an adverse party. Therefore, Dan's statement are [sic] not considered hearsay and are admissible for their truth.

Conclusion

In summary, Scribe's testimony should be admitted. The evidence is relevant to proving Dan's motive to commit the crime, a non-character purpose. And the conversations between Dan and Scribe are admissible because they are being offered for a purpose other than their truth and the hearsay exemption for party admissions applies.

Admissibility of Jan's Testimony

Logical Relevance

Jan's testimony is relevant because it tends to make it more likely that Dan committed the arson. As Jan walked by Dan's office she heard someone say "gasoline is the best fire starter". Because the statement was made in Dan's office, it was likely made either to Dan or in Dan's presence. Therefore, it establishes that Dan had knowledge regarding the means to commit the crime, which makes it more likely that he did in fact commit the arson. It also makes it more likely that Dan would have chosen gasoline if he were to commit arson, which matches up with the fact that the fire was indeed started with gasoline.

Of course, the conversation could have been perfectly innocent. Dan could have been seeking or obtaining advice on the best way to BBQ, or he could have not even been there are [sic] the time. But to be relevant, evidence must only have some tendency to make a fact of consequence more or less likely to be true. Because the evidence has some tendency to make it more likely that Dan committed the arson, it is logically relevant.

Legal Relevance

The evidence is also legally relevant. As discussed above, even relevant evidence can be excluded if its probative value is substantially outweighed by its prejudicial effect.

Here, the evidence is legally relevant because it has substantial probative value and poses little risk of undue prejudice. The fact that the defendant may have given or received advice on the best way to start a fire the night before the defendant's business burned down, coupled with the motive established by Scribe's testimony, is strong evidence of guilt. In contrast, there is little risk of undue prejudice. The defense will be able to argue that Dan was not present at the time the statement was made or that it was innocuous when they present their case.

Therefore, the evidence is legally relevant.

Personal Knowledge

Jan is competent to testify to what she heard because she had personal knowledge of it. She was there that night and heard the statement made.

Authentication

To be admissible, documentary evidence must be authenticated as being what it purports to be. For a voice recording by someone, this would normally mean that a witness who knows the person's voice must testify that the voice on the tape is the voice of the person. Dan would argue that Jan's testimony is inadmissible because Jan could not testify that the voice was Dan's.

However, the authentication requirement will not apply to bar admission of this evidence. First, the evidence is testimonial, rather than documentary, so authentication requirements would not apply. More importantly, it is irrelevant whether Dan was the one who made the statement. The statement could have been made by someone else in Dan's presence, for example if Dan sought the advice of someone in determining what the most effective way would be to commit the arson. Therefore, the statement is relevant even if it was not made by Dan and for this reason need not be authenticated as Dan's.

The defense can argue that Dan was not present when the statement was made or that it was innocuous, but deciding those issues will be up to the jury, not the judge.

Hearsay

A final objection Dan might make to admission of Jan's testimony is hearsay. Hearsay is an out[-]of[-]court statement offered to prove the truth of the matter asserted. Dan would argue that Jan's testimony is hearsay because she is testifying about what she heard someone say in Dan's office.

However, the hearsay objection will be rejected here. A statement is only hearsay if it is offered for its truth. An out[-]of[-]court statement is still admissible for other purposes. Here, it is irrelevant whether the statement is true. Whether gasoline is in fact the best fire starter has no bearing on the case. The significance of the statement is to establish either the speaker's or the listener's state of mind, which are both permissible non-hearsay purposes. If Dan made the statement, then it tends to establish that he had knowledge about how to commit the crime, which would help show his guilty [sic]. Similarly, if someone else made the statement to Dan, it would be relevant to show that Dan heard the statement and thus had obtained advice on the best way to start a fire, which again would be relevant to guilty [sic].

Although Dan may not have been in the office at the time, the fact that the statement was

made in Dan's office, a place where people would not normally be without Dan being there as well, justified the judge in concluding that there was sufficient evidence to find that Dan either made the statement or was present when it was made.

Conclusion

Jan's testimony should be admitted into evidence because it is relevant to establish Dan's guilt, Jan had personal knowledge of the statement, and it is being offered for a non-hearsay purpose.

Answer B to Question 4

4)

Detective Pry's Testimony about DMC [R]ecords

Logical/Legal Relevance

Relevant evidence is generally admissible. In order to be relevant the evidence must have any tendency to make a fact more or less likely than that fact would be without the evidence proffered. The prosecution is offering this evidence to prove that the car seen speeding away from the scene of the arson was owned by Dan (D). This evidence is logically relevant as it tends to prove identity of the arsonist.

Some logically relevant evidence will still be excluded if there are public policy reasons for the exclusion of that evidence. If the probative value of relevant evidence is substantially outweighed by the prejudicial nature of the evidence then the evidence will be excluded. D's attorney would argue that lots of people own blue [C]orvettes and thus using the [C]orvette to identify D as the guilty party is prejudicial. D's attorney would lose however because ownership of a car seen speeding away from the scene of a crime is not prejudicial and any possible prejudice resulting from the inference that D was driving the [C]orvette as it speed [sic] away does not substantially outweigh the probative value that this evidence possesses as far as identifying the arsonist.

Witness Competency

A witness is competent to testify if the witness has personal knowledge and is capable of understanding the oath or affirmation required of all witnesses.

Pry would be a competent witness because he read the dmv [sic] report and thus has personal knowledge of its contents.

Best Evidence

When a witnesses [sic] sole source of knowledge is from the contents of a document, and the witnesses [sic] testimony is being elicited in order to establish the contents of that document as true the best evidence rule requires the profferor of that evidence to either produce the document or explain why the document was not produced before allowing the witness to testify as to the contents of that document.

The defense's objection to Pry's testimony on the contents of the DMV printout should have been upheld as officer Pry's sole source of knowledge regarding D's ownership of a blue [C]orvette was from the DMV printout. Pry did not explain why he was not able to produce the dmv[sic] record. Without the DMV record or a reasonable explanation concerning why it was missing Pry's testimony should have been excluded.

Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Pry's

testimony about the DMV printouts[sic] contents would also be hearsay because it is a statement made by the employee transcribing data into the DMV database that is being offered to prove that D owned a blue [C]orvette. Because this statement was hearsay it should have been excluded unless on of [sic] the exceptions or exemptions from the hearsay rule applied.

Exemptions/Exceptions

Official Document

Official certified documents from public agencies charged with complying [sic] the information contained in the document are exempt from the hearsay rule. Because the prosecution failed to produce a certified record from DMV this exception to the hearsay rule would not have been available.

Business Record Exception

A record that is made in the ordinary course of a business by an employee with a duty to accurately report such information can be admitted in lieu of the employee's testimony. Since there was no dmV[sic] record being offered this exception would not have applied.

Presumption that owner was driver of a vehicle

A presumption can be raised that the driver of a car was the owner of the car. However in criminal trials the burden of proof is on the prosecution to prove each element of a crime and the identity of the person committing the crime beyond a reasonable doubt and thus the prosecution would not have been able to use the testimony regarding dan's[sic] ownership of a blue [C]orvette to raise a presumption that dan[sic] was driving the [C]orvette on the night of the arson.

Because of the best evidence and hearsay problems, Pry's testimony about the DMV printout should have been excluded.

Detective Pry's Testimony about Corvette in Driveway

Logical/Legal Relevance

This evidence is logically relevant because it makes it more likely than not than D owned a blue [C]orvette which was seen sp[e]eding away from the scene of the arson. This evidence would not be excluded due to legal relevance for the same reason the DMV printout testimony would not have been excluded for legal relevance reasons.

Witness Competency

The officer is competent to testify about seeing a blue [C]orvette in D's driveway because the officer has personal knowledge regarding what the officer saw in D's driveway.

Presumption that D was the driver of the blue [C]orvette on the night of the arson

The prosecution would still not be able to use the driver presumption because this is a criminal case.

Scribe's Testimony re: phony accounts receivable for bank loan

Logical/Legal Relevance

This evidence would be logically relevant to show that D needed money because he falsified account records to receive a bank loan which was denied. The defense would argue that this testimony is highly prejudicial and that its prejudicial effect outweighs its probative value substantially because the jury is likely to convict D for arson based on the fact that his [sic] is a dishonest person and not based on whether he actually committed the arson. While this evidence is highly prejudicial, the court was right to admit it as it goes to the d's[sic] motive in starting the fire.

Witness Competency

Scribe would be a competent witness because he or she had personal knowledge about D's request to make false accounts receivable.

Hearsay

This testimony would be hearsay because Scribe is testifying about a statement made by D out of court to prove the[sic] D had Scribe create false records in order to get a loan from the bank. The prosecution would argue that this is not hearsay because the evidence is not offered to prove that D tried to get a loan by false pretenses but that he had a motive to burn down his building for the insurance proceeds because he was denied a loan and thus was in need of money.

The court properly admitted this as non-hearsay if it allowed it in for the limited purpose of showing that D had a motive to burn down the building to collect insurance proceeds.

Admission of a party opponent made by an agent

A statement made by a party offered against the party by the opposing party that is adverse to the party's interest is admissible as non-hearsay. The statement did not have to be against the party's interest at the time that it was made. The prosecution would argue that D's request that Scribe falsify accounts receivable is a party admission exempt from the hearsay rule because it is a statement made by D that is now relevant to his culpability for the crime of arson. The statement would be admitted under this exemption to the hearsay rule because D made the statement and it is being offered by the opposition against D.

Present sense impression

S's testimony would not be excepted from the hearsay rule under the exception for a present sense impression as D's statement to falsify records was not made contemporaneous to d[sic] observing the falsification of the records.

Excited Utterance

It would also not qualify as an excited utterance because there is no evidence that D experienced a traumatic or exciting event around the time that his instructions were made.

Present Intent to engage in future conduct

Since D was instructing S to destroy the records it is unlikely that the prosecution could have this statement admitted as a present expression of intent to engage in future conduct to prove that the future conduct was engaged. D did not make a statement concerning conduct that he was about to engage in or planned to engage in in [sic] the future.

Double Hearsay

S's testimony about transcribing false accounts receivable would be double hearsay because S is testifying to an out[-]of[-]court statement that he made in response to a request that his boss made to prove that S engaged in the conduct alleged by the hearsay statement.

Vicarious Admission

S's statement would be admitted as a vicarious admission so long as transcribing records was [sic] part of the duties that S performed. As D['s agent S' testimony would be vicariously attributed to D.

Character evidence

Character evidence is not allowed in a criminal trial by the prosecution to show that the defendant acted in conformity with his character unless and until the defendant offers evidence of his good character. Character evidence is however admissible to show motive, intent, a common plan or scheme, identity or opportunity.

D would argue that this evidence was offered to show that D is of bad character and likely to commit fraud and thus it should be excluded as impermissible character evidence.

The prosecution would argue that this evidence is being offered to show that D had the motive to commit an arson in order to collect the insurance proceeds on his failing business. Because the falsified accounts receivable are not required to prove that D did not get a loan from the bank which is the evidence that really tends to show that D had a motive to burn down his failing business for insurance proceeds the court should have excluded the portion of Scribe's testimony concerning the falsified records as impermissible

character evidence.

Scribe's Testimony Re: phony accounts receivable two days after fire

Logical/Legal Relevance

This testimony is not logically relevant because Scribe did not offer any reason related to the arson for falsifying the accounts receivable. While the prosecution may argue that D was falsify[sic] the records to get a bigger insurance payoff, Scribe's testimony does not suggest that this is the case. Even if the court did find the evidence to be logically relevant for showing that D was attempting to increase the amount of payoff from the insurance company, this testimony should have been excluded because its prejudicial value substantially outweighs its probative value. Without some testimony concerning why D asked Scribe to falsify the accounts receivable after the fire this testimony tends to suggest to the jury that it should convict D for being a dishonest guy generally instead of for committing the specific crime charged.

Witness Competency

Scribe would be competent because he or she had personal knowledge of what was said.

Hearsay

This testimony would be hearsay as was the prior testimony regarding false accounting records if it was admitted to show the truth of the statement – that D wanted to falsify accounts receivable. The prosecution could still argue that it was being offered to show motive which would be for a reason unrelated to the truth of the statement.

Admission

This testimony would also be an admission of D because it was made by D and is being offered against him and thus it is exempt from the hearsay rule.

The court should not have admitted this evidence because of its potential lack of logical relevance, it [sic] highly prejudicial nature in light of its relatively low probative value.

This testimony would also not fit under the exceptions to the hearsay rule for present sense impressions, excited utterances, or a present statement of intent to engage in future conduct for the same reasons the first statement regarding the falsification of accounting records would not fit under these exceptions.

Jan's Testimony re: "Gasoline is the best fire starter"

Legal/Logical Relevance

This evidence is legally relevant because it tends to show that D knew gasoline was the best fire starter and since it is undisputed that gas was used to start the fire at the business it would tend to show that D committed the arson.

Witness Competency

J is familiar with D's voice and he heard the statement[;] thus he would be competent because he has personal knowledge of the statement and is potentially capable of authenticating the identity of the speaker, a problem which will be dealt with more extensively below.

Hearsay

[T]his statement would not be hearsay because the purpose for its admission is not to prove that gasoline is the best fire starter. The prosecution wants this evidence in to show that D had knowledge that gasoline starts fires since gasoline was used to start this fire. Even if the statement was found to be offered for its truth a hearsay exemption would apply.

Party Admission

D is a party and the statement is being offered against him and thus so long as he can be identified as the speaker this statement would be admissible as a party admission.

Authentication of Voice

When the identify of a speaker is in issue because the speaker was not visible to the person hearing the speech the voice must be authenticated. A voice may be authenticated by the person who heard the voice so long as that person is familiar with the voice. Even if the hearer is not necessarily familiar with the voice of the speaker other facts can be admitted to establish the speaker's identity.

J is familiar with D's voice[,] however J is unable to authenticate the speaker's identity as that of D because the door was closed and the voice was muffled. However the prosecution would argue that there are enough circumstantial factors available that the jury should be allowed to decide whether or not the voice was D's. Such evidence exists from the fact that J was passing D's office and that the voice was a male voice coming from D's office. This should be sufficient to allow this testimony to go to the jury because J's testimony is enough to allow the jury to determine whether D was in his office.

The judge properly admitted J's testimony as either non-hearsay because it was not admitted to prove the truth of the matter asserted or as a party admission.

Question 5

Stan and Barb entered into a valid written contract whereby (1) Stan agreed to convey to Barb 100 acres of agricultural land and water rights in an adjacent stream, and (2) Barb agreed to pay Stan \$100,000. When Stan and Barb were negotiating the deal, Stan said, "You know I want to make sure that this property will still be used for farming and not developed." Barb replied simply, "Well, I can certainly understand your feelings." In fact, Barb intended to develop the land as a resort.

The conveyance was to take place on June 1. On May 15, Stan called Barb and told her the deal was off. Stan said that a third party, Tom, had offered him \$130,000 for the land. Stan also said that he had discovered that Barb intended to develop the land.

On May 16, Barb discovered that Stan has title to only 90 of the 100 acres specified, and that he does not have water rights in the adjacent stream.

Barb still wishes to purchase the property. However, it will cost her \$15,000 to purchase the water rights from the true owner of those rights.

What equitable and contractual remedies, if any, may Barb seek, what defenses, if any, may Stan assert, and what is the likely outcome on each? Discuss.

Answer A to Question 5

5)

Barb v. Stan

Barb's Equitable and Contractual Remedies

Contractual Rights - - Land-Sale Contract

Barb can sue Stan under contract rights for breach of the land-sale contract, for failing to deliver marketable title and for breach of a general warranty deed. She should assert that she is entitled to the remedy of specific performance, or alternately, damages under contract.

Specific Performance

Specific performance is an equitable remedy that is available when: 1) there is a valid contract, 2) the terms of the contract are clear and definite and were performed, 3) there is [sic] inadequate legal damages, 4) there [sic] mutuality, and 5) there are no valid defenses.

Valid Contract

A valid contract in a land-sale agreement requires a writing with all essential terms.

The contract between Barb and Stan was a valid written agreement, for the sale and purchase of 100 acres of agricultural land and water rights to a stream, to close on June 1st. Barb agreed to pay \$100,000 for the purchase of the land.

Clear and Definite Terms

Terms are clear and definite when a court is able to enforce the terms. For a land-sale contract, the contract must contain: 1) parties, 2) property defined, 3) time for performance, and 4) purchase price.

Here, the court can enforce the sale of land, since it defines 1) the parties are Barb and Stan, 2) the land to be sold is 100 acres of agricultural land and water rights, 3) the time for performance as June 1st, and 4) the purchase price of \$100,000. Therefore, this element is met.

Inadequate Legal Damages

Legal damages are inadequate when there is a contract for a subject matter that is unique. Land has been held as a unique subject matter, since no two lots of land are the same, even if they appear to be.

Since the contract between Barb and Stan is for 100 acres of land, the contract is for a unique subject matter and legal damages are inadequate. Therefore, this element is met.

Mutuality

At common law, mutuality required that both parties be entitled to specific performance. However, modernly, mutuality only requires that the person seeking specific performance be ready and able to perform.

Here, as long as Barb, the person seeking the specific performance of the contract, is able to pay the purchase price, she should be entitled to specific performance.

Abatement of Purchase Price

In a land-sale contract, a purchase price can be abated, or reduced when the title rendered is defective due to an encumbrance or unmarketable title, or a conveyance of less than promised.

If Barb succeeds on specific performance, subject to Stan's defenses (discussed below) then she should be entitled to abate the purchase price. Bob contracted for 100 acres of land and water right[s] to an adjacent stream. Barb later discovered that Stan only owned 90 acres and did not own the water rights he claimed to own. Since Barb contracted to pay \$100,000, she should be entitled to a reduction of the purchase price to reflect the value of the land, minus the 10 acres and the stream.

Stream

The stream was not owned by Stan, but owned by another person who is willing to sell the stream to Barb for \$15,000. Therefore, the purchase price should be first reduced by the amount, to a total of \$85,000. This is fair since it would cost Barb that amount to correct the contract as agreed.

10 Acres

Stan agreed to sell Barb 100 acres, but only owned 90 acres of the land. The ten acres of land should be subtracted from the remaining \$85,000. One method of doing this would be to divide \$85,000 by 100 and value each acre at \$850. Then multiply \$850 x 10 acres for a reduction of \$8,500 credited to Barb.

Legal Damages

If Barb is unsuccessful in her attempt to obtain specific performance, she could sue Stan for breach of contract and obtain legal damages.

Breach of the Contract—Anticipatory Repudiation

Anticipatory repudiation is a clear and unambiguous statement that a party will not perform before performance comes due under the contract.

Since Stan called off the sale of the land on May 15, which was two weeks before the closing date of June 1st, Stan anticipatorily repudiated the contract, which is a major breach. This entitles Barb to suspend her performance and sue for breach of contract.

Expectancy Damages

A major breach entitles the aggrieved party to damages to make them whole. These are called expectancy damages. In these contracts, the appropriate measure of damages is the fair market value of the land - - the contract price.

Here, Barb contracted for the sale of land for \$100,000. Stan was later offered \$130,000 for the land by a third party. If indeed this contract reflects fair market value and if the contract was also for the 100 acres and the water rights, then Barb should be granted \$30,000. Otherwise, Barb should get \$30,000 plus \$15,000 for the water rights plus \$8,500 to reflect the additional 10 acres.

2) Stan's Defenses

Stan should assert defenses that Barb is not entitled to an equitable remedy and that specific performance was inappropriate since there was not a valid contract which Barb had performed.

Laches

Laches bars equitable remedies when a party unreasonably delays and this causes prejudice.

Here, there is no indication that Barb delayed in filing her suit. Therefore, this defense will fail.

Unclean Hands

Under the Clean Hands Doctrine, equity will not come to the aid of a person with unclean hands. The Clean Hands Doctrine bars equitable relief to a person who engages in wrongful, fraudulent or unconscionable conduct with regard to the subject matter at hand.

Here, Stan could argue that Barb knew of Stan's firm desire to keep the land as agricultural land to be used for farming and prevent its development. In fact, Barb said, "I can certainly understand your feelings," but in reality had intended all along to develop the agricultural land as a resort. Barb did not disclose this information to Stan, which is material omission and one that probably would have terminated the contract. On the other hand, Stan did not include this statement in the contract, and if it were truly a deal-breaker, he probably should have. Since courts tend to favor the free alienation of property and prefer that material agreements be in the writing, if there is one, the court will likely side with Barb, unless they find that she committed fraud against Stan. Therefore, this defense, although a close call, will not likely bar Barb's relief in equity.

Contract Invalid

Stan can also claim the contract is invalid, which would refute one of the elements necessary to enforce an agreement with specific performance.

Unconscionability

Stan should argue that the contract was unconscionable since there was unfair surprise in Barb's intent to develop the land.

However, this argument will likely fail as Barb and Stan appear to be at arm's length and Stan should have included his restriction on the land.

Terms of the Contract Not Met

Stan can also argue that the contract terms were not met and Barb breached the contract by having the intent to develop the land although there was a condition that Barb use the land with the restriction on the land for agricultural purposes. However, the parole evidence rule will bar this argument.

Parol Evidence

Parol evidence bars introduction of oral or written agreements made [sic] before or contemporaneously with a completely integrated writing.

Therefore, Barb will argue that the oral statements by Stan that he preferred the property be used for farming and not be developed is barred.

Stan's Bad Faith/Unclean Hands

Since Stan also acted in bad faith and with unclean hands by accepting an offer from another purchaser for more money, he will probably lose on his defense arguments.

Answer B to Question 5

5)

Barb (B) v. Seller (S)

Breach of the Land Sale Contract

Valid, Enforceable Contract

The facts tell us that B and S entered into a valid written contract for the sale of 100 acres of agricultural land and water rights in exchange for \$100K.

Anticipatory Repudiation

B will argue that S breached the agreement when he anticipatorily repudiated the agreement on May 15. In order to have an anticipatory repudiation, the breaching party must unequivocally indicate an intent not to perform. In this case, S called B and told her the deal was off. This qualifies as an unequivocal repudiation and S would be free to pursue all remedies available to her for the breach.

B has four options available to her after S's repudiation. She is free to: (1) treat the contract as repudiated and sue for damages, (2) treat the contract as discharged; (3) await the time for performance (June 1) and sue when performance does not occur; or (4) urge S to perform. In this case, we know that B still wishes to purchase the property; thus, her best option is to treat the contract as repudiated and sue immediately for all contractual remedies available to her.

Unmarketable Title

B will also argue that S breached the land sale contract by being unable to provide marketable title. This is because she discovered on May 16 that S only had title to 90 of the 100 acres he was purporting to sell B and because he did not have any water rights in the adjacent stream.

Although S might try to argue that his inability to provide marketable title discharges him from the contract, this will not be a successful defense because only the buyer to a land sale contract has a right to terminate the contract if the seller cannot provide marketable title. If the buyer still wants to purchase the property, the seller must perform under the contract. In addition, the buyer has a right to sue for damages incurred under the contract. This could include abatement of the purchase price.

Remedies

Compensatory Damages

Expectancy Damages

In order to be awarded damages, B must prove that they are foreseeable and certain to result. The usual measure of damages in a contract action is for B's expectancy; that is, B is entitled to recover the amount that she would need to purchase a replacement. In this case, it would be very difficult for B to establish how much it would cost her to purchase comparable property since she specifically wants S's property. Thus, there does not appear to be any way to provide B with an amount that would allow her to buy an adequate substitute. If, however, there were other comparable nearby [sic] for sale, and if S could not obtain specific performance, then she might be able to prove expectancy damages by establishing how much it would cost to purchase that other property. If she could do that, she would be entitled to the difference between what it cost to purchase the replacement property and the contract price (\$100K).

Consequential Damages

In addition to expectancy damages, consequential damages are sometimes available in contract actions. These are damages that are unusual, but that were foreseeable to both parties at the time the contract was formed. B will try to argue that S should be liable to her for any lost profits she will suffer as a result of the delay in developing the land for a resort. She'll argue that the substantial delay that will occur because she has to either bring suit to obtain S's land or because she'll have to go find an alternative property will result in significant lost profit damages. Moreover, she will argue that S knew on May 15, before the June 1 performance date, that she intended to develop the land as a resort and that he thus should be liable for all lost profits that she will incur as a result of his breach.

S will successfully argue that B is not entitled to consequential damages for two reasons. First, he will prove that he was not aware of B's plans at the time the contract was formed. The contract was formed at the time the parties signed the agreement, and at that time, S was under the impression B would be using the land for farming. This is evidenced by his statement that he wanted the property to remain undeveloped and to be used for farming and B's response of "Well, I can certainly understand your feelings." S will argue that this did not put him on any kind of notice as to B's intentions and thus he isn't liable for her lost development profits. Second, S will successfully argue that the lost development profits can't be proven with certainty since it is a new business with no prior history of profits. Since courts are loathe to award lost profits to new businesses, S will also succeed in this argument.

Accordingly, B is entitled to receive the amount it would take to allow her to purchase a new piece of replacement property. However, since land is unique, this is inadequate compensation for B. B will not be able to prove that she is entitled to consequential

damages since they are uncertain and since S was unaware of B's plans at the time the contract was formed.

Incidental Damages

B is always entitled to recover for incidental damages suffered as a result of the breach. In this case, to the extent she can prove what it cost her to search for new property, etc[.], she can recover from S.

Restitutionary Damages

Restitution is an alternative remedy to compensatory damages when the defendant received a benefit and compensatory damages are not the best measure of damages. In this case, S has not actually received any benefit yet. However, B may be able to succeed in her argument that if B is allowed to sell his property to Tom because the court refuses to grant specific performance, then she should be entitled to receive the \$30K S was receiving from Tom that was in excess of the amount S was entitled to receive under the contract with B. She can argue that allowing S to retain the additional sum would result in unjust enrichment.

Specific Performance

Specific performance is available only if B can establish that: (1) damages are inadequate; (2) the terms of the contract are definite and certain; (3) it is feasible to enforce the contract; (4) there is mutuality of remedy/performance; and (5) there are not equitable defenses.

Inadequacy

As discussed above, since land is unique and since B can't prove her damages with certainty, damages are an inadequate remedy in this case.

Definite and Certain Terms

Courts do not award specific performance unless the terms are very definite and certain. Here, B will argue the terms are quite certain since she was entitled to receive 100 acres of land and water rights in exchange for \$100K. She will succeed in her argument.

Feasibility of Enforcement

A court will not award specific performance unless it is feasible to enforce the injunction. Here, a court presumably has jurisdiction over the land and S. In addition, the court would be able to use its contempt power to force S to convey the land to B. Thus, the injunction is feasible to enforce.

Mutuality of Remedy/Performance

In the past, courts would not award specific performance if there was no mutuality of remedy (if the party asking for specific performance could not be made to specifically perform in the event of her breach). Courts today have modified this requirement so that they grant specific performance if it is possible to ensure mutuality of performance. In this case, mutuality of performance is possible since the court can require S to convey the deed to the property at the same time B tenders \$100K to S.

No Equitable Defenses

Laches

B has not waited an unreasonable length of time to bring suit such that S can argue that he detrimentally relied on B's failure to bring suit. Accordingly, this is no defense.

Unclean Hands

S will assert that B has acted with unclean hands with regard to this particular transaction. He will point to B's statement in response to his request that he would like the property to remain undeveloped. S will claim the statement, while not explicitly false, was deceptive since it induced S into believing that B would not develop the property when, in fact, B planned all along to develop it as a resort. S will argue it was a misstatement by omission since B knew at the time the contract was formed that she would develop the property despite S's desire for her not to, yet she did not volunteer this information to S.

B may counter that her evasion was not an actual false statement and that she cannot be held responsible for whatever S may have interpreted her statement to mean beyond its actual literal meaning – that she did, in fact, understand that he'd like the property to remain undeveloped. B will argue that since there was no actual false statement, she does not have unclean hands and[,] thus, is fully entitled to specific performance.

If S is successful in making his argument, the court will deny B specific performance, and award her damages only.

Conclusion

A court will not award B specific performance of the contract since she had unclean hands with respect to the contract. Accordingly, it will grant her whatever damages can be proven would be certain to occur. In this case, B will likely be entitled to the \$30K that S will get from Tom that is in excess of the contract price they had agreed on. In addition, she can receive incidental damages and, in the unlikely event she can prove how much it would cost to obtain replacement property, she can receive any amount in excess of the contract price from S as well.

If, however, the court did award specific performance, it would require that S convey the 90 acres of land S actually owns to B. B would only have to pay \$90K for the 90 acres. In addition, since it would cost B \$15K to purchase the water rights from the true owner, B is also entitled to deduct this from the purchase price. Accordingly, if a court does award B specific performance, it will only require B to tender \$75K to S in exchange for S's 90 acres of property.

S's Defense - Contract was Subject to a Condition

S will argue in his defense that he did not actually breach the contract because the contract was subject to a condition (an agreement not to develop the land). He'll argue this condition was not satisfied because he discovered that B fully intended to develop the land. Thus, he will argue, he was discharged from his own duty to perform under the contract by B's failure to abide by the condition and was free to terminate the contract.

B will successfully defend against this argument by proving that there was no explicit agreement to create a condition to the contract. The parol evidence rule doesn't apply to extrinsic evidence used to demonstrate the existence of a condition precedent to the contract. B will introduce the statement S made: "You know I want to make sure this property will still be used for farming and not developed." Next, she'll introduce her response: "Well, I certainly understand your feelings." Her response did not state that she would agree not to develop the property; thus, there is no condition precedent and B's argument that his duty to perform was discharged will not succeed.

Question 6

Lou is a lawyer. While he was having lunch with a friend, Frank, he learned that Frank's sister, Sally, had decided to dissolve her marriage. At Frank's request, Lou telephoned Sally, told her that Frank had asked him to call, and offered to represent her. They set up an appointment for the next day.

During the appointment, Lou began the discussion by talking about his fee. Sally told Lou she had no money, but admitted jointly owning with her husband some art valued at \$1,000,000. Lou agreed to accept a payment of fifty percent of any assets awarded to Sally in exchange for representing her. Lou and Sally memorialized the agreement in writing.

Over the next month, Lou found himself attracted to Sally and eventually asked her to go out with him. She accepted, and they began dating on a regular basis, including having consensual sexual relations with each other.

Soon after Sally filed for dissolution, her husband's lawyer called Lou and made a property settlement offer. Lou told the lawyer the offer was ridiculously low and he would not insult Sally by telling her about it. Sally learned about the offer from her husband. She thought it was a good offer and was incensed that Lou had turned it down. When she asked Lou about it, he told her he was looking out for her best interests.

What ethical violations, if any, has Lou committed? Discuss.

Answer A to Question 6

6)

Lou has potentially violated the ABA [R]ules of Professional Conduct and the model code of Professional Responsibility. He has potentially violated the California [R]ules of Professional Conduct, and where there is a distinction in the law, I will address it.

Here, Lou telephoned Sally at Frank's request to tell Sally that he would offer to represent her. The general rule is that an attorney may not instigate direct, in person solicitation for legal services unless they are talking to a former client or the person comes up to them. In this case, Lou was having lunch with Frank who asked him to call Sally because Sally is his [s]ister. While Lou did not directly make the contact with Sally in person, he is still not allowed to call Sally and offer her his services because they do not have a previous legal relationship. It is also immaterial that Lou told Sally that he is calling because her brother told him to. Lou should have told Frank that he cannot call Sally because it would be violating his ethical obligations. Lou could have told Frank to tell Sally to call him if she really needed help and was looking for legal representation. Thus, because Lou instigated client contact and solicited his services to Sally, he has breached his ethical obligations.

When Lou agreed to take 50% of Sally's assets she would be awarded after the dissolution, he is basically having an interest in the litigation. Generally, a lawyer may not have an interest in the litigation and thus, what Lou should have done is the following: 1. He should have given Sally consultation as to what fees are, 2. He should have given her informed consultation, 3. He should have given her the chance to see outside counsel if she wanted (in writing in CA), 4. He should have obtained her waiver or consent to this agreement (in writing in CA). However, a lawyer may have an interest in the litigation if, for example, it is a contingency fee arrang[e]ment.

Generally under the ABA rules, a lawyer may not engage in a contingency fee arra[n]gement with a client when the case is about a dissolution of marriage because it would violate public policy concerns. However, in California a lawyer may enter a contingency fee arrang[e]ment so long as the arrang[e]ment does not encourage the divorce. Since Sally is in need of a lawyer to have her divorce, it appears that Lou's representation is not encouraging the divorce. Thus, Lou should have given Sally consultation about the fee arrangem[e]nt, put the contingency in writing, he should have also told her and [sic] what his obligations are under his representation (written in CA), and he should have written what the amount of his services would be after he subtracts any court costs, and obtained her written consent to the arrang[e]ment. While the [sic] memorial[i]zed this arrangement in writing, Lou did not give Sally informed consent about the arrang[e]ment nor did he write down what his responsibility and liability is under his representation. Thus, Lou has breached his ethical obligations.

Lou agreed to accept 50% of any assets awarded to Sally in the divorce. A lawyer has a duty to not make his fee unreasonable or unconscionable. In this case, Sally had no money except she jointly owned art with her husband valued at 1 million dollars. Thus, taken into consideration that Sally and her husband may have a lot of money, some courts would find that 50% of Sally[’s] divorce decree would amount to an unreasonable fee for Lou. Plus, it may also be uncons[c]ionable to take so much money from a client. In this event, what Lou should have done was determine what the normal percentage was for a contingency fee in the general area that he lived in. For example, he could have asked other lawyers and taken note of payment in divorce decrees. He should have also determined if this percentage would actually reflect the amount of work he would be doing. Additionally, Lou should also know that 50% may be too unreasonably high as his fee percentage and he should have offered Sally something more reasonable such as 33% or so. In conclusion, he has breached his ethical obligations by making his fee 50% of Sally’s assets as this is most likely far to[o] unreasonable and unconscionable.

Lou and Sally began a relationship during his representation of her case. Under the ABA rules, a lawyer may not engage in sexual relations with a client. However, in CA it is permissible so long as it does not affect the lawyer’s representation of their client. Here, they began dating regularly and had consensual sexual relations. One the one hand, while this is permissible in CA, it may have affected Lou’s duties as a lawyer because this is a divorce situation where Lou’s emotions may be entangled with the fact that his client is still married. Plus, Lou may be engaging in adultery since Sally only filed for the divorce after she started dated [sic] Lou, subjecting him to more potential ethical violations. Lou has a duty to place his client’s interest in front of his own and now Lou may be placing his emotional interests first. For example, when Husband’s lawyer called, Lou said that he would not take the property offer nor tell Sally about it because he did not want to insult Sally. Here, Lou may be protecting his relationship with Sally rather than being her loyal lawyer.

Also, when Sally asked Lou why he didn’t tell her about the offer, he said that he was looking out for her interests[,] which may not have been true. A lawyer has a duty of loyalty to their client to place their client’s interest first and Lou may have breached that duty by saying he was looking out for her interests when he was really looking out for his relationship with Sally. In this event, Lou should have consulted Sally about their potential conflict of interest (since Lou may place his interest in front of Sally’s best interest), he should have given her informed consent that he may not be able to put her interests first, and he should have asked her to seek another outside counsel’s advice (in writing in CA), then obtain her consent or waiver (in writing in CA). Lastly, if Lou could not reasonably represent her, he should have withdrawn from representation [so] as to not prejudice his client. For example, he could give Sally adequate time to find another lawyer and give her all the documents she would need to continue on her case.

Lou told Husband’s lawyer that he would not tell Sally about the settlement offer. Generally the lawyer is entitled [to] decide the technical and procedural decisions of a case while the client must decide on all the objectives and goals. One major goal is whether or not a client

wants to accept a settlement offer. Here, Lou had a duty to tell Sally about the settlement offer because it was her right as his client to know about it and decide if she should reject it or not. Lou cannot reject a settlement offer and since Lou rejected it, he has breached his duty to behave like a competent lawyer.

Lou did not tell Sally about the settlement offer. A lawyer has a duty to communicate with their client and tell them of all material aspects of their case, especially in a situation like this where Sally would have to know about the settlement offer. Here, Sally found out the settlement from her Husband, not her own lawyer. What Lou should have done is when he received the settlement offer, he should have consulted Sally as to its terms, explained the pros and cons of it and thus, allowed her to make the final decision. Then Sally could ask Lou what [sic] the best thing to do would be since Lou could give her consultation as to the legal implications of accepting a settlement offer. Yet, Lou just rejected the settlement and did not communicate any material terms of the settlement to Sally. Because Lou did not take these necessary steps, he has breached his duty as a lawyer.

Answer B to Question 6

6)

Applicable Law

An attorney in California is bound by the California Rules of Professional Conduct (RPC) and the California's Attorney's oath. The RPCs are similar but not identical to the ABA Model Rules[,] which govern a lawyer's ethical duties in the majority of jurisdictions. Because it is unclear in which state Lou is a lawyer this essay will apply the majority view of the ABA Model rules but also include distinctions in the California RPCs.

Lawyer-Client Relationship

A lawyer[-]client relationship is formed when the client intends to seek professional advice from the lawyer. In this case once Lou and Sally meet for their appointment a lawyer-client relationship has been created because Sally has arrived in response to Lou's call that offered to represent her.

Telephone Call To Sally

Breach of Duty of Candor to the Public and Dignity of the Profession

A lawyer owes a duty of Candor to the Public and a duty to act in a way that does not bring his profession into disrepute. These duties may be violated by in person solicitations for profit.

In Person Solicitation

The [C]onstitution guarantees the right to free speech. However, the Supreme [C]ourt has ruled that this right is limited in the context of commercial speech. Specifically, they have ruled that the [F]irst [A]mendment does not protect false, misleading or inherently deceptive speech. One category of inherently deceptive speech is live contact by a lawyer of a prospective client for profit. Therefore state bar associations can constituti[onally] regulate this conduct.

Under the Model Rules a lawyer is prohibited from engaging in in person, live electronic or telephone contact, for profit, with a person that is not a lawyer or with whom the lawyer has no preexisting personal, legal, or family relationship.

Here Lou telephone[d] Sally[,] which qualifies as a live telephone contact. Furthermore, he offered to represent her in her action to dissolve her marriage for which he was planning on charging her a fee and make [sic] a profit as later evidence[d] by their fee agreement. Finally, Sally was not a lawyer and Lou had no preexisting personal, legal, or family relationship with Sally. Although Lou was asked to contact Sally by her brother

Frank, who was Lou's friend, this contact was not sufficient to qualify as a preexisting personal, legal or family relationship. In fact up until the time of the phone call Lou had no relationship with Sally and she had no idea who he was.

Therefore, by engaging in this live telephone contact, for profit solicitation Lou violated his duty of candor to the public and the duty he owes to the dignity of the legal profession.

What Lou should have done is tell Frank to have Sally call him to ask for representation. In that case Lou would not have initiated the contact and would not have violated any ethical duties.

Fee

Breach of Fiduciary Duty to Client for an Improper Fee

A lawyer owes a fiduciary duty to his client to charge a proper fee that conforms to all the requirements laid down by the ethical rules.

Fees Generally

Under both the California RPCs and the ABA Model Rules a fee must be reasonable. Reasonableness is determined by factors such as the time, skill, and expertise required by the lawyer, the difficulty of the issues, similar fees charged for similar work in that locality, and so forth. Here the fee is for 50% of any assets awarded to Sally. Sally had told Lou that she had no money but her and her husband had \$1,000,000 worth of art. This would mean that Lou's fee was at least \$250,000 assuming Sally had no other assets. However, it is likely that people with such a large amount of art also have other expensive assets such as cars and houses. Therefore, Lou's fee is likely to be greatly in excess of \$250,000. Regardless a contingency fee of 50% is usually not a reasonable fee given that most contingency fees are 33% or less. Therefore, Lou's overall fee is unreasonable and violates the ABA Model Rules and the California RPCs.

A fee should be in writing under the Model Rules and must be written under the California RPCs unless it is for less than \$1000, for an existing client in a routine matter, exigent circumstances exist, it is waived, or it is for a corporation. This fee was in writing; thus in that regard it complied with the Model Rules and the California RPCs.

Therefore, because the fee is unreasonable it is an ethical violation. Lou should have charged a fee that was less than or around 33% or a fee that was charged for similar work in such a locality in order to have a reasonable fee.

Contingency Fee

A contingency fee is one that is a percentage awarded to the lawyer if and when the client prevails. A contingency fee must be in writing, must otherwise be reasonable, must

discuss how work not covered by the contingency fee will be paid, and must provide a formula for how the contingency fee was determined. Here the fee was in writing. However, the fee may not have been reasonable as stated above.

Furthermore, under the Model Rules a contingency fee may not be taken in a domestic relations matter. However, under the California RPCs a contingency fee may be used in a domestic relations matter as long as it does not incentivize [sic] divorce. Therefore, if Lou is in a state that applies the Model Rules this contingency fee is an ethical violation because it involves a domestic relations matter of a dissolution. However, if Lou is in California his contingency fee is likely not an ethical violation because he made the fee with Sally after she had decided to dissolve her marriage and thus did not incentivize [sic] her decision to seek a divorce.

Lou should not have charged a contingency fee if he was in a Model Rules Jurisdiction but rather should have found some other way for Sally to pay her fee, perhaps by asking Frank to loan her the money necessary.

Breach of Duty of Loyalty to the Client

A lawyer owes a duty of loyalty to their client. The lawyer must act with the utmost good faith and in a way she reasonably believes is in the best interests of her client[,] having no other considerations in mind. If the lawyer becomes conflicted and that conflict materially limits the representation the lawyer may continue the representation only if he informs the client in writing of the conflict, receives written consent that a reasonable lawyer would advise their client to give, and he reasonably believes that he can continue the representation without it being materially limited.

Stake in Subject Matter of Litigation

Under the Model Rules a lawyer breaches their duty of loyalty to the client by taking a stake in the subject matter of the litigation. However, one exception to this is contingency fees in civil cases. Here Lou has taken an interest in the subject matter of the litigation because his fee is based on the amount and kind of assets he recovers for Sally in her divorce proceedings. However, this is clearly a contingency fee as it depends on assets actually being awarded to Sally in the divorce, thus it is contingent on Lou's success. Therefore, it does not breach Lou's duty of loyalty. However, because as stated above it is a contingency fee in a divorce proceeding it may not be a valid contingency fee if Lou is in a Model Rules jurisdiction. In such a jurisdiction the court may consider it an interest in the litigation rather than a contingency fee and therefore an ethical violation.

Therefore, the fee agreement breaches Lou's fiduciary duty to his client Sally and possibly his duty of loyalty to her as well.

Consensual [sic] Sexual Relations
Breach of Duty of Loyalty to the Client

The duty of loyalty that a lawyer owes a client is laid out above.

Model Rules

Under the Model Rules a lawyer breaches the duty of loyalty by entering into a consensual sexual relationship with the client, regardless of its effect on the representation. However, the Model rules do allow preexisting consensual relationships to continue as long as they do not materially limit the lawyer's ability to represent the client. Here Lou and Sally's relationship began after the[y] entered into the lawyer[-]client relationship. Therefore, under the Model Rules Lou breached his duty of loyalty to Sally by entering the relationship with her.

Lou should have never entered consensual sexual relations with Sally nor even asked her to go out with him. If Lou had really wanted to date Sally he should have asked her to consent to his withdrawal as her lawyer and then started to date her.

California RPCs

Under the California RPCs a lawyer may enter a non preexisting consensual [sic] sexual relationship with a client without breaching the duty of loyalty as long as he reasonably believes the representation of the client will not be materially and adversely affected, the relationship is not in payment of any of the client's obligations to the lawyer, and the relationship is not entered into by the client because of duress or undue influence. Here there appears to be no evidence that the relationship was in part payment of the fee because the written fee agreement predated the relationship and was for a large amount of money[;] additionally there is no evidence of duress or undue influence.

However, there is evidence that the relationship materially and adversely affect[ed] the representation. Lou later received a call from Sally's husband[']s lawyer and turned it down and refused to communicate it to Sally because it was ridiculously low and he did not want to insult her. His motive in not wanting to insult her may have been do [sic] to their personal relationship. Furthermore, his failure to communicate the offer to her was a breach of his duty of care that he owed to Sally as will be discussed below. If his relationship was causally related to his breaches of duty of care then certainly the representation was materially limited by the sexual relationship. This is further reinforced by the fact that Sally learned of the offer and though[t] it was a good offer. Because the relationship was materially limiting the representation it violated the California RPCs.

Lou should never have entered the relationship with Sally and certainly should have withdrawn after his feelings for her began to limit his representation of her. Lou should certainly have received Sally's informed written consent as to the continued representation, however, once he rejected the settlem[e]nt offer it appears that the representation was

materially limited and he could not reasonably continue the representation. Therefore, at that point he should have withdrawn.

Failure to Communicate the Settlement Offer and Rejection Thereof **Breach of Duty of Care Owed to the Client**

A lawyer owes their client a duty of care. This duty requires that the lawyer act with the skill, knowledge, thoroughness, and preparedness reasonably necessary to effectively carry out the representation. If Lou rejected the offer and it was a good offer then he may have violated the duty of care because a reasonable lawyer would at least entertain a decent offer and communicate it to their client. We do not know anything about the terms of the offer but we do know that his client Sally believed that it was a good offer. Because of this and because of his failure to communicate the offer to Sally, as discussed below, Lou violated his duty of care.

A Lawyer's duty of care includes a duty to communicate with the client. The duty to communicate requires that the lawyer keep the client reasonably informed about the representation and respond to the client's reasonable requests for information. Here Lou failed to communicate the settlement offer to Sally as communicated by Sally's husband's Lawyer. Failing to inform a client of a settlement offer is a failure to keep them reasonably informed about the representation because a decision whether to settle or not is one that is solely in the purview of the client and the client cannot make that decision unless they are informed of that offer. Furthermore, Lou knows that Sally's husband's lawyers [sic] is ethically prohibited from communicating with Sally because she is a party adverse in the matter whom the lawyer knows is represented. Thus Lou must have known that there was virtually no way for Sally to find out about the offer. Therefore, Lou violated his duty to communicate and thus his duty of care.

A Lawyer's duty of care also includes a duty of diligence. That is[,] the lawyer must diligen[t]ly and zealously pursue the interests of his client. Here by failing to communicate the settl[e]ment offer and thus possibly losing the ability to settle, Lou has violated the duty of diligence because a diligent lawyer would at least communicate the offer to his client and discuss it with them.

Scope of Representation

The objectives of the representation are decided by the client subject to the lawyer's advice on the ethical rules and other law. The means of the representation are decided by the lawyer. The Advisory notes to the Model Rules state that decisions regarding the settlement of a civil case are considered to be objectives. Therefore, the decision to settle or not was one that should have been made by Sally rather than by Lou and Lou violated his ethical duty by not communicat[e]nt to her and by deciding on his own that the offer was ridiculously low and an insult.

If Lou felt that the settl[e]ment was inadvisable he should have counseled Sally on that fact rather than withholding information. If he thoug[t] such action was repugnant he may have sought permissive withdrawal to end the representation. However, he did none of these things and therefore violated the Model Rules and the California RPCs.