



California Bar Examination

Essay Questions and Selected Answers

July 2023



ESSAY QUESTIONS AND SELECTED ANSWERS

July 2023

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2023 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered “model” or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Business Associations
2.	Torts
3.	Professional Responsibility
4.	Criminal Law
5.	Remedies

ESSAY QUESTION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

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

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

QUESTION 1

Amy, Bob and Carl are partners in the ABC law firm, which operates under a general partnership agreement. ABC provides all firm attorneys with cell phones to facilitate prompt attorney-client communications. ABC has a policy that all firm attorneys must carry their work-provided cells phones with them at all times and that all client emails must be responded to immediately, at least with a personal acknowledgment of receipt.

Sam, an attorney well known for his many highly publicized trials, often works closely with ABC, but is not a party to the written ABC partnership agreement. ABC believes that Sam's presence raises the profile and prestige of ABC.

Sam leases an office in the suite of offices used by ABC, for which ABC charges Sam \$3,000 per month. The ABC receptionist greets all clients of ABC and Sam. Sam uses the ABC firm name and telephone number on his letterhead. Sam bills his clients directly for his services. Sam also receives 10% of the annual profits of ABC in recognition of his value to the firm.

After work one day, Amy was driving in heavy traffic to attend a baseball game when she received an urgent email from an ABC client. While briefly stopped in traffic, Amy attempted to answer the email on her work-provided cell phone. Due to this distraction, Amy negligently caused a car accident that was the actual and proximate cause of serious injuries to the other driver, Priya.

Priya sued Amy, ABC, Bob, Carl, and Sam for damages arising from the car accident.

Which of these defendants might reasonably be found liable for damages arising from Priya's car accident and why? Discuss.

QUESTION 1: SELECTED ANSWER A

1. Amy's liability to Priya

Amy is clearly personally liable to Priya for the injuries Priya suffered. To be liable under negligence, four elements must be met: (1) the defendant must have owed the plaintiff a duty; (2) the duty must have been breached; and (3) the breach must have been the actual and proximate cause of (4) the plaintiff's injuries (i.e., damages are required). Here, it is clear that all four elements are met. Therefore, Amy is liable to Priya.

As we are told, Amy "negligently" caused a car accident that was the actual and proximate cause of serious injuries to Priya. In other words, we were told that three of the four negligence elements are met here: (1) breach of duty (given that Amy "negligently" caused the crash); (2) causation (both actual and proximate); and (3) damages (we are told that Priya suffered serious injuries) Therefore, the only question here is whether Amy owed a duty to Priya. All persons owe a duty to all foreseeable plaintiffs; i.e., to those within the zone of danger created by the defendant's actions. Here, in operating a vehicle, Amy owed a duty to all the other drivers on the road (at least those within the "zone of danger" created by Amy's actions, i.e., those within her immediate vicinity). Given that Amy collided with Priya, it is clear that Priya was within this zone of danger. Thus, all four negligence elements (duty, breach, causation, damages) are present here, and Amy is therefore liable to Priya.

Note that Amy's status as a partner at ABC law firm will not insulate her from liability. For one, general partnerships do not provide their partners with limited liability (as will be addressed in greater depth below). Second, even with business entities that provide limited liability, member/partners remain liable for their own personal actions (and here, Amy is personally liable). Third, the policy requiring immediate response will not serve to protect Amy from liability (i.e., there is no relevant negligence defense that this policy might trigger). Lastly, because we are provided with no facts indicating that Priya was negligent herself, Amy will likely not have any valid defenses (such as comparative or contributory negligence).

In short, Priya is likely to prevail against Amy.

2. ABC's liability

Partnerships are distinct legal entities from their partners. Nonetheless, a partnership will still be liable for the tortious conduct of its partners when the partners were acting in the ordinary course of the partnership business. Partners are the agents of the partnership. When determining whether a partner was acting in the course of the partnership business, we look to the following factors: (1) whether the partner was "on the job" (i.e., acting within the spatial and temporal bounds of their work); (2) whether they were performing work of the kind they perform for the partnership; and (3) whether the partner was acting to further the partnership business. For the reasons outlined below, ABC is liable to Priya.

Here, Amy negligently caused a crash while attempting to answer an email from an ABC client. Though ABC may try to argue that Amy was acting outside the scope of the partnership business, that is simply not true. As we were told, ABC provides all its attorneys with cell phones to facilitate "prompt" attorney-client communications. Moreover, ABC has a policy requiring all firm attorneys to carry their work-provided phones with them at all times and that all client emails must be responded to "immediately." Therefore, in attempting to respond to an "urgent email" from a firm client while sitting in traffic (i.e., immediately, as per firm policy), Amy was acting within the ordinary course of the partnership business (she was performing the kind of work she performs for the partnership (dealing with client matters) and was acting to further the partnership business (by responding to a firm client). Furthermore, given the aforementioned policy, ABC cannot even claim that it is not liable because Amy should not have been responding to emails while driving. Based on the information we are provided with, it appears as though the policy's mandate was absolute: attorneys must respond "immediately," seemingly irrespective of the circumstances. Perhaps Amy exceeded the scope of the policy when she attempted to "answer" the email instead of simply sending a personal acknowledgement of receipt (as was permitted by the policy), but I do not believe this will be a winning argument.

Moreover, it is true that Amy was responding to the email *after work hours on her way to a baseball game*. Thus, ABC may try to argue that Amy was not acting in the ordinary course of the partnership business at the time of the accident, as she was acting

outside the spatial/temporal bounds of her work as a partner at ABC. However, as was mentioned above, the policy at issue here appears to be absolute in its mandate: firm attorneys must carry their work-provided phones with them at "all times" and respond to "all client emails ... immediately" Thus, it appears as though there are no spatial or temporal bounds when it comes to working for ABC law firm; a firm attorney (such as Amy) can be working within the bounds of their position at any hour of the day at any location.

Therefore, ABC will likely be found liable for the damages Priya suffered.

3. Bob and Carl's liability

As we were told, Bob and Carl are Amy's partners in the ABC law firm. Moreover, we are told that ABC is a general partnership, a business entity that does *not* provide its partners with limited liability. In other words, general partners are personally liable for partnership obligations. Partners are jointly and severally liable for partnership obligations; however, they are only liable as guarantors. Therefore, a plaintiff with a claim against the partnership must first exhaust partnership assets before she can recover from the partners themselves. Moreover, partners must be personally served before a plaintiff can recover against them. A partner who has to pay a plaintiff in her personal capacity has the right to indemnification from the partnership and/or contribution from her fellow co-partners (in the event that the partnership cannot indemnify her).

As was argued above, ABC is liable for Amy's actions at issue here. Therefore, Bob and Carl (and, of note, Amy) - as partners in a general partnership - are personally liable for the obligations of ABC law firm. Therefore, Priya may be able to recover from Bob and Carl (and Amy) in their personal capacity, assuming that ABC's assets are insufficient to cover its liability to Priya. If ABC's assets are insufficient, Priya can recover from Bob, Carl, and Amy personally (assuming she properly serves them). Then, if any individual party pays more than their fair share, they can seek indemnification from the firm or contribution from their fellow co-partners.

Therefore, because of their status as general partners in a general partnership, Bob and Carl may be held personally liable to Priya.

4. Sam's liability

Sam's liability turns on whether Sam can be properly classified as a partner in the ABC law firm. Though Sam is not a party to the written ABC partnership agreement, he may nevertheless be a partner. A general partnership is created whenever two or more persons carry on as co-owners to a business for profit. The partners need not have a subjective intent to form a partnership agreement, nor does any agreement have to be in writing (except where required under the Statute of Frauds). Rather, the relevant intent here is as follows: an intent to carry on as co-owners a business for profit. Where the parties' intent is unclear, the court looks to the following circumstances: (1) whether

profits are shared (profit sharing creates a rebuttable presumption of a partnership; (2) whether the parties have the right to participate in the management of the business; and (3) whether losses are split. For the reasons outlined below, Sam is properly classified as a partner (and, for the reasons outlined above, is therefore personally liable to Priya as a guarantor).

Here, it appears clear enough that none of the parties subjectively intended for Sam to be a partner in ABC (otherwise, why not add him to the partnership agreement?). However, that fact alone is not dispositive. As we are told, Sam receives 10% of the annual profits of ABC in "recognition of his value to the firm." Sam's sharing in the profits creates a rebuttable presumption that Sam is, in fact, a partner in the ABC law firm. The rest of the facts provided only serve to further boost this presumption (instead of rebutting it). First, we are told that ABC believes that "Sam's presence raises" its profile and prestige; therefore, even ABC acknowledges that some relationship exists between Sam and ABC (apart from the tenant-landlord relationship that exists by virtue of the fact that Sam leases an office in ABC's office space). Second, we are told that an ABC receptionist greets all clients of both ABC and Sam, and that Sam uses the ABC firm name and telephone number of his letterhead. Third, we are told that Sam leases an office *within* ABC's suite of offices (i.e., he is working among ABC's firm attorneys). Though Sam bills his clients directly and pays rent to ABC for his office space - perhaps indicating an intent to carry on his own separate business - the evidence discussed above (the joint receptionist, the use of the firm name and phone number on the letterhead, *the receipt of 10% of ABC's annual profits*, ABC's belief that

Sam's presence raises its profile) strongly weighs in favor of finding that Sam is, in fact, a partner at ABC.

Therefore, because Sam is a partner at ABC, he is personally liable to Priya for the same reasons that Bob and Carl are liable - as partners in a general partnership, they are personally (and jointly and severally liable) for all partnership obligations. Thus, because ABC is liable for Amy's actions, *all* of its partners are also liable.

5. Conclusion

In short, everyone here is liable: Amy is personally liable as the tortfeasor (and may also be liable as a partner); ABC is liable for the actions of its partner Amy; Bob and Carl are personally liable as Amy's co-partners; and lastly, Sam is liable as a partner of ABC as well.

QUESTION 1: SELECTED ANSWER B

Negligence by Amy

The issue is whether Amy may be found liable for negligence for the damages to Priya arising from the car accident to Priya. Negligence is a tort with four elements. The plaintiff must show that 1) the defendant had a duty to people such as herself (eg, that she was a foreseeable plaintiff), 2) that the defendant breached this duty by violating the standard of care that would be shown by a reasonably prudent person under the circumstances, 3) that this breach was the actual and proximate cause of 4) an injury. Here, Amy was driving in heavy traffic. When she briefly stopped, she attempted to answer an email on her phone and crashed into Priya. Drivers generally have a duty to other drivers on the road, and in heavy traffic, it is foreseeable that distraction or inadvertence would cause a car crash. Amy therefore had a duty to Priya as a fellow driver that she breached by negligently checking her phone. We know from the facts that this breach was the proximate and actual cause of serious injury to Priya, satisfying the remaining elements of negligence. Therefore, Amy is directly liable for the damage to Priya and Priya may recover money damages from her.

Vicarious liability of ABC

Partnerships are a type of business entity formed whenever two or more people carry on as co-owners of a business for profit. No formal paperwork must be filed to create a

partnership; a general partnership is formed whenever the criteria are met, even if the co-owners did not intend to form a partnership.

Here, ABC is a law firm operating under a general partnership agreement, so it is clearly a partnership.

The issue is whether the partnership entity is vicariously liable for Amy's tortious action. To answer this, we must determine whether Amy was acting as an agent of the partnership when she committed the tort.

A principal may be liable for the actions of its agent when the agent is acting in the scope of their agency or employment (*respondeat superior*). Partners are agents of their partnership and in the law firm context, also employees. If a partner commits a tort while acting in the scope of their employment, the partnership will be held liable. The scope of employment is determined by looking at whether the employee was doing the kind of thing she was employed to do at the time of the tort. An employee who takes a brief break or deviation from work will still be held to be within the scope of employment (known as a *detour*), while one who entirely abandons their employer's purpose to follow their own will be held outside the scope of employment (*a frolic*).

Here, Amy was driving to attend a baseball game. Since there is no indication that Amy was attending this game for firm-related reasons, the partnership will try to argue that she was acting outside the scope of her employment when the accident occurred or

engaged in a frolic. However, this position will likely fail based on other facts. ABC provides all its attorneys with cell phones in order to facilitate prompt attorney-client communications. ABC also has a policy that all firm attorneys must carry these work-provided cell phones with them at all times and respond to client emails immediately. When Amy answered an email while in heavy traffic, she was complying with this strict policy of the firm and doing firm work, placing her actions within the scope of her employment. While the firm may argue that it never required its attorneys to answer emails in unsafe situations, it is rarely the case that an employee who commits a tort was instructed to do so in clear terms--this will not save the partnership from liability. A firm that demands its employees be "on" at all times cannot then complain that its employees were doing firm business in an usual situation.

The partnership is vicariously liable for Amy's tort, meaning that Priya may collect damages from the partnership assets. (Note that the partnership's vicarious liability does not absolve Amy of her personal liability for the tort.)

Direct liability of ABC

An employer may be held directly liable for the actions of its employees based on its negligent hiring, training, or supervision of those employees. The standard, as in all negligence, is whether the hiring, training, or supervision was not reasonable under the circumstances, breaching a duty to a foreseeable plaintiff (and causing injury).

While there is no indication that anything in Amy's background made the partnership negligent in hiring her as an attorney, Priya could try to argue that ABC negligently trained and supervised Amy. Her argument would center on the requirements that ABC attorneys carry their phones at all times and must answer messages immediately. Priya could argue that this creates a risk of accidents like the one that happened to her and that a reasonable employer under the circumstances would have trained its employee to only check their phones in safe circumstances. However, this argument is somewhat far-fetched, since something like this generally goes without saying. A claim of direct liability by ABC would probably fail.

Personal liability of the ABC Partners, Bob and Carl

Now that we know the partnership itself is vicariously liable for Amy's conduct, we must ask whether Amy's partners are liable for her conduct in their personal capacities.

Unlike other business forms, general partnerships do not provide limited liability to the partners-.Partners are jointly and severally liable for the liabilities of the partnership, even if the partner was not at all involved in the wrongdoing, so long as the partner was individually sued. However, individual partner assets will not be reached until partnership assets are exhausted.

In this case, ABC is a general partnership and Bob and Carl are partners, sued in their personal capacity by Priya. Priya will be able to recover damages from them, but only if the partnership assets are unable to cover her damages.

Partnership liability of Sam

Understanding that Bob and Carl are liable as partners, we next consider whether Sam will be liable as a partner of the ABC law firm. As discussed above, a person may be a member of a partnership without explicitly intending to be one or being part of a formal partnership agreement. The main factor considered in determining who is a partner is whether profits (as opposed to gross earnings) are shared with the individual. It is not a requirement of a partnership that profits be shared equally. Other factors are also relevant, including whether the partnership holds the individual out as a partner, whether they share facilities and employees, whether they share clients, and how they interact with those clients. The determination will be made looking at all the circumstances.

Here, on the facts, Sam is likely to be considered a partner of the ABC partnership. First and most importantly, Sam shares profits with ABC--he receives 10% of their annual profit. Sam might argue that if he were really a partner of a four-person partnership, he would receive 25% profits, an equal share. But while equal sharing is a default rule, partners may modify it.

The partnership appears to hold Sam out as a partner. He has a suite within ABC's offices and the same ABC receptionist greets clients of both Sam and ABC. He uses the ABC firm name and telephone number on his letterhead. ABC believes that Sam's

presence raises the profile and prestige of ABC, suggesting that this appearance that Sam is associated with ABC is intentional and intended to profit ABC (which in turn profits Sam to a tune of 10% a year.)

Sam does have a few countervailing facts on his side. He can point to the fact that ABC charges him rent of \$3,000 per month for his office space, an act that seems inconsistent with him being a partner, since the other partners do not pay rent. He may point out that he bills his clients directly and does not share his own profits with ABC. These facts are probably not enough to tip the balance in Sam's favor, however, considering how closely associated Sam and ABC are. At the end of the day, Sam is unlikely to be able to reap the benefits of association with the partnership without paying the cost of liability for its actions.

Therefore, Sam will be treated as a partner of ABC and also be held liable for Amy's tort. As with Bob and Carl, Sam's assets may only be reached once the partnership assets are exhausted.

To sum up: Priya may recover damages from Amy and the partnership, and if the partnership's assets are not sufficient, she may recover from Bob, Carl, and Sam as partners.

QUESTION 2

DishWay developed a new dishwasher powder that it named UltraKlean. The company advertised widely that UltraKlean was “a revolutionary, safe product with the most powerful cleaning agent ever.” This advertisement accurately represented that UltraKlean contained a new cleaning agent that made the product more effective than other dishwasher powders.

DishWay knew the cleaning agent could cause severe stomach pain if ingested, but this is true of all detergent products. What DishWay did not know was that a potentially dangerous amount of UltraKlean residue tended to remain on aluminum cookware after a wash cycle. It is not unusual for dishwasher powders to leave a harmless amount of residue on different surfaces. During product development, DishWay tested UltraKlean on some surfaces but not on aluminum because there was no indication that it would work differently on aluminum than on other surfaces. The residue was not detectable to the eye, and there was no flaw in DishWay’s manufacturing process. DishWay’s instructions on the product only stated that the product should not be ingested.

Paul purchased a box of UltraKlean from DishWay. The first time he used it was to wash some aluminum pots. The next day, Paul used several of those pots to prepare a meal. Shortly after finishing the meal, Paul experienced severe stomach pain, which required him to be hospitalized. Laboratory test results revealed the cleaning agent in UltraKlean caused Paul’s stomach pain.

What products liability claims may Paul bring against DishWay? Discuss.

QUESTION 2: SELECTED ANSWER A

Paul v. Dishway

Products Liability

A plaintiff may bring a products liability claim under five different claims: (1) strict products liability, (2) negligent products liability, (3) warranty, (4) misrepresentation, and (5) intent.

Strict products liability

To recover for strict products liability, a plaintiff must show: (1) Defendant was a commercial supplier, (2) product was defective, (3) actual cause, (4) proximate cause, and (5) damages.

Commercial Supplier

A defendant is a commercial supplier where he puts a product in the stream of commerce without substantial alteration.

Here, DishWay is the developer of UltraKlean. Dishway puts UltraKlean in commerce because they make it available for consumers like Paul to purchase a box. There is no alteration as DishWay sells UltraKlean directly after its development to consumers.

Thus, DishWay is a commercial supplier.

Product was Defective

A plaintiff can show that a product was defective under three theories: (1) manufacturing defect,

(2) design defect, and (3) failure to warn.

Manufacturing Defect

A plaintiff can show that there was a manufacturing defect where the product deviates from the intended design of the product, thus subjecting users to harm.

Here, there are no facts to suggest that the box of UltraKlean purchased by Paul deviated from the intended design of UltraKlean. It was not unusual for dishwasher powders to leave residue on different surfaces. DishWay tested UltraKlean on some surfaces, but failed to test on aluminum surfaces and did not design UltraKlean to specifically not leave residue on aluminum pots. Additionally, there was no flaw in DishWay's manufacturing process.

Thus, it is unlikely that Paul would succeed in showing a manufacturing defect in UltraKlean.

Design Defect

A design defect can be shown where the product has a common feature with other products within the same line of product that poses a risk of harm to consumers. Under the consumer expectation test, a design defect can be shown where a product fails to conform to the safety expectations of an ordinary consumer. Under the risk-utility test, a design defect can be shown where a product's utility is outweighed by a risk of harm.

Using the consumer expectation test, an ordinary consumer would expect that he could use a dishwasher powder to wash his aluminum pots without ingesting a dangerous amount of residue

that would cause physical injury. Here, Paul used UltraKlean to wash some aluminum pots. After use, Paul used the pots to prepare a meal and experienced stomach pain that required him to be hospitalized. Thus, Paul could argue that his expectation as an ordinary consumer was not met. DishWay can argue, however, that it is true of all detergent products that severe stomach pain can occur after use. DishWay can argue that it is expected that every once in a while, a user of dishwasher powder will experience pain after use. However, Paul can argue that he suffered pain after the first use of UltraKlean, creating an inference that UltraKlean subjects users to stomach pain more often than average rate of all detergent products.

Using the risk-utility test, the risks of product use must be weighed against the product's utility. Here, the risk is that using UltraKlean to wash pots will leave residue that can cause internal stomach pain when using the pots later. The utility of the product is the ability to clean more effectively than other dishwasher powders in the market. Paul can argue that the risk of pain that a user subjects himself to when using UltraKlean is outweighed by UltraKlean's utility. Though having the best cleaning agent is beneficial, it is not necessary to have such effective cleaning power if it subjects users to pain while other dishwasher powders do not.

Thus, it is likely that Paul can show design defect under the consumer expectation test and risk-utility test.

Failure to Warn

Under failure to warn, a plaintiff must show that the product subjected users to harm, such harm was not obvious to users, and the defendant knew of such risk of harm.

Here, as mentioned above, UltraKlean subjected Paul to harm after use. The harm was not obvious to Paul because UltraKlean residue is not detectable to the eye and there were no instructions on the box to use a specified amount per wash. The instructions only said that the product should not be ingested. However, the facts state that Dishway did not know that a potentially dangerous amount of UltraKlean residue tended to remain on aluminum cookware after a wash cycle. Paul can argue, however, that as a developer of dishwasher powders, DishWay should have known of the risk of harm because Dishway knew that indeed residue is left on aluminum cookware, that this substance can be dangerous if ingested, and their instructions mention that the product should not be ingested.

Though it's a close call, Paul may be able to argue that UltraKlean was defective because it failed to warn.

Actual Cause

Plaintiff must show that but for the use of defendant's product, plaintiff would not have been harmed.

Here, presumably Paul was healthy before using UltraKlean. After using UltraKlean to clean some aluminum pots, Paul used the pots to cook a meal and subsequently suffered severe stomach pain that required him to be hospitalized. If Paul did not use UltraKlean to clean the pots, he would not have been harmed after using the pots. The laboratory test results specifically revealed the cleaning agent in UltraKlean caused Paul's stomach pain.

Thus, Paul can show actual cause.

Proximate Cause

Plaintiff must show that his injury was a foreseeable result of from the product use. A supervening cause is an unforeseeable event that cuts off defendant's liability after the occurrence of the event.

Here, Paul will argue that it was foreseeable that he would suffer harm after using Dishway's UltraKlean dishwasher powder that left dangerous residue. However, DishWay may argue that Paul did not use the product in a foreseeable manner. DishWay may argue that Paul failed to use UltraKlean with a sufficient amount of water or with water for a sufficient amount of time. If Paul did so, Paul would have consumed the powder more directly, obviously subjecting him to harm. However, no such facts are explicitly stated.

Thus, it is likely that Paul can show proximate cause.

Damages

A plaintiff may recover damages to compensate his harm. Compensatory damages must be causal, foreseeable, certain, and unavoidable.

Here, Paul suffered severe stomach pain that caused him to be hospitalized.

Thus, Paul can recover for hospital fees, medication to alleviate pain and contamination in his stomach. However, Paul cannot recover from economic harm.

Conclusion

Thus, Paul is likely to recover for strict products liability as he is able to show that DishWay is a commercial supplier, UltraKlean is defective, actual cause, proximate cause, and damages.

Negligent Products Liability

To recover for negligent products liability, a plaintiff must show (1) a duty was owed, (2) breach of the duty, (3) actual cause, (4) proximate cause, and (5) damages.

Duty

A plaintiff must show that defendant owed a duty to the plaintiff. Under the majority rule, a duty is owed to all plaintiffs within the foreseeable zone of danger. Under the minority rule, a duty is owed to all plaintiffs.

Here, a duty was owed because DishWay developed a dishwasher powder that it then sold in boxes to consumers. It is foreseeable that users of DishWay's product can be harmed from the use of the product.

Therefore, under both the majority and minority rule, a duty is owed by DishWay to Paul.

Breach

A plaintiff must show that defendant failed to conform his conduct to a specific standard of care.

A developer of a product owes a duty of care to act as a reasonably prudent developer under

like circumstances.

Here Dishway did not know of the potentially dangerous amount of UltraKlean residue that tended to remain on aluminum cookware after a wash cycle. However, Paul will argue that Dishway should have known of such risks. DishWay should've conducted tests to determine whether dangerous residue was a possibility. Though DishWay tested UltraKlean on some surfaces, they failed to test on aluminum because they believed that UltraKlean wouldn't work differently on aluminum.

Thus, Paul can likely show that DishWay breached its duty by failing to specifically test UltraKlean's performance on aluminum surfaces.

Actual Cause

See above in Actual Cause section for strict products liability.

Proximate Cause

See above in Proximate Cause section for strict products liability.

Damages

See above in Damages section for strict products liability.

Conclusion

Thus, it is likely that Paul can recover for negligent products liability as he can show that a duty was owed, DishWay breached such duty, actual cause, proximate cause, and damages.

Warranty

A plaintiff may recover for warranty under express warranty or implied warranty.

Express Warranty

A plaintiff may recover when defendant makes explicit statements concerning the product and the product fails to conform to those standards.

Here, UltraKlean expressly stated that UltraKlean was a "revolutionary, safe product with the most powerful cleaning agent ever." DishWay also represented that UltraKlean contained an agent that made the product more effective than other dishwasher powders. Paul will argue that UltraKlean failed to be a safe product. Upon first use of the product to clean his aluminum pots, Paul suffered severe stomach pains. Paul may argue that he used other dishwasher powders from other companies in the past and did not suffer such harm. The facts do not indicate whether UltraKlean was more effective at cleaning than other dishwasher powders.

Thus, Paul can likely recover for express warranty based on DishWay's express warranty that UltraKlean was a revolutionary, safe product.

Implied Warranty

A warranty is implied in the sale of goods that the goods conform to the ordinary expectations of

ordinary consumers.

Here, a consumer would expect that he could use UltraKlean to clean cookware without suffering stomach pain after using the cleaned cookware. Paul's expectation as a consumer was not met as he suffered harm from the use of UltraKlean.

Thus, Paul could recover under implied warranty.

Misrepresentation

To recover for misrepresentation, a plaintiff must show that a (1) false statement of past or existing fact was made by defendant, (2) the statement was made with an intention to induce reliance on the statement, and (3) plaintiff did in fact rely on the statement.

False Statement

Here, a false statement by DishWay was made when it represented that its product, UltraKlean, was a revolutionary, safe product.

Intention to Induce Reliance

Here, it can be presumed that DishWay intended for consumers to see its advertisement, rely on the representations, and thus purchase more UltraKlean.

Statement Induced Reliance

Paul may have seen the advertisement and relied on the representations when buying UltraKlean.

Thus, if Paul did see DishWay's advertisement and relied on its statements when buying UltraKlean, Paul can recover for misrepresentation.

Intent

A plaintiff may recover under an intent theory for products liability if the defendant intended for the product to cause harm.

Here, DishWay did not know of the potentially dangerous amount of UltraKlean residue that remained on aluminum cookware.

Thus, Paul is unlikely to recover under the intent theory.

Overall Conclusion

Paul can likely recover under strict products liability, negligent products liability, express warranty, implied warranty, and misrepresentation.

QUESTION 2: SELECTED ANSWER B

Products Liability:

A plaintiff seeking to go after and sue a commercial supplier/manufacturer of a product can raise different claims such as 1) strict products claim 2) negligent products claim and 3) breach of warranty claim.

Strict Products Claim:

A commercial supplier can be held strictly liable for defective products that cause damage to a foreseeable user.

Commercial Supplier:

A commercial supplier is one who puts a product in the stream of commerce. Here, DishWay is the company who developed the new dishwasher powder named UltraKlean. The company not only advertised this product widely, but sold it in stores as Paul(P) purchased a box of it from Dishway. Thus, Dishway is a commercial supplier for the purpose of bringing a strict products liability claim and thus can be held strictly liable if all the other elements are met.

Defective Product:

Plaintiff must prove that the product they purchased was defective. A product can be defective in three ways 1) manufacturing defect 2) design defect or 3) failure to warn.

Manufacturing Defect:

This occurs where a product, a single product, deviated from the intended way the product should have been manufactured per the specifications. Here, Dishway developed a new dishwasher powder and named it UltraKlean. Dishway was made as a cleaning agent and was advertised as a new cleaning agent that made the product more effective than other dishwasher products. Thus, Dishway manufactured this product as a whole as a cleaning agent to be used by consumers on different surfaces. The facts do not indicate that Dishway's product that was sold to P deviated from the specific intended manufacturing design, as it was produced like every other Ultraklean product sold. In fact, there was no flaw in Dishway's manufacturing process. The defect of Ultraklean seems to be toward the product as a whole and not the specific one sold to P.

Design Defect:

A design defect arises where the product itself, as a whole, was defective when it was designed and should not have been manufactured in that way. There are two tests the court will use to determine if there was a design defect 1) consumer expectation test and 2) risk utility test. Here, P will argue that there was a design defect in the product UltraKlean itself thus rendering the product defective.

Consumer Expectation Test:

Under the consumer expectation test, the product will be defective if it fails to meet ordinary consumer expectations of the product when used in its proper manner. However, even unforeseeable uses of the product still can render the product defective as it is foreseeable consumers may misuse the product in some fashion. Thus, under CET, the product must fail what an ordinary user would expect when using the product. Here, P purchased Ultraklean and

he used it to wash some aluminum pots. This product as a cleaning agent, can be and is foreseeable that a consumer would use it on pots, even those of aluminum material. Many pots are in fact made out of aluminum, thus Paul reasonably and foreseeably used the product as intended. Moreover, as a consumer, this product failed to meet reasonable expectations because P and other consumers would not expect to experience severe stomach pain from merely using a cleaning agent in its intended manner. Cleaning agents are meant to effectively clean the pots or kitchen utensils, so it is safe and clean enough to rinse off of. The product used to clean the pots should not be nor would it be reasonably expected for such products to be the factor that causes consumers to get sick. In fact, Dishway advertised that the product is new and more effective than other dishwasher powders. Thus, P as a reasonable consumer who used the product in its intended manner can argue that this product has a design defect because it fails the consumer expectation test because one should not get sick from a product advertised to be effective and clean when used in dishwasher.

Risk Utility Test:

Under this test, the courts will balance the risk of the harm of product and providing different designs and the costs of changing the design to the manufacturer. Here, there are many different alternatives Dishway could have implemented to ensure the safety of the product and reduced the likelihood of harm to consumers. For instance, Dishway knew the cleaning agent could cause severe stomach pain if ingested, but chucked it up to the fact that all detergent products can. Instead, Dishway should have tested the product on all types of foreseeable dishwasher products, such as all pots, pans, plates, made out of various different materials to ensure the safety of the product on all types. Each household has different types of pots, some are aluminum such as P. Given that Dishway knew the cleaning agent could cause severe pain, they should have tested their product on all types of pots before placing it in the stream of

commerce. Testing it on different surfaces would not have costed Dishway an exceptional amount nor would it take too much time to simply test their product on all common materials used in dishwashers that are prevalent in homes. Thus, P will argue Dishway failed the RUT because they did not test the product on all common types of surfaces used in homes and doing so would not cost the company too much money or time. When balancing the risk and utility of the product, merely taking more time during the product development stage to test the chemical on other known surfaces is not too much of a burden on the company and can save many consumers from physical injuries. Moreover, if Dishway did test the product on all surfaces, they could have found that the residue was on the surfaces and could have tested whether that amount could cause any harm. From there, they could have altered the exact chemicals in the cleaning agent powder to ensure if any residue amount was left, it would not harm a consumer. There are many alternative designs or means Dishway could have done to mitigate the risk of harm to consumers yet chose not to simply because they did not have an indication that it would work differently on aluminum nor was it detectable to the eye. Thus, P will be able to show that Dishway failed the RUT and their product was defective by design.

Failure to warn:

A manufacturer can also be held liable for a defective product based on the failure to warn theory. This is where a product does not have specific warnings placed on the product indicating certain harms that could result that are not of ordinary nature or that one would expect. Here, Dishway advertised their product as "new cleaning agent that made the product more effective than other dishwasher powders". The only warning was Dishway's instructions on the product that stated the product should not be ingested. P will argue that this warning was ineffective and incomplete. The warning does not indicate what would happen if someone ingests the product nor does it say the amount one would ingest that would cause pain. In fact, the warning does

not even state what type of harm would result from ingesting the product. Given that this product is placed in the dishwasher and used to clean pots/plates that people eat off of, this warning is inadequate because a consumer is bound to ingest part of the product given that it is used to clean kitchenware. Thus, Dishway had an ineffective warning and failed to fully warn consumers about the dangers of ingesting certain amounts of the product and the results that would incur if ingested.

Causation:

A manufacturer will be strictly liable for the defective product if the product is the cause of Plaintiff's (pf's) harm. Here, but for pf using Dishway's new cleaning agent he would not have suffered from severe stomach pain when ingested. Furthermore, Dishway in failing to ensure the product was designed safely and effectively, was the proximate cause of Pf's harm because Dishway's failure to ensure the product was safe before putting it in stores substantially led to P buying said product and suffering stomach pains. Moreover, after going to the hospital, the lab tests revealed that the cleaning agent in Ultraklean caused P's stomach pain. Thus, Dishway is strictly liable for P's harm as they were the cause of the harm.

Damages:

Pf must also show damages from the defective product. Here, Paul experienced severe stomach pain, which required him to be hospitalized. Thus, P suffered physical pain.

Therefore, P may be able to successfully bring a strict products liability claim against Dishway based on design defect and failure to warn.

Defenses:

Dishway may argue that P, as a consumer, assumed the risk that he could suffer from stomach pains. Dishway will point to the fact that it is commonly known and true that all detergent products can cause stomach pain if ingested. However, P will argue that he did not voluntarily and knowingly assume this risk. This risk was ambiguously stated in the instructions to not ingest but did not expressly state what the result would be. Moreover, P did not voluntarily assume this risk because Dishway did not even know of this risk because the residue was not detectable to the eye and they had no indication that it would work differently on aluminum. Thus, there is no possible way that P assumed this risk since it was not openly known to him when he purchased the product.

Negligent Product Liability:

A pf can bring a negligent product liability claim against a manufacturer. The elements needed to bring such a claim are 1) duty 2) breach 3) causation and 4) damages.

Duty:

A commercial supplier, like Dishway, has a duty to be a reasonably prudent manufacturer and supply a safe product for its intended consumers. Dishway owes this duty to any foreseeable consumer as well as bystanders. Here, Dishway had a duty to be a reasonably prudent dishwasher cleaning agent manufacturer and owed this standard of care to P, who is a foreseeable consumer as he bought the product at their store.

Breach:

A breach occurs when the manufacturer's actions fall below the applicable standard of care. Here, P will argue that Dishway breached their duty and was negligent in placing this product in

stream of commerce because they did not adequately test the product's safety. First, Dishway knew prior to placing the product in stores that the cleaning agent could cause severe stomach pain if ingested. Despite this knowledge, Dishway still did not test the product on all different surfaces used in a home. Dishway decided not to test on aluminum simply because they thought there was no indication that it would work differently. Dishway will argue that all cleaning agents could cause severe stomach pain if ingested and thus they did not breach this standard of care simply by not testing it on all products. However, P will argue that Dishway's conduct fell below the applicable standard of a cleaning agent manufacturer because as a manufacturer dealing with chemicals and cleaning agents, they had a duty to ensure the product was reasonably safe on all surfaces and had the duty to test the product. Just because they did not think or have any indication that other surfaces such as aluminum would be different, does not negate their duty. They had a duty as a reasonable product manufacturer to at least test the product on known surfaces used in kitchens before placing product in a stream of commerce.

Causation:

As discussed above, Dishway is the cause of P's harm.

Damages:

As discussed above, P suffered severe stomach pain which resulted in hospitalization.

Thus, P will be able to successfully bring a negligent products claim against Dishway.

Defenses:

Contributory Negligence/Comparative:

Under this, a pf can be barred from any recovery from a Defendant (def) if they were negligent themselves. Here, Dishway will argue that P was negligent as he did not read the warning that the product should not be ingested. However, this will likely fail as discussed above. P did not assume this risk in any manner as he did not know that stomach pain would result from using this product in its intended purpose. Thus, it is unlikely that P will be found negligent on his part at all. In fact, many jurisdictions have strayed away from contributory negligence and modernly apply comparative negligence. Under comparative negligence, a pf is not completely barred if they are found to have been negligent in some manner. Here, based on P's actions, it does not appear he will be found negligent at all because he did not assume the risk of stomach pain from using the product on simple aluminum pots that are commonly used in kitchens. Thus, these defenses will likely fail.

Warranties:

A pf may also bring a breach of warranty claim against a def. There are different types of warranties such as 1) express warranties 2) implied warranty of merchantability and 3) implied warranty of fitness for particular purpose.

Express Warranty:

This is where the commercial supplier expressly in words or actions states/guarantees the product's efficiency. Here, Dishway created an express warranty to P as they advertised Ultraklean to be the new cleaning agent that made the product more effective than other dishwasher powders.

Moreover, Dishway also advertised that Ultraklean was a “safe product”. Here, Dishway made an express warranty/promise that this product was efficient for a consumer to use as a cleaning agent. P will argue this warranty was breach because the product was in fact not effective nor safe because it left residue on the pots that are harmful and caused him severe stomach pain. Moreover, in the ad, there are no disclaimers as to this express warranty thus P rightfully relied on this warranty that the cleaning agent would be the most efficient dishwasher powder, when in fact it was not because it left harmful amounts of residue causing P to be hospitalized.

Implied Warranty of Merchantability:

Under this, the manufacturer impliedly guarantees the quality of the product and that is it fit for the regular intended purpose. Here, Dishway impliedly warranted the dish powder was safe and effective and can be used in ordinary manner in a dishwasher. However, they breached this warranty as it did not contain safe amounts of chemical and left high amount of residue on pots causing stomach pain.

Thus, Pf can bring a breach of express warranty claim and IWM against Dishway.

Misrepresentation:

A pf can also bring a misrepresentation claim against the manufacturer. A misrepresentation is a false statement that was made to induce reliance on the pf and caused the pf to take such action, and under the circumstances, it was reasonable to rely on said misrepresentation. Here, Dishway misrepresented the quality of their product by claiming it was effective and safe. It was reliable for P to rely on this information because Dishway put this misrepresentation in all of their ads for consumers to read.

QUESTION 3

Laura is general counsel for MoreHome Mortgage Company (MoreHome), a California corporation. Eric is an entry-level mortgage advisor at MoreHome.

Eric approached Laura and gave Laura a package of documents that he obtained through his position at MoreHome. The documents demonstrate that MoreHome employees are falsifying the financial history of many mortgage applicants so they can qualify for mortgages they could not otherwise obtain. The documents also show that it is MoreHome's policy to push risky mortgages onto unsuspecting customers.

Eric confided in Laura that he was troubled to have learned of these practices himself and wanted Laura's legal advice on what to do. Eric said that he has never engaged in these practices himself and does not want Mianne, MoreHome's Chief Executive Officer (CEO), to learn of their discussion. Laura told Eric she would think about it and get back to him. Eric left all of the documents with Laura as she requested.

Laura knows that the practices shown in the documents and described by Eric constitute a crime under state law. Laura also knows that the State Attorney General is aggressively investigating similar practices by mortgage companies in the state, although Laura is not aware of whether MoreHome has been identified as a target for investigation.

Immediately after Eric left Laura's office, Laura called Mianne and informed her of Eric's visit and about Eric's concerns. Mianne instructed Laura not to do anything with the documents and to give them to Mianne. Laura consulted with outside counsel regarding what to do with the documents and based on that advice, and against Mianne's instructions, Laura provided copies of the documents to the State Attorney General.

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

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Corporate Misconduct

When a lawyer learns of misconduct done by officers of the court they must not continue to allow their services to be used for a crime or fraud. The lawyer will also have a duty to report to higher ups in the corporation and sometimes to outside forces.

Here, the corporation performed significant misconduct in two ways. First, it falsified financial histories of applicants. As stated by the facts, Laura knew this was a crime under state law. Second, MoreHome enacted a policy that pushed risky mortgages onto unsuspecting customers. Again, we know from the facts that this is a crime that Laura knew about under state law. Thus, the corporation is acting in misconduct by committing crimes and Laura will have certain duties and obligations because of it.

Relevant duties and considerations will be discussed below.

Duty to Act in the Best Interests of the Corporation

When a lawyer is representing a company, they have unique obligations. First, they must always remember that their duties as an attorney remain with the company. Thus, under the Model Rules and the California rules, the attorney must always put the best interests of the corporation first.

Here, there is no indication that Laura acted without the best interests of the corporation

in mind. She promptly reported the misconduct to the CEO and then reported this outside the company when Mianne failed to act (although this may violate her other duties as will be considered below). She likely reported all this misconduct to protect the business and the assets of the business from being fined or seized due to illegal conduct. This is the best interest of the corporation.

Mianne may try to argue that her best interest is the best interest of the corporation. However, lawyers do not even owe this duty to the CEO of the corporation, but rather to the corporation as a whole. Therefore, Laura did not breach her duty of loyalty when she disregarded Mianne's instructions and reported the misconduct out (although she might have breached other duties).

Therefore, Laura did not breach her duty to act in the best interest of the corporation.

Duties to Eric v.s. the Corporation

Because lawyer's best interests remain with the corporation, they must not put the interests of lower level employees above the corporation. They also have a duty to inform the employees that their interests remain with the corporation and must not act under the guise of prioritizing the lower level employees.

Here, Eric is surely a lower level employee because we know from the facts that he is an entry-level mortgage broker. He also approached Laura for legal advice, which she

can give him unless it is against the interests of the corporation. She certainly could not represent both Eric and the corporation in a dispute between them. Laura, then, must not give him the impression that she is representing him in the matter or putting his best interests first.

Laura likely did not violate this obligation because she did not give Eric this impression. First, she did not give him any legal advice when he approached her about liability for the falsified history or policy. She merely told him that she would have to get back to him and then reported the misconduct. However, although she never told Eric that she represented him, a court would probably have preferred her to immediately and affirmatively disclose to Eric that she was the corporation's lawyer, not his.

Additionally, she acted in the best interest of the corporation over Eric's because she reported the misconduct to Mianne despite Eric's requesting that she not. The finding of the misconduct could potentially put Eric in a position of blame for the illegal conduct. Even though Eric asked her not to report it to Mianne, it was within Laura's ethical duties to put the interests of the corporation first.

Thus, Laura likely did not breach her duty to the corporation when she conferred with Eric about the corporate misconduct. However, she probably needed to confirm to Eric more affirmatively that she was not his lawyer nor had a duty to represent his best interests.

Duty of Confidentiality

Lawyers owe their clients a duty of confidentiality to not disclose confidential information to outside sources. Information is confidential when it is made privately to the attorney for the purpose of securing legal services. When representing a corporation, a lawyer does not owe a duty of confidentiality to lower-level employees when reporting to higher ups unless it is within the best interest of the corporation.

Here, Laura owes a duty of confidentiality to the corporation and higher-level employees in some cases. Because Eric is a lower-level employee (entry-level mortgage advisor) she does not owe him a duty of confidentiality when she is reporting to higher ups in the corporation. Even if she did owe him a duty, her duty to the corporation comes first. Therefore, even though Eric asked Laura not to tell Mianne about the misconduct, Laura did not breach her ethical duties when she reported to her higher ups about the misconduct that Eric brought to her.

However, Laura's duty of confidentiality is implicated in two other situations: (1) when she reported up about the misconduct and (2) when she reported out to the State Attorney General. They will be considered below.

Duty to Report to High Level Positions

When a lawyer learns about corporate misconduct, they have a duty to disclose the

misconduct to people in high level positions within the corporation. Under the Model Rules, this duty is absolute as a duty to the corporation. However, under California, a lawyer still may not breach their duty of confidentiality when reporting the misconduct. Attorneys should also try to dissuade the corporate employees from committing the crimes or frauds.

Here, Laura likely acted properly when she reported the misconduct to Mianne because Mianne is the corporation's CEO. As explained above, she did not owe Eric a duty of confidentiality. She also owed it to the corporation to put its best interests first. Serious crimes being committed under its watch are certainly important to know for their best interest. Therefore, Laura did not violate her duties when she reported the misconduct to Mianne.

It might be argued that Laura should have also reported the misconduct to other high level employees, like a Board of Directors. However, there is no indication from the facts that any higher-level such employees exist. Therefore, Laura did not violate her duties.

Reporting Outside the Corporation

A lawyer may report corporate misconduct to outside sources in certain circumstances. First, the lawyer must prove that they first reported the misconduct to higher level positions in the organization. Only when the higher-level people refuse to act or fail to act, may an attorney then consider reporting outside the organization.

After that, there is a split in the Model Rules and California rules. Under the Model Rules, the attorney may report out if the attorney reasonably believes that the conduct will result in death or substantial bodily harm *or* if the misconduct will result in substantial financial harm to the corporation. The substantial financial harm exception is *not* permitted in California. Importantly too, a lawyer may not violate their duty of confidentiality when reporting out in California.

Here, Laura has a pretty good case for reporting out under the Model Rules. Because both the policy and the falsifying of the records are state law crimes, they are rather severe misconduct and could really hurt the corporation. Additionally, Laura knows that the State Attorney General is aggressively investigating similar practices, the chance that the corporation could be found out are rather high. Opponents may argue that she was not aware that MoreHome was identified so it is unlikely they were to be found out. However, aggressive pursuit of the same type of crime still results in a significantly high risk of being found out for criminal liability.

Exposure to criminal liability could result in plunging stock prices and huge decrease in revenue at best and forced termination of the corporation at worst. Both of these results are surely enough for Laura to believe that the corporation could sustain substantial financial harm, which makes violating the duty of confidentiality and reporting outside allowed under the rules.

However, as noted above, California does not allow the exception for substantial financial harm. Thus, in order for Laura to report out and violate her duty of confidentiality, she would have to prove that the misconduct could reasonably result in death or substantial bodily harm. There is no indication from the facts that this is even a conceivable possibility.

Therefore, Laura likely breached her duty under the California rules but acted appropriately under the Model Rules.

Permissive Withdrawal

Under the Model Rules, a lawyer may withdraw if the withdrawal will not materially harm the client's case. This is including if the lawyer finds the acts of the client so repugnant that it would materially affect their representation of the client.

However, the California rules do not allow withdrawal just because it will not materially harm the client. Despite this, a lawyer in California may withdraw from a case if their continuing representation would cause their services to be used in perpetuation of a crime or fraud.

Here, because Mianne is failing to act to rectify either crimes (the policy or the falsifying of history), Laura has a case to permissively withdraw. This is because if she stays on

with the organization and it continues to commit crimes, Laura's services will surely be used in the commission of the crime or fraud. There is also no indication that Laura withdrawing will result in any material harm to the corporation (for example, there is no indication that there are current cases being litigated or cases pending). Therefore, Laura should permissively withdraw from representing MoreHome.

Mandatory Withdrawal

Under both the Model Rules and California rules, a lawyer must not assist a client in the commission of a crime or fraud. If a lawyer actually knows of the crime or fraud, they must withdraw from representation.

For the same reasons as above, it is likely that Laura's services will be used for the commission of a crime or fraud if she stays on as attorney. Therefore, she should withdraw from representing MoreHome.

Duty of Competence

Under the Model Rules, a lawyer must provide reasonably competent representation and legal services to their client. Under the California rules, a lawyer must abstain from intentionally, recklessly, with gross negligence, or repeatedly failing to provide competent legal services to their client.

Here, there is little indication that Laura fell below her duty of competence under the

Model Rules, and thus, under the California rules since it is a lower standard. First, there is no indication that she did not act with reasonable care or with the competence of a reasonable lawyer. Even when she was not sure what to do, she consulted with outside counsel before moving forward with her actions. Therefore, Laura likely did not violate her duty of competence.

Duty to Communicate

A lawyer has a duty to communicate to their clients. This means regular and prompt communication about the state of their affairs, cases, and potential liability about acts.

Here, Laura has a duty to promptly communicate with her client the corporation about the status of their cases and representation. She likely met this duty because she was communicative and prompt with everyone she interacted with. She also promptly informed Mianne of the misconduct and promptly reported it out when Mianne refused to act. Therefore, Laura likely did not violate her duty to communicate.

Duty of Diligence

Under the Model Rules, a lawyer must provide reasonable diligent representation and legal services to their client. Under the California rules, a lawyer must abstain from intentionally, recklessly, with gross negligence, or repeatedly failing to provide diligent legal services to their client.

Just like for the duty of competence, it is unlikely that Laura violated this duty because she acted reasonably, competently, and promptly. Therefore, she likely did not violate her duty of diligence.

Conclusion

Under the Model Rules, Laura likely did not commit any ethical violations, except that she probably should have confirmed to Eric more affirmatively that she was not his lawyer nor had a duty to represent his best interests. However, under the California rules, Laura will likely be disciplined for her reporting of the misconduct to the State Attorney General because she is unable to prove prospect of death or substantial bodily harm. Finally, after learning about the crimes committed by the corporation, Laura should withdraw so her services are not used in the commission of a crime or fraud.

QUESTION 3: SELECTED ANSWER B

What ethical violations has Laura committed?

Lawyer for an Organization

Under both the ABA Model Rules (ABA) and the California Rules, attorneys of organizations are the attorney of the organization itself, not its constituents or officers. Consequently, they owe their duties and loyalty to the organization.

Here, Laura (L) is the general counsel of MoreHome, a California (CA) corporation. As general counsel, she is the attorney for MoreHome, not of the employees, like Eric, or the officers, like Mianne. Thus, she must do what is in the best interest of MoreHome.

Duty of Confidentiality

Under both the ABA and CA rules, lawyers owe duty of confidentiality to their client to take reasonable precautions to protect their confidential communications and documents. However, under the ABA, lawyers are permitted to reveal confidential information if it prevents substantial financial harm to another. However, the CA rules do not have this exception. Under the CA rules, the lawyer may only breach their duty of confidentiality if it is to prevent substantial harm or death to another, and they must

inform the client of their duty and intention before doing so and try to get the client to take another path. Additionally under both the ABA and CA rules, the attorney can reveal confidential information if the client allows or it is implied necessary for the lawyer to carry out her representation.

Here, the documents that Eric (E) gave Laura (L) pertaining to MoreHome's practices show that MoreHome employees are falsifying the financial history of mortgage applicants to qualify them for mortgages and that MoreHome employees are pushing risk mortgages onto customers. These are confidential documents because they pertain to MoreHome's specific work and trade secrets.

When L sent these documents to the State Attorney General, she shared confidential documents of her client, MoreHome, without their permission. In fact, Mianne, the CEO of MoreHome, specifically told L not to do anything with the documents except to give them to her. Thus, L did not have permission to share these confidential documents.

However, L will argue that she was able to breach her duty of confidentiality because she wanted to prevent the financial harm to the current and future mortgage applicants of MoreHome, who were qualifying for mortgages they could not otherwise. Moreover, she wants to protect the clients from taking risk mortgages. However, while this is allowed under the ABA, it is not permitted in CA. And, since MoreHome is a CA corporation, L must follow the CA rules.

Additionally, L may argue that she did not breach her duty because she wanted to prevent any imminent harm or death to the clients who killed themselves or others over losing their money and homes because of MoreHome's practices. However, because there is likely no proof that L reasonably believed a customer was going to kill themselves or others, she will not be successful.

Thus, L breached this duty under the CA rules.

Duty of Loyalty -- Conflict of Interest

Under both the ABA and CA rules, lawyers owe a duty of loyalty to the organization. While Lawyers can represent constituents of the organization at the same time, they can only do so if the employee's interest are not adverse, or will not become adverse, to the organization. The lawyer must also explain to the employee who she represents and who her duty of loyalty lies with when it becomes apparent that an employee's interests may be adverse.

Here, E, an employee of MoreHome, came to L with these documents. Because L was the general counsel, E probably believed that she also represented him as well. Thus, L realized during their conversation that E was giving her information that could hurt MoreHome, she had a duty to tell E that she represented MoreHome, not him, and that

her duty lied with protecting the company.

However, L failed to explain this to E. Moreover, when E asked her not to tell Mianne of what he found because he did not want to get in trouble, L should have explained that she did not have a duty to protect his interests and could not promise that she would not tell Mianne. However, she again failed to do this.

L should have explained her role and loyalty to E.

Thus, L breached her duty under both the ABA and CA rules.

Duty to Communicate

Under both the ABA and CA rules, the lawyer must communicate with their client about their case, answer questions, and keep the client apprised of matters relevant to the lawyer's representation.

Here, L called Mianne, MoreHome's CEO, right after she spoke with E and told Mianne (M) of what she learned from E. Moreover, she told Mianne that it was E who told her this information.

Consequently, because L immediately informed a high officer of MoreHome of this information, L met this duty. Moreover, L did not violate any duty by informing M that it was Eric who told her because she did not owe any duty of loyalty as E, as a mere employee.

Thus, L did not breach this duty.

Duty of Diligence

Under both the ABA and CA rules, lawyers must be diligent in their representation to do what is all reasonably necessary to represent their client and be prompt in their communication. Under the CA rules, if a lawyer intentionally, recklessly, with gross negligence, or repeatedly fails to be diligent, they breached their duty.

Here, L immediately informed M of what she learned from E, and she likely did this to see if what E told her was true. Consequently, she was diligent in quickly informing M and not sitting on the information.

However, L should have checked into the documents and information that E gave her to see if they were accurate and if the allegations were true before going outside the organization to report the information. The facts do not indicate that L did any of her own investigation of the client or that she looked into corroborating the information.

Thus, she breached this duty under both the ABA and CA rule.

Duty of Competence

Under both the ABA and CA rules, a lawyer has the duty to act competently with all the knowledge, skill, and expertise needed for the representation. However, she can research the matter or get advice from another attorney to gain competence. Under CA rules, a lawyer breaches this duty if they intentionally, recklessly, with gross negligence, or repeatedly fail to be competent.

Here, L did not look into the E's allegations or look into what she should do as general counsel to the mitigate the risk to MoreHome if they were true. While she did contact an outside lawyer to see what she should do with the papers from E, she did not do her own investigation to ensure that she was doing the right action under the rules.

Moreover, she should have done her own research or contacted an outside lawyer with expertise to see how she could best protect MoreHome.

Because L did none of this, she breached her duty under the ABA and CA rules.

Duty to Report Within Org

Under both the ABA and CA rules, an organizations lawyer should report misconduct to a higher authority with the organization. If that authority does nothing, the lawyer can report the conduct to another high authority within the organization.

Here, L reported E's information and documents to Mianne, the CEO, so she did report up within MoreHome. However, if L did not think that M would do anything, she should have reported to another officer, like the CFO, or to the board of directors, if there was one, to find an authority who could help deal with the problem.

However, L neither reported to another authority, nor gave M a reasonable amount of time to do anything.

Thus, L breached this duty.

Duty to Report Out of Org

Under the ABA, the lawyer may report outside of the organization if reporting within the organization did not give any reasonable results. However, the lawyer cannot reveal confidential information unless it falls under an exception. However, the CA rules do not allow the lawyer to report outside the organization or reveal confidential information

unless it is to prevent substantial harm or death.

Here, L sent the document to the State Attorney General. She will argue that she had to because she knew the Attorney General was investigating similar practices in other companies within the state, and she wanted to protect MoreHome from further damage. Moreover, she was permitted to reveal the confidential docs under the ABA under the financial harm exception, as explained above.

However, she was not permitted to report out or reveal confidential information under the CA rules.

Thus, L breached her duty under the CA rules.

Duty to Safeguard Client Property

Under both the ABA and CA rules, lawyers have a duty to safeguard and not commingle client property with their own.

Here, L sent the documents to the Attorney General (AG) despite M's specific instructions not to. Thus, L breached her duty by not safeguarding the documents and sending them outside the organization.

Speaking With a Outside Lawyer for Advice

Both the ABA and CA rules allow lawyers to speak to outside lawyers for advice on ethical rules.

Here, L contacted an outside attorney to ask what she should do with the documents. Because she did this based on her duty under the ethical rules, she did not breach her duty here.

Mandatory Withdrawal

Under the ABA, the lawyer must withdraw if their services are being used to for a crime or fraud. Under the CA rules, the lawyer must withdraw if she believes her services are being used for a crime or fraud or if her actions would violate a law or ethical rule.

Here, the practices that E alleged MoreHome was doing was against state law. Consequently, MoreHome would get into trouble with the AG for these practices. Moreover, L could also get into trouble as the general counsel if the AG found she assisted or hid these practices. Moreover, by continuing representation, L could be assisting with a crime or fraud.

Thus, L violated both the ABA and CA rules by failing to withdraw.

Permissive Withdrawal

Under the ABA, a lawyer may withdraw if it would not cause financial harm to the client or if continuing representation would cause significant financial harm to the lawyer (CA law does not allow this). Under both the ABA and CA, the lawyer may withdraw if she finds the course of action repugnant or if the client continues with an illegal action despite the lawyer counseling them not to.

Here, L is permitted to withdraw if she finds that conduct of MoreHome to be repugnant if MoreHome continues with these illegal practices. However, L does not have to. Thus, she has not breached her duty by not withdrawing.

Duties upon Withdrawal

Upon withdrawal, the ABA and CA rules require the lawyer return the client's property and payments she did not earn and to give reasonable notice to the client for them to have time find another attorney. However, the ABA allows the attorney to retain documents or property to obtain unpaid fees in certain circumstances.

Here, because L had a duty of mandatory withdrawal she should have returned the documents E gave her to MoreHome, return any fees she did not earn, and give back any other property she had. She also must tell MoreHome that she is withdrawing and give them reasonable time to find another attorney.

If L did not, or does not do this, then she will have breached her duty under both the ABA and CA rules.

QUESTION 4

Deborah was homeless and without money. One night, the temperature was below freezing and continuing to drop. Deborah realized she might die if she did not find shelter. She found a run-down house with an attached garage that had a door connecting it to the house. Deborah thought the house was unoccupied. She went around to the side of the garage, looked through a window, and saw a stack of wood. Deborah decided to go into the garage, take some of the wood, and build a fire outside the garage to keep herself warm. She broke the window to get into the garage. Because of the extreme cold, Deborah decided to stay in the garage. She gathered wood scraps and paper, started a small fire to keep herself warm, and fell asleep. A spark from the fire ignited some oil on the floor. Deborah awoke to flames and smoke. She then escaped through the window she had broken. The fire quickly engulfed the house where it killed Stuart as he was sleeping in his bed.

Officer Oliver, who was patrolling the area, saw Deborah walking on the sidewalk three blocks from the fire. When Officer Oliver asked her what she was doing outside on such a cold night, Deborah said, "I started the fire."

Deborah is charged in criminal court and moves to suppress her statement "I started the fire."

1. With what crime or crimes can Deborah reasonably be charged; what defense or defenses can she reasonably raise; and what is the likely outcome? Discuss.
2. Should the court grant Deborah's motion to suppress her statement? Discuss.

QUESTION 4: SELECTED ANSWER A

QUESTION 1 -- WHAT CRIME(S) CAN DEBORAH BE CHARGED AND WHAT DEFENSES CAN SHE RAISE

I. Larceny

Larceny is the taking and carrying away of someone's tangible personal property through trespass with the intent to permanently deprive the person of that property.

Here, Deborah took wood from the stack and used it to build a fire in the garage. Deborah might argue that because the wood never left the garage, that there was no taking and carrying. However, the taking and carrying away requirement for larceny is satisfied by the smallest of movement. By taking the wood from the stack, Deborah took and carried away someone else's tangible property.

Because Deborah did not have permission to take the wood, she did so through trespass. And because Deborah meant to destroy the wood by using it to make a fire, Deborah had intent to permanently deprive the owner of the wood of possession of their property.

Thus, the elements of Larceny are satisfied.

II. Burglary

Burglary is the breaking and entering into someone else's dwelling at night with the intent to commit a felony therein. Traditionally, the breaking and entering had to be into

a dwelling and it had to be at night. But modern statutes have removed the "at night" requirement and have expanded "dwelling" to mean any building.

Here, Deborah broke a window and then entered the garage. This constitutes breaking and entering, as Deborah entered into the property, she did so by physically breaking a window, and she did so without consent.

Additionally, Deborah broke into the garage with the intention of taking the wood and using it to build a fire. As discussed above, taking the wood and using it to build a fire constitutes larceny. Thus, Deborah had intent to commit a felony inside of the garage.

And while under a strict traditional view, the garage would not likely count as a dwelling, most modern views of the crime of burglary would expand the definition of dwelling to include the attached garage.

III. Arson

Arson is the malicious burning of someone else's dwelling. A burning is malicious if it is done with reckless indifference to the risk of the structure burning down. Under traditional common law, the building had to be a dwelling. But modern interpretations of arson include almost any building. A structure is burned if there is charring to the structure, mere scorching is not enough.

Here, Deborah lit a small fire inside of the garage and then fell asleep, causing a spark from the fire to ignite oil and burn down the garage and the house. The garage likely constitutes a structure that falls into the arson crime, but also the house is a

dwelling that certainly fits the statute. The fire "engulfed" the house, thus meaning there was sufficient burning for arson.

The question is whether this action constitutes a reckless indifference to the risk the house garage next door would burn down. Deborah would argue that she only lit a small fire, and she had no way of knowing that there was oil on the ground that could ignite.

But Deborah also lit a fire inside of a garage that was filled with wood that itself stood right next to a house. And then she allowed herself to fall asleep. Lighting a fire inside of a structure, especially one filled with flammable objects, and then falling asleep without first putting out the fire constitutes reckless indifference to the risk the building would burn down and the risk that the nearby buildings (including the house in this case) would burn.

The elements of arson are satisfied.

IV. Common-law Murder

At common law, murder is killing with malice aforethought. There is malice aforethought in four different situations: (1) intentional killing, (2) killing with intent to cause substantial bodily harm, (3) depraved heart murder, and (4) felony murder. Murder also requires that the death is the actual and proximate cause of the defendant's actions.

A. Causation

Causation requires actual and proximate cause. Actual cause exists if the

defendant's actions are the but-for cause of the victim's death. Here, but-for Deborah lighting the fire, the house would never have burned down and Stuart would not have died. There is thus actual causation.

Proximate cause exists if the death is the foreseeable result of the defendant's actions. Here, Deborah lit a small fire in a garage filled with wood that was next to a house and then she fell asleep. It is foreseeable that lighting a fire in a flammable (likely wooden) structure and falling asleep would cause the structure and nearby homes to burn down, and it is foreseeable that if a house burns down in the middle of the night that its occupants could die. There is therefore proximate cause.

There is sufficient causation.

B. Intentional killing and killing with intent to cause bodily harm

Here, Debora set the fire by accident. She did not intend to cause anyone harm. Accordingly, Deborah does not have sufficient intent for intentional killing or killing with intent to cause substantial bodily harm.

C. Depraved heart murder

Depraved heart murder is killing caused by an action that constitutes reckless indifference to an unjustified risk to human life. Here, the action in question is Deborah starting a small fire in the garage next to the house. While it is certainly irresponsible to start a small fire inside of a garage that is next to a home, it likely doesn't arise to the level of reckless indifference to human life. Indeed, the fire was small. Additionally, the

main reason it spread was because of oil on the ground, and Deborah was not aware of the presence of the oil. Deborah also thought the house was unoccupied, and this was not entirely unreasonable because the house was run-down.

Accordingly, there is no depraved heart murder.

D. Felony murder

Felony murder applies whenever a defendant's inherently dangerous felony results in someone else's death and the death is a foreseeable result of the felony. The death must also occur during the felony, and before the felon finds a place of temporary safety. The majority view is that felony murder does not apply to people who are in agency with the felon (agency theory). A minority of courts say that felony murder applies to any death that occurs during the felony.

Here, the felony in question would be arson, which is considered an inherently dangerous felony. Moreover, it is foreseeable that someone would die as a result of arson, making Stuart's death within the scope of felony murder. The death happened while the house was burning, meaning it happened during the felony. And Stuart is not in agency with Deborah, so Stuart's death falls within felony murder regardless of whether the agency theory or proximate cause theory is applied.

Thus, the elements of felony murder are met.

V. Statutory murder

Under modern statute, murder is killing with deliberation and premeditation, or

felony murder. As discussed above, there is felony murder in this case.

Deliberation and premeditation require that the defendant intends to kill the victim and that the defendant have a moment to consider their action, if even for a moment. Here, the killing was not intentional, so there is no deliberation and premeditation.

Because there is felony murder, there is murder under modern statutes as well.

VI. Involuntary Manslaughter

Involuntary manslaughter is killing caused by gross negligence. Gross negligence is acting with a conscious disregard for an unjustified and substantial risk, which constitutes a gross deviation from the standard of care of a reasonable person.

Here, the action in question is Deborah lighting a fire inside of a garage that is next to a house, and then falling asleep. The risk of the house burning down is substantial because the garage is full of wood, the garage is next to the house, and Deborah is asleep so she cannot monitor the fire. The risk is unjustified because there is no sufficient justification for why Deborah needed to fall asleep in front of the fire. Yes, Deborah was likely cold and sleepy, but she would have likely been sufficiently protected from the elements while she slept just by nature of being inside of the garage.

The next issue is whether the action is a gross deviation from the standard of care of a reasonable person. A reasonable person would not light a fire inside, and they certainly wouldn't fall asleep during the fire. Deborah will counter that the house next to her was run-down, and thus she thought there was no one in it and accordingly did not

seriously risk human life. However, a reasonably prudent person would not just assume the house next door was empty without checking. Additionally, the existence of a pile of wood in the garage suggests that someone is living in the house next door. Accordingly, Deborah's conduct likely constitutes a gross deviation from the standard of care.

There is likely involuntary manslaughter.

VII. Trespass

While Trespass is usually a tort, it can also be charged as a crime. The elements of trespass are (1) entering another's land without consent and (2) intent to commit the action that causes the person to enter onto someone else's land.

Here, Deborah entered into a run-down house without permission. She also took that action intentionally. Thus, the elements of trespass are met.

VIII. Defenses

A. Necessity

The defense of necessity applies if, during an emergency situation, the defendant reasonably believes that committing the crime is necessary to prevent imminent harm, and the harm is more serious than the crime committed.

i. Burglary

The first issue is whether there was an emergency. Here, the temperature was

below freezing and continuing to drop. Deborah realized that she might die if she could not find shelter. This is enough to constitute emergency.

The next question is whether it was reasonably necessary for Deborah to commit burglary in order to avoid an imminent harm that is greater than the societal harm caused by the crime.

Here, Deborah would have likely died if she did not break into the garage. She was homeless and had no money, so she could not purchase shelter for herself. That said, it is true that Deborah could have always knocked on the door of the run-down house to see if anyone would voluntarily help her out. However, people don't usually let strangers into their home, especially homeless people, and thus it was likely reasonably necessary for Deborah to break into the garage.

The last question is whether the risk to Deborah was more serious than the crime. In this case, the risk to Deborah is death, which is very serious. The crime is breaking into an attached garage with the intent to use some pieces of wood. While never good to trespass and steal, the loss of a couple pieces of wood and a broken window are far less than the risk of death.

Deborah can thus successfully apply the defense of necessity to her burglary crime.

ii. Larceny

The next question is whether necessity applies to larceny. Here, the larceny was using the wood to make a fire. Whether this was necessary to prevent Deborah's death depends on facts outside of the question. The court would want to know how warm the

garage would have kept Deborah if she just stayed within the four walls without a fire. If Deborah would have been fine without the fire, then the defense of necessity doesn't apply. But if starting the fire was necessary to keep Deborah alive, which is certainly possible if the temperature was very low, then the necessity defense applies. After all, stealing a bit of wood is much less serious than the death of Deborah.

iii. Arson

Necessity could also apply to the crime of arson. Deborah would argue that she needed to light the fire to survive, and thus starting the fire, which is what caused the arson, was reasonably necessary to prevent imminent harm to Deborah. Deborah will also argue that while the arson did burn down the house and the garage, that property is always of less societal value than human life, and thus her crime was still less harmful to society than the risk of death against her.

The issue with Deborah's argument is that Deborah is guilty of arson not just because she lit a fire, but because she was recklessly indifferent to the risk that the garage and house would burn down. Indeed, Deborah fell asleep while the fire was lit and seemingly took no precautions to prevent its spread. So while it may have been necessary for Deborah to light the fire, it was not necessary for Deborah to act in a reckless manner when lighting the fire.

Accordingly, Deborah cannot use necessity to defend the arson charge.

iv. Felony murder

Typically, the defense of necessity does not apply to homicide crimes. However, if Deborah can use necessity to negate the underlying felony in felony murder, then that defense also negates the felony murder charge. Thus, if the court accepts Deborah's necessity defense for arson, then the necessity defense also applies to felony murder.

However, as discussed above, the court will likely not agree that necessity applies to the arson charge in this case. Accordingly, necessity also does not apply to the felony murder charge.

v. Involuntary manslaughter

Necessity does not apply to homicide crimes, including involuntary manslaughter. Thus, the necessity defense does not apply here.

B. Mistake

For specific intent crimes, mistake of fact is defense if it negates the specific intent required. For general intent crimes, mistake of fact is a defense if it is reasonable.

Here, the relevant mistake of fact is that Deborah thought the house was unoccupied, while really Stuart was in the house. Deborah can try and use this mistake of fact defense for three crimes: involuntary manslaughter, arson, and felony murder.

i. involuntary manslaughter

Involuntary manslaughter is a specific intent crime--it requires gross negligence.

Deborah could argue that her mistake about the existence of Stuart in the home means that she did not act with gross negligence. However, as discussed above in the original analysis of involuntary manslaughter, Deborah should have checked the home and should have assumed that someone was inside of the home when she saw wood in the garage. Thus, it was still grossly negligent to start the fire inside the garage and then fall asleep. Mistake of fact does not apply.

ii. Arson

Arson is a general mistake crime. Thus, Deborah's mistake of fact as to the existence of Stuart in the home applies only if the mistake is reasonable. Deborah will argue her mistake is reasonable because it was run-down. However, Deborah also saw wood inside of the garage. Additionally, the garage was locked (hence breaking in through the window). A locked garage and the presence of wood in the house both suggest that the house was occupied. Accordingly, the mistake was not reasonable.

iii. Felony murder

Because the mistake of fact defense does not apply to arson, it also does not apply to felony murder, which is based on the arson.

PART 2 -- Deborah's motion to suppress her statement

I. Violation of due process

To be consistent with due process, confessions must be voluntary based on the totality of the circumstances. Here, Deborah told the officer she started the fire when the Officer asked her what she was doing on such a cold night. Nothing in these facts suggests this confession was not voluntary. The confession satisfies due process.

II. Fifth amendment *Miranda* rights

The Fifth amendment states that suspects cannot be subjects of custodial interrogation by the government without being read their *Miranda* warning. The *Miranda* warnings state that the suspect: has the right to remain silent, that everything they say can be used against them, that they have a right to a lawyer, that if they can't afford a lawyer, one will be provided.

Additionally, police cannot place suspects in custodial interrogation by the government without first giving *Miranda* rights. A suspect is in custody if they reasonably do not feel free to terminate the encounter and they feel the same coercive pressures that are present at a station house. Interrogation is when the police know or should know that their actions or questions will illicit incriminating responses. And lastly the suspect must be aware they are being questioned by a government agent.

Here, Officer Oliver did not read Deborah her *Miranda* rights and thus Deborah cannot be the subject of custodial interrogation.

But in this case, the officer just runs into Deborah on the sidewalk and asks her an innocent question. Nothing in that situation would make a reasonable person think they were not free to end the encounter.

Moreover, there is no reason to think the question "what are you doing on a cold night" would illicit incriminating responses, so there is no interrogation.

And lastly, *Miranda* rules do not apply if the suspect makes a spontaneous and voluntary confession. Here, Deborah saying "I started the fire" in response to a question about the cold night certainly counts as a spontaneous and voluntary confession.

Accordingly, there is no violation of *Miranda*.

III. 6th amendment right to counsel

Suspects have a sixth amendment right to counsel, and here Deborah said "I started the fire" without counsel present. However, the 6th amendment right only attaches once charges have been filed. Charges were not filed in this case, the 6th amendment right to counsel doesn't apply.

IV. Conclusion

The court should deny Deborah's motion to suppress her statement.

QUESTION 4: SELECTED ANSWER B

Larceny

Larceny is the (1) taking and moving, (2) the property of another person, (3) without their consent, and (4) with the intent to permanently deprive the rightful owner of that property. If the defendant believes that the property is his or hers to take, they have not committed larceny.

Here, Deborah took some of the wood that belonged to Stuart and was located in Stuart's private home. Deborah knew that this wood did not belong to her. Still, she grabbed the wood, moved it into a pile, and started a fire with that wood. Deborah may argue that she did not take the wood out of Stuart's home and thus did not move it, but she moved it out of its original placement which is enough to satisfy this element.

Deborah knew that she did not have consent of Stuart, the rightful owner, to use or burn this wood. Deborah also must have known that by burning the wood, it was no longer usable for anyone else and therefore would permanently deprive the rightful owner of the chance to use this wood. Thus, Deborah will be found to have committed larceny and can be charged with the crime of larceny.

Burglary

Common law burglary is the (1) breaking and entering, (2) the dwelling of another individual, (3) at nighttime, and (4) with the intent to commit a felony. The defendant must have intended to commit the felony upon entering the premises, not at a later

point. Breaking can be constructive or actual. Entering occurs as soon as the defendant steps inside of the building. Most modern jurisdiction do not require that the building be a dwelling and do not require that the defendant enter at nighttime, but common law still lists these as elements of burglary.

Here, Deborah broke through the window of Stuart's garage and entered into the garage. This garage was directly attached to Stuart's home and although Deborah may argue that the garage is not a dwelling because it is not where an individual actually resides, this argument will likely fail. A garage that is connected to someone's home is generally considered to be part of the dwelling and will satisfy that element here. Deborah's acts occurred at nighttime, while Stuart was asleep in his home. Finally, Deborah had the intent to take wood from Stuart's garage back outside with her and use it to start a fire. If larceny is a felony, this will satisfy the final prong. On the other hand, if this is only found to be a petty theft or some crime less serious than a felony, the final prong is not satisfied and Deborah will not be found to have committed burglary.

Whether Deborah committed the crime of burglary depends upon whether her intent to steal the wood is classified as a felony, or a lesser petty theft misdemeanor.

Defense: Necessity

A defense to any crime is necessity. Necessity occurs when a defendant committed a crime in order to prevent greater harm than the consequences of that crime. There is

both private necessity and public necessity. A private necessity occurs when the defendant commits the crime in order to prevent worse harm from occurring to himself, while a public necessity is when the defendant commits the crime in order to prevent worse harm from occurring to the general public or a large group of people.

Here, Deborah will likely be able to defend any larceny or burglary charges against her with the defense of necessity. Deborah was stranded out in the cold while the temperature was below freezing on the night in question. Deborah had realized that there was a possibility that she would die if she did not find shelter and some source of warmth. Thus, she broke into Stuart's garage and took his wood in order to create a fire for herself and prevent herself from dying out in the cold. The possibility of death outweighs the harm Deborah might have caused by breaking and entering or stealing Stuart's wood for a fire.

Deborah will be successful in defending herself against larceny or burglary by showing that she needed to do these acts in order to prevent greater harm to herself, or in this case death.

Arson

At common law, arson is the malicious burning of the dwelling of another person. Many modern jurisdictions do not require that the burning occur in a dwelling, but rather recognize the malicious burning of any building as arson. Malice is the required mens

rea. Malice needs either an intent to create the outcome or reckless disregard for a high risk of that outcome. Burning must be actual damage or charring to the structure from fire, not mere blackening of the structure from smoke.

Here, Deborah lit fire to the wood while in Stuart's garage. As discussed above, the garage will likely qualify as part of the dwelling because it was directly attached to Stuart's home. The wood ended up catching some oil on fire and burning the entire house. This is enough to qualify as a burning of the dwelling far beyond mere smoke damage.

Defense: No Malice

Deborah will attempt to defend herself against the arson charge by stating that she did not have the requisite intent, or malice, but this will likely fail. Deborah started the fire on the ground, without any protective cover or container. The fire was highly likely to spread and catch part of the house on fire considering that homes and garages are built with wood. While Deborah may not have known that oil was on the ground and may not have intended to start a large house fire, she recklessly disregarded this risk when she started an unconfined fire, fell asleep, and failed to take any precautions to oversee and stop the fire from spreading. There was a substantial likelihood of a house fire here that Deborah consciously disregarded and thus, she will be found to have acted with malice in starting this open fire in a wooden home.

Defense: Necessity

Deborah may attempt to claim the defense of necessity again, but Deborah likely did not need to start this fire. Once she was in the confines of the garage of a home and was protected from the outside elements, she was much safer. She was not at risk of dying any longer. She could have found something in the garage to cover herself and simply remained in the garage overnight to stay out of the freezing cold outside. If the garage was below freezing, Deborah may have a stronger claim of necessity, but this will be a weaker defense than the necessity described above.

Murder or Manslaughter

Common Law Murder

Common law murder is the unlawful killing of another human being with malice aforethought. This includes the intent to kill, the intent to cause great bodily harm, a reckless indifference for a substantial risk to human life, or felony murder.

Here, Deborah will likely not satisfy any of these requisite mens reas. Deborah certainly did not have the intent to kill or cause great bodily harm. Deborah merely wanted to escape the freezing cold and start a small fire to warm herself up. On the other hand, Deborah may have had a reckless disregard for a substantial risk to human life, but only if Deborah had reason to believe that there were humans inside of the attached home. The facts state that Deborah believed that the house was unoccupied, thus she had no reason to think that she was putting anyone's lives in danger by starting a fire in the

garage.

Felony Murder

Felony murder is the killing of a human being that occurs during the commission of attempt to commit an enumerated felony or an inherently dangerous felony. These felonies generally include burglary, arson, rape, robbery, or kidnapping. The defendant does not have to have the intent to kill, as long as the death results during the attempt to commit one of these felonies. The felony must be distinct from the killing. The act that kills must occur before the defendant reaches a place of temporal safety.

Here, as discussed above, Deborah's acts will likely not satisfy the element of burglary because stealing wood is unlikely to be a felony. On the other hand, Deborah's acts will likely satisfy arson (see above). Thus, because the killing of Stuart was a result of the arson that Deborah committed, this might be found to be a felony murder.

Deborah may be found guilty of felony murder, but not under any other theory of common law murder.

First Degree Murder

First degree murder is considered by many states instead of common law murder and it includes the unlawful killing of another person with malice aforethought, as well as premeditation and deliberation. This requires that the defendant have thought of killing

the victim even if just for a brief moment before doing so.

Here, Deborah never had the intent to kill Stuart -- she did not even know he was in the home. Thus, she cannot be found guilty of first degree murder.

Second Degree Murder

Second degree murder is the same as first degree murder, but without any premeditation or deliberation. Again, malice includes the intent to kill, the intent to cause great bodily harm, or a reckless indifference for a substantial risk to human life.

Here, Deborah will likely not meet any of these required mental states. She did not have the intent to kill, cause great bodily harm, or a substantial risk to human life because she did not know that any humans were in the house attached to the garage. She was under the impression that it was unoccupied. Thus, Deborah will not be found guilty of second degree murder.

Voluntary Manslaughter

Voluntary manslaughter is also considered killing in the "heat of passion" or under an imperfect self-defense claim. The heat of passion requires that (1) there be an adequate provocation, (2) that would provoke a reasonable person, (3) the defendant was adequately provoked, and (4) there was not sufficient time to cool down, so the defendant acted while still provoked.

The facts do not fit these elements. Deborah was not provoked and she will not be charged with voluntary manslaughter.

Involuntary Manslaughter

Involuntary manslaughter occurs when the defendant kills while committing criminal negligence or some criminal act that is not a serious felony that falls under the felony murder rule. The defendant does not need the intent to kill.

Here, Deborah will likely be found guilty of involuntary manslaughter if she is not found guilty of one of the greater murder charges. Deborah was committing larceny and arson when she started that fire that caused the death of Stuart. Thus, Deborah's criminal acts resulted in the death of another human being. Deborah will be convicted of involuntary manslaughter if she is not convicted of one of the greater offenses.

Outcome: Deborah is most likely to be convicted of (1) arson and (2) either felony murder (the greater offense) or involuntary manslaughter in the alternative (the lesser offense).

Deborah's Motion to Suppress Her Statement

Fifth Amendment

The fifth amendment provides all individuals with the privilege against self-incrimination. This means that no one can be compelled to make testimonial statements that incriminate themselves.

One of the ways that the legal system protects this privilege is by requiring Miranda warnings whenever someone is in a custodial interrogation. The Miranda warnings must be given by police officers, or anyone acting for the government, before eliciting any incriminating responses. This includes (1) that the suspect has the right to remain silent, (2) that anything the suspect says can and will be used against them, (3) that the suspect has the right to an attorney, and (4) that the suspect will be provided with any attorney if they are unable to afford one.

(1) Custody

The test to determine whether an individual is in custody is whether a reasonable person would feel free to leave. The totality of the circumstances should be considered to determine this, including whether they are confined, cornered, under arrest, or any other relevant facts.

Here, Deborah was walking freely on the sidewalk when Officer Oliver pulled his car up next to her. Officer Oliver did not handcuff Deborah, he did not cut her off in her path, he did not block her, he did not corner her, and he did not even tell her to stop moving. Thus, Deborah was likely not in custody. A reasonable person would still feel free to

ignore his question, continue walking, and be free to leave in this scenario.

Deborah was not in custody.

(2) Interrogation

The test to determine whether someone is being interrogated is whether both the words and conduct of the government official are likely to elicit incriminating responses from the suspect. General booking questions, such as one's name, date of birth, or other basic questions are not considered an interrogation.

Here, Officer Oliver asked Deborah what she was doing outside on such a cold night.

This question is borderline an interrogation, because Officer Oliver was aware that Deborah was only three blocks away from the recent house fire and he was likely looking for some information to connect her to this fire. On the other hand, this is a very basic question that Deborah could have responded to with any simple answer.

While this question may have been attempting to elicit any incriminating response from Deborah, Deborah was not in custody. Therefore, Officer Oliver did NOT need to inform Deborah of her Miranda rights before talking to her. Deborah's response about starting the fire will not be found to be a violation of her Fifth Amendment rights and will not be suppressed on these grounds.

Fourteenth Amendment

The fourteenth amendment requires that all confessions by a criminal defendant be voluntary in order to be used against them at trial. The totality of the circumstances should be considered, including the suspects age, how long they are being questioned for, the manner and method of questioning, whether they are mentally or physically disabled, whether they have been provided with necessities like food or water, and any other relevant factors.

Here, Deborah was walking on the side of the road when Officer Oliver pulled up next to her and asked what she was doing outside in the cold. Deborah immediately and freely responded that she started the fire. Deborah was not coerced into saying this, Deborah was not being brutally questioned or interrogated. There are absolutely no facts showing that this statement was involuntary.

Deborah blurted out "I started the fire" immediately upon talking to Officer Oliver and thus, her voluntary statement will not be suppressed on these grounds.

Sixth Amendment

The sixth amendment gives all criminal defendants the right to an attorney immediately upon being charged with a crime. This right attaches automatically once a criminal defendant has been charged. This right is offense specific, meaning the police can still question a defendant about any unrelated crime without the attorney present. This also

includes the right to have your attorney present at any in-person lineups or identifications.

Here, Deborah has not been charged with any crime yet at the time she is speaking to Officer Oliver. Thus, her sixth amendment right has not attached and this is not grounds to suppress her statement.

Outcome: Deborah's motion to suppress will be denied because she was not in a custodial interrogation so her fifth amendment rights were not violated, her statement was voluntary so her fourteenth amendment rights were not violated, and she had not been charged with any crime at the time so her sixth amendment rights were not violated.

Deborah's statement is a party opponent exception to the hearsay rule (that out of court statements cannot be admitted for the truth of the matter), and it did not violate any of her constitutional rights, so the motion to suppress her statement should be denied by the court.

QUESTION 5

Steve owned property in the state of Columbia that Barbara offered to buy for \$500,000. Steve agreed to sell, provided that he retained the mineral rights and had access to the land. Barbara later accepted Steve's conditions and said that she would tell her attorney to prepare the necessary papers. When Steve met with Barbara to sign the papers, he asked if the documents included his conditions and she assured him that they did. In fact, Barbara had not told her attorney of Steve's conditions and they were not in the papers that he and Barbara signed.

Shortly after the sale, Steve decided to investigate whether his former property had any mineral deposits. Barbara refused to let Steve and his geologist on the property and erected barricades to prevent their access. It was then that Steve realized that the documents he signed omitted his conditions.

Barbara had purchased Steve's property in cash, which included \$250,000 of funds that she had embezzled from her employer, Acme Company (Acme). Barbara later embezzled another \$20,000 from Acme, which she deposited in her checking account containing \$5,000 at the time. The following month, she paid off \$25,000 of her outstanding debts, bringing her checking account balance to zero. Subsequently, Barbara deposited \$10,000 of her own money into the checking account. Shortly thereafter, Acme fired Barbara after discovering her embezzlement.

Both Steve and Acme have brought suit against Barbara.

1. What equitable remedies does Steve have against Barbara? Discuss.
2. What equitable remedies does Acme have against Barbara? Discuss.
3. What amount of money, if any, can Acme recover as part of an equitable remedy from Barbara's checking account? Discuss.

QUESTION 5: SELECTED ANSWER A

1) Steve v. Barbara

Governing Law

The common law governs the contracts for the sale of land. The UCC governs the sale of goods. The common law applies here since it is a contract for the sale of land.

Contract Requirements

A valid contract requires offer, acceptance, consideration, and absence of defenses.

Mutual Assent - Offer & Acceptance

An offer is an objective manifestation to enter into a binding legal agreement with offeree. It places power of acceptance in offeree. It requires reasonably necessary and certain terms. Acceptance is the objective manifestation of assent to be bound to the terms of the offer set by the offeror. A counteroffer is made when the offeree does not accept the offeror's terms but instead rejects that offer and offers a new offer.

Barbara offered to buy Steve's property for \$500k. Steve agreed provided that he retain mineral rights. Since he did not accept Barbara's offer by her terms, this is not valid since it does not follow the mirror image rule which requires the offer and acceptance to mirror each other. Steve's additional condition would be deemed a counteroffer. Therefore, he

rejected Barbara's offer and set a new offer with terms that require the conditions set out by Steve. That he would sell his land for \$500k and he retains mineral rights and retains access to the land. Barbara accepted these conditions.

Consideration

Consideration is the bargain for exchange of promises that the parties would otherwise not be legally obligated to do. Here, there is consideration since S must sell his land, B must give money, mineral rights, and land access to S in return.

Material Terms

The issue here is that their agreement is not reflected on the papers the two signed. Steve should assert: fraud, unilateral mistake, and mutual mistake to recover equitable remedies.

Fraud

D material misrepresented - Barbara told Steve that the documents included his conditions.

A material fact - Barbara knew this was material as Steve made it a condition and it is not an opinion but objective fact.

D had intent to induce - Barbara knew this would induce Steve to sign the contract as he asked her if the documents included his condition and she assured him that they did.

D did induce performance - Steve signed the documents based on her material misrepresentation that they included his conditions.

P justifiably relied - Steve's justification was reliable since he had no reason to believe she was lying. Furthermore, he is not going to be held liable because he was negligent in not signing the document because he relied on her misrepresentation.

Mutual Mistake (scrivners error)

A scrivener's error exists when by accident, the parties omitted something material that was supposed to be in the contract that the parties both agreed to. Steve will argue that based on their previous discussion when Barbara accepted, she told him she would tell her attorney to prepare necessary papers. The attorney committed an error by not putting Steve's conditions in. However, Barbara is not mistaken to this. She is aware, therefore there is no mutual mistake.

Unilateral Mistake

Occurs when one party is mistaken to the material term of the contract and the other party knew of the mistake and failed to correct it. Here, Barbara knew that Steve was

mistaken to a material term of the contract since their previous oral agreement indicated a contract based on certain terms. Furthermore, he even asked her if the documents included his condition and she assured him that they did, when in fact they did not. This is the type of unilateral mistake that is raised to fraud. Therefore, the unilateral mistake creates an option for reformation or rescission.

Reformation

Reformation is the equitable remedy of redrafting the contract to reflect the party's true intent. There must (1) be an agreement, (2) grounds for rescission, and (3) no defenses.

As analyzed above there is an agreement. While Barbara may assert that oral agreement is invalid due to (a) SOF and (b) PER. Statute of frauds bars the formation of some contracts when they are required to be in writing. A contract for the sale of land is required to be in writing. Therefore, Barbara will argue that this oral agreement is not valid. However, SOF does not bar reformation when the parties intended to have a material term in writing. Furthermore, Barbara will argue the PER bars introduction of the prior or contemporaneous statements made before the final contract of the parties was formed. She will argue that this contract is the complete and final intention of both parties. However, this argument would fail since evidence of fraud will not bar extrinsic evidence of prior conversations. Therefore, while the agreement may not be a valid contract, the reformation would fix these errors.

Grounds for reformation. The grounds for a rescission are fraud, mutual mistake, or unilateral mistake if it was done fraudulently. Here, there are valid grounds for reformation. Steve will try to show that the parties did agree to Steve's conditions and had mutual assent to that. The fraud and deceit on Barbara's end has caused the contract to reflect terms that are not what the parties assented to. The court can alleviate the harm by rewriting the contract to the terms orally agreed on.

Rescission

Rescission is the equitable remedy of canceling the contract. There must (1) be a contract, (2) grounds for rescission, and (3) no defenses.

Similarly, to reformation, Steve will argue that if the court finds there to be a valid contract, it should be voided due to the fraud or mistake. Since the contract was entered into through deception, the way to remedy the situation would be to put the parties in the position had the contract never been created. If the contract was never created, Steve would own it and Barbara would have her \$500k.

Specific Performance based on Reformation

Specific performance is granted when there is a valid contract and one of the parties has failed to perform on some part of it.

Valid Contract with definite and certain terms

The contract based on the reformation would have definite and certain terms. Steve would retain mineral rights and have access to the land. Barbara may argue that Steve is unaware if the property even has any mineral deposits and therefore the terms are not definite. However, the terms do not state there are mineral rights just that if there are, he has the right to them.

Irreparable Harm/Inadequate Remedy at Law

The property is a unique good therefore there is an inadequate remedy at law. Furthermore, the lack of specific performance would create irreparable harm since he can lose right to the minerals. Money damages would not be sufficient. Furthermore since he has not even investigated the mineral deposits, he does not even know the value of what he is losing out on.

Mutuality

Under the contract, Steve has performed all of his terms. He has sold her the land and she is now in possession of it. There is no condition waiting to occur for Barbara to be required to perform. She has the property in her control and according to the terms of her deal she is required to perform.

Feasibility

The court may find this to be an issue in terms of feasibility. Since it involves the continuous supervision that he retains the mineral rights and has access to land.

However, Steve may argue that easements, licenses, extractions, are all similar and the court can enforce those. This should be no different. Furthermore, it is not like an employment contract that requires obligation of services. It would just require Barbara to give him access. She can leave the barricades up and just put a gate so Steve can go through.

TRO

A TRO is a temporary restraining order. It is issued before a preliminary hearing and can be issued ex parte. The purpose is to keep the status quo until a preliminary hearing can be held on the matter. Generally, it is 14 days. A TRO requires: irreparable harm, balancing of hardships weights in Ps favor, and likelihood of success on the merits.

Steve should ask for a TRO to make sure Barbara does not touch his mineral rights and/or to remove the barricades that prevent his access onto property.

Irreparable Harm

As analyzed above. Property is unique and if he loses access he would not be able to access the mineral rights of his property before the case is heard. In order to protect his interest, the court should issue an injunction. There is no indication that Barbara is doing anything, but because Steve is not able to see, it is impossible to know.

Balancing of Hardships

When balancing the hardships, it does not seem to make a difference to Barbara if she is not allowed to use her mineral rights. Barbara may argue removing the barricades is beyond the status quo since it is already installed and removing them and putting them back would cause substantial harm. It would be a minor hardship. Barbara may argue removing the barricade is a huge hardship for her since she already erected them and to remove them would be costly especially if it is temporary. For Steve, if his rights are depleted, he would experience severe hardship. This weighs in Steve's favor.

Likelihood of Success on the Merits

If it is likely that the court will find Barbara acted fraudulently, this would mean that Steve should have the power to reform or rescind his contract. Either way, the issuance of the TRO would maintain the status quo until the issue is resolved on its merits.

Preliminary Injunction

Is nearly identical to a TRO however, it cannot be issued ex parte. A D must have notice. It is issued before or during a trial and lasts until the merits of the case are resolved. For the same reasons as stated above irreparable harm, balancing of hardships weighs in Ps favor and likelihood of success on the merits. Steve should seek a preliminary injunction to protect his potential interest in the mineral rights. He can also seek to get an injunction to remove the barricades that prevent his access onto property.

Equitable Defenses

Laches

If a plaintiff asserts an untimely claim, then the doctrine of laches may bar the plaintiff's claim.

Barbara will argue it is untimely since he did not file a claim after he read the contract but after the sale. When he decided to investigate whether his former property had any mineral deposits. It is only after Barbara refused him access to the property that he realized the signed contract did not contain his conditions. This argument will likely fail since presumably once he became aware, he filed suit. And as mentioned above he would argue that he was not negligent for relying on her fraudulent misrepresentation.

Unclean Hands

Bars recover if the plaintiff has unclean hands. This means that the plaintiff has been involved in some sort of fraud or deception.

Barbra will try to argue Steve has unclean hands since he did not investigate the mineral deposits before selling the land. This does not rise to the type of unclean hands the equitable defense is trying to protect. Therefore, this defense will fail.

2) Acme v. Barbra

Restitution - While restitution can be a legal remedy for monetary damages, it can also be an equitable remedy as a constructive trust and equitable lien. Restitution looks to see how the defendant has unjustly benefited. Here, Barbara was unjustly enriched from \$250k which she had embezzled from her employer Acme.

Constructive Trust

A constructive trust is a judge constructed trust. The court will order a constructive trust if D has acquired title to property by unjust enrichment. If the courts can trace the money to purchase the property back to D's unjust enrichment, P can get a constructive trust on the property. This entitles the P to access the amount the property is now worth.

Barbra acquired title to Steve's property by \$250k she stole from embezzling her employer. She paid \$500k for Steve's property. Therefore, Acme can trace 50% of the value of the property to the money Barbra embezzled from them. If the property increases in value, Acme will also be entitled to that increase. On the downside, if the property decreases in value, Acme will not be entitled for the deficit. Therefore, if the property is going up in value, constructive trust should be used. If it is believed the property will decrease in value, Acme should opt for an equitable lien.

For example, under constructive trust if the property increases to \$1 million, Acme is

entitled to half of it, therefore they would be entitled to half a million. However, if the property is reduced to \$100k, then Acme would be entitled to \$100k and would not be able to recover the deficiency.

Equitable Lien

Has essentially the same elements as a constructive trust, however it will only give the P the amount that was taken. Furthermore, the funds do not need to be traced to the acquisition of title, but can be traced to the improvements as well. An equitable lien would allow the P to recover the deficiency judgment. It also would put their rights above unsecured creditors.

Acme can put an equitable lien on Barbara's property. She purchased that money using funds she embezzled from Acme. However, unlike a constructive trust where she is entitled to 50% here, she would be entitled just to the \$250k. If the value of the property goes up, she is out of luck and will not get the access. However, if the value goes down, she will still be able to seek the deficiency judgement. For example, as mentioned above if the if the property increases to \$1 million, Acme is still entitled to \$250k. However, if the property is reduced to \$100k then Acme would be entitled to \$100k and would be able to recover the deficiency so they can be made whole.

Defenses

BFP

If the court orders the property to be returned to Steve, he can be considered a bona fide purchaser. This would bar the courts from putting a constructive trust or equitable lien on Steve's property.

Latches

If a plaintiff asserts an untimely claim, then the doctrine of latches may bar the plaintiffs claim.

It is unclear when Acme is bringing this claim, but it is assumed it is made timely.

Furthermore, while Barbara embezzled from Acme twice, once they found out, they fired her which indicated timeliness.

Unclean Hands

Bars recover if the plaintiff has unclean hands. This means that the plaintiff has been involved in some sort of fraud or deception.

There is no indication that Acme has unclean hands. They likely have clean hands since they fired her after discovering her embezzlement.

3) Checking Account

Lowest Intermediate Balancing Rule

With restitution such as a constructive trust and equitable lien, the law assumes the lowest intermediate balancing rule. Which means that it is presumed that the defendant is taking the D's money out first, not the money it acquired unjustly.

At the time Barbara's checking account contained \$5,000. She later embezzled another \$20,000 from Acme. At this point, the money she pulls out will first be deemed to have been a part of her \$5,000. Once that is exhausted, the money taken unjustly from embezzlement will be reduced.

She then paid off \$25,000 of her outstanding debt, bringing her checking balance to zero. Since the bank account was reduced to zero the presumption that the D's money will be used first no longer exist. At this point, she then deposited \$10,000 of her own money into the checking account. Unfortunately at this point, Acme is not able to trace the embezzlement gains to Barbara's checking account. Therefore, Acme will not be able to recover under the lowest intermediate balancing rule. However, she should try to legal remedies as that may entitle her to the stolen money, but not through tracing.

QUESTION 5: SELECTED ANSWER B

S V. B - STEVE'S EQUITABLE REMEDIES.

Equitable remedies attempt to provide a solution that is the most fair considering the circumstances and often when legal (money) damages will be an inadequate remedy.

Restitution is an equitable remedy and is typically measured by the benefit that the defendant unjustly gained from the plaintiff.

Contract Rescission & Reformation. When there are proper grounds for rescission, such as intentional misrepresentation, unilateral mistake or mutual mistake, the court will rescind or cancel the contract. Similar to the grounds for rescission, including intentional misrepresentation or unilateral mistake, the court may reform the contract to meet the innocent parties' intentions.

Intentional Misrepresentation. Intentional Misrepresentation occurs when a party intentionally misrepresents a material fact in the contract with the intention that the other party relies on the misrepresentation and where the other party actually does rely on the misrepresentation.

Here, B intentionally misrepresented a material fact of the contract when she orally accepted Steve's conditions and purposefully excluded these from the contract.

Material Fact. B will argue that the including a provision in the land-sale contract which allowed S to retain mineral rights in the property is not material to the K (contract) because the contract's predominant purpose is for the sale of the property, not the mineral rights.

However, this argument is weak because the S conditioned the entire sale on whether he would be able to retain the mineral rights in the property and even ensured to ask B whether the mineral rights were in the final written agreement like they negotiated.

Intent to Induce reliance. B intended to induce S's reliance when she lied about the contents of the agreement because when S specifically asked her whether the conditions he requested were in the final contract, B chose to lie to him by assuring him that they were in the contract at the time of signing. Further, she purposefully decided to not tell her attorney of Steve's conditions so that the attorney would not write his conditions into the contract and so that she could retain the mineral rights.

Does Induce reliance. B induced S's reliance because as a result of her intentional misrepresentation regarding the terms of the contract, S decided to sign the contract and give her the property.

Thus, S will be able to establish intentional misrepresentation which is a ground to

rescind or reform the contract depending on S's desires.

Unilateral Mistake. A unilateral mistake occurs when one party intends for and believes that the contract terms include something when they actually do not, while the other party knows of their mistake and does not correct the misunderstanding. When a unilateral mistake occurs and the other party knows of the mistake but fails to disclose this to the innocent party, the court may rescind the contract or reform the contract to meet the intentions of the innocent party.

A unilateral mistake likely occurred as well because one party was mistaken as to facts which were material to the K. Further, since B was aware that S believed the contract terms were different than what they actually were and purposefully did not disclose this to him, S is considered the innocent party and his intentions will be honored if he decides to have the K reformed. In effect, the reformed contract will provide him with the mineral rights and access to the land as he previously requested.

Therefore, the court will likely reform the contract if Steve requests this. Reforming the contract may be the best remedy between rescission and reformation because by reforming the contract to include the mineral right access that he originally wanted, his contract goals will be met. However, if animosity remains between him and B, then he may not want to share a contract with her. If that is the case, then rescission will be his best option.

Injunctive Relief. There are various forms of injunctive relief which requires a party either to do something or refrain from doing something. A TRO and a preliminary injunction happen prior to the end of the trial in order to preserve the rights of the requesting party. Specific performance can occur after the trial has ended and would require the defendant to specifically perform his duties under the contract.

TRO. If Steve fears that Barbara may use up or sell the mineral rights that she is in possession of while the matter is sorted out, he may want to ask for a TRO (temporary restraining order) or preliminary injunction to keep B from taking either of these actions. In order to obtain injunctive relief at the preliminary stages of the trial, the plaintiff must establish (1) Inadequate legal remedy (2) Irreparable harm (3) balancing of hardships that weigh in favor of P. (4) Likelihood of success on the merits.

(1) Inadequate legal remedy. Here, Steve will argue that money damages will be inadequate because the contract involves a unique thing, namely, the sale of land and mineral rights. Thus, forcing B to pay S money to compensate him will not be sufficient because land is irreplaceable.

(2) Irreparable Harm. Here, S will argue that he will suffer irreparable harm if the injunction is not granted because B may maliciously sell the minerals on the land that S is seeking. At that point he will not be able to get those minerals back even though they

are rightfully his.

(3) *balancing of hardships* weigh in favor of P. If the injunction is not granted Steve's hardships will outweigh Barbara's because S values the minerals on the land more than B. Since S owned the property prior to B and specifically conditioned the contract on whether he would retain his mineral rights to the land, he obviously cares about them a lot and has more experience on how to utilize the mineral deposits because he's done so in the past when he owned the land. B will argue that she will suffer greater harm than S will because B does not want to have to share access to her land with someone she doesn't know. However, this was what was originally contracted for, so B's argument is weak. On balance, S will suffer greater harm than B.

(4) *Likelihood of success on the merits*. S has a high likelihood of success in a claim against B to reform or rescind the contract because B engaged in fraudulent behavior to induce S into entering into the contract.

Therefore, the court will grant a TRO or preliminary injunction if S requests this equitable remedy.

Specific Performance. Specific performance is a form of injunctive relief that requires to ask the court to require a party to specifically do something. If the K is reformed to meet the intent of Steve, then he may have to ask the court to require B to specifically

perform her obligations under the K if she continues to refuse. Specific performance may be granted if the plaintiff can show (1) a Valid contract exists (2) there are clear and definite terms to enforce (3) legal remedies will be inadequate (4) feasibility and (5) no defenses to specific performance exist.

(1) a Valid contract exists. A valid contract exists because S and B both entered into a written contract for the sale of the land which they both signed.

(2) there are clear and definite terms to enforce. Since the contract terms do not reflect the intent of both parties but rather only B's intent, the terms are not clear and definite. As a result, the court will have trouble requiring B to specifically perform under the contract because the contract terms are not what S is seeking.

(3) legal remedies will be inadequate. See analysis under TRO

(4) feasibility. Requiring a party to perform under the contract must be feasible for the court to enforce and supervise. It may be difficult for the court to ensure that B is allowing S to access the minerals on her land because at any point, B may decide to erect the barricades again.

(5) no defenses to specific performance exist. It is unlikely that any equitable defenses apply that would bar injunctive or other equitable relief.

In conclusion, specific performance is not going to be granted because the terms of the contract are incorrect. However, a TRO or a preliminary injunction requiring B to allow S access to the property until the contract is reformed or rescinded will allow S to obtain the benefits that he would have been entitled to.

Equitable Defenses

Laches. Laches could bar a plaintiff's recovery if the plaintiff waited an unduly long time to bring their claim against the defendant and this delay prejudiced the defendant.

Here, laches will not help B because there's no indication that S waited a long time prior to bringing his claim. B may argue that as soon as the contract was formed, S should have visited the land to check whether he could enforce his mineral rights and access the property. However, just "shortly after the sale" S decided to investigate the property and exercise his mineral rights, so he definitely did not delay asserting his rights.

Further, B has suffered no prejudice. Thus, laches will not apply.

Unclean Hands. Unclean hands exists when the plaintiff acted with bad intent when contracting. S did not act with bad intent. In fact, he was the innocent party who suffered from B's fraud.

A V. B - ACME'S EQUITABLE REMEDIES.

Constructive Lien / Equitable Trust. When a defendant uses the profits he obtained from the plaintiff unjustly for other things, and the plaintiff can trace the source of the funds to the property or bank account, the plaintiff can get a constructive trust or equitable lien over the property. The elements are (1) D has legal title to the property (2) D was unjustly enriched (3) money damages are inadequate.

Here, B embezzled \$250k from Acme (A) which A can trace back to the purchase of the Columbia property. B has legal title to the Columbia property because she purchased the land in a valid land sale contract. Next, B was obviously unjustly enriched because she is able to keep the entire property she purchased 50% of which was purchased using A's stolen funds. If she hadn't embezzled A's funds, then she likely wouldn't have had enough money to purchase the property at all. Last, money damages might be an adequate remedy because A just wants the money back that was embezzled. However, since B's bank account has a balance of \$0, she will not be able to return the money she stole. Thus, money damages are inadequate.

In conclusion, a constructive trust or equitable, will likely be granted by the court if A requests this equitable remedy. When the value of the property purchased with the plaintiff's money has increased, the plaintiff is better off requesting a constructive trust because this allows the plaintiff to keep the entire property. In contrast, equitable liens

effectively sell off the property and return the proceeds back to the plaintiff for the exact amount that was stolen from them, even if the property sold for more. Acme is better off requesting a constructive trust because property tends to increase in value.

A'S RECOVERY FROM B'S CHECKING ACCOUNT

Commingled Funds. Typically, when a defendant embezzles or otherwise steals, the stolen property or money can be traced to the defendants' purchases. However, once the defendant begins mixing the stolen funds with her own funds, tracing will become very difficult, and the plaintiff won't be able to continue tracing.

Here, B embezzled \$20k from A which she deposited into her checking account containing \$5k of her own funds. At this point the embezzled money likely could still have been traced and returned to A. However, once B used the entirety of the fund to pay off debts, bringing her balance to \$0, the funds were no longer recoverable by A because they could no longer be traced.

In conclusion, Acme will not be able to recover the \$20k as part of an equitable remedy from Barbara's checking account.