



California Bar Examination

**Essay Questions
and
Selected Answers**

February 2018



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

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

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

<u>Question Number</u>	<u>Subject</u>
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

ESSAY EXAMINATION INSTRUCTIONS

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

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

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

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

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

QUESTION 1

Austin recently sold a warehouse to Beverly. The warehouse roof is made of a synthetic material called "Top-Tile." During negotiations, Beverly asked if the roof was in good condition, and Austin replied, "I've never had a problem with it." In fact, the manufacturer of Top-Tile notified Austin last year that the warehouse roof would soon develop leaks. The valid written contract to sell the warehouse specified that the property was being sold "as is, with no warranties as to the condition of the structure."

After Beverly bought the warehouse, the roof immediately started leaking. Beverly hired Lou, an experienced trial lawyer, and executed a valid retainer agreement. Beverly then sued Austin for rescission of the warehouse sale contract, on the bases of misrepresentation and non-disclosure.

At trial, Lou offered the expert testimony of Dr. Crest, a chemical engineer who had testified in other litigation concerning Top-Tile roofs. Lou knew that Dr. Crest had previously testified that, "Top-Tile roofs always last at least five years." Lou also knew from the manufacturer's specifications that Top-Tile roofs seem to last indefinitely, but not in some climates. On cross-examination, Dr. Crest testified that, "Top-Tile roofs never last five years," and that, "Climate is not a factor; Top-Tile roofs fail within five years everywhere in the world." During closing argument, Lou repeated Dr. Crest's statements and also said that Lou's own inspection of the roof confirmed Dr. Crest's testimony.

1. Will Beverly be able to rescind the contract with Austin on the basis of misrepresentation and/or non-disclosure? Discuss.
2. What, if any, ethical violations has Lou committed? Discuss. Answer according to California and ABA authorities.

QUESTION 1: SELECTED ANSWER A

I. Contract dispute

The first issue is whether Beverly will be able to rescind the contract with Austin based upon misrepresentation.

A valid contract requires mutual assent (offer and acceptance) and consideration. Mutual assent means that there is a meeting of the minds as to the basis of the contract or bargain and the terms of the contract. Consideration requires a bargained-for exchange of legal detriment. Where the parties to a contract do not have a meeting of the minds, that is, there is no mutual assent, then the validity of the contract can be challenged. Put another way, if the parties do not have mutual assent then no contract was formed.

Rescission is a contract remedy available where one party seeks to void a contract. Lack of mutual assent is a basis for rescission of a contract where one party shows misrepresentation, mutual mistake or non-disclosure. The result is though the contract did not exist. A misrepresentation may make a contract unenforceable where one party makes a material misrepresentation, that was a basic assumption of the contract and the other party relies on that statement and was damaged. Non-disclosure arises where a party fails to disclose a material fact of the contract which forms the basis of the contract and the other party has no reason to know of the failure to disclose.

Generally, courts look to the terms contract in determining the terms of the contract. Moreover, parol evidence is generally not available to supplement or contradict the terms of a contract. However, the parol evidence rule against extrinsic evidence does not apply to evidence regarding the formation of a contract. Thus, oral

statements made at the time of entering into a contract may be admissible to show a condition on performance or misrepresentation.

Here, the facts state that Austin and Beverly entered into a valid written contract to sell the warehouse. Thus, there is a valid contract that can be the subject of a rescission claim. We are told that during negotiations, Beverly asked if the roof was in good condition and Austin responded that he had never had a problem with it, despite having been notified a year earlier by the manufacturer of the roof tiles, Top-Tile, that the roof would soon develop leaks. Thus, Austin made a misrepresentation of fact regarding the condition of the roof in response to Beverly's inquiry on that exact topic. Finally, the parties agreement included an "as is" clause which stated that Beverly was buying the warehouse in its current condition. Austin will argue that Beverly did not rely on his misrepresentation, and that Beverly did not make it clear in her comments to Austin that the condition of the roof was a material fact of the contract, and that had the roof been in poor condition Beverly would not have purchased the warehouse. Beverly will argue that Austin's misrepresentation as to the condition of the roof certainly formed the basis of the bargain because the condition of a roof is quite important in the purchase of a warehouse, or any structure. It is likely that Beverly would succeed on this point that the misrepresentation was a basic assumption of the contract. Moreover, as Beverly is challenging the formation of the contract itself, parol evidence of Austin's oral statement to her is admissible.

If the court believes that Beverly should have inspected the roof independently of Austin's representations, then Beverly will be hard pressed to survive a claim by Austin that the contract stated the property was sold "as is". Where a contract states that property is purchased "as is" at common law, this was strictly construed. However, the modern trend is to relax the enforcement of "as is" clauses where one party misrepresented or committed fraud. That is the case here given that Austin was informed the prior year by the manufacturer that the roof would soon leak, though it does not appear from the facts that Beverly made her own independent inquiry into the

condition of the roof. Again, Austin will argue that the "as is" clause is controlling and that it would be prudent for a purchaser of property to have an inspection done to inform the buyer of any potential defects in the property, including those that even the seller was unaware of. Finally, had the roof been of such a concern to Beverly, she could have made the condition of the roof a term of the contract and not executed an "as is" provision. Yet, given his misrepresentation of fact, which he clearly knew to be false as we know from the facts, a court may find that the misrepresentation was significant enough to void any mutual assent despite the "as is" provision in the interests of justice. Finally, Beverly can show damages in that immediately after she bought the warehouse, the roof started leaking.

Thus, Beverly may be able to rescind the contract based upon misrepresentation.

With respect to the defense of non-disclosure, Beverly will be required to show that Austin did not disclose a material fact that formed the basic assumption of the agreement and that Beverly relied on his statement. Non-disclosure is different from misrepresentation in that with non-disclosure, the party makes no comment or disclosure with respect to a material fact that is known to be material to the other party. Moreover, Austin must not have any defenses.

Here, as stated above, Austin failed to disclose the actual condition of the roof in addition to misrepresenting the condition of the roof. Austin will make the same arguments as above that Beverly did not make it known - in words or actions - that the condition of the roof was a material fact of the contract that formed a basic assumption of the contract. Moreover, Austin will argue that the "as is" clause bars Beverly from recovery and that Beverly had a duty to do her own inspection of the property to discover the condition of the roof.

However, given the facts presented, and a court's ability to relax the strict construction of an "as is" clause where a party has misrepresented, or failed to disclose a material

fact, or committed fraud, a court may rescind the contract. Thus, Beverly may have a successful claim of rescission based upon misrepresentation.

II. The next issue is what, if any, ethical violations Lou committed.

Under both the ABA and California ethics code (CA rules), a lawyer, as an officer of the court, has a duty of candor. Under both the ABA and CA rules, a lawyer also has a duty to disclose law that is contrary to the client's position. However, a lawyer is not required to disclose facts that are not helpful to the client. Moreover, a lawyer must not offer evidence that he knows to be false or misleading and must seek to rectify any false evidence presented. If a lawyer reasonably believes that a witness will testify falsely, the lawyer must try to convince the witness or client not to testify falsely. If that fails, the lawyer must not allow the witness or client to testify. Under ABA and CA rules, a lawyer may then seek to withdraw. If a witness or client does testify falsely, in addition to seeking to rectify the false evidence, under the ABA rules the lawyer may notify the court or appropriate tribunal.

Here, Lou was an experienced trial lawyer who entered into a valid retainer agreement with Beverly. Lou hired an expert who he knew had previously testified regarding Top-Tile roofs. Lou apparently knew that the expert, Dr. Crest, had previously testified that the roofs last at least 5 years. Lou also knew, based upon review of Top-Tile's specifications, that Top-Tile stated that their tiles do not last indefinitely in some climates. However, at trial Dr. Crest testified differently, testifying on Beverly's behalf, that Top-Tile never lasted five years. If Lou knew that Dr. Crest was going to testify falsely, Lou must not have permitted him to testify. If Lou reasonably believed that Dr. Crest intended to testify falsely he should have tried to convince him to testify truthfully. Finally, if Lou knew that Dr. Crest had indeed testified falsely he must rectify the false testimony. This is particularly the case here, which is a civil case and one in which Lou retained Dr. Crest as an expert. Lou likely could have found an expert who would testify in support of Beverly's claim. Thus, under both ABA and CA rules, if Lou

knew that Dr. Crest was going to testify falsely and did nothing about it, then Lou is subject to discipline. Moreover, once Dr. Crest testified that Top-Tile roofs "never last five years", if Lou knew this to be false testimony, he had an obligation to neutralize the testimony.

This is also the case with respect to Dr. Crest's statement that "climate is not a factor." The fact that Lou was aware of Top-Tile's manufacturer's specifications that climate did affect the condition of the roofs does not mean under the ABA and CA rules that Lou was obligated to disclose that fact. This is a fact that is not in his client's favor, and under the ethical rules Lou was not obligated to disclose that. The obligation under ABA and CA rules is to disclose legal principles that are not in your client's favor. Thus, there is no ethical violation for failing to disclose that fact. However, if Lou knew that Dr. Crest's statement was false based upon the available data and his expert opinion, he had an ethical duty to clarify.

Thus, based on the facts presented, if Lou knew that Dr. Crest testified falsely, he has an ethical violation to clarify and rectify any false evidence, which he appears not to have done. Thus, he is subject to discipline.

Finally, with respect to Lou's closing argument. Lou would also be subject to discipline because he essentially ratified testimony which he likely knew was false. Thus, he did the opposite of what he is ethically obligated to do under ABA and CA rules. Moreover, Lou offered personal opinion and observation which was not the subject of evidence in the case. This was also unethical. Here, Lou inserted his own opinion and "evidence" that his inspection of the warehouse roof confirmed Dr. Crest's testimony. Lou was essentially giving testimony during his closing examination, based upon his own observations. A closing argument is not considered evidence and a lawyer is not permitted to raise issues, facts or evidence that were not presented at trial. Lou clearly violated this rule and is subject to discipline.

Finally, under both ABA and CA rules, when retaining an expert, a lawyer is required to get the client's informed consent (which must be in writing under the CA rules) which includes a clear statement of how the expert is going to be paid. The client is to be fully informed as to the terms of the retainer of an expert, before the expert is, in fact, retained. It does not appear from the facts that Lou did this. Thus, he is subject to discipline.

QUESTION 1: SELECTED ANSWER B

1.) Applicable Law

There are two general bodies of law which apply to cases involving a breach of contract: The Common law, and the Uniform Commercial Code (UCC). The UCC applies to all contracts with respect to the sale of goods, and the common law generally applies to all other contracts. "Goods" for the purpose of this determination are movable objects.

Here, Austin sold a warehouse to Beverly. A warehouse is real property, not a "movable good." Thus, the Common Law would apply to this transaction.

2.) Will Beverly be able to Rescind the Contract with Austin on the Basis of Misrepresentation and/or Non-Disclosure

As a result of the alleged misrepresentation, Beverly seeks to rescind her contract with Austin. Rescission is an equitable remedy which a court may grant under certain circumstances where a valid, enforceable contract has been created, but monetary damages would be inadequate, and equity requires a different remedy. If a court grants rescission as a form of relief, the contract is effectively cancelled, and parties are returned to the position they were prior to the formation of the contract (with possibly some form of incidental damages recovered).

A.) Mutual Mistake

The first ground on which Beverly may seek to rescind this contract is the grounds of mutual mistake. Generally, under the common law, a contract cannot be rescinded due to the mistakes of the forming parties. However, a court may grant the remedy if rescission if it can be shown that (1) there was a mistake as to a material fact, and (2) neither party bore the risk of that mistake.

Here, Austin told Beverly that he had "never had a problem" with Top Tile, indicating that the roof was in good condition. However, the roof ultimately leaked. Thus, there

was a mistake as to whether the roof would leak. Moreover, this is a material fact as it substantially affects the value of the property. Thus, a court would likely find a mistake of material fact.

However, Austin appears to have known about the issue. The Manufacturer of Top Tile had recently reached out to him and informed him that the warehouse roof would soon develop leaks. Thus, Austin knew about the problem, so this would not be considered a "mutual mistake."

B.) Unilateral Mistake

While there is no "mutual mistake" which could have formed a basis for rescinding the contract, there has been a "unilateral mistake." A court allows rescission based on a unilateral mistake as long as (1) the mistaken party did not bear the risk of that mistake, (2) the mistake was as to something material, and (3) the other party had reason to know of that mistake.

Here, Beverly was mistaken about the quality of the roof. She believed that it was in good condition and would not break soon. As discussed above, whether or not it would break is a material fact. Thus, she was mistaken as to a material fact.

Moreover, Beverly likely did not bear the risk of that mistake. A court generally will find a party to have born the risk of the mistake only if they have some superior knowledge. Here, it was in fact the seller, Austin, who had better knowledge because he owned the property and had spoken with the Top-Tile manufacturer. Thus, Austin would have been the party to bear the risk of the mistake here.

Moreover, Austin had reason to know of Beverly's mistake. Beverly specifically asked if the roof was in good condition, and Austin induced that mistake by informing her that he had "never had a problem with it" while being fully aware that the manufacturer had warned him that it would start leaking soon.

Thus, a court would likely find that Beverly may rescind the contract on the grounds of a mutual mistake because (1) she was mistaken as to the condition of the roof, (2) she did not bear the risk as to that mistake, and (3) Austin had reason to know of that mistake.

C.) Misrepresentation

Courts may also grant rescission when a contract was formed based on a material misrepresentation. Under this rule, a court will rescind a contract if they can show that one party (1) intentionally, (2) made a misrepresentation of material fact, (3) intending that the other party rely on that misstatement, (4) the other party did in fact rely on that misstatement, and (5) damages were suffered as a result.

i. Intentional Misrepresentation

Here, a court would likely find that there was an intentional misrepresentation. As discussed above, Beverly specifically asked whether the roof was in "good condition." Despite knowing that Top-Tile, the manufacturer of the roof tiles, believed that the roof would soon develop leaks, Austin responded that he "never had a problem with it." While this was not a direct misstatement of fact, it was an omission.

While a seller of property generally has no duty to disclose issue on the property due to the common law doctrine of Caveat Emptor, a seller may not omit a material fact upon inquiry of the buyer. Thus, while he technically did not lie, he committed an intentional misrepresentation for these purposes.

ii. Material Fact

This omission was also material. A fact is "material" if a reasonable person would consider that information when deciding whether or not to enter into a contract.

Here, the omitted fact related to the quality of the roof. Because repairing roofs is expensive, a reasonable person would want to know that information when deciding whether or not to enter into a contract. Thus, this term would be deemed material.

iii. Intending That the Other Party Rely

Austin likely made this statement knowing or intending that Beverly would rely on it. He wanted to sell the property (possibly because it would soon start leaking). Thus, he would likely have intended that Beverly rely on that statement.

iv. Other Party Did In Fact Rely

It also appears that Beverly did rely on that misstatement. She ultimately purchased

the property. The fact that she asked about the roof's condition prior to the purchase indicates that it was an important fact to her. Thus, she likely relied on that statement. Moreover, there is no evidence that she made an independent inspection, further lending credence to the idea that she relied on this misrepresentation.

v. Damages

Beverly was also damaged. She now has to pay for the repairs.

Because all of these elements are satisfied, a court would likely find that Beverly can rescind the contract on the grounds of a misrepresentation.

D.) Rescission Based on Non-Disclosure

A contract may also be rescinded on the grounds of non-disclosure if (1) there was a duty to disclose information, and (2) the seller failed to disclose.

As discussed above, there generally is no duty to disclose conditions on the premises due to the doctrine of caveat emptor. However, if a buyer makes an inquiry, a seller is not permitted to omit and fail to disclose a material fact related to that question.

Here, Austin would not have had a general duty to disclose the statement made by Top-Tile regarding the impending leak on the premises. However, Beverly asked if the roof was in good condition. This question created a duty for Austin to disclose known conditions in the roofing, which he failed to do when he deflected the question by stating "I've never had a problem with it."

Thus, Austin had a duty to disclose, and failed to do so. Thus, Beverly may properly seek rescission on the grounds of non-disclosure.

E.) The "As Is Warranty."

Generally, when property is sold, certain warranties are contained within the sale contract. These include warranties of habitability (in a residential property), covenants of quiet enjoyment, and warranties related to the condition of the property. However, parties are free to waive such provisions in the contract.

Here, Beverly purchased a warehouse from Austin. Thus, generally she would be granted certain warranties which would have protected against things such as a leaky roof. However, the parties waived those warranties. The written contract explicitly stated that the property was being sold "as is, with no warranties as to the condition of the structure." Thus, there appears to have been a valid waiver of warranties with regards to the condition of the structure. Such a waiver would be applicable even to express conditions.

Arguably, Austin gave an express warranty to Beverly when he implied that there were no conditions with the roof. Thus, generally, this would protect against Beverly's contemplated rescission claims. However, warranties cannot overcome explicit misstatements, omissions, and fraud used to induce into the contract.

As discussed above, Austin made a material omission. Thus, while the waiver generally would be considered valid, the waiver cannot be applied to the condition of the roof.

F.) Parol Evidence

Austin may argue that evidence of his Statements are inadmissible under the "parol evidence rule." This rule state that, when there is a written, "integrated" contract, statements not contained within the writing cannot be used to contradict terms in the writing.

Here, there is a written contract. Assuming there was a proper merger clause, the parol evidence rule would apply to this contract. Moreover, Beverly would be attempting to introduce Austin's statements regarding the roof. This would contradict the "no warranty" provision." Thus, it is being introduced to alter the terms of the writing.

However, this is being introduced not to change the terms, but to show that the contract is invalid. Thus, the parol evidence rule would not bar introduction of this evidence.

III.) What Ethical Violations has Lou Committed

Lou has committed multiple ethical violations related to this representation.

1.) Duty of Candor to the Court & Opposing Counsel

Under both the ABA and CA ethics rules, attorneys own a duty of candor and truthfulness to both the court and to opposing counsel. This means that, while an attorney is required to zealously advocate for the interests of their clients, they may not introduce testimony which they know to be false.

Here, Lou offered the expert testimony of Dr. Crest. Lou knew that Dr. Crest had previously testified that "Top-Tile roofs always last at least five years" and that the manufacturer's specifications indicated that Top-Tile roofs last indefinitely, except in certain climates. However, during cross examination, Dr. Crest testified that "Top-Tile Roofs never last five years" and that "climate is not a factor." Thus, Lou's witness introduced testimony which Lou knew to be false. Moreover, Lou chose to repeat those statements in his closing argument.

By doing this, Lou introduced facts known to be inaccurate to the court and to opposing counsel. This is impermissible. Thus, he violated his duties of candor under both the CA and ABA Rules.

Lou may argue, in his defense, that the testimony was elicited on cross-examination, not in the direct. This means that Lou did not directly induce the fraudulent testimony. However, his duties would require him to communicate this fact to the judge, and would prohibit him from referencing those facts in his closing arguments (which he did.) Thus, even though he did not personally elicit the fraudulent testimony, he will have been found to have violated this ethical obligation.

2.) Attorney as a Witness

Lou also violated his ethical duties when he effectively served as a witness in this case. Under the ABA rules, an attorney is not permitted to act as a witness in a case which they are litigating unless their testimony (1) relates to a non-disputed issue, or (2) the attorney is so critical to the case, that they cannot be removed as counsel, and their testimony is critical. Under the CA rules, an attorney may only testify if

Here, during his closing arguments, Lou testified that his "own inspection of the roof confirmed Dr. Crest's testimony." This is opinion testimony. Thus, while he was not

technically called as a witness, he did serve as one. Therefore, this testimony is only permissible if one of the exceptions apply.

It is unclear if this is a disputed issue. The central issue in the case was the nature of the representation about the leaky roof. However, it does not seem to be in dispute whether the roof was leaking, just whether there was a warranty. Lou's testimony only seems to state that he confirmed there were leaks. It is unlikely that he was testifying about the chemical makeup of the roof, or its propensity to leak. Thus, arguably he was not testifying regarding a disputed issue. However, because what he is talking about comes so dangerously close to the central issue in the case, it is likely impermissible. Thus, by stating that he did his own inspection and confirmed the results, he violated the rule prohibiting attorneys from acting as witnesses.

1. Duty of Competence

Lou also may have violated his duty of competence. Under the ABA rules, an attorney must carry out a representation in a competent manner. Under the CA rules, an attorney must not repeatedly carry out a representation in a negligent, reckless, or incompetent manner.

Here, Lou hired an attorney who had regularly testified about the opposite of the position he sought to assert. This information would almost certainly come out in a proper cross examination. Thus, his witness would have been thoroughly discredited. A competent attorney does not hire an expert witness who will easily be discredited and impeached. Thus, under the ABA rules, he violated his duty of competence.

Under the CA rules, he likely violated no duties. There is no evidence that this was a repeated pattern. Thus, under the CA rules, he likely would not be found to have violated his duty of competence.

QUESTION 2

County Jail has prominently posted in the inmate dining hall quotations from three of the Ten Commandments as follow: “You shall not kill.” “You shall not steal.” “You shall not give false testimony against your neighbor.” County officials thought these were “good moral principles” that would assist prisoners when they were released.

The Jail makes available to inmates copies of the Bible and the Quran (Koran), but no other religious books. Inmate Ivan requested a copy of a religious book central to his recognized, but relatively small, sect. This book urges the religious use of a hallucinogenic sacramental tea. Ivan has requested permission to have the hallucinogenic sacramental tea on a weekly basis as part of his religious observances.

Ivan’s request for the book was denied on the basis that it encourages illegal drug usage. His request for permission to have the hallucinogenic sacramental tea was denied for the same reason.

1. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the dining hall quotations, and what is the likely outcome? Discuss.
2. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the denial of his requests for the book and the tea, and what is the likely outcome? Discuss.

QUESTION 2: SELECTED ANSWER A

Constitutional Law

In general, there must be a separation of Church and State.

Dining Hall Quotations

Establishment Clause

The issue is whether Ivan could assert a violation of the Establishment Clause with regards to the dining hall quotations.

First, to bring a claim under the U.S. Constitution and the Establishment Clause, there must be a government action. Here, the action of posting three of the Ten Commandments was done by the county jail. A county is considered a government actor. Thus, there has been a government action in this case.

Under the Establishment Clause, the government cannot take action or promulgate a rule that has the effect of establishing or inhibiting religion. In order to determine whether government action violates the Establishment clause, the court will apply the *Lemon* test. The *Lemon* test has three factors. To meet these three factors, the government must show that (i) the action has a secular purpose, (ii) that the action's primary effect is not to advance or inhibit religion, and (iii) there is not excessive entanglement between the government action and religion.

Secular Purpose

First, the government must show that its action has a secular purpose. Here, the county officials stated that the three commandments it posted were "good moral principles" that would assist prisoners when released. It appears that the county officials meant for the purpose of posting the commandments to be secular. Their goal was to assist prisoners when they are released from prison. Likely to ensure that they do not commit further crimes such as killing or stealing, and also telling them not to lie. If this was the sole purpose in posting those three commandments, that is likely considered a secular

purpose.

Primary Effect

The primary effect of the action must not be to advance or inhibit religion. Ivan will likely argue that anytime someone posts all or part of the Ten Commandments, the primary effect is to advance religion. More specifically, that the Ten Commandments are inherently religious because they are from the bible. Thus, the primary effect is to advance the religions that believe in the Ten Commandments, while inhibiting the religions that do not believe in the Ten Commandments.

Conversely, the county officials will likely argue that they only posted three of the Ten Commandments. That, coupled with the purpose in posting the three commandments, indicates that the primary effect is not to advance or inhibit religion. Rather, it was intended as a way to help morally guide the prisoners. That the primary effect is to advance good morals.

This will be a close factor and something for the fact finder to decide. It is possible the fact finder could go either way on this particular issue.

Excessive Entanglement

Even if the county is successful on the first two factors of the *Lemon* test, it will likely fail on this factor. Under this prong, the government action cannot be excessively entangled with religion. Ivan will argue (successfully) that the Ten Commandments are inherently religious. And it does not matter that the county posted only three of the commandments, or that their purpose was not religious. Posting the Ten Commandments would likely be the same as hanging a cross or a prayer on the wall. The government's action of posting the ten commandments entangles itself with religion. Even if they do not intend to promote religion, the association of the ten commandments with the government action results in that entanglement. The county officials will have a hard time arguing that their action was separate from religion.

In sum, although a court could find that the county official's purpose in posting the three commandments was secular, and that the primary effect did not advance or inhibit religion, it is likely a court would conclude that posting those commandments resulted in

an excessive entanglement between the government and religion. Therefore, Ivan will be successful in his claim that the county jail has violated the Establishment Clause.

Denial of Ivan's Book

Free Exercise of Religion Clause

The issue is whether the jail's denial of Ivan's request for his book violates the Free Exercise Clause of the U.S. Constitution.

Under the 1st Amendment of the Constitution, every person has the right to the free exercise of his or her religion.

Sincerely Held Religious Belief

The first issue here is whether Ivan's religious belief is protected.

Whether a religion is protected under the Constitution is not based on whether the particular religion is well known or well established. Rather, the court will look at whether the individual has a sincerely held religious belief. Put another way, the question is whether the individual's belief and whether that belief has a similar role in the individual's life as a typical religion would.

In this case, the facts state that Ivan was requesting a religious book related to his recognized, but relatively small sect of his religion. The fact that Ivan's sect is small does not mean that his belief is not protected. Based on the limited facts, it indicates that his sect is recognized, and that he holds a sincere belief in it. His sincerity is evidenced in his request for a book, as well as his request for the religious use of tea (analyzed below). This indicates that Ivan's religious belief, although based on a small sect, is sincerely held and thus subject to constitutional protections.

Free Exercise

The issue is whether the county jail's action of denying Ivan's book violates the Free Exercise Clause of the 1st Amendment of the Constitution.

When a government action or regulation is based on or discriminates against religion, it must pass strict scrutiny. Strict Scrutiny requires that the government action is

necessary to achieve a compelling government interest.

Here, the government's stated interest is that the book encourages illegal drug usage. The reduction or elimination of illegal drug is likely considered a compelling government interest so they will have met this prong of the test. However, the actions necessary to achieve that is to outlaw or prohibit the actual use of drugs. In this case, the county jail is denying Ivan a religious book. The act of denying that book is likely not necessary to achieve the stated purpose of preventing illegal drug use. The action of not allowing illegal drug use is the action necessary to prevent illegal drug use (analyzed below).

As such, a court will likely consider the county jail's action of not providing Ivan his book to not pass strict scrutiny. Specifically because it is not necessary to achieve their purpose. As discussed below, they have other means to achieve their purpose.

Ivan will likely be successful in his challenge that the county jail has violated his 1st Amendment right to Free Exercise of his religion based on their denial of his religious book.

Equal Protection

The issue is whether the jail's failure to provide Ivan his religious book violates the Equal Protection Clause of the Constitution.

Citizens are entitled to equal protection of the laws of the United States. This applies to the federal government under the 5th Amendment, and is applicable to the states under the 14th Amendment.

Here, the jail provides copies of the Bible and the Quran (Koran) to prisoners, but it does not provide any other religious books. Providing religious books for some religions and not others is not equal. Under the Equal Protection Clause, an action or law that discriminates against a suspect class must pass strict scrutiny. Actions based on religion, as mentioned, must pass strict scrutiny. Thus, because the government action is not equal and it is based on religion, it must pass strict scrutiny.

Similar to the above analysis, failing to provide Ivan his book does not pass strict scrutiny. There is no stated basis for why the Jail provides inmates with copies of the

Bible and the Quran, but not other books. The jail offers no reasons why it should be allowed to provide books based on some religions, while denying books for other religions. Although the jail's interest of preventing illegal drug use is compelling, denying the book is not necessary to achieve that purpose.

The jail is required to either provide all of the requested religious books (assuming they are sincerely held religious beliefs) or they can offer none. That is the only way that they can ensure equal protection of the laws to the various religions.

The county jail's offering of certain religious books and not others violates equal protection. The jail's action does not pass strict scrutiny, and thus Ivan would be successful on this claim.

Denial of Ivan's Tea

Free Exercise

The issue is whether the denial of Ivan's request for hallucinogenic sacramental tea violated his 1st Amendment right to free exercise of his religion.

As stated above, a government action that discriminated against religion must pass strict scrutiny. Unlike the book request, the jail's denial of Ivan's request for hallucinogenic tea will pass strict scrutiny.

As mentioned previously, the government's interest is to eliminate or outlaw the use of illegal drugs - a compelling government interest. That interest is no more compelling than in a jail setting. Illegal drug use is not allowed by the general public, and absolutely should not be allowed by prisoners in a jail. Here, Ivan is specifically asking to use hallucinogenic tea, which is assumed to be an illegal drug. As such, not providing that tea is necessary to accomplish its stated goal. The fact that the tea is sacramental does not matter. The Supreme Court previously upheld a similar government action that outlawed the use of drugs (i.e. peyote) by Native Americans. Although Native Americans are still allowed to practice their stated religions, use of sacramental drugs was not allowed. The same analysis applies here. Although Ivan is allowed to practice his religion, including use of a religious book,

the county jail is not required to provide him with illegal hallucinogenic tea.

Denying Ivan his hallucinogenic sacramental tea is necessary to achieve the jail's compelling interest of outlawing and eliminating illegal drug use in its prison.

Ivan will not be successful in his challenge of the government's denial of his hallucinogenic tea.

Equal Protection

The issue here is whether the jail's denial of Ivan's tea violates equal protection. See above for the rules regarding equal protection.

Unlike the book situation, where the jail offers some religious books but not others, there is not the same issue here. There is no indication that the jail has offered the use of teas or other drinks for other religious. Thus, without more, the Equal Protection Clause is not invoked here. Even if it were, for the same reasons as the analysis under the Free Exercise Clause, the government's action passes strict scrutiny.

Ivan will not be successful in his claim that the jail's denial of his sacramental hallucinogenic tea violates equal protection of the laws.

QUESTION 2: SELECTED ANSWER B

Ivan's Constitutional Challenges to the Dining Hall Quotations

Ivan can challenge the quotations on the dining hall as a violation of the Establishment Clause.

A. Establishment Clause

The Establishment Clause prohibits the government from engaging in actions that constitute an establishment of a religion. The clause is applicable to state (and county) officials through the Fourteenth Amendment. When government conduct potentially implicates the establishment clause, courts apply the *Lemon* test to determine if there has been a constitutional violation. The *Lemon* test is a three-step approach whereby government conduct will be found to violate the establishment clause unless it has a secular purpose, the primary effect neither advances nor prohibits religion, and there is no excessive entanglement with religion.

1. Secular Purpose

First, County will need to show that the quotations on the dining hall have a secular purpose. The dining hall quotations contain three quotes from the Ten Commandments: "You shall not kill"; "You shall not steal"; and "You shall not give false testimony to your neighbor." The Ten Commandments is a religious document, and thus appears to have a religious, not a secular purpose. The County will argue that the officials chose this quotes, however, because they emphasized "good moral principles." Ivan may argue that this reason is not a meaningful distinction because the moral principles it purports to support are Christian, and religious, not secular. However, because emphasizing good moral principles is arguably a secular purpose, the County may be able to succeed in showing that the first prong of the *Lemon* test is satisfied.

2. Advances or Prohibits Religion

For the second prong of the *Lemon* test, the primary issue is whether the quotes could

be said to advance religion. There does not appear to be any real issue with the quotes prohibiting a religion. It's unclear from the facts if the dining hall quotations even make clear that the source of the material is the Ten Commandments. If the quotes are clearly attributable to the Ten Commandments, which as noted above is well-known religious text, then the quotations would clearly appear to advance a particular religion. If they do not, then arguably the quotes do not advance or prohibit a particular religion. The County may further argue that the quotes that were chosen do not reference a religion, nor do they expressly support a higher being. The first two quotes relate to common principles that are codified in the state law--all states prohibit killing and stealing. The last quote is arguably more specific to Christianity. While the law prohibits giving false testimony under oath, the actual quote relates to a more specific concept of not giving false testimony about your neighbor that appears to be more amorphous and arguably is readily identifiable as tied to a particular religion. Additionally, the quotes are prominently posted in the inmate dining hall, which suggests that the County is supporting these religious beliefs. While this issue is a closer call, Ivan may still prevail in showing that the primary effect of these quotes is to advance religion.

3. Excessive Entanglement

Finally, Ivan can argue that the quotes constitute excessive entanglement with religion. Many of the arguments discussed above with regard to prong two of the *Lemon* test would also be relevant as to whether the chosen quotes constitute excessive entanglement. However, if the County succeeds in arguing that the quotes relate to core principles of society that are not inherently tied to a religion, the County may succeed in arguing that there is no excessive entanglement.

In summary, for the reasons explained above, Ivan is likely to prevail on his Establishment Clause claim because it appears that the three prongs of the *Lemon* test have not been satisfied.

B. Government Speech

The County may respond to Ivan's Establishment Clause claim by arguing that the quotations constitute government speech. The Establishment Clause claim is part of

the First Amendment, and the First Amendment does not generally apply to government speech. However, when the speech at issue involves religious issues, the Supreme Court has held that the government may not engage in conduct that appears to disproportionately favor one religion. For example, the Supreme Court has held that governments may place a display in a city hall that depicts a menorah and a Christmas tree, two well-known religious symbols, because there are multiple religions recognized, not just one. Similarly, the government may include a religious text in a display that includes other types of texts as well. This exception, therefore, would not appear to help the County here because the dining hall only contains quotations from the Ten Commandments. Because the County has chosen only to display quotations from a religious text, it will not be able to claim that this is acceptable government speech.

(2) Ivan's Constitutional Challenges to the Denial of Requests for Book and Tea

Ivan can challenge the denial of his requests for the book and tea under the First Amendment's Free Exercise Clause (incorporated against the states (and counties) via the Fourteenth Amendment), Equal Protection Clause of the Fourteenth Amendment, and Due Process Clause. For the reasons explained below, Ivan is likely to succeed in challenging the denial of his book, but not the denial of the hallucinogenic tea.

A. Free Exercise Clause

There are three potential issues that arise with Ivan's claim under the Free Exercise Clause: (1) whether Ivan's beliefs are religious, (2) whether Ivan's beliefs are sincere, and (3) whether the County's conduct is discriminatory. Each is discussed below.

1. Whether Ivan's Beliefs Are Religious

The Free Exercise Clause protects religious beliefs. An individual does not give up this right merely because he is in jail. The Supreme Court has never clearly defined what constitutes a "religious" belief protected by the Free Exercise Clause, but it has made clear that it extends beyond the traditional religions. The general test is whether the belief holds a place in the individual's life parallel to that of traditional religious beliefs.

We have very little information about Ivan's religion. We know that it is a relatively small sect with a religious book and that it has weekly religious observances, including use of a hallucinogenic sacramental tea. The Supreme Court has made clear that courts have very little power to question the validity of a religion. Here, it is likely that a court will find that Ivan's beliefs are religious, and thus he may bring a claim under the Free Exercise Clause.

2. Whether Ivan's Beliefs Are Sincere

Assuming Ivan's beliefs are "religious," the court may assess whether Ivan sincerely holds these beliefs. We again have very little information to determine whether Ivan's beliefs are sincere. But there are no facts indicating that Ivan's requests are some kind of ruse or that he does not sincerely believe in this religion. A court, therefore, would likely find that Ivan's beliefs are sincere.

3. Whether County's Conduct is Discriminatory

Because Ivan will likely be able to show that his requests were based on sincere, religious beliefs, the next issue is whether the County's conduct is discriminatory. The Free Exercise Clause affords strong protections for religious beliefs. Any government action that discriminates against religion is subject to strict scrutiny, meaning the government will have the burden of showing it is necessary to achieve a compelling interest. However, government action that is facially neutral may not be subject to strict scrutiny in the otherwise absence of an intent to discriminate. The Supreme Court has recognized as well that the government need not provide religious exceptions if a facially neutral policy incidentally burdens the exercise of a religion. For example, the Supreme Court upheld as constitutional a ban on illegal drugs that prohibited a Native American from using peyote as part of a religious ceremony.

Here, the stated reason for the denial of the book and the tea is that they promote illegal drug usage. We don't have any information as to whether this is an official policy, but since this is a County jail it seems safe to assume that the County would have a policy against illegal drug usage in the jail. The policy on its face appears to be neutral and there is no evidence that it was passed intentionally to interfere with Ivan's religion. While the policy does incidentally burden Ivan's ability to practice his religion, this

seems to be a similar situation to the peyote case discussed above.

4. FEC Conclusion

In summary, as to the tea, a court almost certainly would find that the County does not have to make an exception for Ivan's religion, and would likely not find that the denial of the tea constitutes a violation of the Free Exercise Clause. As to the book, this is a closer call because the book itself is not a hallucinogenic. Ivan's stronger arguments, however, are probably based on the First Amendment and the Equal Protection Clause, for the reasons explained below.

B. Due Process Clause

Ivan may reasonably challenge the denial of his requests as a violation of the Due Process Clause, which prohibits the government from engaging in arbitrary and capricious conduct. Under the DPC, government action that infringes on a fundamental right must satisfy strict scrutiny, meaning the government must show that it is necessary to achieve a compelling purpose. If a fundamental right is not implicated, then the government action is subject only to rational basis review, meaning the burden is on the challenger (in this case Ivan) to show that the government action is not rationally related to a legitimate government purpose. As a practical matter, most government action will satisfy rational basis review.

Here, Ivan can argue that the County's conduct infringes on his fundamental rights of religious freedom. The County, therefore, would have the burden to show that its actions are necessary to achieve a compelling interest. The County has a strong argument that denial of the tea is constitutional. The tea is a hallucinogenic, and assuming hallucinogens are considered illegal drugs, then the County's denial seems to be necessary to uphold the policy against illegal drug usage (which a court would likely find is a compelling purpose).

However, the County would likely not prevail on the book. As noted above, preventing illegal drug usage in jail is likely to be deemed a compelling purpose. But denial of the book is not necessary to achieve this purpose. While the book may urge the use of the tea, there are less restrictive means to prevent illegal drug usage (including denial of the illegal drugs). Reading the book in and of itself will not lead to illegal drug usage. The

County, therefore, will likely not prevail in showing that denial of the book satisfies strict scrutiny.

Accordingly, Ivan is likely to prevail on his challenge that the denial of the book violates the Due Process Clause.

C. Equal Protection Clause

Ivan may also argue that the County's denial of the book violates the Equal Protection Clause because the County allows other inmates to have copies of the Bible and the Quran but will not make available Ivan's religious sect. The EPC analysis depends on whether a suspect, quasi-suspect, or fundamental right is implicated. Government conduct that discriminates on the basis of a suspect class (such as race or national origin), as well as government conduct that implicates a fundamental right, is subject to strict scrutiny, which means the government must show it is necessary to achieve a compelling purpose. Government conduct that implicates a quasi-suspect class (such as gender) is subject to intermediate scrutiny, meaning the government must show it is substantially related to an important purpose (and in the case of gender must also show an exceedingly persuasive justification). All other government conduct is subject to rational basis review, meaning the challenger must show that it is not rationally related to a legitimate government purpose.

Here, Ivan can argue that the County discriminates against his religion because the County allows inmates to have access to the Bible and Quran but not his religious text. Because freedom of religion is a fundamental right, the court is likely to apply strict scrutiny. In that case, the analysis would be the same as described above for the DPC, and County is unlikely to be able to show that the denial of the book was constitutional.

Finally, there does not appear to be an EPC argument based on the tea because we have no facts indicating that the County allows other inmates religious tea or the equivalent. Even if there was, as explained above, because the tea is a hallucinogenic, the County would have a strong argument that strict scrutiny is satisfied because denial is necessary to prevent illegal drug usage.

D. Establishment Clause

Because the County allows inmates access to the Bible and Quran, but denied Ivan access to his religious text, Ivan may also argue that the County's conduct violates the Establishment Clause. The test is discussed above. It is unclear whether the County has a policy of only allowing these two religious texts. If it does, we do not have sufficient facts to analyze whether there is a secular purpose for this policy (such as budgetary constraints). Thus, it is difficult to tell whether Ivan can prevail on this claim, and it is not as strong an argument as the ones discussed above challenging the denial of his book.

QUESTION 3

Len, an excellent chef, installed a smokehouse in his backyard three years ago to supply smoked meats to his friends. Len's neighbor, Michelle, enjoyed the mild climate and spent most of her time outdoors. She found the smoke and smells from Len's property very annoying and stopped having parties outdoors after receiving complaints from some of her guests. She asked Len multiple times to stop using the smokehouse, but he rebuffed her requests.

Len has frequently invaded Michelle's patio to retrieve his dog when it wandered from home. Michelle put up a "no trespassing" sign and a wire fence between their parcels. After the dog dug a hole under the fence, Len cut some of the wires and entered Michelle's property anyway, telling her that he had been fetching his wandering dog from her patio for at least ten years and wouldn't stop now.

Last week, the Town filed suit to condemn Michelle's land for a public park. It tendered to the court as compensation a sum substantially exceeding the prices of comparable parcels recently sold in the neighborhood. Michelle argues that the amount is insufficient because it is substantially less than a sum she turned down for her parcel a few years ago and it does not include compensation for relocation costs.

1. If Michelle sues Len regarding his continued use of the smokehouse, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.
2. If Michelle sues Len regarding fetching his dog, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.
3. Is Michelle likely to prevail in her argument for additional compensation from Town? Discuss.

QUESTION 3: SELECTED ANSWER A

Property/Tort (Nuisance), Torts (Trespass/SL), Property (easement by prescription),
Con Law (Takings)

1. Smokehouse

a. Private Nuisance

A private nuisance is any substantial and unreasonable interference with the use and enjoyment of property.

i. Substantial

The interference must be substantial. An interference is substantial if it would be offensive or annoying to an average member of the community. This is an objective standard - there is no requirement that the plaintiff actually be annoyed nor is there any special allowance if he or she is actually annoyed or offended.

Here, M finds the smoke and smell annoying, so much so that she stopped having parties. This is, however, irrelevant.

It is unclear from the facts whether an "average" person in the community would be annoyed by a smokehouse. While many people find barbecue scents pleasant, just as many find them offensive. It is unclear how much smoke is produced by the smokehouse and how much of it blows into M's property. If the smoke is found to be of such volume that it makes it difficult or impossible for an average person to enjoy M's backyard, then there will be substantial interference. Given that M is annoyed to such a serious degree, it is likely that an average person would at least be annoyed or offended.

ii. Unreasonable

The activity causing the nuisance must be unreasonable. This is a balancing test. If the utility of the activity outweighs its interference with the plaintiff's property rights, it is

reasonable. Otherwise, it is unreasonable.

Here, M will assert that the smokehouse is unreasonable because it prevents her from enjoying the outdoors in the way which she had done for years. Furthermore, it prevents her from having her parties, and likely depreciates her property somewhat.

However, L will counter that the smokehouse enables him to hone his skills as a chef and provide smoked meats to his friends. He will argue that these activities are of substantial benefit.

However, because L's activities substantially interfere with M's enjoyment of her property, and because only L and his immediate circle of friends substantially benefit from the smokehouse, the smokehouse will likely be found to be unreasonable.

iii. Interference/Trespass

The activity must actually interfere with the use of land. Generally, this has been expressed as requiring that the activity have a trespass component. Interfering with access to light traditionally has not met this standard. However, the introduction of any particulate matter or sound waves on the plaintiff's property satisfies this requirement.

Here, L will claim that the smoke is only offensive in that it blocks light, and that therefore there is no interference.

M will counter that the smell component of the nuisance is fundamentally particulate in nature, because of how noses work (discussion omitted). Additionally, she will contend that the smoke consists of particulate matter, and that some of that particulate actually invades her property.

Because there is some degree of physical trespass, M will succeed in demonstrating interference

iv. Use and Enjoyment of Property

The substantial and unreasonable interference must directly interfere with the use of private property. Interfering with public spaces does not create a private nuisance.

Here, L's activity is interfering with M's personal use of her own property. Therefore, it interferes with the use and enjoyment of her property.

Assuming that a reasonable person would be annoyed at L's smokehouse and its resultant effluence, M could succeed in an action for private nuisance. (see statute of limitations, below)

Remedy

Generally, the remedy for a private nuisance is an injunction. If the activity is essential to a community's economic health or otherwise of exceptional utility, money damages may be awarded instead.

Here, L's smokehouse serves limited economic purpose, and does not benefit the community as a whole. Therefore, M will likely receive an injunction.

b. Public Nuisance

Public Nuisance is any activity that interferes with the health or safety of the public at large.

i. Standing

Public nuisance has strict standing requirements. In order to collect under public nuisance, a private individual must demonstrate that they have suffered a harm that is different in kind than the general public. A harm different in degree is insufficient.

Here, M will claim that she has uniquely suffered from the smoke and odor, and that she has uniquely stopped having parties. However, it is extremely unlikely that the smokehouse only deposits smoke and odor on her property, and if it does, there is no effect on the community at large (and as such there is no public nuisance regardless). Furthermore, the inability to have parties is a result of that same harm, merely an intensifier, rather than a unique or different harm. Therefore, M lacks standing to bring a public nuisance cause of action.

c. Statute of Limitations

The statute of limitations serves as an absolute bar to legal action. For most causes of

action, the statute of limitations is one year from the time the cause of action arises. However, continuous actions can be recovered for any violation within the previous year.

Here, L started using his smokehouse 3 years ago. While this initial use would be outside the statute of limitations, L has used the smokehouse continuously. M will still be able to obtain an injunction against current and future use.

2. Fetching the Dog

a. Trespass

A trespass is any physical occupation of real property without permission.

i. Intent

A trespass only occurs if the trespasser actually intended to occupy the land. The trespasser's knowledge about the ownership of the land is irrelevant. A mistaken belief that they had the right to enter the land is not a defense. In essence, trespass is a strict liability offense.

Here, L entered M's property past a fence with a no trespassing sign. L intended to enter the property, so the intent requirement is met.

ii. Physical Presence

The trespasser must be physically present on the property.

Here, L actually entered M's property. The physical presence test is met.

iii. Without Permission

The property owner must not have consented to the trespass, impliedly or expressly.

M did not expressly consent to the trespass. Any implied consent from the adjoining nature of their properties was withdrawn when M constructed the fence. M did not consent to the trespass.

iv. Damages

There is no requirement of actual harm. Nominal damages are recoverable.

Here, M can recover nominal damages for L's trespass. Additionally, she can recover from the actual harm she suffered when L cut the wires on the fence (cost of repairs).

b. Defenses

i. Necessity

a. Private Necessity

Private necessity exists when exigent circumstances cause the trespass. For example, docking a ship on a storm constitutes a private necessity, or swerving to avoid an obstacle on the road. Private necessity allows the avoidance of nominal damages and ejection.

Here, L trespassed in order to retrieve his dog. L needed to trespass in order to ensure that his dog was safe and that it did not cause any damages to M's property without his supervision, since he could be held liable for such damages. As such, private necessity exists, and M cannot eject L or collect nominal damages.

I. Private Necessity - Limitations (Actual Damages)

Private necessity fundamentally involves a balancing of the risk of not trespassing and harm inflicted by trespassing. The trespasser has the ultimate decision on the balance of these factors. As such, the trespasser is traditionally held responsible for any actual damages that occur as a result of the trespass.

Here, L caused actual damages when he cut through M's fence in order to retrieve his dog. As such, L is responsible for actual damages despite the necessity.

b. Public Necessity

Public necessity exists when the trespass is necessary to prevent harm to the public at large. Unlike private necessity, the landowner cannot collect actual damages from public necessity.

Here, the necessity was solely to protect L's dog and prevent L's liability. There was no

benefit to the public at large, and therefore no public necessity. L remains liable for actual damages.

ii. Easement

a. Implied Easement by Prescription

Easements grant the dominant estate (or a party in limited circumstances) the right to use the subservient estate for limited purposes. An implied easement has no writing requirement. An easement by prescription functions similarly to adverse possession of a property, but only for a limited use. In order to establish that there is an easement by prescription, the seeker of the easement must demonstrate **(1) continuous use of the subservient estate, (2) for a statutory period, (3) that was open and notorious, and (4) hostile**. Unlike in adverse possession, there is no requirement that the easement holder have had exclusive use over the property, since the easement does not eliminate the property owners' rights entirely.

i. Continuous Use

The use must have been continuous throughout the statutory period. It need not have been constant, but must have been reliable enough for the scope of the easement sought.

Here, L claims that he had been fetching his dog for 10 years. Because he did so "frequently", this is likely continuous use.

ii. Statutory Period

The use must have lasted the statutory period (usually 7-14 years)

Here, it is unclear what the statutory period for adverse possession is in the jurisdiction. It is likely 10 years or less just based on average AP statutes. As such, the statutory period requirement is met.

iii. Open and Notorious

The use must have been such that an observant landowner would be aware of it. In essence, the landowner must have been put on inquiry notice of the use.

Here, L invaded M's patio. For 7 of the 10 years, M regularly spent time outside and

likely observed his actions. Furthermore, even after M abandoned the outside due to the smoke, she should have observed L walking on her patio. As such, the open and notorious requirement is met.

iv. Hostile

The use must have been without the permission of the landowner. Otherwise, there is a freely revocable license.

Here, it is unclear whether or not M consented to the use prior to erecting the fence.

b. Right to Protect Easement

An easement holder has the right to protect their easement from interference, even from the landowner. This includes the dismantling of any barrier erected as an impediment to that easement.

If L had not received permission to trespass on M's property at any point, then he likely has an easement (assuming the statutory period is met). However, if he had permission to retrieve his dog, then there will be no easement.

If there is an easement, L is not vulnerable to nominal damages or ejection for trespass, so long as the trespass is for the purpose of retrieving his dog. Additionally, L has the right to protect his easement by demolishing or circumventing barricades such as M's fence. As such, he is not liable for actual damages either.

3. Town's Suit

Government entities have the right to "take" property, providing that "just compensation" is provided. In order to take, the government must merely show that the taking is rationally related to a legitimate government purpose.

Town is a government entity.

a. Legal Taking

If the taking was illegal, than M may be able to retake her property or receive additional damage. As above, a taking must be rationally related to a legitimate government purpose. Here, T took the property for the purpose of building a public park. Building a public park is a legitimate purpose. Additionally

b. Just Compensation

Generally, the compensation must merely be equal to the full market value at the time of the taking, including the value of any improvements. Fair market value can be determined by appraisal or by the sale of comparative properties.

Here, the government determined the FMV by paying based on comparable properties in the area. Assuming that those properties actually were comparable, including the cost of any improvements, the compensation was just. If M can demonstrate that the other properties were defective, she can recover more.

However, the prior offer to purchase M's property is likely not relevant. Current FMV is the indicator for just compensation, not prior FMV. If the increased value was due to mineral rights or something, than M can likely recover more, but otherwise she is probably out of luck.

c. Relocation Costs

The government may be liable for losses resulting from reliance on the assumption that there would be no taking. For example, the government may be required to compensate a party for the cost of recent improvements. However, the government is not responsible for other costs, such as the costs of finding a replacement property.

Here, M is seeking relocation costs. However, these costs were not incurred on reliance of the assumption that her property would not be taken. Additionally, they were not incurred based on any recent improvement to her property. They are the types of cost incurred in almost every taking, and as such M is not entitled to additional compensation.

QUESTION 3: SELECTED ANSWER B

1. Whether Michele may assert any claims against Len for his smokehouse.

Michelle is most likely to succeed against Len in a claim for private nuisance. To state a claim for private nuisance, the plaintiff must allege that the defendant's conduct constitutes a substantial and unreasonable interference with the use and enjoyment of her property. Interference is substantial if it would be annoying or offensive to an average member of the community. Interference is unreasonable if the harm to the plaintiff outweighs the benefit of defendant's activity. If there are other members in the community, Michelle may also make a claim for public nuisances. However, it is harder to plead these threshold elements. A claim for public nuisance requires that defendant's activity constitute a substantial and unreasonable interference with the use and enjoyment of the property of the public at large, and at least one homeowner suffers specific injury that is distinct from the common injury suffered by the community. Since the facts do not support a public nuisance claim and do not allege a community of homeowners, Michelle is best off bringing a claim for private nuisance.

What is the nuisance?

Michelle will argue that the smokehouse Len installed in his backyard is a nuisance because, while it smokes the meat, it produces smoke and smells that waft over to Michelle's property and prevent her use and enjoyment of it. Len installed the smokehouse three years ago and he uses it to supply smoked meats to his friends. Len is an excellent chef, so presumably his smoked meats are in high demand. Michelle enjoys the climate near her home and enjoys spending time outdoors. She used to have parties outdoors, but she stopped doing that after she received complaints from her guests. Even though she has asked Len to stop using the smokehouse, he has

refused.

Based on these facts, Michelle should argue that the smoke and smells from Len's smokehouse are a substantial and unreasonable interference with the use and enjoyment of her property because they prevent her from spending time outside.

Is it a substantial interference?

Interference is substantial if the interference would be annoying or offensive to an average person in the community. Based on these facts, the smoke and smells from Len's smokehouse is substantial. An interference is not substantial if it is annoying or offensive to the plaintiff because of her particular traits or sensitivities. Here, nothing in the facts suggests that Michelle has specific sensitivities. Moreover, she has guests over and they also find the smells and smoke to be annoying and they find it unpleasant to be outside. The smokehouse not only prevents her from having outdoor dinner parties (which Len will argue are a specialized use of the property and do not give rise to nuisance) but from spending time outdoors as she enjoys.

It is important for Michelle to focus on the harm that she suffers as an average member of the community. If she alleges that the harm is that she cannot have outdoor dinner parties anymore, her claim for nuisance may fail because Len will argue that the nuisance arises from her particular circumstances. It is important for Michelle to show that having a few friends over for dinner is a regular part of being a homeowner.

Michelle's strongest argument is that the smoke and smells prevent her from being outside and enjoying her property. She should use her friends as evidence that the smoke and smells are offensive to an average person.

Is it an unreasonable interference?

Interference is unreasonable if the harm to plaintiff outweighs the benefit to defendant. Here, the harm Michelle likely outweighs the benefit to Len. Michelle can no longer enjoy the outdoors on her property, something that she enjoys doing. Therefore, she has been deprived of the use and enjoyment of her property. Michelle will argue that Len's harm is slight - she is merely asking him to stop using the smokehouse in his backyard. Although Len is a chef, the facts do not indicate that he's smoking the meat for commercial gain or as part of his livelihood. Len is merely providing the smoked meats to his friends, gratuitously. Accordingly, the harm to Len is slight if he has to stop using the smokehouse. Len will argue that the smokehouse cost a lot of money, and he will be harmed greatly, because he will not be able to reap the benefit of his investment. On balance, Michelle will probably prevail that the interference is unreasonable.

Defenses

Len will probably assert the defense of laches and argue that too much time has passed for Michelle to assert this claim. He will argue that he installed the smokehouse 3 years ago, and this is the first time that she is alleging it is a nuisance. In response, Michelle will argue that she tried to live with it, but after three years, it was clear that the smokehouse would permanently deprive her of the use and enjoyment of her property. She will also bring up that she asked Len, multiple times, not to use the smokehouse, and tried to arrive at a compromise. Len, however, rejected her attempts to deal. Since she and Len were not able to resolve it privately, she is finally bringing suit. Len will probably not prevail on his defense of laches.

Outcome

Michelle is likely to prevail on her private nuisance claim. Since the remedy for nuisance is often an injunction, or a court order telling a person to act or not act, the

court may balance the harms. Instead of granting a complete injunction against Len using the smokehouse, the court may limit his use so that it does not substantially and unreasonably interfere with Michelle's use and enjoyment of her property. An injunction may permit Len to use the smokehouse for a certain number of hours or to give Michelle notice that he will use it. An injunction may also order Len to install some technology to limit the smoke and smells coming from the smokehouse. While Michelle will likely prevail on her claim, Len's own right to the use and enjoyment of his property will probably block her from obtaining a complete injunction.

2. Whether Michelle may assert any claims against Len for fetching his dog from her patio.

The issue here is whether Michelle may assert a claim against Len for trespass for fetching the dog (not for the dog itself), and whether Len has any valid defenses.

The elements of trespass are 1) intentional act, 2) entering the land of another, 3) causation, 4) damages. The interference with the property right is sufficient for damages. The facts state that Len's dog had been entering the property for years and that Len repeatedly entered the property to fetch the dog. Michelle will argue, on these facts, she has stated a valid cause of action for trespass. Len intentionally enters her land and retrieves her dog. Her damages/injury is the injury to her property right and her right to keep trespassers from her property. Len's conduct is the actual cause of her injury.

Len's Defenses

Privilege

Len will argue that his entrance onto the land was privileged because he was retrieving

his property, the dog. However, when an animal is on another's property, the owner is not privileged to go and retrieve it himself without giving notice to the landowner. Len's entrance onto the land would only be privileged if he informed Michelle that his dog was on her property and he intended to retrieve. She would then be compelled to allow him to retrieve it at a reasonable time and in a reasonable manner. The facts state that no such communications occurred. Therefore, Len's entrance onto land was not privileged.

Prescriptive easement

Len will argue that he has an easement by prescription to enter Michelle's property and retrieve the dog from the patio. An easement is a nonpossessory right in land. Here, Len will argue that there is an easement appurtenant. His land is the dominant tenement, and Michelle's land is the servient tenement. He has a right to use the servient tenement within the scope of the easement.

An easement by prescription is an easement that is acquired through use over time, and the elements are similar to those of adverse possession. The use of the land must be continuous for the statutory period (usually the same as adverse possession), open and notorious, and hostile to the landowner. Here, the facts state that Len has been entering the property and retrieving the dog from the patio for the last 10 years. In many jurisdictions, ten years is the applicable period for the statute of limitations. Therefore, the first element is likely satisfied. Second, his entrance has been open and notorious. First, Michelle knows that Len regularly enters her property, because sometimes the dog is there and sometimes it is not. Based on Len's statement to Michelle, he does not try to keep it a secret that he regularly enters her property. Additionally, Michelle installed a fence and 'no trespassing' signs, showing she was aware of the trespass. Therefore, the open and notorious factor has likely been satisfied. Finally, the entrance is hostile because Len enters knowing it is not his land and knowing that Michelle considers him a trespasser.

Michelle may argue that Len merely had a license to enter her property and remove the dog from the patio, and that she revoked his license to do that when she built the fence and put up the signs. A license is not a right in land, it is merely permission to enter the land of another. Michelle will argue that she implicitly granted Len a license to retrieve the dog from the patio, however she chose to revoke that license, and built a fence so the dog would not enter her property and Len would not retrieve it. Len then clipped the fence and trespassed onto her property.

Michelle may not succeed in an action alleging that all of Len's entrances onto her land constituted trespass. However, she will probably prevail in an action for any trespass that occurred after Len clipped the fence and re-entered her property. Moreover, clipping the fence on Michelle's property constitutes trespass to chattels (interference in the use and enjoyment of personal property) which is actionable.

3. Whether Michelle is likely to prevail in her argument for additional compensation from Town.

The issue here is whether Town has provided Michelle with just compensation for her property.

Takings

Under the 5th Amendment, the government is permitted to condemn private land for public use so long as it provides the landowner with just compensation. Just compensation is measured as fair market value at the time of condemnation. Here, the condemnation is likely valid because the government is taking the land for a public use, to create a public park. The facts state that Town has offered Michelle a sum "substantially exceeding the prices of comparable parcels recently sold in the neighborhood." Generally, the way to determine fair market value for real property is to look at recent sales of similar parcels in the area. Here, Michelle will receive even more

than the sale price of comparable lots. While this isn't a guarantee of fair market value, it makes it likely that she is receiving fair market value. However, Michelle will still point out the sum she turned down a few years ago. The fact is that the market a few years ago is not the current market, and a pass offer does not affect the value of property under takings law. She will also argue that the price is insufficient because it doesn't provide compensation for relocation. However, the Takings Clause does not require the government to compensate landowners for relocation costs. Accordingly, Michelle's challenges to the Town's taking will probably not prevail. If she wants to challenge the purchase price, she must have her land appraised and sue the government in court, arguing that what they offered her is below market compensation.

QUESTION 4

Claire, a four-year-old girl, went missing. Ike, who regularly provided reliable information to Officer Ava, told her that he had recently overheard Don planning to kidnap a child to raise as his own daughter. Officer Ava's partner, Officer Bert, hurried to the courthouse to apply for a search warrant for Don's house. Meanwhile, Officer Ava rushed to Don's house and knocked on the door. Don answered. Officer Ava told him, "I heard that a missing child might be here," and asked, "Can I come in and look for her?" Don replied, "No." Officer Ava said, "A life is at stake. I am searching your home, whether you want me to or not." Don stepped aside and allowed Officer Ava to enter.

Officer Ava searched the home thoroughly. In a closet in the bedroom, she found a bomb, measuring about 2 feet by 2 feet. In a medicine cabinet in the bathroom, she found several vials of cocaine. While looking under the bed, she found a plain sealed envelope, which she opened, that contained a map with a highlighted route from Don's house to Claire's house. She did not find Claire. Immediately after she completed the search, Officer Bert arrived with a warrant authorizing the "search of Don's home for Claire." Not long afterward, Claire turned up elsewhere unharmed.

Don was charged with: (1) possession of a bomb; (2) possession of cocaine; and (3) attempted kidnapping.

Don filed a motion, under the Fourth Amendment to the United States Constitution, to suppress evidence of the bomb, the cocaine and the map.

1. How should the court rule on the motion to suppress regarding:
 - a. the bomb? Discuss.
 - b. the cocaine? Discuss.
 - c. the map? Discuss.

2. Can Don be found guilty of attempted kidnapping? Discuss.

QUESTION 4: SELECTED ANSWER A

MOTIONS TO SUPPRESS

Under the Fourth Amendment of the U.S. Const., which applies to states via the Due Process Clause of the Fourteenth Amendment, all *unreasonable* searches and seizures of persons, properties, and papers are unlawful. Where an unlawful search has taken place, the exclusionary rule generally applies -- that is, the evidence wrongfully obtained will not be allowed in as evidence, although it can typically be used for impeachment and other limited purposes. Similarly, evidence *derived* from wrongfully obtained evidence is deemed "fruit of a poisonous tree" and will not be admitted unless there has been attenuation. All that said, courts will follow the "harmless error" rule and not overturn a conviction unless the admission of the wrongfully obtained evidence was material and affected the final judgment.

Reasonable Expectation of Privacy

In order to bring a suppression claim under the 4th Amendment, a person must have a reasonable expectation of privacy in the place searched. Here, Don's house was subject to a search. Don, who answered the officer's knock, undoubtedly has a reasonable expectation of privacy in his home.

Warrant Requirement

The Supreme Court has upheld a warrant requirement under the 4th Amendment. The warrant must describe in reasonable specificity the places and persons to be searched, and the types of things to be searched for. Therefore, barring certain exceptions to be discussed, an officer must have a warrant to search someone's house. There are six exceptions to the warrant requirement: (1) Search Incidental to Arrest, (2) Consent, (3) Hot Pursuit and Exigent Circumstances, (4) Automobiles, (5) Plain View, (6) Stop and

Frisk.

Here, the prosecution will argue that Officer Ava had both consent to search D's house and was compelled to search his house given the exigency of the situation.

Consent

An otherwise unlawful search is permitted if the searched party voluntarily consented to the search. The person need not have known that he was free to decline consent; however, officers cannot utilize coercive methods in obtaining such consent or else it will not be deemed voluntary.

Here, Ava asked D for permission to search the house but was flatly told, "No." Thus, D can, likely successfully, argue that there was no consent here. Prosecution will respond, however, that when Ava told D that "[a] life is at stake" and that she is therefore searching the house, D's stepping aside was implicit consent. That is unlikely to be a successful argument with a court, especially when it comes at the heels of being denied consent. A court will likely conclude that D felt that he had no choice but to allow the officer in -- indeed, the officer said she would search the home "whether you want me to or not."

Thus, consent is unlikely to provide the exclusion from warrant in this case.

Exigent Circumstances

There is also an exception to the warrant requirement where emergency circumstances require that the officer not wait for a warrant. Such circumstances exist where, say, a felon is fleeing or an officer is worried that defendant will destroy the evidence or instrumentality of the crime in the time it would take to obtain a warrant.

Here, prosecution would argue that Ava had just such a concern. After having sent Bert to obtain a warrant, Ava was worried (given the reliability of Ike) that it might be too late by the time the warrant came -- D might already have concealed or transported Claire by then. D, however, will respond that that does not qualify as an exigent circumstance that would warrant a non-consented, unwarranted search of a person's home. D would

argue that Ava, if she was so concerned about Claire's kidnapping, could have waited *outside* Don's house after he was refused consent -- that would have prevented Don from transporting anyone he had kidnapped. But that might have still given Don time to conceal a small four-year-old girl or perhaps even cause her harm.

Ultimately it will be upon the court to decide whether the "totality" of the circumstances are in favor of allowing the exigent circumstance exception. But even if the court chose not to do so, the government can rely on the inevitable discovery doctrine (discussed below) to argue in favor of admission.

Officer Bert's Search Warrant / Inevitable Discovery

The obtaining of a warrant *after* a search has been performed does not provide immunity to the unlawful search carried out. Thus, if Ava was unjustified in searching D's home, the warrant would not, by itself, render the search lawful.

Nonetheless, whether Bert's warrant was a valid one is important because, if the warrant was valid, it could render the search harmless under the inevitable discovery doctrine, which provides that evidence that otherwise should be excluded can be included where it would have been inevitably discovered by lawful means.

Here, first, the warrant was a valid one (nothing to the contrary in the facts; moreover, officers are allowed good faith reliance on a warrant they believe valid). Assuming Ava had waited to conduct the search until the warrant arrived, the warrant would have allowed her to then go ahead and conduct the same search that she did (that said, we discuss below how Ava exceeded the scope of her search under either the warrant or exigent circumstance theory).

Thus, between the exigent circumstance and warrant, the court will likely deem the search itself to be lawful, though that brings us to the specific search itself and how it might have exceeded its *lawful scope*.

Scope of Search

Under both exigent circumstances exception, whereby Don would be searching for a

little girl or other evidence of kidnapping, or under the explicit terms of the warrant, Ava's search was limited in scope to the "search of Don's home for Claire" and, perhaps under the former exception, also of evidence of kidnapping.

Bomb

Ava discovered the bomb in a closet in the bedroom. A closet, arguably, *is* a good place to hide a kidnap victim. Thus, Ava's search of the closet was proper. Once she had opened the closet, of course, the large 2'x2' bomb was in plain view, another exception to the warrant requirement which allows the search (and thus confiscation) of items found in plain sight in a location where the officer is lawfully present. Here, Ava was lawfully in the closet and the bomb was in her plain view. Thus, the court should deny the motion to suppress evidence of the bomb.

Cocaine

The cocaine was found in a medicine cabinet, which is probably too small to hide a child, even a little girl who is four. Prosecution would argue that, at least under exigent circumstance exception where evidence of kidnapping (and not just of Claire physically) would be allowed, Ava looked to find clues to any kidnapping. That, however, is likely to fail because under that theory almost every aspect of the house would be searchable -- courts find warrant exceptions to be narrow in scope. Under the express warrant itself, of course, Ava's search was limited to Claire, who could not have been found in the medicine cabinet. Thus, the court should grant the motion to suppress evidence of the cocaine.

Map

The map was found whilst Ava was looking "under the bed." Like the closet, under the bed is a location where a kidnapping victim might be tied or placed. However, the map was in an envelope that the officer had to open in order to access the map. Under the warrant, that is clearly beyond the scope. Even under the exigent circumstances exception, this is likely to come closer to the finding of the cocaine than the bomb. Unless the map was visible from the outside (facts do not state), Ava would be beyond her authority to search inside it. Thus, the court should grant the motion to suppress evidence of the map.

In conclusion, the court should admit the bomb, but not the cocaine or the map.

2. ATTEMPTED KIDNAPPING OF CLAIRE

Whether Don can be found guilty of Claire's attempted kidnapping.

Kidnapping

Under common law, the prosecution for kidnapping must prove the following elements beyond a reasonable doubt (the first two elements are essentially those involved in the lesser crime of false imprisonment): (1) confinement or restraint, (2) to a bounded area, (3) and victim was either moved or concealed. The confining or restraining must be of such a nature that the victim does not feel that she is free to leave. Similarly, the bounded area must prevent, at least in the victim's knowledge, her from escaping without harm. The confinement or the bounded area need not be physical -- being threatened with a gun on a porch could satisfy the requirements. In addition, kidnapping requires that the victim either be concealed or moved during her state of false imprisonment.

Attempted Kidnapping

Attempted kidnapping (AK) is an inchoate crime and would merge with the actual crime of kidnapping, if that were charged. AK is a specific element crime, which means that D must have had the particular intent to satisfy the elements of kidnapping as described above. In addition, attempt requires the presence of an overt act. Under common law, this meant that D had to be "dangerously close" to committing the actual crime. Modern courts have relaxed that rule some, although they still require more than mere preparation, which is what is needed to prove the overt act in a conspiracy. Typically, they require a "substantial step" in furtherance of the actual crime.

Here, a jury would be able to impute specific intent from both the actual and circumstantial evidence. Assuming Ike testifies, he will be able to tell them what he overheard regarding Don's plan to kidnap a child and the map found in Don's house

(assuming it is admitted) will confirm that the child to be kidnapped was in fact Claire. It is unlikely that the bomb and cocaine, assuming that they are admitted into evidence, will inform the charge of attempted kidnapping. Perhaps the bomb was going to be used to threaten or restrain Claire, but the facts do not say anything in that regard. Whilst the evidence is relatively slim, a jury could nonetheless reasonably find that D had the specific intent to commit the kidnapping of C.

The overt act is a closer question, and likely to ultimately resolve in D's favor. While the map is certainly an overt act that at least satisfies the "mere preparation" requirement of a conspiracy, it likely is *not* a "substantial step" in achieving the crime (and far from coming "dangerously close" to achieving it). The jury would perhaps have to rely on other circumstantial evidence to reach that conclusion, but the facts as presented do not state what other evidence might exist. Without the map, there almost certainly is no overt act.

Thus, under the circumstances and without more evidence of steps taken by D, D is unlikely to be found guilty of attempted kidnapping.

Defenses

According to the prompt, it does not appear that D has any valid defense to his specific intent crime, such as voluntary or involuntary intoxication, duress, entrapment, or insanity.

QUESTION 4: SELECTED ANSWER B

1. DON'S MOTION TO SUPPRESS

The issue is whether the evidence of the bomb, cocaine, and the map were obtained in violation of Fourth Amendment to the US Constitution.

FOURTH AMENDMENT

The Fourth Amendment of the US Constitution protects citizens from unreasonable search and seizures.

Government Conduct

The Fourth Amendment applies to conduct by the government. There must be conduct by a publicly paid police or a person acting in the direction of the police.

Officer Ava (A) is a publicly paid police officer.

Therefore, there was government conduct.

Reasonable Expectation of Privacy

In order to have standing to challenge a search or seizure, the person must have standing. Standing exists where the person has a reasonable expectation of privacy over the place or item to be searched or seized. A person has a reasonable expectation of privacy over his home.

A searched Don's (D) home, so D had a reasonable expectation of privacy.

Therefore, D has standing to challenge the search and seizure.

WARRANT

A search and seizure are reasonable if it is based on a valid warrant. A warrant requires probable cause and particularity. Probable cause requires a fair probability that evidence of a crime will be found in the place or item to be searched. Particularity requires a description of the items that can be searched and seized. Probable cause may be based on information obtained from a reliable and credible source.

A had probable cause to believe that Claire (C) would be at D's home. A reliable informant, Ike, told A that she overheard D planning to kidnap a child to raise as his own, and C, a four-year-old girl went missing. Additionally, B obtained a warrant to search D's house for C, so the warrant contained particularity. However, even though Officer Bert (B) obtained a warrant, A did not have a warrant to search D's house when she conducted the search.

Therefore, the search was not based on a warrant. Since the search was not based on a warrant, the evidence of the bomb, the cocaine, and the map was obtained in violation of D's Fourth Amendment right.

WARRANT EXCEPTION

Absent a warrant, evidence obtained from a search and seizure will be inadmissible at trial unless the search falls within an exception to the warrant requirement.

Consent

A police officer may search an item or place with consent so long as the consent is voluntary and the person has apparent authority to consent.

A knocked on D's door and asked D if she could come in and search for a missing girl. D responded, "No." Although D stepped aside and allowed A to enter and search, D's consent was not voluntary because A told him that he had no choice, indicated by the fact that she said she would search whether D wanted her to or not.

Therefore, the search was not based on consent.

Exigent Circumstances

Under exigent circumstances such as emergency aid, a police officer may enter the home of another and conduct a search without a warrant.

C, a four-year old girl went missing and A had reliable information to believe that D had kidnapped her. The fact that a young child may have been in D's home and likely needed help to escape could constitute an exigent circumstance, which allowed A to enter D's home to render aid to C.

Assuming exigent circumstances exist, the next step is to analyze whether each item found in D's house was obtained through a valid warrant exception.

Plain View

Evidence may be seized without a warrant if (1) the police officer was legitimately on the premises, (2) the item was contraband or evidence of a crime was in plain sight, and (3) the police officer had probable cause to believe that the item was evidence of a crime or contraband.

A. THE BOMB

A searched D's home and found a bomb in a closet in the bedroom. Because there were exigent circumstances, A had a legitimate right to be in D's house. Additionally, A had reason to believe that C could be hidden in the closet, so A was legitimately in the closet, the bomb was in plain sight since A saw the bomb when she opened the closet, and the bomb was about 2 feet by 2 feet. Additionally, given the fact that A is a police officer and the bomb was clearly visible, A had probable cause to believe that the bomb was evidence of a crime.

Therefore, evidence of the bomb was not obtained in violation of D's Fourth Amendment rights.

B. THE COCAINE

It is unlikely that C could be found in the medicine cabinet in the bathroom, but A searched the medicine cabinet and found several vials of cocaine. Since A was searching for C, she did not have a reasonable belief to search D's medicine cabinet. Since A opened the cabinet, the cocaine was not in plain sight.

Therefore, the evidence of the cocaine was obtained in violation of D's Fourth Amendment rights.

C. THE MAP

A had a reasonable belief that C could be under the bed because she is a four-year-old girl and could fit there, so the envelope was in plain sight. However, A did not have probable cause to believe that the envelope was evidence of a crime, since C could not fit inside of it. Since A opened the sealed envelope that contained the map, the map was not in plain sight.

Therefore, the evidence of the map was obtained in violation of D's Fourth Amendment rights.

EXCLUSIONARY RULE

Evidence obtained in violation of a person's constitutional rights is inadmissible at trial. Additionally, evidence obtained from an illegal search and seizure will also be inadmissible as fruit of the illegal search and seizure. However, evidence that would be subject to the exclusionary rule may be admitted at trial if the prosecution can remove the taint of the evidence. The prosecution has the burden of showing by a preponderance of evidence that (1) the evidence would have been obtained through an independent source, (2) the evidence was inevitably discoverable, or (3) intervening acts broke the causal chain between the illegal conduct and the evidence obtained.

Because the map and cocaine were obtained in violation of D's Fourth Amendment right, the map and cocaine should be suppressed at trial unless the prosecution can remove its taint.

The prosecution cannot show that the evidence would have been inevitably discovered. Although A conducted an illegal search, B obtained a warrant to search D's home for Claire and arrived immediately after A had completed the search. The warrant authorized search of D's home for C and since C could not be found in the medicine cabinet or the envelope, A and B would not have been able to search those areas. Because the medicine cabinet and map exceeded the scope of the search warrant, the

cocaine and map would not have been inevitably discovered. Additionally, because D did not consent to the search, there were no intervening acts that broke the chain of illegality. Furthermore, it is unlikely that the cocaine and map would have been discovered from an independent source because they were in D's home and in his possession.

Therefore, the evidence of the map and cocaine should be suppressed.

Alternatively, if the court finds that exigent circumstances did not exist and the evidence of the bomb was obtained in violation of D's Fourth Amendment rights, the evidence of the bomb would have inevitably been discovered through the search warrant because the police officers would have had a reasonable belief that C could be hidden in the closet.

Therefore, the court should grant the motion to suppress regarding the cocaine and the map, but should deny the motion to suppress regarding the bomb.

2. ATTEMPTED KIDNAPPING

The issue is whether D can be found guilty of attempted kidnapping.

KIDNAPPING

Kidnapping is the act of confining another person with movement or in a concealed place. Kidnapping is a general intent crime and requires an intent to perform the proscribed conduct or an awareness of the circumstances of one's conduct or that a proscribed result may occur.

ATTEMPT

Attempt is an act to commit a proscribed crime, that falls short of the completed crime. Under the majority view, a defendant is guilty of attempt when he takes a substantial step in committing the proscribed crime. Under the minority view, a defendant is guilty

of attempt when he is dangerously close to completing crime. Attempt is a specific intent crime and the defendant must act with the specific intent to commit the crime. Attempted kidnapping requires an act with the intent to kidnap another person.

A searched D's home and found a map that contained a map with a highlighted route from D's home to C's house. Additionally, Ike overheard D planning to kidnap a child to raise as his own daughter. The prosecution will argue that D had the intent to kidnap C because he had a plan to kidnap a child, which shows that he intended to commit a kidnapping. However, D had not taken a substantial step in committing the kidnapping. Although D had the map, D was not in the course of a kidnapping. D was in his home when A arrived and C had already been kidnapped. D had not taken a substantial step to kidnap C and the map was an act of preparation that does not amount to a substantial step in the course of completing the crime. Additionally, D was not dangerously close to committing the kidnapping since he was at his home alone when A arrived.

Therefore, D cannot be found guilty of attempted kidnapping.

QUESTION 5

In 2001, Ted, who was married to Wendy, signed a valid will bequeathing all of his property as follows: "\$10,000 of my separate property to my daughter Ann; then \$2,000 of my separate property to each person who is an employee of my company, START, at the time of my death; and all the rest of my separate property, plus all of my share of our community property to my beloved wife of 20 years, if she survives me." No other gifts were specified in the will.

In 2003, Wendy died.

In 2005, Ted adopted a child, Bob.

In 2006, Ted signed a valid codicil to his 2001 will stating that, "I hereby bequeath \$10,000 of my separate property to my beloved son, Bob. All the rest of my 2001 will remains the same."

In 2011, Ted married Nell.

In 2012, Ted and Nell had a child, Carol.

In 2016, Ted died, leaving his 2001 will and his 2006 codicil as his only testamentary instruments. After all debts, taxes, and expenses had been paid, Ted's separate property was worth \$90,000, and his share of the community property was worth \$100,000. At death, Ted still owned START, which by then had ten employees, none of whom had been an employee of START in 2001.

What rights, if any, do Nell, Ann, Bob, Carol and the START employees have in Ted's estate? Discuss. Answer according to California law.

QUESTION 5: SELECTED ANSWER A

The facts tell us that the 2001 will and the 2006 codicil were both valid so we do not examine their validity.

Nell

Ted's 2001 will provided for his "beloved wife of 20 years" to receive all his share of community property (CP) and the remainder of his separate property (SP). Under this calculation, the wife would receive \$50k in SP and Ted's (T's) interest in the CP. Nell (N) will argue that the will specifically provided for this estate to go to his wife, Wendy (W), who he had been married to for 20 years. This gift failed because it was specifically conditioned on W surviving T. This provision would not be covered by the Anti-Lapse statute because the gift was specifically conditioned on the wife's survival. Had it been silent on this point, we would assess rules of lapse and anti-lapse. Anti-lapse would not apply because that saves gifts to kindred of the testator (not the testator's spouse) who die leaving surviving issue. Here, the gift was to a spouse, not kindred, so even absent the specific condition, the gift would not have been saved by the anti-lapse rules.

Instead, N will argue that she is an omitted spouse, so she is entitled to an intestate share of the estate. If T married N and never updated his will after their marriage, and his will does not provide a gift for his wife, or evidence a specific intent not to provide for his wife, and the wife does not get a gift outside the will (such as an annuity), the wife is considered an omitted spouse and she takes a share of the estate equal to what she would get if her spouse died intestate.

Here, T made his original will in 2001. He republished his will by codicil in 2006. He did not marry N till 2011. He did not update his will to provide for N after he married her. There is nothing to suggest that he intentionally wanted to exclude N from his will, and there is nothing to suggest he provided for her outside his will. Therefore, the only

question is whether he intended for N to receive W's share under the will, or whether she should be treated as an omitted spouse.

While a court would permit the introduction of parol evidence to aid in resolving the ambiguity, there are no facts to suggest any evidence that would be helpful. Therefore, the court will likely take the will at face value and find that the gift was meant for W (as she was T's wife of 20 years and N was only T's wife of five years), who died, so the gift failed according to its own condition, and N would take an intestate share. The intestate rules provide that a spouse receives all of her husband's estate if he died without issue or parents. If he died with one child/issue or parents, the spouse would take half his SP and all of the CP. If he died with two or more children/issue or parents, the spouse would get 1/3 of his SP and all of his CP. T died with three living children, so his omitted spouse gets 1/3 of his SP and all of his interest in the CP.

Under these calculations, N would get \$30k (which is 1/3 of T's SP) plus all of the CP.

Ann

A was given \$10k of T's separate property in the 2001 will. In 2006, T executed a codicil that said he was leaving \$10k of his separate property to his beloved son, Bob and leaving the rest of his will unchanged. The court will have to determine whether the codicil was meant to take anything out of the 2001 will, or whether it was meant to simply add another gift to the 2001 will.

A will may be revoked explicitly by a later instrument, or by obliteration (lining out words) or by physical act such as tearing or burning. Here, there are no facts to suggest that A did any of these things. Therefore, the court will find that the 2001 will was not revoked at all, and the 2006 codicil simply added another gift to the 2001 will.

A will get \$10k of T's SP.

Bob

B might have been treated as an omitted child (similar to the omitted spouse, as discussed above) except that after he was adopted, T republished his will by codicil and

provided specifically for B to take a gift of \$10k of T's SP. (Adopted children are treated the same way biological children are treated.)

B will get \$10k of T's SP.

Carol

C will be treated as an omitted child. She was born after T last updated his will. T did not evidence any intent to exclude her from his will. He did not provide a specific gift to her mother to care for her - her mother was omitted from the will, too. C was not given a gift outside the will. It appears T updated his will, had a child, and forgot to update his will again to include her. C will take her intestate share under the will.

As discussed above, since T died with more than 1 child (issue), and a spouse, the spouse gets 1/3 of T's SP and the children get 2/3 of the SP. The 2/3 is divided equally, per capita to the children, or per capita with representation if any of the children predeceased their father and left issue.

Here, T's estate consists of \$90k in SP. Two thirds of \$90k is \$60k. C would be entitled to 1/3 (because she is one of three children) of \$60k, which is \$20k.

The other two children were provided for in the will, so they do not take their intestate share. They only get the gifts they were provided in the will.

START Employees

The court will determine whether the employees are sufficiently identified in the will. The will refers to "each person who is an employee of my company, START, at the time of my death." The court will find that these are facts of independent legal significance. T would have employed these people regardless of whether he wanted them to take under his will. He would employ them because they would make his business succeed. He acted to employ them for reasons other than making his will valid. Therefore, the court will allow the will to refer to these facts of independent legal significance and allow the gift to stand.

Each employee will get \$2k. There are 10 employees. The START employees would get a total of \$20k, which exhausts T's SP.

QUESTION 5: SELECTED ANSWER B

1. CALIFORNIA IS A COMMUNITY PROPERTY STATE

California is a community property ("CP") state. Therefore, there is a presumption that property acquired during the marriage is community property. Separate property consists of property acquired before or after a marriage, property acquired during the marriage with separate property ("SP") funds, property acquired during the marriage by bequest, devise, or gift, and the rents, issues, and profits from the SP. Courts will trace the assets to determine the source of funds used to acquire the asset, to determine whether the asset is SP or CP. Courts will also look to see if any valid agreements or the spouses' conduct changes the character of assets. Via a valid will, each spouse may devise all of his SP and his half of the CP to any beneficiaries that he wishes.

NOTE: Wendy's Share

In the original will, Ted's gift to Wendy consisted of all of his share of the CP and any SP not devised by will (also known as the "residuary estate"). Ted included a survivorship requirement for Wendy's gift; Wendy did not survive Ted, so these gifts would not be valid. Furthermore, this gift would have failed anyway without this clause. Under California law, a beneficiary of a testamentary gift must survive the testator, or else the gift "lapses" (meaning it fails). If the gift lapses, the gift goes to the testator's residuary devisees, if any, and if not, it is distributed by intestate distribution. A testator's "residuary" estate is a gift of whatever is not specifically devised in his will to certain beneficiaries. California does have an anti-lapse statute. However, it only applies if the devisee is the kindred (blood relative) of the testator and the kindred leaves issue. Wendy was Ted's spouse, not his kindred. Therefore the anti-lapse statute does not save her gift under Ted's 2001 will, and the separate property and community property devised to Wendy by Ted's will therefore lapses and will be distributed via intestate succession (because Wendy was the residuary beneficiary - he devised whatever remained of his SP to Wendy, so it must instead be distributed

intestate). Therefore, Wendy's gifts under the will do not preclude others from inheriting Ted's SP.

2. NELL - The Pretermitted Spouse

California has a statute protecting spouses from being accidentally omitted from testamentary dispositions. If, after execution of all testamentary instruments (including wills and codicils, and any intervivos trusts), the testator gets married, the spouse is considered a "pretermitted spouse" and will be entitled to take her intestate share of the estate. Exceptions to this are if the will states on its face that it was not his intention to give this gift to a pretermitted spouse, the pretermitted spouse is otherwise provided for by nontestamentary transactions (for example, if the testator takes out an annuity for the spouse), or if the spouse waives her rights to make claims as a pretermitted spouse.

Here, the last testamentary instrument executed by Ted was in 2006 (his codicil). Ted married Nell in 2011, and no subsequent testamentary instruments were executed. There is no evidence that any of these exceptions to Nell's ability to claim as a pretermitted spouse exist. Therefore, Nell would be entitled to her intestate share of the Testator's estate; under California intestacy distribution laws, when as here, there is one surviving spouse and more than one surviving issue (here, Ted has three surviving children), the surviving spouse is entitled to the testator's one-half of the community property (so she ends up with 100% of the community property) and one third of the testator's SP. Therefore, Nell would be entitled to all of the CP (\$100,000) and one-third of the SP (\$30,000).

It is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Nell would also be entitled to her intestate share of the SP and CP value of Ted's ownership of the business.

3. CAROL - The Pretermitted Child

Just like the pretermitted spouse, California protects children who have been unintentionally omitted from a testator's testamentary distributions when the child is born

or adopted after the execution of all testamentary instruments. Pretermitted children are entitled to their intestate share of the testator's estate, unless the face of the will indicates an intent not to do so, the child is provided for by a non-testamentary transfer, or all of the testator's assets are given to the mother of the pretermitted child when the testator has other children, with the indication that the mom take care of all the kids. Here, Carol was born in 2012, well after Ted executed his last testamentary instrument (the codicil in 2006), so she is a pretermitted child.

Here, there is no evidence that facts exist that would prevent Carol from making a claim as a pretermitted child. There are no apparent non-testamentary transfers to Carol to be taken instead of a testamentary gift, and in the original will, although Ted left a substantial portion of his estate to his then wife Wendy, he also left gifts to his other children - Ann and Bob. Therefore, Carol is entitled to her intestate share of Ted's estate, which under California's intestate distribution laws described above, would mean that Carol is entitled to her share of 2/3 of Ted's estate (Nell gets 1/3, and all the children would share the other 2/3 of the SP). Therefore Carol would get \$20,000 of Ted's SP.

Again, it is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Carol would also be entitled to her intestate share of the SP value of Ted's ownership of the business.

4. ANN and BOB

Neither Ann nor Bob is a pretermitted child. Ann was born prior to the execution of the 2001 will, and Bob was adopted prior to the 2006 codicil. Note that adopted children are treated the same as natural children for the purposes of distribution in California.

Ann and Bob both receive valid gifts from the will. Ann is devised \$10,000 of Ted's SP, and Bob is devised \$10,000 of Ted's SP. Unless their gifts have to be abated to accommodate the share of the estate given to Nell and Carol (which, it does not appear that this is the case), they would be entitled to this money.

5. START EMPLOYEES - ACTS OR FACTS OF INDEPENDENT SIGNIFICANCE

To take under a will, the beneficiary must be ascertainable. Usually all of the material terms of the will must be within the will itself, and extrinsic evidence is not allowed to supplement the will provisions. A potential problem with Ted's will is that he wants to give \$2,000 to each employee who works at his company at the time of his death. These employees are not individually known at the time of the will, and their names are not included in the will. Generally, the court will not admit extrinsic evidence to probate a will due to fear of fraud. However, a gift to a group of individuals to be determined upon the death of the testator can be a valid gift. Under the theory of **acts or facts of independent significance**, the court may use external facts to fill in the gaps of a will if the external facts would be in existence regardless of the will. In other words, the existence of the extrinsic evidence is not testamentary in nature and therefore does not have the same concern of fraud. Here, who Ted's company employs exists separate and apart from the will. Therefore, the court will admit extrinsic evidence to determine who the employees were at the time of Ted's death in order to give effect to his testamentary dispositions. At the time of his death, START had ten employees. It does not matter that none of them were employed when the will was created in 2001, or re-published by codicil in 2006, because the will provision applies to the employees of START at the time of Ted's death. Therefore, each of the employees is entitled to \$2,000.