



**California  
First-Year  
Law Students'  
Examination**

**Essay Questions  
and  
Selected Answers**

**October 2004**

**ESSAY QUESTIONS AND SELECTED ANSWERS**

**OCTOBER 2004 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the October 2004 California First Year Law Students' Examination and two selected answers for each question.

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

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page ii.

<u>Question Number</u>	<u>Subject</u>	<u>Page</u>
1.	Criminal Law	1
2.	Contracts	9
3.	Torts	19
4.	Criminal Law	28

## **ESSAY EXAMINATION INSTRUCTIONS**

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

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

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

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

You should answer the questions according to legal theories and principles of general application.

## Question 1

Al went to Dan's gun shop to purchase a handgun and ammunition. Dan showed Al several pistols. Al selected the one he wanted and handed Dan five \$100 bills to pay for it. Dan put the unloaded pistol and a box of ammunition in a bag and placed it on the counter.

While Al was filling out the necessary registration papers, Dan went to the cash register to make change. As he was doing so, Dan noticed that the bills Al had handed him were counterfeit, and he exclaimed, "You rotten bum! You've given me phony money."

At that moment, Al grabbed the bag that had the gun and ammunition in it and fled from the gun shop. Dan grabbed a loaded pistol he kept under the counter and ran after Al, yelling at him to stop. As Dan pursued Al down the street, he fired a shot into the air, and yelled, "If you don't stop, the next shot will stop you." Al kept running, and, as he did so, he loaded a cartridge into the pistol he had fled the gun shop with, turned, and shot toward Dan. The bullet struck and killed Dan.

1. What legal justification, if any, did Dan have (a) pursuing Al, and (b) threatening Al with deadly force? Discuss.
2. With what crimes can Al be charged, and what defenses, if any, can he assert? Discuss

## Answer A to Question 1

### Larceny

Larceny is the intentional taking and carrying away the property of another with the intent to permanently deprive thereof. Al took possession of the gun and ammunition under false pretenses, i.e. by giving fraudulent money (counterfeit) to Dan. Al therefore obtained possession of the gun and ammunition unlawfully, such that the taking and carrying away was of the property of Dan[.] Dan was justified in his pursuit of Al in that he was legally the owner of the property that Al took, and a person is legally entitled to retrieve property that is rightfully theirs. The retrieval of the property must be immediate for it to be justifiable to use force (lawful) to retrieve. Dan was in hot pursuit of Al, as Al had just taken the goods from his store.

Dan was therefore justified in pursuing Al, as the lapse of time between the asportation of the goods, and Dan's discovery of the good's missing, was almost immediate. A person is entitled to use reasonable force necessary to retrieve stolen goods, if they are in hot pursuit, i.e. immediate pursuit of the stolen items.

Therefore, although deadly force is never allowed in the defense or retrieval of property, if the owner of the property is in hot pursuit of the property, reasonable force may be used to retrieve the property. It was reasonably foreseeable that Dan would run after Al to retrieve his stolen property as the occurrence of the taking was immediate. It could be argued that the firing of a shot into the air was not the use of reasonable force a person is lawfully entitled to use to retrieve their property. Dan, however, could argue that as he was in hot pursuit of his property it was "reasonable" force to fire the pistol in the air, in order to scare the felon, Al, into stopping in his tracks. Dan could argue that his words were reasonable given the immediacy of the situation and his right to retrieve his property. Al could counter that because deadly force is never justified in the retrieval of property, the fact that Dan fired a shot in the air and stated the words "If you don't stop, the next shot will stop you" there was more than the use of reasonably[sic] force used by Dan, because he (Dan) had the apparent ability to carry out his threat.

Assault is the apprehension of an immediate battery. Al could argue that Dan was not justified in his pursuit as the assault was coupled with words and the present ability to carry out the use of deadly force[.] Dan could counter (if he were alive) that he was justified in pursuing Al with deadly force. A civilian is privileged to make a lawful arrest of a felon. Their belief that a felony is being committed must be reasonable. In this case, Dan knew that Al had committed a felony. Al had given him counterfeit bills, and had obtained possession by trick.

Larceny by trick is when a person obtains property possession by deceit. In this case, title did not pass because Al took possession of the gun, knowing that the money he paid for it was counterfeit. Title did not pass, as Dan discovered the counterfeit before he gave the

gun & ammo to Al. But he intend[ed] to pass title, so it could be inferred that Al committed the crime of false pretenses. Because Al had committed a felony, false pretenses, Dan could justifiably arrest him, because he reasonably believed Al had committed a felony, by obtaining property under false pretenses – the gun was not fully registered to him, which would have been title, because it does not appear that Al completed the paperwork. Had the transaction been complete & then Dan found out the money was counterfeit – it would have been larceny by trick, in which title would have passed.

A felony has been committed, and a civilian's entitled to use force necessary to arrest the felon, but it must be reasonable. Dan, again, could argue that it was reasonable to fire a gun & yell at Al, as Al had stolen a gun & ammunition, & was therefore armed & dangerous. However, the gun was not loaded, therefore, deadly force which Dan could be found guilty of applying, if the words he used, coupled with the firing of the shot, were found to be an immediate threat of deadly force capable of being performed which may not have been justified given the fact that Al was fleeing and therefore the force that could be reasonably used to stop a fleeing felon was not justifiable to be deadly force. The gun Al carried was not loaded, and he was fleeing from Dan. Dan[,] it could be argued, could have reasonably believed that Al loaded the gun & he was using reasonable force to stop a dangerous fleeing felon – who had committed an inherently dangerous felony – theft of a firearm and ammunition.

A shopkeeper is entitled legally to detain a customer they believe is unlawfully attempting to steal from them. Dan could argue successfully here, it was within his rights to lawfully detain Al for a reasonable time to question him, as he reasonably believed the money was counterfeit.

II. Al can be charged with obtaining property by false pretenses. False pretenses is obtaining title of the property by the use of deceit. It is a specific intent crime. Here, it can be inferred that Al intentional[ly] gave Dan 5 \$100 bills that were counterfeit. Al could have argued that he did not know the bills were counterfeit, however, he took the gun & ammo & ran, therefore, it can reasonably be inferred that Al knew the bills were no good. On the other hand, Al could argue that he did not know the money was bad & when Dan yelled at him "You rotten bum". . . . "Al got terrified & fled from the shop. Al could argue that he was registering the gun, which indicated that he intended to lawfully obtain title to the gun. However, it could be argued that a reasonable person would not have run, however, nonetheless, Al may have personal reasons for his reaction to Dan. This theory may be found to be a bit reaching, but could be arguably used to find Al lacked the requisite specific intent necessary to be found guilty of the specific intent crime of false pretenses. A crime require[s] mens reas [sic] & actus reas [sic]. The mental state is necessary, along with an act – physical move.

Larceny is the trespassory taking and carrying away the property of another with the intent to permanently deprive thereof. It could be argued that Al intended to take the gun and ammo – there is an asportation (required for larceny) as Al moved the gun & ammo. [A]ny

movement of the property is sufficient to meet the requirement of asportation. Here there was a lot of movement as Al hot[-]tailed it out of the gun shop. Larceny is a specific intent crime; the actor must intend to deprive the owner of the property. Al could argue that he took the gun & ammo “at that moment” that Dan yelled at him regarding the \$ counterfeit [sic]. Al could argue that he was shocked by Dan’s accusation & fearful of Dan because Dan did own a gun shop & more than likely possessed a loaded pistol. Al could argue that because he thought the money was legitimate, and perhaps Dan was acting unreasonably, that he was fearful of his life & believing that he lawfully purchased the gun & ammo – took his property & left Dan’s shop. Title had not passed, only possession however, as the requisite paperwork – registration papers had not been filled out fully. Therefore Al obtained property possession[,] not title. If he is found to have intentionally passed counterfeit bills to Dan, he may be found guilty of larceny by trick – unlawfully obtaining property by the use of deceit.

If Al argues against the larceny charges successfully, he could be successful in establishing that it was his property. However, as stated earlier, a shopkeeper is entitled to lawfully detain a customer if he reasonably believes the customer is attempting to defraud him. Al could be found guilty of larceny based on violation of this law[.] Al could argue that the property he took, he believed, was (reasonably) his. It could be argued against Al, that continuing to run is unnecessary & unreasonable due to the fact that Dan had only said “You rotten bum – you’ve given me phony money” – Al could counter that he knew Dan had grabbed a gun & that he was afraid for his life & so he ran from Dan, when [D]an fired the shot & yelled that the next shot will stop him, the immediacy of the potential for Dan to carry out his threat was imminent, therefore, Al could argue that in self-defense he loaded the cartridge & shot toward Dan. Al could argue that a person is lawfully entitled to use that force which is necessary to defend oneself against an aggressor & deadly force if it is reasonable to believe it is necessary in self[-]defense – is justified. Al could argue that he believed Dan was crazy & going to kill him & that he was acting in self[-]defense. The state could argue that Dan was the victim of a felony – that under the doctrine of felony murder (a death that occurs during the commission of a felony, the defendant is found guilty of murder) – and hold Al liable for his death. The felony has to be one that is not inherently dangerous, and is separate from the death. Al, it could be argued, did go to Dan’s shop with the specific intent of taking the gun & ammo by deceit & obtaining title (false pretenses)[,] therefore in the commission of this felony he would be liable for any deaths resulting thereof. Dan was killed – he was a victim. If Al cannot prove that Dan was a threat to him, Al may be found guilty of felony murder[.] If Al is not found guilty of larceny he could be found guilty of murder. Murder is the unlawful killing of another with malice aforethought – reckless, wanton, an[d] malignant heart. It could be argued that firing a shot at anyone who was not an immediate threat to one – in this case Dan had not yet fired at Al – therefore, Al’s firing a shot toward Dan, it would be reasonably foreseeable that the bullet would hit Dan & Al’s recklessness may be grounds for successful charges of murder. The state could try to also argue that Al specifically intended to kill Dan, in that he premeditated the killing – he had time to think & to load the gun. Al could counter that he was acting in self-defense, and was reasonably justified to use that force he believed

was necessary under the circumstances to defend himself. This could mitigate the charge to voluntary manslaughter acting in the heat of passion, or to involuntary manslaughter – reckless conduct likely to cause death – or reckless disregard of consequences. If it can be found Al acted with specific intent to deprive Dan of property, he may be found guilty of felony murder. If not, then he may be justified in using a self-defense justification to mitigate his charges to manslaughter or to dismiss his charges.

## Answer B to Question 1

### I. - Dan - Justification of Actions

A. Pursuing AI - Dan[']s justification(s) for pursuing AI require review of the relationship and standards for Dan[.]

- 1.) Shopkeeper - Dan as a shopkeeper has a valid use of reasonable force and detention of AI if Dan reasonably believed that AI had stolen goods from the store. The fact that AI grabbed the bag and fled the store when he was confronted about the counterfeit money makes this a reasonable assumption[.]
- 2.) Owner - Recovery of personal property - Regardless of shopkeeper rule, Dan had the right to timely use reasonable force to recover his personal property which had been stolen by AI. He had the right to pursue AI a reasonable distance in this recovery pursuit.
  - A. Chasing with a loaded gun — Dan would need to show that taking a loaded gun in his pursuit was a reasonable action. The fact that — AI had stolen a gun and the ammunition may not be sufficient for this showing. The gun was not loaded and this could be a turning point as to reasonableness[.]
- 3.) Felony Prevention - If AI's action was to be considered a felony, then Dan could act as private citizen [sic] acting to prevent the commission of a felony as well as the two other standards.
- 4.) Greater Evil - If AI can show that his actions were reasonably necessary to prevent the greater evil that Dan presented with the stolen gun & ammo, then his actions would also be justified[.]

### II. Dan - Use of Threat of Deadly Force

A. - Reasonableness -

- 1.) Did Dan have reason to believe the use of threat of deadly force was reasonable? If AI's stealing the gun & ammunition gave rise to a felony situation & Dan reasonably believed such threat of force was necessary then he should be justified in using this threat[.]
- 2.) Danger to Others - It may also be argued against Dan that his firing in the air was reckless and unjustified in the threat of danger to

others.

B.) Felony - (see I a 3)

Use of threat of deadly force would be justified if reasonable to prevent felony.

III. Crimes of AI

A.) Murder - For AI to be charged with murder he must be found to have committed a homicide with malice.

- 1.) Homicide - Homicide is defined as the killing of a person by another — Here the facts clearly show that AI turned and shot at Dan[,] causing his death[.]
- 2.) Malice - Malice can be determined by one of four factors 1) intent to kill, 2) intent to cause serious bodily harm, 3) reckless and wanton behavior (depraved heart) 4) in the commission of an inherently dangerous felony.
  - a. Intent to Kill - Deadly weapon use absent any evidence to the contrary is sufficient to show intent. AI loading & shooting does this.
  - b. Intent to Cause Serious Bodily Harm - It is clear that AI intended some harm even if he can show his intent was not to kill[.]
  - c. Reckless & Wanton - AI[']s firing of gun in the street in any direction should show reckless & wanton behavior[.]
  - d. Felony Murder - Was AI's action causing Dan[']s death in the course of a felony? If it can be shown that AI's action was inherently dangerous and the taking of the gun and ammunition in conjunction with the passing of counterfeit money satisfied the felony portion then AI would fall under the felony murder rule as well.

It seems on the facts that AI would be charged with first degree murder unless he could somehow mitigate the charge.

DEFENSES

1. Self[-]Defense - AI can raise the issue of self[-]defense because Dan

threatened to shoot him. However, self-defense is not viable in the commission of this act. Al had other options to remove this threat that did not require his use of deadly force (i.e. surrender).

2. Heat of Passion - Al may claim that he acted in the heat of the moment and not in a clear state of mind to try to mitigate to Voluntary Manslaughter[.]

3. Inadequate Defense -

All may have some other reason or justification allowing him to claim his action was based on behalf of facts not mentioned that led him to act in the manner he did[.]

4. Mental State - Because of intent requirement if Al could show an inability to form the intent he could then reduce the murder charge[.]

B.) Larceny - Trespassory taking of the property of another with intent to deprive

1. Taking - While Dan had placed the gun & ammo in a bag and placed it on the counter, it seems clear that as the money had not been fully exchanged - Al's grabbing would be a taking.

2. Intent - Al's use of counterfeit money and subsequent flight would indicate an intent to take the gun & ammo by trick if not directly. It would likely be argued that he formed the intent at the time he was confronted if not before.

3. His fleeing the store with the items clearly shows his depriving Dan of those items.

Defenses -

C.) Attempted Larceny by Trick

1.) Al misrepresented the money as genuine in tendering same to Dan in exchange for the gun.

2.) Intent - His entering & using the counterfeit would seem to indicate his intent, particularly when coupled with his subsequent taking & fleeing when confronted[.]

Defenses

Mistake - Al might try to argue that he did not know that the money was counterfeit, but his actions & lack of other facts make this

unlikely[.]

D.)

[sic]

## Question 2

Seller inherited a collection of antique dolls from her aunt. In her aunt's estate, the collection had been valued at \$15,000. On September 1, Seller wrote, signed, and sent the following letter to several well-known doll collectors in her area:

Dear Doll Collector:

I now own a collection of antique dolls that I'm willing to sell for \$15,000 to the first person who lets me know he or she wants the collection. This offer will be good for 30 days. If you want to inspect the dolls, I'll be happy to make an appointment. Phone me at 555-1765.

Seller

On September 3, Buyer, who was familiar with the collection, received the letter and immediately called Seller to arrange to inspect the dolls on the same day. Buyer appeared at Seller's home and inspected and photographed the dolls. She told Seller, "I'm interested, but I want to do some research. I'll get back to you." Seller said, "Okay, but my letter went out to a number of other people. I'm selling to the first one I actually hear from who wants to buy the entire collection."

On September 4, Buyer took the photographs to an expert doll appraiser and paid the appraiser \$1,000 to evaluate and authenticate the collection. The appraiser told Buyer the dolls were authentic and worth at least \$30,000. Buyer immediately phoned Seller, who was not at home. Buyer left a message on Seller's telephone answering machine saying, "This is Buyer. I like the dolls. Please call me at 555-8876 when you get home." Also on September 4, and just to be doubly sure, Buyer wrote and signed a letter to Seller stating, "I accept your offer to sell your doll collection for \$15,000. Buyer," and deposited the letter in the mail at the Post Office.

Soon after Buyer returned home from depositing the letter at the Post Office, she received a phone call from Seller. Seller said, "I got your voice mail message. However, I just want to let you know that I've had an appraisal made of the collection, and I'm not willing to let it go for less than \$35,000." Buyer responded, "You can't do that. I accepted your offer of \$15,000, so you have to sell it to me for \$15,000."

Was an enforceable contract formed binding Seller to sell the doll collection to Buyer for \$15,000? Discuss.

## Answer A to Question 2

2)

### **Buyer v. Seller**

#### **UCC v. Common Law**

A contract for the sale of goods will be governed by the UCC.

Since the dolls for which the parties are contracting are tangible, movable, and fully identified in the contract, they are goods as defined by the UCC, and the contract will be under the UCC.

#### **Merchants**

One who deals regularly with the goods involved in the transaction, or who otherwise holds himself out as having special knowledge or skill with the goods.

Although seller is selling to professional buyers, she does not deal regularly in dolls. Therefore, she is not a merchant under the UCC.

Buyer, as a well-known collector, was one who dealt regularly with dolls and who held herself out as having special knowledge and skill with dolls. Therefore, she is a merchant under the UCC and will be held to a heightened standard of good faith and fair dealing.

#### **Offer**

An outward manifestation of present contractual intent which is definite in terms and which is communicated to the offeree.

The letter by Seller mentioned the following terms:

Subject: Doll collection

Quantity: One

Price: \$15,000

Parties: Although no specific party is mentioned, the offer is for the first offeree to respond to the offer.

Time: There is no time specified, so a reasonable time will be implied by the UCC.

Therefore, the communication has sufficiently definite terms for a UCC offer.

Furthermore, the language "I'm willing to sell" shows that there was an intent to be bound on the part of Seller.

Moreover, the fact that Buyer received the offer shows that it was effectively communicated.

Therefore, there is a valid offer under the UCC.

### **Merchant's Firm Offer Rule**

Where a merchant promises to hold an offer open in a signed writing, the offer will be held open for the specified time.

The offer by Seller promised that it would be good for 30 days. Buyer will argue that since the offer was written and signed by Seller, it falls under the merchant's firm offer rule and must be held open.

However, as discussed above, Seller is not a merchant. Therefore, the merchant's firm offer rule will not apply, and the offer is freely revocable by Seller.

### **Rejection**

Where an offeree rejects an offer.

When Buyer had inspected the dolls and said she wanted to do some research, it could be argued that she had rejected the offer. However, there is no indication that she intended to reject, and her language indicated her intent to have the offer remain open for possible acceptance at a later time. Therefore, there has been no rejection of the offer by Buyer.

### **Acceptance**

An outward manifestation of unequivocal assent to the terms of an offer.

When Buyer left a message on Seller's phone, saying that she liked the dolls, she will argue that she accepted Seller's offer. However, her language was not unequivocal assent, since she said nothing about buying the dolls. It would have been reasonable for Seller to assume that she wanted to inspect the dolls again. Therefore, the phone message was not an acceptance.

### **Acceptance #2**

An outward manifestation of unequivocal assent to the terms of an offer.

When Buyer mailed her letter stating "I accept" your offer, she showed her unequivocal assent to Seller's offer.

Normally, acceptances are valid upon dispatch based on the mailbox rule. However, Seller's offer expressly stated that acceptance would only be valid upon receipt, because she would sell to the first collector who "let her know" of their willingness to buy, not the first who mailed an acceptance. Therefore, the acceptance will probably be valid only when received by Seller.

### **Revocation**

An offeree's revocation of his offer.

When Seller phoned Buyer and said, "I'm not willing to sell for less than [sic] \$35,000", she made a statement inconsistent with the offer remaining open, and thus showed her intent to revoke her offer. Since she had not received the letter from Seller[sic], the offer had not been accepted and the revocation occurred before acceptance. Therefore, there was a valid revocation.

### **Detrimental Reliance on Offer rule**

Where an offeror makes an offer which he should reasonably foresee to induce reliance on the part of the offeree, the offeree will be held open for a reasonable time to prevent injustice.

Seller will argue that she detrimentally relied on Seller's offer by appraising the dolls for \$1000. Moreover, she will claim that this was foreseeable, because she told buyer that she would be researching the dolls.

However, Seller will claim that "doing research" does not foreseeably include paying thousands of dollars for evaluations. Therefore, this argument will likely fail and Seller's revocation will be effective.

Since Seller's offer was revoked, there is no enforceable contract.

If a court should find that Seller's acceptance was effective, the parties will proceed as follows:

### **Consideration**

A bargained-for exchange of legal value, involving both benefit and detriment to both parties.

The contract called for the exchange of dolls for money. Since both parties incur detriment under the contract, there is valid consideration.

## **Defenses:**

### **Statute of Frauds**

A contract for the sale of goods of \$500 or more must have a writing.

Seller will argue that since the contract was for the sale of goods of \$500 or more, it must be in writing. However, since there is a writing signed by the party to be charged (seller), there is sufficient memorandum for the contract.

Moreover, Buyer could argue that by paying the appraiser she detrimentally relied on the contract, which may take it out of the statute under the UCC. However, since this occurred before acceptance, it was not reliance on the contract and this argument will fail.

### **Unconscionability**

Seller may claim that by trying to enforce a contract to sell the dolls at half their value, Buyer was acting unconscionably. However, this is probably not a sufficient discrepancy in price for unconscionability to apply. Therefore, this defense will fail.

### **Unilateral Mistake**

Seller will argue that there was a unilateral mistake as to the value of the dolls. Since Buyer knew about the mistake, her acceptance of the contract was in bad faith.

However, the contract was made on Seller's terms, and a court will probably hold it to be a mistake in judgment. Therefore, this defense will probably not apply.

### **Anticipatory Breach**

Where a party, by his words, indicates his unequivocal intent to breach the contract.

When Seller said to buyer, "I'm not willing to sell for less than \$35,000", Seller showed her intent to breach the contract by failing to perform her duty. Therefore, seller [sic] can sue immediately for breach of contract, and need not hold herself ready to perform.

## **Remedies:**

### **Specific Performances:**

Seller will probably argue that the goods were unique goods, since they were collector's items, and ask the court for specific performance. Since Seller still has the goods, a court will probably agree and give specific performance to Buyer.

**General Damages:**

If specific performance is not granted, Buyer may argue for expectation damages for her reasonable expectation under the contract. However, she will probably not get these as they are not the usual UCC remedy.

**Reliance Damages:**

Seller will probably collect compensation for the \$1000 that she paid for appraisal in reliance on the contract, if this reliance was foreseeable.

**Incidental Damages:**

Seller will also collect the costs of bringing suit and getting specific performance.

## Answer B to Question 2

2)

### WHAT LAW GOVERNS?

Contracts for the sale of goods are governed by the UCC. Goods are movable, tangible property.

Here the facts involve the potential sale of a set of antique dolls. Dolls are movable, tangible property.

Therefore, these facts will be governed by the UCC[.]

### WERE THE PARTIES MERCHANTS?

Under the UCC, merchants are held to special rules governing the formation and enforcement of contracts. Merchants are those who regularly deal in the kind of goods in question or who hold themselves out [h]as having some special skill or knowledge as to the particular goods.

Here, Seller simply inherited a collection of antique dolls from her aunt. No facts suggest she had any prior knowledge or dealing with dolls and her apparent undervaluing of the dolls would support this inference. However, she sent a letter to “several well-known doll collectors in her area,” one of whom was Buyer.

Therefore, while Seller is not a merchant, Buyer is.

### CONTRACT

A contract is a promise or set of promises which the law will enforce and for the breach of which a remedy is available. A contract consists of an offer, acceptance, consideration and lack of defenses to formation and enforcement.

### WAS THERE A VALID OFFER?

An offer is a present commitment to enter into an agreement communicated to an identifiable offeree and containing definite and certain terms.

### SELLER'S LETTER OF SEPT. 1:

Seller's letter indicates a commitment to enter into an agreement to sell the dolls for \$15,000. It is communicated to a number of well-known doll collectors, though it specifies that it can only be accepted by “the first person who lets [Seller] know he or she wants the

collection.” By indicating that the offer, though sent to several individuals, is extended only on a “first-come, first-served” bases[sic]” Seller has communicated that the letter is, in fact, an offer, rather than simply an invitation to negotiate further (such as an advertisement). To be sufficiently definite, the UCC requires that the offer state the quantity and subject matter of the offer. Although “a collection” does not state a specific number, it is likely that this number would be known to doll collectors who would be familiar with the custom of the trade. Moreover, at common law, an offer is sufficiently definite when its terms can be determined for the purpose of establishing when a breach has occurred and what remedy would be available. Therefore, even if it were not immediately apparent from the offer how many dolls are included in a “collection,” it is something that could be established to a reasonable degree of certainty sufficient for awarding a remedy in the event of breach. For the purpose of analysis, we assume the offer was sufficiently definite, though see below (PROMISSORY ESTOPPEL) in the event a court would find otherwise.

Therefore, it appears, at least provisionally, the Seller’[s] letter is a valid offer.

#### ACCEPTANCE?

Under UCC Sec. 2-206, an acceptance can made [sic] by any means reasonable under the circumstances unless otherwise specified in the offer. Here, the offer indicates that an interested buyer should contact Seller by phone at 555-1765. However, because of the context, a reader might also construe the letter as instructing someone to call in the event he/she wants to schedule an appointment to inspect the doll, in which case, any means reasonably [sic] under the circumstances would suffice as a mode of acceptance.

Here Buyer did, in fact, contact Seller by phone to schedule an appointment. Having inspected the dolls, however, Buyer said that she was interested but that she would need to get back to Seller after having done some research. As distinct from a rejection/counteroffer or an acceptance, Buyer’s communication would probably be considered a communication of intent to continue negotiations. In any event, it is not an assent to the terms of the offer, so that it will not serve as an acceptance.

On September 4, however, Buyer again telephoned Seller, this time leaving a voicemail message indicating that she wished to accept the offer to purchase the dolls at \$15,000. She also wrote a letter “to be doubly sure” to lock in the price and to beat out her competitors before they got to the dolls. Because Seller did not give any further or more specific instructions about how she wished to have the offer accepted, the parties’ course of dealing suggests that acceptance by telephone, or, in the absence of both parties, by voicemail is an acceptable method of acceptance. The real issue here is timeliness rather than method, so that the letter would probably be superfluous if not for the additional problem of whether the statement “I like the dolls” is sufficiently unequivocal to communicate Buyer’s acceptance. The letter indicates an unequivocal, so that if Buyer’s acceptance by letter was timely, then her voicemail message is unnecessary.

## TIMELINES OF ACCEPTANCE: MAILBOX RULES

Acceptance is effective upon dispatch.

Here Buyer deposited the letter in the mailbox.

Therefore, she accepted the offer, barring any exceptions to the Mailbox Rules.

## EXCEPTIONS TO MAILBOX RULES; OPTION CONTRACTS/MERCHANT'S FIRM OFFER

Acceptance of an option contract is effective upon receipt. A merchant's firm offer is a writing, signed by a merchant, that indicates that an offer will be held open for a reasonable amount of time, not to exceed three months. Unlike a common law option contract, which requires consideration or at least purported consideration, a merchant's firm offer is valid, even absent consideration.

Although Seller indicates that "the offer will be good for 30 days," there is no apparent consideration, not even purported consideration from Buyer, so that this cannot be considered a traditional option contract. Additionally, as noted above, Seller is not a merchant, so that her letter of September 1 cannot serve as a merchant's firm offer.

Therefore, Buyer has accepted.

## TIMELY REVOCATION?

An offer is freely revocable at any time prior to acceptance. Revocation is effective upon receipt.

Here, Buyer deposited her acceptance in the mailbox and then returned home. Soon thereafter, Seller called attempting to revoke the offer. Because Buyer had already effectively accepted by mailing her letter before she received Seller's attempted revocation, Buyer's acceptance controls.

## CONSIDERATION

Legally sufficient, bargained-for exchange that constitutes a detriment to the promisee, induces current performance and creates a binding obligation on both parties. A promise for a promise is generally valid as consideration.

Here Seller indicated that she would sell a collection of antique dolls to the first person who notified her of an interest in purchasing the collection for \$15,000. Buyer, in turn, accepted

this offer on its terms by mailing a letter on September 4 in which she specifically mentions the price, and thereby promises to pay the requested \$15,000.

As a promise for a promise, there is valid consideration and, absent defenses to formation or enforcement, a valid contract exists.

## STATUTE OF FRAUDS

Certain contracts to be enforceable must be in writing and signed by the party to be charged. Among these, the UCC requires that contracts for the sale of goods for \$500 or more be in writing and signed by the party to be charged.

Here, Seller would be the party trying to avoid the contract (the party to be charged). A sufficient writing exists, however, because her September 1 letter states the necessary terms of the agreement and was signed by Seller.

Therefore, the Statute of Frauds will not bar this contract from enforcement.

## OTHER DEFENSES?

There are no facts to suggest that other defenses might apply, as both parties appear to be competent adults dealing at arms['] length without overreaching or imposing oppressive terms. Therefore, there do not appear to be any defense of incapacity, illegality, unconscionability, mistake or misunderstanding. Seller's stat[e]ment, "Okay, but my letter went out to a number of other people. I'm selling to the first one I actually hear from who wants to buy the entire collection," does not rise to the leve[l] of duress, as it does not in any way limit Buyer's choices or hold over her any threat, other than the possibility that she will not be able to obtain the dolls if she does not act soon to purchase them.

If, as noted above, a court should find that the offer itself was insufficiently definite, by stating only "a collection" rather than a specific quantity, of dolls, then a valid contract would not have been formed, though there may be an alternative theory for Buyer to recover at least her expenditures for the appraiser.

## PROMISSORY ESTOPPEL

Where the promisee reasonably, foreseeably and substantially relies to her detriment on the promisor's offer, the promise will be enforceable to the extent necessary to avoid injustice.

Here because Buyer informed Seller that she intended to conduct further research, arguably her \$1000 is recoverable under a theory of promissory estoppel. It was both reasonable and foreseeable that she might have expenses--indeed, Seller herself decided to have the dolls appraised, indicating that it was not an unexpected or bizarre action to

take by one about to enter into an agreement for the sale or antique dolls. Additionally, \$1000 is a substantial outlay, so that, in the unlikely event that the custom and usage of trade for antique doll collectors does not specify how many dolls are in a “collection,” Buyer should at minimum be able to recover her \$1000 under a promissory estoppel theory.

### Question 3

Prof is a professor of torts and commercial law at University Law School (“ULS”). Prof’s employment contract with ULS requires him to teach a certain number of hours, conduct research, publish scholarly works, be available for consultation with his students, and engage in community service.

Dave, one of Prof’s students and research assistants, applied for a summer job with the State Office of Youth Assistance, an agency that houses and counsels troubled youths. Dave asked Prof to write a letter of recommendation for him. Prof agreed and wrote a letter recommending Dave highly and in unqualified terms. He sent the letter to the Office of Youth Assistance in a sealed envelope marked “Confidential.”

Prof knew that the job for which Dave had applied required the incumbents to be in frequent close and unsupervised contact with young children. Prof also knew at the time he wrote the letter that Dave had admitted during a confidential disciplinary investigation by ULS that he had molested his girlfriend’s young daughter and that Dave was undergoing counseling related to the incident. Prof did not mention anything about this in the letter because he did not want to hurt Dave’s chances of getting the job and because he was convinced that Dave would not repeat his conduct.

Dave was hired by the Office of Youth Assistance. Toward the end of the summer, while conducting a private interview with a six-year-old girl, Dave succumbed to temptation and attempted to molest her. The girl’s screams attracted the attention of Gina, a youth counselor working nearby. Gina ran to the rescue, but the stress of the situation caused Gina to suffer a debilitating heart attack.

Gina sues Prof and ULS for negligent misrepresentation, alleging that Prof is liable because of his neglect in failing to disclose what he knew about Dave in his letter of recommendation and that ULS is liable under the doctrine of *respondeat superior*.

Prof moves to dismiss Gina’s suit on the grounds that (i) he owed no duty of care to Gina to disclose what he knew about Dave and (ii) even if did have such a duty, his breach of the duty was not the proximate cause of Gina’s injuries.

ULS moves to dismiss Gina’s suit on the ground that ULS cannot be held vicariously liable because writing letters of recommendations for his students was outside the scope of Prof’s employment duties as a professor.

How would a court be likely to rule on each ground of the motions filed by Prof and ULS to

dismiss Gina's suit? Discuss.

### **Answer A to Question 3**

3)

Question 3 Torts

Negligent misrepresentation

Misrepresentation is the false assertion of past/present material fact, made with unreasonable conduct (negligence), causing reliance, upon which misrepresentation the plaintiff does justifiably rely, and the plaintiff suffers damages as a proximate result.

Negligent misrepresentation occurs when there is a duty to disclose or some relationship between P and D which incurs liability towards the plaintiff. Here, it could be said that although scienter and intent to induce reliance may not have been present, the elements for negligent misrep are present if the D's conduct fell below the appropriate standard of care. By representing Dave to be such an upstanding individual, D made a false assertion of past/present material fact, which D should have known would cause justifiable reliance upon the statement.

G v. Prof

Negligent misrepresentation results from the unreasonable conduct of D, which imposes an unreasonable risk of harm upon others, and which causes actual harm or injury to others as a proximate result of the D's negligence.

DUTY

When D acts affirmatively, D owes a duty of care to all foreseeable P's within the zone of danger. D has the responsibility and duty to act as an ordinary prudent person, and to refrain from acting in ways that impose risks of harm upon others. Here, D [P]rof acted affirmatively when he wrote a letter of recommendation for Dave. The real question is whether G can be considered a foreseeable P. The more obvious foreseeable P's to D's conduct were employers of Dave and the children with whom Dave would come into contact. However, as well known in tort law, danger does invite rescue and since G was not only a youth counselor, but a rescuer as well, rescuers are foreseeable plaintiffs. Therefore, G was a foreseeable plaintiff since she was a rescuer.

In addition, Prof was under contract with ULS to do certain things within his job description. These activities affected more people involved than just the other contracting party, (ULS),

and therefore, arising out of this contractual duty, a duty arose to all those affected by his assigned duties on the job.

## STANDARD OF CARE

The applicable standard of care is that of an ordinary prudent person in same or similar circumstances. Here, D was a university professor who had basically the same duties as others with the same title. Here, as the writer of a recommendation letter for a student, D was required to act in the capacity of a reasonable person when doing so.

## BREACH OF DUTY FAILURE TO DISCLOSE

Breach is established when the D's conduct is unreasonable. Unreasonableness is determined by a balancing method, which weighs the social utility of the D's conduct and the burden of reducing/eliminating the harm against the probability and gravity of the harm imposed by the conduct. Otherwise known as the Learned Hand Formula, D is liable if  $B < PL$ . Here, D's conduct may have been unreasonable since he personally had knowledge of the job description of Dave and knew that Dave would be in close unsupervised contact with young children. D also knew that Dave had admitted to molesting another young child. D acted unreasonably when he failed to include this information in the recommendation letter. Even if he did not want to clearly repeat Dave's history to the new employer, D could have abstained from writing such a glowing recommendation which recommended Dave in unqualified terms. Any reasonable person would probably have been reluctant to dismiss Dave's history, and would have been more objective in the letter.

D will counter that he did not breach his duty because he did not believe his conduct was unreasonable. D will claim that he was "convinced" that Dave would not repeat his conduct and was undergoing counseling related to the incident. D will claim that he was only trying to help Dave and did not want to hurt Dave's chances of getting the job. However, D imposed an unreasonable risk of harm upon the children coming into contact with Dave and upon rescuers (since they are foreseeable) because of D's unreasonable conduct.

## CAUSATION ACTUAL CAUSE BUT FOR "sine qua non"/SUBSTANTIAL FACTOR

A cause is an actual cause of the harm if "but for" the D's conduct, the harm to P would not have occurred. Here, D negligently misrepresented Dave's character, and this would be an actual cause of G's harm if but for D's conduct, the harm to G would not have occurred. Here, had D not been negligent, D would not have been hired, would not have attempted to molest the child, and the G's rescue would not have occurred. Therefore, but for D's

conduct, the harm to G would not have occurred.

PROXIMATE CAUSE  
INTERVENING/SUPERSEDING  
WAS DAVE'S ATTEMPT TO MOLEST AGAIN A SUPERSEDING EVENT?  
FORESEEABLE CRIMINAL ACT

Proximate cause determines if the actual cause is sufficient to hold the D responsible for the P's harm. It determines whether intervening events break the chain of causation, and whether the resulting harm was a foreseeable consequence of D's conduct. An event is considered intervening if it occurs after the D's conduct occurs, but before the resulting harm. Here, D wrote a glowing recommendation, causing Dave to be hired. It was foreseeable that he would be hired after such a glowing recommendation letter. Considering Dave's history (and regardless of D's personal opinion that Dave would not molest again), it was foreseeable that he would succumb to temptation when around young children. G ran to the rescue of the young girl because of her screams. The girl's screams were a foreseeable result of Dave's attempt to molest her, and anyone coming to the rescue was also foreseeable because danger does invite rescue.

Furthermore, the ordinary negligence of rescuers is foreseeable, but rescuers' gross negligence, criminal acts of 3<sup>rd</sup> persons, and unforeseeable acts of God are unforeseeable. Here, the facts do not indicate that Gina was even ordinarily negligent. All that happened was that the stress of the situation caused her to suffer a heart attack. Again, it is foreseeable that one would be alarmed at hearing a young girl screaming.

THIN-SKULL/EGGSHELL PLAINTIFF

D [P]rof will try to establish that G's sensitive condition was pre-existing and sufficient to break the chain of causation. D is unlikely to succeed with this argument because the D must take the P as he finds her. Therefore, any prior condition of Gina's health will be irrelevant and the fact that her condition (if any) was aggravated would not break the chain of causation. D will be held liable for G's harm as long as it was foreseeable that D's negligent misrepresentation was a proximate cause of the harm.

DAMAGES

In negligence actions, the P may recover harm for actual damage in the form of personal injury/property damage, as long as that harm is quantifiable and reasonably ascertainable. Purely economic loss is not recoverable unless parasitic to personal injury/property damage. Here, G could recover for her pain/suffering, loss of wages, medical bills, etc.

## DEFENSES

### CONTRIBUTORY NEGLIGENCE

In jurisdictions adopting contrib neglig, it is complete bar to recovery if the P's conduct falls below the reasonable standard of care which one should hold for himself. Here, there are no facts to suggest that G was contrib neglig.

### COMPARATIVE NEGLIGENCE

The majority of jurisdictions nowadays have adopted comparative fault in place of contrib neglig. In compa[ra]tive fault, the P's recovery is reduced in proportion to the amount of harm attributable to his own negligence.

### PURE V[.] MODIFIED

Pure comp neglig allows the P to recover even if she was more negligent than [sic] D. In modified comp neglig jurisdictions, the P's recovery is barred if the P was more than 50% at fault as compared to D.

Again, there are no facts to suggest that G's recovery will be barred due to comp neglig.

### ASSUMPTION OF THE RISK

ATR occurs where the P voluntarily elects to encounter a known understood risk of harm. D may counter that G was aware of the gravity of the situation when she heard the child's screams and[,] therefore, knew of the risk and voluntarily elected to encou[n]ter it. However, G will argue that just running to someone's rescue does not mean that G knew of the risk involved and that she would suffer a heart attack due to the stress. It is unlikely that D will have a successful defense against G.

### G v[.] ULS

### RESPONDEAT SUPERIOR

This doctrine imposes vicarious liability in several relationships, particularly employer-employee, as we have here. When an employee is acting within the scope/course of employment, his emp[lo]yer can be vicariously liable for all tortious acts committed in furtherance of the employment. Here, ULS is the employer who has hired Prof. Therefore, the employer-employee relationship is established.

### COURSE/SCOPE OF EMPLOYMENT

Determining whether D's conduct was within the scope of employment will depend upon the similarity of his conduct with the description of his assigned duties. ULS required Prof to "be available for consultation with his students," and "engage in community service." It

seems foreseeable that a professor would write a letter of recommendation for a student, and especially for a research assistant (who probably had more contact with [P]rof than the other students). Therefore, D's conduct was close enough to his assigned duties/job description to be considered within the course/scope of employment. Furthermore, since Dave was more than just a student, his status of being on[e] of [P]rof's research assistants, made it likely that [P]rof would write such a letter.

#### PROXIMATE CAUSE

Based on the information provided as to D's assigned duties towards ULS, it seems a foreseeable result of being employed at ULS that D would write letters of recommendation for his students. After all, "conducting research" is one of the assigned duties, and it seems natural that a professor engaging in research would need student help in the form of research assistants. Further, it does not break the chain of causation that he would write letters of recommendation for his students.

#### SUPERSEDING CAUSE - UNFORESEEABLE CRIMINAL ACT OF 3<sup>RD</sup> PERSON

However, the fact that Dave was no ordinary research assistant/student, but was actually a child molestor[,] may be sufficient to constitute an intervening cause, sufficient to break the chain of causation. An event will be superseding if it is unforeseeable, independent, and sufficient to break the chain of causation. So, since the criminal act of Dave was unforeseeable to ULS, then ULS would not be vicariously liable for the acts of professor.

### Answer B to Question 3

3)

#### **Prof's Motions for Dismissal**

##### I. Negligent misrepresent[ation]

The prima facie case for negligent misrepresentation requires that the the [sic] misrepresentation be one of fact in which the Defendant was negligent in not discovering the truth and which the Plaintiff reasonably and foreseeably relied upon the misrepresentation and [,] such reliance was the actual and proximate cause of his injuries. All cases for negligence, including negligent misrepresentation, requires [sic] the defendant show a duty, a breach of that duty, that the breach was the actual and proximate cause of the plaintiff's injuries and that the plaintiff suffered injury resulting from the breach and that the defendant has no valid defenses. Here, Prof's motions to dismiss focus on the duty element, claiming essentially that he owed no duty to Gina and proximate cause issues claiming essentially that unforeseeable intervening events breaks [sic] the chain of events from his act of writing the letter and Gina's heart attack.

##### I. Duty

A duty is a legal obligation to conform one's conduct to a recognized standard of care to avoid unreasonable risks to foreseeable plaintiffs. Generally, when one commits an affirmative act, he owes a standard of reasonable care to all people who might be injured by that act. Here, Prof wrote a letter of recommendation to the State Office of Youth Assistance (SOYA) recommending Dave. With this affirmative act, he owes a duty to anyone who might be foreseeably injured by this harm.

A. Foreseeable plaintiffs. In the Palsgraf case, the Andrews opinion holds that anyone who commits an affirmative act owes a duty to anyone who is harmed by that act. However, the current majority - the Cardozo opinion, holds that the duty flows only to those who are foreseeably harmed by the act. The specific tort being alleged here, negligent misrepresentation, generally require[s] a fiduciary duty and the duty flows only to those who might foreseeably be harmed by the misrepresentation. For example, an accountant who negligently misrepresents a company's books might be liable to the company's stockholders who foreseeably relied on those numbers. Or, as here, if SOYA relied upon his letter and were sued by the child['s] parents, they might have a cause of action against Prof. However, Gina is the one suing Prof and Prof will argue that because he has no fiduciary duty to Gina and because she is not a foreseeable Plaintiff for injuries caused by his writing a letter to SOYA he has no duty to conform his actions for her protection.

## II. Proximate Cause

The Defendant's actions must be both the actual and proximate (legal) cause of the Plaintiff's injuries. Proximate cause issues are properly raised when the alleged negligent conduct is remote in time or place from the injuries caused by that conduct. Here, the allegedly negligent conduct was Prof's writing of the letter recommending Dave for a position working with children knowing that Dave had a history of misconduct working with child. The injury is a heart attack and analysis of proximate cause revolves around foreseeability. The foreseeability of the plaintiff is discussed above, under duty. Here, we discuss the foreseeable type and extent of harm.

1. Intervening causes? The letter did not cause the heart attack; seeing Dave molesting the young girl caused the heart attack. Dave's molestation is criminal act and generally a criminal act will break the chain of causation. The exception to this is when the negligent act increases the likelihood or creates the conditions for the criminal act. Gina will argue that writing the letter put Dave in a position to accomplish the criminal act and therefore the criminal act should not break the chain of causation. In fact, Gina will argue that because Prof knew of Dave's previous molestations, the criminal act was actually foreseeable. However, Prof will argue that Dave was in counseling and that the letter, if negligent at all, only provided an incentive for hiring. There is nothing in these facts to show that the SOYA relied upon Prof's letter. We are told Prof wrote it and Dave was hired. Prof will argue that, according to these facts, his letter was not the cause of Dave being placed in position to molest the girl. It may have been[,] at most, a contributing factor[,] but the facts do not describe any specific reliance by SOYA on the letter.

2. Foreseeable type of harm? Negligently representing a child molester in "unqualified terms" in a letter does not foreseeably result in a heart attack for a coworker of the child molester. Prof will argue that the foreseeable type of harm resulting from this conduct is that a child would possibly be molested but not that someone will have a heart attack. However, the foreseeable harm did actually occur - a child was molested. Gina heard the child scream and, as is often put, "danger invites rescue". Gina ran to the scream, thinking a child was in danger and when she saw the danger suffered foreseeable harm from seeing a child being molested - specifically, she suffered stress and an ensuing heart attack. Thus, although the heart attack is not a directly foreseeable type of harm resulting from a negligent misrepresentation, the chain of causation is from the letter, to the hiring, to the molestation, to the rescue, to the heart attack. Gina will argue that each item in that chain was foreseeable and nothing intervened to break this chain (see above for whether Dave's criminal conduct serves as an intervening cause).

3. Foreseeable extent of harm? Under the current majority, if the type of harm is foreseeable, Prof will be liable for the full extent of the harm.

The court will likely rule Prof owed Gina no fiduciary duty and owed Gina no duty as she was not a foreseeable Plaintiff. Furthermore, the chain of causation is stretched extremely

thin and the act of writing the letter and the eventual injury of a heart attack is tenuous, only connected by the fact that the heart attack was induced by rescue.

#### ULS Motions for Dismissal

ULS is being joined in this suit as a codefendant under the doctrine of *respondeat superior* which imposes liability on the employer for the torts committed during the course of and in the scope of their employment. ULS has motioned for dismissal claiming that the Prof, even if he was negligent in writing the letter, did so on his own - letters of recommendation are not in the scope of his employment for ULS.

I. Not in scope of employment. We are told that the ULS-Prof employment contract requires Prof to teach, research, publish, perform community service and be available for consultation with his students. ULS is correct when the[y] say that writing letters is not part of the employment contract[,] however Gina will argue that it is [a] foreseeable part of the employment that Prof, who teaches and consults with students, will write letters of recommendation for students. In fact, she will be able to show that this is a very common occurrence and is in fact highly foreseeable. If she can show that part of consulting with students and working with students and grading students is also writing letters of recommendation, she can include Prof's conduct in the scope of employment which will impute liability to ULS on the basis of RS. She can also argue that if ULS did not want teachers to write these letters, they could easily have prohibited it. However, they did not and therefore should be liable for the foreseeable actions of their employees.

If Prof is found liable, the court will likely rule that ULS is liable under respondeat superior as writing letters of recommendation is a foreseeable activity within the scope of employment of a law professor.

## Question 4

Dan intensely disliked his co-worker, Mona, with whom he was in direct competition for an important promotion at work. He knew that Mona and her husband, Otto, had a troubled marriage and that Otto suspected Mona of infidelity. He also knew that Otto had a very bad temper when provoked.

Hoping secretly that it would provoke Otto to kill Mona, Dan told Otto that he had seen Mona and another co-worker in a compromising position in the storeroom on several occasions. Believing what Dan told him, Otto went to Mona's workplace and hid in the storeroom. As he waited, he became angrier and angrier with each passing moment. When Mona entered to get some supplies, Otto jumped out from behind a cabinet, flew into an uncontrollable rage, yelled "Dan has told me what you do when you come in here. I'm going to kill you," and began to strangle her. Mona's screams attracted a security guard, who subdued Otto and freed Mona.

Dan and Otto have each been charged with solicitation of murder, conspiracy to commit murder, and attempted murder.

Do the facts support each of the charges against Dan and Otto, and what, if any, defenses might they each assert? Discuss.

## Answer A to Question 4

4)

### **People v. Dan**

Solicitation of Murder. Solicitation is asking another to do an illegal act. Where the target (intended) crime requires a certain result (such as murder requires a homicide), the actor must desire that the result occur. While Dan (D) may have secretly hoped a murder would occur, he has not asked Otto (O) to kill Mona (M), or anyone for that matter. He has also not asked anyone to do anything illegal. Rather, D has provided O with information that he hopes will lead to M's death. This will bear on his liability for attempted murder. However, D has not committed the crime of solicitation of murder.

· Merger. A successful solicitation merges into the crime of conspiracy. Here, there was no solicitation, so there was nothing to merge.

· Conspiracy to Commit Murder. Conspiracy is an agreement between two or more parties to do an illegal act, or to do a legal act by illegal means. The majority of modern jurisdictions also require a minimal overt act in furtherance of the conspiracy. Again, as above, D and O have not agreed to do anything. D gave O information that he hoped O would act on, but his true intentions were secret and there was no agreement between D and O to kill M, or anyone, or to do anything illegal. Therefore, D is not guilty of conspiracy to commit murder.

Attempted Murder. Attempt is the intent to do an illegal act, or bring about an illegal result, plus an act in furtherance of that intent. The target crime involved in attempted murder is, of course, murder, to be discussed infra. Here, the state will argue that D attempted to murder M.

· Specific Intent Crimes. Because attempt requires the intent to do an illegal act or bring about an illegal result, general intent crimes (as some types of murder are) cannot be the subject of malice. Specific intent crimes - those in which the actor intends his result can be the subject of an intent crime. Crimes requiring a knowing mental state can be the subject of attempt if the actor could be substantially certain that the illegal act or result would occur.

· Act In Furtherance. Traditionally, the act must have been in close proximity to the target crime. The Modern Penal Code (MPC) requires that the act be a substantial step toward completion of the target crime; an act is not a substantial step unless it is strongly corroborative of the actor's criminal intent. Here, D has undertaken an act in furtherance of his intent that M be murdered by setting in motion a chain of events which he hoped (secretly, of course) would lead to O's killing of M. Telling O, who[m] he knew had a very

bad temper when provoked, something as provocative as the fact that he'd caught M in compromising positions with another person[,] constitutes a substantial step toward her killing and is in close proximity to her actual killing.

Use of Instrumentation. As a defense, D may attempt to argue that he did not intend to kill M, rather, only O did. D would argue that he simply gave O some information and that O was the "only" prospective murderer. In this case, however, O can be viewed as an instrumentality who, while human, is truly little different than [sic] an inanimate weapon such as a gun. Where one loads a gun and fires it at another, substantially certain that firing the gun will kill the intended victim, D "loaded" O with information that he hoped, and was substantially certain would, inflame the temperamental O to the point where he would kill M, or at least attempt to. Consequently, D clearly did undertake an act that was intended to result in M's murder.

Target Crime: Murder. Murder is an unlawful homicide, committed with malice.

Homicide. Homicide is the killing of another live human being. Had the target crime been completed, Mona would have been killed, as D desired. Thus, the homicide element is satisfied for attempted murder.

Malice. Malice can be satisfied through any of the following four manners: intent to kill, intent to do serious bodily harm, depraved heart and felony murder. Only one type of malice is relevant to this discussion:

Intent to Kill. Where the actor, intending to kill his victim, does so, this will be the appropriate charge. In this case, we are specifically told that D secretly hoped that O would kill M. The fact that his intent was secret is immaterial. The fact that D intended that M be killed as a result of his actions with regard to O is all that is needed to satisfy this element. Had O killed M, D would have been criminally liable for intent to kill murder. Because O did not kill M - and even if O had not acted on D's intentions, this would be the case - the malice element of the target crime is satisfied. Intent to kill being, by definition, a specific intent crime, it can be the subject of a charge of attempt.

Degree. Intent to kill murders in which the actor premeditated the killing are first-degree offenses; without premeditation, intent to kill murder is a second-degree offense. Here, D had planned M's death, conceiving the plan to provoke O into killing her, thus premeditation is demonstrated.

Conclusion: D Guilty of Attempted First-Degree Murder. Because D intended that M be killed, and because he undertook an act in furtherance of that intent by attempting to provoke O into killing her, D will be criminally liable for attempted murder in the first degree of M. He has no defenses to this crime.

## People v. Otto

Solicitation of Murder. Defined supra. Here, O has not asked anyone to do anything, much less commit a murder. He has solely acted on information D gave him, secretly hoping to induce O to act. O is not criminally liable for solicitation of murder.

Conspiracy to Commit Murder. Defined and discussed supra. Conspiracy requires an agreement between two or more parties, and while O did eventually try to kill M, he did so of his own accord. O is not criminally liable for conspiracy to commit murder.

Attempted Murder. Defined supra.

Act in Furtherance. Defined supra. O's strangling of M is an undeniable act in furtherance of his intent to kill M.

Target Crime: Murder. Defined supra.

Homicide. Defined supra. O told M, "I'm going to kill you." Clearly, he desired to commit the homicide of M.

Malice. Defined supra.

Intent to Kill. Defined supra. O's statement that he was going to kill M demonstrates that he intended to kill her. Intent to kill being, by definition, a specific intent crime, it can be the subject of a charge of attempt.

Degree. Defined supra. Here, it may be difficult to know for certain whether O actually premeditated for a long period on M's killing. However, by announcing his intention to kill M, O has demonstrated that he has at least thought about it for a moment, so premeditation is established and O will be liable for attempted murder in the first degree.

Conclusion: O May Be Guilty of Attempted First-Degree Murder. Barring a successful defense, O will be criminally liable for the attempted murder of M in the first degree.

Defense: Mitigation to Attempted Voluntary Manslaughter (VM). Where the elements below are satisfied, a party may mitigate a murder down to VM. Here, O will claim that the elements of VM are satisfied and that his attempted murder of M should be mitigated to attempted VM. The elements are:

Reasonable Provocation. A provocation act must have occurred that would have

caused a reasonable person to lose his self control to such a degree that he would kill. Because of the reasonableness standard, O's bad temper will be immaterial to this element. However, discovery of infidelity by a spouse has been held to be a reasonable provocation. Here, O had "learned," however incorrectly, that M had been unfaithful to him from D. If a jury finds that a reasonable person would have believed D's entreaties that M had been caught in compromising positions on several occasions to be a reasonable discovery of marital infidelity, then O will be able to establish this element.

· Actual Provocation. The actor must have actually been provoked by the provocative act; if the actor, not actually provoked, uses the act as a mere pretense for his crime, VM mitigation will not be available. We're told that O believed what D told him and acted on it by going to M's workplace and laying in wait for her in the storeroom, so he clearly was actually provoked.

· No Reasonable Cooling-Off Period. A period of time must not have lapsed in which a reasonable person would have regained his self-control. Again, the reasonableness standard makes O's temper immaterial. In this case, we do not know the length of time between the provocative act (learning of M's alleged infidelity) and O's attempt to kill M. We only know that O waited for M, but we do not know for how long. We also do not know how long it took O to get to M's workplace. Without this information, it is impossible to conclude as to whether there was a reasonable cooling-off period. If there wasn't, VM mitigation will not be available to O.

· No Actual Cooling Off. The actor must not have actually cooled off prior to his act. Here, we are told that, rather than cooling off, O became angrier and angrier with each passing moment, attacking her as soon as she entered the storeroom. O clearly had not actually cooled off.

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· . . . .  
· . . . .  
Conclusion. If O can prove there was no reasonable cooling-off period, he will be able to mitigate his criminal liability down to attempted voluntary manslaughter. If he cannot, he will be criminally liable for the attempted murder of M in the first degree.

## Answer B to Question 4

4)

I. State vs. Dan

a. Solicitation Of Murder: Solicitation is asking, aiding, enticing, encouraging others to commit murder with a specific intent that the crime be committed. The facts indicate that Dan secretly hoped that his conduct would provoke Otto to kill Mona. So the specific intent is established. Solicitation is complete when the act of enticing is done even if the solicitee rejects the solicitation. Here the act of telling Otto that Mona was having an affair with another coworker knowing that Otto had a trouble[d] marriage and Otto suspected Mona of infidelity and knowing that Otto had a very bad temper [sic] will be sufficient to establish enticement impliedly. Therefore, he is most likely found to be guilty of solicitation. A crime once committed cannot be undone. Solicitation merges with conspiracy, attempt or completed crime. It is generally a misdemeanor.

b. Conspiracy to Commit Murder: An agreement between two or more person [sic] to commit an unlawful act or lawful act with an unlawful purpose and an overt act in furtherance of the commission of the crime with a specific intent that crime be committed. Conspiracy does not merge with attempt or the crime.

i. Agreement does not have to be express and it could be implied. In [a] majority of states it requires two guilty minds. Dan will argue that though he secretly hoped that Otto kill Mona [sic] but there was no express or implied agreement between the two.

ii. Two guilty Minds: In majority for conspiracy there should be at least two guilty minds. The actus rea and mens rea must concur. Here though Otto hoped that Dan will [sic] kill Mona, but the facts do not indicate whether at this time Otto had the specific intent to kill Mona.

iii. An Overt Act: Otto will assert that he did not do any act in furtherance of the crime. However, any act that is in furtherance of crime and committed by any coconspirator is sufficient for the overt act requirement. Here, Otto's going to Mona's workplace will be sufficient.

If the jury finds that there was no agreement between Dan and Otto to kill Mona either express or implied Dan may not be guilty of conspiracy. On the other hand if the jury finds that there was an implied agreement to murder Mona than [sic] Dan is guilty of conspiracy.

MPC Jurisdiction: An agreement with one or more person [sic] to solicit, attempt or commit a crime or aiding to planning and commissioning of the crime. MPC does not require two guilty minds. One guilty mind is sufficient. MPC does require an overt act. Therefore, in MPC jurisdiction Dan is guilty of conspiracy to commit murder as he

solicited Otto by enticing him to commit murder.

c. Attempted Murder: The guilt of Dan will be based on vicarious liability based on solicitation or coconspirator. Under Pinkerton's rule, he is vicarious[ly] liable for the crimes of Otto which are in furtherance of the agreement and that are foreseeable unless Dan effectively withdraws. Dan had not withdrawn. So Dan is liable for attempted murder if Otto is liable for attempted murder (see discussion below). He will be vicariously liable based on solicitation in majority of jurisdiction [sic] and will not be liable based on coconspirator if he is not found to be guilty of conspiracy under majority as discussed above.

MPC Jurisdictions: MPC does not follow Pinkerton's rule. MPC finds a D liable only if [sic] acted in the commission of the crime or aided or abetted, that is only based on accomplice liability. Since Dan did not act [sic] in the commission of the crime, he may not be found vicariously liable unless the jury finds that his act of telling Mona's infidelity is aiding and abetting[.] Then he will be guilty based on accomplice liability.

## II. State vs. Otto:

a. Solicitation of Murder: Solicitation is defined supra. Otto did not ask or entice anyone. He is the solicitee and Dan is the solicitor. Therefore, Otto cannot be guilty of solicitation.

b. Conspiracy to Commit Murder: See supra for majority and MPC jurisdiction definitions. Since the conspiracy is between Dan and Otto, the discussion of conspiracy for Otto is similar to that of Dan. Otto will also argue that he did not have any agreement with Dan to commit murder. He will also argue that he did not have any intent to kill Mona. He went to her office just to confront her and to verify the veracity of Dan's statement. Since he did not have any intent than [sic] he cannot be guilty of conspiracy even under MPC jurisdiction where one guilty mind is sufficient.

c. Attempted Murder: Specific intent to kill and an act in perpetration of murder that is a substantial step and which is highly corroborative of the intent to murder.

i. Substantial Step: Here Otto went to Mona's office and hid in the storeroom. He jumped at Mona from behind the cabinet when she entered to get some supplies. Otto has gone to the [sic] Mona's office but the issue is whether this is highly corroborative of his intent to commit the crime. There is no substantial certainty that Mona will visit the storeroom. On the other hand Dan had told him that he has seen Mona in [a] compromising position in the storeroom and that's why he hid in the storeroom. So most likely his hiding in the storeroom and waiting for her to visit coupled with his strangling of Mona will be a substantial step.

ii. Specific Intent: The intent may be inferred based on D's statement or conduct prior to act and his relationship with the victim. Here Otto made a statement that he was going

to kill Mona before he strangled her may be [sic] sufficient to show intent. Also, the fact that he was hiding and he believed that Mona was infidel [sic] may further be used to infer his intent to kill Mona. On the other hand Otto will argue that he did not take any deadly weapon with him nor he is an expert in strangling persons [sic] to death to negate his specific intent.

iii. Factual Impossibility: Otto may also argue factual impossibility. Factual impossibility exists when a D who seeks to perform a prohibited act is not able to do the act because of the facts unknown to him. Otto will argue that it is impossible to kill someone in a storeroom which is visited by all the employees with bare hand [sic] and he is not an expert. However, factual impossibility is not a defense to attempt.

iv. Heat of Passion: If Otto can show that he cannot be guilty of murder than [sic] he is also not guilty of attempted murder. So if he is able to show that had the crime been committed it would have been only voluntary manslaughter [sic]. Heat of passion can reduce the charge to voluntary manslaughter. This requires that:

- a) a reasonable person is provoked (objective)
- b) D was actually provoked (subjective)
- c) a reasonable person would not have cooled off during the time interval between provocation and D's conduct (objective)
- d) D was actually not cooled off.

It is reasonable that a person can be provoked when informed about wife's compromising positions and specially if Otto already suspected Mona of infidelity. However, seeing your wife having sex with other [sic] is sufficient for provocation, but hearing about the compromising position may not be sufficient for a reasonable person for provocation. So even if Otto is provoked but a reasonable person will not be provoked [sic]. Also, there probably is enough time for a reasonable person to cool off as he went to Mona's office and waited for her. In Otto's case he did not cool off[,] instead he got angrier. Since a reasonable person would not be provoked and would cool off, Otto's murder will not be mitigated to Voluntary Manslaughter.

State will argue that he had enough time to premeditate and deliberate in the storeroom to commit murder[,] therefore he is guilty of attempted murder.

