

The seal of the State Bar of California is a circular emblem. It features a central shield with a scale of justice and a book. Above the shield is a grizzly bear. The shield is flanked by two scales of justice. The entire emblem is surrounded by a circular border containing the text "THE STATE BAR OF CALIFORNIA" and the year "1927".

California Bar Examination

Essay Questions
and
Selected Answers

February 2002

**FEBRUARY 2002 CALIFORNIA BAR EXAMINATION
EXAMINATION ESSAY QUESTIONS AND
SELECTED ANSWERS**

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This document contains the six Essay Questions from the February 2002 California Bar Examination and two selected answers to each question.

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

ESSAY EXAMINATION INSTRUCTIONS

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

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

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

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

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

Question 1

Pam, a resident of State X, brought suit in state court in State X against Danco, a corporation with its principal place of business in State Y. The suit was for damages of \$90,000 alleging that Danco breached a contract to supply Pam with paper goods for which she paid \$90,000 in advance. In her complaint, Pam requested a jury trial. State X law provides that contract disputes for less than \$200,000 must be tried to a judge.

Danco removed the case to federal court in State X. Danco moved to strike the request for a jury trial. The federal court denied the motion.

A few days before trial, Pam learned for the first time that Danco was incorporated in State X. She moved to have the case remanded to state court on this ground. The federal court denied the motion.

At trial, Pam testified that she paid for the goods but never received them. Danco admitted receiving Pam's payment and then presented evidence from its dispatcher that it had sent a truck to Pam's office with the paper goods. Danco also called as a witness Rafe, who works in a building next to Pam's office. Rafe testified he saw a truck stop at Pam's office on the day Danco claimed it delivered the goods. Rafe also testified he saw the truck driver take boxes marked "paper goods" into Pam's office that same day.

At the close of all the evidence, Pam moved for judgment as a matter of law. Danco opposed the motion, and the court denied the motion. The jury returned a verdict in favor of Pam.

Danco then moved for judgment as a matter of law, which Pam opposed. The court denied Danco's motion.

Did the court rule correctly on:

1. Danco's motion to strike the request for a jury trial? Discuss.
2. Pam's motion to have the case remanded to state court? Discuss.
3. Pam's and Danco's motions for judgment as a matter of law? Discuss.

ANSWER A TO ESSAY QUESTION 1

I. Danco's motion to strike request for jury trial

Because this is a diversity case *(see below) and involves common law questions, Erie comes into play. Under Erie, in such a case, the federal court must use federal procedural law and state substantive law.

The question is whether a jury trial (versus a bench trial) is a procedural or substantive question. The state and federal laws on the subject conflict -- the law of State X provides for only a bench (or court) trial when the contract dispute is over an amount less than \$200,000, and Pam is claiming only \$90,000 in damages. The federal constitution, in the Seventh Amendment, provides for a jury trial in civil cases "for suits at common law" when damages exceed a mere \$20.

Therefore, in state court, Pam would have a trial in front of a judge, while if following federal law, she would have a trial in front of a jury. The Seventh Amendment is not incorporated to the states through the Fourteenth Amendment, so that does not control.

Some issues that at first may not seem substantive -- such as statutes of limitations -- are in fact considered such because of the effect they may have on suits. Because a jury trial is handled somewhat differently than a bench trial, it

would probably be considered a substantive issue, so the federal judge should have applied the law of State X and denied the motion.

Diversity jurisdiction

This has to be a diversity case in federal court. Federal courts have two types of subject matter jurisdiction -- the power to hear cases regarding certain issues. The first is federal question jurisdiction, where federal courts may hear cases "arising under" a federal statute or the constitution. This is a contracts case, arising under state contracts law (or possibly the common law). Therefore it is not a federal question case.

Federal courts also have jurisdiction over diversity cases, where there is complete diversity among the parties -- all plaintiffs have different citizenship from all defendants, and where claimed damages exceed \$75,000. Citizenship of a corporation for these purposes is its principal place of business and the (or all) place(s) of its incorporation. When Pam brought the suit and when Danco removed, there seemed to be diversity jurisdiction because P is a resident of State X, and D has its principal place of business in State Y, and damages exceed \$75,000.

2. Pam's motion to have the case remanded to state court

Removal

Even if a plaintiff properly brings suit in state court, the defendant may remove it to federal court. However, the defendant may not do so if it is a resident of the state in which the case was brought. Therefore, because Danco (D) is a resident of State X -- since it is incorporated there -- it cannot properly remove to federal court.

(If removal were proper, it would be proper to remove to the federal court in the same state and district in which the case was brought.)

For analysis of citizenship of corporations, please see #1 above.

The federal court may have discretion to keep the case because Pam's motion was brought just a few days before trial, but in the end it cannot do so, as it lacks subject matter jurisdiction.

Lack of subject matter jurisdiction is not a waivable defense -- that is, even though Pam didn't raise this defense in her first pre-answer motions, she did not forfeit the defense. It may be brought at any time, even throughout trial.

The court simply lacks subject matter jurisdiction over this case, so it may not hear it. Therefore the court should have granted P's motion to remand.

3. (A) Pam's motion for judgment as a matter of law

Timing

A motion for judgment as a matter of law may be brought after the close of plaintiff's evidence or at the close of all evidence. Therefore Pam's (P's) timing was fine, as she brought the motion at the close of all evidence.

Substance of motion

A motion for judgment as a matter of law is granted if no reasonable person could differ as to the outcome of the trial. That is, it asks the judge to take the case out of the jury's hands and decide it as a matter of law.

Evidence

Dispatcher's evidence

The issue is whether the dispatcher's evidence was admissible and whether it makes a difference to Pam's motion.

We do not have enough information to decode this issue for sure, and we do not know how this evidence was offered at trial -- by the dispatcher orally, through notes or from someone else. It could be subject to the hearsay rule, if it is an out-of-court statement offered for the truth of the matter asserted -- particularly if D offered a written document or someone else to testify as to what the dispatcher said. If written, it could possibly come in under the business record exception to the hearsay rule -- if it was made in the normal course of business, known to the dispatcher at the time he made it, and timely made.

In any event, it wouldn't help the jury all that much because it doesn't show (alone) that the truck ever showed up at Pam's place of business.

Rafe's evidence

This is not an out-of-court statement, and it is relevant because it might show (especially when put together with the dispatcher's evidence) that the delivery from D was in fact made to P. This is Rafe testifying to his own personal knowledge.

The written statement "paper goods" could, however, be hearsay -- it is an out-of-court statement and D is offering it for the truth of the matter asserted -- that the boxes did in fact contain paper goods. That written statement would not fall into any exception or exclusion to the hearsay rule, so it should not be admitted.

With or without the "paper goods" statement, Rafe's evidence does not make clear whether the truck belonged to D. Together with the dispatcher's evidence, however, it does seem enough that reasonable people could differ as to the outcome.

Therefore the judge was correct in denying P's motion.

(B) Danco's motion for judgment as a matter of law

The issue is whether D's motion should have been granted.

In order to be able to make a renewed motion for judgment as a matter of law -- which is what it is called when made after the jury has returned its verdict -- the party must have made a motion for judgment as a matter of law at the close of all evidence.

Danco failed to make that motion, so its renewed motion is barred.

(If D had made the proper motion, its renewed motion would be subject to the same standard as discussed above.)

Therefore, the court was correct in denying D's motion.

ANSWER B TO ESSAY QUESTION 1

1. Danco's motion to strike request for jury trial

According to the US Constitution, any plaintiff who is suing in federal court for damages has a right to a trial by jury. If the suit involved is one of equity, there is no right to a jury trial.

Here, at the time that Danco made its motion, the case was in federal court. The state law that provides that contract disputes for less than \$200,000 be tried by a judge does not therefore apply. Federal courts generally follow federal rules of procedure and are bound by the US Constitution. Therefore, the plaintiff does have a right to have a trial by jury and the federal court properly denied Danco's motion.

2. Pam's motion to have the case remanded to state court

If a plaintiff sues a defendant in state court and the case at hand is one in which a federal court would have subject matter jurisdiction over it, a defendant may properly remove the case to federal court. Therefore, if this case either posed a federal question or there was diversity between the claimants, the court could properly be heard in federal court.

In order to have diversity jurisdiction, the case at hand must involve an amount of at least \$75,000 and there must be complete diversity between the plaintiff and defendant. For a person, his or her place of residence is the state to which he or she belongs. For a corporation, it is the principal place of business or place of incorporation where it is a resident.

At the time of removal, the federal court appeared to have diversity jurisdiction over this case. Pam was suing for \$90,000, an amount over the required \$75,000. Furthermore, Pam was a resident of State X and all that was known was that Danco had its place of business in State Y. Therefore, it appeared that there was complete diversity.

After a case is removed to federal court, it can be remanded back down to state court if the federal court does not in fact have proper jurisdiction. Here, before the trial took place, Pam learned that Danco was incorporated in State X. This would ruin the complete diversity requirement and would be grounds for the federal court to remand back down to state court because it would not be proper for the federal court to hear the case since it did not have jurisdiction. If a federal question was involved it would be different, but that is not the case here. This is a simple contract claim. Danco would argue that Pam could have easily found out where it was incorporated by simply asking. However, that does not have anything to do with the federal court's actual power to hear a case.

Therefore, the Federal Court was mistaken in denying the motion to have the case remanded.

3. Pam's and Danco's motions for judgement as a matter of law.

A motion for judgement as a matter of law can be made after the other side to a lawsuit has presented its case. That is, the Defendant can make the motion after the plaintiff has presented its side and after the defense has presented its side (or after all evidence has been presented). Furthermore, a renewed motion for a judgement as a matter of can be asked for after a jury has rendered its verdict. However, in order for the defendant to be able to make such a motion, he or she must have first made the motion at the end of all of the evidence being presented.

Pam's motion

When determining whether to grant a motion for a judgement as a matter of law, the court must consider the evidence and be able to determine that reasonable minds could not differ as to the outcome. This is an extremely difficult standard to meet. The judge in essence would be ruling that this would be the only reasonable verdict that could be reached if he or she granted the motion.

Here, Pam claimed that Danco breached the contract by not supplying the paper goods to her. Her only evidence was her testimony that she paid for the goods, but never received them. Danco on the other hand, admitted to receiving payment, but

claimed to have delivered the goods. He presented several pieces of evidence, including evidence from his own dispatcher that it did deliver the product and testimony of a neutral witness that claimed he saw a truck parked at Pam's office that day and a box marked "paper goods" on the front being delivered to her.

However, the witness did not mention whether the truck belonged to Danco and Pam could have received different paper products from another company. Therefore, it could be reasonable to believe Pam's story over Danco's. The other evidence offered was simply that from their own records or own recollection. At the same time, it could be reasonable to believe Danco's story because he offered credible testimony from two different sources. Therefore, it would be reasonable to believe either side and a motion for judgement as a matter of law should not have been granted.

Therefore, the court properly denied Pam's motion.

Danco's motion

Danco first moved for a judgement as a matter of law after the jury verdict. Again, this would normally be a renewed judgement as a matter of law and could only have been brought after Danco made a motion for a judgement as a matter of law after the close of all evidence or at the time Pam made the motion. Instead of simply denying Pam's motion, Danco should have brought its own motion at that point.

Furthermore, as mentioned before, reasonable minds could have come to different conclusions in this case and such a motion would not have been warranted anyway.

Therefore, court properly denied Danco's motion.

Question 2

Berelli Co., the largest single buyer of tomatoes in the area, manufactures several varieties of tomato-based pasta sauces. Berelli entered into a written contract with Grower to supply Berelli its requirements of the Tabor, the only type of tomato Berelli uses in its pasta sauces. The Tabor tomato is known for its distinctive flavor and color, and it is particularly desirable for making sauces. The parties agreed to a price of \$100 per ton.

The contract, which was on Berelli's standard form, specified that Grower was to deliver to Berelli at the end of the growing season in August all Tabor tomatoes that Berelli might require. The contract also prohibited Grower from selling any excess Tabor tomatoes to a third party without Berelli's consent. At the time the contract was executed, Grower objected to that provision. A Berelli representative assured him that although the provision was standard in Berelli's contracts with its growers, Berelli had never attempted to enforce the provision. In fact, however, Berelli routinely sought to prevent growers from selling their surplus crop to third parties. The contract also stated that Berelli could reject Grower's tomatoes for any reason, even if they conformed to the contract.

On August 1, Berelli told Grower that it would need 40 tons of Tabor tomatoes at the end of August. Grower anticipated that he would harvest 65 tons of Tabor tomatoes commencing on August 30. Because of the generally poor growing season, Tabor tomatoes were in short supply. Another manufacturer, Tosca Co., offered Grower \$250 per ton for his entire crop of Tabor tomatoes. On August 15, Grower accepted the Tosca offer and informed Berelli that he was repudiating the Berelli/Grower contract.

After Grower's repudiation, Berelli was able to contract for only 10 tons of Tabor tomatoes on the spot market at \$200 per ton, but has been unable to procure any more. Other varieties of tomatoes are readily available at prices of \$100 per ton or less on the open market, but Berelli is reluctant to switch to these other varieties. Berelli believes that Tabor tomatoes give its sauces a unique color, texture, and flavor. It is now August 20. Berelli demands that Grower fulfill their contract in all respects.

1. What remedies are available to Berelli to enforce the terms of its contract with Grower, what defenses might Grower reasonably assert, and what is the likely outcome on each remedy sought by Berelli? Discuss.

2. If Berelli elects to forgo enforcement of the contract and elects instead to sue for damages, what defenses might Grower reasonably assert, and what damages, if any, is Berelli likely to recover? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. The contract between Berelli and Grower is a contract for the sale of goods, tomatoes. Accordingly, it is governed by Article 2 of the UCC. Because Berelli is a pasta sauce manufacturer and Grower is a commercial farmer, both parties are merchants and the UCC's special rules for merchants will apply. Additionally, because the contract calls for Grower to provide Berelli with all of the tomatoes it requires, the agreement is a requirements contract and the rules applicable to those particular types of agreements will also apply.

The parties appear to have made a valid contract, as it was in writing and reflected both the type of goods specified (Tabor tomatoes) and the price (\$100/ton). Although the UCC ordinarily requires contracts to specify the quantity of goods to be provided, in a requirements contract it is sufficient that the buyer (Berelli) agrees to buy all its requirements from the Seller (Grower), to the limit of Seller's ability to provide goods of that type. That renders the contract sufficiently definite to be enforced under the UCC, as the Buyer's good faith in using Seller as its sole supplier, and its actual after-the-fact use of the goods contracted for, define the quantity of goods to be delivered. Here, Berelli's actual need for 40 tons of Tabor tomatoes supplies the requisite quantity under the contract.

While in this case Grower may have defenses to contract formation based on the doctrines of failure of consideration, unconscionability, misrepresentation and fraud, these will be discussed later.

If Berelli seeks to enforce the terms of the agreement with Grower, it may do so under the doctrines of replevin and specific performance, or seek an injunction prohibiting Grower from selling the tomatoes to Tosca.

Anticipatory Repudiation. The time for performance under the contract has not yet arisen, and won't arise for 10 more days. A party can ordinarily not sue under a contract until the time for performance has arisen. Where, however, a party unambiguously states to the other, before the time for performance has arisen, that it will not perform, the other party is entitled to treat that as an anticipatory repudiation that gives rise to an immediate right to sue for total breach of the contract, including the right to seek to cover its losses by purchasing replacement goods. Because Grower informed Berelli that it was repudiating the contract, Berelli is entitled to sue immediately and seek replevin or specific performance, or damages.

Replevin

Replevin. Replevin provides a remedy for a plaintiff to recover its goods prior to determination of a dispute, upon a judicial hearing to determine whether the plaintiff has title to the goods, and upon plaintiff's posting of a bond to secure any damages that may be owed to the defendant if the replevin is wrongful. Under the common law, to obtain

replevin a plaintiff must show that the defendant has possession of personal property that is owned by the plaintiff. Under the UCC, however, where goods have been "specifically identified" under a contract and the buyer is unable to cover by purchasing other goods, it has a right to replevy the goods in seller's possession, even though title to those goods has not yet passed. Here, the requirements for replevy are met. Because Berelli agreed to buy all of Grower's Tabor tomatoes, all the tomatoes actually grown by Grower have been specifically identified under the contract. And because Berelli has only been able to cover 10 of the 40 tons it needs, the second requirement is met. Accordingly, Berelli is entitled to replevy 30 tons of the Tabor tomatoes in Grower's possession, as well as recover damages for the excess price it paid for the 10 tons it was able to cover (as discussed in the next section).

While Grower does not have any defenses to Berelli's claim for replevin (because all elements of that claim are met), Grower will defend on grounds that the contract is invalid for failure of consideration and lack of mutuality, or voidable for fraud and unconscionability.

Failure of Consideration/Mutuality: A contract must be supported by consideration, which is a bargained for exchange of something of value. In addition, the promises must be mutual, with both parties required to perform a detriment in exchange for receiving a benefit. Here, Grower will contend that because Berelli had the right to reject conforming goods under the contract, it was not bound to purchase anything from Grower and, as a result, there is a failure of consideration under the contract.

Consideration is found in a requirements contract from the fact that the buyer is required to meet all its requirements from seller, despite the fact that, as stated above, the contract itself does not expressly require the buyer to buy any fixed quantity of goods. While a requirements contract will not fail for lack of consideration if the buyer in good faith has no requirement for the goods and therefore orders none on that basis, it will fail if the buyer has no real obligation to buy goods it needs, and can accept or reject without regard to its actual requirements for the goods. Here, that is precisely the case. As a result, there is no mutuality of obligation under the contract -- Berelli can buy if it pleases, whereas Grower is required to sell all its Tabor tomatoes only to Berelli. Accordingly, the contract is void for failure of consideration and Grower should succeed in defending against all of Berelli's claims on this basis.

Fraud/Misrepresentation. Where a party is induced to enter into a contract based upon the fraud or misrepresentation of another party, the contract may be voidable in whole or in part at the election of the defrauded party. Here, Berelli's standard form provided that Grower could not sell Tabor tomatoes to third parties without Berelli's consent. When Grower objected, Berelli's representative falsely stated that Berelli never enforced this provision, when in fact it regularly did. In reliance thereon, Grower went forward and signed the agreement. While Grower might argue that this provided it grounds for voiding the entire contract, this argument will likely be rejected because the term was not material to the bargain (as evidenced by the fact that it was just a clause in Berelli's standard form), and because Berelli had made no attempt to enforce it. Rather (as we shall see in the discussion of Berelli's right to injunctive relief), the

remedy will be to void the term, rather than the entire contract. This is also the result under the doctrine of estoppel and under the UCC battle of the forms rules. Having induced Grower not to formally object to the term based on the representation that it will not be enforced, Berelli will be estopped to do so. Moreover, under the UCC battle of forms rules pertaining to contracts between merchants, additional terms do not become part of the bargain when the other party objects within 10 days of receipt of the form, as Grower did here. Hence, the contract is not void for fraud.

Unconscionability. Grower will also argue that the contract is unconscionable because (i) Berelli is not bound to purchase anything, as explained above, while (ii) Berelli is prohibited from selling to third parties.

Changed Circumstances. Grower may also seek to challenge the validity of the contract under the doctrine of changed circumstances, contending that the poor growing season coupled with the unprecedented demand for scarce Tabor tomatoes was not foreseen by the parties such that performance should be excused on grounds of commercial impracticability. This defense will be rejected, however, because uncertain weather is always foreseeable at the time of contracting, and unanticipated market conditions will never support a challenge to the validity of a contract based upon commercial impracticability.

Specific Performance

Berelli will also seek to enforce the contract through a decree of specific performance. Specific performance is an equitable remedy that will be granted where: (1) the contract is valid, definite and certain; (2) mutuality is present; (3) the legal remedy is inadequate; and (4) the plaintiff has fully performed all of its obligations under the contract. A request for specific performance is subject to equitable defenses, including the defense of unclean hands.

Here, the contract is sufficiently definite and certain, as stated above, but could be found invalid for lack of consideration or mutuality, also as explained above. If these defenses are accepted, specific performance will not be granted. If the promises are found to be mutual and the consideration sufficient, however, then Berelli would be able to meet the elements required for specific performance. The legal remedy is inadequate because the subject matter of the contract is unique. Here, we are told that Tabor tomatoes are in short supply, they have a distinctive flavor that is critical to the Berelli sauce recipe, and the use of other types of tomatoes is inadequate. Hence, this would provide sufficient uniqueness to support a request for specific performance. In addition, Berelli performed all of its current obligations under the contract when it placed the order with Grower for all of its requirements, and stands ready and willing to perform its remaining obligation to pay for the goods when received. Hence, assuming the mutuality/consideration issues could be overcome, the other requirements necessary for specific performance would be met.

However, Grower could defend against such a decree on the doctrine of unclean hands. Equity will deny relief to a party with unclean hands, that is, one that has engaged in wrongful conduct with respect to the case at hand. Here, Berelli's fraud in inducing Grower to sign the contract based on its false assertion that the prohibition on third party sales was never enforced by Berelli, coupled with its insistence on terms that allowed it to reject Grower's goods without reason, could support such a defense.

Injunction

Berelli could also seek the Court's immediate assistance through the issuance of a Temporary Restraining Order, followed by a preliminary injunction and a permanent injunction. This relief will likely be denied, however, unless Berelli can show a right to replevin.

A TRO may be granted ex parte based on a showing of immediate and substantial hardship. Here, the fact that Tabor tomatoes are scarce and Grower is about to sell them to Tosca would be sufficient to support entry of a TRO. Berelli would have to make a good faith effort to provide Grower with notice of the hearing, but if it could not the TRO could be entered on an ex parte basis. The TRO would last for only 10 days, however, and then be automatically dissolved.

Berelli would thus have to seek a preliminary injunction before the 10 days expired. A preliminary injunction will be granted in order to preserve the status quo pending trial or otherwise avoid extreme hardship to a party, where the plaintiff can

demonstrate the likelihood of success on the merits and the balance of hardships favors entry of injunctive relief. Here, Berelli can meet the hardship test but will have difficulty establishing the likelihood that it will succeed on the merits, due to the failure of consideration/mutuality argument described above. Additionally, the fact that the tomatoes are perishable goods will make it impossible for the Court to preserve the status quo -- the tomatoes simply cannot be preserved in any useable form pending the outcome of a trial on the merits. If Berelli can overcome the problems described above and establish its immediate right to replevy the goods, this hardship could be avoided because the tomatoes would be immediately sent to Berelli. Hence, a preliminary injunction could be entered. If it cannot do so, an injunction would be denied on grounds that Berelli has not demonstrated it is likely to succeed on the merits, or the balance of hardships (spoiled rotten worthless tomatoes) favors Grower, or both.

While a permanent injunction is theoretically possible, it would be of no practical use because the tomatoes would spoil long before the injunction would be entered. However, to obtain such an injunction, Berelli would have to show that its legal remedy is inadequate, it has a property interest to protect, the injunction would be feasible to enforce, and the balance of hardships favors entry of the injunction. Here, the remedy is inadequate for the reasons explained above; Berelli has property interest in both the contract and, if specifically identified, the tomatoes; the injunction would be simple to enforce because it countenances just a single act, delivery of the goods; and (assuming, arguendo, the contract was enforceable) the balance of hardships would favor Berelli because it has an immediate need for and contractual right to the

tomatoes, whereas the hardship to Grower -- a lower contract price -- was entirely of its own making.

2. If Berelli elects to sue for damages, it can seek to recover compensatory damages, nominal damages, and restitutionary damages. Punitive damages would not be allowed because this is a breach of contract action. The defenses to contract enforcement described above would pertain to these claims as well. However, Berelli might be able to recover these damages under a theory of promissory estoppel, which provides that a party is estopped to deny the existence of an agreement where their promise can reasonably be expected to induce reliance in the other party, and the other party so relies to their detriment. Here, Berelli elected not to enter into a contract with other growers of Tabor tomatoes in reliance on Grower's promise to meet all its requirements. Hence, if the contract is invalid, Berelli may be able to claim damages under this alternate theory of relief.

To be recoverable, contract damages must be foreseeable at the time the contract was entered into, they must have been caused by the other parties (sic) breach, and the amount must be provable with certainty.

Compensatory damages aim to give each party the benefit of their bargain. The amount is the amount necessary to put them in the place they would have been in had the contract been performed. Here, Berelli can claim the right to recover the difference between the \$200/ton it paid for the 10 tons of tomatoes it purchased on the open market, and the \$100/ton contract price, or \$1,000. Berelli will also be entitled to recover any incidental expenses it incurred in purchasing these goods, that it would not have incurred had the contract been performed. These damages were all foreseeable,

the amount is certain, and they were caused by the breach. Hence, Grower would have no defense (other than the defenses to contract validity described above).

With respect to the other 30 tons, Berelli could seek to recover the lost profits it would have realized on the pasta sauce made from these tomatoes, or may seek to recover restitutionary damages in the amount by which Grower was enriched by refusing to perform its contract with Berelli. Lost profits would be defended by Grower on grounds that they are speculative and uncertain. However, here, Berelli's past sales and manufacturing records could be adequate to demonstrate how much sauce could be made from 30 tons of tomatoes, how much would be sold, and what the anticipated profit would have been. On the restitutionary side, Berelli would simply argue that Grower has been unjustly enriched by being allowed to sell the tomatoes to Tosca for \$250/ton, and therefore should be liable to return the excess \$150/ton to Berelli.

Both claims would be subject to Berelli's duty to mitigate; and Grower could successfully argue that Berelli must try to make sauce with other tomatoes to mitigate its damages, and then be limited to recovering the amount by which its sales were lowered due to using worse types of tomatoes.

ANSWER B TO ESSAY QUESTION 2

I. VALIDITY OF THE CONTRACT

This is a requirements contract for a sale of goods of over \$500. The UCC applies, and the writing requirement appears to be satisfied.

CONSIDERATION: Grower will argue that there was no consideration for its promise to supply Berelli's tomato requirements because Berelli could reject the tomatoes for any reason, even if they conformed to the contract. Thus, Grower would argue, Berelli's promise is illusory. This is probably not a good argument because Berelli still has an obligation to try in good faith to be satisfied with the shipment. Although the terms are harsh, there probably is consideration here.

II. CONTRACT TERMS

Grower would argue that the contract terms should reflect the oral "agreement" from the Berelli's representative that the prohibition on sales to third parties would not be enforced. Berelli would successfully raise the PAROLE EVIDENCE RULE which states that where the parties have reduced their agreement to final written for form (sic), evidence of prior or contemporaneous agreements varying the contract are inadmissible. Here, the supposed promise by Berelli that a part of the contract would not be enforced clearly varies the agreement, so this evidence would not be admitted. The terms of the writing will be applied.

Grower might argue that the parole evidence rule does not ban evidence that the agreement was induced by FRAUD. Grower would argue that Berelli committed fraud by knowingly misrepresenting Berelli's practices regarding enforcement of the clause forbidding sales to 3rd parties.

III. GROWER'S BREACH

Anticipatory Breach: When Grower informed Berelli on August 15 that it would not perform, this was a breach of the contract. Berelli could either sue for damages immediately or choose to treat the contract as still in force.

Frustration of Purpose: Grower would argue (unsuccessfully) that its duty to perform was excused by frustration of purpose because of the unexpected rise in tomato prices. This is not a valid argument because a change in market price is generally a foreseeable risk allocated by the parties under the terms of the contract.

1. BERELLI'S REMEDIES IF HE CHOOSES TO ENFORCE THE CONTRACT.

A. SPECIFIC PERFORMANCE: Specific performance is an equitable remedy which will be allowed only if money damages are inadequate (typically because the goods are unique), if the terms of the contract are clear and definite and if no equitable defenses apply.

Here, Berelli will argue that money damages are inadequate because the Tabor tomatoes are very distinctive and that using inferior tomatoes would cause irreparable harm to Berelli's high reputation. The facts also state that Berelli is unable to get Tabor tomatoes elsewhere, and this indicates that money damages would be inadequate because there is no opportunity to cover. The written terms of the contract terms are also clear and definite, so the court would likely grant specific performance if no defenses apply.

B. BERELLI WOULD ALSO SEEK A PRELIMINARY INJUNCTION TO STOP GROWER FROM SELLING THE CROP TO TOSCA.

The purpose of the preliminary injunction is to maintain the status quo between the parties pending outcome of the merits of the suit. Berelli must show irreparable harm, likelihood of success on the merits, and that a balancing of interests favors Berelli.

Here, Berelli appears to have a valid claim on the merits or the breach of contract. Moreover, Berelli would suffer irreparable harm if Grower were to sell the Tabor tomatoes elsewhere because these are the only tomatoes Berelli uses and they are not available elsewhere. The balancing of interests is a fairly close case here. A court of equity might be influenced by the very harsh terms of the contract and look to the hardship suffered by Grower in being unable to sell his tomatoes elsewhere. On the other hand the hardship to Berelli would be very great because there are no other tomatoes available and use of inferior tomatoes would damage Berelli's trade reputation. Moreover, if the court grants specific performance, clearly the sale of the entire tomato crop to Tosca must be halted, or performance of the contract will no longer be possible.

C. GROWER'S DEFENSES

Specific Performance and Preliminary Injunction are both equitable remedies. Thus Grower would raise several equitable defenses.

UNCLEAN HANDS: Grower would assert that Berelli acted wrongfully in relation to the very contract which Berelli seeks to enforce because Berelli's representative made misrepresentation to Grower during contract negotiations. Also, the generally harsh terms of the contract indicate possible overreaching by Berelli. This argument probably will not prevail because there is nothing wrong with hard bargaining. There appears to be no outright wrongdoing here, hence, the defense of unclean hands does not apply.

ESTOPPEL: Grower will argue that he relied to his detriment on Berelli's oral promise that Grower would be allowed to sell his excess tomatoes elsewhere. The reliance was Grower's act of entering into the contract. This is probably a good argument, so Berelli

would be estopped from preventing Grower from selling the excess tomatoes to Tosca. Thus, if this defense applies, Grower will still have to sell 40 tons to Berelli but may sell the excess 15,000 tons to another buyer.

UNCONSCIONABILITY: Grower would argue that the terms of the contract are unconscionable: the writing was Berelli's standard form contract. The terms themselves are oppressive (preventing Grower from selling elsewhere) and Berelli is the largest single buyer of tomatoes, so there may be a great difference in bargaining power. This is probably a convincing argument, given all these factors.

Under the UCC the court may refuse to enforce the contract or limit the effect of the unconscionable terms. Thus the prohibition on selling elsewhere probably would not be enforced.

2. Berelli's Legal Damages.

As the aggrieved buyer, Berelli may seek either the difference between the contract price and the market price at the time he learned of the breach, or he may make a reasonable "cover" of substitute goods and sue for the difference between the cover price and the contract price plus incidental and consequential damages.

Here, Berelli can partially cover on the spot market per ton. The difference in price is ten tons times 100, so \$1,000. Berelli is entitled to damages for the remaining 30 tons which it is entitled to under the contract. The damages there would be the difference in market price and contract price at the time of the breach. Berelli will argue that the market price is 250, since that is what Tosca was willing to pay. Grower would argue that the cover price is only 200 per ton because that is the price on the "spot market."

Berelli would also seek incidental and consequential damages such as damage to its reputation and customer goodwill because of being forced to use inferior tomatoes. Any possible delay might also result in consequential damages to Berelli.

B. BERELLI'S DEFENSES

UNFORESEEABILITY: Contract Damages will only be awarded if they were foreseeable at the time the parties entered into the contract, (Hadley v. Baxendale). Here, the money damages are clearly foreseeable, but Grower would argue that damage to reputation was not foreseeable, and thus should not be awarded. However, damage to trade reputation is probably foreseeable here because both parties appear to be aware of the uniquely excellent qualities of the Tabor tomatoes.

FAILURE TO MITIGATE: Grower will also argue that Berelli cannot collect damage it failed to mitigate. Here, Berelli could have mitigated its damages by buying inferior tomatoes, and this would at least allow Berelli to continue production. This argument is probably not convincing because Berelli has no obligation to "cover" with inferior tomatoes.

Berelli probably can obtain money damages for Grower's breach.

Question 3

Acme Corporation was a publicly traded corporation that operated shopping malls. Because of an economic slowdown, many of Acme's malls contained unrented commercial space. Additionally, the existence of surplus retail space located near many of Acme's malls prevented Acme from raising rents despite increasing costs incurred by Acme.

In June 2001, Sally, president and sole owner of Bigco, approached Paul, Acme's president. She proposed a cash-out merger, in which Bigco would purchase for cash all shares of Acme, and Acme would merge into Bigco. Sally offered \$100 for each outstanding share of Acme's stock even though Acme's stock was then currently trading at \$50 per share and historically had never traded higher than \$60 per share.

Paul, concerned about Acme's future, decided in good faith to pursue the merger. In July 2001, before discussing the deal with anyone, Paul telephoned his broker and purchased 5000 shares of Acme at \$50 per share. Paul then presented the proposed merger to Acme's board of directors and urged them to approve it. The board met, discussed the difference between the current market share price and the offered price, and, without commissioning a corporate valuation study, voted to submit the proposed deal to a shareholder vote. The shareholders overwhelmingly approved the deal because of the immediate profit they would realize on their shares. Based solely on shareholder approval, the board unanimously approved the merger, and all shareholders received cash for their shares.

In December 2001, shortly after completing the merger, Bigco closed most of the Acme malls and sold the properties at a substantial profit to a developer who intended to develop it for light industrial use.

1. Did Paul violate any federal securities laws? Discuss.
2. Did Paul breach any duties to Acme and/or its shareholders? Discuss.
3. Did the board breach any duties to Acme and/or its shareholders? Discuss.

ANSWER A TO QUESTION 3

PAUL'S VIOLATION OF FEDERAL SECURITIES LAW

The issue here is whether Paul violated any federal securities laws by purchasing 5000 shares of Acme stock prior to the merger with Bigco. The two main federal securities laws that Paul could be liable under are Rule 10b-5, which prohibits insider trading, and Section 16(b), which imposes strict liability on officers, directors, and 10% shareholders for trading the stock of their company within 6 months of each other. Each will be discussed below:

Rule 10b-5

The issue is whether Paul violated rule 10b-5 of the SEC. Rule 10b-5 prevents insider trading by making it illegal for one who owes a fiduciary duty to a corporation and possesses "inside information" to use an instrumentality of interstate commerce to buy or sell the corporation's stock. Additionally, the rule contains a scienter requirement. The "insider" must either disclose the information or abstain from trading.

A person who owes a fiduciary duty is one who is an officer, director, attorney, employee, etc. who owes some duty (duty of care, loyalty, confidentiality, etc.) to the corporation. As the president of Acme, Paul is an officer and is clearly within the class of persons owing Acme a fiduciary duty.

Inside information is that information that a reasonable trader would want to know before buying or selling the corporation's stock. Here, the information was that Bigco had proposed a merger and buyout of Acme's stock at twice its current selling price and \$40 higher than it had ever traded before. This information would be crucial to any person who was trading Acme's stock.

Using an instrumentality of interstate commerce is easily satisfied. Here, Paul used the telephone to place the order to his broker. The telephone lines cross state lines and are used to conduct business across state lines. Therefore, this requirement is satisfied as well.

Paul did purchase 5000 shares of Acme's stock. And, he did so with improper intentions. This is what is required in "scienter" -- it is knowledge that what one is doing is wrong. In short, Rule 10b-5 requires that the insider to something "slimy" and repugnant to an ordinary person. Purchasing 5000 shares of his company's stock on the basis of inside information is just what Rule 10b-5 was enacted to prevent.

The "abstain or disclose" rule is also part of 10b-5. Here Paul did eventually disclose the Bigco offer to the Board of Directors, and then to the shareholders, he traded on the information prior to disclosing. The announcement could have increased the current trading price of Acme, and Paul took advantage of the low price of Acme stock by purchasing before the disclosure.

In short, Paul has violated Rule 10b-5 and will be forced to disgorge his profits to the corporation.

Section 16(b)

The issue here is whether Paul violated Section 16(b). Section 16(b) imposes strict liability on any officer, director, or shareholder owning 10% or more of the outstanding stock from buying and selling or selling and buying stock of the company within 6 months of each transaction. There is no "guilty mind" requirement as in 10b-5 because the idea is that it is simply bad policy and bad for the market to have these persons trading. In order for Section 16(b) to apply, the corporation has to either be publicly traded or be of sufficient size to meet the guidelines. Here, Acme is a publicly traded corporation, and Paul, as president is an officer; therefore, the rule applies.

Here, Paul bought 5000 shares in July of 2001. If he sold those shares within 6 months, he is strictly liable to the corporation. The facts do not indicate when Bigco purchased the shares, but it had to be prior to December of 2001, when Bigco closed the malls. This is 6 months or less from the purchase. Paul therefore is strictly liable for profits.

Profits under 16(b) are tricky -- the calculation is the difference between the lowest price in the six month period and the highest price in the six month period. Paul's profits were at least the same as they would be under 10b-5. However, if the price fluctuated under \$50 or sold for more than \$100, P would be liable for that additional amount as well.

Conclusion

Paul has violated both Rule 10b-5 and Section 16(b).

PAUL'S BREACHES OF DUTY TO ACME/SHAREHOLDERS

The issue is whether Paul breached any duty to Acme or the shareholders. Paul owes two overarching duties to the corporation and hence the shareholders: the duty of care and the duty of loyalty. Each are discussed below.

Duty of Care

As an officer, Paul owes a duty of care to Acme. Paul must act as a reasonably prudent person would in this situation. He must act in good faith and in what he honestly believes is the corporation's best interest.

Paul, in good faith, decided to pursue the Bigco merger. A reasonably prudent person would most likely do the same thing. A merger would be good for the shareholders because the company was suffering from financial hard times. However, Paul apparently did not do any checking on Bigco's intentions after the merger. Had Paul done some investigating, he might have been able to discover that the reason Bigco was offering so much for the Acme stock was because it had a developer waiting to purchase the property and make a substantial profit.

Business Judgment Rule

Paul will assert that his actions did not violate the duty of care he owes the corporation because he acted under the protection of the business judgment rule. The

business judgment rule provides that when an officer or director acts in a way motivated by a good faith belief that he is acting on behalf of the corporation's best interests and that judgment turns out in hindsight to be wrong, the court will not step in [and] hold the officer or director liable.

However, the corporation or the shareholders will be able to argue that a reasonable person would have made the further inquiries, that the high asking price should have tipped Paul off that something else was happening here. This was a substantially high price for stock here -- Acme had never traded higher than \$60/share, and Sally offered \$100/share while the market was depressed and Acme was suffering financial hardship. This would have tipped off any reasonable person that something was motivating her.

Therefore, the business judgment rule will probably not protect Paul's decision in the end. While pursuing the merger might have been a wise choice, the failure to inquire into the basis of the merger was a violation of the duty of care.

Duty of Loyalty

As an officer, Paul owes a duty of loyalty to the corporation as well. This means that Paul must put the corporate interest ahead of his own, or those close to him, at all times. There are many ways to violate the duty of loyalty; of particular relevance here is the duty not to engage in interested transactions.

Normally, an interested transaction is one where the officer has an interest such as an ownership in another corporation that this corporation is considering doing business with. Here, however, the interest came in the \$250,000 Paul spent on Acme's stock before he went to the Board with the merger proposal. A quarter of a million dollars -- there was no way that Paul would be able to act in an impartial manner in this transaction. By purchasing the stock before he even went to the meeting and informed the board of the merger proposal, he had indicated that he had decided it was going to happen. Otherwise, he risked losing that money.

As such, Paul violated his duty of loyalty to the corporation.

Conclusion

Paul has violated both the duty of loyalty and the duty of care he owed to the corporation.

THE BOARD'S BREACHES OF DUTY TO ACME/SHAREHOLDERS

The issue is whether the Board breached any duty to Acme or the Shareholders. Directors owe two overarching duties to the corporation and hence the shareholders: the duty of care and the duty of loyalty. Each are discussed below.

Duty of Care

The board of directors owes the same duty of care that Paul, as an officer, owes. The Board will, like Paul, argue that the Business Judgment Rule protects their decision to take the merger to the shareholders. However, like Paul, the argument will fail.

One of the fundamentals of the duty of care is that the directors need to investigate. Here, all the directors saw was dollar signs. They did not take the time to get a corporate valuation study, which in all likelihood would have revealed the developer that Bigco was dealing with, or some other similar venture. Directors are allowed to base decisions on the recommendations of employees or other people who have relevant information. However, there has to be some basis for this reliance. Here, the directors only relied on Paul's recommendation. Paul had done nothing to indicate that he had substantially investigated the deal. All the board based its decision on was the price. While price is important, it is not the only concern of the board. The board should have investigated further.

Therefore, the board breached its duty of care to the corporation and is not protected by the business judgment rule.

Duty of Loyalty

The board owes the same duty of loyalty that Paul, as an officer, owes. There is no evidence here of any interest on the part of the directors. If the directors were also large shareholders in Acme, that might provide the basis for the breach of the duty of loyalty, but absent such or similar evidence, there is no indication that the board breached any duty of loyalty to the corporation.

Conclusion

The board has violated its duty of care owed to Acme, but no facts indicate that a suit for violation of the duty of loyalty could be maintained.

POSSIBLE DEFENSES BY PAUL AND THE BOARD

Shareholder Approval

Paul and the board both could attempt to defend any liability based on the fact that the shareholders approved the merger. The merger constituted a fundamental corporate change, and as such, required shareholder approval. Therefore, the board acted properly in submitting it to them. However, the shareholders are permitted to rely on the board's recommendation, as they did here.

Therefore, the shareholder approval will not protect either Paul or the Board.

ANSWER B TO QUESTION 3

1. Did Paul violate any federal securities laws?

Rule 10b-5

Rule 10b-5 is a federal law that makes it illegal for any person to use any means or instrumentality of interstate commerce to engage in a scheme to defraud, make an untrue statement of material fact (or omit a material fact) or engage in any practice that operates a fraud, in connection with the purchase or sale of a security. The elements of a violation of Rule 10b-5 therefore include an instrumentality of interstate commerce, scienter, an act or misstatement and the purchase or sale of a security.

Here, Paul telephoned his broker, which satisfies the element of interstate commerce. The "means or instrumentality" requirement is broadly defined to include anything that affects interstate commerce, and the use of the telephone is included. (Also, the facts state that Acme Corporation is publicly traded. If it is traded on a national exchange, Paul would satisfy this element even without using the telephone.)

Paul purchased 5000 shares of Acme while in possession of insider information, which is insider trading. Paul is an insider of Acme Corporation because, as its president, he is in a position of trust and confidence to the corporation. He knew about the merger proposal when he purchased the shares, even though not even the Board, much less

the public, knew about it. Inside information is material nonpublic information, which includes any information about which there is a substantial likelihood a person would be interested (or that a person would find persuasive) in deciding whether to buy or sell the security. A potential \$50 per share profit in a month or two is certainly material.

Because Paul is an insider and he possessed inside information, he had an obligation to either disclose the information or abstain from trading on it. He violated this duty when he purchased the shares without disclosing the offer.

Paul's knowing disregard of his duty to disclose or abstain fulfills the scienter element of a Rule 10b-5 violation. His purchase of the shares is the requisite act and also satisfies the purchase or sale requirement.

Paul has violated Rule 10b-5.

Section 16b

Section 16b makes it illegal for any director, officer or 10% shareholder of a company to profit from the purchase and sale, or sale and purchase of shares of that company's equity securities within a time frame of 6 months; if the company has 500 shareholders and \$10,000,000 in assets or is traded on a national exchange.

Here, Paul purchased 5000 shares of Acme stock at \$50 per share in June of 2001. Because he was a shareholder of Acme when the merger was approved, he received \$100 per share. The merger was completed prior to 2001, so Paul's profit was

sustained within 6 months. Acme Corporation is publicly traded. If it has 500 shareholders and \$10M in assets or is traded on a national exchange, Paul has violated Section 16b. His profit of \$50 per share times 5000 shares must be disgorged to the company. Therefore, Paul owes Acme (now Bigco) \$250,000, assuming someone pursues this claim against him. He will have to defend a claim by any shareholder who held shares of Acme in June 2001 when Paul purchased the 5000 shares, and remained a shareholder through the merger and the suit.

2. Has Paul breached any duties to Acme and/or its shareholders?

As Acme Corporation's President, Paul owes Acme and its shareholders the duties of care and loyalty. He is therefore required to act in good faith as a reasonably prudent person would and in the best interests of Acme and its shareholders.

Paul's decision to pursue the merger was in good faith and supported by his concern about Acme's future. Therefore, this decision did not breach his duties.

However, Paul's purchase of 5000 shares of Acme stock based upon material inside information breached his duty of loyalty. An officer or director may not profit at the expense of the company or its shareholders. Paul purchased his shares from either Acme or another shareholder, so he profited at their expense when he reaped the \$50 profit per share associated with the merger.

Paul may also have breached his duty of care when he submitted the merger proposal to the Board and urged them to approve it. Other than Paul's good faith concern about Acme's future, there is nothing in the facts to suggest that Paul did any research regarding the offer or the other possible ways Acme could make a profit. Since the facts indicate that Bigco sold Acme's properties at a substantial profit shortly after the merger, it appears that there were options Paul failed to look into or convey to the Board.

3. Did the Board breach any duties to Acme and/or its shareholders?

As with Paul, the Board as directors have duties of care and loyalty they owe to the corporation. This means that they must act as reasonably prudent persons would, and in good faith, in the best interests of the corporation and its shareholders.

The business judgment rule prevents the directors from being liable for any action taken in good faith that they reasonably believed to be prudent in their business judgment. The directors are also allowed to rely on the recommendations of officers in good faith.

Here, the Board was unaware of Paul's breach of duty when it relied on his recommendation, so the reliance was probably justified. However, a closer question arises regarding the Board's decision to submit the merger proposal to shareholders without commissioning a corporate valuation study or, as with Paul (above), considering alternative sources of profit. If a reasonably prudent person in conducting his or her

own business affairs would have taken such actions then the Board's failure to do so breached their duty of care owed to both the corporation and its shareholders.

As with Paul, the Board likely should have considered other possibilities or commissioning a valuation study. A reasonably prudent person, when offered double what that person previously believed to be the fair value of his or her property, would probably look into whether there was value to the property of which he or she was unaware.

On the other hand, the fact that the shareholders overwhelmingly approved the deal undermines this argument and could be used as evidence that the Board acted prudently.

The Board also breached its duties by failing to vote on the merger proposal until after the shareholders had already approved it. The Board may not shirk its responsibility to make decisions for the corporation and leave the decisions to the shareholders. The shareholders must see the Board's decision in the proposal.

Question 4

Richard, a resident of California, created a revocable, inter vivos trust in 1998 at the urging of his wife, Alicia, who was also his attorney. Alicia drafted the trust instrument.

Richard conveyed all of his separate property to the trust. The trust instrument named Alicia as trustee with full authority to manage the trust and invest its assets. By the terms of the trust, Richard was to receive all of the income during his life. Upon his death, his child by a former marriage, Brian, and Alicia's daughter by a former marriage, Celia, would receive for their lives whatever amounts the trustee in her discretion thought appropriate, whether from income or principal. Whatever remained of the principal on the death of the last income beneficiary was to be divided equally among the then-living heirs of Brian and Celia. Celia was included as a trust beneficiary only after Alicia convinced Richard that this was necessary to avoid a possible legal action by Celia, although Alicia knew there was no legal basis for any claim by Celia.

Celia had lived with Alicia and Richard from her 10th birthday until she graduated from college at age 21 in 1990. Although Richard had once expressed an interest in adopting her, he was unable to do so because her natural father refused to consent. After Celia's college graduation, however, she rarely communicated with either Richard or Alicia.

After creation of the trust, and while Richard was still alive, Alicia invested one-half of the trust assets in a newly-formed genetic engineering company, Genco. She lent the other one-half of the trust's assets at the prevailing market rate of interest to the law firm of which she was a partner.

Richard died in 2000, survived by Alicia, Brian and Celia. Brian, upset with the way Alicia has handled the trust assets, seeks to have the trust declared invalid or, in the alternative, to have Alicia removed as trustee and require her to indemnify the trust for any losses.

1. What grounds, if any, under California law can Brian assert for invalidating the trust, and what is the likelihood Brian will succeed? Discuss.
2. What grounds, if any, under California law can Brian assert for removing Alicia as trustee and requiring her to indemnify the trust, and what is the likelihood Brian will succeed? Discuss.
3. As an attorney, independent of her capacity as trustee, has Alicia violated any rules of professional responsibility? Discuss.

ANSWER A TO ESSAY QUESTION 4

Part 1. Grounds Under California Law Which Brian ("B") Can Assert for Invalidating the Trust and Likelihood of Success

The issue is whether B can assert that the trust created by Richard ("R") pursuant to California law suffered legal defects in its creation so as to invalidate the trust. In order for a trust to be validly created, the settlor must deliver trust assets (res) to a Trustee for the benefit of certain beneficiaries for a valid legal purpose. According to the facts a trust instrument was executed, which satisfies any statute of fraud issues, whereby R, the Settlor, conveyed its separate property to the trust. Thus, the res requirement has been met. A California court will not invalidate a trust for lack of a trustee, but where there is only one trustee and such trustee is also the only beneficiary. Here, R named Alicia ("A") as Trustee, and the beneficiaries are initially, R, then B and Cecilia ("C"), and then others. The last legal hurdle is that the trust must have a valid legal purpose. In the instant case, the purpose is valid, since it does not restrict actions frowned upon by the law, such as prohibition of marriage.

According to the facts, R's trust was validly created. B's best argument for invalidating the trust is that R lacked the testamentary capacity and intent to create the trust because of (1) undue influence and (2) fraud. B is likely to succeed on this basis. With respect to undue influence, B will point to extrinsic evidence that A, an attorney, drafted the trust instrument and urged R to create the trust. Pursuant to common law, beneficiaries of a trust or will is (sic) prohibited from drafting the trust, unless they are related and live in the same house. This exception is met, since A is R's wife and lives with R, though A should have sought outside counsel to review the instrument. For B to succeed on a claim of undue influence, B would have to show that but for a strong influence, R would not have entered into a trust and made the specific distributions outlined therein. Given the facts, it would be difficult for B to succeed in proving undue influence.

B's other cause of action, which is much stronger, is fraud in creation of the trust. For a claim of fraud, B would have to prove that A intentionally made a misrepresentation of fact to induce R to enter into the trust, and that R relied on such representations. These requirements are met in this case. The facts show that C was included as a trust beneficiary only after A convinced R that this was necessary to avoid a possible legal action by C, although A knew there was no legal basis for such a claim. A clearly misrepresented law and had the necessary scienter to induce R to include C, a stepdaughter that (sic) was not formally adopted or acknowledged as a daughter by R, as a beneficiary to the trust. Because the requirements for fraud are met, B would likely succeed in invalidating the trust or at least the provision in the trust benefiting C.

Part 2. Grounds under California Law B can assert for removing Alicia ("A") as Trustee and Requiring A to indemnify the Trust; and Its Likelihood of Success

A's powers as a trustee can be expressly granted in the trust instrument or implied. In addition, A as the trustee has fiduciary duties, mainly a duty of care and a duty of loyalty. Because the trust does not specifically discuss A's powers, we must look to A's duties of care and loyalty. A's duty of care, which has been described as the prudent investor rule, requires that A exercise the degree of care, skill and prudence of a reasonable investor investing his or her own property. The prudent investor rule requires the trustee to, among other things, diversify trust assets and avoid risky investments while keeping the income production potential of the trust.

In the present case, A violated her duty of care to R and the other beneficiaries, including R. A invested 50% of trust assets in a newly-formed genetic engineering company, Genco, and the other 50% in the form of debt at the prevailing market rate of interest to the law firm of which she was partner. Both of these investment decisions are not decisions that prudent investor would decide upon. First, A did not diversify the trust's assets as exemplified by the 50% and 50% investments. Second, the investment in a (sic) Genco a newly-formed company without publicly disclosed operating results for a period of time is a very risky investment. Most financial institutions and prudent investors would advise investors to avoid shares of new companies because they lack operating results and many years of public reporting of financial results. A violated this

basic rule in investing 50% of the corpus into a newly-formed genetic engineering company. The facts do not indicate that Genco is a public company, which compounds the riskiness of this investment since private companies are not subject to many of the accounting and financial restrictions and disclosures that are intended to protect investors. Lastly, A invested the remaining 50% of the funds as debt to a law firm at prevailing interest rates. All things equal, this investment is more risky than placing the funds at a bank which is generating the same amount of interest. If the latter option is available, A also breached A's duty of care by not investing R's separate property into a less risky investment.

B can also claim that A violated her duty of loyalty. The duty of loyalty requires that the Trustee has undivided loyalty to the trust and may not enter into transactions with the trust that will detriment the beneficiaries. In the instant case, A made a loan of trust assets to the law firm where A is a partner. As discussed in the previous paragraph, this is to the detriment of the beneficiaries since safer investments and possible more profitable investments existed.

Because A violated her duties of care and loyalty, B has a strong claim for removing A as trustee and requiring her to indemnify the trust. Where a trustee has violated these duties, not only may the trustee be removed, the beneficiaries can see (1) to ratify the transactions made by the trustee, (2) impose a surcharge on the trustee (i.e, indemnify the beneficiaries for losses) or (3) trace trust assets and recover such asset. Because we do not know the results of A's investments in Genco and in the loan

to her law firm, we cannot recommend a specific course of action to B; however, since B seeks to have A indemnify the trust for losses, B will clearly have such option at his disposal. In addition, the court will not hesitate to remove A as trustee for lack of another trustee specified in the trust instrument, since the Court has power to appoint another trustee.

Part 3. Possible Violations by A of the Rules of Professional Responsibility

As an attorney, independent of her capacity as trustee, A has violated many rules of professional responsibility. First, A has a duty of loyalty to R, which means that A should act in the best interest of R, her client, and her own personal interests should not adversely affect her representation. If such personal or other interest affects her representation, A can only represent R if she reasonably believes that her personal and possible conflicts of interest will not adversely affect her representation of R and R is advised of the situation with consultation and consents. Pursuant to California Law, such consent should be written. According to the facts of this case, A had a potential conflict, since A was named a trustee and A's daughter was a beneficiary. This was not a potential conflict, but an actual conflict. In addition, A did not seek R's consent or advise him of the conflict. In fact, A was well aware of the conflict and intentionally lied to R so that R would include C as a beneficiary and continued to draft the trust instrument. When apprised of such a conflict, A should have withdrawn or asked R to seek another attorney for representation (or at least an outside attorney's opinion on the

trust instrument). Because of this conflict of interest, A has violated her duty of loyalty to R.

A also violated her duty of competence. A lawyer should have the legal knowledge, skill, preparedness and thoroughness necessary to protect his or her client's interest. In this case, A did not possess such knowledge as reflected by her advice to R. A should have withdrawn as R's attorney given the conflict of interest and not have advised R as to the legal consequences of not including C.

Lastly, A committed misconduct since A has duty not to lie and defraud clients. As an officer of the court, A should not have intentionally abused her role [as] a lawyer to R by telling him that it was necessary to include C in the trust. This intentional misrepresentation of the law is misconduct that is violative of the rules of professional responsibility.

Because of these violations of the rules of professional responsibility, A should be censured for her actions.

ANSWER B TO ESSAY QUESTION 4

1. Brian's Grounds to Invalidate the Trust

At his wife's urging, Richard created an express inter vivos trust of his separate property, which allowed him the income from the property for the remainder of his life, and at his death to go to his children. Brian can argue (1) that the trust was not validly formed, (2) that Alicia exerted undue influence over Richard and overcame his will in his disposing of his separate property in the trust at his death, (3) that the trust is voidable because of Alicia's misrepresentation to Richard regarding Celia.

Trust Requirements

Brian could first attempt to argue that the inter vivos trust was not validly created.

Under California law, a valid inter vivos trust requires (1) intent to create a trust, (2) delivery of the res (including constructive delivery), (3) a res (property to be placed in the trust Btrust assets), (4) named ascertainable beneficiaries, (5) a trustee, and (6) a valid lawful purpose.

In the present case, it appears that the requirements for a valid trust have been met. Although Richard created the trust at the urging of his wife, it appears that he did in fact intend to create the trust. Additionally, his separate property was transferred to the trust as the res, Brian and Celia and their heirs were named ascertainable beneficiaries,

Alicia was named as the trustee, and the trust purpose (providing for Richard's children) is a lawful one. Therefore, the trust appears to have facially met the requirements for a valid trust.

Undue Influence

However, Brian will assert that the trust is void because Alicia exerted undue influence (1) by urging Richard to create the trust of his separate property, and (2) by convincing him against his will to leave trust property to his stepdaughter Celia.

Under California law, a testamentary disposition is void if it was the result of undue influence. In order to prove undue influence, Brian has the burden of showing (1) that Alicia exerted influence over Richard, (2) that Richard's will was overborne by Alicia's influence, and (3) that but for the influence, the disposition would have been different. However, proof that a party had the ability to influence the testator, as well as the motive, is not sufficient in and of itself to demonstrate undue influence.

In the present case, Alicia urged Richard to create the trust of his separate property. This fact demonstrates that she did attempt to exert influence over him, but there are no facts indicating that Richard's will was overborne by this urging, or that he did not already desire to create the trust of his own will.

Additionally, Richard did not want to include Celia in the trust, but Alicia convinced him to do so because he might be sued if he did not. This is a much closer call, because in

this case, Alicia exerted influence by giving faulty legal advice to Richard, he changed his mind based solely on the influence, and but for Alicia's self-serving advice, he would not have included Celia in the trust. If the Court or finder of fact believes that Alicia exerted undue influence, then the inclusion of Celia in the trust would be void, and the trust may potentially be declared invalid.

Misrepresentation

Brian will also argue that Alicia's misrepresentation regarding Celia was fraud in inducing Richard to create the trust and include Celia in it.

In order to demonstrate that the trust was based on misrepresentation, Brian must show (1) that Alicia made a material misrepresentation to Richard, (2) that Alicia knew the information was false, (3) Richard in fact relied on the misrepresentation, (4) that Richard's reliance was justifiable, and (5) damages.

In the present case, Alicia knew that Celia did not have grounds for a legal action against Richard, and yet she still told Richard that he should include her in the trust to avoid a lawsuit. Richard relied on this advice because he did in fact include Celia in the trust, and his reliance was justifiable given that his wife was an attorney and he was not, so he reasonably trusted her legal advice. The damages in this case result from the fact that Celia was wrongfully added to the trust.

Based on this misrepresentation, it will be a close call whether the entire trust will be found void, or whether the provision regarding Celia will be declared invalid. It appears that Richard intended to create a trust for the benefit of Brian and his heirs, and that he originally intended to create a trust before the misrepresentation. Therefore, the gift to Celia would likely be declared void based on the misrepresentation, but the trust itself would likely not be revoked.

2. Removal of Alicia as Trustee and Indemnification

Alicia invested half the trust assets in a new biotech company and loaned the other half of the trust assets to her law firm. Based on her actions as trustee, Brian has several arguments that she should be removed and that she should be forced to indemnify the trust.

Powers of Trustee

Under the common law, a trustee was entitled to buy or sell trust assets, but was not entitled to borrow for the trust or loan funds from the trust. However, under the modern trend, the trustee is entitled to loan or borrow funds for the benefit of the trust under certain circumstances.

Brian could argue that Alicia exceeded her duties as trustee because she was not empowered to loan trust assets, but nonetheless loaned funds to her own law firm. However, because under the modern trend a trustee is entitled to loan trust assets,

Brian will likely lose this argument. (However, see discussion below regarding self-dealing/duty of loyalty regarding loan to Alicia's law firm.)

Duty to Diversify Trust Assets

Brian would also argue that Alicia violated her duty as trustee to diversify the trust assets. A trustee has an obligation to diversify the trust assets to keep them from being depleted.

In the present case, Alicia invested half of the trust assets in one risky company, and loaned the other half to her own law firm. In doing so, she failed to properly diversify the trust assets, and ran the risk that if one of the two investments lost money, the trust assets would be depleted. Therefore, Alicia violated this duty.

Duty to Avoid Speculation

Brian will also argue Alicia violated her duty to avoid speculation and risky investments of the trust assets. A trustee has an obligation to avoid speculating the trust assets or placing the assets in risky investments that might jeopardize losing the trust assets. Under the prudent investor rule, a trustee must act as a reasonably prudent person would do in managing their own business assets.

In the present case, Alicia invested half the trust assets in a speculative new biotech company. Regardless of whether Alicia actually believed that this was a good company, new and untested biotech companies are inherently risk investments. In

investing half the trust funds in this company, Alicia did not act as a reasonably prudent investor would do, and she violated her duty to avoid speculation.

Duty to Keep Trust Assets Productive

A trustee also has a duty to keep trust assets productive. In this case, Alicia loaned half the trust assets to her own law firm. There is no indication what kind of rate of return this loan will receive, but if it is not substantial, or if it is below what it would otherwise receive from being properly invested, Alicia has violated her duty to keep the trust assets productive.

Duty of Fairness

A trustee also has a duty of fairness not to favor one beneficiary over the other. In the present case, Celia is Alicia's daughter, and Brian is Richard's son from a previous marriage.

Therefore, Alicia cannot favor Celia over Brian. Additionally, Alicia cannot attempt to invest in risky investments in order to benefit the trust assets during the lifetime of Celia (who has a lifetime interest in trust income), at the risk of jeopardizing the trust assets for future beneficiaries. By investing in risky investments for quick-profit (the biotech firm) it appears that Alicia is violating this duty.

Duty of Loyalty of Trustee

The main duty that Alicia violated is the duty of loyalty. A trustee has a duty not to self-deal trust assets or commingle trust assets with her own. In the present case, Alicia loaned half the trust assets to her own law firm, where she is a partner. Therefore, because she loaned money to an entity which she is an equity owner, she violated her duty to avoid commingling or self-dealing.

Damages

Brian has several options in receiving damages for Alicia's breaches of her duties as trustee. First, for any investment that Alicia made that benefitted the trust and were profitable, he can ratify those actions, and keep the proceeds. For any deals that Alicia made that lost money, Brian can surcharge the trustee, and she will be required to indemnify the trust for the losses. Finally, for any self-dealing, such as the loan to her law firm, Brian can trace the funds, and have them given back to the trust.

3. Alicia's Violation of the Rules of Professional Responsibility

Alicia violated several rules of professional responsibility.

Duty of Loyalty

First, an attorney has a duty of loyalty to the client to avoid conflicts of interest. A conflict of interest arises where an obligation or interest of the attorney, to a third party, or to another client is materially adverse or directly adverse to the client. If there is a

potential conflict of interest, the attorney can represent the client in that matter only (1) if the lawyer reasonably believes she can give the client effective representation, (2) the attorney informs the client of the nature of the conflict, (3) the client consents, and (4) the consent is reasonable.

In the present case, Alicia had a conflict of interest in serving as the trustee and in drafting the trust document for Richard because her own interest in providing for her daughter may affect her representation. (This was in fact demonstrated by the fact that she misinformed Richard of the law to include Celia in the will). Although there was a conflict, Alicia did not inform Richard of the conflict, Richard did not consent, and on the facts given, any consent he gave would have been unreasonable.

An attorney can also not create an instrument for the client that gives the attorney or close relative of the attorney a gift or devise. Alicia may have violated this duty by writing the testamentary trust that gave Celia, Alicia's daughter, an interest in the trust. Although there is an exception where the attorney is a relative of the client, this exception may not apply given Alicia's fraud and the devise to her daughter.

Duty of Competence

An attorney also has a duty of competence to the client to act vigorously and competently to advance that client's interests. Under this duty the attorney has an obligation to give competent legal advice, vigorously advance the client's interests, and not take a case if they will violate an ethical rule. Alicia did not advance Richard's

interests, and should have refused to draft the instrument because of her conflict of interest (discussed above).

Duty of Dignity and Decorum

Under the duty of dignity and decorum, an attorney has an obligation not to present false or misleading legal advice. Alicia violated this duty when she told Richard falsely that Celia would have a legal claim if she were not included in the will. This may also constitute tortious misrepresentation (see above).

Question 5

The growth of City has recently accelerated, putting stress on municipal infrastructure. City's water supply, roads, sewers, and schools are all operating in excess of designed capacity.

The Assembly of Future Life was organized in City not long ago. Its members adhere to certain unpopular religious beliefs. City gave the Assembly preliminary zoning approval for plans to build a worship center on a one-acre parcel of real property the Assembly owned within City's borders. The Assembly's plans incorporated a dwelling for its minister. Soon after the preliminary zoning approval, newspapers in City featured articles about the Assembly and its members' beliefs.

After these newspaper articles appeared, City adopted a "slow growth" ordinance providing for an annual lottery to allocate up to 50 building permits, with applicants for certain "priority status" dwellings entitled to participate first. Priority status dwellings were defined as: (1) affordable housing; (2) housing on five-acre lots with available sewer and water connections; or (3) housing with final zoning approval as of the date the ordinance was adopted. Only after all applicants for priority status dwellings had received permits in the lottery could other applicants participate.

Over 500 applicants for priority status dwellings participated in the first annual lottery. Realizing that its opportunity to participate in a lottery could be years away, the Assembly submitted an application for retroactive final zoning approval and a building permit. City denied the application.

The Assembly brought suit in federal district court against City, alleging that: (1) City's ordinance was invalid under the due process, equal protection, and takings clauses of the U.S. Constitution; and (2) City's denial of the Assembly's application was invalid under the due process clause of the U.S. Constitution.

What arguments can the Assembly reasonably make in support of its allegations and is each argument likely to succeed? Discuss.

ANSWER A TO QUESTION 5

1. Assembly of Life's (AAsembly@) Challenge of the City Ordinance

The Assembly, an unpopular religious organization in the City, is attempting to obtain building approval for its worship center on a one acre parcel of land. However, in response to the growth of the City and the strain on the City's infrastructure, the City enacted an ordinance that strictly limits growth, and affords priority largely on the basis of increasing affordable housing with preexisting facilities. Assembly challenges the ordinance based on (1) Due Process, (2) Equal Protection, and (3) the Takings Clause of the United States Constitution.

Standing

Because Assembly is suing in Federal Court for violation of its constitutional rights, it must first demonstrate that it has proper standing to bring its claim. A plaintiff has standing to sue (1) where it has suffered an actual injury, (2) where that injury has been caused by the defendant's actions, and (3) where the harm or injury is redressable by a court order.

In the present case, Assembly has standing to challenge the ordinance. Assembly has suffered an actual injury because it cannot build its worship center because of the change in the law, preventing it and its members from more fully exercising their religious beliefs. This injury was caused by the change in the law when the city enacted the ordinance, and it could be redressed if the court struck down the ordinance.

However, the city could argue that even if the court struck down the ordinance, Assembly's injury would not be redressed because [it] may not receive final zoning approval regardless. In light of the fact that Assembly received preliminary approval without difficulty, this argument would likely fail.

It is also important to note that the assembly has organizational standing, because its members are injured by the city's action, and it relates to the purpose of the organization (exercise of religious beliefs).

Ripeness

In a related matter, Assembly's claim must also be ripe in order for the court to hear its claim. A suit is not ripe where the injury has not yet occurred or where the harm is speculative in nature or where the issues for the record are not fully developed or fit for adjudication.

The City may argue that Assembly has not yet been turned down for its permit, and that it could conceivably receive its permit after the lottery takes place. However, this argument would likely fail, given the limited nature of available permits, and given the fact that the available permits will be given on a basis of priority which excludes Assembly. Additionally, the issues in the case are fit for adjudication, and there is no further factual development necessary before the court can properly decide the merits.

State Action

The protections of the Constitution prevent the government from infringing the Constitutional rights of its citizens, and therefore, for Assembly to succeed it must prove state action. However, because the City's ordinance is at issue, and the City is a government actor, there is sufficient basis for state action.

Substantive Due Process

Assembly will argue that the city enacted the ordinance in order to prevent it from exercising its unpopular religious beliefs, violating its fundamental right to exercise its religion, as well as its members' right to free assembly.

In cases where a statute denies a plaintiff the exercise of a fundamental right, the statute should receive strict scrutiny. However, if the law does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

This law would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. The members are still free to assemble where they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

Under rational basis review, the law will be upheld if it is rationally related to achieve a legitimate governmental interest. In the present case, the city has a legitimate interest in preserving the city infrastructure for necessary housing purposes, and delaying approval for development that may otherwise tax the city's resources until they can be improved. This ordinance is rationally related to achieve this purpose because it gives a priority to housing development and development with pre-existing infrastructure, thereby limiting growth to necessary housing, and housing that will not sufficiently burden the resources of the city. Thus, under rational basis review the ordinance will be valid.

However, if the law is analyzed under strict scrutiny, the law will only be upheld if the City can show that (1) it is narrowly tailored to (2) achieve a compelling governmental interest. Additionally, there must be no less restrictive means available to achieve the city's goal. Under this analysis, the City would assert that it has a compelling interest in

increasing housing and limiting development. However, the Assembly will likely argue that it is not narrowly tailored to achieve this goal because it includes housing that had final zoning approval at the time the ordinance was passed, which could potentially include land that did not include housing. Additionally, because the religious center was only going to have one person (the minister) live on the property, they could argue that the law could have been less restrictive by allowing development of property which would not tax the water supply, sewers or schools by the mere addition of one person. Therefore, in the unlikely event that the court applies strict scrutiny, the ordinance would be struck down.

Equal Protection

The Assembly would argue that the ordinance is discriminating against it because of its unpopular religious beliefs, and that the law is therefore invalid under the Equal Protection clause because it discriminates against them based on their exercise of their fundamental right to exercise their religion.

Classification

If the statute does not discriminate on its face or expressly in its terms, the plaintiff must prove (1) discriminatory effect, and (2) discriminatory intent.

The ordinance in this case does not discriminate on its face between religious or nonreligious development. The classification in the ordinance is between affordable

housing and nonaffordable housing. Because this classification does not implicate a fundamental interest, the statute would receive rational basis review.

However, the Assembly would argue that the ordinance has a discriminatory effect, because other development would be permitted under the new law, but the religious development is now prevented. Additionally, it would argue that the timing of the ordinance leads to a conclusion that the law was passed because of discriminatory intent. Assembly would argue that it received preliminary approval of its zoning, but that immediately after the unfavorable newspaper articles were printed, the city enacted the ordinance that prevented their development. The city would argue that there is no discriminatory intent because it was not acting to prevent the Assembly from its religious beliefs, but was instead motivated by the dire crisis for city resources.

This is a close call, but the city would likely prevail. Absent additional evidence, the City's ordinance appears to be related primarily to its concern regarding limited resources, rather than an aversion to Assembly's religion.

Level of Review

If the court believes that the ordinance was not motivated by discriminatory intent, it should apply rational basis review. As discussed above, the statute would pass this level of review.

However, if the court believes that this law was motivated by religious animosity to Assembly and discriminated against it for issuing permits based on its unpopular religious beliefs, then it should apply strict scrutiny. As discussed above for due process, the law would likely fail strict scrutiny.

Takings Clause

The Assembly would argue that the retroactive change in the permit approval process after it has already received preliminary approval constitutes a taking of its property right in violation of the Takings Clause.

Under the Takings Clause of the Fifth Amendment, where the government takes or condemns private property, due process requires that it provide just compensation. Any permanent physical occupation of private property by the government is a per se taking of the property. However, a statute which limits the productive uses of the property is considered a regulatory taking. In order for a regulatory taking to occur, the government's action must take away all reasonable use or value of the property. Otherwise, the government's action that impacts, but does not take away, the value or use of the property need not be compensated.

The assembly wants to use its parcel of land in the city to develop a worship center and give its minister a place to live. It will argue that because it is a religious organization, its only purpose in owning the property is to conduct religious

activities. Because the ordinance prevents them from building a worship center to conduct their activities, it prevents them from beneficial use of the property and should be compensated.

However, the city would argue that the ordinance may have prevented (or more likely, merely delayed) the building of the center, but did not deprive the Assembly of every beneficial use or value of the property itself. The assembly is free to use it for other purposes that do not require the building permit, and are still free to use it for religious worship. Because the Assembly is still free to use the property for other purposes than building the center, the ordinance likely does not constitute a taking, and need not be compensated.

2. Assembly's Challenge of the Denial of its Retroactive Zoning Approval and Building Permit

The Assembly will argue that the city's denial of its retroactive zoning application violated its right to procedural due process and substantive due process.

Procedural Due Process

The Assembly will argue that it did not receive procedural due process when its application was denied. Under procedural due process, before a plaintiff is deprived

property or liberty right, it must receive reasonable due process (including a hear, right to present its side and argue its case). For property, a taking of property without due process only occurs if there was a property right, i.e., an entitlement to the benefit or property interest.

In the present case, although Assembly will argue that it was already approved for preliminary zoning and that it would have been approved for final building if not for the newspaper, it will likely lose because it cannot demonstrate that it was deprived of a property right. Zoning approval was not yet complete, and preliminary approval did not create an entitlement to final approval. Therefore, because Assembly was not deprived of a property right or interest entitlement, no procedural due process is required, and the City's denial of the application was likely valid.

Substantive Due Process

As discussed above, in cases where a statute denies a plaintiff the exercise of a fundamental right, the state action should receive strict scrutiny. However, if the state action does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

The city's denial of Assembly's permit application would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. As discussed above, the members are still free to assemble where

they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

The denial of Assembly's retroactive application survives rational basis review because it is rationally related to the legitimate city interest of preserving development and city resources for necessary housing.

ANSWER B TO QUESTION 5

1. Validity of Ordinance?

Standing

First, Assembly will have constitutional standing whether as [an] organization or by individual members to sue in federal district court. In order to have standing, a party must have (1) an injury in fact; (2) caused by alleged unconstitutional conduct; (3) capable of redressibility. Here, the Assembly and its members have injury in fact, as they have been denied a permit to build, caused by the new ordinance;; and if the court rules in favor of Assembly, their grievance will be capable of redressibility. The ordinance caused them not to get their permit, and if the ordinance is invalidated, they will be able to participate in the lottery.

(a) Due Process argument. (Procedural and Substantive)

Procedural Due Process

The Assembly could first argue that the ordinance is invalid under procedural due process. The Fifth Amendment due process clause, as applied to the states via the Fourteenth Amendment, is applicable in this case to City (a State Actor). The due process clause guarantees that no person shall be denied life, liberty, or property without due process of law. Assembly will argue it was denied procedural due process in the denial of its permit under the ordinance. It will argue it had a right to be heard on the issue, particularly after it had already been granted a preliminary

zoning permit. It will argue the ordinance does not leave open any procedures to be heard.

In determining the need for procedural due process, courts look at (1) whether a fundamental life or liberty interest or property entitlement has been denied, (2) the importance of that interest; (3) whether the procedures claimed by Assembly would make the hearing more fair and accurate; and (4) balance those interests against the interests of governmental efficiency.

Assembly could argue that (1) their land and zoning permit is a property entitlement. Although they did not have a final permit, the preliminary permit gave them reason to claim an entitlement and believe they would receive a final permit. Also, they will argue they have a right to build on their land and the ordinance is denying them this.

(2) the Assembly will argue that their interest is important. They have invested money in the land, and they are a church that needs a place to worship.

(3) The assembly will argue that to have a hearing or at least a chance to repetition will greatly increase the fairness and accuracy of the permit procedure. As of now, City determines on its own, without hearing, who fits Affordable housing,[@] and sets an arbitrary 5-acre minimum land size, and doesn't leave open for hearings for those with preliminary permits. The hearings, rather than an arbitrary lottery, will better determine who needs the permits more, who should be entitled to them, etc.

(4) The City will counter that its interests in efficiency outweigh the interests in procedure, particularly because no one truly has an entitlement to a building permit. The City will argue that it is facing a crisis in its municipal infrastructure, and that the only way to relieve it is to substantially slow down growth. If it were to have a hearing on every permit, this would drastically slow down the process with so many parties competing for limited spots. Plus, a lottery is fair and objective.

City, could, however, have a lottery for some, and leave open a few spots/permits to be reviewed by application.

Given City's interests, they could keep the lottery, but they should have allowed reasonable procedures and hearings in place for others who want to develop their land. Assembly could win here.

Substantive Due Process

In order to succeed on a claim of substantive due process, Assembly must show (1) that the ordinance denies applicants a fundamental liberty interest and did so deny them; and (2) is not necessary to achieve a compelling government interest.

Assembly will argue that the ordinance denies individuals the right to build on their property, [and] to decide how to develop their land. Assembly, unfortunately, will not be able to show this is a fundamental right. The Supreme Court has not recognized a fundamental economic right (but see below as applied to them).

Therefore, the Rational Basis test will apply. Assembly must prove that the ordinance is not reasonably related to a legitimate government interest. Assembly will fail here. Government will be able to assert that the extreme stress on the City's infrastructure is a legitimate government interest in the welfare of its people. City will also show that the ordinance was a rational way of solving the City's growth and infrastructure problem. By limiting building, it can stabilize and improve infrastructure to keep up with the growth.

Assembly will not succeed here.

Equal Protection

Assembly can argue that the ordinance, on its face, denies equal protection of the laws based on an applicant's housing to be built, those with final zoning approval, and the infrastructure of the land. In order to sustain an equal protection claim, Assembly must show that people are treated differently with regard to fundamental rights, or that Assembly is part of a suspect (or quasi) class.

Assembly will again try to argue that people are treated differently depending on the nature of their land, what they choose to build, etc. Again, this is not a fundamental right recognized by the supreme court, and rational basis will apply. (See before.)

Also, Assembly won't be able to make a reasonable argument as to suspect classification. The law in its intent, effect, or in its face, does not discriminate based on

race, national origin, alienage, gender, or illegitimacy (recognized protected classes by the supreme court). Therefore, rational basis applies and City again will succeed (see before).

(c) Takings Clause.

Assembly will argue that the ordinance acts as a taking of their real property for public use without just compensation. Under the Takings Clause, when a government entity (State Actor B as City is here) (1) takes property of another for (2) public use, it must provide just compensation.

Taking?

Assembly will argue that the regulation, in effect, is a taking because by denying building permits, the regulation leaves no viable use for the property (other than farming). Assembly will argue that those who want to build something other than housing and who do not meet the other requirements are left with no viable use for their property. The City is essentially taking their property because City is leaving them without use.

City will counter that there are other viable uses like parking, or farming, that there are some viable uses left, although severely limited. And that the limitations are outweighed by the benefits to the City in reducing the stress on its infrastructure and slowing growth.

Assembly may succeed on this issue if they can show that where their property is situated, it can not be made useful in any other way **B** that will stay a vacant property without earning potential.

If Assembly meets this prong it will also be able to show it was taken for public use as the City admits that it's being used for the City's purposes in slowing growth.

Assembly will receive just compensation if it succeeds.

2. City's denial of Assembly's Application

Assembly will argue again that it should have had a hearing, etc. (see above) and may succeed there.

However, Assembly may have an argument that it was denied substantive due process because the City used the ordinance to violate Assembly's right to worship/free exercise of religion.

Assembly will try to show that although the ordinance seems to be a law of general applicability on its face, it is really an attempt to interfere with its practice of religion under the First Amendment as applied to the states under the Fourteenth Amendment.

Assembly will argue that (1) City's intent in passing the ordinance was to prevent them from building a place of worship; and (2) the law had the effect of preventing them from building.

Obviously, they were denied the building permit, so they will be able to show prong #2.

In order to meet Prong #1, however, they will have to show that they were granted the preliminary permit and that only after the newspaper article, the lottery came into effect. They will have to prove that the City never had this ordinance in mind before learning of Assembly, the City passed the ordinance with the intent to prohibit Assembly's plans. Assembly could try to find witnesses or City council members, or minutes of meetings to help them.

If they succeed here, City will have to show that their discrimination vs. religion was necessary to achieve a compelling government interest. This will be nearly impossible to show, and Assembly will succeed. City would have to show Assembly was a cult, or illegal institution.

Question 6

Phil sued Dirk, a barber, seeking damages for personal injuries resulting from a hair treatment Dirk performed on Phil. The complaint alleged that most of Phil's hair fell out as a result of the treatment. At a jury trial, the following occurred:

A. Phil's attorney called Wit to testify that the type of hair loss suffered by Phil was abnormal. Before Wit could testify, the judge stated that he had been a trained barber prior to going to law school. He took judicial notice that this type of hair loss was not normal and instructed the jury accordingly.

B. Phil testified that, right after he discovered his hair loss, he called Dirk and told Dirk what had happened. Phil testified that Dirk then said: (1) "I knew I put too many chemicals in the solution I used on you, so won't you take \$1,000 in settlement?" (2) "I fixed the solution and now have it corrected." (3) "Don't worry because Insko, my insurance company, told me that it will take care of everything."

C. Phil produced a letter at trial addressed to him bearing the signature "Dirk." The letter states that Dirk used an improper solution containing too many chemicals on Phil for his hair treatment. Phil testified that he received this letter through the mail about a week after the incident at the barbershop. The court admitted the letter into evidence.

D. In his defense, Dirk called Chemist, who testified as an expert witness that he applied to his own hair the same solution that had been used on Phil and that he suffered no loss of hair.

Assume that, in each instance, all appropriate objections were made. Did the court err in:

1. Taking judicial notice and instructing the jury on hair loss? Discuss.
2. Admitting Phil's testimony regarding Dirk's statements? Discuss.
3. Admitting the letter produced by Phil? Discuss.
4. Admitting Chemist's testimony? Discuss.

ANSWER A TO ESSAY QUESTION 6

Phil v. Dirk

This question raises issues under the Federal Rules of Evidence. (FRE)

1. Judicial Notice.

Under the FRE, judges may take judicial notice of certain types of facts. To take judicial notice, the fact must be of the type that (sic) well-established and commonly known, including certain scientific facts. For example, that water freezes at 32°. In a civil case, if a fact is judicially noticed (sic) and the judge so instructs the jury that fact is conclusively established.

Here, the judicial notice was improper. It is not commonly known or well-established that the type of hair loss suffered by Phil (P) was abnormal. Proving that P's hair loss was abnormal was part of P's case-in-chief to establish negligence. The judge cannot use his personal experience to judicially notice a material fact. The instruction was error.

The court erred in taking judicial notice.

2. Phil's Testimony Regarding Dirk's Statements.

Presentation. Witnesses are competent to testify only if they have personal knowledge of the subject matter of their testimony. Here, Phil called Dirk and heard Dirk's statements himself, so Phil has personal knowledge.

Relevance. Only relevant evidence is admissible. Evidence is relevant if it has a tendency to prove a fact in issue. Here, Dirk's testimony tends to prove his negligence, so it is relevant.

Exceptions to Relevance: Substantial Risk of Prejudice

However, not all relevant evidence is admissible. A court may exclude relevant evidence if its probative value is substantially outweighed by the risk of prejudice. This rule is within the court's discretion. It would not apply here though because several Public Policy Exceptions apply: (1) Offers of settlement. Offers to settle claims will be excluded due to the public policy of encouraging settlements. The rule only applies if there is an actual claim however: that is there is a dispute as to (1) liability or (2) amount.

Here, D will argue that his statement regarding paying \$1000 was clearly an offer of settlement and should have been excluded. Although D admitted he knew he put too many chemicals in the amount was still in dispute. Also, Phil had called him to complain about the hair loss, suggesting that Phil was threatening suit. This testimony should have been excluded.

(2) Remedial Measures. Evidence of remedial measures taken after the incident are not admissible for public policy reasons of encouraging remedial actions. Here, D's statement clearly shows the taking of remedial action and may be excluded. Evidence of remedial measures may be, however, admissible to prove ownership and control, or to rebut proof that greater care could not be taken. If D presented evidence that the chemicals he used were proper and could not be changed, then D's statement that he fixed the solution^o could be admitted to rebut, for that purpose only. The courts should have allowed the testimony but given a limiting instruction in purpose.

(3) Liability Insurance.

Evidence of liability insurance is also excluded for the public policy to encourage the purchase of insurance. It generally is inadmissible, except to show ownership and control. D's statement is only about liability insurance, and ownership and control is not at issue.

The court should have excluded this testimony.

Hearsay. Hearsay is an out of court statement offered to prove the truth of the matter amended. D may argue that the testimony should have been excluded as hearsay.

However, all three of D's statements are admissible because they are non-hearsay as an admission of a party opponent. The court erred in allowing the testimony only on the public policy grounds discussed above.

3. Admitting Phil's Letter.

Form: P's testimony about the letter is proper since he has personal knowledge.

He did not testify about whether the handwriting and signature were actually D's. He could only do this if he had personal knowledge of D's writing, or if the letter was a response letter to something he had written.

Presentation: Foundation, Authentication, Best Evidence Rule.

Foundation: P's testimony about receiving the letter a week after the incident at D's barbershop laid a proper foundation for the document.

Authentication: Documents must be authenticated before they can be admitted into evidence. They can be authenticated by testimony of a witness with personal knowledge about the document. P's testimony is sufficient.

Best Evidence Rule: This Rule requires that where the party is trying to prove the contents of the document, the original document must be submitted, or if it is not the original document, an explanation that is satisfactory must be given as to why the original document is not submitted. Here, P is trying to prove the contents of the letter. P is not testifying about what the letter

said, but is actually introducing the letter into evidence. Since he is submitting the original, the rule is satisfied.

Relevance: The letter is relevant because it tends to prove that D was negligent, the issue in the case.

Hearsay: D may object that the letter is hearsay. However the statement in the letter is an admission by a party - opponent and is non-hearsay. The court did not err in admitting the letter.

4. Chemist's Testimony.

Form: D can produce expert witnesses to testify in aid of his case.

Presentation: Expert witnesses must meet several requirements before they can testify. The testimony must be helpful to the factfinder and based on scientific evidence. The expert himself must be qualified, may rely on treatises or other scientific, well-established bases of information, and must have personal knowledge of the facts of the case being discussed (must make himself or herself aware of the facts).

Here, Chemist does not meet these requirements.

Chemist's testimony is not based on sufficiently scientific evidence. Conducting one experiment upon himself does not qualify as scientific and is not helpful to the fact-finder.

It is unclear whether Chemist is qualified to testify to this matter, whether he knows about chemical effects on hair loss for example. He did not mention relying on scientific evidence or treatises to conduct his experiment. He seems to have personal knowledge of the facts of the case if he knows the chemical solution used on Phil, but this is insufficient to qualify as an expert witness.

The court erred in admitting Chemist's testimony.

ANSWER B TO ESSAY QUESTION 6

I. Judicial Notice and Jury Instruction

A. Judicial Notice

A judge may take judicial notice on his own initiative. However, a judge may only take judicial notice of things of common knowledge, or that may be ascertained by reference to sources of undisputed accuracy.

Here, the judge took notice of the fact that the type of hair loss was not normal. He based this, not on common knowledge, or on reference to a source of undisputed accuracy, but on his own personal knowledge. This was not a proper basis for judicial notice. Therefore the court erred.

B. Jury Instruction.

The instruction itself, other than the error in the judicial notice, would not have been in error. The judge may instruct the jury that something has been judicially noticed. In a civil case such as this one, it would be conclusive. However, because the judicial notice was in error, so was the instruction.

C. Misconduct

A judge may not offer expert testimony in a trial over which he presides. His actions should subject him to discipline.

II. Phil's Testimony re: Dirk's Statements

A. Statement One

1. Logical relevance

The statement is relevant because it has ~~A~~any tendency~~@~~ to show that D was negligent and liable.

2. Legal relevance

Offers of settlement and negotiations are inadmissible to prove negligence or liability, due to a public policy of encouraging such measures. Here, D's first statement was a negotiation and an offer. However, spontaneous offers made when no case is pending are admissible. Here, all we know is that P called D to tell him what had happened. It appears no claim was pending, so admissible.

D may also argue it was an offer to pay medical expenses, inadmissible because of a policy encouraging such measures. However, it is doubtful that P was going to seek medical care ~~B~~ there is no mention of physical injury. Further, the exception only applies to the offer, and not surrounding statements, so the statement about too many chemicals would come in.

3. Hearsay

D's statement was made out of court, and is offered for its truth, so it may be hearsay.

However, under the FRE, admissions of a party opponent are admissible. Here, D is a party, and the statement is offered by P, his opponent. It is an admission because it is an acknowledgment of a fact in issue, namely D's liability. Thus, it is not hearsay.

If D testifies that he didn't use too much, the statement will also come in to impeach him as a prior inconsistent statement, so long as D's given a chance to explain or deny it.

Finally, it might also be a state of mind statement of D's intent to pay P \$1000, which is an exception to hearsay.

Thus, the statement was admissible and in error.

B. Statement Two

1. Logical relevance

If he Afixed@ it, it must have been Abroken@B negligence.

2. Legal relevance

Evidence of subsequent remedial measures are inadmissible to show liability or negligence due to a policy of encouraging such measures. Here, D said he fixed the solution after P's harm. Thus, it was a subsequent remedial measure.

However, if D denies the solution was his, or that a fix was possible, it will be admissible. Further, if there are no longer any samples of the solution used on P, the statement can come in to explain why D's new solution isn't defective, or that D destroyed evidence.

3. Hearsay

See above.

Party admission, so not hearsay. May be inconsistent, depending on D's testimony, Also could be present sense impression, if D made it while fixing the solution.

Therefore, the statement was admissible only if an exception to the bar on subsequent remedial measures applies. Probably an error to admit.

C. Statement Three

1. Logical relevance

Saying that the insurance company would cover it shows that D was liable.

2. Legal Relevance

Evidence of liability insurance is inadmissible to show liability or liability to pay, due to a policy encouraging insurance.

Here, D said his insurers would cover it. Therefore it is inadmissible unless used to prove ownership and control, which appears to be undisputed.

3. Hearsay.

Even if not barred by public policy, there are two levels of hearsay. The statement from D to P is an admission, as discussed above. However, the statement from the insurance company to D (they told me) is also an out of court statement offered for its truth, and not under any exception, unless there are circumstantial guarantees of trustworthiness, necessity, and notice, none of which are present here. Thus, the court erred in admitting the statement.

III. The letter

A. Logical Relevance

It goes to show D was negligent.

B. Legal relevance

It may be more prejudicial than probative, if D's statement, above, came in. It might be unnecessary cumulative evidence that would not add much and would waste the jury's time.

C. Authentication

A document must be properly authentic. Here, it is a letter allegedly from D. P needed to authenticate.

P could have authenticated by having someone familiar with D's handwriting or signature testify it was his, or by having an expert or the jury compare it to a sample of D's handwriting or signature.

Or, if P had written a letter to D, and received this one in response, it could be authenticated. A response to their phone call was not sufficient. Since P did none of this, not authenticated, and error to admit.

D. Hearsay

Party admission B see above.

IV. Expert

An expert may give testimony on any subject beyond common experience that is helpful to the trier of fact.

The expert must be qualified, express reasonable certainty about their opinion, and have a proper factual basis, such as hypotheticals, things generally relied on by such experts, or personal knowledge. An expert may testify to ultimate issues.

The hair chemicals and effects appear to be beyond common experience. It would be helpful to the trier of fact to see if the expert found the chemicals to make him lose hair (that's why it's relevant).

However, it's unclear that Chemist was qualified as an expert in the subject of chemicals and hair loss. If he was, an opinion based on his experiment would be admissible. However, here, the expert gave no opinion as to any issue in this case, but merely testified about what he did to himself. The jury may not know enough to tell whether the experiment shows that P's claim has no merit. They needed an expert opinion to show them the two were comparable. Because he gave no opinion, he did not express any certainty.

Finally, if the Aexperiment@ is not let in as expert testimony, it must be authenticated. To have proper foundation for an experiment, there must be evidence that the experiment was conducted with the same materials, under the same conditions as the events at issue. No foundation was laid here.

Thus, admission as expert opinion or as evidence in its own right was in error.