

Question 5

Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops and to fill their wells, immediately demanded that Diane stop construction. Diane refused. Six months into the construction, when the dam was almost complete, the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance and for a taking under the United States Constitution. After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, separately retained Lawyer and filed an application for a permanent injunction against Diane in federal court asserting the same causes of action and requesting the same relief as in the state court case. Personal jurisdiction, subject matter jurisdiction, and venue were proper. The federal court granted Diane's motion to dismiss Paul's federal court application on the basis of preclusion.

Infuriated with the ruling, Paul told Lawyer, "If the court can't give me the relief I am looking for, I will take care of Diane in my own way and that dam, too." Unable to dissuade Paul and after telling him she would report his threatening comments to criminal authorities, Lawyer called 911 and, without identifying herself, told a dispatcher that "someone is on his way to hurt Diane."

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
2. Was the federal court's denial of Paul's application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
3. Did Lawyer commit any ethical violation when she called 911? Discuss. Answer according to both California and ABA authorities.

Question 5

Remedies – Civil Procedure – Professional Responsibility

(This whole paragraph goes to call 1.) Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. (This is a substantial benefit to the community and the court will weigh the utility of Diane’s conduct against the gravity of any harm) In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops (Agricultural use) and to fill their wells, (Residential use) immediately demanded that Diane stop construction. (The neighbors proper remedy, at this point, is to file a temporary injunction as they are aware of the potential harm) Diane refused. Six months into the construction, (Seeing as how the neighbors filed the action six months later, they have slept on their rights. Diane will be able to assert laches in defense of their claim) when the dam was almost complete, (The fact that the dam was almost complete is one of the main reasons the court will deny plaintiffs claim. Diane will suffer substantial loss and the delay prejudiced her rights) the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance (Substantial and unreasonable inference) and for a taking under the United States Constitution. (No government action) After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

(This paragraph goes to call 2.) Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, (Paul was a party to the initial action) separately retained Lawyer and filed an application for a permanent injunction (The same cause of action against Diane as in the state suit) against Diane in federal court (A federal court is equally bound by the state court’s judgment) asserting the same causes of action (Same claim) and requesting the same relief as in the state court case. (The issues and claims are identical) Personal jurisdiction, subject matter jurisdiction, and venue were proper. (This is the examiners way of telling an applicant not to discuss these issues. For preclusion to apply the judgment must be on the merits and not based on improper jurisdiction or venue) The federal court granted Diane’s motion to dismiss Paul’s federal court application on the basis of preclusion. (Correctly ruled)

(This whole paragraph goes to call 3.) Infuriated (Since Paul is “infuriated” he may react with vengeance) with the ruling, Paul told Lawyer, “If the court can’t give me the relief I am looking for, I will take care of Diane in my own way and that dam, (Property damage) too.” Unable to dissuade Paul (Lawyer is making a good faith effort to persuade Paul not to commit a criminal act) and after telling him she would report his threatening comments to criminal authorities, (It is appropriate for Lawyer to inform Paul of her ability to reveal information necessary to prevent a criminal act likely to result in death or substantial bodily harm) Lawyer called 911 and, without identifying herself, (Lawyer may determine that the best course of action is to make an anonymous disclosure to relevant law-enforcement authorities) told a dispatcher that “someone (In revealing confidential information, Lawyer’s disclosure must be no more than necessary to prevent the criminal act. In compliance with the rules, Lawyer only stated that “someone” is going to hurt Diane) is on his way to hurt Diane.” (Lawyer believes that Diane may suffer substantial bodily harm)

A Glance into the Realm of this Question

This question was definitely a cross-over. It contained issues stemming from Remedies (Injunctions), Torts (Nuisance), Constitutional Law (Fifth Amendment Takings Clause) and Real Property (Nuisance and Takings) in call 1. In call 2. the examiners switched gears again to test Civil Procedure issues in Federal Court. And finally call 3. presented a common Professional Responsibility problem. The good news is that the examiners did a great job of laying out the specific issues they wanted you to discuss, so issue spotting wasn't an ordeal. On closer inspection of this particular bar exam, Professional Responsibility was a full essay two days earlier in Question 2. In addition, Torts and Civil Procedure (albeit California Civil Procedure) were crossed-over in Question 1 on that same Tuesday in July. Essentially, it is the examiners way of telling you that everything is fair game on the final Thursday.

Model Answer by One-Timers ©

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct?

The court correctly ruled on the injunction, while it serves a great benefit to the community, the harm to the plaintiffs' may be just as significant. However, the decision will rest on the fact that the neighbors waited too long to file the application for a permanent injunction.

In order to reach the remedy, the court must be able to enforce a right. Here, the claims have been brought under nuisance law and the Takings Clause of the United States Constitution. Both causes of actions will be discussed to determine if they are actionable.

Private Nuisance

A private nuisance is a substantial and unreasonable interference with the use or enjoyment of one's land. A nuisance is substantial if a person of normal sensibilities would be affected by the harm and consider it strongly offensive or seriously annoying. A slight inconvenience or a claim by a person with hyper-sensitivities does not rise to the level of a nuisance. It is unreasonable if the gravity of the harm to the plaintiff outweighs the utility of defendant's conduct.

Here, the fact that Diane usurped her downstream neighbors water supply that they use for both agricultural and residential use, would offend the average person in the community. This type of conduct rises above the level of being a minor annoyance. As to the unreasonableness of the conduct, Diane is putting the water to good use. She is building a pond to provide economically-disadvantaged children the opportunity to engage in water sports at no charge to them. However, the gravity of the harm to the nearby residents who rely on the stream is great. If they are without water to irrigate their crops and fill their wells, it would make living difficult, if not impossible. While it may be possible for the neighbors to acquire a secondary water source, more facts are needed to precisely determine the extent of the harm. For arguments sake, assuming there is a nuisance, whether an injunction is the appropriate remedy will be discussed below.

Takings Clause

The Fifth Amendment of the United States Constitution states in part, “Nor shall private property be taken for public use, without just compensation.” This means the government may exercise its police power and take private property for public use but must pay just compensation. It applies to the states via the Fourteenth Amendment.

Here, there is no government action. Diane is not an entity of the government, nor is she employed by or working for the state. Thus, there can be no taking.

Permanent Injunction

An injunction is an equitable remedy that is discretionary by the court. It usually prohibits the defendant from engaging in future harmful conduct. In order for a court to enforce an injunction the legal remedy at law must be inadequate, meaning money damages would not afford the plaintiff proper relief. Also, the plaintiff must have a protected property right, this is a very broad standard. The decree must be feasible to enforce, which poses little problem if a court orders a negative injunction prohibiting a defendant to refrain from a course of conduct. Finally, and most important, a court will balance the hardship to the defendant with the benefit to the plaintiff.

Assuming the court holds that Diane created a nuisance, it may stop her from commandeering her neighbor’s water source if it finds the legal remedy at law is inadequate. Here, the neighbors’ will contend that without water from the stream they will no longer have a water supply. Without such a necessity of life, the plaintiffs’ will be faced with a Hobson’s choice in their current living situation. Diane could argue that another water source to supply the neighbors’ needs would be adequate and that money damages, if any, should be awarded. However, without what seems like the neighbors’ only supply of water, damages would be inadequate. The neighbors’ also have a property right in their land and preventing further construction of the dam and seizure of the water supply could easily be enforced.

The chief concern is the balancing of the hardships. As discussed above, the gravity of the harm (no water to irrigate crops and to fill wells) seems to outweigh the utility (water-sports) of Diane’s conduct. Therefore, since the harm in not having water use is greater than the benefit to Diane, the state court apparently ruled suitably in denying the injunction, subject to any defenses Diane could raise.

Diane’s Defense - Laches

Laches is an equitable defense and is mainly concerned with the effect of the passage of time. Laches bars a party from relief where that party’s unreasonable delay in enforcing a right has prejudiced the opposing party. *Note*: Laches will always be shorter than the statute of limitations.

Here, when Diane started construction of the dam, the plaintiffs' immediately demanded that she stop, but Diane refused. At this point the neighbors' had knowledge of her unwanted conduct. Thereafter, they waited six months until the dam was almost complete to file suit for a permanent injunction asking a court to order Diane to not only stop further building but to remove the dam as well. It seems the neighbors' slept on their rights and waited too long to enforce any equitable remedy they were entitled. Had the neighbors' filed suit immediately when Diane started construction, she would have faced little, if any damage. Now, six months later, the dam is almost complete and Diane is in a worse position than at the time the claim should have been brought. Since the neighbors' delay in bringing suit was unreasonable and it has severely prejudiced Diane's position, the court correctly denied the neighbors' application.

2. Was the federal court's denial of Paul's application for a permanent injunction correct?

The federal court correctly ruled on denying the injunction as the issues and the parties are exactly the same. Also, the federal court must give deference to the state court ruling.

Res Judicata (Claim preclusion)

When a court enters a final judgment on the merits of a suit, res judicata prevents subsequent claims on the same cause of action between the same parties. In order for res judicata to apply the first judgment must have been "on the merits," meaning it was not based on lack of jurisdiction, venue or failure to join an indispensable party. In addition, only parties or their privies are bound. Essentially, anyone who had control over the previous litigation to fully litigate their claim will be affected by the outcome. Strangers are not bound. Res Judicata is a latin term meaning a matter already judged.

Here, Diane's neighbors originally filed an application in state court for a permanent injunction. After a hearing, the state court denied the application on the merits and the neighbors did not appeal the ruling. Thus, the state court entered a final judgment on the merits of this suit. Now, Paul, who was a plaintiff in the earlier state court case, has filed another application for a permanent injunction, which is the same cause of action requesting the same relief as asserted before. Since Paul was the same party and Diane was the same defendant in the original suit based on the same causes of action, claim preclusion applies.

Full Faith and Credit

Under 28 U.S.C. § 1738, judicial proceedings of any State court shall be admitted and shall have the same full faith and credit in every court within the United States as they have from the State from which it was taken.

The fact that Paul and the other neighbors originally filed in state court has the same full faith and credit effect in the present federal court ruling. Thus, the federal court must heed the final judgment from the state court.

Appeal

The fact that the neighbors did not appeal the state court ruling may have no effect. Federal Courts deem judgments final for res judicata purposes when issued. However, should the neighbors appeal the ruling, assuming the time hasn't passed for filing an appeal, and a reversal is upheld, then res judicata will not apply. But, the original ruling came from a state court, not a federal court. In California, a final judgment is not really final until the appeal is completed or the time for appeal has run out. Because the facts do not reveal which state denied the original application, this discussion is unresolved.

3. Did Lawyer commit any ethical violation when she called 911?

Lawyer did not commit any ethical violations when she called 911 as it was reasonable for her to believe Diane (or her property) was in imminent danger of substantial harm.

Confidential Information of a Client (California)

According to § 6068(e) of the California Business and Professions Code, it is the duty of an attorney to maintain inviolate the confidence, and at every peril to herself to preserve the secrets of her client. However, an attorney (member) may, but is **not required** to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

Before revealing confidential information to prevent a criminal act, a member shall, if reasonable under the circumstance, make a good faith effort to persuade the client not to commit the criminal act and inform the client of the member's ability to reveal such information. *California Rules of Professional Conduct* § 3-100. In revealing confidential information, the member's disclosure must be no more than is necessary to prevent the criminal act.

Here, California has a policy favoring the preservation of human life. This makes Lawyer's conduct ethical and not in violation of these rules of professional conduct. On the facts presented, it seems Lawyer reasonably believed disclosure was necessary to prevent death or substantial bodily harm to Diane. Paul's threats were vague but could have been interpreted to a reasonable person that Paul would carry through with them since Paul was infuriated because the water that filled Diane's pond took away from the irrigation of his crops and his drinking well.

As for Lawyer's conduct, she did more than everything required under the rules. First, before she revealed any confidential information, Lawyer made a good faith effort to dissuade Paul not to pursue his planned course of action. This plea fell on deaf ears. Lawyer then told Paul that she had the ability to report his threatening comments. Finally, Lawyer placed an anonymous call and only revealed no more information than necessary, as she stated "someone is on his way to hurt Diane." This way if Paul's threats were empty, no harm would be done to Paul's reputation or his freedom. Her disclosure was only to those who she reasonably believed could act to prevent any harm to Diane, who was unaware of Paul's threat.

Confidentiality Of Information (ABA)

The Model Rules of Professional Conduct § 1.6(b) states a lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a crime that is reasonably certain to result in substantial injury to the property of another. This rule recognizes the overriding value of life and physical integrity.

Here, the model rules are very similar to California, except Lawyer must be reasonably certain that death or substantial bodily harm may occur to Diane. As stated above, Paul's statement and the facts are not precise on Lawyer's beliefs. In addition, under the ABA, Lawyer may reveal information to prevent Paul from "taking care of that dam." His destruction of it would likely result in substantial injury to Diane's property. Therefore, the analysis is really the same under either authority.

For all those reasons, Lawyer firmly did not commit any ethical violations.

This essay was written by Jason Tolerico (One-Timers Personal Bar Review Course ©). If you have any questions or wish to discuss this essay or any others, please feel free to contact me at (949) 500-7627 or jtlaws@gmail.com. It is an open invitation. Any critique, feedback, compliments or additions to this essay are welcome. Your opinion is valued and respected. Thank you. You may also find this essay at www.One-Timers.com

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Answering each call of the question specifically and addressing each issue within it as well as numbering accordingly and making logical coherent arguments supported by the law **9%**

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? **39%**

Private Nuisance
Takings Clause
Permanent Injunction
Diane's Defense - Laches

2. Was the federal court's denial of Paul's application for a permanent injunction correct?

27%

Res Judicata (Claim preclusion)
Full Faith and Credit
Appeal

3. Did Lawyer commit any ethical violation when she called 911? **25%**

Confidential Information of a Client (California)
Confidentiality Of Information (ABA)