

QUESTION 2

Public School District (District) in State X is attempting to reduce gang violence in District's high schools. After consulting with local law enforcement, District has determined that most violence results from confrontations between two gangs, the Westsiders and the Eastsiders. As a result, District has adopted the following rule for all high school students: "No student shall wear any label, insignia, words, colors, signs or symbols that reflect gang-related activities. Students violating the policy will be immediately suspended or expelled from school."

For several years, Paloma, a high school senior, has had a small tattoo of a dove on one wrist, her "self-expression" as a peaceful person. Paloma has never been associated with any gang, including the Westsiders and Eastsiders. After learning of Paloma's tattoo, District officials described it to local law enforcement officials who said that it sounded like a Westsider gang symbol, which includes birds. Paloma was suspended for the last ten days of school after she refused District's request that she either wear long sleeves to cover her tattoo or have it removed.

Paloma, now graduated, and attending the college of her choice, has brought a declaratory relief action challenging the validity of District's policy under the First and Fourteenth Amendments to the United States Constitution. District has moved to dismiss Paloma's lawsuit as moot on two grounds: (A) because she is no longer a high school student, and (B) District has now redefined "gang-related activities" in its rule in a manner consistent with State X's criminal code.

1. What arguments can Paloma make in support of her First and Fourteenth Amendment claims? Discuss.
2. Will either or both of District's arguments in support of its motion to dismiss Paloma's lawsuit be successful? Discuss.

QUESTION 2: SELECTED ANSWER A

First & Fourteenth Amendment Claims

First & Fourteenth Amendments

Paloma (P) is suing District (D) on the grounds that it violated her constitutional rights under the 1st and 14th Amendments. The First Amendment provides that Congress shall make no law abridging the freedoms of speech, press, association, and religion. The First Amendment is applied to the states via the 14th Amendment Due Process Clause (in other words, the First amendment is "incorporated" to apply to the states under the 14th Amendment Due Process Clause). Thus, P must show that her 1st Amendment rights, which apply to D under the 14th Amendment, were violated.

Standing

To bring a constitutional action in federal court, the plaintiff must have standing under Article III (because Article III only grants jx to "cases or controversies"). To show standing, the plaintiff must show: 1) injury in fact; 2) causation; and 3) redressability.

Here, P has suffered injury in fact because she was suspended for the last ten days of school (in other words, she has suffered actual harm as a result of D's policy). Second, P can show causation; the reason that she was suspended was because of D's policy prohibiting gang-related speech. Third, P can show redressability because a favorable court decision would declare the policy invalid and could potentially remove the suspension from her academic record. Thus, P has sufficient standing to bring this action (assuming it is not moot, see arguments below).

Freedom of Speech

P will argue that D's policy violates her freedom of speech under the 1st and 14th Amendments of the US Constitution. As a preliminary matter, speech is broadly defined under the 1st Amendment, and it can include symbolic/expressive conduct that would not be traditionally thought of as speech. Here, P was punished for having a small tattoo as an act of self-expression; the fact that she wore this tattoo as an act of self-expression shows that this is a symbolic/expressive act that counts as speech. P's tattoo constitutes expressive/symbolic speech that implicates the 1st Amendment.

State Action

To show a First Amendment violation, P must first show that there was state action (the Constitution does not apply to private actors, other than the 13th Amendment, which is not at issue here). State action simply means government action (it need not be at the "state" level; it can be local, federal, etc.). Here, P is challenging the actions of D, a public high school district. As a public school district, D is a part of the government and is thus a state actor. This requirement is met.

Vagueness

Laws/policies infringing on the freedom of speech cannot be vague; this requires that the law give fair notice of the prohibited conduct such that a reasonable person would understand what is prohibited by the policy.

Here, P can challenge D's policy on the grounds that it is vague. It prohibits symbols that reflect "gang-related activities," however, it does not define what exactly "gang-related activities" means. D will argue that given the prevalence of the two gangs, W and E, in the community, it would be obvious to a reasonable person what constitutes gang-related activities. However, P can argue that "gang-related activities" is a broad

and unclear term with no set definition, and thus it does not put a reasonable person on notice of what conduct is prohibited--indeed, P had never had any association whatsoever with W or E, yet the symbol tattooed on her arm apparently was enough to get her suspended. P will argue that she was punished simply because her tattoo was a bird and birds are included in W's gang symbols--the phrase "gang-related activity" was insufficient to put her on notice that her own small dove tattoo may be punished. P has a good argument that this regulation was impermissibly vague.

Overbreadth

Similarly, a speech regulation will be struck down if it is overbroad, i.e., it regulates more speech than is necessary. P can also argue that D's regulation is impermissibly overbroad because it purports to broadly prohibit all symbolic speech reflecting "gang-related activities." This could include speech such as P's, which is not gang related in any way, simply because it looks similar to gang-related activity. This regulation could have been drawn more narrowly by clearly defining what constitutes gang-related activity; by allowing D officials to punish any speech that looks remotely gang-related, this regulation goes too far, and P can potentially challenge it as overbroad. D will argue that the rule was drawn as narrowly as possible to only impact gang-related activities but, given that that term is not defined and could be construed very broadly (as it was in P's case), D will have a difficult time proving this law is not overbroad.

Prior Restraint

A prior restraint is an order (such as an injunction or gag order) or a licensing scheme that seeks to prohibit speech before it has occurred. Here, although the regulation punishes speech, it does not appear to be a prior restraint in the way the court has

traditionally defined it (this policy punishes speech after it happens, like most speech related laws). Thus, P cannot challenge this policy on the grounds that it is a prior restraint.

Symbolic Speech

P will argue that D's policy impermissibly regulates expressive speech under the 1st and 14th Amendments. The test is as follows: a regulation will be upheld only if: 1) it serves an important, non-speech related interest; 2) it burdens no more speech than necessary; and 3) the primary aim is not the suppression of speech. The government, D, has the burden of proving this test. Also, as a threshold matter, the government must have the power to create the law--here, the school district has the power to create reasonable regulations on public high school students, so D has the authority to implement such regulations.

Here, D will argue that this regulation passes the symbolic speech test. First, D will argue that it serves an important interest unrelated to speech--here, the purpose of this regulation is to reduce gang violence in public high schools. D will argue that a consultation with law enforcement has revealed that two main gangs, W and E, are responsible for gang violence in the community, and the goal of this regulation is to identify those students who are associated with the gang and may lead to violence. D will argue that there is an important interest here in making sure that children are safe from gang violence while at school. Moreover, D will argue that the primary aim of this law was not the suppression of speech, but rather to ensure the safety of students while at school. D will argue that permitting students to flash gang signs and represent their gangs will disrupt school and lead to violence; the goal of this law is not to suppress

speech, but rather to facilitate public safety. Finally, D will argue that this policy does not burden any more speech than necessary--D will argue that this policy was narrowly drawn to only prohibit symbols/expression involving gang-related activities. D will argue that students can still express themselves in many other ways while at school and that this regulation only burdens gang-related speech; and is thus narrowly tailored and burdens no more speech than necessary. D will also point out that P could have simply worn long sleeve shirts for the final 10 days of her high school career and there would have been no issue (thus, the law is not overly burdensome on student speech because she was not required to remove the tattoo, she simply had to wear certain clothes to cover it up).

On the other hand, P will argue this regulation fails the test. P will argue that D's true aim is not to encourage safety in the school, but rather to suppress any speech it does not like by defining it as gang-related--she will point out that she is a peaceful person who has never been associated with any gang, and yet she was still punished and suspended from school for 10 days. P will argue that even if there is a valid interest in protecting student safety, this regulation burdens more speech than necessary by punishing students who engage in symbolic, expressive speech that is not gang-related, but arguably could be. She will argue that being suspended from school simply because she has a bird tattoo and one of the gangs (W) used bird symbols is a prime example of how this regulation is not narrowly drawn and burdens more speech than necessary---birds are an incredibly common symbol in numerous different contexts (religion, product logos, national symbols, etc.), and construing the ban on gang-related symbols to include all bird-related symbols is going much too far--this will result in the regulation of

far more speech than is necessary to serve the interest of reducing gang violence and protecting students from such gang violence. P will argue that D's policy clearly burdens more speech than necessary by applying to anything that is even remotely gang-related, even if it is simply a bird tattoo that is designed to show "peaceful" self-expression.

On balance, even though D can likely establish an important, non-speech related interest motivating this policy (the safety of students at school and reduction of gang violence), P will likely prevail here by showing that the law burdens more speech than is necessary to protect that interest. P can most likely demonstrate this policy is an unconstitutional regulation of symbolic/expressive speech, and thus the court should strike it down and grant her relief on that basis.

Content-Neutral vs. Content-Based

If the court did not apply the symbolic/expressive speech test set forth above, and instead took a more traditional freedom of speech approach, the court would examine whether the regulation was content-neutral, or content-based. Content-neutral regulations are subject to intermediate scrutiny-like analysis, while content-based regulations receive strict scrutiny.

Here, the regulation is content-based given that it specifically targets gang related expressive conduct/speech (it regulates a particular type of content, not the time/place/manner of the speech's occurrence). Because it is content-based, it must pass strict scrutiny. Strict scrutiny requires that the government show the regulation is the least restrictive means of achieving a compelling government interest. Here, D will argue that it has a compelling interest in the protection of high school students from

gang violence. A court may or may not find this to rise to the level of compelling.

However, even if it is compelling, the policy still fails strict scrutiny because P can show that it is not the least restrictive alternative. Broadly banning all symbols/labels/colors that reflect "gang-related activity" (which is not clearly defined) is not the least restrictive way of preventing gang violence--the school could establish clear guidelines showing what counts as gang-related activity and could establish some sort of review process rather than outright suspending/expelling students. Because the district policy is not the least restrictive means of achieving the goal of reducing gang violence, it would fail strict scrutiny. Thus, P could successfully challenge it as a content-based regulation of speech that fails strict scrutiny.

Unprotected Categories of Speech

There are certain categories of speech that are viewed as unprotected: incitement, fighting words, true threats, and obscenity. Here, D may try to argue this regulation is attempting to regulate speech that falls into one of these categories. However, the problem is that this regulation is broadly drawn to impact all expressive speech related to "gang-related activities." This does not explicitly regulate incitement (words that have a likelihood of inciting imminent lawless activity), fighting words (words that tend to cause an immediate breach of the peace), true threats of violence, or obscenity (sexually explicit material under the 3-part Miller test; not seen here). Although gang-related speech *may* tend to incite violent activity and *may* tend to cause a breach of the peace, a broad regulation prohibiting any gang-related expressive conduct does not qualify as a regulation of a category of unprotected speech, and D could not defend against P's claims on that ground.

Type of Forum: SCHOOL

Additionally, there is an issue raised by the fact that this is a public high school regulating speech within its walls. As SCOTUS held in *Tinker*, public students do not shed their First Amendment freedoms at the schoolhouse gate. Thus, the fact that this speech took place while at school does not give the school district plenary authority to regulate it; it can only regulate speech at school if there is a substantial and material likelihood that the speech will cause disruption to class. Although there is a likelihood that gang-related conduct/speech could cause disturbances at school, there are zero facts to suggest that P's small, peaceful dove tattoo caused a substantial/material disruption to the mission of the school. Thus, even though D was regulating her speech while at school, P can still challenge the constitutionality of that regulation under the 1st and 14th Amendments.

Conclusion

P can likely succeed on a First Amendment freedom of speech claim, either because this fails the test for regulating symbolic speech or because it fails the content-based strict scrutiny test.

Freedom of Association

The First Amendment also guarantees the freedom to associate with groups whom one chooses. Arguably, a regulation prohibiting gang-related speech would violate the freedom to be associated with that gang. P may potentially consider raising a challenge under this provision of the 1st Amendment as well, although she would likely be better served by challenging this on speech grounds since it would likely be difficult to convince a court that high school students should have the right to associate with

gangs, which are often a source of violence/criminal activity in local communities.

Fourteenth Amendment Claims

Additionally, P may be able to argue that this regulation violates her constitutional rights under the 14th Amendment only.

Procedural Due Process

Under the 14th Amendment procedural Due Process Clause, no person shall be deprived of life, liberty, or property without due process of the law. This requires a showing that 1) there was a deprivation of a protected interest, 2) without due process protections (namely, notice and a hearing). When deciding what process is due, the court looks at the nature of the interest affected, the probable value of additional safeguards, and the burden on the government.

The court has recognized that students have a protected interest in public high school education; they cannot be denied the opportunity to attend school without some level of due process protections. Here, the decision to suspend P took place immediately and it does not appear the speech regulation allows for any opportunity of notice and a hearing. Notice and a hearing are generally viewed as the bare minimum for PDP, and here P was provided with neither. P can argue that a hearing would have been helpful because she would have been able to present evidence that shows her tattoo was a peaceful non-gang-related symbol, and that the burden on the school district to have a pre-suspension hearing would be relatively minimal (it would not be too difficult for D to hold a quick hearing in connection with each suspension rather than implementing it immediately). Thus, given that P was not provided with any sort of due process protections and was suspended immediately, she likely can show a PDP violation here.

She may be able to challenge this law on PDP grounds because she was suspended without any sort of due process protections (i.e., notice and a hearing).

Substantive Due Process

Under the 14th Amendment substantive Due Process Clause, the government shall not infringe on individual rights in an arbitrary or irrational manner. If the right is fundamental, strict scrutiny applies; if the right is not fundamental, it is subject to rational basis review. Here, D will argue that there is no fundamental right to attend public school, and thus suspending her from school did not violate her fundamental rights and this action should be viewed under the rational basis test. If the rational basis test is applied, the law will be upheld as long as it is rationally related to a legitimate government interest (here, preventing gang related symbols is rationally related to the interest in preventing gang violence at school; the law will likely be upheld).

On the contrary, P will argue this law infringes on her rights of speech/self-expression while at school, and the First Amendment rights are regarded as fundamental. She will argue that strict scrutiny should apply here, and as set forth above, this policy will fail strict scrutiny because it is not narrowly tailored/least restrictive alternative.

The court could potentially go either way, depending on whether it views this regulation as infringing on the right to go to school (not fundamental) or the right to free speech (fundamental). P would be best served by pursuing the First Amendment claims set forth above, but she could also potentially raise this substantive due process argument.

Equal Protection Clause

The EP clause protects from unconstitutional discrimination. If the law discriminates

based on a suspect class or involves a fundamental right, strict scrutiny applies; if it's not a suspect class, rational basis review applies.

Here, P may argue this law violates EP because it discriminates against students wearing gang-related symbols and students who do not. However, people who belong to gangs are not a protected class, so the law will be subject to RBR (will be struck down; see above). The arguments re whether it involves a fundamental right will be the same as they were for SDP (see above).

The Equal Protection Clause is not the best argument for P to advance. She would be better served by focusing on the First Amendment and procedural due process issues.

D's Arguments in Support of Motion to Dismiss as Moot

D has moved to dismiss P's action as moot. An action is moot when a live controversy under Article III no longer exists. Here, D will argue that this case is moot and there is no more controversy because: 1) P is no longer a student being harmed by the regulation; and 2) the district has redefined "gang-related activities" to be consistent with the criminal code (implying that under this new definition, P would not have been punished).

1. P No Longer HS Student

D argues the case is moot because P is no longer a high school student and thus no longer subject to D's policy. However, P will argue that this falls under an exception to the mootness doctrine: cases capable of repetition yet evading review. The key example of this exception is pregnancy: claims involving pregnancy often evade review because the length of time is short, but because one can get pregnant again, they are

capable of review.

P will argue that such cases will keep arising as more and more students are subjected to this policy (i.e., her type of claim is capable of repetition), and yet because high school only lasts four years and the process of litigation a case often also takes years, it is often that these claims will evade review because students will graduate by the time the claim gets through the court system. D will argue this should not apply because the length of time (4 years) is far longer than something like a pregnancy (9 months), so it is not truly going to evade review (although it unfortunately does for this specific plaintiff, given that she sued so late into her career). Moreover, D will argue that it is not capable of repetition because P will not go to high school again.

On balance, the court will probably side with P and not dismiss it as moot because the claim is capable of repetition (more students will be subjected to the policy in the future and thus will have claims), but evading review (students will graduate before claim is finished because high school only lasts 4 years).

2. Redefined "Gang-Related" Activities

Another exception to the mootness doctrine arises when the defendant voluntarily ceases the offending activity--the case will not be deemed moot simply because the offender has ceased the activity, given that they could always do it again and that would render the case no longer moot.

Here, P will argue that D's voluntary redefining of the term in the policy does not render her action moot because D's voluntary choice to change the policy could always be overturned (it's not as though the state's legislature changed the law; a school district policy can be changed far easier). Here, P will argue that D's voluntary choice to change

the policy does not make her case moot because D could always choose to change the policy back, and thus everyone would be right back in the same situation. A declaratory relief action can help clarify the constitutionality of this policy and will prevent future cases if the district decides to simply change the policy back. Thus, on balance, a court will likely find that P's action is not moot on this ground, because D could always re-define the policy in a manner that is overly broad/unconstitutional.

QUESTION 2: SELECTED ANSWER B

I. ARGUMENTS THAT PALOMA CAN MAKE IN SUPPORT OF HER FIRST AND FOURTEENTH AMENDMENT CLAIMS

Sovereign immunity

Paloma is suing the public school district for declaratory relief challenging the validity of the district's gang-related clothing rule. Under the Eleventh Amendment, a state cannot be sued in state or federal court by a citizen unless certain circumstances exist. A citizen may sue for declarative relief or sue a local government or municipality.

Here, Paloma seems to be seeking a declaratory judgment holding that the District's rule is unconstitutional, thereby abolishing the rule. This type of declaratory judgment does not fall within sovereign immunity protection. Furthermore, Paloma is suing a school district, which likely qualifies as part of a local government or municipality, which can be sued under the Eleventh Amendment. Thus, there is no Eleventh Amendment bar to Paloma's suit.

State action

Only a unit or instrument of government can be sued for violating the Constitution, because private parties not subject to state action cannot violate the Constitution. Here, the District is an instrumentality of the state, seeing as it's a public school, and can be sued for unconstitutional actions. Thus, Paloma may sue the District for constitutional violations.

Standing

An individual only has standing to sue when there is an injury in fact, causation, and

redressability. Here, Paloma has suffered an injury by being suspended from school for violating the District's policy, the injury was caused by the District enacting and enforcing its policy, and the injury is redressable if a court awards declaratory relief to Paloma because she may be able to get damages based on the District's action or ensure that the rule is not enforced for future students. Thus, Paloma has standing to sue.

Ripeness and Mootness

As will be analyzed further below, the issue of the constitutionality of the District's policy is ripe because Paloma suffered an injury from it and the policy is still in effect. The issue is not moot because it will be a continuing harm that can be redressed for future students and for Paloma's incurred injury, even though Paloma is no longer a high school student. Thus, the requirements of ripeness and mootness are satisfied.

1. FIRST AMENDMENT CLAIMS

The First Amendment prohibits the government from limiting an individual's freedom of expression in most cases. There are a variety of First Amendment grounds upon which Paloma could challenge the District's policy. If a court finds that Paloma succeeds on any of these grounds, then the District's policy constitutes an unconstitutional violation of the First Amendment.

Symbolic Speech

Symbolic speech, such as freedom of expression when doing an action (i.e., flag burning) is protected by the First Amendment. The speech at issue in this case is Paloma's dove tattoo, which isn't written or spoken speech, but qualifies as symbolic

speech because it is her "self-expression" as a peaceful person. The government (here, the District as a public school) may only regulate symbolic speech if the regulation is narrowly tailored, related to a significant government interest, and not primarily concerned with the suppression of symbolic speech.

Narrowly tailored

A regulation is narrowly tailored when it is not too restrictive and targets the conduct at issue.

The District's policy prohibits all students from wearing any "label, insignia, words, colors, etc... that reflect gang-related activities." This is very broadly tailored to basically encompass all forms of bodily expression, including clothing and tattoos, that bear any relation to a gang. The District could have narrowly tailored this policy by providing specific restrictions, such as prohibiting an exact bird gang sign or finding the actual signs used by the Westsiders and Eastsiders and banning the use of those signs. Instead, the District enacted a broad rule that covers almost everything on a student's body, and which can be related to "gangs" in general, not even mentioning the Westsiders and Eastsiders. Additionally, the restriction provides a broad and harsh punishment that is not narrowly tailored to fit any violation of the restriction.

Thus, the restriction here is not narrowly tailored.

Related to a significant government interest

In addition to being narrowly tailored, the restriction on symbolic speech must be related to a significant government interest. Here, the District has a significant interest in reducing gang violence in schools. The District has consulted with local law

enforcement to determine that the most violence results from gang confrontations between the Westsiders and Eastsiders. The District, in overseeing public schools, has a significant interest in fostering a safe learning environment without violence so that students can learn peacefully and be shielded from the gangs and violence beyond the school. Thus, the District has a significant government interest in reducing gang violence and this interest is related to the District's policy prohibiting students from wearing labels that reflect gang-related activities.

Suppression of symbolic speech

To be valid, a restriction on symbolic speech must not be primarily enacted to suppress that speech or have that effect. Here, the District will argue that its purpose in enacting the policy is to suppress gang violence and reduce the violence in the District's high schools, not ban students from having dove tattoos and engaging in self-expression of their peacefulness. However, Paloma will argue that the District's failure to narrowly tailor its policy effectively results in the suppression of symbolic speech, as any symbolic speech that bears a relation to gang-activity in general will constitute a violation of the District's policy and open the student to a harsh punishment.

Thus, the lack of narrow tailoring in the District's policy leads to an unjustifiable suppression of symbolic speech, even though the policy is related to a significant government interest. Thus, the District's policy is unconstitutional as a suppression of symbolic speech.

Time, Place, or Manner Restriction

If the court does not accept Paloma's argument that the District's policy unconstitutionally suppresses symbolic speech, Paloma can argue that the policy is an

unconstitutional time, place, or manner restriction. These restrictions apply to the government's limitation of speech in traditional public forums or designated public forums and enable the government to place restrictions on the time, place, or manner of speech so long as the restriction is content-neutral.

A content-neutral restriction does not regulate the content of speech, and to be valid as a time, place, or manner restriction, it must be narrowly tailored to serve a significant governmental interest and leave alternative avenues of communication available. A content-based restriction is subject to strict scrutiny and must be necessary for a compelling governmental interest and narrowly tailored to that interest.

Paloma may try to argue that her high school is a traditional public forum whereby students can engage in free speech. A court may not accept this characterization, but if it does, then Paloma can argue that the District's policy is an invalid time, place, or manner restriction that regulates students' speech during the time they are at school.

Content-based

A content-based regulation prohibits some speech on the basis of its content and is subject to strict scrutiny. Here, Paloma will argue that the District's policy is a content-based one because it prohibits expression related to gang activities, so it regulates the content of gangs.

Under strict scrutiny, the regulation must be necessary for a compelling governmental interest and narrowly tailored to that interest. The burden is on the District (the governmental unit) to prove these elements. The District will argue that it has a compelling governmental interest in reducing gang violence in high schools, for reasons of student safety and school functioning outlined above. The District will argue that the

regulation is narrowly tailored because it only regulates expression related to gang activities, and only while the student is in school. The District will argue that gang signs are changing and numerous, and the District or law enforcement officers may not have all the information on what constitutes a gang sign, so it is necessary to restrict students from having anything that might be related to gang activities in order to discourage students from aligning with their gangs in school or breaking out in fights upon seeing the sign of a rival gang and disrupting school operations and student safety. The District will thus argue that its policy is necessary due to the problem of gang violence in its high schools and the difficulty of nailing down who exactly is a gang member and what constitutes a gang sign, and thus that its policy passes strict scrutiny.

However, as analyzed above, Paloma will argue that the policy is not narrowly tailored because it prohibits basically any expression related to a gang activity without defining these terms and comes with a harsh punishment. Even if the policy is necessary for a compelling governmental interest, Paloma has a good argument that it is not narrowly tailored, and thus the regulation will likely fail strict scrutiny.

Content-neutral

The elements of being narrowly tailored to a significant governmental interest have already been analyzed above under the symbolic speech analysis. The additional element here is that there are alternative avenues of communication available. The District will argue that its policy only applies in schools, and that students are free to wear gang insignia outside of school so there are alternative avenues of communication. However, Paloma will argue that the District is requiring students to remove things like tattoos, which are not temporary and cannot be banned in school

while existing outside of school. Even though the District gave Paloma the option of covering up her tattoo, it confines her to only being able to show the tattoo outside of school which may be impossible if she has strict family that will not let her show the tattoo. Additionally, students often spend much of their day in school and there are not many alternative avenues of communication outside of school for students who go to school and then return home.

Thus, even if classified as a content-neutral time, place, and manner restriction, the District's policy will likely fail, primarily because it is not narrowly tailored.

Nonpublic forum

The government has more freedom to restrict speech in nonpublic forums, such as prison. In these forums, a restriction on speech is valid so long as it is viewpoint neutral and related to a significant government interest. The District will argue that a school is a nonpublic forum and should be subject to this analysis, instead of being classified as a traditional or designated public forum and subject to strict scrutiny or the time, place, and manner analysis.

If a court accepts the District's classification of a school as a nonpublic forum, then the restriction is valid if viewpoint-neutral and related to a significant governmental interest.

The significant governmental interest has been analyzed above in the suppression of symbolic speech point. The District may argue that the policy is viewpoint-neutral because even though it bans content-based speech on the subject of gangs, it does not take a viewpoint stance on gangs. Rather, the language of expression that reflects "gang-related activities" can cover viewpoints that are supportive of gangs, as well as viewpoints that are opposed to gangs, as long as the viewpoint is related to gangs.

Thus, the District likely has the best chance of convincing the court that its policy is constitutional if it argues that a public high school is a nonpublic forum and subject to that analysis.

Vagueness

A restriction on speech is unconstitutional if it is too vague. The District's policy that "no student shall wear any label, insignia, words, colors, signs... that reflect gang-related activities" is likely much too vague and unconstitutional for vagueness. This is because the policy basically prohibits any form of clothing, tattoo, paint, or anything that a student can wear, possibly extending even to backpacks and items that touch a student --essentially any item, so there is no limitation or definition on what constitutes a banned item. Furthermore, the term "gang-related activities" is much too broad and not defined at all. As analyzed above, this term encompasses both viewpoints supportive and dismissive of gangs, and can encompass any gang, not just the Westsiders or Eastsiders. It could conceivably encompass a fictional gang, a gang in another city that causes no harm in the District's schools, or symbols that have a non-gang meaning and possibly a gang meaning, such as Paloma's tattoo. The lack of definition makes the policy too vague and almost absurd because it has no limit, essentially.

Thus, the policy is very likely to be void for vagueness.

Overbreadth

A restriction on speech is unconstitutional if it is overbroad and encompasses too much protected speech. As analyzed above, the District's policy is not narrowly tailored, to the point of being overbroad because it encompasses too many items, and "gang-related activities" is not defined to the point where it can be broadly interpreted to encompass

symbolic speech such as Paloma's tattoo. Thus, the District's policy is likely to be void for overbreadth.

2. FOURTEENTH AMENDMENT CLAIMS

The Fourteenth Amendment applies to the states and contains the Equal Protection Clause as well as the Due Process Clause.

Equal Protection Clause

Under the Equal Protection Clause, all individuals must be treated equally without discrimination. A restriction is subject to strict scrutiny if it discriminates on the basis of a suspect class such as race or national origin, subject to intermediate scrutiny if it involves gender or legitimacy, and subject to rational basis review for everything else.

Here, Paloma will likely argue that the District's policy violates the Equal Protection Clause because it discriminates on the basis of gang members or those who may be gang members. Gang members are not a suspect class, so the policy would be subject to rational basis review under which the challenger must show that the policy is not rationally related to a legitimate governmental interest. As analyzed above, the District has a legitimate interest in reducing gang violence in its high schools.

Paloma will argue that there is no rational relationship between the District's policy prohibiting gang-related symbolic expression and the District's interest in reducing gang violence. However, this argument will likely fail because it is conceivable and likely that the District's prohibition on gang-related symbolic expression will make it harder for gang members to identify each other at school and get into disputes, so there is a rational relationship here. Thus, Paloma's Equal Protection Clause challenge will likely

fail because the policy satisfies rational basis review.

Due Process Clause

Under the Due Process Clause, a person may not be deprived of life, liberty, or property without due process. This clause comes from the Fifth Amendment but is applied to the states through the Fourteenth Amendment. Paloma will argue that her procedural due process and substantive due process rights have been violated by the District's policy.

Procedural due process

Procedural due process guarantees protective procedures such as notice and hearing when an individual is deprived of life, liberty, or property.

Life, liberty, property interest

Paloma will argue that she has a liberty interest in wearing what she wants at school, or a property interest in her body such that the school cannot make her cover up her tattoo or remove it. Paloma can further argue that she has a liberty interest in going to school and cannot be immediately suspended or expelled without an opportunity for notice and hearing. Here, Paloma was immediately suspended for ten days when she refused to cover up or remove her tattoo. A court will likely find that Paloma's liberty and/or property interest was implicated here.

Notice and hearing

A court weighs many factors in deciding what process is due. The main issue is Paloma's suspension, seemingly without notice or a hearing. It is unclear when the District enacted the policy or how much notice Paloma had, especially considering she had her dove tattoo for years without issue. More facts are needed here, but if the

District did not broadcast its policy and adequately inform students, then it is likely that Paloma did not have notice. Furthermore, due to the vagueness and overbreadth of the policy, it's likely that, even if Paloma knew about it, she did not know that it could apply to her dove tattoo due to the lack of definitions or examples in the policy.

Thus, Paloma likely lacked notice of the policy and was likely entitled to a hearing of whether she should have been suspended, especially considering she was not a gang member and she lost out on the last few days of her high school experience.

Substantive due process

Substantive due process applies when the government prohibition at issue impacts an individual's fundamental right, such as the right to travel, vote, or have privacy. Here, Paloma will argue that her right to privacy was intruded on when the District tried to make her cover up or remove her tattoo.

Right to privacy

An individual has a right to privacy, including a right to what they wear on their body.

This is a fundamental right that is subject to strict scrutiny. If the court finds that Paloma had a valid privacy right in her tattoo and her choice of how to display it, then the District has to pass the strict scrutiny standard. This standard is the same for purposes of due process and the Equal Protection Clause, so the strict scrutiny analysis above will apply to Paloma's right of privacy. Even if the court finds that Paloma doesn't have a right to privacy here, and that any right is only subject to rational basis review, that analysis has also been done above and will apply here.

Conclusion

Paloma can make all the above arguments in support of her First and Fourteenth Amendment claims, but her strongest argument is that the policy is unconstitutional due to vagueness and overbreadth.

II. WILL EITHER OR BOTH OF DISTRICT'S ARGUMENTS IN SUPPORT OF ITS MOTION TO DISMISS PALOMA'S LAWSUIT BE SUCCESSFUL

The District can dismiss Paloma's lawsuit in the first instance if it can show that Paloma does not have standing to bring the suit. A lack of standing will cause the court to dismiss the lawsuit. The District will argue that Paloma's lawsuit is moot, meaning that the injury has passed and there is no current or continuing harm to sue on.

1. Mootness--Paloma is no longer a high school student

A claim is moot if the injury has passed and is not capable of repetition. But, as in abortion standing cases, mootness will not bar a suit when the injury is one that eludes judicial review because it passes before a court has time to hear and decide the issue.

The District will argue that Paloma's injury has passed because it occurred when she was in high school and she is now in college, so the lawsuit is now moot because Paloma will never again be subject to the District's policy for high school students.

However, Paloma can argue that when the harm occurred in high school, she was not able to sue for some reason, or that the harm is one that will likely repeat itself for future high school students in the District. Paloma can likely successfully argue that the brevity of her high school experience (this injury occurred during the last days of senior year) is similar to the abortion-standing in that the harm eluded judicial review, but is capable of repetition. Paloma will likely prevail on this point given that the District's policy still exists.

2. Mootness--District has redefined "gang-related activities" in a manner consistent with State X's criminal code

A court may still hear a case even if the offending party has stopped its criminal conduct or reformed its conduct. This is because there is no guarantee that the criminal or otherwise prohibited conduct will not continue because the offending party may merely be pretending to conform to avoid judicial review or has the discretion to repeat the offensive conduct in the future in the absence of an injunction or a judicial determination that the conduct is unconstitutional.

Here, the District may not argue mootness merely because it has redefined "gang-related activities" to be consistent with State X's criminal code. First, there is no guarantee that the District will adhere to this definition or not change the definition in the future, thus repeating the harm that Paloma is suing upon. Second, it is unclear whether its redefinition is constitutional because it may not be enough to redefine the term in accordance with a criminal code that itself may be unconstitutional. Third, the redefinition of gang-related activities does not solve the other parts of the policy that may be unconstitutional, namely the vagueness and overbreadth in what items of clothing/tattoos/etc. are covered under the policy, and the harshness of the immediate suspension or expulsion without any procedural protections in place.

Thus, both of the District's mootness arguments will likely fail, and the case will proceed.

QUESTION 3

Clint hired Linda, a lawyer, to represent him in a personal injury lawsuit against Dan, the driver of the car that collided with Clint's car, thereby causing him serious bodily injury. Clint could not afford to pay Linda, so Linda told Clint not to worry about paying anything until there is a recovery in the case. Linda told Clint that if a recovery is obtained, Linda would take 50% as her attorney fee and Clint will get the other half, less any costs Linda incurred. Clint orally agreed to this fee arrangement.

Dan's insurance company, Acme Insurance (Acme), emailed Linda before Linda completed any substantive work on the case, and offered to settle the matter for \$100,000. Linda was thrilled and replied to the email that she accepted the settlement offer. Linda then told Clint about the settlement. Clint was relieved that the case settled so quickly.

Acme delivered a check for \$100,000 payable to Linda, who deposited it into her law firm's business account. Linda then wrote a check from that account to Clint for \$50,000, minus her costs, and mailed it to him. Upon receipt of the check, Clint complained about Linda's fee and threatened to sue Linda for malpractice and report her to the State Bar. Linda offered to return \$10,000 of the fee in exchange for an agreement releasing Linda from all liability associated with the representation. Clint accepted and executed the release.

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

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Formation of Client Relationship

Formation

A lawyer-client relationship is formed when the client reasonably believes that the relationship has been formed. Here, Clint (C) asked Linda (L) to represent him, and L agreed. At this point, C would reasonably believe that L was his lawyer so a lawyer-client relationship had been formed.

Duty of Competence

A lawyer should not accept representation of a client unless they are competent to perform the duties or can reasonably become competent through preparation. Here, there is no evidence that L has experience doing anything to do with personal injury law. If she did not have personal injury experience, then she either needed to ensure that she could adequately represent C through adequate preparation, or associate with a competent lawyer with C's permission, or decline the representation. Because there is not enough information to determine if L was competent to accept representation, there is no clear violation here.

Conflicts of interest

A lawyer also must ensure that they have no conflicts of interest that would prevent them from providing competent and diligent representation to the client before accepting or continuing representation. This could be due to personal conflicts or current, former, or prospective client conflicts. Here, there is no evidence of conflicts of interest, so there is no violation.

Working with an indigent client

A lawyer may waive fees for an indigent client and may advance reasonable expenses for litigation. If the client is in fact indigent, then the client does not need to pay the lawyer back. If the client is not indigent, then there must be arrangements for the client to repay the lawyer for the advanced costs. Here, it states that C cannot afford to pay L so there is some indication that he may be indigent. Therefore, L could ethically advance only the legal costs and is not obligated to force C to repay her for those if he is in fact indigent. Otherwise, C must repay her.

Contingency Fee Agreement

A lawyer is permitted to work for a contingency fee in most cases. The exceptions are when there is defense of a defendant in a criminal case or when the lawyer is working on a divorce or divorce settlement case and the contingency fee is based on obtaining a divorce or the amount of settlement. Here this is not the case, so L is able to agree to a contingency fee.

Writing Requirement

Under both the ABA and CA rules, all contingency fee agreement must be in writing.

For the ABA, the agreement must be: (1) signed by the client; (2) include the allocation of expenses; and (3) outline the scope of the representation. Under CA, the agreement must: (1) be signed by both the client *and the lawyer* and a copy must be given to the client; (2) include allocation of expenses; and (3) outline the scope of performance.

Here, L did not comply with the ABA or CA requirements. This is a contingency fee arrangement because it is based on a percentage of the outcome of the case. However,

it is not in writing, it is not signed by anyone, and C never got a copy. C and L merely agreed orally to the arrangement. L did state that it would be "less any costs," but this was not an exact definition of what costs C should be expected to pay and what costs L will pay as is required. It also did not dictate when this would be paid, nor did it state the scope of their relationship.

Therefore, L violated her ethical duties through making this oral agreement with C for a contingency agreement.

Fee must be reasonable / not unconscionable

Any time a lawyer represents a client, the fee must be reasonable (ABA) and not unconscionable (CA). Under the ABA, the reasonableness of the fee is determined by the complexity of the case, the preclusion of other employment, the expertise and reputation of the lawyer, the actual outcome achieved, structure of the fee (fixed v. contingent), and community standards for these kinds of cases.

Characteristics of the case

Here, this is a very easy case of a personal injury suit negotiating with an insurance company. L did not have to give up any other employment as she ended up doing no real work on the case. She also was likely not expecting to give up substantial work as this is a one-off personal injury case, so it was unlikely to lead to wide reaching conflicts of interest. While this case may have taken some work, it was not likely to dominate her entire practice and preclude her from taking on other jobs. This kind of case requires some expertise, but not extensive as it seems like it is a standard accident personal injury negligence case and there is also no information on L's reputation in the field.

L's Actual Work, Fee structure, and Community Standards

Her actual outcome was good for C as it was a fast and efficient resolution getting him a large settlement, but that was not actually due to anything that she did, but rather her just accepting a settlement so this does not deserve such a large fee. This is a contingent fee agreement, which does inherently come with more risk for the lawyer. Therefore, in general, it is reasonable for the fee on contingency to end up being higher than a fixed fee as the lawyer takes on more risk when structuring the agreement this way. However, it is not justifiable to have a fee that is grossly disproportionate to the amount of work done. Contingency fees also must still be reasonable on community standards. There is no information about the kind of fee normally charged, but, in general, contingency fees tend to be 20-30% of the settlement, not 50% plus fees. Here, L is getting \$50,000 plus costs for doing no substantive work at all on the case other than accepting an unauthorized agreement for settlement. This fee is grossly disproportionate to the services that she rendered to the client and would imply an outrageous hourly rate of about \$100,000, assuming she even did 30 minutes of work total on the case. Therefore, this fee seems unreasonable.

CA's Unconscionably also looks to the negotiation process

Under CA, most of the above elements are also considered. CA does not expressly look at the community standard for fees, but they do take into account the complexity, time/skill, reputation of lawyer, structure of the fee, and preclusion of other employment when considering the fee. In addition, they add several more requirements to these by looking at the time when the agreement was made. This includes elements such as if the lawyer committed fraud or misrepresentation in making the agreement, the relative

sophistication between lawyer and client and the existence of a preexisting relationship. Here, this fee was also likely unconscionable. L had a duty to memorialize this agreement in writing and get C to sign it, but she did not. Instead, she spoke it orally when C was likely desperate for a lawyer. Therefore, the instance of negotiating this fee was unethical on L's part. Additionally, there is likely a large discrepancy in the sophistication of the parties because C was a potentially indigent client who could not pay. He is seeking a lawyer because of a personal injury suit, not a business relationship, which indicates that he may have no prior experience with the law. Therefore, there is a substantial power imbalance here that makes the negotiation and agreement to the fee unconscionable as well as the rest of the factors described above. Therefore, the fee is unconscionable as well and L violated both her duties under ABA and CA.

C has option to void, and L would get reasonable fee

Because the writing requirement for a contingency fee was not met, C would have the option to void the contingency fee contract. In this instance L would get a reasonable fee, which would be substantially less than \$50,000.

Agreement to settle

Duty to communicate settlement offers

A lawyer has a duty under the ABA to communicate all settlement offers. Under CA, the lawyer in a civil case has a duty to communicate all written settlement offers and all oral significant settlement offers. Here, this is a written settlement offer being made by Acme (A) to settle the claim. This means that under both ABA and CA, L had a duty to

communicate this settlement offer to C. She failed to communicate this offer to him prior to accepting the deal. This was a violation of her ethical obligations under both ABA and CA.

Client's decision to accept settlement offers

The clients and lawyers have different spheres within the representation. The lawyer has control to make decisions regarding the strategy of the case, but the client has complete authority to make all decisions that are substantively related to the rights under the case, such as acceptance of settlement offers, plea deals, or demand for a jury trial. Here, it was only within C's power to accept the settlement offer. L was not permitted to accept the settlement offer without express authority from C. If C had given her express authority to accept any settlement above \$90,000, then L's acceptance would have not been unethical, but here there was no such agreement beforehand. Therefore, L violated her ethical duties by accepting this agreement.

L may argue that C was happy with the settlement and was not harmed by this.

However, a client need not be harmed for an ethical violation to occur. Therefore, L has still violated her ethical duties and should still be punished accordingly.

Duty of Competence

A lawyer has a duty of competence to their client, which means that the lawyer must act with the required knowledge, skill, thoroughness, and preparation of a reasonable lawyer to provide services to the client. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide competent representation to a client. The standard of competence for CA is similar, requiring knowledge and skill as well as the appropriate physical and emotional state to serve the

client.

Here, L likely breached her duty of competence to her client. She failed to take any investigation or preparation to uncover if the \$100,000 settlement offer was in fact in the best interest of her client. She took no action to understand similar claims, what her client's claim may be worth if they went to trial, or what the chances of success on the merits would have been. By accepting the settlement offer without making any effort to properly investigate the claim or the potential alternatives that C would have if he did not accept it, L breached her duty of competence.

Duty of Diligence

A lawyer has a duty of diligence to their client, which means that the lawyer must act with the reasonable promptness to provide services, managing their workload to ensure that they can see the matter through to the end. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation to a client. Here, L could have also been said to have violated her duty of diligence by quickly accepting the settlement offer and cutting short the chance to fully explore all the options. However, she did respond quickly and take prompt action, which is also required under the duty of diligence. Therefore, this violation is less clear.

Duty of Loyalty

The lawyer also owes a duty of loyalty to act in the best interest of their client. A lawyer need not press for every possible advantage for the client, but they must reasonably act to serve the best interest of their client and not act in a self-serving manner that undermines the best interest of the client.

Here, L violated her duty of loyalty by accepting the settlement offer without making reasonable investigations into the true value of the claim. L was acting in her own best interest when she did this because she was going to make \$50,000 for doing no work. However, she clearly did not adequately consider the client's best interest as she had completed no substantive work yet on the case. Therefore, it was not possible for her to reasonably know if accepting the settlement offer would be in C's best interest. As a result, it was a violation of the duty of loyalty to accept this settlement (regardless of the issues with lack of client consent) without proper investigation.

Receiving settlement check

Client Trust Account and Commingling Client Funds

When a lawyer receives client funds, they must keep that money in a separate client trust account. A lawyer is strictly prohibited from commingling the client funds with the lawyer's personal assets or firm's assets.

Here, L violated her duty to keep the client funds separate. She took the \$100,000 check that was given to her from A as the settlement and deposited the check into her law firm's business account. This meant that she commingled C's settlement with the rest of the firm's assets. This is strictly prohibited and is a violation of both ABA and CA rules.

Disputed amount

L then sent C the amount that she believed that he was entitled to under their agreement by mailing him a check for \$50,000 less fees. L was right to promptly deliver the client their funds from a settlement. A lawyer has a duty to hold client property and

promptly distribute all client settlements to the client once the settlement is complete. Therefore, this action itself was not a violation.

However, once there became a dispute with the funds L was obligated to continue to hold the rest of the fee, or any disputed amount if not all the amount is disputed, in the client trust account until the matter was resolved. Here, L never had a client trust account which was a violation, as explained above. Now that there is a dispute, it continues to be a violation as L is required to hold all disputed funds in the client trust account. Only funds that she has a clear legal and undisputed right to can be deposited into her own account. Here, she deposited the funds in her own account prematurely and this is a violation.

Settling claims of malpractice

A lawyer under CA rules is strictly prohibited from making agreements to prospectively limit their malpractice liability. Under the ABA, a lawyer is permitted to do this only if the client is represented by independent counsel when they make this release. Here, under both rules, L would have violated as C was not represented by counsel.

Here, L is negotiating after C has threatened her to sue for malpractice. Therefore, this should be analyzed as a settlement offer for malpractice rather than a prospective release.

Written Release and Representation by independent counsel

Here, when negotiating settlements of malpractice liability, the client should be advised and given an opportunity to seek external counsel. This makes the negotiation process substantially more fair and will allow the client the best chance to protect their own

interest. Here, L never told C that he should seek independent counsel, nor did she give him an opportunity to do so.

L and C only negotiated orally on the release after C threatened to sue. L offered to return him \$10,000 of the settlement that she had withheld in exchange for him not suing. While under contract law, this likely would be an enforceable contract. This is also unethical because this was purely an oral conversation in which C had no counsel. Additionally, C did have a reasonable claim and could have voided the entire agreement. This was an option that C was not aware of because he was not advised of his rights. Therefore, L violated her duty of loyalty to C in this situation as well by failing to provide him with an adequate warning and opportunity to seek counsel.

QUESTION 3: SELECTED ANSWER B

Fee Agreements

Under the California rules (CA), a written fee agreement is required if fees will likely exceed \$1,000. It must be signed by the client and attorney, and the client must get a copy. It must explain the basis of the fee. Under the ABA Model Rules (MR), a writing is not always required except for contingency fees. Under both rules, cases on a contingency fee basis always require a writing. In CA and the MR, fees must be reasonable. Under CA rules, they must not be unconscionable.

Even if this were not a contingency fee case, the fact that the agreement was oral, not written, would violate the California rules. Were it not contingent, the lack of a written agreement would be acceptable under the MR, though that is not the case here.

Reasonable Fee

Fees must be reasonable, and this is evaluated on factors including the skill of the attorney, the time the matter will take, the matter's complexity, the amount to which the work will preclude other employment, and the standard fees generally charged in related matters and circumstances. In California, the prohibition on unconscionable fees also looks to the relative sophistication of the parties in negotiation.

50% of a client's recovery in a case is very high for a personal injury contingency fee.

Contingency fees are generally around 30%, so this is significantly higher and could be viewed as unreasonable.

Clint is likely not a sophisticated negotiator regarding personal injury representation.

There's no indication he has prior experience seeking legal services, nor that he works

in a related field. This made him lack knowledge about negotiating the fee and could suggest procedural unconscionability. Clint also said he is unable to pay for a lawyer, so is in a disadvantageous financial position, giving him less power in negotiating a fee. Due to his inability to pay, he may think that he is unable to afford a lawyer at all, and this offer may seem generous to him, or at least, the only offer he is able to get.

The fact that C was surprised at how low his cut of the settlement amount was also indicates that he was not provided with information on how the fees and costs would be allocated--another ethical issue.

Contingency Fee Agreements

Under both the CA and MR, a contingency fee requires a written fee agreement. Under the MR, this requires a writing signed by the client indicating the basis of the fee and the extent to which the client will be responsible for costs at the end of the case. The CA rules are more stringent and require the agreement, again, to be signed by both the client and the attorney. They require noting the basis of calculation of the fee, the extent to which the client is responsible for costs in the outcomes of the case, and a statement that the fee is negotiable, if it is not a medical malpractice case.

When C told L he didn't have money for an attorney, L told C not to worry about payment and that instead she could provide legal services where she took 50% of the ultimate recovery. This is a contingency fee agreement and, under MR and CA rules, requires a writing signed by the client (MR and CA) and, in CA, also the attorney. There was no writing here, as C orally agreed to the terms.

There is no indication C knew the fee was negotiable, which would violate CA rules.

L told C she would take 50% as well as "any costs" she incurred. This is likely insufficient information to meet the requirements that the agreement specify his responsibility for costs. It doesn't indicate what types of costs that could include, and whether and to what extent he would be responsible for them in the case that he did not prevail. This would likely violate CA and MR rules.

CA also requires an explanation of how fees are calculated. L would say that noting the 50% split is sufficiently specific. However, this doesn't make any explanation of costs of litigation, which may be insufficient. She merely told him to "not worry about it," which is vague, providing no basis or explanation.

Advancing Costs of Litigation to Clients

An attorney may not give money to clients, however under CA and MR, an attorney may advance litigation costs so long as the client must repay those at the end of litigation.

L did not pay C but did front litigation costs as under their agreement she would pay for any costs and then recoup them from the ultimate recovery amount at the end of the case. This was permissible.

Scope of Employment

In an attorney-client relationship, the client has control over setting the goals of the case, while the attorney can make strategic decisions. The client controls aspects of the representation such as whether to waive a jury trial, testify in a criminal case, or accept settlement offers among others.

D's insurance company emailed L with a settlement offer for \$100,000. L accepted it without D's consent. This violated her duty as that was D's choice, not L's.

L would argue that D was relieved when he heard of the settlement, so there was no issue, but that does not absolve her of her violation.

Communicating Settlement Offers

A lawyer has a duty to communicate with the client, keeping them reasonably apprised of the status of the case. In the model rules, the lawyer must communicate all settlement offers to a client. In CA, the lawyer must communicate all written offers as well as any oral offers that are a significant advancement in the case.

Dan's insurance company emailed Linda with a settlement offer. She did not communicate it to Dan before accepting it. This violated the CA and MR rules as it was both written and a significant advancement in the case.

L would argue that D didn't object to the settlement as he was "relieved" it settled so quickly. However, this doesn't cure her ethical violation. Dan did object later once he came to understand how little he would recover (again indicating the issue of fee reasonableness discussed above). Also, harm to the client is not required for an attorney to be in violation of ethical duties.

Duty of Competence

Under MR and CA rules, a lawyer has a duty of competence and must have the requisite skill, knowledge, training, and preparation to represent the client. In CA, an attorney may not repeatedly, recklessly, or grossly negligently fail to provide competent representation. If a lawyer is not competent in an area, they may accept representation if they are able to educate themselves on the matter enough to become competent in a timely manner, seek assistance from another attorney who is competent in the area, or

in an emergency.

Here, L didn't set an appropriate fee agreement, which arguably shows a lack of knowledge regarding how to proceed in a personal injury case on a contingency fee basis. She also accepted a settlement offer without asking for C's permission, also arguably demonstrating a lack of competence as a client advocate.

There is no indication whether L has experience in personal injury cases, or whether this was an area she was unfamiliar with. Her overall conduct indicates lack of competence which may suggest this wasn't her usual area of practice; if so, she should have not taken the case, done additional preparation, or retained co-counsel to assist. This situation was also not an emergency.

L didn't do any substantive work on the case before accepting a settlement offer, also indicating lack of preparation and skill in negotiating and advocating for a client. L likely violated her duty of competence.

Duty of Diligence

Per the MR and CA rules, a lawyer has a duty represent the client diligently, including keeping the client reasonably apprised of updates in the case, pursuing a matter to completion, meeting all filing deadlines, and managing workload.

L had not done any substantive work on the case when she received and accepted the settlement offer. This is clearly a lack of diligence as she did no work on the case. Had she done work on it, she would have had the knowledge about the extent of his injuries, applicable law, and comparable amounts of recovery at trial or by settlement in comparable cases. As it stands, she has seemingly no basis for determining whether

this was a reasonable settlement offer in the circumstances (this overlaps with the competence issue). It also violates this duty in that she did not keep her client updated on a serious development in the case.

As noted above, the duty of diligence also includes the duty to keep clients reasonably updated on their case. Here, L only informed him after she accepted the offer. Based on C's surprise at how little he received, it seems that her explanation of the situation to him did not in fact provide him with a reasonable amount of information, suggesting failure to adequately communicate regarding substantive information as well as timing.

Client Trust Account

An attorney may not mingle their assets and a client's assets under the CA and MR. A lawyer must keep all a client's money in a separate client trust account. An attorney may only move money out of the trust account into their account once they have earned the fees.

Here, A gave L a \$100,000 check and she put it in her firm's business account. She did not put it in a client trust account. She mingled this with her assets. After depositing the money in her account, she then wrote a check to C for \$50,000 minus costs.

She would argue that she paid C in a timely manner, but that is not sufficient to meet the requirements of either the MR or CA rules.

Disbursement of Disputed Fees

When there is a dispute about the fees owed to an attorney or payment due to a client, the attorney must immediately pay the client all money that is not disputed as theirs and maintain the rest in the trust account until the matter is settled.

D disputed that the amount L took as costs deducted from the check was not acceptable, complaining about it and threatening to sue her. At that point, L should have maintained the disputed amount of money in a trust account until the issue of fees was resolved. But she did not, as she had the money in her firm account and kept it there.

Settlement of Malpractice Claims

Under the CA and MR, an attorney may not settle a malpractice case with a client before advising the client to seek independent legal counsel and giving them an opportunity to do so.

C threatened to sue L for malpractice and report her to the State Bar. L offered him \$10,000 to settle the malpractice allegation as well as all liability with the representation. L did not advise C to seek independent counsel, nor gave him the opportunity to do so. C accepted the money and executed the release without having the opportunity to seek counsel. L violated her ethical duties here.