QUESTION 5

Claire met with Len, a personal injury lawyer, in his office and told him that she had burned her legs when she slipped on some caustic cleaning solution spilled on a sidewalk outside Hotel. Len agreed to take her case and they properly executed a retainer agreement. Claire showed Len scars on her legs that she said were caused by the cleaning solution. She also showed him clothes that she said were stained by the cleaning solution. Len took the clothes from her and put them in his office closet for safe keeping.

Len filed a lawsuit in state court against Hotel. Hotel's lawyer, Hannah, called Len. She told him that this lawsuit was the fourteenth lawsuit that Claire had filed against Hotel, and that she intended to move the court to declare Claire a vexatious litigant. Len and Hannah had been engaged two years ago before they amicably decided to go their separate ways.

Len called Claire and left a message asking her to call him "about an important update in the case." He also sent her an email with a "read receipt" tag, with the same request. He received a notice that she had read the email, but did not receive any response. Over the next week, he sent her a copy of the same email once each day with the same "read receipt" tag; each day, he received a notice that she had read the email, but did not receive any response. He then sent her a registered letter asking her to contact him, but again, did not receive any response. A week later, he sent her another registered letter stating that he no longer represented her and that he would return her clothing to her.

Claire soon called Len, begging him not to "fire" her, saying she had not responded to him because "I didn't think calling you back was such a big deal." He then asked her about "the thirteen prior lawsuits against Hotel." She replied: "What 'thirteen prior lawsuits'? Besides, Hotel's got more money than I do." He told her that he was sorry, but that he was no longer her lawyer.

The next day, Len went to his office closet to retrieve Claire's clothes to send them back to her. To his dismay, he realized that he had sent her clothes along with his to be dry-cleaned. He rushed to the dry-cleaner and learned that all of the clothes he had sent had been dry-cleaned and that all of their stains had been removed.

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

Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

Under the ABA and CA rules, a lawyer owes a duty of loyalty to his or her clients to zealously advocate on their behalf and be free of conflicts of interest that have a significant chance of materially affecting their ability to do so. That duty begins, at the very least, at the execution of a retainer agreement. Claire and Len executed a retainer agreement, and thus the attorney-client relationship was formed and Len owed Claire all of the duties under the ABA and CA rules.

1. Duty of Loyalty

Moreover, under both, a lawyer is deemed to have a conflict if they represent a party who is adverse to another party that is represented by one of the attorney's immediate family members. In such an instance, the lawyer is required to get the informed written consent of their client before pursuing the representation. (Such personal conflicts would not be imputed on other attorneys in a law firm, however.) Ignorance of a conflict is not an excuse for failing to obtain consent or notify about the conflict. An attorney can still represent a client, notwithstanding such a conflict of interest, so long as the client consents and the lawyer reasonably believes that the conflict will not infringe on his or her ability to zealously and competently advocate on behalf of her client. While the ABA would require written consent for such a conflict, California requires only written notification by the attorney because the conflict is only personal.

The issue, though, is whether a former fiancee of two years representing the other party is a conflict of interest at all that need be reported to the client for her consent. Under a strict framework, a former fiancee would not qualify as a family member. It is true that a current fiancee qualifies as a family member, but this rule is unlikely to apply to former fiancees from over two years ago. The rationale for the current fiancee rule is that they are engaged to be members of the family; a former fiancee has, on the other hand, specifically decided *not* to be a part of the family. Therefore, for purposes of this rule, Hannah was not a member of the family and thus this did not trigger an ethical situation

under this rule.

Nonetheless, a lawyer has a general duty to remain loyal to a client, and being close friends with the attorneys on the other side could warrant notification and consent. Here, Len and Hannah "amicably" decided to go their separate ways and Hannah seemed to "call" up Len as more of a friendly notice than as an opposing party counsel. Therefore, it seems that Len and Hannah were quite close. Indeed, in response to the notification, there is no indication that Len looked into the truthfulness of the representation, but rather accepted it at face value, showing that he still trusted Claire quite a bit. This goes to show that Len was not, in fact, able to maintain a fiduciary relationship with Claire notwithstanding the personal connection with Hannah. As a result, Len violated an ethical rule by not disclosing this conflict as it came to pass to Claire.

2. Duty to Represent a Client

A lawyer is free to (more or less without restriction) take or not take clients and causes of action (although is encouraged to do pro bono). But once they decide to do take a client, many ethical rules apply. CA and the ABA allow an attorney to withdraw from representation under certain circumstances and require an attorney to do so under others. For example, if an attorney is not receiving their fees or other obligations pursuant to the attorney-client relationship and they have notified the client and given the client a reasonable time to remedy the situation, then the attorney is permitted to withdraw. Additionally, attorneys may withdraw if the clients are using their legal services for illegal purposes. Moreover, if the attorney finds the representation of the individual repugnant to their sensibilities, they may withdraw so long as they do not materially harm the client's interests. If representing the client would require the attorney to violate other ethical rules or laws, then the attorney must withdraw. Thus, for example, if representing a client would require the attorney to file a frivolous lawsuit, then the attorney must withdraw.

a. *Frivolous lawsuits*

Here, Len will argue that he had to withdraw from representing Claire because failing to do so would violate the rule that attorneys are not allowed to file frivolous lawsuits. He will point to Hannah's representation--whom he had been engaged to and amicably decided not to marry, and thus trusted--that Claire was a serial litigant that had filed fourteen other lawsuits against the Hotel and that Hannah intended to move the court to declare Claire a vexatious litigant. But having been a vexatious litigant does not, in and of itself, show that *this* lawsuit was frivolous. In fact, Claire showed Len scars on her leg and clothes that were stained by the supposed cleaning solution that caused the scars. Opposing counsel's representation that Claire was a vexatious litigant did not even include any allegation that *this* lawsuit was frivolous. Instead, it was merely that other lawsuits filed by her might have been. And indeed, only that they *might* have been because Claire did not even represent that these lawsuits were frivolous or that a court had yet deemed her a vexatious litigant. A reasonable lawyer would not have relied solely on these representations in determining to no longer represent Claire. Instead, a reasonable attorney would have looked into whether these allegations by Claire were true by searching court documents or, at the very least, asking Claire about these cases. And Claire's later response saying "what 'thirteen prior lawsuits'" indicate that doing so might well have revealed that Claire did not actually file those, or that they were not frivolous. In sum, Len did not take reasonable precautions to ensure that the lawsuit that he was attempting to withdraw from representing Claire was, in fact, frivolous, and as such cannot rely on this rationale for withdrawing from representing her.

b. *Costs of representation*

Len might also argue that because Claire was a vexatious litigant, representing her would unreasonably financially burden him. Indeed, California allows the unreasonable financial burden on the attorney as a justification for discontinuing representation of a client. Len appears to be a solo practitioner, this making this claim more reasonable.

However, Len has not shown any financial burden that would necessarily result in trying to defend a claim that Claire was a vexatious litigant (or even that he would have to defend that claim in court). Therefore, it is unclear what financial burdens this revelation would reveal. Moreover, as discussed above, Len did not make any effort at all to determine if there was any basis for determining that Claire actually was vexatious.

c. *Lack of communication*

Len's best argument is that Claire's failure to respond to his numerous requests constitute a permissible reason for him not to continue representing her. Indeed, the rules allow a lawyer to withdraw from representing a client when the client fails to communicate with the lawyer. Much like a lawyer has a duty to communicate with the client (as Len effectively did here once he learned of the potential vexatious litigant problem), a client must fulfill their side of the bargain and communicate back. Len left a voicemail saying that he had an "important update" and asking to be called back. He sent her one e-mail a week with the same request, and received confirmation that Claire had read the e-mails. He then decided to send her a registered letter asking her to contact him. Notwithstanding the three forms of communication asking for a reply because of an "important" update and the *registered* letter, Claire did not respond at all. Importantly, though, Len failed to mention the reason for why he wanted her to contact him. He might respond that he could not have provided details in e-mail, voicemail, or letter because it might have violated his duty of confidentiality to keep all information he learned about her secret absent her consent (which we have no evidence of here). This will likely be sufficient, especially considering the read receipts and the registered letter confirm that Claire actually received the communications.

Even more importantly, though, is the fact that Len never made clear the ramification of failing to respond. Much as in failures to pay attorney fees, the attorney must reasonably notify the client of the consequences of failure to and give them a chance to respond before withdrawing from representation. Here, Len violated that duty by never telling Claire that he would withdraw from representing her unless she responded.

Instead, he simply repeated the same content in different methods asking for a response. This, in conjunction with the fact that he waited what seems like no more than a little over two weeks before withdrawing from representation. If this speed were justified in light of approaching deadlines, that might be reasonable. But there is no indication here that such a rapid action was necessary or, more importantly, that Claire had any reason to believe that such a rapid action was necessary. Len did not tell Claire that he would withdraw if she didn't respond (and he cannot rely on Hannah's representation that she was a vexatious litigant without actually looking into that at all, as a reasonable attorney would, to augment the implication of her nonresponse). Taken together, Len violated his duty of continued representation by withdrawing for this reason.

d. *Court's approval*

Moreover, in California after a lawsuit has been filed, an attorney cannot withdraw from representing a client without attaining the judge's permission to do so. While he likely would have gotten it here, because of the failure to communicate because the case had just been filed and there is no indication that allowing withdrawal would otherwise prejudice Claire, that does not excuse his not following this rule. Therefore, regardless of the merits of any justification for withdrawal, Len breaches this rule.

3. Duty to the Court to Investigate Positions

Even if Len were correct that Claire's lawsuit was entirely without merit, he would have still likely violated ABA and CA ethics rules by filing the lawsuit in the first place. An attorney is required to investigate legal positions and pleadings taken and represented to a court before doing so. The standard for this is what a reasonable attorney would do in similar circumstances. Thus, if the lawsuit was entirely without Merit, Len likely violated his ethical rules in filing it in the first place. Len will argue that the scars and stained clothing were sufficient to file the suit, but the record does not indicate that Len provided *any* additional investigation or research into the merits of the claim. Whether

that is reasonable depends on how a qualified attorney in like circumstances would have acted.

4. Returning Property

A lawyer has the obligation to keep any property of the client's that is in his possession in a safe and secure location. Moreover, the lawyer certainly cannot destroy evidence that the client entrusts to him. The lawyer must take reasonable protective measures to safeguard such evidence, if the lawyer chooses to accept responsibility for possessing it. Here, Len accepted responsibility for maintaining Claire's clothes and those clothes were relevant to the legal claim that Claire was pursuing. As such, he had a duty to his client to implement effective measures for ensuring the safeguarding of the property entrusted in his care. However, he "sent her clothes along with his to be dry-cleaned." Thus, it seems that he did not put her property in a separate location or otherwise implement methods to ensure that the inadvertent destruction or disclosure of the evidence would not occur. Len, therefore, violated this duty to Claire.

If Len received any money following the "properly executed retainer agreement," he violated his duty by not attempting to give it back to her when he sent her the letter saying that he would send her the clothing. However, since there is no evidence that he had any property but for the clothing, he likely did not violate this duty.

QUESTION 5: SELECTED ANSWER B

Attorney-Client Relationship

Len formed an attorney-client relationship with Claire. An attorney-client relationship is formed when the client reasonably believes the relationship formed. The attorney's beliefs are irrelevant. Within the scope of the representation, an attorney determines the means, including which claims to present and which witnesses to call, and a client determines the ends, including whether to accept a settlement offer and other duties.

Retainer

L and C executed a valid retainer agreement. In California, an agreement to represent that is worth more than $1,000 must be in writing. In ABA, it is strongly encouraged. Additionally, the fees must not be unreasonable under the ABA authorities, or unconscionable in California. Here, there is no indication that the fees were unreasonable/unconscionable. The retainer must describe the nature of the relationship, the responsibilities of the parties, and the method of determining fee. Here the facts tell us there was a properly executed retainer agreement.

Duty of Loyalty

An attorney owes a duty of loyalty to his clients, and cannot accept representation if it would result in a conflict of interest that would materially impair his representation of client. A conflict of interest may occur between an attorney and his client; between two clients, whether former and current or two or more current clients; between a third party and client; or between the members of an organization and the organization itself. A conflict of interest may occur between the attorney and his client when the attorney has a close relationship with opposing counsel in a case. Here, L has a close relationship with H, the Hotel's attorney. They were engaged for two years before amicably deciding to go their separate ways. L should have informed C of his relationship with H. In California, L needs to inform C in a written disclosure of his relationship with H. In the ABA authorities, L needs to obtain written consent from C with respect to his relationship with H. Because L did not inform C of his relationship with H or obtain

written consent, L violated his duty of loyalty to C by not disclosing his relationship with H.

Duty of Communication

An attorney must promptly and diligently communicate with his client. This duty includes a duty to inform the client of their responsibilities and obligations with respect to the representation. Here, L owed C a duty to tell her about the scope of her responsibilities, including communicating with him regarding material facts. When L met with C, he should have informed her about her duty to respond to his inquiries so that he could competently represent her. C's statement that "I didn't think calling you back was such a big deal" indicates that L neglected to tell her that she should promptly return his calls and inquiries because failure to do so may hurt her case. C has a responsibility to make decisions with respect to her representation. If L had received a settlement offer with a deadline, he could not have accepted it without C's permission. Because L failed to communicate her own responsibilities to C, L violated his duty of communication with C.

L also owed C a duty to communicate all of the material facts so that she could make an informed decision. L should have communicated with H regarding the "thirteen prior lawsuits" before attempting to withdraw from the representation. L called C and left her a message, and sent many emails and a registered letter. But none of the communications informed C that he was concerned about prior litigations or that he was considering withdrawing until he did attempt to withdraw. L owed a duty to C to communicate all of the material facts before he attempted to withdraw. Because L did not inform C of the material facts, L breached his duty of communication with C.

Duty of Competence

An attorney owes a client a duty of reasonable knowledge, skill, and ability in the scope of the representation. Here, L did not inquire into the prior lawsuits that C may have filed against Hotel. Instead, he relied on the word of opposing counsel and did not do his own research. Because L did not do his own inquiry, he violated the duty of

competence he owed to C.

Duty to Safeguard

L owed C a duty to safeguard the evidence she gave him. An attorney owes a duty to the client to safeguard possessions of the client, including money given as a retainer and any possessions or evidence entrusted to the attorney. Here, C gave L evidence related to her litigation, the clothes that were stained by the cleaning solution. L had a duty to diligently safeguard this possessions with reasonable competence. L placed the evidence in a closet and negligently sent them to the dry-cleaners, where they were cleaned. Placing material evidence in a closet is not a reasonable way to diligently safeguard important items. L should have placed them in a safe deposit box or other manner of safekeeping. Material evidence with respect to C's case was destroyed. L violated his duty to safeguard C's evidence and possessions entrusted to him.

Mandatory Withdrawal

An attorney may withdraw if representation will necessarily cause a violation of an ethical rule. Under the ABA, this extends to any law. An attorney must also withdraw if, because of his physical or mental condition, continued representation would materially impact the client. In California, an attorney must withdraw if the client insists on pursuing a claim without probable cause and with the purpose of harassing or maliciously injuring another person. Under the ABA authorities, an attorney must withdraw if he is fired. None of these events have occurred and L does not have a reason that would support mandatory withdrawal.

Permissive Withdrawal

An attorney is permitted to withdraw if a client insists on pursuing an illegal course of conduct. An attorney is also permitted to withdraw if they insist the attorney take actions against the attorney's judgment, violating the scope of the relationship so that the attorney is no longer dictating the means of the litigation. An attorney may also permissively withdraw if the client does not pay her fees or for any other "good cause shown." An attorney is also permitted to withdraw if the client makes representation

unreasonably difficult.

Here, L may argue that C has made the representation unreasonably difficult. He attempted on numerous occasions to contact C in order to inquire about the prior litigations and discuss the case with her. He called her and left a message, sent at least 7 emails that he knows she read but did not respond to, and sent a registered letter with a return receipt requested. A reasonable client would likely have understood that L had a matter of some urgency to discuss with L and would have returned his call. But a week is too short of a time for L to say that this behavior made the representation unreasonably difficult. C could have been on vacation or with limited access to email and phones, and she did not want to take the time to respond to L. A week or two is not an unreasonable amount of time for a client not to respond. He at least should have waited to withdraw until he had discussed with her the importance of returning his calls and communicating with him. It was perhaps L's failure to communicate the responsibilities of the client to C, to inform her of her responsibility to also communicate with him so that he could adequately represent her, that caused the breakdown in communication in the first place. Therefore, C's lack of communication for two weeks does not make L's representation of her unreasonably difficult.

There is no indication that C did not pay her fees. Her statement to L that "Hotel's got more money than I do" may suggest an inability to pay her fees in the future, but this is not a reason to permissively withdraw. Additionally, there does not appear to be any other "good cause shown" to permissively withdraw. L did not have any reason to permissively withdraw from the representation and therefore violated the ethics rules.

Additionally, in California, an attorney may not permissively withdraw if the matter is currently pending before a tribunal. Because L filed the lawsuit in state court, the matter is currently pending before a tribunal and L must seek court permission to withdraw. Because L did not seek court permission to withdraw, he violated the California ethics rules.

Withdrawal from Representation

When an attorney withdraws, either permissively or because the withdrawal is mandatory, he owes a duty to the client to mitigate the harm from the withdrawal. An attorney must timely inform the client of the withdrawal and give the client time to seek new representation. Here, L simply told C he was withdrawing. He did not give her adequate time to find new representation and she may therefore be prejudiced in her case if there are upcoming deadlines or other issues in the case and she is not adequately represented.

Additionally, an attorney must mitigate the harm by returning all papers or possessions to the client. Here, because he did not competently and diligently safeguard C's evidence, it was destroyed when he negligently sent it to the dry-cleaners.

An attorney may collect fees for reasonable compensation, but must return any remainder of fees to the client. In California, an attorney may retain a true retainer, meant to ensure the attorney's availability. Here there is no indication that L retained any unearned fees or was paid a true retainer.

Because L did not give C adequate notice and time to find new counsel, and failed to return C's possessions, his withdrawal from representation violated the ethics rules.

QUESTION 6

Ivan, an informant who had often proven unreliable, told Alan, a detective, that Debbie had offered Ivan $2,000 to find a hit man to kill her husband, Carl.

On the basis of that information, Alan obtained a warrant for Debbie's arrest. In the affidavit in support of the warrant, Alan described Ivan as "a reliable informant" even though Alan knew that Ivan was unreliable.

Alan gave the arrest warrant to Bob, an undercover police officer, and told Bob to contact Debbie and pretend to be a hit man.

Bob called Debbie, told her he was a friend of Ivan and could do the killing, and arranged to meet her at a neighborhood bar. When the two met, the following conversation ensued:

> **Bob:** I understand you are looking for someone to kill your husband.
>
> **Debbie:** I was, but I now think it's too risky. I've changed my mind.
>
> **Bob:** That's silly. It's not risky at all. I'll do it for $5,000 and you can set up an airtight alibi.
>
> **Debbie:** That's not a bad price. Let me think about it.
>
> **Bob:** It's now or never.
>
> **Debbie:** I'll tell you what. I'll give you a $200 down payment, but I want to think some more about it. I'm still not sure about it.

When Debbie handed Bob the $200 and got up to leave, Bob identified himself as a police officer and arrested her. He handcuffed and searched her, finding a clear vial containing a white, powdery substance in her front pocket. Bob stated: "Well, well. What have we got here?" Debbie replied, "It's cocaine. I guess I'm in real trouble now."

Debbie has been charged with solicitation of murder and possession of cocaine.

1. How should the trial court rule on the following motions:

    a) To suppress the cocaine under the Fourth Amendment? Discuss.

    b) To suppress Debbie's post-arrest statement under *Miranda*? Discuss.

2. Is Debbie likely to prevail on a defense of entrapment at trial? Discuss.

QUESTION 6: SELECTED ANSWER A

SUPPRESSION OF COCAINE

The Fourth Amendment prohibits unreasonable searches and seizures, and is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. For a search by a state actor to be valid, it must be conducted pursuant to a valid warrant issued by a neutral magistrate or an exception to the warrant requirement. In this case, Bob, who arrested and searched Debbie, was an undercover police officer, and therefore a state actor, so his search needed to comply with the Fourth Amendment.

Bob did not have a warrant to search Debbie. While the facts state that Alan obtained an *arrest* warrant, there was no warrant specifically for the search. That said, pursuant to a valid arrest, police can search the arrestee, including the arrestee's person and anything within the person's wingspan. Such searches are meant both to protect officer's safety and to ensure that the arrestee does not destroy any evidence with reach. The search must be at the same time and place as the arrest. Because, in this case, Bob found the white, powdery substance on Debbie's person - her front pocket - at the same time and place as her arrest, the search was lawful as long as the arrest was lawful.

Valid Search Warrant?

The first possible basis for the arrest was the arrest warrant that Alan obtained. The Fourth Amendment itself requires that warrants describe with particularity the place to be searched and the people or things to be seized. The warrant that Alan obtained appeared to satisfy this requirement, because it named Debbie as the person to be "seized," i.e., arrested.

That said, a warrant must be based on probable cause, which is defined as a fair

probability that the searched place will contain contraband or other evidence of crime, and that the arrested person has in fact committed the crime of which they are suspected. In this case, the arrest warrant was not supported by probable cause. It was based only on one statement by Ivan, an informant who had often proven unreliable. Probable cause is determined by examining the totality of the circumstances. While each determination is necessarily very fact-specific, the say-so of one unreliable informant cannot be enough to satisfy the probable cause requirement. Courts have held that a tip from an anonymous informant, while relevant to probable cause, cannot by itself establish probable cause. A tip from an unreliable informant is no more reliable than a tip from an anonymous one, so Ivan's statement did not provide probable cause for the arrest.

Good Faith Exception?

An officer can nonetheless rely on an invalid warrant if the officer relied on it in good faith, meaning the officer did not know that the warrant was lacking in probable cause. This exception is not available, however, when any of the following is true: (i) the warrant, on its face, is so lacking in probable cause that no reasonable officer would rely on it, (ii) the warrant, on its face, is so lacking in particularity that no reasonable officer would rely on it, (iii) the affiant officer misled the magistrate in issuing the warrant, or (iv) the magistrate was so biased against the object of the warrant that he could be said to have given up all neutrality.

Here, the warrant probably appeared, on its face, to be supported by probable cause. Alan had told the magistrate that Ivan was a reliable informant, and a tip from a reliable informant is enough to establish probable cause. Bob, who executed the warrant after Alan gave it to him, therefore fell outside the first two exceptions to the warrant requirement. However, the third exception clearly applies. Alan misled the magistrate by telling him that Ivan was a reliable informant, when in fact Ivan had often proven unreliable. Police cannot obtain a warrant through deception, but then take advantage of the good-faith exception by having an officer who doesn't know about the deception

execute the warrant. Debbie's arrest was therefore not permissible under the good-faith exception to the warrant requirement.

Valid Warrantless Arrest?

Police almost always need a warrant to conduct an arrest in a home or other private place, unless they are pursuing evanescent evidence, where they either have reason to believe that evidence in the house is being destroyed, or they are within 15 minutes of a suspect in hot pursuit. That said, Bob did not arrest Debbie in a private home; he arrested her in a neighborhood bar where they had arranged to meet. Police can generally effect a warrantless arrest in a public place whenever they have probable cause to believe that the person has just committed a crime. The validity of Debbie's warrantless arrest by Bob thus turns on whether he had probable cause to think she had just committed a crime.

Bob did in fact have probable cause. Just seconds earlier, Debbie had paid him $200 as a down payment for committing murder. This gave him probable cause, at the very least, to think that Debbie had just committed a crime. Murder is the intentional killing of another person with malice aforethought. In most states, premeditated murder is first degree murder, but murder is committed even by acting with reckless indifference to an unjustifiably high risk to human life. Hiring a hit man probably satisfies the former standard, and it certainly satisfies the latter. When she paid Bob, Debbie arguably committed solicitation. A person is guilty of solicitation where they urge, request, or pay another person to commit a substantive offense. By paying Bob an advance, Debbie was arguably soliciting his commission of the murder of her husband, Carl. Because she had just committed this crime in front of him, Bob had probable cause to arrest Debbie. The arrest was therefore lawful.

Debbie may argue that she did not actually commit solicitation in front of Bob, because she made clear that she was not yet sure she wanted him to kill Carl, and that she still needed some more time to think about it. It is not clear that this defense would work at

trial, because Debbie still paid money as consideration for keeping open the promise of committing the crime. Bob had said she needed to pay him now or never if she wanted him to commit the murder, and she did pay him, albeit not the entire amount. That said, it does not matter that Debbie might win this argument at trial, because the arrest only required probable cause - again, a fair probability that the person had committed the substantive offense. By paying money to a hit man, Debbie at least came within a fair probability of committing solicitation, such that the arrest was lawful.

Furthermore, Bob had probable cause to think that Debbie had committed solicitation by offering Ivan $2,000 to find a hit man to kill her husband. While Ivan's unreliable testimony might have not established probable cause on its own, Debbie corroborated his report by saying "I was," by showing interest in Bob's offer when she said "not a bad price," and by ultimately offering him the $200 to keep the offer open. This earlier solicitation could also be the source of probable cause.

As mentioned above, a search can occur incident to a valid arrest. The officer can search the arrestee's person and everything within her wingspan, as long as time and place are contemporaneous. Bob's search was at the time and place of the arrest, and did not go beyond Debbie's person. It was therefore a lawful search pursuant to arrest. Once such a search is carried out, any evidence found is not subject to suppression, even if it is not evidence of the same crime for which the person was arrested. Thus, although the white powder was not evidence of the crime for which Debbie was arrested - solicitation of murder - it is not subject to suppression.

The judge should therefore deny Debbie's motion to suppress the cocaine.

SUPPRESSION OF POST-ARREST STATEMENT

Debbie's post-arrest statement, on the other hand, is subject to suppression. Under the Self-Incrimination Clause of the Fifth Amendment (and the *Miranda* case implementing it), incorporated against the states by the Due Process Clause of the Fourteenth

Amendment, police must warn people of their rights to remain silent and to an attorney before commencing a custodial interrogation. The warning need not be verbatim, but it must convey that (1) the person has the right to remain silent, (2) anything they say can be used against them at trial, (3) they have the right to speak to an attorney, and (4) that if they cannot afford an attorney, one will be provided. The trigger for these warnings is custodial interrogation. An interaction is "custodial" any time a reasonable person would not feel free to leave, and would expect that the detention will not be of relatively short duration, as with a routine automobile stop or a *Terry* stop. Another test for whether the interaction is custodial is whether it presents the same inherently coercive pressures as a station-house questioning. The interaction is an "interrogation" any time the police act in a way that they know or should know is likely to elicit an incriminating response. They need not actually conduct a formal interrogation, as long as this likelihood exists. Violations of a suspect's *Miranda* rights provide grounds to suppress any incriminating statements, though they will not necessarily lead to the suppression of the investigatory fruit of such statements.

Here, Debbie was clearly subject to a custodial interrogation. She was in custody because she was being arrested. Bob had just identified himself as a police officer, handcuffed her, and begun searching her. No reasonable person would feel free to leave such an arrest, and any questions asked while being handcuffed and arrested are just as coercive as questioning at a police station-house. Moreover, Debbie was subject to interrogation, because Bob, upon finding the cocaine, asked her "What have we got here?" Bob should have known that this question, asked by a police officer about a suspicious substance found on Debbie's person in the course of an arrest, was likely to elicit an incriminating response. Therefore, Debbie's incriminating response identifying the substance as cocaine is subject to suppression. So is her statement about being in trouble, which has the tendency to incriminate her by demonstrating her awareness of culpability.

The court should therefore grant her motion to suppress her post-arrest statement under *Miranda*. That said, the physical evidence itself - the bag of white powder - need not be suppressed, because *Miranda* suppression applies only to testimonial

statements like Debbie's verbal statement, not physical evidence. Because the powder was not obtained in violation of *Miranda*, the police are free to test it and introduce it as evidence at trial if it proves to be cocaine. Debbie might argue that the nature of the bag's content is the fruit of an illegal interrogation, because Bob only knew what was inside because Debbie told him. This argument will fail for a number of reasons. First, Bob had an independent source for knowing that the bag might be cocaine - namely, his own eyesight and common sense. A bag of white powder carried around in a person's pocket is sufficiently likely to be drugs that a reasonable officer would have it tested no matter what. Second, and relatedly, the police could claim that discovery of the powder's chemical makeup was inevitable, because all suspicious powders found on arrestees are tested as a matter of course (assuming this is true, which it should be). Third, the fruit of the poisonous tree doctrine does not apply to evidence whose discovery can be traced back to a statement suppressible under *Miranda* - only the statement itself is subject to suppression. The Supreme Court has determined that the evidentiary value of such down-the-line evidence outweighs the deterrent effect of suppression, unless the officer's failure to give *Miranda* warnings occurred in bad faith. Here, there is no indication that Bob acted in bad faith, withholding a *Miranda* warning so that he could gather evidence from Debbie to be used to further an investigation. It appears that, in the heat of the arrest and subsequent search, he simply forgot to give the warning. That said, even if this third argument against suppression failed, either of the first two would be enough to make the cocaine admissible at trial.

ENTRAPMENT

The defense of entrapment requires a defendant to show (i) inducement and (ii) a lack of predisposition. Inducement occurs when a criminal design originates with the police. A lack of predisposition occurs when the defendant was not otherwise intending to commit the crime, but only did so because the police applied pressure or some sort of other unfair deceit. The defendant must establish both elements by a preponderance of the evidence in order to make out the defense of entrapment.

If Debbie is found to have committed solicitation, it is unlikely that she will be able to establish an entrapment defense. As to predisposition, while the specific plan - to have Bob kill Carl - may have originated with the police, the underlying idea to kill her husband through a hit man was Debbie's. She had already taken a major step to achieve the underlying crime by paying Ivan $2,000 to find a hit man - a fact that she confirmed when she said that she "was" considering it. (While she may argue withdrawal, from discontinuing her plan, the entrapment defense assumes that she has otherwise been convicted.) She will thus struggle to show that she was not already predisposed to commit the crime. The plan originated with her, and she had already put significant money toward showing that it was not a mere fancy, but in fact a serious plan.

As to inducement, Debbie would have a slightly better argument. When she told Bob that she had changed her mind because her original plan was too risky, Bob applied pressure in several ways. He told her that her change of heart was silly, because the plan was not risky at all; he tried to persuade her that her alibi would be "airtight"; he offered her a presumably unnaturally low price; and he told her that she needed to accept on the spot. These all show police attempts to induce the crime through a combination of emotional and financial pressure.

That said, mere precatory language like this is rarely enough to establish inducement, or to negate predisposition that otherwise appears to exist. Generally the government must apply more forceful pressure - like an affirmative threat - to reach entrapment. For drug stings, these elements can be satisfied by offers to buy or sell drugs at a price that is grossly more favorable to the defendant than the defendant could obtain in the real world. But for solicitation of murder, the fact of offering a discount is probably not enough to show inducement or lack of predisposition. A person who does not otherwise intend to engage in murder is generally not induced to solicit murder by being offered a low price. Debbie's entrapment defense is therefore not likely to prevail at trial.

She may have slightly better luck at sentencing, by offering either a sentencing entrapment argument or a sentencing factor manipulation argument. These typically

allow a judge to reduce a sentence, even to go below the guidelines, based on police conduct that is unfair or pressuring, but that does not rise to the level of entrapment. Bob's pressuring statements might satisfy these sentencing defenses, if Debbie can convince the sentencing judge that she in fact had decided not to carry out her plan, and indeed would not have carried it out, but for the officer's pressure. This may reduce her sentence, but it will not excuse her from criminal liability.

QUESTION 6: SELECTED ANSWER B

Suppression of Cocaine Under the 4th Amendment

4th Amendment

Under the 4th Amendment to the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, the government must not conduct unreasonable searches and seizures.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment is to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 4th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Search and Seizure of the Cocaine

As provided above, the 4th Amendment bars police from conducting unreasonable searches and seizures. There are a number of steps that we must go through in order to determine whether the seizure of the cocaine violated Debbie's 4th Amendment rights.

(1) We first need to determine whether this is government conduct. Government conduct occurs when the publicly paid police, or private police that are deputized with arresting power, conduct an action. Here, it appears as though it was government/police conduct. Alan was a detective and Bob was an undercover police officer. Accordingly, there was police/government action.

(2) Next, we need to determine whether Debbie had a reasonable expectation of privacy in the area searched or the item seized. Put another way, we need to determine whether she has standing to complain about this particular search. Standing is always present when (1) an individual owns a premises; (2) an individual is the possessor/leasor of the premises; or (3) the individual is an overnight guest at a premises. These do not apply to Debbie's particular situation. A defendant sometimes has standing if they have a reasonable expectation of privacy in the area searched. Here, the search took place on Debbie's person, in her pockets. Debbie undoubtedly has a reasonable expectation of privacy in her pocket. As such, the government/police must have had a valid warrant or a valid excuse for not having a proper warrant when they searched Debbie.

(3) As stated above, we next must determine whether Bob and Allan had a valid warrant for the search and arrest of Debbie. A valid warrant has two specific requirements: (1) particularity; and (2) probable cause. Particularity requires the warrant to state with relative specificity the items to be recovered, the person to be arrested, or the areas to be searched. Probable cause is the reasonable belief that contraband will be found in the area to be searched or reasonable belief that the individual to be arrested committed a crime. Here, there appears to be serious problem with the arrest warrant in this case, specifically with the probable cause requirement.

The particularity requirement appears to be satisfied because it is a warrant for the arrest of Debbie. This is a specific person and particular enough to satisfy the first prong of the valid warrant requirement. The problem arises with regards to the creation of probable cause. Alan obtained the warrant on the basis of an informant's information.

There are many circumstances where an informant's information may be used to establish probable cause. That being said, whether the informant may be trusted is based on the totality of the circumstances. This includes the informant's previous reliability, whether there is independent evidence to support the informant's testimony and, most importantly, whether the informant's testimony can be corroborated. Here, there does not appear to be any sort of corroboration of Ivan's testimony. Furthermore, it is made clear that Ivan has <u>often</u> proven unreliable. As such, there is no reason to believe Ivan's information without any additional corroborating evidence. Because probable cause is not based on sufficient information, there is a good argument to be made that the warrant was invalid to begin with.

(4) Even if a warrant is invalid, a search/arrest may still be considered legitimate if the arresting/searching officer uses good faith in the execution of the warrant. Here, there is no indication that Bob knew of the lack of probable cause, and appears to rely on the warrant in good faith. That being said, there are a number of situations where the arresting/searching officer's good faith does not excuse an invalid warrant: (1) when the warrant is so lacking in particularity that no reasonable officer could believe in good faith that the warrant is valid; (2) when the warrant is so lacking in probable cause that no reasonable officer could believe in good faith that the warrant is valid; (3) when the magistrate judge who issued the warrant is biased; or (4) when the officer who obtained the warrant lied in the warrant application. Here, there is nothing on the face of the warrant to demonstrate that it is so lacking in particularity or probable cause such that no officer could reasonably believe it valid. There is also no indication that the magistrate judge who signed the warrant is biased. There is, however, evidence that Alan lied in the warrant application in order to obtain the warrant. The facts indicate that Alan described Ivan as "a reliable informant" even though he knew that was not the case. Had the magistrate judge been aware that the warrant was solely based on information provided by an unreliable informant, they would probably not have issued the warrant because there is not sufficient probable cause to support the warrant. Accordingly, the warrant was invalid and the officer's good faith reliance on the warrant does not overcome that deficiency.

(5) If a warrant is invalid and the officer's good faith is not enough to overcome that deficiency, there are still some instances where a search and/or arrest is not required to be conducted pursuant to a valid warrant. Some such instances include, but are not limited to: (1) the plain-view doctrine; (2) searches incident to a valid arrest; (3) exigent circumstances; and (4) the automobile exception. Here, Bob may be able to validly argue that the search and seizure of the cocaine was valid pursuant to a search incident to a valid arrest. When an officer validly arrests an individual, they are allowed to search the clothes/body of the person, as well as any area around the person within their wingspan. Any contraband/evidence of crime that is obtained as a result of the search conducted pursuant to a valid arrest is admissible, despite the absence of a proper warrant. Here, Bob will argue that his search of Debbie and seizure of the cocaine was valid pursuant to a valid arrest. He will argue that he personally witnessed Debbie commit a crime (solicitation of a murder - which is discussed in greater detail below) and therefore was allowed to arrest her and entitled to search her person. Debbie will undoubtedly have a different view of the situation.

Debbie will argue that she committed no crime and that the search and seizure was not done pursuant to a search incident to a valid arrest. Solicitation requires (1) the defendant to request or ask another person to commit a crime; and (2) an intent that the requested crime be committed. Solicitation is a specific intent crime. If there is an agreement between the parties to commit the crime, solicitation merges with conspiracy and is no longer alive for purposes of prosecution. Here, it is unclear whether or not Debbie manifested the intent to commit the murder. If she did not have the requisite intent, she did not commit the crime of solicitation. Debbie used words such as "let me think about it," "I've changed my mind," and "I'm still not sure about it." While she did give Bob a down payment, she does not seem to express the necessary intent for Bob to commit murder against her husband. Her argument will be that no crime was committed, therefore there was no valid arrest and the search incident to the arrest was also improper.

Conclusion - Here, it appears a close call as to whether the court should suppress the

cocaine pursuant to the 4th Amendment. As an initial matter, there was not a valid warrant and the conducting officer's good faith reliance on the warrant does not save it because Alan lied in obtaining the warrant. There does appear to be a valid reason for the search conducted by Bob, but Debbie will argue that she did not commit the crime of solicitation because (1) she never expressly asked Bob to commit the crime of murder; and (2) she did not express the intent for Bob to commit murder. The government will counter that the down-payment was meant to obtain the services and the exchange of money was enough to establish solicitation.

Ultimately, it appears as though Debbie does not commit the crime of solicitation because she did not expressly ask Bob to commit the murder and she did not have the necessary intent. While she did provide money, there was no agreement to commit the murder or express request to commit it - it appeared to simply compensate Bob for his time spent during their meeting. If Debbie had called back later and said to apply that money towards the commission of the crime, then the money would have been given with intent for Bob to commit the murder. Accordingly, it seems as though no crime was committed and the search that Bob conducted that uncovered the cocaine was not incident to a valid arrest. Therefore, the cocaine should be suppressed.

Suppression of Debbie's Post-Arrest Statement Under Miranda

5th Amendment and Miranda

Under the 5th Amendment of the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, individuals are entitled to Miranda warnings prior to "custodial interrogation." Miranda warnings include (1) the defendant has the right to remain silent; (2) anything the defendant states can be used against them in the court of law; (3) the defendant has a right to an attorney; and (4) if the defendant is indigent and can't afford an attorney, one will be supplied to her. The warnings need not be verbatim. As previously stated, the trigger for Miranda warnings is "custodial interrogation." "Custody" means any situation in which an individual would not feel able to leave on their own volition. While this may be in a jailhouse, it can also

occur in any other situations where police conduct does not leave a reasonable belief that the person can wilfully leave. "Interrogation" occurs when the police can foresee that the line of questioning may elicit an incriminating response. Once there is custodial interrogation, the individual being questioned must be given the Miranda warnings. If not, the exclusionary rule and fruit of the poisonous tree doctrine may apply.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment are to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 5th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Custodial Interrogation of Debbie

In order to determine whether Debbie's post-arrest statement violates Miranda and is thus entitled to suppression, we need to determine whether she was in a state of custodial interrogation. After receiving the $200 from Debbie, Bob identified himself as a police officer, handcuffed her, and searched her. During the course of the search, Bob found a vial of white, powdery substance and asked "well, well, what have we got here?" Based on the facts of this particular case, it appears as though Debbie was in custody at the time Bob made this statement. She was handcuffed and being searched by Bob. Accordingly, no reasonable person would believe that they have the right to leave on their own free will at that point.

Next, we need to determine whether Bob's question qualifies as "interrogation" under the meaning of "custodial interrogation" defined above. Bob's question is "What have we got here?" While this seems relatively innocuous, it is most definitely intended to elicit an incriminating response. When the police ask someone what the contents of a vial suspected to be contraband are, they are undoubtedly attempting to obtain a response that can incriminate the defendant.

Debbie was in "custody", as defined by Miranda, because no reasonable person would feel able to leave when they're handcuffed and searched by the police and she was being "interrogated" because Bob asked a question that is foreseeable to elicit an incriminating response, it appears as though she was entitled to her warnings under Miranda prior to Bob's questioning. Because Bob's questioning was a violation of Miranda, Debbie's response should be excluded pursuant to the 5th Amendment.

Debbie's Defense of Entrapment

As stated above, Debbie was charge with solicitation of murder. Solicitation requires (1) defendant to ask or request someone to commit a crime; and (2) specific intent that the requested crime is to be committed. Murder, the crime that Debbie supposedly wanted to commit, is defined as the unlawful killing of another human being with malice aforethought, expressed or implied. There are multiple "degrees" of murder - first and second degree. First degree is premeditated murder, with intent to kill, and knowledge, or felony murder (murder in the commission of a dangerous felony independent from the murder itself). Second degree murder is any other kind of murder. The intent required for murder is (1) intent to kill; (2) intent to commit serious bodily harm; (3) intent to commit a felony; or (4) depraved heart/reckless indifference.

While there is some question about whether or not Debbie manifested the intent necessary for solicitation, the defense determined that the defense of entrapment was a viable defense. In order to bring a successful entrapment defense, a defendant must show (1) the government unduly encouraged/enabled/aided the defendant in the

commission of the crime; and (2) the defendant would not have committed the crime but for the government's actions. This is an extremely difficult defense to establish and Debbie may have trouble succeeding in its presentation.

Initially, we must determine whether the government encouraged and/or enabled Debbie to commit the crime in question. Here, Debbie's actions seem to indicate that she was predisposed to committing the crime of solicitation of murder. First, Debbie agreed to meet Bob at a neighborhood bar when the only information he provided was that he was a friend of Ivan and could do the killing. When they met, Debbie stated "I was [looking for someone to kill my husband], but I now think it's too risky. I've changed my mind." This statement seems to suggest that Debbie is not withdrawing because she doesn't want to commit the crime, but that she is afraid of getting caught. Bob does not force her to continue, but states that "it's not risky at all" and gives her a price quotation. At this point, Debbie states "let me think about it." When Bob states that he needs an answer now, Debbie proceeds to put a down payment and states "I'm still not sure about it." Based on Debbie's statements and behavior, it does not seem that Bob unduly coerced her to commit the crime of solicitation. Bob merely provided her with the opportunity to do so. Debbie's statements seem to suggest that she has the desire to do it, but is simply afraid of getting caught. Bob's assurances that she won't get caught do not rise to the level necessary for the first prong of entrapment.

We also must determine that Debbie would not have committed the crime but for the government's actions. As established in the preceding paragraph, Debbie has the intent to commit the crime, but is simply afraid of being caught. The government will argue that the provision of money was a down payment to commit the murder and Debbie had the necessary intent to commit the underlying crime necessary for solicitation. Debbie will claim that she would not have given the money, but for the assurances made by Bob that she would not be caught. That is not enough to establish the second prong necessary for entrapment. If a separate/non-governmental actor had provided the same assurances, Debbie appears to have been likely to react in the same manner.

Because (1) the government did not unduly encourage or enable Debbie to commit the

crime of solicitation, and (2) Debbie would have still committed the crime without the government's interference, the defense of entrapment does not appear to be a valid defense for Debbie.