



FEBRUARY 2015

MODEL ANSWERS

**APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS**



FEBRUARY 2015 EXAMINATION QUESTIONS

**APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS**

- EXAM 1, QUESTION 1 -

1)

Essay #1

Valid Will: In Nevada, a valid will requires the testator to be at least 18 years old, requires testamentary intent, and the will must be signed by two witnesses in the presence of the testator. Here, the facts do not indicate that the Testator is a minor, and as such, the Testator is presumed to be at least 18 years old. The Testator had testamentary intent to execute a will as he went to his attorney's office to execute the will. The will was signed by three witnesses, Testator's brother Frank, his friend Greg, and an employee of Testator's attorney. A will must be signed by the witnesses in the presence of the testator. The line of sight test is used to determine whether the witnesses were in the line of sight of the Testator for a valid witnessing of the will. Another test is the conscious presence of the testator, meaning that so long as the witnesses sign the will in the conscious presence of the testator- within the testator's senses, then the will is validly witnessed. Here, the facts indicate that the will was signed in Testator's presence.

1. \$10,000 to Amy: Anti-lapse statute: When a beneficiary predeceases a testator, the gift generally lapses. However, under Nevada's anti-lapse statute, the gift is saved if the beneficiary is a close family member of the testator and left lineal descendants. A close family member includes siblings and children, but does not include spouses or friends. Instead of lapsing, the gift will go to the close family member's living

descendant. Here, Amy is the Testator's sister, satisfying the close family member requirement. Amy predeceased the Testator, who died in 2013. The facts indicate that Amy is survived by a son, Alan. Thus, under the anti-lapse statute, Amy's son will take the \$10,000 devise from Testator.

2. 1965 Mustang: Ademption: Ademption applies when a specific gift in the Testator's estate no longer exists at the time of the Testator's death. A specific gift is a gift of a specific item or monetary amount. Here, the Testator devised a specific gift of his 1965 Mustang convertible to his friend Bob. In 2005, Testator sold his Mustang and his ABC stock to buy a Porsche. Generally, under ademption, when the specific gift is adeemed and no longer in the Testator's estate upon the Testator's death, the beneficiary gets nothing. The specific gift is not replaced by another item in Testator's estate nor does Bob get the Porsche. Instead, the Porsche falls to the Testator's residuary estate.

3. Coin Collection: Holographic Codicil: A holographic will is a handwritten will that does not require any witnesses. A holographic will must be in the Testator's handwriting, must be signed by the Testator, and all the material terms must be in the Testator's handwriting. A codicil is an amendment of a will. The codicil can amend part of an already existing will. Here, Testator had originally devised his coin collection to his cousin, Chuck in 2000. In 2003, after a disagreement with Chuck, Testator drafted a holographic codicil to amend his original devise to his cousin, Chuck. All material terms of the amendment were in Testator's handwriting.

However, the facts do not indicate that the codicil was signed by the Testator. A valid codicil must either satisfy the above requirements for a holographic will or be re-executed in accordance with all will formalities. The facts also do not indicate that the codicil was re-executed. As such, the codicil revoking the gift to his friend Chuck is likely invalid and the terms of Testator's 2000 will remains valid.

4. 300 Shares of ABC Stock: Ademption & Class Gift: As stated above, ademption applies to specific gifts from the Testator's estate. If the specific gift is no longer existing at the time of Testator's death, the gift is adeeemed. Here, Testator devised 300 shares of ABC stock to the children of my friend, Diana. Here, the gift is not a specific gift because the will does not state that Testator devises "300 shares of my ABC stock to the children of my friend, Diana." Because the terms of the will do not specifically state "my ABC stock," then the gift is a general devise. Ademption does not apply to general devises, only to specific devises. As such, Testator's gift of a general devsie will not be adeemed, but rather will be replaced by another item in Testator's estate. Here, Testator sold his ABC stock and his Mustang to purchahse a Porsche. Because the devise of ABC stock was a general devise and ademption does not apply, Dolly will be able to take the Porsche under Testator's will.

The terms of Testator's will also state that the shares are to go to the children of my friend, Diana. This is a class gift. A class gift is a devise to a class of people, here being the children of Diana. The class remains open until the Testator's death, at which point the class closes. Here, at the time of Testator's execution of the 2000 will,

Diana had two children, Dave and Dolly. The Testator died in 2013, at which point the class closed and no other children born from Diana after 2013 would be eligible to take under Testator's will. Here, Diana had a third child named Donald in 2014.

Donald will not be eligible to take because Donald was born after the class closed.

The facts indicate that Dave predeceased Testator. Under the anti-lapse statute as stated above, if a beneficiary predeceases the Testator, the anti-lapse statute saves the gift if the beneficiary is a close family member of the Testator and leaves lineal descendants.

Here, Testator's gift of 300 shares of ABC stock was to children of a friend, Diana.

Because Diana is a friend of Testator and not a close family member, the anti-lapse statute does not apply to save the gift to Dave from lapsing. Even though Dave has a lineal descendant, a daughter named Daisy, Daisy will not be able to take under the anti-lapse statute. As such, under the terms of Testator's 2000 will, only Dolly will be able to take.

5. \$25,000 proceeds: A demonstrative gift is a gift of money from another item in the Testator's estate. When the named beneficiary in a life insurance policy conflicts with the terms of a will, the named beneficiary of the life insurance policy prevails. Here, Testator's will devised \$25,000 to his friend, Ellie. However, Testator's life insurance policy named his friend Greg as his primary beneficiary. As such, Greg will take the \$25,000 life insurance proceeds and Testator's friend, Ellie will not take anything.

6. Residuary Estate: Supernumerary witness: A valid will, as stated above, requires

two witnesses to sign in the presence of the Testator. When a witness is also a beneficiary of the will, in order for the gift to the interested witness to be valid, the interested witness must be supernumery. Here, Frank was an interested witnesses because Testator's will devised the residuary estate to Frank. However, the gift to Frank is valid because Frank is a supernumeray witness. There were two other disinterested witnesses present at the execution of Testator's will. Here, Testator's friend Greg and an employee of Testator's attorney were also witnesses to Testator's will and signed in the Testator's presence. Thus, Testator's gift to Frank is valid.

Frank has predeceased the Testator, leaving no lineal descendants. As such, the anti-lapse statute does not apply because Frank has no lineal descendants. Testator's gift to Frank will lapse and fall into intestacy. Intestacy applies when a testator dies without a will or not everything in the testator's will is devised or a gift fails and lapses. Here, the residuary estate lapses. Under the intestacy statute, Testator's residuary estate will first go to Testator's lineal descendants, meaning children. The facts do not indicate that Testatory has any children. Next, under intestacy, the Testator's residuary estate will go to the Testator's siblings or lindeal descendants of siblings. If there are no surviving siblings and no surviving lineal descendants of siblings, then the residuary estate will go to the Testator's surviving parents. If there are no surviving parents, then the residuary estate will go to the Testator's grandparents, if none, then next of kin, and if no next of kin, then the residuary estate will escheat to the state. Here, Testator's brother Frank leaves no lineal descendants. However, Testator's sister Amy, who also predeceased Testator leaves a son, Alan. Because Alan is a lineal descendant

of Testator's sister, Alan will take the residue by right of representation. If the holographic codicil amendment of the coin collection to Chuck was not valid, Testator's residue will also include the coin collection devised to Chuck.

END OF EXAM



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- EXAM 1, QUESTION 2 -

2)

Day #1, Question #2

Duty of Confidentiality

A lawyer must not reveal any confidential information relating to the representation of a client unless they have the informed consent of the client. A lawyer may reveal confidential information when an exception applies. Here there is an issue that Luis (L) is representing the personal interests of both Howard (H) and Wendy (W) because there may be a conflict in an interest and Howard will need to be able to confidentially represent both of their interests. In this situation, L will need to make it clear up front that typically this information is confidential but that confidentiality could be breached given that they are all meeting together about the estate plan. At the very least L should have gotten informed consent from both in writing that stated they understood that the arrangement could have issues with confidential information being revealed. The facts do not state this informed consent was obtained from H and W, thus L may have an ethical violation.

Duty of Loyalty - Husband and Wife for Estate Plan

A lawyer has a duty of loyalty to all of their current, former and prospective clients to fully represent them and their personal best interests to the best of the lawyers abilities. Through the representation of both H and W here, a conflict of interest of current clients could arise. A lawyer may avoid this conflict if they fully believe that the interests of the clients are not materially adverse to each other, they inform the client of the potential conflicts and receive informed consent. Here it is likely that as an estate planner it is beneficial to have both the co-trustees represented together so that they can come up with a plan that is best for the trust going forward. The interests are likely not materially adverse at the point the trust is setup so it is reasonable that L would represent both H and W in setting up the estate plan. Although, it should be fully explained to the clients that they are hiring them to setup the trust, so L will be doing what's best for their interests in the trust which could change in the future. If there is any concern for the personal interests, L should advise that H or W could seek that advice of independent counsel on their own to have their personal interests addressed. Given that L did not explain these conflicts or get informed consent, he could be liable for an ethical violation.

Duty of Competence

Every Lawyer owes their client a duty of competence. Competence includes having the necessary knowledge and skill for the representation, while being thorough and prepared to fully represent their clients interests. Here, there could be an issue if L does not have the necessary knowledge to setup the LLC for H and W. This issue can

be corrected by studying and researching to obtain the necessary knowledge, as long as the client is not charged for this time of study, or by associating with another Lawyer who does have the required knowledge for the representation. As an estate planner, L's practice may include business entities for his clients but if he does not have this experience he is required to get it or he will have an ethical violation.

The duty of competence also requires that the lawyer be thorough and prepared. W will likely argue that L was not thorough because if he was then he would have discovered that the 100 acres was owned by W before her and H were married. This will likely result in an ethical violation.

Representation of an Organization

When a lawyer represents an organization he represents the entity itself and not the individual members. When this type of representation arises the lawyer needs to make it clear to the members and managers whose interests he is representing and advise that individuals may need to seek the advice of independent counsel when situations arise. Here, L setup an LLC for H and W who are current clients, naming the trust (which was also setup by L) as the owner. The facts do not state that Luis is representing the LLC, so as long as he made it clear and received informed consent from both H and W that his representation was limited to the establishment of the LLC and nothing further he may have avoided a potential ethical violation here. If however he is the LLC's lawyer moving forward there will be an ethical violation for the

conflicts of interest that will arise and the fact that he will not be able to represent the LLC, the trust and H and W without their interests being materially adverse.

Third Party Payments

A lawyer may accept payment from a third party for a client's representation if the client knows of this arrangement and grants informed consent preferably in writing and the lawyer makes it clear to the third party payor that he will not be able to provide any confidential information. Here, L did not receive informed consent from Frank, who is the client. Additionally he likely revealed confidential information relating to the case when he told Howard that the case would settle if Luis could get Frank to compromise on one small point and told him that he had some reservations about the merits of Frank's position. L illiciting the help of H to help and persuade Frank to make a decision is definitely an ethical violation. Here there will be ethical violations for not getting Frank's informed consent and still accepting H's payment and revealing confidential information.

Duty to Communicate

A lawyer does have a duty to communicate to their clients the status of their ongoing cases. There could be a breach here if L is not relaying the case status information to Frank, since it seems that L is revealing or communicating the information to H instead.

Settlement Decisions

A lawyer has a duty to allow critical decisions of a client's case to be made by that client, while the more minor or administrative decisions of client's case can be made by the attorney as long as the client is not objecting to them. Here, L is pushing Frank to compromise so that the case can be settled. L is able to give his advice on moving forward, but cannot advise a client to be dishonest and "compromise" on a small point, nor can the lawyer go against the client's wishes in not wanting to settle. It is Frank's decision to compromise and L needs to respect the wishes of his client. An ethical violation has likely not yet occurred here, but could very easily occur depending on L's future actions.

Duty of Loyalty - LLC Development Dispute

A lawyer has a duty of loyalty to all of their current, former and prospective clients to fully represent them and their personal best interests to the best of the lawyer's abilities. Through the representation of both H and W here, a conflict of interest of current clients could arise. A lawyer may avoid this conflict if they fully believe that the interests of the clients are not materially adverse to each other, they inform the client of the potential conflicts and receive informed consent. Here given the fact that L has now represented the LLC, the trust and H and W it is likely that these interests

will be materially adverse to each other if H moves forward with the derivative lawsuit on behalf of the LLC. If, as discussed above, the representation for the LLC was limited to the setup, this may allow L to represent the trust if needed. It is not likely that he will be able to represent W against a lawsuit filed by H without it being materially adverse to both of their interests given the information that he has been privy to in their prior dealing. If L represents W against H or the LLC there will likely be an ethical violation.

Lawyer as a Witness

Additionally a lawyer cannot accept representation where he may be a material witness. Given the fact that he setup the trust who is the LLC member and wrote the managers duties and responsibilities in the LLC's operating agreement, it is likely that L may be called as a witness in the LLC's lawsuit against W.

Fee Arrangement

A lawyer's fees always need to be fair and foreseeable. This can include the amount of time the representation will take, custom in the community, L's knowledge and experience amongst other things. Here W is insisting that L represent her for free because of him not advising her of her interests in the 100 acres. A lawyer can represent a client for free if they are indigent. There are no facts that state that W is indigent. Thus, if L represents her for free this will be an ethical violation.

Malpractice

Here W is suggesting that L represent her for free in exchange for her not filing a malpractice suit against him. Malpractice suits can be waived if they are done upfront and the client must be represented by independent counsel in such an arrangement. If this type of agreement is made L will be liable for an ethical violation.

Duty of Confidentiality

A lawyer must not reveal any confidential information relating to the representation of a client unless they have the informed consent of the client. A lawyer may reveal confidential information when:

- it is necessary to prevent reasonable certain death or substantial bodily harm;
- the client is trying to use the lawyer's services in furtherance of committing a crime or fraudulent activity, but first the Lawyer must try and persuade the client into taking corrective action
- a Lawyer must disclose confidential information if they know of criminal activity that will reasonably lead to death or substantial bodily harm
- it is needed to get advice on their ethical duties
- if it is needed to defend themselves against a claim
- to comply with the law or a court order.

Here L will need to advise W of the potential breaches of confidentiality that will occur if he represents her in a lawsuit against Frank and the LLC. L has been privy to confidential information between both H and W, which would likely lead to his withdrawal on the case if the court grants his motion to withdraw. Additionally since W is hinting towards a malpractice suit, this information may need to be revealed to show that he had not violated any ethical or other duties owed to the client.

Duty of Candor

Every lawyer has a duty of candor that they owe to the court and to opposing counsel. Here, it appears that Luis met with Frank prior to his deposition for the suit he brought against W which is a violation of his conflict of interest. Additionally, he advised H that his answers were not going to be helpful and did not inform the court when Frank surprisingly answered that he did not recall the answers to the same questions that they discussed the day before. L has a duty to ensure that the truth is what is reported to the court and other parties and cannot be a part of a client trying to conceal information. If this is not reported to the court, this will be an ethical violation.

Duty to the Profession

Every lawyer also has a duty to uphold the profession in high regard. Many of L's actions have violated this duty and if any other attorneys are aware of his dishonest acts they have a duty to report these ethical violations or they will be charged with an

ethical violation themselves.

END OF EXAM



FEBRUARY 2015 EXAMINATION QUESTIONS

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- EXAM 1, QUESTION 3 -

3)

1. Standing of Citizens for Privacy ("CFP")

In order for a case to be justiciable, a plaintiff must have standing. A plaintiff has standing where she has suffered an injury in fact or subject to imminent, injury, where the defendant has caused that injury, and where that injury will be remedied by a court order (redressability). The general rule is that there is no third-party standing. However, an organization may assert third-party standing on behalf of its members if the members themselves would have standing to sue, the injury relates to the purpose of the organization, and the lawsuit will not require the participation of individual members.

Hence, we must first determine whether CFP's individual members would have standing to sue. Here, the Act would require Nevada telephone companies to produce to the Nevada Tourism Safety Task Force (the "Agency") the dates, times, and phone numbers for all calls made or received in Nevada. Because the Act covers all calls received in the state, members who make calls to Nevada will have suffered an injury in fact, in that their private information will be disclosed. Moreover, the injury will have been caused by the State of Nevada, a defendant. Finally, a declaration that the Act is invalid and an injunction stopping its enforcement would remedy that injury. Hence, CFP's individual members, citizens throughout the United States, likely have standing. Thus, the first requirement for third party standing is met. The second requirement is met because the purpose of CFP is to protect individuals' right to

privacy, which it would seek to vindicate with this suit. Finally, the third prong is met because the suit will likely not require the participation of individual members. For these reasons, CFP likely has standing to sue.

However, CFP may not sue the State of Nevada in federal court. The 11th Amendment prohibits suits against states in federal court. Therefore, the State of Nevada is immune from suit. However, the 11th Amendment allows for suits against state officials in their individual capacity. Hence, the suit as against the Governor is permitted. Moreover, the Governor appears to be a proper defendant because the Agency is subject to his control because it is an arm of the state's executive branch. However, the head of the Agency may have been a better defendant.

2. Constitutionality of the Act

The state action requirement is met because the State is requiring the disclosure of this information and it is being reported to the Agency, and arm of the state.

CFP should challenge the Act on Fourth Amendment grounds. The Fourth Amendment prohibits unlawful searches and seizures. The Fourth Amendment requires state action, and it applies to the states through the Due Process Clause of the Fourteenth Amendment. The Fourth Amendment prohibits the seizure of evidence unless a warrant has been obtained, or, in the absence of a warrant, unless an exception to the warrant requirement applies. In order to protect this right, the courts have fashioned the exclusionary rule, whereby evidence obtained in violation of the

Fourteenth Amendment may not be used against a person. Moreover, evidence derived from illegally obtained evidence is also excluded as fruits of the poisonous tree. In order to have standing to challenge such evidence, a defendant must have a reasonable expectation in the items or information seized and/or the area searched.

Here, the Act allows for the seizure of such information without a warrant. This blanket warrant exception likely violates the Fourth Amendment because it does not provide for individualized inquiry into whether a warrant exception applies in that case. The state action requirement is met because the State is requiring the disclosure of this information and it is being reported to the Agency, and arm of the state.

CFP should also challenge on substantive Fifth Amendment Due Process grounds, which applies to the states through the Fourteenth Amendment. CFP should argue that the Due Process clause protects individual liberties, such as the right to privacy in the home. CFP should argue that under the Due Process Clause, privacy is a fundamental liberty upon which a state government cannot infringe unless it meets the requirements of strict scrutiny. However, this argument would likely fail because the state would likely successfully counter that citizens do not have a right to privacy in the dates, times, and phone numbers of their calls. CFP would have a stronger argument if the content of the calls were being monitored, but citizens likely do not have a reasonable expectation of privacy in the details provided because citizens should know that, at the very least, their telephone providers are privy to this kind of information. This is analogous to a holding that citizens do not have a reasonable

expectation of privacy as to the contents of their bank accounts, because at the very least, the banks are privy to this information.

However, were the Court to find a fundamental liberty interest at stake, the strict scrutiny analysis would apply. Under a strict scrutiny analysis, the state has the burden of demonstrating that the law is necessary to achieve a compelling state interest. Here, the state would argue that it seeks only the most limited information in order to achieve the compelling state interest of protecting citizens against terrorism. However, that was not the Legislature's actual motivation in passing the law, which is relevant under a strict scrutiny analysis. Rather, Congress acted to protect Nevada's tourism economy. This law is not necessary to protect Nevada's tourism economy, to the contrary, it may hurt Nevada's tourism economy by discouraging telephone calls to the state. Hence, the law would likely fail were a strict scrutiny analysis to be applied.

CFP should also challenge the Act on procedural due process grounds, which applies to the states through the Fourteenth Amendment. The state action requirement is met because the State is requiring the disclosure of this information and it is being reported to the Agency, and arm of the state. Assuming a fundamental liberty interest in privacy is at stake, the government cannot take or invade that right without procedural safeguards, usually a notice and a hearing. Here, there is no procedure at all required because the Agency can seize this information without a warrant, and therefore not enough procedure is provided for. To determine what procedural safeguards should apply, the court would utilize the matthews balancing test which

takes into account the interest of the individual in the liberty at stake, the value of additional procedural safeguards in reducing error, and the government's interest in efficiency. Here, there are no procedural safeguards to protect the interest at stake, and the Act likely fails for procedural due process reasons.

CFP may also challenge on the ground that it exceeds the Legislature's power. However, the police power granted to the states is very broad and allows states to legislate for the general welfare. This challenge would likely fail because the state may generally legislate for the public welfare.

CFP should also challenge the Act on Commerce Clause grounds. CFP should argue that Congress has the power to regulate the instrumentalities of interstate commerce, such as telephones. Pursuant to the Dormant Commerce Clause, a state law will be held unconstitutional where it discriminates against interstate commerce unless it is necessary to achieve an important state interest unrelated to protectionism. Here, even though the state seeks only to regulate intrastate companies within Nevada, the law reaches instrumentalities of interstate commerce and reaches citizens outside of the state by disclosing information related to calls received in Nevada. CFP would therefore have a Commerce Clause

CFP should also challenge the Act on Supremacy Clause grounds. Under the Constitution, federal law is supreme to state law. Hence, state laws preempted by federal laws are unconstitutional. Federal preemption may be found where Congress

explicitly preempts conflicting state laws, where federal law occupies an entire field, or where state law would frustrate federal objectives. Here, the federal government arguably preempts the entire field of anti-terrorism activity because there is an entire federal agency, the Department of Homeland Security, dedicated to that purpose. Moreover there are federal programs monitoring telephone calls in this fashion. CFP would therefore have a strong challenge based on preemption grounds. However, this argument may fail in light of the Fee Law, whereby Congress impliedly sanctioned this practice by the States.

3. The Fee Law

The Fee Law is unconstitutional. Congress does not have general police power - that is reserved to the states under the 10th Amendment. Instead, Congress can act only according to its enumerated powers, such as the Commerce power of the Tax and Spending Power. The 10th Amendment therefore prohibits the federal government from commandeering the states to exercise their police power. Here, Congress has sought to force states require their citizens to pay fees to telephone providers. The federal government may not order states to take such action. Hence, the Fee Law is unconstitutional.

Congress could have collected these fees itself through the Commerce power, pursuant to which Congress has the power to regulate the instrumentalities of interstate commerce, including telephones. Congress also could have enticed the

states to collect these fees through the Spending power, by conditioning federal grants to the states upon such a requirement, so long as that condition is not coercive. But Congress did not do so. The Fee Law is invalid.

4. Constitutionality of Phone Records as Evidence

The Fourth Amendment prohibits unlawful searches and seizures. The Fourth Amendment requires state action, and it applies to the states through the Due Process Clause of the Fourteenth Amendment. The Fourth Amendment prohibits the seizure of evidence unless a warrant has been obtained, or, in the absence of a warrant, unless an exception to the warrant requirement applies. In order to protect this right, the courts have fashioned the exclusionary rule, whereby evidence obtained in violation of the Fourth Amendment may not be used against a person. Moreover, evidence derived from illegally obtained evidence is also excluded as fruits of the poisonous tree. In order to have standing to challenge such evidence, a defendant must have a reasonable expectation in the items or information seized and/or the area searched.

Here, the Act allows the seizure of this information without a warrant. a defendant seeking to exclude evidence obtained pursuant to the Act would argue that the information was obtained in violation of his Fourth Amendment rights. To have standing, the defendant must have a reasonable expectation of privacy in the information. However, a defendant likely does not have a reasonable expectation of privacy in these details provided because citizens should know that, at the very least,

their telephone providers are privy to this kind of information. This is analogous to a holding that citizens do not have a reasonable expectation of privacy as to the contents of their bank accounts, because at the very least, the banks are privy to this information. Accordingly, a defendant would lack standing to challenge this information on Fourth Amendment grounds.

The Sixth Amendment Confrontation Clause. A criminal defendant has the right to confront witnesses against him. This right is violated where out of court testimony is offered against him and the defendant does not have the opportunity to cross-examine the declarant. Here, in providing the records without providing the witness from the Agency as to how the records were obtained, the state would be violating a defendant's right to confrontation. The records would be out of court statements, i.e. defendant made/received these calls from these numbers on these dates, and the person who prepared the records would not be subject to cross-examination. And they would be testimonial, because these details were not obtained by police in order to remedy an ongoing emergency.

END OF EXAM



FEBRUARY 2015 EXAMINATION QUESTIONS

**APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS**

- EXAM 1, QUESTION 4 -

4)

Corp A:

Authorized Shares: A corporation's Articles of Incorporation provide for the number of authorized shares and classes of shares. It sets the minimum value (par value) and it is up to the Board of Directors to determine adequate consideration for the issuance of shares. Amending the Articles requires a majority vote of the Board at a meeting, unanimous written consent outside of a meeting, and notice and approval by a majority of the shareholders. Here, Corp A is authorized 1,000 shares of common stock which it issued to Alice. Corp A needs to amend the Articles to authorize the issuance of 100 more shares of common stock as that is what is being given to Becky and Mark. The Board can determine that the value of Corp B serves as sufficient consideration. It is assumed the Board passed this as they adopted the plan of merger, and a majority of the shareholders, Alice's 1,000 shares, voted in favor of this. Thus this transfer would be valid as to that part of the contract.

In line with the above, the amendment to the Articles to authorize a class B preferred stock must pass the same test. Similarly, the Board adopted the plan of merger and Alice voted in favor of this change. Peter has no voting rights under his stock and does not count towards quorum or the majority of votes required.

If the Articles provide, a shareholder may have rights to maintain her percentage of the stocks issued for money. Here, the Articles appear silent on that issue and the issuance of the new stock is not for money, but for Corp B.

Notice of Meeting by Corp A: A merger is not a fundamental change for the company that is absorbing another. This means that the majority of all shareholders is not required. Despite this, the decision to amend the Articles is a fundamental change and proper notice is necessary. The Bylaws provide that notice must be given to shareholders between 10 and 60 days. The President issued notice of the meeting on Monday less than a week before the meeting. This is not proper notice.

Waiver: Where notice is not proper a shareholder may be deemed to have waived the notice requirement by attending the meeting. Here, Alice attended the special meeting and thus waived the notice requirement.

Agenda: Notice of a special meeting must include the items to be discussed/voted on during the meeting. The special meeting is limited to the stated purposes. Here, it appears the President of the corporation only mentioned that a special meeting was occurring, not what would be discussed.

Special Meeting: The special meeting was attended by a majority of the votes entitled to be cast and so quorum was reached. With quorum, the vote still needs to be for a majority of the votes entitled to be cast. Here, Alice has 100% of the votes entitled to be cast. She arrived, and voted for the merger and its terms. Thus it is valid.

Corp B:

Fundamental Change: Merger is a fundamental change for the company that is being

absorbed. After the merger, Corp B will no longer exist. A fundamental change requires the vote of the majority of shares entitled to be cast. It needs to be at a meeting unless there is unanimous written consent from the shareholders. Here, Mark did not consent in writing. Thus a meeting needs to be called. The Board of Directors should provide notice of the special meeting to Becky and Mark. If both waive the notice by attending (either in person or through a proxy) then the meeting can be had immediately. Becky's share are sufficient for quorum. Mark is out of town but has a third party opening his mail. Notice is sufficient if sent to the third party because he is supposed to notify Mark. If he decides to set up a proxy through this third party it will need to be written and communicated to Corp B's President or Secretary. With proper notice Becky can attend the meeting, reaching a quorum by having a majority of the shares entitled to vote and can vote all her shares in favor of the merger.

Assuming merger is approved:

Marks Dissenter's Rights: Dissenters rights allow a shareholder who is not happy with a proposed action to sell his shares if he follows the proper procedure: 1) Notice of intent to dissent prior to the vote; 2) Do not vote in favor of the proposed action; and 3) Request the sale of the shares after the vote is approved. Here, Mark notified Corp B that he wants to sell his shares and did not sign the consent. This would show Corp B of his intent to dissent. At the meeting that would need to be held he would not attend and thus would not vote in favor of hte merger. Following the vote, however, Corp B mailed a notice fo the dissenters rights to the third party in charge of

receiving his mail and he did not follow through with a request for the sale of his shares. He will maintain his 20 shares as part of Corp A following the merger.

Agent: Mark's hiring of a third party to read his mail and notify him regarding the merger creates an agency relationship. Agency is where there is a principal who hires an agent to perform duties on his behalf. The Agent is liable to the principal with a duty of obedience. Further, a principal can give authority to the agent to perform certain functions. Here, Mark's third party has Actual Express authority to read his mail and notify him of notices regarding the merger. Corp B's notice to the Agent was sufficient because of this authority. Mark will be able to recover from the agent for his failure to comply with his assigned task: retrieve the mail and notify Mark of notice regarding the merger.

Peter's Rights: Peter is a non-vote holding shareholder with Corp. A. Where the shareholder cannot vote he is not entitled to dissenters rights (as he cannot dissent). Peter is entitled to notice of the shareholder meeting. Peter can attempt to bring a shareholder derivative suit.

Shareholder Derivative Suit: A shareholder derivative suit is brought by a shareholder (who owns 5% of the shares or has owned stock for 6 months) on behalf of the corporation against the Board of Directors. Peter will be required to send notice to the Board of Directors unless it is futile to do so. Here, it will not be futile to do so as it doesn't appear there are any interested directors. He can attempt to challenge the Board's merger. This will likely not succeed as the Board will be protected by the Business Judgment Rule. This allows the Board to perform actions that are reasonably

informed and are not a violation of the fiduciary duties.

Peter's shares: Peter can also attempt to argue that his shares are being diluted because of the addition of another class of shares. He will likely fail on this charge as well. Peter has preferred stock upon liquidation. This is different than preferred for dividends. Corp A still has 500 shares of Class A stock it can issue. It may decide to do that at any time for an amount it considers adequate.

Abuse of the minority: Peter can also argue that there is abuse of the minority shareholder. Where there is a majority shareholder who acts in a means that oppresses the minority, the minority can have the actions set aside. Here, Alice is the majority shareholder. She is the only one entitled to vote. She wants to merge the corporations and it does not matter what Peter wants as he does not have any voting rights. This will likely not succeed either because there appears to be no improper purpose behind the merger. The facts do not show any self dealing or anything that would show Corp A is acting ultra vires (outside of the purpose set out in the Articles of Incorporation, typically any lawful purpose).

Peter will likely not succeed in any of the above actions. He will maintain his 500 shares of preferred stock. If and when the company liquidates he will have priority in getting paid out according to his shares. The Class B stock only receives preference for when dividends are issued by the Board. They are paid first, followed by the Common stock and Class A. Further, Peter may attempt to purchase the newly authorized Class B stock or the remaining 500 Class A stock for the value determined by the Board.

END OF EXAM



FEBRUARY 2015 EXAMINATION QUESTIONS

**APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS**

- EXAM 3, QUESTION 1 -

1)

Q.1:

1) Enforceable Contract between Glitter & Hi-Def?; Terms of Contract

Enforceable Contract

A contract is formed when there is a valid offer made by an offeror, that is accepted by the offeree, supported by consideration of each party. There must also be no applicable defenses to formation of the contract.

Offer

An offer is any communication or expressive conduct of an intent to form and enter into a contract. Typically, an offer must contain certain and definite terms, be communicated to an offeree, and must create the power of acceptance in the offeree.

Here, Glitter Hotel (Glitter) emailed a purchase order to Hi-Def on June 1, 2014 for flat screen televisions (TVs). In this order, Glitter indicated an intent to purchase 1,000 TVs at a price of \$500 per TV. This is a sufficient communication of an intent to form a contract with Hi-Def, it was communicated to Hi-Def through the form an email, and the terms were certain and definite because the quantity and price of each

unit were included, which is a requirements of contracts within the UCC, discussed below.

Acceptance

Acceptance of an offer is any communication or conduct, communicated to the offeror, that indicates an intent to be bound by the terms of the offer. Because Glitter's offer was an offer to enter into a bilateral contract - requiring a promise for a promise, Hi-Def was required to either communicate its acceptance, or could have accepted by simply delivering and installing goods conforming to the offer.

Here, Hi-Def replied to Glitter's email agreeing to all of Glitter's terms. The email was a communication to Glitter, the offeror, and expressed an intent to form a contract because the email "agreed to all of Glitter's terms." This would likely be sufficient to constitute an offer under the UCC, however because Hi-Def included additional terms in its acceptance, more analysis of the acceptance is necessary.

Additional Terms in Acceptance under UCC

Under the common law, which controls all other contracts that are not for the sale of goods, any additional terms in an acceptance constitute a rejection of the offer and a counteroffer due to the mirror image rule. The mirror image rule requires acceptance of all terms, and no addition of new terms. However, because this contract is governed by the UCC, additional terms in the acceptance will still constitute

acceptance of the offer as long as the offer does not expressly limit acceptance to its terms, the offeror does not object to the additional terms within a reasonable time, or the additional terms do not materially alter the rights and obligations of the parties under the contract. Another consideration is whether the parties are merchants. A merchant is a person who deal specifically in the type of goods sold.

Here, Glitter is not a merchant, because as a hotel, it does not deal specifically in TVs - the type of good sold. Hi-Def on the other hand is a merchant because it is presumably a seller of TVs and possibly other electronic devises. Because the Buyer (Glitter) is not a merchant, but the Seller (Hi-Def) is, the additional terms will not automatically become part of the contract. Also, Glitter's offer did not specifically limit the acceptance to the exact terms of the offer, and Glitter did not respond to Hi-Def's additional terms in the acceptance within a reasonable time. Thus, we must determine whether the additional terms materially alter the rights and obligations under the contract.

The first additional term - both requiring arbitration and chosing CA as the choice of law provision - is typically construed as materially affecting the parties' rights and obligations under the contract. When an additional term materially affected parties' rights, it does not become part of the contract. Therefore, Hi-Def's first additional term is not part of the contract.

The second additional term - Hi-Def's disclaimers of all implied warranties - will also not become part of the contract becuase a party under the UCC cannot waive the implied warranty of merchantability. The implied warranty of merchantability is implied in every contract for the sale of goods, and warrants that the goods sold are

fit for ordinary purposes that a reasonable person would expect them to be for. Here, the goods are TVs. An ordinary person would reasonably expect that TVs would be fit for watching, meaning that the screen would work, all controls and buttons would work properly, and the TVs were in good working condition. Therefore, the second additional term will not be part of the contract because the implied warranty of merchantability is in every contract under the UCC.

The third additional term - that Glitter waived any remedies following the installation of the TVs - will also not become part of the contract because a seller, and specifically a merchant, cannot unilaterally cause a Buyer to waive their remedies under a contract. Hi-Def knew that Glitter wanted the TVs to be installed by June 30, 2014 because that was an explicit term in Glitter's offer. If the TVs are not later installed properly by Hi-Def, Glitter can hold Hi-Def liable for breach of their contract. In order for this type of term to be lawful in a contract, both parties would have to mutually agree to it, and the buyer would also likely have to sign or initial the provision in the contract. Also, if this type of term was included in the contract, the Seller would likely have to give the Buyer a discount on the delivery or installation that would offset the Buyer's inability to hold the Seller responsible for any defect with the installation.

The fourth additional term - that Hi-Def would charge 5% of the purchase price for installation - would likely become part of the contract if it is reasonably according to either the parties' course of dealing or industry standards. If Glitter's price term of \$500 per TV did not contemplate the price of installation, the Hi-Def rightfully included the price of installation into its acceptance. If Glitter did not agree to paying

any installation cost of the TVs, it should have objected to this term within a reasonable time after receiving the acceptance.

In conclusion, the acceptance was proper; the first 3 additional terms will not be part of the contract, but the last term contemplating installation cost will likely be a part of the enforceable contract. The other terms are that Hi-Def is to deliver 1,000 TVs at \$500 per TV to Glitter no later than June 30, 2014. Also, the provision requiring that all modifications of the contract must be in writing and signed by Buyer's authorized representative is also a term of the contract.

Mailbox Rule

The mailbox rule provides that acceptance is valid upon dispatch unless it is for an option contract. Here, when Hi-Def sent its email in response to Glitter's emailed offer, the acceptance was effective immediately upon dispatch. Thus, Glitter cannot argue that the acceptance was not effective until Glitter read or received the email.

Consideration

In order for a valid contract to be formed, the parties' obligations must be supported by mutual consideration. Consideration is also caused a bargained-for-exchange, where each party promises to give something in exchange for the other party's

promise or performance. Consideration supporting a bilateral contract can simply be promises of each party to perform its end of the bargain.

Here, Glitter has agreed to buy 1000 TV from Ho-Def and Ho-Def has agreed to supply, deliver and install these TVs in exchange of Glitter paying 500 per TV, in addition to the 5% installation cost. Therefore, there is valid consideration to support an enforceable contract.

UCC & Statute of Frauds

Contracts made for the purchase and sale of goods are controlled by the Uniform Commercial Code (UCC), Article 2. Any contract that is within the UCC that is worth over \$500 also must comply with the Statute of Frauds (SOF) to be enforceable. The SOF requires certain contracts to be in writing in order to offset any potential allegations of fraud or indefiniteness.

Here, TVs are goods for the purpose of the UCC because they are tangible, movable objects. This contract is worth approximately \$500,000 because 1,000 TVs are to be sold at the price of \$500 each. Thus, this contract is within the bounds of the UCC, and will therefore need to comply with the requirements of the UCC. Typically, a contract does not need to be executed in one single transaction. It can be made up of separate written documents, as long as they evidence an intent of the parties to be bound by their promises. Here, the two emails between Glitter and Hi-Def are sufficient to satisfy the SOF. They will be integrated so that the obligations of the parties will be determined by analyzing both emails together as a single written transaction.

In conclusion, there is an enforceable contract. Glitter is to buy the TVs that Hi-Def is to deliver and install no later than June 30, 2014.

2) Claims and Defenses of Each Party

Glitter's Claims & Defenses

Glitter will claim that Hi-Def breached the contract by failing to deliver and install the TVs by June 30, 2014. It may also claim that the TVs delivered and installed were not conforming to the contract, constituting a second breach.

Breach

When a party to a contract fails to fulfill a required promise, they have breached the contract. If the delivery and installation date was a "time is of the essence" clause, then Hi-Def's failure to deliver and install by that date is a material breach. However, because this contract is within the UCC, the perfect tender rule is applicable.

Perfect Tender

Under the UCC, a seller must deliver conforming goods to the buyer by the date contemplated in the contract. If the seller delivers nonconforming goods, the buyer

has the right at its option to either accept all of the goods, reject all of the goods, or accept any commercial unit and reject the rest.

Here, Glitter does not deliver by June 30, which is a breach under the UCC because the tender was not "perfect." If the delivery date was not a "time is of the essence" clause, or if Hi-Def gave notice to Glitter that it was unable to perform by the contract date, then Hi-Def would have a reasonable time after that date to perfect its tender. Because the TVs were destroyed in an accident, Hi-Def will argue that its performance by the contemplated date became impossible.

Impossibility vs. Impracticability

Impossibility will excuse nonperformance of a contract obligation if performance becomes impossible through no fault of the seller. Impracticability will typically not excuse nonperformance simply because performance has become more costly or more time consuming than originally contemplated by the seller.

Here, although Hi-Def will attempt to persuade a court that its performance became impossible, the court will not excuse performance because destruction of the TVs only made the contract more expensive to Hi-Def. Since all 1000 TVs were destroyed, Hi-Def would have to manufacture 1000 more TVs in order to fulfill its order obligation. This would make its performance a lot more costly, but not impossible. Thus, Hi-Def's nonperformance by June 30 is not excused.

Risk of Loss

Another thing to consider is whether Hi-Def assumed the risk of loss to the TVs. Typically a merchant seller's risk of loss ends and transfers to the buyer when the seller tenders the goods. If the risk of loss was on Glitter during transit of the TVs, then Hi-Def is not responsible for the destruction of the TVs.

Here, Hi-Def had not tendered the goods yet, the goods were still on Hi-Def's truck, and they were not installed in the Glitter Hotel, as required by the contract. Thus, Glitter did not assume the risk of loss, so Hi-Def is responsible for paying for the destruction of the first set of TVs.

Hi-Def then delivers the TVs on August 1, about one month later, which may be a commercially reasonable time after the contemplated time for performance as long as the contract date is not construed as being a time of the essence clause. However, if the court finds that this was not a reasonable time for Hi-Def to perform, then this was a breach of the contract, giving rise to a claim of damages to Glitter.

Glitter's Waiver of the Condition

When Glitter's employee signed the receipt acknowledging installation of the TV's, Hi-Def will argue that this was acceptance, waiving any right to a claim that Hi-Def breached the contract. However, Glitter will counter that it did not accept the installation of the TVs until it had time to inspect the TVs, about a month later, and found that the TV screens were barely visible in the rooms. Glitter will argue this was

a breach, however Hi-Def will counter that it did not warrant that the goods were fit for a particular purpose.

Goods fit for Particular Purpose

When the buyer expresses to the seller that he needs goods for a specific purpose, the seller knows of that purpose, and the buyer relies on the seller to select the goods, the seller warrants that the goods are fit for that purpose. Here, however, Hi-Def was not made aware that Glitter needed TV screens that could be visible in areas with flooded natural light. Also, Glitter did not rely on Hi-Def to select the TVs because Glitter sent the order for the type of TVs to Glitter without informing them of their specific needs. Thus, Glitter will not be successful in claiming that the TVs were not conforming to the contract.

Hi-Def's Claims & Defenses

Glitter refuses to pay for the TVs. If Glitter's refusal is based on Hi-Def's earlier breach arising from not delivering the TVs in time, then Glitter may be correct in refusing to pay the contract price. However, if Glitter's refusal to pay is based on the TV screens not being visible, and thus, not fit for a particular purpose, then this would be a breach by Glitter, giving Hi-Def a claim to expectation damages.

Here, in order to recover for Glitter's failure to pay, Hi-Def will assert that the TVs were conforming to the contract, and were delivered and installed by Hi-Def. Hi-

Def will also assert that Glitter waived the express condition that the TVs be delivered no later than June 30 when Glitter allowed the TVs to be installed and then the employee signed the receipt. Hi-Def's claim that the TVs were accepted is not entirely plausible because Glitter has a reasonable time after accepting to inspect the goods. If a month is reasonable, then the could revoke their acceptance. However, a court would likely find this amount of time was not reasonable because Glitter allowed Hi-Def to install all 1000 TVs in the hotel without first inspecting at least one of them to make sure they were conforming.

Glitter's Defenses

Glitter will claim that the goods were non-conforming, but this will be unsuccessful because Hi-Def did not know of Glitter's particular purpose. Glitter will likely be estopped from asserting the late delivery because it allowed Hi-Def to install the TVs.

3) Damages Sought by Each Party & Whether Successful

Glitter's Damages Sought

Glitter can seek damages for Hi-Def's failure to deliver the TVs on time if the delivery date was a time of the essence clause, and if the condition was not waived by allowing Glitter to ultimately install the TVs. Glitter's alleged damages are for lost revenues from customers who cancelled their reservations in July. This will only be

recoverable if this consequence is foreseeable by the parties when they formed the contract, or unless Glitter specifically informed Hi-Def that this was a possible consequence of not having the TVs in the rooms on time.

If the court finds that Glitter waived the condition of delivery date, then Glitter will have to pay the contract price plus the installation fee because the goods were conforming to the contract. Glitter will seek to offset the contract price by its attempt to cover - when it purchased 1000 TVs from another supplier for \$700 each. However, because the goods were conforming, other than satisfaction of the delivery date condition, which Glitter waived, Glitter is obligated to pay the contract price.

Hi-Def's Damages Sought

Hi-Def is entitled to payment for the delivery and installation of the TVs if the court finds that the delivery date was not time of the essence. Glitter may be entitled to offset the contract price by Glitter's damages it incurred during the month of July when the rooms did not have TVs.

Hi-Def also has a claim against Glitter for the TVs Glitter sold for 100 each. When a buyer rejects goods, it must inform the seller of his rejection and give the seller the opportunity to pick up the goods during the normal business hours of the buyer. The buyer has a duty to protect and keep the goods safe, here this duty is breached by Glitter selling the TVs for a very small fraction of their original worth.

Glitter should not have sold the TV's for 100 each w/out first giving Hi-Def an opportunity to pick up the TVs. Thus, if Glitter is not required to pay the contract price, it will at least have to pay Hi-Def the value of each TV wrongfully sold.

END OF EXAM



FEBRUARY 2015 EXAMINATION QUESTIONS

**APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS**

- EXAM 3, QUESTION 2 -

2)

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches or seizures. Searches are presumptively unreasonable if a warrant has not issued for the search, unless the search falls under one of the six enumerated exceptions to the warrant requirement. A search takes place whenever the citizen had a reasonable expectation of privacy in the place or thing searched. A seizure takes place when a reasonable person in the place of the person seized would not feel that he was able to leave or to terminate the encounter. It has been determined that an investigatory stop under Terry is not a seizure.

Question 1:

(a) Ozzie did not violate Devon's rights by pulling him over. A traffic stop is constitutional so long as the stopping officer has probable cause to believe that a law has been violated. Probable cause exists when an reasonable officer has a reasonable belief that there are facts that exist that constitute a violation of the law. Here, a law had been violated- Devon (D) had been driving in excess of the posted speed limit. Therefore, Ozzie (O) had probable cause to believe that a law had been violated, and the stop was constitutional. The fact that the stop was pretextual- O really wanted to investigate whether the car contained methamphetamine- is irrelevant. The Supreme Court has held that pretextual reason for making the stop does not violate the Defendant's constitutional rights so long as the stop itself was proper- i.e. predicated

upon probable cause that the law had been violated. If D had not violated any traffic laws, and O had not known of the outstanding warrant for D's arrest, then the stop would have violated D's constitutional rights. ON these facts, however, the stop was proper.

(b). An officer may conduct a search of the suspects car under several exceptions to the search warrant requirement. Firstly, an officer may search the car when the suspect is not in custody/under the control of the officer, such that the suspect may still be able to gain access to the interior of the car in order to obtain a weapon. Secondly, an officer may search the car when the officer believes that there is evidence in the car of the crime for which the suspect was stopped. A search predicated on either of these exceptions is limited to the passenger compartment only. Lastly, an officer may search the car when, based on a reasonable belief that its occupants are armed, the officer orders the occupants out of the car and then searches the passenger compartment only for weapons.

Here, none of the above exceptions to the warrant requirement seem to apply because the offense for which D was stopped was not the possession of an open container in a car. However, O saw, in plain view, D throw a half-empty bottle of beer into the back seas, and there is a statute that makes it illegal to possess an open container of alcohol within the passenger area of a moter vehicle. Therefore, even though the open container was not the offense for which the stop was initially made and therefore entry into the car to find evidence of the violation of the open container statute would

normally be prohibited, here, the open container was thrown into the backseat in plain view of O, and therefore, O had the authority to go into the backseat of the car to obtain evidence of a law that he had probable cause to believe that D had committed. The entry into the backseat of the car was lawful based on the plain view exception to the warrant requirement, coupled with the automobile exception for search for the evidence of the crime for which the stop was made. D's constitutional rights were not violated by the entry into the car for the open container.

(c). It is likely that the handwritten recipe for methamphetamine violated D's constitutional rights. As noted, there is a plain view exception to the search warrant requirement. The plain view exception states that an officer may seize the fruits or instrumentalities of a crime when the officer is rightfully on the premises where the fruits or instrumentalities are, the illegal nature of such fruits or instrumentalities are immediately apparent, and such fruits or instrumentalities are in plain view such that the officer need not move or touch anything in order to find or determine the nature of the illegal object. Here, the facts indicate that O found a handwritten recipe for drugs "inside of a wallet he saw on the back seat." Because O did not have a search warrant for the car, he was limited to the retrieval of the open container while he was inside the vehicle, as noted above. If the wallet was open and the recipe for methamphetamine ("meth") was plainly visible to O, then his seizure of it did not violate D's constitutional rights under the 4th Amendment. However, if the wallet was not open and O engaged in a search of the wallet and found the recipe subsequent to that search, or if O even slightly moved the wallet in any way in order to decipher

what the writing was for, it would constitute an illegal search, as there was no warrant and no exception to the warrant requirement applies. If O moved the wallet in any way in order to find the receipt so that its criminal nature was not immediately obvious to O on plain view, the D's rights have been violated with regard to the receipt.

(d). There is a search exception for automobiles when the car itself is considered contraband. In this situation, the car itself may be impounded and searched. In this case, D's car itself was not contraband. There is also an exception when a suspect is constitutionally arrested, as D was here due to the open container rule. Officers have the discretion of whether to arrest a suspect for a traffic offense if the offense is not minor. Here, between the speeding and the open container, the arrest was valid. Further, there was an outstanding warrant for D's arrest, so even if O didn't have the authority to arrest him for the traffic stop, such authority arose when he discovered the outstanding warrant. Whether O had the authority to decide to have the car impounded is questionable. It was not contraband itself. However, cars have a diminished expectation of privacy because of their mobile nature and because such a mobile nature makes it easier for evidence to be disposed of. But, without any probable cause as to whether there was additional contraband in the car, it is arguable that O did not have the authority to decide to have the car impounded. If he did not have such authority, the subsequent search for valuables pursuant to police protocol would have violated D's constitutional rights, IF he did have the authority to have it impounded, then the search subject to police protocol is constitutional. The officer

will argue that he had probable cause due to the meth receipt and D's prior arrests. It is likely that a court would err in favor of the police and decide that O did have authority. It is close and D's attorney will certainly argue that probable cause did not exist and that the search violated D's rights. However, O erred when, after finding the drugs, he released the car to the tow truck driver. Releasing the car to the tow truck driver and not following the protocol of having the car impounded is a violation of the protocol and would further D's argument that O was not interested in the following of protocol and the constitution, and instead was only interested in getting evidence of D's illegal activity.

2. Miranda rights are required to be given under the 5th amendment right against self-incrimination. Here, it appears that the Miranda rights were properly administered, and O ceased all questioning when D asked for a lawyer. The request for a lawyer was unambiguous, which is required in order for questioning to stop. When a defendant requests a lawyer, all questioning must cease until the defendant's lawyer is present, and no further questioning may take place without the lawyer's presence. Here, O stopped questioning when D requested a lawyer and thus did not violate his Miranda rights.

Miranda rights only apply to custodial interrogation. Determining whether someone is in custody is a two-step process: first, the custody must be such that a reasonable person in the defendant's position would not think that they were free to terminate the encounter and leave. Second, the custody must be such that the same type of inherent

coercion and pressure present in station-house questioning is present. Interrogation is any line of questioning that is likely to illicit an incriminating response by the defendant. Here, since D was being questioned by someone who he did not know was a police

officer. Therefore, the interrogation was not custodial because the interrogation did not have the same inherent coercion that is present when police officers are questioning a defendant at a police station. D's Miranda rights were not violated by having Irvine inmate ask D about his crime.

However, although D's miranda rights were not violated, the motion to surpress does bring up constitutional confrontation clause issues. In order to admit hearsay, which is an out of court satement offered in court in order to prove the truth of the matter asserted in the statement, under federal law, a criminal defendant must have had an opportunity to cross-examine the declarant with regard to the statement, either in the current proceeding or in a prior proceeding, when the statement made is testimonial. The statement made by D was testimonial because it has to do with the crime committed. Here, however, the statement to be admitted is an opposing party statement, D, which under the Federal Rules of Evidence is nonhearsay that is admissible for both impeachment purposes as well as substantive evidence. However the Confrontation clause rights of a defendant are very strong, they are a constitutional right to confront adverse witnesses, and here D does not have the opportunity to confront Irving about the statement made. It is likley that D's confontation rights have been violated by allowing I to testify without D being able to

cross-examine him.

3. Regardless of confrontation clause issues, D's rights would have been violated if D had been charged with a crime at the time that Irving (I) was placed in his cell. The 6th Amendment right to counsel attaches at the time that a defendant is formally charged with a crime. After a defendant has been formally charged, he has a right to counsel at all critical proceedings during the case, and this applies to interrogation-questions that are likely to elicit an incriminating response from a defendant. The 6th Amendment right to counsel is offense specific, and here, if D had already been formally charged when he made the statement, he had a right to have his attorney present at anytime "interrogation" by the police, or someone working at the police's behest, takes place. Here, I was "interrogating" D, formal charges had been filed, as a result D's 6th Amendment right to counsel at all critical stages of the proceedings had attached, and as a result D's 6th Amendment rights have been violated. If formal charges had attached when I questioned D as to his offense in teh jail cell, the motion to suppress should be granted.

4. The judge did commit a constitutional error when she permitted the district attorney to read a transcript of I's grand jury testimony. As explained above in question 2, a defendant has the constitutional right to confrontation. All the rules regarding this right are fully discussed in question 2, please refer above. During grand jury proceedings, the defendand does not have the right to be present and also does not have the right to confront any of the witnesses or cross examine them. Under federal

law, D's right to confrontation has been violated and the motion to suppress should be granted.

Under Nevada law, a defendant need not have had the opportunity to develop the testimony or to cross examine the witness if the statement was made in a former judicial proceeding under oath. However, this likely violates a defendant's constitutional rights.

END OF EXAM



FEBRUARY 2015 EXAMINATION QUESTIONS

**APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS**

- EXAM 3, QUESTION 3 -

3)

Rodrick's Motion for joint physical custody of Terrence

Nevada law recognizes that continuing relationships with both parents is in the best interests of the child. The court retains jurisdiction over issues involving the minor children until they reach 18, or 19 if still in high school, whichever occurs first.

The court considers the following factors when making custody determinations: the age and health of the children; health and stability of the parent; whether there has been domestic violence against a parent or child; a parent's willingness and encouragement in facilitating the child's continuing relationship with the other parent; the parent's new partner; whether there are other siblings and the desire to keep them together.

Here, the initial divorce decree awarded primary custody to Jasmine, with visitation to Rodrick. The court determined that it was in Terrence's best interests to do this. This may have been based in part on the fact that Rodrick worked whereas Jasmine did not, and so she was available to care for Terrence. Now, Jasmine is working and Rodrick now has Terrence 4 days per week instead of 2 weekends per month.

In support of his joint custody motion, Rodrick should argue that maintaining/continuing the current routine of him having Terrence 4 days a week is in Terrence's

best interests because it provides stability. In fact, he could argue, it would be detrimental to Terrence to disrupt this schedule that Terrence has not become accustomed to. Further, If Rodrick's other child lives with Rodrick, he could argue that Terrence having and spending time with his sibling is also in his best interests. The routine of 4 days on, 3 days off, can also be used to argue that Rodrick is supportive of and encourages Terrence's relationship with Jasmine. Lastly, he is gainfully employed and financially stable.

In response, Jasmine should argue that joint custody is not in Terrence's best interests because of Rodrick's recent arrest for domestic violence perpetrated against Jasmine. The police report or arrest record may serve as corroborating evidence that the court may consider, but it is likely that the court would instead consider a conviction as determinative in the best interests of the child standard. Rodrick has not been convicted of DV, and so this factor may not be considered.

In sum, the Court will likely grant Rodrick's motion to modify to joint custody because of the presumption that continuing parent-child relationships to the greatest extent is in the best interests of the child, and because Rodrick has established a new (informal) joint custody pattern that may be detrimental to Terrence if interrupted.

If Rodrick is later convicted of DV, Jasmine may consider filing a new motion for change of custody based on that fact.

Reduction in child support

Both parents have a continuing duty to support their children until they reach the age of 18, or 19 if still in high school, whichever occurs first. They will continue to have a duty to support their child after this age of majority if the child is incapacitated.

Courts generally award child support based on a guideline formula that Nevada has adopted. It generally takes into account the respective income of the parties and their respective custodial time with the children of their relationship. The court may deviate from the guideline for certain reasons, such as the child's special needs and whether child support is paid for child(ren) of another relationship. In the case of deviation, the court's findings are put on the record.

Motions for modification of child custody orders are appropriately made based on a change in circumstances. However, parents are entitled to automatic review every three years, upon written request.

Here, the court will likely grant Rodrick's motion for reduction in child support because there have been a number of changes in circumstances.

If joint custody is formally ordered, this will have an effect on the guideline award because of respective custodial time. Furthermore, Jasmine is not employed and her income should be considered in the guideline amount.

The court should deviate slightly from guideline because Rodrick now has another child for which he is obligated to pay support, which should be taken into consideration. Rodrick is not paying for health insurance, but Jasmine may be paying for a portion of Terrence's health insurance. (If she is not, then ignore.) The deviation and reasons for deviation should be stated on the record.

Ownership of Marital Residence

The divorce decree is final unless jurisdiction over certain issues is specified.

Here, in the absence of the court retaining jurisdiction over disputes arising from the marital home mortgage, i.e., because of the continuing joint obligation, Rodrick cannot ask that the court, and the court cannot order the home now be awarded to him. If, however, the court retained jurisdiction over property division, Rodrick may request, and the court may order that Rodrick receive the home and Jasmine gets an offset for the value from the property Rodrick was awarded. Or he could buy it from her.

Further deviation from child support guideline

However, an alternate option includes reduction in child support payable by Rodrick to account for the fact that he is paying Jasmine's mortgage (a special circumstance,

requiring deviation that must be stated on the record).

Forced sale

If the court retained jurisdiction over matters regarding the marital home, due to the parties' continuing joint liability, Rodrick can move the court for a forced sale of the home. He should argue that Jasmine is not paying the mortgage, he is paying the mortgage, and failure to do so would affect his credit. However, in the absence of continuing jurisdiction over the home, Rodrick cannot move the court for a forced sale of the marital residence. However, he may have the option to force a sale as a joint debtor.

Agreement

Jasmine and Rodrick may agree to allow Rodrick to buy the house.

Jasmine's counterclaim: one-half of the savings account

Community property

Community property is property that was acquired during the marriage, or by community labor such as a spouse's salary during marriage. There is a presumption that any such property is community, unless it can be rebutted with clear and

convincing evidence otherwise.

Separate property is property that is acquired by inheritance, prior to marriage or after the final divorce decree.

CP and SP that are mixed together are "commingled," and that property is part CP and part SP.

Here, Rodrick deposited a portion of his salary during the marriage into a savings account. These monies are presumptively community property, and Jasmine would be entitled to them. However, Rodrick continued to deposit monies in the same manner after divorce, which would be Rodrick's SP. Because the CP and SP funds were mixed, they are commingled and the account is part CP and part Rodrick's SP.

Typically, due to the length of time, various deposits/ withdrawals to an account, and appreciation, parties may need to hire a forensic accountant to determine the precise CP and SP interests. However, here we know that Rodrick only made deposits of \$25, and continued in the exact same fashion after divorce. Assuming no appreciation, one can easily quantify the parties' interests. The CP portion is the amount of the account from date of marriage until date of divorce decree. Jasmine would be entitled to one-half of that amount (unless non-disclosure - discussed below). The SP interest is the amount from date of divorce decree until present. That all goes to Rodrick.

However, married persons stand in a fiduciary like relationship similar to business partner. With this backdrop, the parties are required during the divorce to make full and accurate disclosures of any and all assets and debts. Wilful or knowing failure to do so means the breaching/ non-disclosing party has all or a portion of their interest in that account taken away from them and given to the other party.

Here, Rodrick knowingly concealed the existence of the savings account from Jasmine. Because of this non-disclosure, the court has the discretion to award up to the entirety of Rodrick's one-half share of the CP interest in the account to Jasmine.

END OF EXAM



FEBRUARY 2015 EXAMINATION QUESTIONS

**APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS**

- EXAM 3, QUESTION 4 -

4)

1. Daniels claims against AAA

Does Daniel have an easement across the commercial property?

An easement is an interest in the use of land. There is a servient land that is burdened by the easement and a dominant land that gains the benefit. An easement can be express, the parties agree to the easement, or it can be implied under different theories.

Easement by necessity: When there was once land held in common ownership, then severance, and there is a strict necessity for an easement to exist. Here the land was once owned by AAA and then severed. Here D has a driveway that Barry put from the highway to his back lot. It does not appear he is landlocked from the fence being built and there is not strict necessity.

Quazi easement: When land was once held in common ownership, then severance, the easement existed at the time of severance-a "quazi-easement" and there is a reasonable necessity for the easement to remain it will remain. The land was once owned and then severed by AAA. However it does not appear that there was any quazi easement before the severance. Finally, D still has the driveway to the highway that isn't across the commercial lot. An easement likely does not exist.

Easement by prescription: One can gain an easement through prescription. It follows much the same as adverse possession but it applies to use. If a party uses property actually, openly and notoriously, exclusively, hostile to the true owner, and continuously for the statutory period they can gain rights in the easement. Here, D

started driving across the property in 2006. He did so openly and notoriously as he left a trail behind him and did it often. AAA may argue that the use was not sufficient enough as D only used it a few times a month. Sufficient use is determined by the particular property, and as D does not have a home on the lot, the use of a few times a month may be sufficient.

One could see the track from the highway. It was not D's land to use so it was hostile to AAA. Consent can negate hostility but there is nothing here to say that AAA consented to D's use. Nevada requires 5 years for adverse possession, or easement by prescription. It appears D used the easement continuously for more than 5 years. However, Nevada also requires that the person trying to claim through prescription or adverse possession have had paid taxes. Here it is not known, but probably can be assumed that D did not pay the taxes for the commercial lot or the easement.

Daniel likely does not have a right to the path he has created and the fence that was put up can stand.

2. Daniels claims against Barry

Does Danie have an easement over Barry's land?

Quazi easement: When land was once held in common ownership, then severance, the easement existed at the time of severance-a "quazi-easement" and there is a reasonable necessity for the easement to remain it will remain. The land was once owned and then severed by Barry. Before Barry had separated the lots he had created a driveway to the back lot. This would likely qualify as a quazi easement. There is

likely a reasonable necessity for the easement to continue so that D can get to the property, as he is now cut off from the road he used to use.

B may argue that D had abandoned the easement. When a party stops using an easement and then through words or conduct further shows abandonment the easement may be abandoned. B will say that D was using the path across the commercial property, and if there was an easement before D had abandoned it.

Equitable rules do not seem to apply as it does not appear B relied on any representations from D, or relied on anything D did concerning the easement.

As D is now landlocked, he likely would have an easement to access his property across B's lot through implication.

3. Smog Check against AAA

Breach of an express condition: An express condition is agreed to by the parties, the non-performance of which releases the other party from their obligation.

Smog and AAA entered into an agreement where AAA would build a space with highway frontage. AAA instead built the smog check station in the back of the lot, with a Market that it owned and operated located on the highway frontage. AAA will argue that the smog check can be accessed by the highway. However this is likely a breach of an express condition as it is what they had agreed to, and smog check is not the owner of the market. A court may still find that a party has substantially performed an obligation to avoid forfeiture. In this case the building is completed and switching

the buildings would likely be too great of an expense. A court may find that AAA substantially performed and that Smog could be entitled to damages from the breach that they can take from payment.

Remedies: general money damages would be compensable under the expectation interest of the parties. Here money may be inadequate. Specifically, the parties entered into a build-to-suit lease. Meaning that AAA was building the smog check for a specific purpose in the express place contracted for. It may be possible to seek specific performance if AAA has highway frontage property elsewhere and build the smog check there instead.

4. Freda against Carl

Duties of Landlord and Tenant: A tenant has a duty to pay rent and take care of the premises. The landlord has a duty to maintain the premises under certain situations and to honor the agreement. Here C has tried to sell the property with F's lease still in effect without providing for the property to be subject to the lease. If F faces eviction she can likely maintain an action against C for breach of the lease. Damages would include reasonable costs of moving and finding a new place.

Fraudulent misrepresentation: an intentional material representation of past or present fact, made with scienter, to induce reliance, that was justifiably relied on to the detriment of the party is actionable. Here C asked F not to record her lease because he didn't want to hurt his chances at refinancing. We know this is false as he quickly sold the property. It was likely made with scienter, meaning C knew it was false as there is nothing the facts that say his property was financed to anything. C

made the misrepresentation to prevent F from recording her interest so that he could sell the property. C will argue that it was not reasonable for F to rely on his assertion and not protect her interest. But I'm assuming it was reasonable, and that it is clear F was harmed by the sale as she is now being evicted.

5. Freda against Greg

Nevada is a race-notice jurisdiction. A subsequent bona fide purchaser can be protected from earlier claims to property. So long as they gave value and took property without notice. Notice can be actual, constructive, or inquiry. Here, G will argue that he exercised due diligence and did not have constructive notice because if he would have checked the county records there would not be a recordation of the lease. Further, he did not have actual notice in that C did not tell him of the lease. However, G actually went and saw that F was on the land. He was on notice that someone was there. G will argue that even seeing F there did not necessarily mean that she would remain past the closing date. F will argue that G had notice that someone was living on the land and would not be protected as a bona-fide purchaser and be able to evict her.

Likely if G has taken the land he has done so subject to F's lease.

6. Greg against Carl

When selling property one is under a duty to provide marketable title. This means that the seller is able to provide title free of defect or encumbrances. The seller has until

closing to correct any defects. Upon closing certain warranties come with the deed. Present warranties occur at closing and include: the covenant of seisin: the seller has rights to the property, the covenant of right to convey: the seller can sell the property, the covenant against encumbrances: there will be no encumbrances on the property at closing. Covenants that run with the land and continue past closing are the covenant of quiet enjoyment: the seller warrants that no one with a claim of superior title will appear, the covenant of warranty: the seller warrants to defend against any challenges to the owner's title, and the covenant of further assurances: the seller will continue to perfect title.

Here C had a five year lease on his land to F that had not expired and tried to convey the land to G. C was trying to convey more than he owned. C only had a reversion from the end of the term lease when he tried to convey a fee simple absolute. C did not have the right to convey, and there was someone who had a claim to the land. C has breached his present covenants and breached his running covenants. He owes a duty to defend against any claim by F and owes compensation for not providing marketable title.

C may argue that G had notice of F being on the land and should not have closed escrow, in effect he took on more damages than necessary and would not be entitled to anything past closing.

Remedies: When money damages are inadequate a court may offer equitable relief.

Rescission: the court voids the contract. This is permissible in acts of fraud or major mistake. A court may rescind F and C's contract for fraud, although F likely

wishes to keep her home and this may not be the best remedy for her.

Reformation: a court due to mistake or following reasonable expectations of parties may reform a contract to find equity. A court may reform the land sale contract to provide for F's lease.

I

END OF EXAM