FEBRUARY 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

Exam Information

Exam Date:	2/2020
Exam Name:	Question 1

Count Specifics

Total word count: 1986

******* Question 1 STARTS HERE *******

Danny's claims against Abe and Deep Dish:

Negligence:

A plaintiff has a claim for damages based on the defendant's duty, defendant's breach of that duty, causation (both legal and proximate), and damages.

Duty: A person owes a duty to exercise the level of care that a reasonably prudent person would under the circumstances; this duty is owed to any person who may foreseeably be harmed by a failure to do so. Here, Abe was driving and as such he owed a duty of care of a resonably prudent driver, owed to any persons who might foreseeably be injured if he failed to do so with reasonable care.

Breach: Abe failed to meet the standard of care of a reasonably prudent driver. He was distracted by his phone as he drove, and as a result accidentally hit Danny. This is a breach of the duty of care.

Causation: Abe's breach was the actual ("But for") cause of Danny's injuries -- if not for Abe's distracted driving, he would not have accidentally hit Danny. He is also the proximate cause (though, as discussed below, Abe will argue that Danny's failure to seek medical attention contributed to the harm). Proximate cause requires that the harm be foreseeable, and negligent medical care or a failure to seek proper medical care are considered foreseeable; Danny's refusal to seek medical care would likely be considered foreseeable. Thus, Abe was the actual and proximate cause of the injury.

Damages: Danny was actually injured by the car accident. This will mean he can establish damages.

Thus, Danny will have a claim for negligence against Abe.

Negligence per se based on unlaful use of cell phone:

Where a defdendant has violated a satute that caused plaintiff's injury, that violation may be used to establish a breach of duty based on Negligence Per Se. This requires a statutory violation, and that the statute was intended to prevent the type of harm that was caused and that the plaintiff is the type of person meant to be protected by the statute.

Here, if there is a staute that made it unalwful for Danny to use his cellphone while driving, Abe may ague that Danny was negligent per se. Under the facts, Danny was distracted by his phone, which caused the accident. This is the type of harm that such a statute seeks to avoid (distracted driving), and Danny is the type of plaintiff the statute is meant to protect (a person harmed in a car accident caused by distracted driving). Thus, Danny may be able to establish negligence per se if he can establish that Danny violated a statute.

Battery:

Battery occurs when the defendant's intentional act results harmful or offesnive contact to the plaintiff's person. This is an intentional tort, meaning the plaintiff must show that the defendant's action was voluntary and the harm was foreseeable from it.

Here, Danny may argue that Abe committed a battery. However, because Abe was merely "distracted" and was apparently unaware that Danny was present, it is unlikely Danny can show that Abe committed battery.

Vicarious liability for Deep Dish (with respect to Negligence):

Respondeat superior provides that a principal may be held vicariously liable for the torts of an agent who is acting within the scope of the agency. This is commonly applied to torts by an employee int he scope of employment, to extend liability to the employer. In general, the employer will be liable (along with the employee, jointly and severally) for negligence commiitted in the scope of employment.

The employer is generally not liable for intentional torts (such as battery), unless the employment involves some level of "agression" or "friction." Further, an employer will not be liable for acts by an employee that are outside the scope of employment; the employer will be liable for acts committed on a "detour" (i.e. a minor deviation from the scope of employment), but not on a "frolic" (i.e. a major deviation that takes the acts outside the scope of employment).

Here, Danny may argue that Deep Dish is vicariously liable for the torts of its employee, Abe. Danny would aruge that even though it was past closing time, Abe was delivering pizzas (something he sometimes does for work) and Billy told him to charge his card for the pizzas -- this is indicates that Abe acted for the benefit of his employer.

Because there is no indication that Abe's job involved agression or friction, it is unlikely Deep Dish could be liable for battery. If there is vicarious liability, it would extend only to negligence.

Abe and Deep Dish's defenses:

Contributory or Comparative Negligence:

Nevada recognizes a defense of contributory negligence when the plaintiff's own neligence is determined to have been more than 50% at fault for the injury. Here, Abe would argue that by riding his bike int eh middle of the road at night, Danny was more than 50% at fault. If the jury accepts this, it would bar Danny's claim for damages.

Even if Danny was not more than 50% at fault, Abe and Deep Dish would argue that under the theory of comaprative negligence, any award against them shoudl be reduced by the percentage of Danny's fault for riding in the street.

Plaintiff's intervening act:

Abe and Deep Dish would argue that by failing to seek medical care, Danny aggravated his injuries and caused na infection. They would argue that this "cuts off" the causation, and should bar damages for negligence. It would be up to the jury to deice, but as discussed above the failure to get medical attention would likely be viewed as "foreseeable."

Assumption of risk:

Nevada recognizes a defense to torts when the plaintiff assumed the risk of harm. Here, Abe and Deep Dish would argue that by riding his bike int he middle of the road Danny assumed the risk of being harmed in an accident.

Not in scope of employment, or on a "frolic":

As discussed above, an employer is not vicariously liabel for an employee's torts outside ht escope fo employment or on a frolic. Here, Deep Dish would argue that Abe was not acting within the scope of his employment, or that he was on a "frolic" at the time. THis ie evidenced by the fact that he was going to meet his friends and would also be drinking/partying (indicative of a frolic). It would be a factual issue for the jury to decide whether the fact that Abe was delivering pizzas that Billy told him to charge to his card is sufficient to mean he was acting within the scope of his employment.

Abe v. Billy:

Defamation (Libel):

The tort of defamation involves a defamatory statement of or concerning the plaintiff, that defendant has published, resulting in damages. For libel, which is written or broadcast defamation, general damages are presumed even if the plaintiff cannot establish actual damages. Further, statements regarding allegations of criminal conduct by the palintiff are considered defamamtion "per se" and dmaages are presumed even if spoken (slander).

Here, Billy described Abe as a "felon" on social media. As discussed below, Billy will contend that this statement was not directly regarding Abe; however, because a reasonable person who views the statement will consider it to be about Abe (the context makes clear he is referring to Abe) this would be sufficient to be a defamatory statmeent about Abe. Th eact of posting to social media constitues a publication, as publication only requires that a person other than plaintiff or defendant see or hear the statement. Because this statement was libel (written, online) Abe can claim general damages and does not need to show actual damages; further, the statment is a claim that he is a "felon," and would therefore be defamation per se even if it were not libel.

Assault:

Assault occurs when the defendant's intentional action causes plaintiff to experience apprehension of imminent harmful or offensive contant to plaintiff's person. It requires more than mere words by the defendant, and apprehension does not necessarily require fear.

Here, Abe may claim that Billy's act of yelling at him constitutes assault. However, these are mere words and there is no indication that

Battery:

Battery occurs when the defendant's intentional action causes harmful or offensive contact with plaintiff's person. The contact need not be direct (i.e. can be by throwing something at plaintiff. etc.).

Here, Abe may claim that Billy has battered him by yelling in a way that caused him to fall. While the fall and resulting injury are harmful bodily contact, becuase intent is required for this tort Abe likely cannot show that Billy committed battery -- Billy did not intend for Abe to fall and under the circumstances could not foresee that his yelling would cause Abe to "trip." Thus, this is not battery.

Premises liability:

Because Abe tripped at Billy's apartment he might try to raise a claim based on premises liability. The occupant of premises owes a duty to a licensee (i.e. a social guest, like Abe) to warn of any concealed dangers that may exist ont he premises. There is no duty to inspect to find dangers that the occupant is unaware of.

While Abe might raise this claim, it would likely be unsuccessful. Here, Abe tripped over a step. This is not a concealed danger, and as such Billy's duty to warn would not extend to warning about the condition of the steps. Thus, this claim would likely not succeed.

Intentional Infliction of Emotional Distress:

The tort of intentional infliction of emotional distress occurs when defendant's extreme and outrageous conduct, with knowledge or recklessness with respect to the likelihood that it will cause distress, causes plaintiff's emotional distress. Extreme and outrageous conduct is that which excedes all bounds of deceny in civilized society. For intentional infliction (unlike negligent), no physical manifestation of the ditress is required.

Abe may try to argue that Billy's yelling at him caused him to be "distraught," which is sufficient distress to constitute IIED damages if the other elemtns are established. Here, the quesiton of fact for the jury would be whether Billy's behavior was sufficiently "extreme and outrageous" to qualify, and whether it was foreseeable that Abe would suffer distress from it.

Billy's defenses:

Statement re: "folons" was not directly about Abe:

As discussed above, Billy will claim that his comment about "felons" was a general statement and not about Abe; this will be asserted as a defense to defamation. However, for defamation to be "of or conerning" the plaintiff, the standard is whether a reasonable person who hears or reads the statement will believe it to be about the plaintiff. Here, because the statement was in a social media post that mentioned Abe and connected the "felons" remark to the "scumbag" remark, a reasonable reader would understand that Billy was calling Abe a felon. This defense would fail.

Truth:

Truth is always a defense to defamation. Here, Billy may try to present evidnce that Abe really is a felon, though from the facts it is not at all apparent that he would be able to do so. Thus, based on the facts this defense would likely fail.

First Amendment defense:

Based on the First Amendment, when plaintiff sues for defamation and the matter being discussed by the allegedly defamatory statement was regarding a matter of public concern, the plaintiff must establish the additional elements of falsity and fault. The level of "fault" required is malice if the plaintiff is a public figure, or negligence if they are a private individual. Here, Billy may assert that discussing "felons" is a matter of public concern, as it relates to crime in general. If this were accepted, he could then contend that Abe must prove falsity and negligence (as Abe is apparently not a public figure). Even if successful, this would onyl add to the elements that Abe must prove and would likely not absolve Billy of liability.

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QUESTION 2

Exam Information

Exam Date:	2/2020
Exam Name:	Question 2

Count Specifics

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******* Question 2 STARTS HERE *******

Question No. 2:

1. Did the Court correctly grant Equipco's (E) Motion to Dismiss?

E's motion to dismiss (MTD) was based on its argument that the Nevada federal district court lacked of jurisdiction over it, or personal jurisdiction (PJ), and over the claims, or subject matter jurisdiction (SMJ).

Personal jurisdiction is the court's ability to exert its power over the defendants. It requires the court to have this power both through the United States Constitution and the Nevada state long-arm statute. Nevada's long-arm statute grants Nevada courts powers to the extent allowed by the Constitution. The analysis for personal jurisdiction requires that the court's powers comport with traditional notions of fair play and substantial justice, to where the party has minimum contacts with the state to where it is reasonably foreseeable that the party would be haled into court there. A court can have general PJ over a corporate party if its activities in the state are so systematic and continuous to where it is essentially at home in the state. This can be a domicile, for corporations this is one of two places: (1) where it is incorporated or (2) where its nerve center is. The corporate nerve center is where the majority of its important management decisions come from or take place at. A court can also have specific jurisdiction, to where its activities were so targeted in one state to where it establishes the minimum contacts and foreseeability in that state for any situation that arises out of those actions. The party must assert this issue before any answer to a complaint in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or else personal jurisdiction is deemed waived in that court.

E's MTD will attempt to establish that there was no PJ here. E is a foreign Swedish manufacturer, so on its face the court would not have personal jurisdiction based on its domicile. There is likely no general PJ by Nevada over E as it is not at home in Nevada. Its minimum contacts are unclear, as it does generally sell drilling machines throughout the United States, so it might be foreseeable it would be haled into court in the US. But all of E's US sales were exclusively through Distribco (D), an independent business that has domicile of incorporation in Missouri and nerve center PJ in Missouri. D does maintain a small office in Nevada, but E only ships its products from Sweden to D in Missouri, not Nevada. However, D has sold products to MineCo (M) through its website for five years. But the facts do not specify how many sales to M through the website were from D's products it shipped to D in Missouri. On balance, E makes sales throughout the United States, so it is likely foreseeable considering that it distributes exclusively to D, a business that has an office in Nevada. These minimum contacts seem to comport with fair play and substantial justice to where E should expect that it would be haled into court in Nevada for an issue concerning its products. The court likely did err in granting E's MTD as it relates to issues of personal jurisdiction. E timely raised this issue after being served with the complaint and before it made any answer to the complaint.

Subject matter jurisdiction is the court's ability to exert its powers over the claims at issue in the suit. It is not waivable, and a party can raise it at any time, as well as a court must do on its own, and the federal court must dismiss a suit at any time if it finds it does not have SMJ. SMJ requires that the claims arise under the US Constitution, or any federal statute, law, or regulation. Alternatively, SMJ can be established if there is diversity jurisdiction under federal statutes, such that there is complete diversity between all the parties and the amount in controversy exceeds $75,000. Here, this is a suit involving a breach of contract claim for a sale of goods that will accordingly fall under Article 2 of the Uniform Commercial Code. Contract claims are generally colorable under state law. It is a claim for rescission, which is an equitable claim, but it is still essentially an issue of quasi-contract so it will not arise under a federal claim. So for SMJ to be established this must meet the requirements for diversity jurisdiction. The amount in controversy does exceed $75,000 as the

invoice attached to the complaint shows the drilling machine's purchase price was for $100,000. Complete diversity requires that both the parties on the plaintiff and defendant sides are diverse citizens. Here, M is a Nevada corporation and thus a citizen there, E is a Swedish foreign citizen, and D is a Missouri corporation and thus a Missouri citizen. Further, D brought in a third party in Component (C) that is a Georgia corporation, and thus a Georgia citizen. Overall, there is complete diversity here, so the Nevada federal court will have SMJ over the claim against E based on diversity jurisdiction. Therefore the court also erred in granting E's MTD as it relates to SMJ over the claim against E.

2. Does the court have jurisdiction to hear the claims against Distribco (D)?

Again, this is an issue of PJ and SMJ. The rules for PJ and SMJ from issue 1 above are fully incorporated here. Here, D is likely at home in Nevada to where there is general PJ over it, becaue it maintains a small office there and has sold products to M, a Nevada corporation with no facts suggesting it does business elsewhere, for five years over its website. Again, the same issue of lack of a federal claim for SMJ holds true as to D. So diversity jurisdiction would be required. The same analysis applies, and D bringing in C will not defeat complete diversity. Despite D having an office in Nevada, it is not domiciled in Nevada for purposes of citizenship because its domicile is only in Missouri. So that will not defeat complete diversity. The Nevada federal court will have PJ and SMJ over D for these actions.

3. Was D permissible to bring Component (C) into the action?

D is able to bring in a third-party as a third party defendant under the federal rules if it believes a third party was partially responsible for the claims asserted against D. It needs to do so within a certain time limit after receiving the complaint. Here, D is asserting that C was partially responsible for the claims against it because C was the suppleir of the drilling party that went to E that ultimately failed. However, it seems that E likely should have brought this claim as it seems that C is more responsible to E as the manufacturer than it is to D as the distributor. Still, D brought in C around the same time it answered the complaint, as the facts state it answered the complaint *and* brought a third-party claim for indemnity against C.

The court will still need to establish that there is PJ and SMJ over the third-party defendant. The rules from issue 1 above are once again incorporated here. SMJ will likely be established under supplemental jurisdiction, as this claim arises from a common nucleus of operative facts. The common nucleus test requires that the claim be arising from the same transaction or occurrence as the main claims in the suit. Here, this is the same transaction or occurrence as this is the drilling party that led to the ultimate failure. So SMJ will likely be established as to C.

However, PJ over C may be an issue. C is a Georgia corporation and no facts suggest that it does any other business in Nevada. Its only link to Nevada is pretty attenuated, because it sent an allegedly defective part from Georgia to E in Sweden. However, there is an argument that C put that part into the stream of commerce that flowed all the way into Nevada, so it should be foreseeable that it would haled into court for some form of product liability there. It was permissible that D brought C into the action here as a third party defendant.

4. Should the Court certify the dismissal order as Final for purposes of Appeal?

To certify a dismissal order as final for purposes of appeal, a court must state it is a final order, that there is no good or just reason for delay and it is an issue that needs to be handled on appeal as the suit going on will cause some form of great harm to the parties involved, and it was addressed on the merits. For example, an early appeal that is certified typically occurs regarding such claims as interlocutory orders or injunctive relief. Here, this is the court granting a MTD regarding PJ and SMJ for purposes of dismissing one defendant party

from the suit. While based on the analysis above, the court likely erred in granting this motion on the merits of PJ and SMJ, it is unclear that there would be no just reason for delay here. The parties may not be able to get their full relief if E is not involved in the entire litigation of this matter, when they are the manufacturer of the allegedly defective product, which could cause substantial harm to the plaintiff's case as well as the other defendant and the third-party defendant. On balance, the court should certify the dismissal order as final for purposes of appeal.

******* Question 2 ENDS HERE *******

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QUESTION 3

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******* Question 3 STARTS HERE *******

General

Lawyer Lisa's conduct in the matter of Cara v. Thomas Morrow will be analyzed in light of the Nevada Rules of Professional Conduct (NRPC), which are modeled in large part on the American Bar Association's Model Rules of Professional Conduct and which apply to all Nevada attorneys and all attorneys practicing in Nevada.

An attorney subject to the NRPC must take care to adhere to the rules fully. An attorney must also take reasonable steps to ensure that staff and other agents are aware of, and follow, the NRPC.

Solicitation

Over the last several decades, attorneys have been allowed increasing latitude in the realm of advertising for clients. Despite this change, a persistent rule has been that attorneys may not personally solicit business from potential clients whom they know have a potential claim. As stated above, this prohibition also applies to an attorney's staff or agent. The reason for the rule is that attorneys are considered highly persuasive individuals because of their training and status in society, and the inherent pressures of an in-person solicitation for business are at risk of inducing the potential client to accept representation she would not otherwise choose.

Exceptions to this general rule include solicitation of past clients, close friends or family members, or in the case of representation offered without expectation of any compensation. (The classic example of the latter is a civil-rights lawyer who contacts an impoverished person or family to vindicate their rights.)

Here, Peter witnessed the accident involving Cara and walked over to her. While it is permissible for a lawyer's paralegal -- or even the lawyer herself -- to render aid in such a situation, Peter took his helpfulness one step too far. When Peter referred Cara to Lisa for legal representation, he violated the rule stated above. As an employee-agent of an attorney, Peter could no more engage in this kind of direct soliciation than could Lisa. No facts indicate that Cara was a past client or close friend or relative of Lisa's (or Peter's, to the extent that the exception stretches so far), and Lisa's representation of Cara was clearly not without contemplation of payment.

Peter violated the rule against solicitation, and Lisa is responsible for failing to train Peter about this professional duty or reasonably supervise his observation of the same.

Even if further facts vindicated Lisa in terms of her supervision and training of Peter in this respect, her later conduct may have ratified Peter's wrongful solicitation. Although Cara's statement -- "I met that nice paralegal of yours" -- did not expressly link Peter's post-accident contact with Cara and the referral, it should have placed Lisa on notice that a potential professional issue was afoot. Lisa should have inquired as to the facts of how Peter and Cara came to know each other, especially since Cara likely volunteered that the crash happened right outside Lisa's law office. The facts are undeveloped in this regard, but it seems more likely than not that a reasonable attorney adhering to the NRPC in good faith would have questioned whether Peter had engaged in improper solicitation. If so, Lisa should have explained to Cara the predicament this placed her in and declined the representation to avoid furthering her involvement in a tainted referral.

Client Conflicts

Conflicts Lists

An attorney must take steps to avoid creating conflicts between current and former clients. One helpful device is a conflicts list, which is a searchable database of the attorney's past clients. When a new client is contemplated, the attorney (or her staff) search the names of all parties to the contemplated representation to identify any potential conflicts.

Here, Lisa properly maintained a conflicts list. However, Peter did not search the list until after Lisa had already met with Cara and agreed to take on the representation. Ideally, conflicts would be vetted before meeting with the client or agreeing to represent them. To the extent that reasonable procedures could have prevented this, Lisa may be subject to discipline.

Even still, once the conflict was discovered Lisa should have asked whether she could continue the representation. She entrusted Peter with doing the conflicts check, but he decided in his judgment that it was not worth telling Lisa about when he discovered a potential conflict between current client Cara and past client Thomas Morrow. To the extent that Peter did this as a result of inadequate training or supervision, Lisa is subject to discipline.

Potential Conflicts

An attorney cannot represent two clients whose interests in a matter are diametrically opposed. An attorney also cannot represent a new client where that client's interests are adverse to those of a former client in a matter where the prior representation could affect the attorney's efforts in the present representation, either by restraining the attorney's zealous representation of the new client or by arming her in the new case with facts from the old case. Where a conflict arises between a former and new client that does not necessarily make it impossible for the attorney to represent the new client, she may proceed with written consent from both former and current client and after making a good faith judgment that she can fairly represent both client's interests.

Here, Lisa previously represented Thomas Morrow in his business capacity (i.e., his company Morrow Manufacturing). That fact alone is likely not enough to create a potential conflict. Upon further examination, it appears that the representation also involved a car accident, the same general subject matter as the new case. But each car accident is potentially unique, so that is not dispositive, either.

If further facts indicated that the Cara-Thomas crash was caused while Thomas was engaged in work for Morrow Manufacturing, or that he was personally involved in the earlier accident, or if there were some other entanglement between Thomas's conduct in this accident and the former crash, then those facts might create a former-client conflict as discussed above.

Based only on the facts above, there might not have been an improper conflict here. But the facts discussed below change this analysis.

Actual Use of Private Facts

As it turns out, there was private information that carried over from Lisa's work on the Morrow Manufacturing case that was germane to the Cara-Thomas action at present. Lisa directed Peter to examine the old case file, where he found a renewable insurance policy that covered Thomas personally and Morrow Manufacturing as an entity. Lisa intended to use this information to inform her strategy to "get [Cara] a lot of money."

If subjected to discipline for this conduct, Lisa might defend herself on the grounds that the existence of a relevant insurance policy is among the mandatory disclosures required by the rules of civil procedure. In other words, the information would have come out eventually, and Lisa simply expedited her access to it. But Lisa's conduct strikes at the core duty of loyalty in the attorney-client

relationship, and she used facts revealed to her in confidence by Thomas when he was involved in a business capacity to gain an advantage over him when he was Lisa's opponent in a personal capacity.

Fee Agreements

The NRPC requires an attorney's fee to be "reasonable" in light of various factors surrounding the representation. These include the difficulty and complexity of the case, any time pressures represented, the relief sought and the skill required, and the attorney's availability to take on the representation in light of other duties.

Nevada attorneys are allowed to enter into contingent-fee agreements under certain circumstances. A contingent fee is impermissible in matters of domestic relations (i.e., to secure a divorce) or criminal defense. Even when the subject matter of the case is amenable to a contingent-fee agreement, there are additional requirements. A contingent-fee agreement must be in writing, signed by the client, and it must clearly state what the terms of the contingency are (i.e., a flat amount or a tiered approach with different shares for a resolution on the pleadings, before trial, etc.). Additionally, the agreement must explain whether expenses will be deducted from the gross recovery or from the client's or lawyer's share and whether the deduction will occur before or after the application of the contingent fee.

Here, Lisa agreed to represent Cara in exchange for 40 percent of any recovery. While 40 percent of the recovery is at the high end of the spectrum for contingent-fee agreements, this fact is not dispositive standing alone. Lisa would be justified in seeking such a large share of the recovery if the likelihood of prevailing was especially low or if the front-end expenses for the representation were especially high. Without additional facts to supply such a predicate, it is likely that Lisa's fee was unreasonably high.

As noted above, contingent-fee agreements are permissible under certain circumstances. This is a civil claim for personal injury, so a contingent-fee agreement is permissible. But the facts indicate that Lisa "told" Cara she would take the case on a contingency basis; this suggests an oral agreement, and no further facts describe a writing memorializing the agreement. This is a violation of the NRPC.

Additionally, the purported contingent-fee agreement did not comply with the requirement to explain how expenses were to be deducted. Although Lisa required an advance of $10,000 in expenses, she did not explain whether expenses would be deducted from the total recovery before or after making the 40-percent split. The agreement also did not explain whether the expenses would be solely Cara's responsibility or whether the expenses would be split between lawyer and client. These were additional violations of the NRPC.

Client Funds, Costs, Expenses

Fronting Expenses

An attorney can require the client to provide a deposit on the expenses for a case, and indeed the rules prohibit attorneys from making certain payments to clients. For instance, a personal injury attorney anticipating a substantial recovery cannot induce a client to hire her in the matter by lavishing gifts or other incentives upon the client. An attorney can, however, front expenses reasonably related to the representation for later compensation from the recovery or reimbursement by the client.

Here, Lisa acted properly by asking Cara to deposit a sum to cover expenses for the representation. As discussed above, it was not adequately clear how lawyer and client would split the cost of these expenses. But to the extent that the expenses were contemplated as being Cara's responsibility in whole or in part, it was proper for Lisa to take a deposit toward them.

Client Funds

An attorney must take scrupulous care to keep personal and client property separate. When it comes to money, a Nevada attorney must maintain a client trust account that is separate from the attorney's operating account. The trust account should bear interest -- payable to a fund maintained by the Nevada State Bar to enhance access to justice -- and client funds representing unearned fees, expenses advanced, and funds that are the subject of litigation should be deposited into the trust account. (If especially large amounts of money are involved, or the funds are anticipated to be held for an especially long time, the attorney has a fiduciary duty of loyalty to the client to place these funds in a special account that will bear a reasonable rate of return for the client.)

Here, Lisa violated these rules by placing Cara's $10,000 deposit "into her operating account." Lisa should have deposited the funds into her client trust account, as stated above. By comingling client property (i.e., the unrealized expenses fronted by Cara) with her own law-firm property, Lisa violated the NRPC.

The facts are not adequately clear as to whether Lisa had a further duty to invest Cara's expenses to obtain a reasonable rate of return. Given that this is a personal injury case that will likely involve the hiring of medical or forensic experts in the immediate future, at significant expense, Lisa likely would not have violated the NRPC by simply placing the funds in her client trust account.

Fees vs. Expenses vs. Costs

An attorney's fee for legal representation reflects the value of her time and professional services in carrying out the representation. This fee is the attorney's to keep in satisfaction of her own material needs and the maintenance of her law practice. The costs of representation reflect the value of resources that the attorney necessarily and reasonably consumes in the scope of representation. Examples include the cost of supplies, postage, copying, etc. Expenses are amounts paid to outside parties for services reasonably necessary to the representation. Examples include expert witness fees not covered at court expense.

An attorney owes her client duties of loyalty and candor, and implicit in those duties is the rule that the attorney cannot mis-designate as "expenses" items that the client ought not be bound to pay for.

Here, Lisa purported to charge against Cara's $10,000 deposit amounts for a "large bonus for Lisa," secretarial time, and a $300 dinner charge. The bonus Lisa sought to pay herself is clearly improper -- this represents an enhancement to her own fee. Not only is this a violation of the parties' purported contingent-fee agreement (i.e., Lisa sought to pay herself even above the high, 40-percent fee she negotiated for), it also represents an improper claim of expenses.

As discussed above, secretarial time ought to be priced-in to the attorney's fee, since those costs reflect the attorney's internal business costs. No facts indicate that Cara's case required special transcribing or other services from an outside party that would properly be treated as expenses; absent those facts, it appears that Lisa violated the NRPC by attempting to charge as "expenses" the ordinary costs of maintaining a law practice.

The $300 dinner most likely represents another improper charge against "expenses." The facts do not indicate whether the dinner was related to some aspect of the case -- i.e., as part of a valuable expert witness's compensation -- or even that it was a professional expense at all. Unless Lisa can show that this dinner was a reasonable and necessary expense related to the representation, she should not charge Cara for it.

Finally, as stated above, Lisa needed to explain on the front end how expenses would be handled vis-a-vis the recovery. Even after the fact, it is unclear whether Lisa took her "cut" before or after the application of expenses. The most plausible interpretation is that she took her "cut" before deducting expenses; where the attorney fails to properly lay out the contingent-fee agreement at the outset, it should be interpreted to maximize the client's welfare rather than the attorney's. Thus, Cara's expenses should have been deducted from the full recovery and then Lisa should have taken 40 percent of what remained.

Candor

A Nevada attorney owes a duty of candor to the tribunal and to opposing counsel. An attorney generally must sign pleadings affirming that the allegations contained therein are true to the best of the attorney's knowledge and belief. Sanctions can be imposed on an attorney who fails to comply.

Here, Lisa subjectively believed that "Cara was not hurt badly" yet planned to pursue a hefty recovery from Thomas Morrow nonetheless. Thus she did not prosecute the litigation in good faith and with full candor to the tribunal and to opposing counsel, in violation of the duties described above. Her focus on Morrow's insurance policy also indicates that she may have been contemplating a lawsuit for the purpose of compelling a settlement, a violation of the NRPC.

Confidentiality

A lawyer owes a duty of confidentiality to her client. This means taking scrupulous care not to divulge private facts about the representation without authorization from the client or as necessary for the representation. Attorneys must also take care to protect the attorney-client privilege by keeping private client communications about the case secret.

By calling her paralegal "from a crowded restaurant" and likely speaking loudly about Cara's case, Lisa risked violating her duty of confidentiality to Cara and destroying the attorney-client privilege. This risk was realized, too: Lisa "was overheard" saying things about Cara's case as discussed above. Making this information public placed Cara's representation in jeopardy and constituted a violation of the NRPC.

******* Question 3 ENDS HERE *******

FEBRUARY 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 4

Exam Information

Exam Date:	2/2020
Exam Name:	Question 4

Count Specifics

Total word count: 1819

******* Question 4 STARTS HERE *******

1. Imposing Personal Liability against Maria

Maria may be personally liable if she was a promoter for Maria's Clothing when she signed the contract with landlord and/or if the corporation was not properly formed. However, Maria will be able to argue that Maria's Corporation should be treated as a de facto corporation or the landlord should be estopped from claiming that Maria's corporation is not a corporation. Landlord may also try and pierce the corporate viel to hold Maria personally liable.

Promoter liability

Promoters are those who sign contracts on behalf of a corporation prior to its formation. A promoter is personally liable for all contracts it enters into because at the time the corporation has not yet been formed. A promotoer will not personally liable where there has been a novation. However, there the corporation has only adopted a contract, the corporation and the promoter will both be held liable.

Here, Maria signed the contract be half of maria's Clothing (the corporation). Maria will argue that she instructed her attorney to file the articles of incorporation which she believed he did prior to her entering the lease agreement and therefore she was not personal liable as a promoter because it was her good faith belief that she was a properly (de jure) corporation. The landlord will argue that Maria is personally liable because the corporation was never formed and therefore, she is the person liable under the terms of the lease. However because Maria believed the corporation was formed, the court will probably find a de facto corporation or the landlord will be estopped from denying Maria's clothing was a corporation as discussed further below.

De facto Corporation

A de facto corporation is where the parties who formed the corporation believed in good faith that it had properly been formed and then acted according to that belief.

Here, Maria had no reason to believe that her attorney who advised her that she should incorporate her business would not have properly filed the articles of incorporation with the secretary of state and paid the filing fee to make Maria's Clothing a de jure corporation. As such, she carried on as if the business had been properly formed and after her attorney prepared the articles of incorporation entered into a lease on behalf of Maria's Clothing and signed as the president and hired an employee to help manage the shop. Because Maria acted in good faith and carried on the business as it was a corporation, Maria's Clothing will likely to be found to be a de facto corporation.

Estoppel

A party will be estopped from denying that a corporation existed when they parties actions indicate that they carried on s business relationship.

Here, the landlord and Maria carried on as if the landlord had entered into a contract with Maria's Clothing and not Maria, personally. The lease was for a year, it is assumed that Maria paid rent on time and she even informed the landlord about her new employee and how the landlord should speak with Paul, the employee, regarding all business related issues concerning Maria'c Clothing and the lease. The landlord even spoke with Paul about extending the lease because he was in charge now. Therefore, because Maria's Clothing and the landlord carried on as if Maria's Clothing was a business corporation, he will likely be estopped from denying it was one.

Piercing the corporate veil

Where a shareholder or partner treats a corporation as part its self as an alter ego, a person may pierce the corporate veil and hold the shareholders or partners personally liable. The court will look at factors to see whether the veil should be pierece including, comingling of assets, not following proper formalities, such as having meetings and business minutes, whether there is fraud involved, etc.

Here, the facts do not provide much information as to whether Maria treated the business as personal extension of herelf to pierce the corporate veil. However if the landlord to able to show that Maria's "year long buying trip" was actually a vacation and not business related, but that she treated the business as her atler ago in doing so by commingling funds or making her trip a business expense when it was not, the landlord may be able to pierce the corporate veil and hold Maria personal liable. In addition, it does not appear that Maria held annual meetings or followed the proper formalities of a corporation, which the landlord could also use to booster his argument that he should be able to pierce the corporate veil.

Proper formation - Articles of incorporation

The name of a corporation must have the words Inc. or incorporated in its title to let others know that they are doing business with a corporation.

Here, Maria did not want the business entity of Maria's Clothing listed in its name for personal reasons. As such, the landlord will argue that Maria's Clothing would never have been proper because it lacked the necessary business entity in its name. Maria will argue that she attorney should have advised her as that requirements and then she would have included a business entity of inc or incorporated in her title of her business. Therefore, because the business entity type is missing, landlord could argue that he did not know he was doing business with a corporation, but rather a sole proprietor because the name of the business did not include the proper designation and therfore should not be estopped from denying the Maria's Clothing is corporation.

2. Paul's Legal Authority

Paul was Maria's agent and had legal authority to act as discussed below.

AGENCY

An agency relationship is formed where there is assent, benefit and control. That is, the prinicpal and agent agree to be in an agency relationship where the agent will act for the benefit and under the control of the prinicpal.

Here, Maria hired Paul to manage the store. Therefore, they formed a relationship where Paul was act as an agent of Maria under her control and for her benefit in managing the store. Therefore, an agency relationship was formed.

EXPRESS AUTHORITY

Express authority is shown by the principal's words or conduct that expressly allows the agent to act on the principal's behalf.

Here, Maria expressly told Paul that he was responsible for the ordinary day-to-day business operatiions of Maria's Clothing. Therefore, because Maria specifically told Paul he was responsible for such, she gave him express authority to operate the busienss.

IMPLIED AUTHORITY

Implied authority related to authority from the principal that is implied in order to achieve the principal's goal or act in accordance with the expres authority.

Here, because Paul was expressly told he was to operate the day-to-day of the store, this gave him broad implied authority to act in the best interest of the store in managing and to make those decisions necessary to its daily operations. Therefore, Paul had implied authority.

APPARENT AUTHORITY

Apparent authority exists where the principal does something so that a third party believes that the agent has authority to act on behalf of the principal. This authority can only be revoked or withdrawn when the principal tells the third party that the agent no longer has the apparent authority.

Here, Maria went up the landlord (a third party) and told him that Paul was the store manager and he was charge while Maria was away. This statement from Maria, the principal, to the landlord, the third party, gave apparent authority for Paul to act on behalf of Maria's Clothing for the time while Maria was gone at the least. By the time Maria notifed the landlord that Paul did not have authority to sign the lease, it was too late because the Paul signed the lease before Maria revoked or withdrew the apparent authority she expressed to the landlord. Maria's statemets to the landlord regarding Paul being in charge while Maria was gone were also expressly stated to Paul from the landlord and Paul likely had no reason to believe that the landlord ws being dishone because Paul was unware of the prior negotiation to extend and Maria held left in charge of the store for the last year to run the day-to-day operations which he had been doing, including all tasks and decision making in order for him to do so.

WAS SIGNING THE EXTENSION WITHIN THIS AUTHORITY?

Paul had expess and implied authority to operate the day-to-day operations of the business and Maria created apparent authority to act on behalf of Maria's Clothing while she was gone. When the landlord approached Paul about the lease he was unaware of Maria's prior negotiations and actually tried to contact Maria but was unable to do so after several attempts. Paul, believeing it was a good deal to extend the lease, and with the authority from Maria to be responsible for the day-to-day operations and manage the store while she was gone, Paul had legal authority to sign the Extension Agreement on behalf of Maria's Corporation.

3. Maria's Clothing v. Paul

Maria

An agent owes the principal fiduciaries duties, including the duty of care and loyalty. Under the duty of care, an agent must act reaasonable under the circumstances and make business decisions ont he best interest of the principal. Under the duty of loyalty, an agent may not usurp corpoerate opporunities or be involved in self-dealing.

Maria may claim Paul breached his agent duty of care to her by signing the lease without her permission and that it was outside his scope of authority. But as discussed above Maria will fail.

Maria's Clothing

Officers and Directors also owe a duty of loyalty and care as discussed above to the shareholders of the corporation.

Maria could argue that she is the sole shareholder of Maria's Clothing and Paul's action in signing the lease extension was, again, a breach of his duty of care to the corporation. However, Paul is only listed as the store manager. He is not listed as an officer or director of Maria's Clothing. Therefore, the duty of care and loyalty do not extend to him as an employee to same as a director or officer. However, should the court find Paul was an officer or director of Maria's Clothing, Paul will use the busines judgment rule against any claim of the breach of the duty of care because Paul made his decision to sign the lease based upon a business judgemt because afterall, he had been managing the store for the year Maria was gone, he was not able to get in touch with Maria to confirm whether to sign the lease, Maria gave him authority to act on her behalf and the store's behalf, and Paul thought extending the lease was a good deal because the landlord also offered to significantly discount the rent. Therefore, Maria's clothing will fail on its claim against Paul for breachof fiduciary duty.

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******* Question 4 ENDS HERE *******

FEBRUARY 2020
EXAMINATION ANSWERS

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NEVADA BOARD OF BAR EXAMINERS

QUESTION 5

Exam Information

Exam Date:	2/2020
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Count Specifics

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******* Question 5 STARTS HERE *******

Owen = O

Teresa = T

Jerry = J

Hard Money Lender = HML

1. Interests of O, T, J, and JML in Property Following Foreclosure

O's Interest

The first issue is what is O's interest in Property.

Fee Simple Absolute

A fee simple absolute is a fee that exists indefinitely. The fee simple absolute is subject to no conditions or restrictions, aside from what the owner freely and voluntarily enters. A fee simple absolute may be divided, devised, or sold to another party. A landowner has a right to mortgage a property that he or she owns in fee simple absolute.

Here, O leased the Property to Teresa. Although there are limited facts regarding his interest in Property, O also mortgaged the property. It is likely that O's interest in the proeprty is a fee simple absolute because he is voluntarily mortgaging and leasing Property without restriction. Additionally, HML later forecloses on the property. All of this evidence suggests that O owns the property in Fee Simple Absolute.

Mortgage - Title Theory State

However, O has likely validly encumered his property with a mortgage. A mortgage is a security interest that uses a parcel of real property as collateral to secure the repayment of a loan. A mortgage gives a mortgagee an interest in the property, depending on the jurisdiction. Upon default, the mortgagee can foreclose on the property provided that he or she follows the appropriate procedures. A deed of trust is treated as a normal mortgage which transfers the deed of the land to the mortgagee subject to full payment of the loan, when it will be transferred back. Additionally, Nevada is a title theory state. A title theory state provides that once a property is mortgaged the mortgagee (the holder of the mortgage) is given legal title of the land while the mortgagor (the person who sought the mortgage) retains beneficial title of the land. This means that a mortgage that is done in a title theory jurisdiction transfers title of the property to the mortgagee subject to full satisfaction of the loan at which point the land will be transferred back to the mortgagor, or true owner. Land that has a mortgage on it is encumbered by that mortgage.

Here, the mortgage is a valid encumbrance on O's Property. The mortgage is held by HML. O likely still is the true owner of the land. However, his property interest is subject to the mortgage which he executed and will be primarily liable under. However, upon the foreclosure of a property interest, the property interest will pass to a seller provided that the foreclosure sale is done appropriately. Here, the property interest likely passes to HML if they can prove that the foreclosure proceeding was valid (see below).

Subject to the Judgment

O's interest is also subject to J's judgment (see below).

Therefore O hold fee simple absolute ownership of the property subject to the mortgage by HM and the judgment by J. Because the foreclosure sale is likely not valid, O will still be the owner of the property but subject to the pending judicial foreclosure on the land by HML.

T's Interest

The next issue is what interest T holds in the land.

Tenancy for Years

A tenancy for years is a tenancy that lasts for a specific period of time. A tenancy for years lasts for whatever period of time is specified and terminates following the close of that time. A tenancy for years is a possessory interest in the property. If the tenancy is for more than one year, it must comport with the statute of frauds.

Here, O and T entered into a contract to lease Property for 10 yeras. The lease was written and T entered into possession of the Property. T has a valid tenancy for 10 years under O's ownership and has the right to possess the property during the tenancy.

Subject to Covenant

A covenant is an agreement between the parties. A real covenant can be enforced provided that it is in writing, intends to run with the land, touches and concerns the land, there is horizontal privity, notice to both parties, and vertical privity. For intent to run with the land, the court will determine whether the parties meant for the provision to run to subsequent landholders. Touches and concerns the land means that it is of some value or interest in the land. Horizontal privity is contractual privity between the two parties that has something to do with the transfer or interest sin the property. Notice requires that subsequent parties be on notice of the covenant. Lastly, vertical privity requires that the subsequent purchaser of either interest be in privity with one of the original individuals who covenanted.

Here, there is likely a covenant on the land regarding the insurance of the Property. The lease requires O to insure the property in case of casualty and the lease will be junior to any existing or future deed of trust recorded ont he proeprty. These two covenants are likely to run with the land because both parties freely contracted for them. They touch and concern the land because they are regarding both parties interest in the land. There is horizontal privity because the parties are contracting to transfer an interest in the land. There is also vertically privity because the land is transferred via a foreclosure sale to HML. Lastly there may not be notice because there is no evidence that it was recorded. However, it is likely that this is a valid covenant between the parties on the lease.

May Not Survive the Foreclosure

The last issue is whether the tenancy will survive the lease. A tenancy typically will survive the sale of the land. However, the new owner may have the right to remove the tenant subject to any covenants that are provided for the in the lease. This is because once the new owner comes into possession he is no longer in privity with the party unless there is a restrictive covenant or equitable servitude on the land. However, the new owner is likely able to eject the tenant if desired.

Here, it is still to be decided whether HML will eject T as a tenant. T still has four years remaining on her lease when the foreclosure sale is concluded. It will be up to HML as to whether they want T to continue in possession of the property. However, due to the fact that a covenant of the property specifically provides that the lease is junior to any deed of trust recorded against the property, it is likely that T's interest is extinguished by the foreclosure of the deed of trust. Therefore, T likely no longer has a tenancy in the Property.

Trade Fixture

A trade fixture is personal property that is affixed to real property such that it becomes part of the realty. A trade fixture is something used in the profession of a tenant or individual. Fixtures that cause destruction of the property when removed are typically considered part of the realty and may not be removed. However, trade fixtures used in the trade of a an individual may be removed provided they do not cause damage and are removed before the end of a tenancy. In a foreclosure proceeding, trade fixtures of a tenant are not the property of the foreclosing property and likely can be removed.

Here, T has an interest in the fixtures that she installed including improvements for a new air condition system and kitchen equipment. The air conditioning system is likely a permanent fixture that may not be removed. That is because it likely does not become a trade fixture because it is not used in T's trade, owning and operating a restaurant. Rather, it is personal property that has become so affixed that removing it would cause destruction. However, the kitchen equipment can likely be removed. The kitchen equipment will be considered a trade fixture that T can remove because she uses it in her trade. T will have to remove it before the end of the tenancy. Therefore, if HML seeks to eject T or not create a new tenancy, T will have an interest in her kitchen equipment but not the air conditioning system.

Destruction of Property

In Nevada, if the property is entirely destroyed by no fault of the tenant. The tenant is free to terminate the lease and leave the property.

Here, since the entire property was destroyed. T will also likely be able to terminate the lease and leave the property since there is no restaurant left for her to run.

J's Interest

The next issue is J's interest in the land.

Type of Interest - Judgment

A judgment can be an interest in the land provided that it is properly recorded. A judgment can attach to a property but follows the notice jurisdictional rules of the jurisdiction.

Here, J's interest is a judgment because it was obtained by a court against O. J's interest will take priority like any other interest on the land.

Race Notice Jurisdiction

Nevada is a race notice jurisdiction. A race notice juridiction provides for the priority of interests in land. Race notice requires that a party be a bona fide purchaser for value that records first. Recording gives constructive notice to all future parties that there is an interest in the land.

Here, J validly and apporpriately recorded his judgment in the Clark County Recorder's Office. A judgment will be treated just like any other interest even if J was not specifically a bona fide purchaser for value. J filed the judgment prior to HML recording its mortgage. Therefore, J's mortgage will take priority over JML's interest because it was recorded first.

JML Interest

The last issue is what is JML's interest in the land.

Type of Interest - Mortgage

See above for the rule on mortgage.

Here, JML has a valid mortgage on the property through a deed of trust. The deed of trust and the type of jurisdiction requires the transfer of title to HML by O. HML had a valid mortgage on the property.

Race Notice Jurisdiction

See above.

Here, JML will likely be junior to J's interest in the property. JML's mortgage was recorded after J recorded his interest in the property. JML's mortgage is for $400,000 on the property. However, JML did not record until a month after it was made. JML did not give notice to subsequent purchasers or judgment holders of JML's interest in the property by not recording. Therefore, JML's interest will be junior to J's Interest.

Foreclosure

A foreclosure is a forced sale of the property that is done following a default on a loan. The foreclosure sale must be judicial meanin that it results in a fair price, is open to the public, and conducted in a way that is reasonable and fair. A foreclosure sale provides a platform for a buyer, including the mortgage holder, to puchase the land to satisfy the debt on the property. A valid foreclosure sale must give notice to all interested parties and add all other interest holders to the proceeding. A foreclosure sale does not extinguish senior interest holders but does extinguish junior interest holder, who are to be satisfied out of the proceeds of the sale.

Here, the foreclosure sale was nonjudicial. This means that it was not done through the judicial system. There is also no showing tha tthe sale was public and may have been done just with HML present. additionally it is unlikely that the sum of money for the property if $10,000 was a fair price. Although it does not have to be fair market value (which would be up to and possibly exceeding $400,000) it must at the very least be fair. The foreclosure sale was also not done through an appropriate judicial proceeding so it is likely that by holding a nonjudicial proceeding and buying the property for a low price, the foreclosure sale is invalid. Therefore, while HML has the right to conduct a valid foreclosure proceeding he failed to follow the formalities of a foreclosure sale. Even if the court finds this sale to be valid, the property would still be subject to J's interest of $20,000 since it is senior to JML's interest.

Conclusion

Therefore, it is likely that O is still the fee simple owner of the property subject to a valid foreclosure sale. T holds a tenancy on the property that will likely be extinguished by a valid foreclosure sale. J holds a senior interest in the property for $20,000. JML holds a junior interest in the property for $400,000 and is the current legal title holder of the property under the title theory and deed of trust theories of mortgages. O clearly defaulted on the loan because he could not pay off the money owed to HML. However, HML conducted a nonjudicial foreclosure proceeding which did not result in a fair price for the property. Therefore, O is still in default subject to a proper foreclosure proceeding.

2. O's Liability with respect to $400,000 Loan

The next issue is O's liability with respect to the $400,000.

Nonjudicial Foreclosure Proceeding

See above.

Here, it is likely that the conducting of a nonjudicial foreclosure sale is invalid. This would result in manifest injustice as the interest holder would walk away with a valuable property for only $10,000. Therefore, the foreclosure proceeding is likely invalid. However, O will still be liable for the full value of the loan because he has defaulted and all money is due. This will make O liable for all $400,000, most of which can be received from a proper judicial foreclosure proceeding.

Deficiency Judgment

However, if the court finds that the nonjudicial foreclosure proceeding was valid, O will still be liable. A deficiency judgment can be sought following a foreclosure sale by a mortgage holder. The deficiency judgment comes after the mortgagor for the balance of the loan.

Here, if the foreclosure proceeding is valid, the funds from the proceeding will be credited against the loan. That will leave $390,000 outstanding on the loan. HML can seek to put a deficiency judgment on O for the balance of the loan, or $390,000.

Conclusion

Therefore, provided that the court finds that HML's foreclosure proceeding is invalid, O will still be liable for the full amount of the loan, $400,000. If a judicial foreclosure proceeding is done, that may reduce the loan by whatever proceeds were received. If the court finds that the nonjudicial foreclosure proceeding was proper, then O could still be liable for the remainder of the loan, $390,000 through a deficiency judgment. Regardless, O will still be liable for the loan on the property.

3. Respective Interests of O, T, and HML in Insurance Proceeds

The last issue is what are the interests of O, T, and HML in the insurance proceeds.

Risk of Loss of the Building

The first issue is who bore the risk of loss of the building. The majority rule is that risk of loss during the transfer of property is on the holder of the beneficial title. Although the true owner may retain legal title, the beneficial owner bears the risk of loss of the building. This exists when there is a sale of the property and the building burns down, the buyer will be liable for the loss. However, Nevada follows the minority rule, which does not transfer risk of loss until both titles are held by the buyer. This means that until the buyer is in possession of the property and holds legal title he or she or it is not liable for the loss.

Here, O is still the owner of the property even though he executed a deed of trust which transferred title to HML to be held in trust following the repayment of the loan. The risk of loss will remain on O because the property burned down before the foreclosure proceeding was completed. The property will not have been successfully transferred to HML so the risk of loss will remain on O. This means that O will be liable for the damages. Additionally, this means that the proceeds of the property will go to O becuase he is still liable for the risk of loss of the property.

Covenant

The rule for a covenant is above. Enforcing a covenant can entitle a party to damages.

Here, it is likely that L will still be able to enforce the covenant provided in the lease for the use of the insurance proceeds for the restoration of the property. Because O is still the owner of the property because the foreclosure sale has not concluded, O will be required to use the proceeds for the restoration of the property. L can seek to enforce this covenant because there is notice between the parties of the provision of the lease. Additionally, the lease was in writing and provided for the restoration. The provision touches and concerns the land because it requires the restoration which would increase the value of the property. There is an intent for it to run with the land because it is in the lease and provides for the protection of the value of the property. T and O are in privity. Additionally there is no subsequent purchaser as of the loss. Therefore, it is likely that T can enforce the covenant to restore the land by O. However, T can just seek damages for the destruction of her interest in the property. This means that since all of the fixtures that T installed were likely destroyed in the property, she can seek damages for the kitchen supplies that she installed.

Equitable Servitude

Equitable servitude's can be enforced by and against subsequent parties by showing intent to run with the land, touches and concerns the land, and notice. Equitable servitudes involve injunctions to prevent or require a party to fulfill a covenant between the parties.

Here, T could also seek to enforce the provision of the lease by arguing that it is an equitable servitude. See above - the covenant runs with the land, touches and concerns the land, and there is notice to O and T. Therefore, it can also be enforced as an injunction to restore the land. However, courts are unlikely to use equitable remedies to restore the land because it requires a party to act in a certain way. T is better off using the covenant rule above.

HML's Interest

HML may try to claim that through the foreclosure sale it is the owner of the property and has the rights to the insurance proceeds. However, it is unlikely that the insurance sale will be valid. Additonally, the destruction occured before the transfer of title to HML. Therefore, O will be entitled to the proceeds under the policy. However, HML may be able to enforce the covenant to restore the land because he is in privity of estate with O. Therefore, once HML comes into actual possession legally of the property he can likely enforce the restriction in the lease.

Conclusion

O is likely entitled to the entire insurance policy ($600,000) because the land was destroyed before the title was completely transferred to HML. T will be entitled to damages for the restoration of the trade fixtures that she installed on the land. HML may be able to enforce the covenant as well to restore the land once HML is in lawful possession.

******* Question 5 ENDS HERE *******

FEBRUARY 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 6

Exam Information

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******* Question 6 STARTS HERE *******

1. Is Virginia's testimony about Daniel beating her up and molesting the neighbor's daughter admissible in the prosecution's case in chief?

Evidence is admissible if it is relevant, if there is foundation for the evidence, if the form is proper, and if there is no basis for exclusion of the evidence.

a. Testimony about Daniel beating Virginia up

Here, Virginia's testimony about Daniel beating her up is relevant because it is likely to prove or disprove a material fact. Virginia has personal knowledge of the incidents about which she is testifying, so proper foundation is established. The form is proper because Virginia is testifying to something she experienced. Virginia could elect not to testify, based on the marital testimonial privilege, which provides that a spouse cannot be compelled to testify against their spouse. She has not raised that privilege. There is no basis for exclusion of the evidence. The testimony is admissible

b. Testimony about Daniel molesting the neighbor's daughter.

Here, Virginia's testimony about Daniel saying that he molested the neighbor's daughter is not relevant to the question of whether he beat Virginia up. Virginia does have personal knowledge of the statement that Daniel made, because she alleges that he made it to her, so there is proper foundation. However, the statement is an out of court statement and may be hearsay. Is the statement offered for the truth of the matter asserted? The prosecution likely is not offering the statement for the truth of the matter asserted but instead to show Daniel's state of mind. The statement therefore would be nonhearsay. However, a statement that someone molested a child is highly prejudicial and, here, it does not have much probative value as to what acts Daniel may have committed on Virginia. It likely would be excluded as being substantially more prejudical than probative.

2. If Virginia refuses to testify and asserts marital privilege, is the Officer's testimony regarding the statements Virginia made on the day of the incident admissible?

The general rule regarding admissiblility of evidence is set forth in 1, above.

Here, the Officer's testimony about what he saw on the day of the incident is admissible because it is relevant, there is proper foundation because it is his first hand knowledge, and there is no reason to exclude the testimony.

The officer also will be asked to testify about what Virginia said to him on the day of the incident. She said, "Daniel adn I were fighting because he told me that he molested the neighbor's daughter, and after I got upset, he beat me up." As discussed in 1.b. above, the testimony regarding Daniel's statement that he molested the neighbor's daughter will be excluded.

The other two statements "Daniel and I were fighting" and "he beat me up" will be analyzed according to the rule in 1, above. The statements are relevant because they are likely to prove or disprove a material fact. There is foundation because the officer will testify about what he personally heard. However, the statements are out of court statements offered for the truth of the matter(s) asserted - that Daniel and Virginia were fighting and that Daniel bear Virginia up. The analysis will then be whether the statements are admissible under an exception to the rule against hearsay. Here, the facts say that the officer arrived on the scene immediately and that Virginia was crying

hysterically. Therefore, the prosecution likely will prevail in the argument that Virginia's statements qualify as an excited utterance and should be admissible.

3. Is Nancy's testimony that on one occasion, she saw Virginia with a black eye and Virginia said that Daniel hit her, causing the black eye, admissible?

The general rule regarding admissibility of evidence is set forth in 1, above.

Here, Nancy's testimony is relevant to whether Daniel has hit Virginia in the past. However, that is not the issue here. The issue here is whether Daniel beat up Virginia during the incident in the facts. Therefore, Nancy's testimony about what Virginia told her Daniel did in the past and what Nancy obersved in the past is not relevant to this particular matter. Moreover, the testimony likely is substantially more prejudicial than it is probative. Because the probative value of this testimony to the question of what Daniel did on this particular occasion is low, and because testimony about Daniel being violent wiht his wife is very prejudicial, the probative value will be substantially outweight by the prejudicial nature of the testimony.

Furthermore, Nancy's testimony about what Virginia said to her on a previous occasion likely would be excluded as inadmissible hearsay. The statement that Daniel hit her and caused a black eye seemingly would be offered for the truth of the matter asserted and therefore would fall under the rule against hearsay. There is no apparent applicable exception to the hearsay rule that would allow the statement to be admitted.

Finally, although evidence about the defendant's character, offered through extrinsic evidence of habit or reputation, is admissible to rebut the defendant's own evidence of his character, this question asks whether the evidence would be admissible as part of the prosecution's case in chief. Evidence of the defendant's character is not admissible as part of the prosecution's case in chief.

4. Is Nancy's testimony that Virginia hates fighting and refuses to fight Daniel when Daniel abuses her admissible?

The general rule regarding admissibility is set forth in 1, above.

Here, Nancy's testimony about Virginia's peaceful nature and her response to Daniel's abuse of ther is relevant because it is likely to prove or disprove a material fact. It is unclear whether there is proper foundation for the testimony because it is unclear how Nancy knows this or has come to this conclusion (is it speculative or an assumption or does she have actual knowledge?). For this analysis, it is easier to split Nancy's testimony into two parts: first, the testimony that Virginia hates fighting and, second, the testimony about Virginia's reaction to Daniel beating her on previous occasions.

The testimony that Virginia hates fighting is character evidence about Virginia's reputation for peacefulness. Such evidence of habit or reputation, is admissible as character evidence. However, the character of the victim is not admissible except once the defendant has raised the issue of the victim's character by presenting evidence, for example, of the victim's tendency toward violence as part of the defendant's case.

The testimony that Virginia has refused to fight back when Daniel abuses her will be inadmissible for two reasons. First, evidence of past acts is not admissible as character evidence. Second, the statement assumes facts not in evidence (that Daniel has beaten Virginia in the past) and will be excluded because there is not proper foundation for that evidence.

5. Is Daniel's testimony that he has never engaged in any violent acts in his entire life admissible in Daniel's defense?

The general rule regarding admissibility is set forth in 1, above.

A defendant may offer evidence of his character. That evidence can be through habit or reputation evidence. After the defendant opens the door, the prosecution may rebut that character evidence. The prosecution also may impeach the defendant regarding his testimony about his character.

Here, Daniel is testifying about his habit throughout his life, and that he has never been a violent person. He is not offering evidence of previous acts. This evidence about his character is admissble. If Daniel testifies to this, however, he is opening himself up to impeachment by evidence from anynone who can contradict that statement, even through extrinsic evidence.

6. Is the following testimony of Daniel's childhood friend, Wendy, admissible?

The general rule regarding admissibility is set forth in 1, above.

a. Wendy's testimony that Daniel has never been in any physical altercation and when confronted with altercations, he refuses to fight?

A defendant can present character evidence through testimony about his habit and reputation. The defendant cannot present character evidence through testimony about specific acts. Here, Wendy's tesimony that Daniel has never been in any physical altercation likely is testimony of habit and likely will be admissible as character evidence. On the other hand, Wendy's testimony about the occasions that, when confronted with altercations, Daniel refuses to fight is likely evidence of specific acts and therefore likely will not be admissible as character evidence.

b. Wendy's testimony that Virginia is a very violent person who has a history of fighting and batters Daniel all the time?

A defendant can present character evidence about the alleged victim through testimony about the victim's habit and reputation. Here, the testimony that Virginia is a very violent person who has a history of fighting and who batters Daniel all the time is evidence of Virginia's reputation and habit. Therefore, the testimony likely will be admissible, provided that the defense can lay a proper foundation for Wendy's testimony (i.e. how she knows the information).

c. Wendy's testimony that Virginia told her, "I will make Daniel pay for everything he has done to me, no matter what I have to do"?

The question of whether and why this evidence will be admissible will depend on the purpose for which it is offered.

If Daniel offers Wendy's testimony about Virginia's statement to prove the truth of Virginia's statement, it will fall within the rule against hearsay because it is an out of court statement offered to prove the truth of the matter asserted. It may qualify as an exception to the hearsay rule as a party admission, because it amounts to an admission by Virginia that she is making up the claim that Daniel beat her in order to get back at him. If the testimony qualifies as an exception to the hearsay rule, it will be admissible.

Daniel may also try to offer this evidence to impeach Virginia's credibility. In Nevada, evidence used to impeach may be admitted into evidence. Wendy's testimony about Virginia's statement would be admissible impeachment evidence because it would not be offered to prove the truth of Virginia's statement (i.e. not offered to prove the truth of the matter asserted) but instead would be offered to show that Virginia has a motive to lie, which would affect the credibility of her testimony.

******* Question 6 ENDS HERE *******

FEBRUARY 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 7

Exam Information

Exam Date:	2/2020
Exam Name:	Question 7

Count Specifics

Total word count: 1178

******* Question 7 STARTS HERE *******

1. There was likely a contract for completion of the plans for $45,000.

Initial meeting:

During Dan and Carl's initial meeting, no contract was formed because there had not been sufficient terms agreed upon. To find the existance of a contract there must be an offer, an acceptance, and consideration. Furthermore, Nevada common law also recognizes the general requirement that there was a "meeting of the minds." The meeting of the minds requirement requires that the parties come to a mutual agreeance on the material terms of the contract. During the initial meeting, Dan and Carl did not have the specifications of the tenant improvement nor did they agree upon a payment amount. Simply saying that the construction would be at cost plust 15% is not enough detail for a material term.

Furthermore, it is also possible that they could not properly form a contract because both Dan and Carl had been drinking.

There isn't express writing requirement as the contract does involve the sale of land, isn't longer than a year, isn't a good above $500, etc... However, despite there being no statute of frauds requirement, there was no contract because there was not meeting of the minds.

The contract and formation:

The contract was still not formed the next day, but the essential terms were finally discussed. When Dan emailed the construction plans and specification to Carl, telling Carl that those were the plans he was telling him about, he was establishing the terms for the constuction work. Carl's response that he could probably get the job done in four weeks for $50,000 was an offer of Dan. Dan's respons to Carl for $45,000, was a rejection and counter offer. Since this is not a contract for the sale of goods, the UCC rules do not apply. Under common law acceptance follows the mirror image rule, which means that any subsequent changes of the terms of the contract will be treated as a rejection and a counter-offer. Dan's email changed the terms of the agreement by lowering the price by $5,000.

Since Dan's email was a counter-offer, no contract had yet been formed.

A week later the contract finally formed when Carl began performance. For a service contract, where a contract does not specify to the contrary, or state the conditions for acceptance, a party may unilaterally accept by beginning performance. The contract likely formed when Carl began working.

It is possible that since a week passed before Dan saw Carl beginning performance, that the amount of time initiated a lapse in the offer. Generally an offer ends either by revocation or by sufficient lapse of time. The conversation on the first day that Dan and Carl, where Dan said that he could mobilize a crew in a week, likely made is so that acceptance in a week was reasonable and that the offer did not lapse. However, even if the offer had lapsed Dan's subsequent payment of $10,000 to Carl waived his right to claim a lapse of contract.

Terms:

The terms are for the plans and specifications that Dan emailed to Carl, and for $45,000. Dan, in his email, specified that the plans he sent were for the work that he wanted done. Carl did not dispute those condition and he subsequent offer implied consent to those plans. Since Dan's email was a counter-offer (as discussed above) the amount was for $45,000. Also, since Dan's email was a counter-offer, it is likely that the provision of getting the job done in four weeks is not included in their agreement. Since the timeframe is generally not

considered a material term of a service contract (within reason) the lack of agreement on this term does not block formation of the contract.

Carl could make the argument that he didn't get the subsequent counter-offer email from Dan and that Dan's payment after the first weeks progress was an acceptance by Dan.

2. Carl's Claims, Dan's Defenses

Breach of contract for failure to pay.

Carl could make the argument that Dan did not pay as required by the contract. Although the payment schedule was not stated as a part of the contract, common industy standards could apply. It is normal in construction contract for progress payments to be made. Since the industry standard is to provide progress payments, Dan could be found to have breach his contract by failing to pay the $20,000 when charged.

Dan could argue that his failure to pay the second invoice was reasonable because he was concerned that Carl would not be able to meet his end of the contract. A party can request reasonable assurance that the contract will be executed as agreed. Here Dan reasonably asked Carl for assurance that the work would not exceed the contract price. The second week of work billed $20k, this would put the total pay (if Dan had paid) up to $30K out of $45k in just two weeks. When Carl failed to respond to the reasonable request, Dan had the right to withold payment until an assuance could be made.

Breach of contract for failure to allow Dan to Remedy.

Where a contract does not state that time is of the essense, it is generally assumed that performance would occur within a reasonable amount of time. Furthermore, a party is generally allowed the opportunity to remedy their breach. When Dan inspected the work on the third week and found the work did not conform to the contract, he should have given Carl the opportunity to remedy the breach. Dan's immediate dismiss of Carl was a breach of contract

Dan could argue that his dismissal of Carl was in anticipatory repudiation, because a Carl's lack of conformance with the plans were so severe and because of Carl's lack of communication. Where a party fails to provide assurances of compliance when requested by the opposing party, or where one parties conduct is such that indicates their lack of intent to perform, a party may end a contract by anticipatory repudiation. Here Dan requests assurances about the price from Carl, and Carl did not respond to his requests. Furthermore, the fact that much of the work did not conform to the plan could potentially lead Dan to conclude that Carl did not intend to, or could not, comply with the contract. It is likely that Dan will not succeed in this Defense becaues it is likley that Carl could have remedied within a reasonable time.

3. Remedies and Defenses

Dan could claim compensation damages for the work performed, because he had to hire Ben to finish the work. Compensation damages seek to put a party in as good of a position as they would have been if the other party fulfilled their duty ("benefit of the bargain"). Here since Dan already had to pay 10k to carl, and then pay 50k to ben, Dan would be owed, $15,000 for compesnation damages.

No liquidated damages becuase there was no such provision in the contract.

Carl can claim that Dan did not give him the opportunity to remedy.

******* Question 7 ENDS HERE *******

FEBRUARY 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 8

Exam Information

Exam Date:	2/2020
Exam Name:	Question 8

Count Specifics

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******* Question 8 STARTS HERE *******

(1) DUNCAN'S CRIMES

Attempted Murder

First-Degree Murder is defined as a killing under various circumstances and with willful premeditation and deliberation. Incorporating the attempt definition below, the promixity test requires that the defendant go beyond mere preparation and tend to commit to crime.

Here, D premeditated and deliberated killing R. R called D and told him that he gave the briefcase to the cops. D waited until the next day to go over to R's home. He did so on his own volition. He also went beyond mere preparation by showing up at R's door, pulling out the gun, and shooting. Therefore, D can be charged with attempted first-degree murder.

Assault

Assault is attempted battery (see the definitions for attempt and battery below).

Here, D committed assault on R when he came to R's home and pulled out his handgun. Therefore, D may be charged with assault.

Battery

Battery in Nevada is defined as willful and unlawful use of force on the person of another. Battery is **willful**, rather than accidental, if the defendant pursposefully or knowingly uses force on the person of another (accidential is not battery). **Force** may be direct or indirect--through an instrument. If the defendant uses a deadly weapon, the battery is enhanced to aggravated.

Transferred intent allows a defendant to be charged with a criminal actupon the victim even though that defendant intended to commit the crime on a different victim. Under this concept, the defendant has committed two crimes: attempt on the intended victim and the completed crime on the actual victim.

Attempt

Nevada applies the "proximity" test in determining whether an attempt has occured. This test requires that the defendant commit acts beyond mere preparation that tend to achieve the crime intended.

Here, D has committed battery on R's wife through the doctrine of transferred intent. D's act was willful because he came to R's home with a gun and purposefully shooting the gun to hit R. The force came indirectly through the bullet in D's gun. When it made contact with R's wife, it was made on the person of another. Since D used a gun (deadly weapon) the battery charge may rise to aggravated. Transferred intent because at the time D shot the gun, he intended to have the bullet hit R. However, the bullet missed R and hit R's wife.

The attempt on R occured because D took his acts beyond mere preparation by bringing the gun to R's home, pointing it, and shooting it, tending to achieve the battery intended.

Based on the foregoing, D has committed attempted aggravated battery on R and completed aggravated battery on R's wife.

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Criminal Trespass

Criminal trespass is the willful and unlawful entry onto the property of another without consent and with the intent to commit a crime thereon.

Here, D went to R's home and stepped inside the door R opened. Since R invited D in, and thus consented to D's presence on his property, D will likely **NOT** be charged with criminal trespass. However, there may be an argument that D exceeded the scope of R's consent when he shot at him and hit his wife. This D may still be charged with criminal trespass.

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Compounding Crimes

Where a party commits a crime, or knows of a crime that was committed, and knowing obstructs justice, they may be convicted of compounding crimes.

Here, D learned that the cops were investigating him for burglary and document theft. By knowingly keeping the incriminating evidence from the cops, D compounded the crimes. Thus, D committed compounding crime.

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Burglary & Document Theft

D may also be able to be charged with burglary and document theft, if the elements are otherwise incorporated from the cop's investigation.

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Solicitation

D may also be liable for solicitation when he asked R to destroy the briefcase, knowing it contained incriminating evidence. He ask R to commit a crime, and once asked, the crime is completed. Therefore, D may be charged with solicitation.

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(2) FOURTH AMENDMENT

The Fourth Amendment (4th) protects citizens from unreasonable searches and seizures by the government. Generally, searches and seizures require either that the officer have a warrant or that a warrant exception apply.

REOP - The Briefcase

To have standing to sue under the 4th, a party must have a reasonable expectation of privacy (REOP) in the area or item being searched or seized. Parties have a REOP in the property they own and the home they are staying in. However, parties do not have a REOP in things they generally hold out to the public, such as they voice, the location of their car on the public road, and bank account information. Further, a party does not have REOP in items that do not belong to them. Nor may a party conclude that a third party will keep their communications confidential; the party should assume that everyone is wearing a wire and ready to take their conversations to the cops.

Here, D has a REOP in his locked briefcase. While he entrusted the briefcase to R--who hid it in his basement--he did not relinquish his ownership over the briefcase. Thus, the cops either need a warrant or to have a warrant exception apply.

Consent

Consent is a warrant exception and allows the cops to search and seize if a person with apparent authority over the area or item provides to cops with informed consent. In Nevada, merely stepping away from the door of a home does not indicate consent; it must be clear.

Here, A few days after D to R to destroy the briefcase, the cops interviewed R at his home and R told the cops about the briefcase. Since D willing disclosed to R that he wanted R to destroy the briefcase so the cops could not obtain its contents, he no longer had a REOP regarding what was in the briefcase. R handed the briefcase to the cops, thus consenting to the seizure.

On the other hand, R did not have any authority to consent to the search. See the full explanation under *Violation* below.

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Violation - Breaking the Lock

Where the facts do not give rise to a warrant exception, officers must obtain a warrant. A warrant is obtained by the cops having probable cause and articulatble facts that the cops are likely to find contraband or evidence to the crime in question in the place where they are requesting the warrant for.

Here, the officers had probable cause and articulable facts that the briefcase contained the evidence of the burglary and document theft they were investigating.

Further, there is no indication that exigent circumstances--calling for an immediate search to avoid present danger to the cops--or evanascent evidence--easily destroyed evidence--that would excuse the officers from prying open the briefcase with a screwdriver. Even if the cops feared exigent circumstances applied, they must have more than fear and show that the circumstances truly warrant immediate search or seizure (i.e. the defendant knows the cops are after him). Here, although D knows the cops are after him, he though R destroyed the briefcase as promised, and thus, would not have been seeking out the briefcase to destroy himself.

Moreover, D did not tell R what was in the briefcase until much later, he never gave R the combination, and never gave R permission to *open* the briefcase. Thus, this was an unreasonable government search and seizure.

By breaking the lock, the officers violated D's 4th rights.

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Exclusionary Rule

Under the exclusionary rule, evidence obtained during a search in violation of the defendant's constitutional rights ("fruits of the poisonous tree") will be excluded from the defendant's trial (except Miranda violations for impeachment) unless the cops can show one of the following:

1. The officers would have **inevitably** discovered the evidence;
2. The evidence was obtained through an **independent source** from the violating search; or
3. The time between the violation and obtaining the evidence is so **attenuated** that the connection between the two is broken.

Here, the cops will argue that that it would have **inevitably** discovered the evidence because they would have obtained a warrant and proceeded accordingly. D will argue that if R had destroyed the vriefcase as promised, the cops would not have ever discovered it.

Independent source does not seem to apply because D and R seem to be the only two who knew about D's participation in the burglary and document theft.

Attenuation does not apply because, while R consented to the seizure, he had no authorty, apparent or otherwise, to consent to the search of the contents in the briefcase. Thus, the Court will likely exclude the evidence in the briefcase from D's trial as fruits of the poisonous tree.

******* Question 8 ENDS HERE *******

FEBRUARY 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION MPT

Exam Information

Exam Date:	2/2020
Exam Name:	MPT

Count Specifics

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******* MPT STARTS HERE *******

I. Because Mr. Doran Was Incapable Of Consenting To Marriage At The Time Of The Marriage And Had No Understanding Of What Marriage Is, His Marriage To Ms. Daws Must Be Annuled.

The uncontraverted expert witness evidence in this case is clear and convincing that Mr. Doran was incapable of consenting to his marriage to Ms. Daws. The marriage occured on January 15, 2019. *Tr. Direct Examination of Daws by Andrews.* Petitioner do not contest that the marriage complies with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act or dispute the law that such a marriage is presumptively valid. *In re the Estate of Green*, Fr. Ct. App. (2014). However, that presumption may be overcome through clear and convincing evidence. *Id.* Petitioner has more than met that burden in this case.

The court should look to precedent set in the case of *In Re Marriage of Simon,* (Fr. Ct. App. 2005) to guide its analysis of this case. In *Simon*, the court found that a person lacked the capacity to marry based on its conclusion that the person was "incapable of receiving or evaluating information and should not make any decisions for herself and others." *In re Green*, citing *In Re Marriage of Simon*. The evidence that Mr. Doran was incapable of making decisions for himself or others is overwhelming. First, with regard to Mr. Doran's ability to make decisions, Dr. Anita Bush provided expert testimony that as far back as 2018, Eli could not pay a bill, know what it was to call 9-1-1, or know what a fire alarm is. *Tr. Direct Examination of Bush by Cook.* Dr. Bush also testified that in 2018, "Eli was incapable of any abstract thinking and incapable of ordinary judgment or reasoning." *Id.* Dr. Bush continued, "He lacked the ability to meet his most basic needs and provide for his health and safety. He could not live alone, drive, or manage his medicine or money." *Id*. Dr. Bush testified that on the Mini-Mental State Exam or MMSE Mr. Doran had dropped from a 21 in 2015 when tested by Dr. Ricci, to a 19 on May 3, 2018 and then down all the way to a 17 on June 21, 2019. *Id*. Dr. Bush explained that a score for someone Mr. Doran's age, education, and health would normally be a 23. *Id*. Dr. Bush, having examined Mr. Doran as recently as June 21, 2019, concluded that Mr. Doran did not have the mental capacity to consent to a marriage or a will. *Id*. The Respondent provided no expert testimony to rebut Dr. Bush's expert opinions and analysis.

In *Simon* the court also noted that the individual in that case was unable to understand what a marriage was. *In Re Green, citing In Re Simon*. The same is true here. Ms. Richards explained that Mr. Doran once asked Ms. Wilson, his cleaning lady, to marry him. *Tr. Direct Examination of Richards by Cook.* Dr. Bush explained that Mr. Doran equated marriage with being cared for. *Tr. Direct Examination of Bush by Cook.* Thus, just as the court found in S*imon*, the individual in this case had no understanding of the significance of marriage or what it is.

Respondents will undoubtaby argue that at the time of the marriage Mr. Doran appeared lucid to Rev. Simms. *Tr. Direct Examination of Simms by Andrews.* While that may be true, Dr. Bush explained that while persons suffering from mental disability may have moments of lucidity, that is not the same as having the ability to exercise judgment. *Tr. Direct Examination of Bush by Cook.* Dr. Bush also explained that Mr. Doran had a progressive condition that only worsened with time. *Id.* Respondents may also urge the court to follow the precedent in *Green* and conclude that the burden to undo a marriage has not been met. But the facts in *Green* are clearly distinguishable from the facts before the court in this case. In Green the court found that the individuals were engaged for two years, discussed where they would live in retirement, and even broke off their engagement once before recommitting. *In Re Green.* The court in *Green* properly distinguished the facts in that case from the facts in *Simon.* Similar to the case before this court, in Simon the individual met in a facility and had no prior romantic or other relationship. *In Re Green, citing In Re Simon.*

In light of the weight of the uncontraverted expert testimony and testimony of Mr. Doran's neice, the court shuold annual Mr. Doran's and Ms. Daws' marriage.

II. Because Mr. Doran Lacked Testamentary Capacity His Will Must Be Set Aside.

In a previous ruling this court has already determined that Mr. Doran was incompetent as a matter of law. Unfortunately, since the time of that ruling Mr. Doran's condition only worsened turning his lack of competence into a lack of capacity and making his will invalid. The law requires that a testator have testamentary capacity meaning he must, "at the time of executing his will, be capable of knowing the nature of the act he is about to perform, the nature and exent of his property, the natural objects of his bounty, and his relation to them." *In Re the Estate of Dade*, Fr. Ct. App. (2015). This test is to be determined as of the time when the will is executed. *Id.* The party challenging the lack of testamentary capacity, in this instance the Petitioner, has the burden to do so by a preponderance of the evidence. *Id*. In this instance, the Petitioner can and has met that burden.

The evidence is clear that Mr. Doran lacked capacity. The will was made on October 7, 2019. *Tr. Cross-Examination of Daws by Cook.* Just a few months earlier, Dr. Bush examined Mr. Doran on June 21, 2019. *Tr. Direct Examination of Bush.* Dr. Bush's testimony was that Mr. Doran, as a result of that examination and his prior examination: (1) did not have the capacity to make decisions; (2) did not know the extent of his property; (3) mistakenly believed that he was still married to his deceased wife Janet; (4) mistakenly believed his deceseased parents were alive and visited him; and (5) did not know who his neice was, the person who cared for him for years after his wife died, and denied they were related. *Id. and Tr. Direct Examination of Richards by Cook.* Based on Dr. Bush's uncontraverted expert testimony, Mr. Doran failed every element of the test described in *In Re Dade* for having testamentary capacity.

Respondents may argue that Mr. Doran was lucid at the time that he executed his will and that can be attested to by Ms. Daws and Ms. Johnson. *Tr. Direct Examination of Daws by Andrews and Direct Examination of Johnson by Andrews.* As a preliminary matter, the credibility of Ms. Daws and Ms. Andrews must be viewed in light of the fact that Ms. Daws is the beneficiary of the new will and Ms. Johnson is her daughter. The fact that the other witness to the will, Mr. Johnson, is Ms. Daws son-in-law is also an important consideration. *Tr. Direct Examination of Daws by Andrews.* That self-serving testimony does not and cannot outweigh the expert testimony of Dr. Bush who examined Mr. Doran on three separate occasions from May 3, 2018 through June 21, 2019 - just a few month before the will was executed. That testimony also cannot overcome the expert testimony that Mr. Doran's condition was getting worse, not better, with time. *Tr. Direct Examination of Bush by Cook.* As the court in *Dade* noted, assessments of credibility are critical in determinations of testamentary capacity. *In Re Dade*. In that case, the court took into account the fact that the certain witnesses' testimony was "colored by their interest." *In Re Dade.*

Taking into consideration the uncontraverted expert testimony of Dr. Bush and weighing that testimony against the self-serving lay testimony of Ms. Daws and Johnson, the preponderance of the evidence is that Mr. Doran lacked testamentary capacity. As such, the court should set his will aside.

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