



JULY 2014

**EXAMINATION QUESTIONS  
AND  
MODEL ANSWERS**

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



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 1, QUESTION 1 -**

**JULY 2014**

**EXAMINATION DAY 1 – MORNING SESSION;**

**QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET**

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Husband was arrested and charged with the crime of sexual assault of estranged Wife. At trial six months later, Wife testifies she was sexually assaulted by Husband. The following evidence will also be offered at trial:

a. The prosecution offers a copy of a judgment of conviction against Husband for misdemeanor battery constituting domestic violence for breaking Wife's nose three months before the alleged sexual assault.

b. The prosecution offers testimony of Registered Nurse who has been a nurse for 30 years, completed sexual assault examiner training, and performed over 1,000 sexual assault examinations during her career. Registered Nurse will testify she completed a sexual assault examination of Wife that showed no genital injury. The prosecution also offers Registered Nurse's opinion testimony that frequently in cases where a sexual assault has occurred, the victim sustains no genital injury.

c. The prosecution offers testimony of Police Officer who responded within minutes to Wife's 911 call made two days after the alleged sexual assault. Police Officer will testify that upon his arrival Wife was upset, trembling, and seemed nervous when she told him, "I can't believe Husband raped me."

d. The defense offers testimony of Friend who will testify that the day before trial Wife told Friend, "Even though Husband and I are both in the United States illegally, I can stay in the country with a U-visa if I say I am a victim of sexual assault."

**1. Assuming all objections are timely made, how should the Court rule regarding the admissibility of each item of evidence and why?**

**2. Assume Friend's testimony is admitted in Husband's defense case and that the prosecution offers Police Officer's testimony for the first time in rebuttal to Friend's testimony. Fully discuss whether there is a different analysis and ruling for admission of the testimony.**

1)

To be admissible, evidence must be relevant to the facts and issues of the case at hand by indicating if something is more or less likely to have occurred.

a. Husband's three-month old conviction for battery

Evidence of husband's prior conviction is probably relevant to show a past history of abuse of wife by husband, but the evidence is probably not admissible because it is offered to show the defendant's propensity for violence against the wife, which is not admissible. The conviction is hearsay but falls under the hearsay exception of judicial records of conviction.

Evidence of a party's character cannot be admitted to show that the party had the propensity to act in a certain way unless it falls into an exception and unless it is offered in a criminal case by the defendant. Evidence of a person's character for untruthfulness may be admissible to impeach a witness, and that evidence may include prior convictions. However, the rules of evidence only allow evidence a prior conviction to show untruthfulness if the conviction is a felony or a crime of falsity, within the last ten years. Battery does not qualify as a crime of falsity because it does not require as an element a fraudulent statement or act. Therefore, the conviction does not fall under this exception.

Evidence of a person's character by evidence of prior bad acts may be offered if it is to show something else besides propensity, such as motive, intent, plan, or identity under rule 404(b). However, husband's conviction does not fall under any of these exceptions because the battery for breaking wife's nose does not show a common plan as it is different from the sexual assault, and it does not show identity as identity is not an issue in this case.

Evidence of a defendant's character or a victim's character in a criminal case can also be admitted in certain homicide cases to show a propensity for violence or peacefulness to explain self defense. However, because this case is for sexual assault, this exception does not apply here either, and so the past conviction should not be admissible.

b. Registered Nurse (RN)'s expert testimony

The Court should admit the RN's testimony of the examination and allow the RN to testify to her opinion as an expert in sexual assaults.

To be admissible, expert testimony must satisfy the following requirements: the testimony must be helpful to the jury, the expert must be qualified, the expert's testimony must be based on facts, and the expert's methods of analysis must be reliable. To show an expert's methods of analysis are reliable, the methods must have a low error rate, must be tested and subject to retesting, and must be reasonably accepted by other experts in the field according to the majority standard, and generally accepted by experts in the field under the Nevada standard.

Here, the prosecution will offer RN's testimony as relevant to show that wife underwent a sexual examination. This testimony is relevant because sexual assault requires the prosecution to prove a sexual penetration, and so a medical professional who has examined wife for sexual penetration will be able to testify as to the possible physical injuries or any physical indications of a sexual penetration. Here, the testimony may lack relevance and may not be helpful to the jury because the RN found no genital injury. However, this makes the evidence relevant for the defense to possibly show that there was no sexual assault. It could also be relevant for the prosecution to show that the wife did undergo a physical examination after reporting the sexual assault, which is a fact the jury would probably want to know about when judging the credibility of wife's claim. Therefore, RN's testimony is relevant, and it will be helpful to the jury.

For the prosecution to allow the RN to testify as to her opinion as an expert, they will explain why the testimony will be helpful to the jury, as explained above. They will also explain that the RN is qualified as an expert on sexual assault because she has completed general education in medical studies, specific training for sexual assaults, and she has vast experience with sexual assaults after doing over 100 examinations in her career. The RN's opinion will be based on the facts of this case, because she actually examined wife herself, however the defense may argue that her opinion about how other victims have acted in the past is not based on the facts of this case specifically. The RN's methods of examination must also be reliable, and so the prosecution will need to use additional facts about the RN's method of examining wife which that her methods have a low error rate, be tested and subject to retesting, and must be reasonably accepted by other experts in the field according to the majority standard, and generally accepted by experts in the field under the Nevada standard.

#### c. Wife's Hearsay Statement to Officer

Because wife's statement to officer is hearsay and does not fit into a hearsay exception, the court should not admit wife's statement to officer.

Relevant testimony may not be admitted if it is hearsay, which is an out of court statement offered to prove the truth of the matter asserted. A court may admit a hearsay statement if it falls under a hearsay exception, and if the court determines that its prejudicial effect does not outweigh its probative value.

An excited utterance is an exception to hearsay and is a statement made while a person is in an excited or shocked state after an event. The person making the excited utterance must actually still be in a state of excited as to the event, and so the court will heavily consider the amount time which has elapsed after the event to determine if the person was excited at the time they made the statement. The court may also look to the declarant's physical behavior to determine if they are still in an excited or shocked state.

Another exception to hearsay is a declarant's expression of a then-existing state of mind, where a declarant expresses what they are planning at that moment in their own mind.

Here, wife's statement to officer is relevant because it speaks directly to the issue of the case which is the alleged sexual assault of the wife by the husband. However, wife made the statement out of court and is offering the statement for its truth; that husband sexually assaulted her. The statement is hearsay but may be subject to an exception. The prosecution may argue that wife's statement to officer will qualify as an excited utterance because the officer observed that the wife was upset, trembling, and seemed nervous at the time she made the statement that she could not believe her husband raped her. The physical symptoms that the officer observed of the wife certainly help to indicate that the wife was indeed in a state of excitement when she made the statement, however, the statement was made two days after the alleged sexual assault, and so will not qualify as an excited utterance. While the wife may have been in a state of shock and grief for the entire two days after the assault, the excited utterance exception is meant to cover statements made in a high degree of shock or excitement very soon after or immediately following an event, and two days is just too long for the statement to have the higher degree of reliability the excited utterance exception was intended for.

The prosecution may also try to argue that wife's statement falls under the mental state exception, and while the wife's statement is indeed a statement of her then existing disbelief, the statement does not fall into the exception because it is not an expression of wife's current mental plan. The statement does not carry the higher degree of reliability that the mental state exception is to protect because the statement serves to support wife's accusation more than it speaks to her then-existing plan in her mind.

#### d. Wife's Hearsay Statement to Friend

The court should not admit wife's statement to friend as a statement against interest because the wife is available.

Wife's statement to her friend is relevant because it also speaks to the exact issue of the alleged sexual assault of wife by husband because it tends to explain why wife may have a motive to tell officers about the sexual assault (whether she is lying or not). The statement is hearsay because it was made by wife outside of court, and is being offered for its truth, which is to show that wife's motive for telling about the sexual assault. The court should admit the testimony if it falls under a hearsay exception.

The defense may argue that this is a statement against interest, which is an exception to the hearsay rule. A statement against interest is a statement that exposes the declarant to penal, pecuniary, or proprietary liability, and the declarant knows it is against his interest when making the statement. Here, the defense will argue that this statement is against wife's interest because it exposes her to penal liability or possible deportation or other proceedings because she is admitting that her and her husband are present in the country illegally, and the wife knows that her illegal status opens her up to possible consequences at the time she made the statement. Therefore, this statement probably qualifies as a statement against interest except for the fact that the wife is unavailable, and so the court cannot admit the statement.

## 2. Wife's statement to Officer as prior consistent statement

If the defense offers wife's statement to friend to impeach wife by showing that she has a motive to lie, then the prosecution may be able to rehabilitate wife's credibility by offering a prior consistent statement, but only if the prior consistent statement was made after the alleged motive to lie arose.

Here, if the wife's alleged motive to lie is so that she would qualify for a U-visa, then her statement made to the officer would have arisen after her motive to lie because the motive to lie would have been present once she made the allegation. Wife's statement also speaks to a non-collateral matter, and so her specific statement would be admissible.

**END OF EXAM**



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 1, QUESTION 2 -**

**JULY 2014**

**EXAMINATION DAY 1 – MORNING SESSION;**

**QUESTION NO. 2: ANSWER IN RED BOOKLET**

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Nancy owns Home Stuff, a home goods store in Nevada. While vacationing in Oregon, Nancy stops by Ceramics, a popular manufacturer of ceramic dishes. Ceramics is closed for the day, but knowing its inventory, Nancy leaves a note on Home Stuff's stationery ordering 10 five-piece place settings, in Antique White, for \$100 per setting plus freight. Nancy includes her signature, email address and shipping address on the note, and indicates she needs the order no later than August 1<sup>st</sup> for a customer's wedding.

While in Oregon, Nancy receives an email from Ceramics saying: "Dishes in stock, terms accepted, \$110 per place setting, C. & F., any disputes to be settled by arbitration in Oregon." Ceramics promptly delivers the order to an Oregon licensed carrier and emails Nancy notice and the required documents to obtain possession.

Nancy receives the order at Home Stuff in July. Before paying, Nancy inspects the order and finds that five of the settings are Blueberry Blue and five are Antique White. In addition, most of the dishes in two of the Antique White settings have been broken in transit. Nancy promptly calls Ceramics regarding the problem. Ceramics says it will ship a new order and sends five Antique White settings, but the new order arrives after August 1<sup>st</sup>. With little time to locate a replacement, Nancy loses her sale. She refuses to pay and ships the new order back to Ceramics. She sells the unbroken dishes from the first order at a discount, keeps the proceeds and discards the broken dishes.

Home Stuff sues Ceramics in Nevada state court and Ceramics counterclaims. Oregon and Nevada have identical laws except that Oregon has an unusual statute disallowing lost profits as buyer damages in contract actions involving the sale of goods that are not specially manufactured. Assume personal and subject matter jurisdiction exist.

**Fully discuss:**

- 1. Whether there is an enforceable contract between Home Stuff and Ceramics and, if so, its terms.**
- 2. What claims Home Stuff and Ceramics have against each other and any defenses thereto.**
- 3. Which state's law the Nevada state court should apply regarding any damages either Home Stuff or Ceramics could recover against the other and the measure of those damages.**

2)

### 1. Enforceable Contract

Governing Law: The UCC Article 2 governs contracts involving goods. A good is any moveable object (meaning excluding land), therefore, "ceramic dishes" will be considered goods covered by the UCC. In addition, both Nancy, Owner of Home Stuff, and Ceramics are merchants. A merchant is someone who regularly deals in the items sold. The facts indicate that Home Stuff regularly deals in home goods and that Ceramics regularly deals in ceramic dishes. Therefore, both parties are merchants and will be subject to any special rules for merchants.

Valid Contract: A valid contract includes offer, acceptance and consideration. Here, there is a valid contract between the parties, as explained below.

- - Offer: A valid offer is a clear manifested intent to enter into a contract. Here, Nancy left a note at Ceramics with her order of place settings, a price, and a reasonable description of the items. In addition, the terms stated were on Nancy's letterhead. Therefore, Nancy has placed a valid offer to buy.

- - Acceptance: At common law, a valid acceptance was subject to the mirror image rule, whereby the acceptance had to match the offer. Any additional terms would not constitute an acceptance, but rather a counteroffer. However, in the UCC, an acceptance may include additional terms. While the validity of those additional terms will be discussed below (in "Terms"), Ceramic's response indeed constitutes an acceptance of Nancy's offer despite the introduction of additional terms. Moreover, the other contracting party must be aware of the offer in order to accept it. Here, awareness of the offer may be inferred by Ceramic's "terms accepted" portion of their letter back to Nancy. Therefore, there has been an acceptance of the offer.

- - Consideration: consideration requires a bargained-for exchange, whereby parties are subject to a legal obligation to complete the contract. Here, Nancy will pay \$100 per setting, and Ceramics will supply the place settings. Therefore, there is valid consideration to support this contract between Nancy and Ceramics.

Terms: Under the UCC, additional terms in the acceptance will become a part of the contract provided that: they do not materially alter the terms of the offer, and either the offeror did not limit the terms to the terms of the offer, or there was no timely objection by the offeror to the additional term. Additional terms that will be deemed to have materially altered the offer include those involving

money or those that affect the rights of the parties upon dispute of the contract. Here, Ceramic's additional term in the contract provided "disputes to be settled by arbitration in Oregon". Therefore, this addition qualifies as a material alteration to the offer and will not be included in the contract formed between the two. Another change to the offer, the price from \$100 per setting to \$110 per setting, may not be a material alteration of the contract. The change results in a \$100 difference for Nancy, or 10% of the total contract price (\$1000 total vs. \$1100 total). It is unlikely that a 10% difference would be considered a material alteration of the offer, therefore, because Nancy neither limited her offer to the terms of the offer nor objected to the \$10 difference, the term has become a part of the contract.

Therefore the terms of the contract between Nancy of Home Stuff and Ceramics are: 10 five-piece place settings, in Antique White, for \$110 per setting plus freight, with receipt no later than August 1.

## 2. Claims and Defenses

Home Stuff's Claims & Defenses: Home Stuff (through Nancy) will claim that their performance is excused because Ceramics sent her nonconforming goods. She will also claim that Ceramics is responsible for the broken dishes, and that her performance is excused because Ceramics breached the contract by delivering past the date of performance.

Nonconforming goods: At common law, the perfect tender rule governed the shipment of goods and states that when a contracting party fails to ship conforming items, a breach of contract has occurred. By contrast, the UCC allows for nonconforming goods to be shipped provided that the merchant then seeks to "cure" the defect in the shipment. Here, Nancy timely inspected the goods, which arrived to her before the date of performance in the contract, and saw that the goods were nonconforming (Blueberry Blue, when Antique White was ordered is clearly not in conformity with the contract).

Cure: Upon notice to Ceramics, they (Ceramics) offered to cure the nonconforming goods shipment. Typically, a notice to cure must accompany the nonconforming shipment; this did not occur in this case - Nancy had to notify Ceramics of the problem. Had Ceramics notified Nancy of the nonconforming goods and the offer to cure, they would have been afforded time after the date of performance to ship the conforming goods. However, as here when a merchant seeks to cure a nonconforming goods shipment without prior notice, the shipment of conforming goods must arrive before the time of performance on the contract. The goods arrived after the date of performance, so here, Ceramics will be liable to Home Stuff for breach of contract for nonconforming goods.

Allocation of Risk: (see below for complete discussion on the allocation of risk regarding the broken dishes between Home Stuff and

Ceramics.)

Time is of the Essence Clause: Nancy will also claim that Ceramics breached their contract by failing to perform by the contract date. A material breach would excuse Nancy from having to perform (i.e. paying for the 10 place settings). Generally, in a contract for goods, time is not considered of the essence unless stated in the contract. Therefore, a failure to deliver goods on time would not be a material breach excusing performance. Here, time was clearly of the essence from Nancy's indication that "she needs the order no later than August 1 for a customer's wedding." Therefore, because Ceramics did not deliver the goods by August 1, and time was of the essence, the failure to do so will be considered a breach of contract excusing Nancy's performance to pay for the additional 5 settings.

Cover: A party must seek to cover the contract in the event of another party's breach. Here, upon Ceramics' failure to deliver conforming goods by the contract date, Nancy is obligated to seek to cover the contract. It is clear from the facts that she attempted this but that there was "little time to locate a replacement".

Ceramic's Claims & Defenses: Ceramics will claim that Nancy is responsible for the damage to the dishes and that she breached their contract by both not accepting the "cure" (i.e. the five Antique White settings sent as cure) and by keeping the proceeds of the original order.

Allocation of risk: In a shipment contract, risk or loss or damage shifts to the buyer after the seller has delivered the goods to a carrier, given notice to the buyer, and included the process by which the buyer may take possession of the goods from the seller. Here, Ceramics delivered the order to the Oregon carrier, notified Nancy by email (which is likely sufficient notice since the acceptance was also by email), and gave Nancy the required documents for possession. Therefore, Ceramics fulfilled their duty in the shipment of the goods and the risk of loss shifted to the buyer upon delivery to the carrier. This means that Nancy may not claim that Ceramics is responsible for the broken dishes once they were delivered to the carrier. The facts state that the dishes were broken "in transit", so Ceramics does not bear the risk of loss.

Cure: As mentioned above, once a merchant offers to cure a nonconforming shipment, the conforming shipment must be accepted by the buyer, even though the shipment of the goods may be deemed a breach of contract. Here, Nancy rejected the conforming goods and sent them back to Ceramics. This is not allowed; Nancy will only be able to sue for breach of contract for the goods but must accept them.

Sale of Goods on Credit: Ceramics will also claim that Nancy impermissibly sold the nonconforming goods and part of the

conforming goods at her store. A buyer has options with regard to nonconforming goods: they may return the goods to the seller, or, upon the instruction of the seller, may keep the goods to store them or sell on credit. The buyer may not destroy or discard the goods without the permission of the seller. Here, Nancy threw away some of the goods and sold and kept the proceeds of others. Therefore, because Nancy did not conform with permissible methods of treating rejected goods, Nancy will be liable to Ceramics for the first order of dishes.

### 3. Conflict of Laws: Which law NV should apply?

Nature of claim & NV Preference: The nature of this claim is a contracts substantive one. It involves a contract and the issue of damages is considered a substantive (rather than procedural) element because it materiall affects the rights of the parties to recover. The relevance of this information will be discussed below. In addition, Nevada prefers to use the Second Restatement in a conflict of laws issue.

Methods of Analysis: the three methods of analysis used to determine which law should be applied are vested interest, governmental interest, and significant contacts anylsis. The three are discussed below.

Vested Interest Analysis: vested interest analysis provides that the law applied should be that of the forum where the interest was vested - meaning, that which the last event that gave rise to the action ocured. In a contracts case such as this one, normally the contract vests either where it was made or where the contract was to be performed. Here, the contract was arguably formed in Oregon - the offer was made in Oregon, and the email acceptance to the offer was made while Nancy was still in Oregon. If the contract-formation method is used in this case the law of Oregon would appy and the measure of damages would be compensatory damages, plus incidental and nominal damages, not including lost profits. If, on the other hand, the contract-performance method is applied the performance would be in Nevada, Nevada law would apply, and the measure of damages would include lost profits.

Governmental Interest Analysis: The government interest analysis looks at the policy underlying the laws and the interest the states have in applying their own laws. For Nevada, the policy underlying the law allowing lost profits shows an importance placed on ensuring their citizens get full recovery for their business losses. For Oregon, they have an interest in limiting the amount a business can recover based on what may be a speculative valuation - lost profits. Nevada has an interest in seeing their law applied since Home Stuff is located in Nevada. Oregon , on the other hand, also has an interest in seeing their law applied because their citizen would be the one responsible for paying the lost profits. This creates a true conflict between the two laws. In the event of the true conflict, the

law of the forum state applies and Nevada law would apply, allowing lost profits.

Significant Contacts Analysis: The significant contacts analysis includes the government interest analysis and takes a look at the entire claim and what law makes the most sense to apply. Here, Nevada has an interest in seeing their law applied to protect their businesses, the goods were shipped to Nevada, the communications involving cure, sale of the dishes on credit, etc all occurred in Nevada, so it makes more sense to apply Nevada Law. Therefore, the Nevada law will be applied allowing recovery for lost profits.

Therefore, under all three analyses, the Nevada court should apply the law of it's own state that includes recovery for lost profits.

**END OF EXAM**



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 1, QUESTION 3 -**

**JULY 2014**

**EXAMINATION DAY 1 – MORNING SESSION;**

**QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET**

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In the late 1980s, Dave subdivided a ten acre parcel of land in Sparks, Nevada calling his development “Desert View Estates.” He built a house on each of the ten lots. Several of the houses in Desert View Estates front on City Blvd., then a quiet street. He conveyed fee simple title to his purchasers by a recorded deed that included a covenant "forever" restricting all of the lots in Desert View Estates to residential use. Judy bought one of the houses from Dave located on the corner of City Blvd. and Sagebrush Ave. Her friend, Susan, liked the neighborhood and bought the house on City Blvd. next to Judy’s house.

City Blvd. is now a major commercial thoroughfare. Six years ago, Judy left the neighborhood for a quieter location. She was unable to sell her house. Like many of the houses on City Blvd., Judy’s house fell into disrepair and remains unoccupied. The other houses in Desert View Estates that do not front on City Blvd. are occupied and in good repair.

Susan also moved out of her house six years ago and started a successful daycare center at that location. In order to obtain approval for her daycare center, the City required Susan to install additional utility lines to her house. The cost of installation would be quite expensive because of the large trees on Susan’s lot, so she asked Judy for permission to install the lines and utility box on Judy’s side of the boundary between their lots. Judy orally agreed. The lines were installed underground with a small utility box visible on Judy’s side of the boundary and remain in use.

Because of the traffic on City Blvd., Susan insists that children be dropped off in the alley behind the lots on City Blvd. The alley is a public street on the recorded plat map.

Tom recently acquired Judy's lot. The City approved Tom's application for a zone change to build an office building on his lot. The City also agreed to vacate the alley behind his lot. As a result, Tom and the owner of the lot behind Tom's lot will each own the half of the vacated alley abutting their lots. Tom recently discovered that the utility box and lines he thought served his lot served only Susan's house. He demanded that Susan remove the utility box and lines from his lot. Susan responded with a lawsuit against Tom.

**1. Susan seeks relief for Tom's violation of the deed restriction. How should the court rule on her claim? Fully discuss.**

**2. Susan claims an easement over the alley despite the City's vacation of the alley. How should the court rule on her claim? Fully discuss.**

**3. Susan claims a right to keep the underground utility lines and box on Tom's lot. How should the court rule on her claim? Fully discuss.**

3)

## PROPERTY

(1) Susan v. Tom - for violation of the deed restriction. How should the court rule on her claim?

### Reciprocal Negative Servitude

The issue here is whether the restrictive covenant that all lots in Desert View Estates be used only for residential will run with the land and bind Tom so that Susan can sue to enforce it. A restrictive covenant is a promise in writing not to do something. Generally, these restrictive covenants can be enforced in equity as an equitable servitude. In these kinds of situations, where there is a common grantor (Dave) who subdivided a parcel of land into individual residential parcels of land, thus creating a neighborhood, the covenants contained in the deeds can be enforced by anyone living the neighborhood so long as they run with the land.

There must be intent, notice, and touch and concern. Generally, horizontal and vertical privity is not required to enforce these kinds of implied reciprocal negative covenants that arise based on a common grantor subdividing plots and making a subdivision with each lot containing the restrictive covenant. Nonetheless, privity would be met here since Tom took the entire interest from Judy (vertical privity) and Judy and Dave (the grantor) had a grantor-grantee relationship which is enough to establish horizontal privity.

### Intent

Here, there is intent for the covenant to run with the land since Dave conveyed deeds, and subsequently recorded these deeds, and these deeds included that the covenant "forever" restrict lots in the neighborhood to residential use. The use of the word "forever" clearly indicates an intent for this covenant to bind all successors in interest (Tom here) to the same residential use restriction. As such, there is intent that the covenant run with the land.

### Notice

In order for the covenant to run with the land, and thus bind successors in interest, the successor in interest must have notice of the covenant. This can be either actual notice, constructive notice or inquiry notice. Constructive notice arises from proper recording of the deeds so that any person conducting a title search would be aware of the restriction if they looked in the deed. Inquiry notice results from a physical inspection of the land. A person will be deemed to have notice of whatever a physical inspection of the land would have uncovered.

Here, Tom will likely be said to have notice of the restriction. First, the facts indicate that there was a recorded plat map. Such a plat map that is recorded is generally sufficient to give constructive notice. Moreover, the deed that Tom received from Judy had the restrictive covenant within. Thus, Tom will be deemed to have constructive notice of this reciprocal covenant.

In sum, since there was intent for this reciprocal covenant to run with the land and Tom had notice of the restriction, he will be bound by the restriction unless there is a defense to Susan's action.

#### Changed Circumstances

A party may argue that non-compliance with the deed restriction is legitimate based on changed neighborhood circumstances. The changed circumstances must be significant in that they render the current use of the property essentially valueless. Moreover, the changed circumstance must apply to all plots/deeds within the subdivision in order for the defense to work.

Here, Tom will argue that his non-compliance with the residential restriction is justified based on changed circumstances of the neighborhood. The facts indicate that the City Blvd which borders the neighborhood is now a major commercial thoroughfare. In addition, all of the houses that directly border City Blvd are unoccupied and are in disrepair, presumably due to the major increase in commercial activity, which has pushed occupants to quieter places for living. However, the other houses in Desert View Estates that do not front City Blvd. are occupied and are in good repair. Thus, the changed circumstances of increase commercial activity does not affect the entire subdivision. As such, Tom will have a tough time arguing that only his house, or even that only the houses on City Blvd., should be allowed to ignore the deed restriction because of the changed circumstances.

If the changed circumstances had affected the entire subdivision, Tom would have a plausible argument. However, since only some of the houses are affected, then Tom is still going to be bound by the restrictive covenant contained within his deed.

#### Unclean Hands

Given that implied reciprocal negative servitudes such as the one at issue here concerning residential use are enforced in a court of equity, Tom will be able to raise in equitable defenses recognized by such courts. Here, Tom could argue the equitable defense of unclean hands. Essentially, Tom will argue that Susan cannot try to enforce the residential covenant against him since she is herself violating the covenant. The facts indicate that Susan has moved out of her house and ceased using it for residential purposes. In stead, Susan has started a day care operation at that location, which is clearly not a residential use. Thus, Susan is violating the residential covenant that she seeks to enforce against Tom. As such, Susan does not have "clean hands" and a court of equity (which is devoted

to fairness and good faith) is not likely to issue an order forcing Tom to comply.

In sum, the restriction in the deed for residential use could possibly be enforced as an implied reciprocal negative servitude against Tom. There was intent for this covenant to run with the land, and Tom was on notice since the restriction was in the deed. Although not required, there was also privity, both horizontal and vertical. Tom's defense based on changed circumstances is unlikely to prevail since the entire subdivision is not affected by the increased commercial activity. However, Susan is not the proper party to bring this claim in equity since she does not have clean hands.

(2) Susan's claim for easement over the alley despite the City's vacation of the alley. How should the court rule?

#### Easement

An easement is a non-possessory interest in land, that entitles the holder of the easement to make use of the land of another. Generally, easements must be in writing to be effective, as they should comply with the same requirements as deeds, i.e., the statute of frauds. If an easement fails because of lack of writing, it becomes a license to use the land.

#### Easement by necessity

An easement by necessity arises when a common grantor subdivides a plot, and leaves a portion landlocked, with the only access to a public road being across a piece of land. Here, the traffic on City Blvd is significant, so Susan wants the children to be dropped off in the alley behind the lots on City Blvd. The problem is that the City vacated the lot and now Tom owns the lot.

This is not the appropriate situation for an easement by necessity.

In order to allow the kids to be dropped off, Susan would have to obtain an easement from Tom conceding to such use. Since this is no longer public property, Tom's permission is required if the Susan wants to use his land.

(3) Susan's right to keep the underground utility lines and box on Tom's lot. How should the court rule on her claim?

#### Easement

An easement is a non-possessory interest in land, that entitles the holder of the easement to make use of the land of another.

Generally, easements must be in writing to be effective, as they should comply with the same requirements as deeds, i.e., the statute of frauds. If an easement fails because of lack of writing, it becomes a license to use the land.

#### Easement in gross

Generally, allowing another to use your property to install power lines or utility lines results in an easement in gross. An easement in gross is an easement where there is no benefited land. Rather, there is only a parcel of land that is burdened by the easement. This is known as the servient estate. Although utility easements, like the one here, are generally easements in gross, and thus have no land that is benefited by the use of the easement (i.e., no dominant estate), this easement seems to benefit Susan in the use and enjoyment of her land, and thus would be an easement appurtenant.

#### Easement Appurtenant

An easement appurtenant is an easement where one parcel of land is burdened and one parcel of land is benefited. The benefited parcel (the dominant estate), gets some kind of increase in use and enjoyment from the easement on the burdened land (the servient estate). Here, there is likely an easement appurtenant since Susan's use of the power lines/utility lines that run over Judy's property benefits Susan's land - it benefits Susan in the use and enjoyment of her land since it provides the necessary utility capabilities to run the day care center. The utility lines running over Judy's land burden that land, thus creating the servient estate. Thus, there is an easement appurtenant, which Susan holds and is the dominant estate, and Judy is the servient estate.

#### Statute of Frauds

Easements generally have to be in writing to be effective. Here, Judy orally agreed to the easement. She orally allowed Susan to install the lines and utility box on Judy's boundary between their lots. This easement fails due to the statute of frauds since it is not in writing. However, such a failure is not detrimental to Susan since an easement that fails for statute of frauds reasons is treated as a revocable license to use the land of another.

#### Tom's Ability to Terminate the Easement

Generally, with an easement appurtenant, the burden of the easement runs with the land and binds successors in interest. As such, if this easement were a proper easement appurtenant, in writing, then Tom would have no choice but to continue to allow Susan to run the utility lines across his land, and to allow Susan to keep the utility box on his land. However, since the easement failed because of the statute of frauds, Susan only has a license, which is revocable. Thus, Tom can revoke the license and is under no obligation to honor the oral easement allowed by Judy.

**END OF EXAM**



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 1, QUESTION 4 -**

**JULY 2014**

**EXAMINATION DAY 1 – AFTERNOON SESSION;**

**QUESTION NO. 4: ANSWER IN ORANGE BOOKLET**

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Alex and his 85-year-old grandmother Eloise share a small one-bedroom apartment. Both are named as tenants on the lease. Eloise uses the bedroom as her room, and Alex keeps his bed and belongings in the living room. The police received a credible tip that Alex was using the apartment to deal drugs. Police officers went to the apartment. They did not have a search warrant. When the police knocked on the door, Eloise answered. Alex was not home. The officers asked Eloise for her permission to search the apartment, telling her they thought there might be drugs inside. Eloise agreed and signed a consent form that authorized the police to search the entire apartment. The search began in the living room. As the officers got near Alex's bed, Eloise told them that part of the living room is "where Alex keeps his personal property." One of the officers saw a closed cardboard shoebox next to Alex's bed and picked it up. When he opened the shoebox he found 50 grams of cocaine and a large amount of cash. These items were taken as evidence.

Based on the drugs and cash in the shoebox, the district attorney filed a felony criminal complaint against Alex for possession of a controlled substance for the purpose of sale. Thereafter, police officers returned to the apartment with an arrest warrant. Alex answered the door and was immediately handcuffed. One officer asked Alex if they could search the apartment. He told him "No way! Stay out of my place." Alex was arrested. After officers left

with Alex in custody, another officer asked Eloise if he could search the apartment. Eloise agreed. During this search the officer found 70 grams of cocaine and a handgun in a kitchen cabinet. Additional felony charges were filed against Alex.

Alex has standing to challenge the police officers' searches of his apartment.

**1. Did the police violate Alex's Fourth Amendment rights in either search? Fully discuss.**

**2. If Alex's Fourth Amendment rights were violated, is there a remedy? Fully discuss.**

1)

1. DID THE POLICE VIOLATE ALEX'S FOURTH AMENDMENT RIGHTS IN EITHER SEARCH?

The Fourth Amendment protects the people from unreasonable searches and seizures. This amendment applies directly to federal government, and it applies to the States by incorporation through the Fourteenth Amendment. A person must have standing to assert that his fourth amendment rights, which the facts state Alex has. The Fourth Amendment's prohibition against unreasonable searches and seizures applies to homes, and applies most strictly to homes (given that this is where people have the highest expectation of privacy).

a. The First Search

Any search of a home without a warrant violates the Fourth Amendment, subject to limited exceptions. Consent is one of those exceptions. To be valid, the consent must be knowing and intelligent, though the person consenting need not know that she can refuse consent. Police may only rely on consent when they reasonably believe that the person consenting has authority to consent. A tenant may consent to a search of the premises, but that consent only goes as far as the areas that the consenter controls and to the common areas. If more than one tenant is present, and one refuses consent, the police do not have valid consent, even if the other(s) do consent. If the police know that more than one person lives in the apartment, consent of one tenant is sufficient where there is no other tenant present and objecting to a search.

Here, Eloise opened the door before the first search. It is reasonable for the police to believe that she has authority to consent to a search of the apartment, even though they know that Alex also lives there. Eloise opened the door when they knocked. It is reasonable to believe that a person who answers the door, especially where she is not a child, has authority to consent to a search. Upon entry, the police did not know what areas were under which tenant's control. At that point, they could reasonably have searched the living room, as it would appear to be a common area. But, as they approached Alex's bed (in the living room), Eloise stated that this was Alex's room, "where he keeps his personal property." Upon learning this, the officer's knew that they could not lawfully search that area based on Eloise's consent. Her consent extended to the areas under her control and the common areas. The area that she and Alex had designated as Alex's (and especially in light of the fact that his bed was there) was not under Eloise's control, nor was it a common area. Without a warrant or Alex's consent (or some exigency) the police could not lawfully search that area.

Another exception to the warrant requirement is the plain view doctrine. Under that doctrine, if an officer is located at a place where legitimately can be, he may seize any instrumentality or fruit of a crime, so long as it is immediately apparent that the item is such. This doctrine does not allow an officer to move or manipulate an object to determine whether it is contraband. Here, the officer could legitimately stand outside the area that Eloise designated as the area for Alex's personal property, and look around to see if there is any immediately apparent contraband. Here, however, the officer did much more. First, he moved the box that ultimately contained the cocaine and cash. That alone puts the officer's conduct outside the purview of the plain view doctrine. Second, the officer opened the cardboard box, and thereafter saw the contraband. This evidence was not in plain view, and is not admissible under the plain view doctrine. Rather, the contraband was seized as a fruit of police misconduct and is inadmissible.

#### b. The Second Search

To arrest a person, officer's must have probable cause that this person is committing or has committed a crime. In order to arrest a person in his home, the police must obtain a warrant, unless an exception to the warrant requirement is met. Here, the police had a warrant for Alex's arrest, and thus could lawfully arrest him in his home. Before entering the home, the police should knock and announce their presence and that they have a warrant. Here, Alex answered the door, he was immediately arrested. It appears that the police knocked (hence Alex opened the door) though they need not announce unless they intend to enter the home. But, Alex answered the door. Because the police had a warrant, their arrest was valid.

When a person is lawfully arrested, even in a home, the police may conduct a search incident to arrest. When performing such a search, officer's may search the arrestee's person, and the area within the arrestee's wingspan, or lunging area, even if such area is within the home. If the arrestee must be moved through the home while the police remove him, the police may search the areas within his wingspan as they move. This serves two important functions: protection of the officers in case of any weapon within that area, and preservation of any evidence that the arrestee could reach and destroy. Here, after Alex's lawful arrest, the police could search his person and the area within his wingspan. Of note, when police arrest a person, they may do a protective sweep of the home to check if there are any hidden assailants. It does not appear here that the police did a protective sweep.

Upon arrest, the police sought Alex's consent to search the apartment. Alex refused. Consent, as discussed above, is an exception to the warrant requirement, but Alex refused consent. When two tenants of an apartment are present, and one consents, but the other refuses consent, the police do not have consent to search. While one would think that arresting and removing the non-consenting tenant would not destroy that refusal of consent, the United States Supreme Court has recently decided otherwise. In their case, the Court held that if a tenant refuses consent, is arrested and removed, and the other present tenant then gives consent, the

consent is valid and the officer's may search. After Alex was arrested and refused consent, the police removed him from the scene ("left with Alex in custody"). Then they recieved constitutionally valid consent from Eloise to again search the apartment and subsequently found more contraband in the kitchen.

But, what about the fact that the warrant wasn't issued until after the police had violated Alex's Fourth Amendment rights during the first search. Under the fruit of the poisonous tree doctrine, any evidence that is obtained as a fruit of police misconduct is also inadmissible. It is unclear what the basis for the arrest warrant was. The facts state that the police recieved a credible tip that Alex was using the apartment to deal drugs. If this tip was the basis of the warrant, than Alex's arrest and the subsequent search could not be a fruit of the police misconduct. If the basis of the warrant was the cocaine and money found during the illegal search, there is a better argument that his arrest and subsequent search of the apartment is a fruit of the police misconduct.

There are exceptions to the fruit of the poisonous tree doctrine. One such exception is "inevitable discovery." Even if evidence is fruit of police misconduct, it should be admitted at trial if the prosecution can show that it would have been discovered, inevitably, without the misconduct. Here, there are not enough facts about the basis of the arrest warrant to determine whether the warrant would have been issued and the apartment searched for the second time without the initial police misconduct.

Another important consideration is the good faith exception to the warrant requirement. When police reasonably rely on a facially valid warrant, and that warrant is later quashed, the evidence found as a product of the warrant is still admissible. This is applied because the exclusionary rule is an attempt to temper police misconduct, and if the police were acting in reasonable reliance to a facially valid warrant the purpose of the exclusionary rule would not be served by exclusion of the evidence. But, the good faith exception does not apply when an officer lies to the judge, when the warrant is facially defective, or when the judge has wholly abandoned the judicial role of being neutral and detached. None of the facts here indicate any reason that the good faith exception would not apply. Thus, because the officer's reasonably relied on the facially valid warrant to arrest and remove Alex, the evidence thereafter seized as part of the consented search is admissible.

## 2. IF ALEX'S FOURTH AMENDMENT RIGHTS WERE VIOLATED, IS THERE A REMEDY?

As discussed above, when evidence is seized in violation of a person's Fourth Amendment right against unreasonable searches and seizures, the remedy is exclusion of the evidence at trial. The evidence found in the cardboard box and seized during the first search will be excluded because it was seized in violation of Alex's Fourth Amendment rights when the officer search Alex's private area without a warrant or valid consent.

The evidence seized in the second search, as discussed above, will likely be admitted. When the police arrested Alex, removed him from the scene, and obtained Eloise's consent to search there was no police misconduct. The officers had valid consent and searched the kitchen, a common area to which that consent extended. If it is to be excluded, then it can only be excluded as fruit of the poisonous tree. The only police misconduct here was when the police searched the box in Alex's private area of the apartment without a warrant and without valid consent. But, it is unclear whether this police misconduct is a "poisonous tree" from which the later arrest warrant and search can be attributed as fruit.

When evidence could be fruit of the poisonous tree, and therefore excluded, it will not be excluded if the evidence is too far attenuated from the police misconduct. Attenuation takes into account all the surrounding circumstances, including time, strength of connection between the evidence and the misconduct, etc. It is unlikely that a judge would exclude the evidence from the second search because it appears the officers were acting in good faith reliance on the arrest warrant when Alex was arrested. Thus, even if the warrant is quashed, the evidence seized pursuant to the warrant would not be excluded. In other words, the evidence is too far attenuated from police misconduct. This is especially true here because the link between the misconduct and the evidence from the second search is interrupted by a magistrate's issuance of the arrest warrant, and the valid consent received from Eloise.

Thus the evidence from the first search should be suppressed, but the evidence from the second search should not be suppressed.

**END OF EXAM**



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 2, QUESTION 1 -**

**JULY 2014**

**EXAMINATION DAY 3;**

**QUESTION NO. 1: ANSWER IN PURPLE BOOKLET**

---

Dan, a resident of Reno, loaned his car to his friend Tom for the weekend. Unbeknownst to Dan, Tom drove Dan's car to Las Vegas. After a weekend of fun and little sleep in Las Vegas, Tom headed back to Reno. While driving back to Reno, Tom fell asleep at the wheel and the car struck a truck driven by Penny, a Nevada resident. Tom died instantly on impact. Penny survived the accident, but sustained serious injuries.

Penny filed a complaint in Nevada state court against Dan for negligent entrustment related to Tom's use of Dan's car. Penny sought damages "in excess of \$10,000." Five months after the complaint was filed, copies of the summons and complaint were served on Dan by mailing the documents to his home.

Dan filed an answer generally denying the allegations contained in Penny's complaint. Two weeks after the answer was filed, Dan filed a motion to quash service of process of the summons and complaint. The court denied Dan's motion to quash.

The parties conducted an early case conference and filed a joint case conference report. Penny then served written interrogatories on Dan. The written interrogatories consisted of 50 questions inquiring into Dan's knowledge of Tom's intended use of the car and Dan's habit of loaning his car to third persons. Dan did not answer the written interrogatories and Penny filed a motion to strike Dan's answer as a discovery sanction. The court granted the motion to strike

and entered default against Dan as to liability. Dan filed a motion to set aside the default, which the court denied.

The court scheduled a prove-up hearing to determine the amount of damages. Penny retained the services of an expert witness to testify at the prove-up hearing regarding her damages. Penny disclosed the identity of the expert witness, but only provided Dan's attorney with a one-paragraph summary of the expert witness' opinion.

Two weeks before the prove-up hearing was set to commence, Dan served an offer of judgment on Penny. The offer of judgment offered to allow judgment to be taken against Dan in the amount of \$100,000. Penny rejected the offer of judgment.

At the prove-up hearing, Dan objected to Penny's expert witness testifying due to the failure to produce a written report. The court precluded Penny's expert witness from testifying. At the conclusion of the prove-up hearing, the court entered judgment in favor of Penny and awarded damages in the amount of \$50,000. Following the court's order, Dan sought an award of attorney's fees and costs.

**Fully discuss all procedural issues arising out of the parties' conduct and how such issues should be resolved pursuant to the Nevada Rules of Civil Procedure and the Nevada Revised Statutes.**

1)

## Complaint

Notice Pleading - Nevada follows the same rule as the Federal courts and uses notice pleading. A properly plead complaint must contain (1) a statement of subject matter jurisdiction (2) a short and plain statement of the facts showing a plausible cause of action, and (3) a demand for the relief sought.

Here, the request for the \$10,000 in damages is the proper way in Nevada to state a demand for relief in excess of \$10,000. The facts do not provide any information about whether the rest of the pleading was proper, but as Dan (D) failed to raise an improper process motion before answering, the complaint is deemed valid for now. If the complaint failed to state a plausible cause of action D could make a motion to dismiss the case for failure to state a claim.

## Service

Service must be done by a person not a party to the action 18 years or older either by personal service on the defendant or by substituted service at defendant's usual abode on a person of suitable age and discretion who resides there. Service must include a copy of the complaint and a summons. Service must be made within 120 days of filing the complaint with the court. Here, Penny (P) served copies of the summons and complaint on D 5 months, or roughly 150 days after the complaint was filed. This is improper without good cause. Further, P served D by mailing the documents to D's home. This is also improper absent an agreement by D to accept service by mail. P should have served D by personal or substituted service.

## Answers and Waivable Procedural Defenses

A motion based on improper service or process, lack of personal jurisdiction, improper venue must be filed with defendant's first answer or the defense is waived. An answer must be filed within 20 days of service of the complaint. Here, D filed an answer and then attempted to file a separate motion to quash service. That motion was properly denied because D already answered the complaint and thus D's defense based on any improper service or process is waived.

## Discovery Issues

Discoverable evidence is any evidence that may lead to the discovery of admissible evidence and thus the scope of discovery is broader than admissible evidence. Discovery is not permitted of privileged information. Here, P sought a wide range of discovery from D, but nothing privileged, and thus P's discovery requests are permissible due to the broad scope of discovery.

In Nevada, typically only 40 interrogatories may be served on the opposing party absent good cause. Here, P served D with 50 written interrogatories. D must answer P's request and either (1) state the reasons for not answering (such as "not answered because this question is excessive discovery absent good cause"), (2) answer the questions, or (3) seek a protective order from the court.

Not responding entirely is not appropriate and is cause for sanctions.

As a matter of procedure, prior to seeking sanctions for discovery violations, a party must meet and confer with opposing counsel and attempt to resolve the discovery issues. If the issues remain unresolved, a party must make a motion to compel the other party to answer the discovery. It is only after the other party fails to comply with the motion to compel that major sanctions can be imposed by the court for failing to respond to discovery. Here, it appears that D failed to answer and P immediately filed a motion to strike. This is not correct because a motion to strike is a motion used to exclude improperly introduced evidence and here D provided no evidence. P should have made a motion to compel D to respond, and then if D failed to respond, P could move for sanctions which can include, in the most extreme cases, finding for the moving party on various questions of fact. That did not happen here and thus the default was improperly entered.

A default may be set aside at the court's discretion based on mistake, inadvertence, or excusable neglect within 6 months of the entry of the default. Here, there is evidence that P failed to follow the correct discovery sanction procedures, which should mandate that the motion to set aside be granted. When a default is taken without notice to the other party that the default will be taken absent a response, it is much easier for the party whose default is taken to make and win a motion to set aside. Here, because the default was taken due to P's failure to follow discovery sanction procedures and without notification to D, D's motion to set aside should have been granted.

#### Expert Witnesses

When a party seeks to use an expert witness at trial, the party must disclose many facts about the expert and the expert's testimony so that the opposing party can make a proper motion concerning the validity of the expert's testimony under the Nevada rules of evidence. An expert must be (1) qualified (2) helpful to the jury (3) opinion based on reasonable facts (4) using generally accepted methods (Higgs v. State standard), and (5) believe in their opinion to a reasonable degree. In order for the party opposing the expert

to make a reasonable inquiry into these elements, the party offering the expert must produce a written report of the expert and include the expert's experience, qualifications, compensation, and other information that goes to the elements of a proper expert witness.

Here, that wealth of information was probably not included with D's one paragraph summary, and thus, D's one paragraph summary was probably insufficient. As a result, the court's preclusion of the expert witness's testimony at trial was proper.

#### Settlement Offers

As a general rule, the American rule precludes a party from recovering their attorney's fees and costs incurred pursuant to a lawsuit absent agreement otherwise. By statute, this rule has exceptions. If a party makes an offer to settle that is rejected, and the offeree wins a lesser amount at trial than the amount originally offered, the offeror party may be able to recover their attorney's fees and costs if the offer was made pursuant to an applicable statute. Here, it is unclear whether P's offer was made pursuant to a statute which would put D on notice that if D failed to accept the offer, D would be liable for attorney's fees and costs if D did not recover more than the offer at trial. If D's offer was made pursuant to such a statute, D would be able to recover his attorney's fees and costs, whereas, if the offer was generally made without an applicable statute, P would not be liable for D's attorney's fees and costs, even if P unreasonably proceeded to trial in the face of a very generous settlement offer.

**END OF EXAM**



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 2, QUESTION 2 -**

**JULY 2014**

**EXAMINATION DAY 3;**

**QUESTION NO. 2: ANSWER IN YELLOW BOOKLET**

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Cate owns The Coffee Shop, the most successful coffee shop in Las Vegas. Cate attributes The Coffee Shop's success to its customers' cravings for its Brazilian organic fair trade coffee beans. The Coffee Shop is the only place in Las Vegas that sells these beans.

Bart owns The Breakfast Shop, which is located one block from The Coffee Shop. The Breakfast Shop serves all kinds of breakfast treats, including coffee drinks. Bart struggles to keep The Breakfast Shop open, and is jealous of Cate's success.

In an effort to increase business, Bart asked Cate if he could start brewing the Brazilian coffee beans at The Breakfast Shop. Cate declined and informed Bart she had an exclusive five-year contract with Brazilian Coffee Company to be the only store in town to sell these coffee beans. She also told Bart she had already paid for an ongoing supply of coffee beans for the next five years.

Frustrated with Cate's response, and curious to find out more about the coffee beans, Bart tried to research Brazilian Coffee Company on the internet. Bart discovered there was no such company and that Cate's coffee beans were not organic or fair trade, nor grown in Brazil. In fact, the coffee beans were being shipped to Cate from a roasting plant in China.

Eager to spread this news and undermine Cate's success (and maybe increase his business), Bart wrote a letter to the editor of the local newspaper explaining what he had uncovered about The Coffee Shop. The letter to the editor was published the next day.

The Coffee Shop's sales plummeted the following week.

After reading the letter to the editor Cate walked to The Breakfast Shop to confront Bart. Upon entering, she started screaming profanities, then picked up a glass coffee mug and threw it at Bart, missing him by only a few inches. Upset, Cate ran out of The Breakfast Shop, but tripped and fell on the thick rubber mat outside the entrance. Cate, humiliated, got up and limped away with a twisted ankle.

**1. What claims, if any, does Cate have against Bart? What are Bart's possible defenses?**

**Fully discuss.**

**2. What claims, if any, does Bart have against Cate? What are Cate's possible defenses?**

**Fully discuss.**

2)

1) Cate's claims against Bart

#### Cate v. Bart: Defamation

Bart attempted to spread the word that Cate lied about where she outsourced her coffee and attempted to undermine Cate's success and increase his own business. Cate will argue that Bart defamed her reputation. To prove defamation there must be a defamatory statement, of and concerning the plaintiff, that is published to a third party and results in damages. There are also certain constitutional protections that must be analyzed when determining the standard of proof one must prove in defamation cases.

#### Defamatory Statement

Bart's statement concerned what he uncovered about The Coffee Shop, that the Brazilian Coffee Company did not exist, and Cate lied about offering Brazilian organic fair trade coffee. A defamatory statement is one that lowers a person's esteem in the community. It cannot be mere opinion or parody, but a statement of fact concerning one's reputation. Bart will argue that the statement was published as a letter to the editor, which is mainly concerned with members of the community and their opinions. However, Cate will argue that Bart made statements of fact as he researched Cate's statements and uncovered the fact that she lied. In fact, Cate's business sales plummeted the following week so the community believed Bart's statements as truthful facts. Cate will also argue that calling her a liar and stating that her business did not sell Brazilian organic fair trade coffee is defamatory because it is the reason for her company's success and her reputation would likely be harmed. The Coffee Shop is the most successful coffee shop in Las Vegas and if people read Bart's article, Cate's reputation would certainly be lowered as she holds her business out to the public as one that serves specialty coffee. Thus, Cate will likely be able to establish that the statement was defamatory in nature as it lowered her esteem in the community if it is found that the statements in the letter to the editor were not merely opinion.

#### Of and Concerning the Plaintiff

Here, Cate must prove that the statement was about her. She may have difficulty establishing this element because Bart will argue that the statement concerned her business. However, as a sole owner of a coffee shop in Las Vegas, people reading the article would understand it to mean that the owner of the coffee shop is lying to the public about selling the specialty coffee. Further, it is not clear from the facts what the exact statements were, but Bart may have even written Cate's name in the article and explained their interaction

and what she said to him. Thus, the statement likely concerned the plaintiff or would be at the minimum, reasonably construed to pertain to the Plaintiff.

#### Publication

In order to prove defamation, the statement must be published to a third party. Here, the fact that the article was published in the local newspaper the next day will suffice for publication.

#### Damages

Damages in defamation are presumed, unless special pecuniary damages need to be proven. For Libel (written or recorded defamation) and Slander Per se (spoken defamation regarding commission of a crime, loathsome disease, chastity/impotence, or business incompetence) damages are presumed. Here, the statements were published in the local newspaper and because they were recorded, damages are presumed. Even if special pecuniary harm needed to be proven, Cate would be able to establish because the facts indicate that her business plummeted the following week.

#### Constitutional Overlays

Where a plaintiff is a public figure and the statement concerns a matter of public concern, the plaintiff has a higher burden of proving both falsity and fault in their case in chief.

#### Public Figure

A plaintiff may be considered either an all-purpose public figure, which is one that has achieved much pervasive fame, or a limited-purpose public figure which is one that voluntarily entered into the limelight for a particular controversy. Here, Cate runs the most successful coffee shop in Las Vegas. While many people may know Cate as the owner of The Coffee Shop, she has not achieved such pervasive fame to render herself an all-purpose public figure. Further, Bart will claim that she is a limited purpose public figure because Cate is now involved in a particular controversy that the public is interested in, however, Cate did voluntarily create the situation to where she would be deemed a limited purpose public figure.

#### Public Concern

Bart will argue that the statements involved a matter of public concern because the public is now concerned that the specialty coffee is actually outsourced from China and they were being duped into believing and paying for specialty roasts. However, the statements do not give rise to a serious nature such as the health or safety to the public. While the statement does not concern such statements that are usually held to be on a matter of public concern, such as a politician lying to the public or a suspect that is at large in the

community, Bart may have an argument as Cate is the owner of the most successful coffee shop and members of the community as customers have an interest in what is occurring at The Coffee Shop.

#### Falsity/Fault

If Cate is deemed to be a public figure and the statements relate to a matter of public concern, Cate will have to prove both that the statement is false and that Bart had actual malice when making the statement. Here, Bart allegedly has proof that the statement was true and if what Bart uncovered is true, Cate will not be able to prove that Bart's statements are false. However, it is likely that Cate could prove Bart had actual malice. Here, Bart is jealous of Cate's success, is angry that Cate would not allow him to sell the Brazillain coffee beans, and he purposefully published the letter to undermine Cate's success. Thus, malice would be proven.

If Cate is not deemed a public figure, only negligence needs to be proven. Cate would need to prove that Bart acted without regard for the statements truth in publishing the statement. This situation usually arises in the press where a reported negligently relies on a lead without investigating the statement's truth. Here, Bart investigated Cate's claims and researched whether she was telling the truth, so it not likely that Bart acted negligently as he did his due dilligence in uncovering the truth.

#### Truth as a Defense

Truth is always a defense in Defamation. Bart has a valid defense because he discovered that Cate does not supply her customers with Brazilian coffee. Thus, his statements are not false. Even though the statements lower Cate's esteem in the community, the statements are not false and will be a defense to Cate's defamation suit.

#### Cate v. Bart: Privacy Torts

##### Public Disclosure of Private Facts

Cate may have a claim against bart for Public Disclosure of Private Facts. This tort arises where a defendent publishes a statement to the widespread public and they uncover private facts about the plaintiff. Truth is not a defense to this privacy tort. Here, the statement is published widespread, but Cate will have difficulty proving that Bart published private facts about her. While the facts were private and undisclosed in nature, they were not about Cate's personal life nor does Cate have a right to protect facts that should be disclosed to the public. Cate will not be successful in claiming Public Disclosure of Private Facts.

##### Portrayal in False Light

Nor will Cate has a claim in Portrayal in False Light because Bart's statements are true. Where a defendant potrays the Plaintiff in false light, the defendant will be liable for a privacy tort. However, this is not the case here because Bart was being truthful when he

made his statements.

### Cate v. Bart: Business Torts

#### Tortious Interference with Contracts

If Bart's statements were not true and Cate really did have an exclusive contract with the Brazillian Coffee Company, Bart may be found liable for Tortious Interference with Contract if he did anything to interfere with the existing contract between the Brazillian coffee company and The coffee shop. Here, the facts do not indicate that Bart intentionally interfered with their contract or started selling the beans himself in violation of Cate's exclusive relationship with them.

#### Intentional Interference with Business Expectation

Cate may have a claim that Bart intentionally interfered with her sales and thus, her business expectation. Cate had a successful business operation and Bart intentionally relayed Cate's false product by relaying the information to her customers for the purpose of hurting her business. In fact, Bart did hurt Cate's business expectation because her sales plummeted the following week after the letter was published. However, Cate cannot be protected from making false statements where it was her conduct that caused her sales to drop. While Bart did uncover the facts that hurt her business, Cate created the situation and her sales would not have plummeted had she acted truthfully to begin with.

Cate will not be successful in either of her claims for business torts.

### Cate v. Bart: Negligence

Cate will claim that Bart was negligence in placing the rubber mat outside of his business which injured Cate. Negligence requires a duty, that is breached, and causes damages. If Bart negligently placed the rubber mat outside his business, Cate may recover for her sprained ankle.

#### Duty/Special Landowners Duty

Generally, people have a duty to act as a reasonable person under the circumstances. Bart has a duty to act as reasonable prudent businessowner with how he operates his business and keeps his business premises. Further, as a business owner Bart has a special duty to as an Invitee to warn and his customers of known dangers and make reasonable repairs and inspect his property for harm that could foreseeably cause injury to his patrons.

If the rubber mat was defective in some way or placed negligently, Bart had a duty to repair the rubber mat and warn customers with a sign that notified them that there was a step. Bart may argue that he did not have a duty to Cate because he came to his business for the purpose of assaulting him and not as a legitimate business customer. However, Bart has a duty to anyone that enters his establishment as he is a business owner that opens his doors to the community. Thus, Bart had a duty to Cate and all other people that entered his business.

#### Breach

A breach occurs where a person violates a duty owed. Here, Bart owed a duty to Cate but more facts are needed to indicate whether Bart breached his duty. Nothing is conspicuous about having a rubber mat outside of a business. The rubber mat may actually be for the purposes of making his business safer by not allowing slippery mud or slush in. The facts do indicate that the mat was thick and Bart may have been in breach by selecting a thicker mat and not having a sign that indicated that there was a danger in tripping on the mat. Without more facts, it is difficult to determine whether Bart was in breach of his duty.

#### Causation

Causation will be established by proving that a breach was both the actual and legal cause of the plaintiff's injuries. Actual or factual causation requires that but-for the defendant's breach, the plaintiff would not be injured. Here, but-for Bart's breach by placing a thick mat outside his store without a warning, Cate would not have tripped and injured her ankle. Thus, actual cause is established.

Proximate or legal causation asks if it is foreseeable that the Defendant's breach would result in injuries to the plaintiff. Here, Cate was in the geographic zone of danger being just outside Bart's coffee shop and it was foreseeable that a person may trip on an object placed outside a business. Thus, proximate causation is established.

#### Damages

Damages must be established by proving personal or property injury. Purely economic harm will not suffice. Here, Cate twisted her ankle and will be able to recover general damages if it is proven Bart was negligent and any special damages that resulted.

#### Defenses

##### Assumption of the Risk

Where the plaintiff voluntarily and knowingly encounters a risk, the defendant will not be liable for any negligence. Here, Cate did not know that the rubber mat posed a threat to her safety. Even though she voluntarily entered Bart's business she did not appreciate the

risk and therefore, assumption of the risk will not be a defense for Bart.

#### Comparative Fault

Nevada follows partial comparative fault where they take into account the plaintiff's negligence and apportion damages to the parties.

If the negligence of the plaintiff is not greater than the Defendant's negligence, the plaintiff will recover in a Partial Comparative Fault jurisdiction. Here, Cate was likely negligent because she had been screaming profanities at Bart right before she was injured. She was not walking away from the store composed and may be found to be negligent. Any negligence of Cate's will reduce any damages Bart owes to Cate. If Cate is found to be more negligent than Bart, Cate will not recover and Bart will have a complete defense.

#### 2) Bart's claims against Penny

Bart v. Cate: Assault

An assault is an act with intent to cause reasonable apprehension of imminent harmful or offensive touching. Assault requires a voluntary act, intent, causation, and damages. Here, Cate voluntarily chose to throw the glass coffee mug at Bart. She acted with intent to hit Bart. Bart reasonably believed he was about to be hit by the mug which is why he ducked and the physical threat was imminent. Further, by throwing the mug, the act caused Bart to be fearful that he would be hit. He was damaged due to being in the reasonable apprehension of being hit by the mug. Cate will be liable for damages, unless she has a defense.

#### Defense

Cate cannot claim that Bart consented to the assault nor can she claim that she was defending herself or others. She may try to argue that she was defending her property or her reputation, but it must be proportional force and Bart posed no threat to Cate. Cate will have no defenses.

#### Trespass to Chattel/Conversion

By throwing the glass coffee cup, Cate took Bart's property. Trespass to Chattel is an intentional interference with the property in possession of another. By picking Bart's property up and throwing it at him, Cate interfered with Bart's business property without consent. Bart is entitled to reasonable rental value of the mug, but will likely seek an action for conversion if Cate destroyed the mug.

Conversion is the intentional exercise of wrongful dominion over the property in possession of another. Cate took Bart's property and likely destroyed it when she threw it at him. Bart is entitled to the fair market value of the mug at the time of the conversion.

#### Defense

Cate did not have consent to take Bart's property and throw it at him, nor was she rightfully defending herself, others, or her property.

#### Trespass to Land

Trespass to Land is the intentional entry upon the land in possession of another. It does not require any harm to the land nor that the person was aware they were trespassing. Here, Bart may argue that Cate trespassed into his business, but it will not be likely because he had his business open to the public and never informed Cate that she was not allowed to enter the business. If Bart is able to prove that Cate trespassed, Cate will not have a defense if Bart did not consent, she was not defending herself, nor was it out of public or private necessity.

### Intentional Infliction of Emotional Distress

Intentional Infliction of emotional distress is found where conduct of an extreme and outrageous nature that is calculated to cause and does cause severe emotional distress. Here, Cate screamed profanities at Bart in front of his customers. This is extreme and outrageous conduct. However, the facts do not indicate that Bart suffered any emotional distress as a result. He will not be able to recover absent any severe emotional distress.

**END OF EXAM**



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 2, QUESTION 3 -**

**JULY 2014**

**EXAMINATION DAY 3;**

**QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET**

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Antonio, a recent college graduate, worked for a gaming company in Reno where he earned a salary and retirement benefits when he met Gina, a 21-year-old hostess at a nightclub. They married six months later. Although Gina earned good money, Antonio became unhappy with her working in a nightclub. Therefore, she obtained a job in pharmaceutical sales. She quickly earned enough that she was able to support them while Antonio took a leave of absence to complete his MBA.

After he obtained his MBA, Antonio was promoted and transferred to New Jersey. The unvested portion of Gina's retirement was forfeited when she left her job to move with him to New Jersey. Shortly after the move, their daughter was born. Gina did not work outside the home for a year. She then successfully returned to work in sales. She later took six months off when their twin sons were born.

Antonio was transferred back to Reno and Gina again lost her unvested retirement benefits. In Reno, Gina devoted her time to caring for the family. She did charity work and took a few classes with the idea she might be interested in becoming a therapist.

They moved into a large home in an exclusive neighborhood in Reno that Antonio inherited two years earlier. Antonio paid off the mortgage debt on the home with money from an account held in his name alone. Antonio had deposited money from his salary into the account. He had also deposited money he inherited into the account.

The account had been used to pay expenses related to the home as well as routine family expenses.

After 23 years of marriage, Antonio quit his job to run a start-up company where he will earn half of his previous salary, but where he may earn large bonuses if the company is successful. He told Gina he wants a divorce. Antonio has a pension from his prior job that he will be eligible to receive when he is 65. Gina has a small IRA she funded with the unforfeited portion of the retirement she earned early in the marriage.

Gina moved into a small apartment and hopes to become a therapist. Their 19-year-old daughter lives with Antonio while she goes to college which Antonio has promised to pay for. They have agreed their 16-year-old sons will spend half their time with Gina and half with Antonio – although the boys prefer having their own rooms at Antonio's home rather than sharing a room in Gina's apartment.

**Fully discuss the parties' respective rights and obligations regarding:**

- 1. The house**
- 2. The retirement benefits**
- 3. Child support**
- 4. Alimony**

3)

### Community Property

Nevada is a community property state. There is a presumption that everything acquired during marriage through divorce is community property except property acquired by gift, devise, or bequest. Property acquired before marriage, after divorce, acquired by gift, devise, bequest, or profits therefrom is separate property. The party claiming property is separate must prove it is so by clear and convincing evidence. All community property is subject to equal division upon divorce.

Courts use tracing to determine the character of property. The mere change of title or form does not change the character of the property.

### The house

#### Gift

A party claiming property is his or her separate property must prove it is by clear and convincing evidence. Here, Antonio will claim the house is his separate property because it was acquired by inheritance. Gina, will argue the community has an interest in the house because it was acquired during marriage and because community assets were used to pay down the mortgage (as discussed further below). Antonio will likely prevail provided he is able to produce the conveyance instrument showing he alone inherited the property.

### Commingling - payments from account in Antonio's name

Antonio will argue the community has no interest in the house because he paid the mortgage payments from a bank account held in his name alone. Form of title does not control the characterization of property. Here, although the bank account is in Antonio's name alone the funds in it are from both his salary and money he inherited. Because the funds are comingled, tracing is necessary to determine which funds were used to pay down the mortgage. If the funds used were from inheritance (Antonio's separate property) the community will have no interest in the house. However, if the funds used were paid from Antonio's salary (community property because money earned during marriage is community property), the community will have an interest in the house.

In order to trace the funds in a comingled account the court (or more likely an accountant or financial expert) will examine the minimum balance in the account and the transactions over time. Under the money in and money out rule, Antonio may be able to prove some payments were paid from his inheritance if the amount inherited and deposited in the account is quickly paid out in the

same amount for the mortgage.

To the extent Antonio paid for family expenses from his inheritance, he may be entitled to reimbursement. However, such expenditures are typically presumed to be gifts and as a practical matter, the required tracing to recover those funds will be very difficult.

#### Transmutation

Married couples may agree to change the character of property. However, such agreements must be express and in writing. Here, there is no evidence that Antonio transmuted the house from his separate property to community property. Mere payments on the mortgage from community funds will not transmute the property.

#### Community interest

Where community assets are used to pay down the mortgage on one spouse's separate property, the community acquires an interest in the property and any appreciation. Here, unless Antonio can prove only his inherited money was used to pay down the mortgage, the community will have an interest in the house. The community should be reimbursed for mortgage payments traced to Antonio's salary and will also receive a pro-rata share of any appreciation based on principal paid down by the community.

#### The retirement benefits

In Nevada, the courts apply a proration rule to determine the percentage of a retirement account which is community property. The court apply either the "present value" rule or "wait and see" approach to determine when payment should be made. Under the present value rule, the court will ascertain the current value of the retirement, any unvested portions, value the community interest, apply a present value table to determine the appropriate amount to pay today and if there are sufficient assets, pay the non-earnings spouse his or her interest. Nevada prefers the wait and see approach to avoid unfair speculation. Under the wait and see approach the retirement assets due to the community are paid only after they vest and after the earning party receives them.

#### Antonio's retirement benefits earned at the gaming company

To the extent Antonio's retirement benefits earned at the gaming company were earned prior to marriage, they are his separate property. The extent of the retirement benefits earned after marriage are community property subject to equal division.

#### Gina's unvested retirement from her pharmaceutical sales company

Gina's retirement benefits from her pharmaceutical sales job were earned after she left her job working at a nightclub at Antonio's request and were acquired during marriage. Thus, the benefits were entirely CP. The funds were forfeited when the family moved to New Jersey for Antonio's work; thus, there are no retirement benefits to divide other than what is discussed below.

#### Gina's unvested retirement from her "work in sales"

Gina's retirement benefits forfeited from her "work in sales" are subject to the same analysis as her benefits from the pharm company as discussed above.

#### Antonio's pension from his post-MBA job

Antonio's pension from his post-MBA job was earned entirely during marriage although it was earned in two different states: New Jersey and Nevada. The law in New Jersey will apply to determine the character of the retirement earned in New Jersey. The portion earned in Nevada, however, is community property and will most likely be subject to the wait and see rule since Antonio will not receive it until he is 65 (he is currently about 43).

#### Gina's small IRA

The small IRA was earned during marriage and is entirely community property. It will be subject to equal division.

#### Child support

A parent owes a duty of support to his or her children until they reach either the age of 18 or 19 until they finish high school. Generally, the custodial parent is entitled to child support from the non-custodial parent based on the state's guideline formula which takes into account the custody share and incomes of the parents.

Here, the parties have three children. The daughter is over 19 and lives with Antonio who has agreed to pay for her college. Gina is the noncustodial parent, however, because the daughter is over 19 she has no legal obligation to pay support to Antonio to assist with the college payments.

Antonio and Gina have joint custody over their 16 year old twin boys. Although custody is joint, Antonio will likely have to pay child support to Gina due to her smaller living quarters. Public policy requires that support be paid by one spouse to another to enable them to secure comparable living quarters. Otherwise, the children will prefer the larger, nicer house as the twin boys do here. Accordingly, the court may award Gina support to assist her in securing more suitable accommodations that are comparable to Antonio's to the extent he can pay.

### Alimony

In Nevada, a court may award spousal support to a lesser earning spouse taking into account several factors such as: (1) the lesser earning spouse's ability to earn an income; (2) the age and health of the parties; (3) the extent one spouse sacrificed his or her career for domestic duties; and (4) the increased earning capacity of a spouse due to specialized education. There are two types of spousal support awardable in Nevada: (1) general support and (2) support for education to improve earning capacity.

Here, Gina will seek alimony from Antonio on both grounds. Gina gave up her job at a nightclub where she earned a good income at Antonio's request. However, she was able to obtain an even better paying job in pharmaceutical sales. She was able to support them both while Antonio attended school for his MBA. She later moved across the country for Antonio's job and spent a year out of work raising their child. She was successfully able to return to work, however, in sales. She took another six months off after their sons were born and after the family returned to Reno she did not return to work, instead caring for the family and engaging in charitable endeavors.

Gina has proven she has the ability to earn a good living in sales. However, she desires to be a therapist. Given her sacrifices for Antonio's education and job over the years and her time out of the workforce, she may be entitled to alimony despite her likely good health and young age. Antonio's lower earning at the start up will be taken into account in determining the amount of alimony, however, Gina may also be able to receive a percentage of the bonuses. Thus, Antonio will likely have to pay Gina alimony while she pursues her education as a therapist.

**END OF EXAM**



**JULY 2014  
EXAMINATION QUESTIONS**

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

**- EXAM 2, QUESTION 4 -**

**JULY 2014**

**EXAMINATION DAY 3;**

**QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET**

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Adam and Betty, who are both Nevada-licensed attorneys, are partners in a law office in Nevada. They hired Carl, who was recently admitted to the Nevada bar.

A few years ago, Adam assisted Mr. and Mrs. Smith with incorporating their business, The Pizza Place. Adam continues to handle legal matters for The Pizza Place. Recently, Mrs. Smith met with Adam to discuss initiating a contested divorce proceeding against Mr. Smith. Adam agreed to represent her.

Betty represents XYZ Corporation, a privately-held construction company. The CEO of XYZ contacted Betty to inform her that XYZ was being sued for the collapse of a building constructed by XYZ. The CEO was also named individually in the lawsuit. During their conversation, the CEO mentioned he had a copy of an email he sent to an XYZ employee in which he had approved the installation of substandard materials in the building to reduce costs. Later, when Betty was compiling documents in response to requests for production, she was surprised to not find a copy of the email the CEO had mentioned.

While waiting for his pizza order at The Pizza Place, Carl saw Paul, another customer, slip on some pizza dough and severely dislocate his shoulder. Carl rushed over to him, exclaiming "Ouch! I saw you fall. Here's my business card. Give me a call and we'll get you something for your injury." Later that week, Paul met with Carl at Carl's office. Paul told Carl that he did not have enough money to hire an attorney. Carl orally offered to advance Paul the

court costs and expenses in return for a contingent fee of 55 percent. Paul readily agreed. Carl discussed Paul's case with Betty. Thereafter, Carl was able to negotiate a settlement of the claim. At his next meeting with Paul several weeks after negotiating the settlement, Carl informed Paul he had settled the case and presented Paul with a check for Paul's share of the settlement. Paul was upset with the amount of the check, but accepted it.

**Fully discuss all ethical issues raised by the actions of Adam, Betty and Carl.**

4)

## Ethical Issues of Adam

### Conflict of Interest

A lawyer has a duty to avoid conflicts of interest as they pertain to his clients. This means a lawyer cannot take on representation of a client where that representation creates a conflict. A conflict arises where a lawyer may take on new representation that is materially adverse to the interests of an existing client. Here he represents both Mr. and Mrs. Smith with their business the Pizza Palace.

Upon agreeing to represent Mrs. S in a contested divorce adverse to her husband Mr. S, Adam is facing a potential conflict of interest. Having been their counsel upon business formation Adam is likely intimately familiar with their finances and personalities. He has been privy to varying degrees of close information -- information that Adam may be able to utilize against Mr. S in the divorce proceeding.

Nevertheless, an attorney is able to take on such representation if 1) he reasonably believes he can fulfill his duty of competence and 2) the clients give informed written consent to proceed with the representation. From the facts it looks like he has not received the consent of Mr. S and this is a potential violation of the NRPC.

### Duty of Competence

A lawyer has a duty of competence to his client. This means that he must possess the requisite knowledge, thoroughness and experience to handle the client's issues. If the lawyer is inexperienced in an area of law for which he has agreed to represent a client then he must bring himself up to speed to know that area of law or else bring on the assistance of experienced co-counsel.

As the business counsel for Pizza Palace, Adam is presumed to have experience in this area of the law but we don't know if he has the experience necessary to represent Mrs. S in divorce. If he doesn't then he needs to bring himself up to speed on this area of law so that he can maintain his duty of competence.

### Duty of Zealous Representation

A lawyer has a duty of zealous representation to his client. This means he must do everything legally and ethically possible to advance his client's cause. Upon accepting representation of Mrs. S for the divorce, Adam may have inhibited his ability to meet this duty for the Pizza Palace because the representation is adverse to Mr. S's personal interests and could affect how Adam represents the business. Conversely, it may affect his ability to represent Mrs. S.

#### Duty of Loyalty

A lawyer has a duty of loyalty to his client. This means that he must put the client's interests first and not pursue course of action that are self-serving for the attorney. Here there is a potential violation because Adam has chosen to represent Mrs. S, an arguably self-serving representation in the name of generating more legal fees at the cost of his loyalty to Pizza Palace and Mr. S.

#### Ethical Issues of Betty

#### Conflict of Interest

A lawyer has a duty to avoid conflicts of interest as they pertain to his clients. This means a lawyer cannot take on representation of a client where that representation creates a conflict. A conflict arises where a lawyer may take on new representation that is materially adverse to the interests of an existing client. Here Betty has a potential conflict because she represents XYZ but has also spoken with the CEO who is being personally sued for the same issue as XYZ. Given his role in the company there is a chance that the representation of XYZ could be materially affected by even speaking with the CEO about being sued. She is likely to get information that the CEO has that she could use against him or that she knows would be adverse to the interests of XYZ.

#### Duty of Integrity and Candor to the Court

In general a lawyer has a duty of integrity. This means that the lawyer must conduct her actions in such a manner as to reflect positively on the profession as an officer of the court. Under this duty a lawyer is expected to be honest and candid. Additionally there is a duty of candor to the court. This duty prescribes honesty in dealing with the court - things like recognizing adverse controlling authority or being compliant with discovery requests.

Here both of these duties are potentially impacted because she has spoken with the CEO that told her of a damaging email he sent, but upon complying with a discovery request she noticed that that email never showed up. Since she knows it exists she would be

under a duty to find out what had happened with it. She cannot permit the CEO as a witness to lie about its existence or contents just to save himself or the company. This would be a clear violation of the rules of ethics.

### Ethical Issues of Carl

#### Solicitation

A lawyer may not solicit clients for fee-generating work through person-to-person contact, or through things like telephone calls. The only exception is for those persons with a close or family relationship with that attorney or former clients and those with existing professional relationships to the attorney.

Here Carl has violated this rule by immediately handing out his business cards to Paul when he saw Paul slip and get hurt. An attorney is not permitted to solicit in this manner, and for injury representation an attorney cannot contact that person until 45 days have passed since the injury or if the person has asked not to be contacted. Clearly Carl has violated this rule.

#### Lawyer as Witness

An attorney cannot represent a client in a case where the attorney may be a necessary witness. There are exceptions, such as when the witness testimony is for a collateral matter to the issue of the case, or when the testimony is about the value of the attorney's fees and services, or when withdrawal from representation would place an undue hardship for the client.

Carl was a witness to Paul's injury and could be called to testify. As a result there is a strong likelihood that Carl should not represent Paul, especially because it seems that there is little application of the exceptions to the lawyer as witness rule.

#### Advancing Fees to Client

An attorney may not advance monies to a client except for necessary court costs and expenses unless those fees are then to be later deducted from any award the attorney may obtain on behalf of the client. Here Carl seems to have met the burden of compliance with this rule since he has advanced such costs but agreed to deduct them from his fee.

#### Reasonable Fee

An attorney has a duty to charge a reasonable fee. This fee is to be calculated based on the attorney's skill, the complexity of the case, the opportunity costs of not taking on other clients, the time involved in the case among others. Reasonableness is determined by weighing these factors together along with a knowledge of how other similarly situated attorneys in the area charge their fees. Whether or not a 55% contingency is reasonable or not will be determined by understanding all of these issues. However, given Carl's lack of experience as an attorney and what seems like a very high percentage rate contingency there is a potential that this fee is unreasonable.

#### Contingent Fee

A lawyer also has a duty to make sure that a contingent fee is explained in detail and written out to the client. Particularly for new clients. The explanation must lay out how costs arise, how expenses are deducted and accounted for and how the attorney has arrived at the figure he has arrived at.

Here the facts don't imply that any such explanation was provided to Paul thus Carl violated this rule.

#### Settlement Negotiation

A lawyer has a duty to allow the client the final say in substantive matters relating to their case, especially whether to accept a settlement award or not. Here Carl has violated this rule by negotiating and accepting a settlement offer without letting Paul decide. The fact that Paul is dismayed at the amount received suggests that he would not have agreed to this settlement offer. Carl has violated this rule.

#### Duty to Communicate

A lawyer has a duty to keep his client abreast of developments in their case. Here Carl has not told Paul about the settlement negotiation or the offer, but rather just accepted the offer himself on behalf of Paul. Carl has violated his duty to communicate with the client.

#### Duty of Zealous Representation

A lawyer has a duty to zealously represent his client as discussed above. Here Carl has likely violated this duty by accepting the first

settlement offer he got without even really working on the case.

#### Commingling Funds

A lawyer must never commingle his funds with the clients. Any settlement checks should be placed into a trust account for the client, with the client getting paid from it and the lawyer then deducting his costs from it. Here Carl has violated this by taking the settlement check himself and later giving Paul a separate check. This is a major violation because it also suggests a lack of integrity and an abuse of a fiduciary relationship because Carl has taken on himself the role of managing the client's money.

#### Accounting for the Award

A lawyer must be able to explain to his client and present an accounting of the costs deducted from any award received. Here Carl has merely offered Paul a check, nothing more. Paul was not happy about the amount and was not provided any explanation of how the amount was determined or why it was the amount he received. Carl has violated this rule.

**END OF EXAM**