



**JULY 2017
EXAMINATION ANSWERS**

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

QUESTION 1

1)

Duty of Competence:

The Nevada Rules of Professional Conduct (NRPC) require that all lawyer's maintain a duty of competence in the area of practice before agreeing to represent a client. This duty of competence means that a lawyer must have experience (or the time and ability to gain knowledge) of an area before agreeing to represent a client. Here, Ashley has never participated in a personal injury suit. There is no information in the facts that Ashley spent time researching the topic. Thus, Ashley breached her duty of competence when she agreed to represent Beth.

Reasonable Fees:

NRPC require that all attorney's fees must be reasonable. Reasonableness is determined by a number of factors, including the lawyer's skill in the subject area, the amount of time needed for the case, the lawyer's reputation and experience, and the average amount in the community that other lawyers charge.

Here, 40% for contingency fees may be unreasonable because Ashley has never represented anyone in a personal injury case and does not have any experience in personal injury. Further, it may be unreasonable because she does not have reputation and experience in the area. She is a newly liscened attorney and would likely be getting less fees than attorneys with more experience in the area. Ashley's 40% for contingency fees may be unreasonable. Thus, Ashley breached her duty to her client to provide reasonable fees.

Contingency Fees

NRPC has specialized rules that apply when a lawyer charges a contingency fee. First, the contingency fee must be fair and reasonable (as explained above), explain how it is calculated, whether the client has to pay opposing party's fees, and whether the percentage is calculated before or after the client pays the fees. Further, the contingency fee must also be signed, in writing by the client.

Ashley did not provide a contingency fee to Beth at all. Ashley did not explain how the fees would be calculated, what Beth would have to pay if they lost, or whether the contingency fees are calculated before or after Beth pays the fees. Thus, Ashley's request for fees breached her duty of reasonable fees to her client, Beth.

Duty of Loyalty- Personal Conflict of Interest:

A lawyer has a duty of loyalty to her client, which means that a lawyer cannot represent a client if there is a conflict of interest. A conflict of interest arises when there is a directly adverse interest, or the lawyer is so materially limited by her own interests, that she cannot reasonably represent the client. Further, a conflict of interest can only be avoided if the client gives informed consent, in writing.

Here, Ashley is friends with Carol, the opposing party. A reasonable attorney may reasonably believe that this would materially limit her representation to Beth. If Ashley did believe that she could fairly represent Beth, she should have gotten Beth's informed consent of the conflict, in writing. Since Ashley did not get consent from Beth, she breached her duty of loyalty.

Duty of Loyalty- Concurrent Conflict of Interest:

A lawyer's duty of loyalty against conflicts of interest also extends to concurrent representation. The NRPC advises against representing two individuals in one matter. This is because the two individuals' interests may diverge and the matter may become adversarial. However, this potential conflict of interest may be overcome by obtaining informed consent, with all advantages and potential risks of conflict of interests.

Here, Ashley agreed to represent both David and Ed for their food truck business. Although both of clients have a common goal presently, it is possible that their interests would diverge. For example, if the business did not end up working out or there was some other internal issue, David and Ed could become adversarial. This would mean that Ashley would not be able to adequately represent David & Ed. Ashley should have gotten consent, explaining these potential issues to David & Ed. Thus, Ashley breached her duty of loyalty to David & Ed.

Duty of Fairness-Disclosing Inadvertant Information:

NRPC provides that a lawyer owes a duty of fairness to third parties and opposing counsel. One of these duties includes disclosing receipt of potentially inadvertant disclosure. This means that when an attorney receives information that is likely confidential, the attorney should inform the opposing counsel of the receipt.

Here, Ashley received a memo that was prepared by opposing counsel for the opposing party. This memo is a confidential communication between an attorney and his client. Ashley likely knew that her receipt of the memo was inadvertant. Thus, Ashley should have

informed opposing counsel that she received the memo. The NRPC provides that a lawyer does not have to return the information, but should at least inform the sender. Ashley breached her duty of fairness to opposing counsel when she did not inform the opposing counsel of her receipt of the memo.

Duty to Tribunal-Disclosure of Adversary Authority:

A lawyer has a duty of fairness to the tribunal. This duty of fairness includes the duty to report any adversary authority of their clients position, with controlling jurisdiction, that the other party has not raised. This duty continues throughout litigation and includes the duty to correct any prior statements and cases.

Ashley breached this duty when she did not report the reversal of the worker's compensation case to the court, assuming that opposing counsel did not raise this reversal. Even though the case was originally not directly adverse, the reversal now became adversarial to the clients position. Ashley should have reported to the reversal. Thus, Ashley breached her duty of fairness to the tribunal.

Duty of Communication and Duty of Diligence:

A lawyer has a duty of prompt and diligent communication to her client. This includes communication for any aspect of the case or matter that the client may need to immediately be aware of. Here, Ashley breached her duty of prompt communication when she did not tell her client about the settlement offer. Ashley should have told her client immediately of the offer. Thus, Ashley breached her duty of communication.

Scope of Representation:

A lawyer has a duty to stay within the scope of the legal representation. This means that the lawyer may make strategic litigation decisions, but the client must have the final decision in certain decisions. Particularly, the NRPC explains that the client, not the lawyer, has the final decision for settlement offers.

Here, Ashley received a settlement offer from opposing counsel. Ashley did not tell her client and instead made the decision by her supervisor. This settlement offer is a decision that lies solely with the client. Thus, Ashley breached her scope of representation to her client when she failed to inform her/allow her to make the decision of whether to accept the settlement.

Duty of Subordinate Lawyers:

A subordinate lawyer has a duty to conform all conduct to the NRPC. This includes conduct that was directed or ordered by superior attorneys. However, a subordinate lawyer does not breach the NRPC when following a superior, when the ethical conduct is an arguable question of ethics, where reasonable attorneys could come to alternative conclusions.

Here, Ashley may argue that she is not liable for her breach of communication/scope of representation because she was only following what her supervisory attorney directed. However, as explained above, this duty and situation was not an arguable question of ethics. No reasonable attorney would agree that Ashley should not have told her client about the settlement offer. Thus, Ashley cannot claim that she did not breach her duties, because she was following her supervisory attorney's directions.

Duty of Supervising Attorneys:

A supervising attorney has a duty to ensure all subordinate individuals (lawyers and nonlawyers) abide by the NRPC. A supervising attorney is liable for the ethical breach's of his subordinate attorney when the supervising attorney ratifies the conduct, or knows of the conduct and fails to rectify, while the situation may still be rectified.

Here, Ashley's supervising attorney ratified Ashley's breach of fairness to opposing counsel when he directed her not to tell the opposing party that they received the memo. Thus, Ashley's supervising attorney is also liable for breach of ethical conduct under the NRPC.

Direct Conversations with Opposing Party:

The NRPC provides that an attorney cannot communicate with opposing party if the lawyer knows that the opposing party has counsel. Here, Ashley knew that Carol was represented by an attorney, because she received a voicemail from the attorney. This includes casual conversations as well as conversations about the case. Thus, Ashley breached her duty when she spoke to Carol at the bar.

Duty of Confidentiality:

An attorney has a duty of confidentiality to her client, unless informed consent is given for disclosure. The duty of confidentiality includes all communications and any information about the representation (broader than the attorney-client privilege in evidence law). An attorney must make reasonable efforts to ensure that all communications with and about the client are protected from disclosure.

Here, Ashley breached her duty of confidentiality when she told her friend Felicity about the David & Eds truck. Ashley did not get consent, implied or affirmative, from the client to discuss their business with others. The duty of confidentiality was breached even further because Ashley did not take reasonable efforts to ensure that her conversation was confidential. Instead, Ashley spoke to Felicity in a crowded bar, where others heard, and the bartender even commented.

Ashley may argue that she did not breach her duty because it was only explaining the business and the profits. However, any information obtained while in the scope of representation is subject to confidentiality. Thus, Ashley breached her duty of confidentiality to David & Ed when she told Felicity about their business.

Opposing Counsel- Duty to the Tribunal:

The opposing counsel breached its duty to the tribunal on Friday when it told its client to delete incriminating emails. A lawyer may not encourage or knowingly destroy evidence or knowingly allow its client to do so. Here, the opposing counsel told his client to delete emails. This violates a duty of fairness to Ashley as opposing counsel, and to the tribunal.

Duty to Report:

A lawyer has a duty to report other attorney's breach of the NRPC if the lawyer knows of a breach of the rules. Here, as explained above, the opposing counsel breached its duty of fairness to the tribunal. A lawyer must report the conduct to the Nevada Board of Professional Conduct. Since law is a self-regulating profession, it is extremely important for attorney's to report known wrongdoings of other lawyers.

Here, Ashley had knowledge that the opposing counsel breached the NRPC when she received the emails. Ashley should report the opposing counsel when he directed his client to delete the emails. This was a breach of the NRPC (as explained above), and Ashley has a duty to report the opposing counsel.

END OF EXAM



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QUESTION 2

2)

1. K and Terms

Applicable law - the UCC article 2 applies to the sale of goods and the common law applies to everything else. Here, since this is a contract for the sale of goods, the UCC Article 2 applies. Since both parties are merchants, the special rules within art 2 will apply to the merchant transactions. Parties are considered merchants if they are acting in the normal course of business for their line of work. Here, CPM is a cycle gym in the business of buying cycles for their customers to use, although it is not their main business, it still makes them a merchant for this tx, and S is a seller of cycles that normally sells to people wanting to use cycles.

SoF

Under the SoF, a contract for the sale of goods over \$500 must be in writing. Under the art 2, a merchant's confirmatory memo also satisfies this requirement. Here, since the offer/acceptance was via email, this constitutes a writing and SoF is satisfied.

K Formation

A K is a legally enforceable agreement between two parties. Under the UCC, a K is formed when mutual assent occurs. Mutual assent occurs once there has been an offer, acceptance and consideration.

Offer

An offer is the manifestation of a present intent to enter into a contract, with certain and definite terms, and communicated to a known offeree. Here, CPM manifested their present intent to enter a K by emailing S an order. The order included certain and definite terms of price, quantity, and delivery date. Under the UCC art 2, only quantity is required. S knew the offer was sent to them, meant for them and was in a position to accept. The order was accomplished on 9/1.

Acceptance

An acceptance is a manifestation to accept the offer. This acceptance does not need to be a mirror image of the offer as is required in the common law, but must include enough similar terms to evince the intent to contract. When two merchants engage in offer/acceptance, the UCC applies the battle of forms 2-207 to determine the terms that get included in the final contract. Here, S responded to the offer by CPM and addressed each of the requirements in the offer. If any additional terms are added, they will not become part of the K if they materially alter the K, if acceptance is expressly conditioned on the original terms or if the other party objects within a reasonable time. Here, although the price of the cycles was changed by S to \$1010, the extra 10 is not enough to materially alter the K. Stating that we will deliver 20 lever style cycles indicates acceptance of quantity. CIF to LV, NV is acceptance of the "to be delivered" term in the offer. The only issue with the acceptance is the fact that S stated 20 cycles, "subject to stock" which may be a material issue to the K. Furthermore, when CPM responded to the acceptance, they indicated that time was of the essence and that the lever style was important, thus making the "subject to stock" provision at issue and under the UCC, it is struck and not included in the terms.

As of the email conversations on 9/1 a valid offer and acceptance occurred and the required consideration was a promise to pay for a promise to deliver goods.

Terms

Under the battle of the forms, different terms are knocked out and additional terms are added unless they 1. materially alter the K, 2. the merchant requires express acceptance of their own terms, 3. the other party objects within 10 days. Here, the "subject to stock" term does not necessarily materially alter the K because they are the same price as the knob cycles, however, CPM may argue that they are so disfavored that shipping knob cycles, although the same price frustrates the purpose of the K or the knob cycles would be completely unusable. However, the more likely argument for CPM is that they "objected within a reasonable time" to indicate that they required the lever style and not the knob. Either under the material alteration or the objection, this term would not survive into the contract.

This contract is also a destination contract, stating that S bears the risk of loss on the cycles until they are delivered to CPM, as opposed to a shipment contract, which would shift the risk of loss to CPM once the cycles were in the hands of a common carrier. Since payment terms were not mentioned in the contract, the UCC uses a gap filler with a reasonable time frame for payment. Furthermore, the delivery date is a term of the contract, as 9/15, which is from the time is of the essence statements from CPM.

2. Claims and damages CPM v S + likelihood of recovery

A valid K existed between CPM and S. Under the UCC performance required is perfect tender. If perfect tender does not occur, the buyer can accept the conforming parts and reject the nonconforming, reject the entire shipment, or accept the entire shipment. Since this is not an installment contract, the only time the seller has to cure is if the

nonconforming delivery occurs before the final delivery date and time is remaining for a cure. If a seller does not ship a perfect tender, this is construed as a breach, unless the seller had reason to believe the buyer would accept. If the seller ships nonconforming goods with an explanation, this is considered a counter offer.

CPM v S - Breach of K Non conforming goods

As stated in the terms, S was supposed to ship 20 lever cycles, since they only shipped 10 elver and 10 knob, S is in breach of the contract with CPM. S will argue that the 10 knob were not sent in satisfaction of the order, but "only as an accommodation", although this may be true, no additional statement was made regarding cure. Since the 10 knob were sent as an accommodation only, S effectively only sent 10 of the 20 cycles, which in and of itself is a breach. Either way, S breached the K to deliver 20 lever cycles.

CPM v S - Breach of K delay in delivery

As stated in the terms, S was supposed to deliver on 9/15. As also stated in the terms, this was a desitination contract, meaning that the risk of loss or liability for delay was on S. S will be liable for the late delivery to CPM but may be able to seek indemnification by the licensed 3P delivery trucking company. Despite S's ability to recover from the trucking company, the delay of delivery prevented CPM from having the time to inspect the delivery and cover for the missing lever cycles. S will argue that CPM was notified about the deficiency and failed to mitigate their own losses.

CPM v S - Anticipatory Repudiation

Anticipatory repudiation occurs when one party unequivocally communicates the fact that a breach will occur. Since S emailed CPM and warned them that they are only shipping 10 lever cycles, S is liable for the cost of cover of those cycles. CPM can treat the repudiation as a breach at the time of getting it, can try to convince S not to repudiate or can wait until performance to sue on the breach. Here, CPM waited until performance and is not liable for doing so.

damages

Typically, S would have been given time to cure if time remaining before 9/15, but since CPM did not have time to cover, S is liable for more damages. Both monetary and equitable remedies exist, monetary damages include compensatory damages, incidental and consequential damages. Equitable remedies would be specific performance in the event that money damages would be inadequate. Here, since money damages are adequate and S is not the only seller of cycles, specific performance is not going to be awarded.

Money damages

Compensatory damages include both expectation and restitution damages. Damages aim to put the non breaching party in a position that they would be in had the K been completed (expectancy) or had the K never been entered (restitution). CPM will claim compensatory damages of expectation damages because they are the NBP and should get the benefit of the bargain they made. Expectation damages here would be the additional cost to obtain the remaining 10 cycles over the \$1010 CPM expected to pay originally. Furthermore, incidental damages would be proper for any additional costs associated with obtaining those additional cycles. Foreseeable consequential damages are also appropriate here because CPM communicated the need for the lever over the knob and also that time was of the essence. These conditions were communicated and FS at the commencement of the contract and are recoverable. Items within the consequential damages would be the lost profits of turning students away due to the late delivery and the cost of cancelled memberships due to the knob cycles. Moreover, since some of the computers were damaged, CPM could have reduced the price proportionally to the cost to fix.

No punitive or liquidated damages will be awarded because K damages do not punish the BP, only protect the NBP and the K did not include LD, therefore CPM cannot add them now.

Likelihood of recovery

Since S had the risk of loss and knew of the timing and requirements for the levers, CPM will recover the expectation damages, incidental damages and consequential damages of the breach. CPM will not get everything they are asking for because S will argue that CPM accepted the tender despite the nonconformity and owes at least the \$1010 price each, less the cost to repair the conforming goods.

3. Claims and damages of S v CPM + likelihood of recovery

S v CPM - Acceptance of delivered goods

As noted above, when a nonconforming delivery occurs, the buyer can accept in full, reject in full, or accept in part/reject in part. If rejection, the buyer must notify the seller within a reasonable time after delivery and inspection. After notification, the buyer can hold the goods for the seller, resend to the seller, or resell on the seller's behalf.

Although the cycles were delivered late, S will argue that CPM accepted all of the goods because they immediately put them into service. Successfully, CPM will argue that they did not have time to inspect and such behavior does not constitute an acceptance. However, S will prevail in that CPM failed to timely notify S of the return and CPM after inspecting and finding further damages on the computers of both the knob and lever cycles, exercised dominion over the goods by fixing the knob computers. CPM will argue that the letter telling S to "come and get the [knob cycles]" is the notification, however, this was done AFTER exercising dominion and S will prevail that CPM effectively accepted

the entire shipment.

Since CPM accepted the entire shipment, they are required to pay for the accepted goods, less the money spent to repair the computers. Thus, the price was 20200, and less the 1000, would be 19200. S will likely recover the remaining 10k after the initial payment of 9k.

Likelihood of recovery

When S breaches but B keeps, B can recover the difference between the nonconforming good mv and k price, but since the mv was the same for both this determination does not help anyone. S will likely recover the remaining 10k owed for the goods, but will be liable to CPM for the cost of cover and for the consequential costs for the breach and delay. S may try to argue that the anticipatory repudiation allowed CPM the time to cover before running out of time, however they had no duty to do so.

Conclusion

S will recover the cost of the knob machines, CPM will recover consequential damages for the delay and incidental damages associated with the breach. CPM would also recover expectation cost of the breach. That being said, S's recovery will just reduce the amount they would otherwise owe CPM.

END OF EXAM



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QUESTION 3

3)

Question #3: Meth Madness

I. Arrest Issues

A. The "Cold Hit"

There are several issues that the Nevada Court of Appeals may address if properly plead by Daniel's Appellate Counsel. The undercover officer approached Daniel and performed a "cold hit" in which he offered him money for the procurement of a controlled substance. The 4th Amendment protects U.S. Citizens from unlawful search and seizure. The 13th Amendment Equal Protection Clause protects suspected classes from racial discrimination. Case law further enhances this rule that officers may not target specific populations of people for searches or to investigate criminal activity if those actions target a specific race, gender, or national origin and must be neutral. Since this "cold hit" was not targeted at a specific type of person it did not violate the protections afforded to Daniel under the 4th Amendment. If the officers were targeting people based on race or some other classification this action may be in violation of the 4th Amendment or equal protections under the 13th Amendment; however that did not occur here and there is no evidence that Daniel is a protected class.

B. Entrapment

There is a question of whether or not Daniel would have conducted the drug related activity if the officer had not offered the "cold hit". Criminal law protects citizens from entrapment by police officers. The rule for entrapment is that if a citizen would not have otherwise conducted the illegal activity "but for" the officers actions a criminal conviction will not be upheld. Here, the officer offered Daniel the money for drugs. Daniel in turn took money from the officer and then went and found a drug dealer to provide those drugs. This action does not constitute entrapment because any person could have approached Daniel and made the same offer as the officer. Further, Daniel was not coerced or forced by the officer to do anything and acted on his own volition.

II. Conviction Issues

A. Unlawful Sale of a Controlled Substance

Daniel was charged and convicted of unlawful sale of a controlled substance. Unlawful sale of a controlled substance is defined as the unlawful sale of a controlled substance in a certain quantity pursuant to statute and with the requisite intent to furnish that substance to another party in return for goods, money, or something of value. Here, the Daniel told the officer that to give him \$20 and that he would be back with the \$60 worth of methamphetamine ("meth"). Daniel then returned and at his direction Sam gave Daniel a baggie which he handed to the officer. At Daniel's direction, the officer gave Sam the remaining \$40. When Daniel was arrested shortly thereafter he still retained the \$20 in his pocket. Daniel found the drug dealer, accepted funds to do so, and then carried out the transaction in the officers presence in which he actually handed the controlled substance to the officer. Daniel has met all of the requirements of the unlawful sale of a controlled substance statute.

For any drug related crime as an evidentiary rule the drugs in question must be presented and an expert or qualified person must testify as to the contents of the alleged drugs in front of the fact finder. In the instant case the laboratory's director testified that she is a chemist and reviewed the test results of the substance and found that it was acceptable and that the baggie contained meth. Here, the supervisor did not actually conduct the test itself and that the test was performed by a trained laboratory chemist. Appellate counsel may attempt to raise this issue on appeal and argue that the supervisor did not ever have actual custody of the evidence or perform any test herself. In many cases in Nevada an ODV test is conducted by police at the time of initial arrest and sent to a laboratory for chemist certification of the substance. Since ODV test reliability (performed by police) has come into question actual lab certification is now favored among prosecutors when the perpetrator insists on going to trial. As a supervisor of the laboratory this witness is in a strong position to certify the drug test because she holds the requisite qualifications as an expert chemist as well and holds a position of increased authority at the lab over the actual chemist that tested the substance.

On appeal Daniel's counsel may raise the issue that Daniel was paid mere \$20 to find the drug dealer and act as a conspirator in the transaction. However, Daniel actually touched the controlled substance and handed it

to the officer making him an essential part of the crime. The actus reus in this case (act) is sale of the controlled substance. Daniel handed that substance over to the officer and the transaction materially involved him making a challenge to his actions in the sale highly unlikely. Since the lab and testifying witness certified the substance as meth and Daniel received something of value for furnishing the controlled substance the appellate court would affirm this portion of the conviction.

B. Conspiracy to Unlawfully Sell a Controlled Substance

The Nevada Conspiracy to Unlawfully Sell a Controlled Substance Statute states that any person that knowingly forms an agreement with others to facilitate or personally violate the underlying statute of Unlawful Sale of a Controlled Substance is guilty of that crime. According to Nevada case law and other states conspiracies are often not in written form and must be interpreted from the actions of the parties involved in the alleged conspiracy. Here, Daniel was offered money, procured the drug dealer, touched the drugs, and directly handed them over to the officer. There is evidence of an agreement between Daniel and Sam because Daniel procured the \$20, found Sam the drug dealer, and directed him to furnish drugs to conduct the deal with the officer. His direction to produce the drugs is evidence that he and Sam, while away for a short time, agreed to do the deal and formed the requisite agreement factor required for a conspiracy.

In terms of facilitation of a violation of the Unlawful Sale of a Controlled Substance Statute the prosecutor does not need to show that Daniel actually carried out any actions as part of the conspiracy. The prosecutor need only show that an agreement was made and Daniel could be charged at any time after the crime constituted an "attempt." If the officer had arrested Daniel before he actually handed him the drugs Daniel's actions during the brief exchange in which Sam gave him the baggie may have constituted enough evidence to prove that Daniel conspired to Unlawfully Sell a Controlled Substance beyond a reasonable doubt. The reasonable doubt standard in Nevada is the highest evidentiary standard to sustain a conviction. It is higher than preponderance of an evidence and clear and convincing evidence. The proecutor would have to prove to the judge (bench trial) or jury (12 people and two alternates) that there was no reasonable doubt that Daniel violated Conspiracy to Unlawfully Sell a Controlled Substance. Since the agreement was evidenced by Daniel's and Sam's actions the appellate court would uphold a conviction for Conspiracy to Unlawfully Sell a Controlled Substance.

C. Possession of a Controlled Substance

The Nevada Possession of a Controlled Substance Statute states that any person possessing a quantity of a controlled substance defined by statute on his person and/or in a place in which he controls is guilty of that crime. Once again the prosecutor would need to prove that the substance was in fact meth before the triar of fact. Here, Daniel held the baggie and he handed it directly to the officer. The question presented is did Daniel actually "possess" the controlled substance when he held it for merely a moment during the drug transaction. According to Nevada law the amount of time one possesses something is immaterial to whether or not they constructively possessed it for the purpose of this criminal statute. An example would be if a person was at a concert and was standing between two people sharing a marijuana joint. If the person held the marijuana joint and passed it to another person merely because he stood between them a fact finder would still probably find that they "possessed" it for a brief moment before he handed it to the other person.

Nevada law and the law in many states reinforces the notion that possession does not even require intent and that merely having the regulated substance on one's person or in an area they control constitutes possession for the purposes of drug statutes. Here, Sam gave Daniel the baggie and he handed it to the officer. Not only did Daniel present the actus reus of grabbing the baggie, holding the baggie, and transferring the baggie, he also possessed the mens rea that he intended to make \$20 through this possession, sale and the underlying criminal conspiracy.

Appellate counsel may raise this argument that Daniel only briefly possessed the controlled substance but the conviction will be affirmed becuse there is overwhelming evidence that Daniel did in fact possess the meth.

III. Sentencing Issues

A. Aggregate Sentencing

The sentencing judge imposed prison sentences for each count on Daniel's criminal convictions. The judge may have chosen to run those sentences consecutive or concurrent based on certain aggravating or mitigating factors presented at sentencing by competetant counsel for both the state and defense. If the sentencing judge ran those sentences consecutive after a certain date in 2013 pursuant to the Nevada Revised Statute 176 they would be required to state on the record the "aggregate sentence" and the inmate would not receive a parole board hearing until all convictions qualified for one. If the judge failed to state that

"aggregate sentence" in a qualifying situation the defense attorney or attorney general may request a modification of the judgment of conviction via motion practice or raise that issue on appeal to the appellate court.

B. Enhancement Statute for Sale Near Public School

The judge imposed a sentence enhancement punishment for unlawful sale of a controlled substance because it took place within 1,000 feet of the perimeter of a public school. An enhancement like this one, similar to an enhancement for using a deadly weapon, must be included in the charging document on the case to put the defendant on notice of the statute and that there is a heightened potential for punishment at the outset of the process. The 6th Amendment Confrontation Clause and the Due Process requirements of the 5th and 14th Amendments require that a defendant may confront his accusers and have notice of the crimes he is charged with and have the ability to adequate representation by counsel at all critical stages of the process. If Daniel did not receive notice of the enhancement statute it would be in violation of his procedural due process rights under the 5th and 14th Amendments to the U.S. Constitution and that notice would be required in the grand jury indictment (5th Amendment) or criminal information.

END OF EXAM



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QUESTION 4

4)

1) ADAM vs. WALLYS

Vicarious Liability / Respondeat Superior

An employer will be vicariously liable for the torts committed by their employees acting within the scope of employment. An employer is generally not liable for the intentional torts of their employees. However, an employer may be held liable for the intentional torts committed by their employees when the employer authorized the use of force, the use of force or potential for violence was inherent in the job, or when the employee does the act for the benefit of the employer.

Here, Brian was an off-duty Wally's manager. Thus, Wally's will likely try and argue that Brian was not acting within the scope of his employment because he was not working on the job at that time. They may attempt to assert that this was a "frolic" - a major deviation from his normal duties that would place him outside of the scope of employment rather than a mere "detour" where he would still be acting in the scope of employment. However, Adam will likely successfully assert that Brian was acting in the scope of his employment because he was an employee at Wally's, and he was doing a duty that he would have typically done on the job - watch for potential shoplifting. Furthermore, under an agency/principal theory - Brian likely had both express and apparent authority to act on behalf of Wally's. Without further facts, it is hard to tell if he had express authority to detain a potential shoplifter, but presumably he would as a manager. And he certainly would have apparent authority to do so because of his title as a manager for the store. Third parties would reasonably believe that Brian, as a manager had the ability to detain shoplifters. As indicated above, employers are generally not liable for the intentional torts committed by their employees. But, in this case, Brian was likely authorized to use force to detain a shoplifter - and the use of force or the potential for violence was something inherent in the job. Therefore, Adam will likely be able to assert that Wally's is vicariously liable for the actions of their employee, Brian.

Intentional Torts

False Imprisonment

False imprisonment is an intentional tort. False imprisonment is the intentional confinement of another person that causes that person to be confined to a bounded area without their consent. There must be knowledge of the confinement or actual harm caused by the confinement. Damages are not required. The intentional element is satisfied if the defendant actually acted with the purposes of causing the confinement, or if they acted with substantial certainty that the confinement would occur. If there is a reasonable means of escape that the plaintiff knows about, there will not be a cause of action for false imprisonment.

Here, Brian followed Adam into a restroom and cornered him in a stall. In doing so, Brian confined Adam to the area within the stall. It doesn't appear that there was any way for Brian to escape, and he did not consent to the confinement. Brian had the requisite intent because it appears that he followed him and "cornered" him on purpose. There is no time requirement for false imprisonment, however, it appears that this went on for at least a few minutes as Brian was yelling profanities at Adam, and then swinging a plunger at him, and then he "calmed down." Thus, all of the requisite elements for false imprisonment are satisfied and Wally's may be held liable for Brian's conduct. Adam may also recover any damages for any emotional distress he was caused as a result of this tort.

Assault

In Nevada, assault is the intentional creation of reasonable apprehension of a harmful or offensive contact. Unlike other states, Nevada does not require that the harm be imminent, and threats made to a person's property may constitute an assault as well. The intent required is the same for false imprisonment (acting to produce the consequence, or acting with knowledge that the consequence is substantially certain to occur). Damages are not required.

Here, Brian yelled profanities at Adam and then picked up a toilet plunger and started swinging it in front of Adam. Thus, Brian likely created a reasonable apprehension in Adam that he would be hit by the plunger. The facts indicate that Adam was scared and very upset, so he likely did suffer apprehension of this contact. Furthermore, they were in a small stall area, so it is reasonable to believe that he may be hit by the swinging plunger. Wally's will be liable to Adam for Brian's assault.

Intentional Infliction of Emotional Distress (IIED)

Intentional infliction of emotional distress requires 1) extreme and outrageous conduct 2) intent to cause the conduct, or recklessness 3) the plaintiff suffered extreme emotional distress 4) damages. Thus, the intent element may be proved by showing the defendant in fact intended to cause the distress or acted recklessly in causing the distress. Extreme and outrageous conduct is conduct that goes beyond the bounds of decency - the type of conduct that is not tolerated in a civilized society and that would be highly offensive to a reasonable person. Note that physical manifestations of the distress need not be proven, just the fact that emotional distress resulted.

Here, Brian had no reason to believe that Adam had stolen anything, he cornered him in a restroom stall, accused him of stealing, then swung a plunger in front of him. Then, before allowing Adam to leave, he made him show him that his backpack and pockets were empty. It appears that Brian did suffer emotional distress because he

was skaing and very upset. Wallys will likely argue that Adam did not suffer emotional distress because he in fact returned to Wally's the very next day. However, given the nature of the actions, Adam will likely succeed on an IIED cause of action.

Defense - Shopkeeper's Privilege - Wally's may attempt to argue the Shopkeeper's Privilege defense. Under this defense, a store may detain a suspected shoplifter for a reasonable time and in a reasonable manner in order to determine if something in fact had been stolen. However, following someone into a bathroom stall, berating them, swinging a plunger at them, and using profanity will put Brian's conduct outside the scope of the privilege because it was unreasonable. Thus, Wally's may not assert this defense.

Negligent Hiring

Adam may also assert that Wally's negligently hired Brian. He would have to prove duty, breach, causation and damages. There aren't enough facts to determine whether or not there was a breach in hiring Brian (potentially there could be if Brian had a past criminal record, etc). However, note that if Brian did go forward on a negligent hiring theory - he would not be able to bring in proof of the bulletin board with the suspected shoplifters.

Subsequent Remedial Measures - When a tortfeasor takes subsequent remedial measures to remedy his previous actions, it will not be admissible in order to prove negligence. Likely, Wally's put a bulletin board up near the manager's office with the photos of the shoplifters so that this same thing would not happen to other people - so the managers and employees would be on notice of people they should actually be watching/questioning about potential shoplifting.

2) CHARLIE vs. WALLYS

Negligence

In order to prove a cause of action for negligence, a plaintiff prove duty, breach, causation (actual and proximate) and damages. A person owes a duty of reasonable care to all foreseeable plaintiffs to engage in risk reducing measures to prevent injury to the plaintiff. Here, Wally's owed a duty to Charlie because Charlie was a foreseeable plaintiff - he was a customer in their store. The traditional rules for duties owed to people coming onto someone else's property depending on the status of the person on the property. If the person was a trespasser, no duty was owed. If the person was a known trespasser, the duty owed would that to be to warn or make safe known, dangerous, artificial conditions on the land. If the person was an invitee (a social guest, or someone welcomed onto the property who did not confer a benefit on the landowner) the duty owed was a duty to warn of known, concealed dangers on the property. If the person was a licensee, then the duty owed was a duty to inspect, and make safe or warn of concealed dangers on the property. Here, Charlie would be a licensee and the duty owed to him would be for Wally's to inspect and make safe any concealed dangerous conditions on the land. However, Nevada has abolished the traditional rules, opting instead for the reasonable prudent person standard. Thus, Wally owed Charlie a duty to act reasonable and engage in risk reducing measures to prevent injury

Breach - Wallys breached this duty by leaving liquid and a mop on the ground. The facts indicate that an employee left the mop on the ground and in the morning a manager walked by the mop at the beginning of his shift. The manager was on notice, and breached his duty by not picking up the mop.

Causation - The test for actual cause is the but for test - but for Wally's leaving the liquid and mop on the ground Charlie would not have been injured. And proximate cause is satisfied if the injury that occurs was a normal incident of or within the risk created by the breach. It is a test of foreseeability - and it was foreseeable that leaving a mop on the floor would result in a patron tripping and injuring himself

Damages - Eggshell Skull Plaintiff - The defendant takes his plaintiff as he finds him, and so if a plaintiff suffers some injury that would not typically be suffered by another person, the defendant is still liable for that injury. Thus, Charlie may recover for his broken arm even though he suffered from brittle bone disease.

Contributory Negligence - Partial Comparative Negligence

Wallys will attempt to argue that Charlie was negligent by "staring" at the toothbrushes rather than watching where he was walking. However, Charlie would have no reason to believe that there would be a mop laying in the middle of the aisle. At common law, contributory negligence was a complete bar to recovery. Nevada has adopted partial comparative negligence and will allow a plaintiff to recover so long as their negligence is not greater than that of the defendant. The plaintiff's recovery will be reduced by the amount of their own negligence. It is unlikely that Charlie was negligent, but if he was his recovery will be reduced in comparison to the percentage that is allotted to his negligence.

3) DANIELLE vs. WALLYS

Negligence

Danielle will also assert a cause of action for negligence. A duty was owed to Danielle, because she is a customer in the store, a foreseeable plaintiff. She will argue that Wally's breached their duty by leaving a mop on the ground in the middle of the afternoon and that this breach caused her to fall over Charlie who fell because of the mop. Danielle will argue that but for Wallys leaving the mop on the ground, she would not have been injured. However, Wally's will argue that their conduct was not the proximate cause of Danielle's injury. They will argue that Charlie was an intervening force that cut off their liability. However, it is foreseeable that someone may trip on the mop, and cause someone else to fall down on top of them. Danielle did not suffer personal injury, but she did suffer injury to her

property, and could recover the cost of damage caused to her phone.

Contributory Negligence - Partial Comparative Negligence

Wallys will assert that Danielle was negligent because she was texting on her cellphone while she was walking around the store. The facts indicate that Charlie was "sprawled on the floor" and thus had Danielle been looking where she was going, she would not have tripped over Charlie. If Danielle was more negligent than Wally's, she will not be able to recover. If a jury determines that she was not more negligent than Wally's her recovery will be reduced according to the percentage of fault attributed to her actions.

Conversion/Trespass to Chattel - Danielle does not have a cause of action for conversion or trespass to chattel because there was no intentional acts on behalf of Wallys, thus there is no ground for an intentional tort claim.

END OF EXAM



**JULY 2017
EXAMINATION ANSWERS**

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

QUESTION 5

5)
Jurisdictional Issues

Divorce

To enter an order stating that the parties marriage has ended in divorce, the court (here a Nevada state court) must have jurisdiction over at least one of the parties. Here, the wife is the one seeking a divorce and the Nevada court has jurisdiction over her.

Nevada has jurisdiction to handle a divorce hearing relating to the marriage only if one of the parties has established residence in Nevada for at least six weeks. Here, Wife has obtained a Nevada's driver's license and registered to vote in Nevada about seven months before filing the complaint. Not only that, she has been living in the Reno home for most of the time. Indeed, wife lives in Reno home during the school year which is approximately 8 months out of the year. Thus, Nevada has jurisdiction over her and she is able to file for divorce in Nevada.

Incompatibility is a sufficient reason to enter into a divorce in Nevada as it is a nofault state. Therefore, the parties likely have a reason to get divorced (the extra marital affair and the incompatibility).

Property issues

In order to divide property, the court must have personal jurisdiction over the individual and/or his property. In order to have personal jurisdiction in Nevada, the Nevada Constitution allows for personal jdx to exist to the maximum of the United States Constitution. Thus, all that is required to have personal jdx over the husband is whether he has minimum contacts with Nevada and jurisdiction over him would not offend the traditional notions of fair play and substantial justice. Another way personal jdx could be established over the husband is through in person service on him in the jurisdiction.

Here, the facts tell us that he was served while walking through the Reno airport. Therefore, as he was properly served while in the State of Nevada, he is subject to the Nevada courts jdx and thus the court can handle the collateral issues that come with divorce, such as alimony, and property splits.

Child jdx

In order to have jdx over a child, the state must be the home state of the Child. A child's home state is typically where the child has remained consistently for the last 6 months. Moreover, if another state is the home state of the child, that other state must relinquish jdx before another state can enter orders regarding child custody.

Here, the home state of Son is likely Reno. This is because he is typically here for a majority of the year as he goes to school in Reno and he lives at the home bought by husband in Reno with his mom during the school year. While it is true he travels sometimes to California and lives in California on weekend, Nevada is the state that Son has the most substantial contact with and thus Nevada is likely deemed Son's home state because he primarily lives in Nevada for about 8 months out of the year. Therefore, it is likely that Nevada court has jdx to handle the Son's custody issue. Additionally, the Son is essentially unable to leave Nevada when it snows due to the pass closing. This is simply another factor that states he may be deemed to be at home (home state jdx) in Nevada. It may be argued that Son has never fully established his home state in Nevada as it does not seem to have been a continuous six months, but the Son is mostly associated with Nevada and thus Nevada is likely able to handle this issue.

The Daughter is a different story however. While she goes to school in Nevada, it seems that the daughter primarily lives in Tahoe City California with the father. Therefore, as California was the original place where the family made their home and seemingly is where Daughter was born, California likely is the Daughter's home state. In order for Nevada to hear the custody of the daughter issue, California likely must relinquish jdx. However, because California has an interest in protecting its residents and hearing cases involving the welfare of its children, California is unlikely to do so.

Therefore, while the Nevada court can likely hear the Son's custody issue, it is likely unable to hear the Daughter's custody issue as it is not her home state.

Choice of law

Here, the suit has been brought in Nevada so Nevada will apply its conflict of laws rules. In Nevada, the court uses the Second Restatement Most Significant Relationship test. This requires the Nevada court to look at what the

connecting facts at issue are and what the countervailing policy reasons are between the two states. Typically however, a forum that has jurisdiction over the parties will apply its own law.

Here, the connecting facts involve both California and Nevada. Thus, the court will have to decide which states law applies. The couple owns a home in both states, and one child lives in each state primarily. The son primarily lives in Reno and the daughter primarily lives in California. However, both children go to school in Nevada. The divorce complaint was also filed in the Nevada forum. Therefore, it seems that Nevada prevails and has the most contacts with the family as a whole.

Looking to the policy question, each state has an interest in protecting its citizens. Here, the entire family was originally from California, but has since split across state lines for the purposes of school. Nevada has an interest in protecting its citizens and the welfare of its children. California has the same interest and wants to protect the property within its borders. Because each state has an interest, the policy argument seems to be a wash.

Therefore, because Nevada has more connecting facts to the situation arguably than California, and each state has an interest in protecting its inhabitants and seeing they are treated fairly in property distribution, the Nevada court will likely apply Nevada law to the property under the Second Restatement test applied above and thus the entire action will be governed by Nevada law.

However, the wife could possibly ask to apply depeceage and have the court apply each states law to each part of property. Typically, the situs of where the property is located will govern. Therefore, the wife could seek the court to apply California law to the Tahoe City Home and Nevada law to the Reno home. However, this typically will not be applied unless requested and there is no evidence she has requested this sort of application.

Nevada community property law

Nevada is a community property (CP) state and this means that all property acquired during the marriage is presumptively community property. However, this presumption can be overcome depending on how property is taken or sometimes in rare instances how it is titled. Specifically, Separate property (SP) is defined as all property acquired before the marriage, all property acquired during the marriage through gift, will, or intestacy, personal injury suits, and all profits from those prior mentioned. Moreover, property can change its form if it is shown through clear and convincing evidence that the property has been turned from CP into SP or vice versa. Nevada can only divide CP property and must divide so equally, absent financial misconduct being shown.

Additionally, the fact that wife has been engaging in an affair cannot be taken into account when dividing the property, only financial misconduct may, which does not seem to exist here.

Husbands Bank Account

Typically, a bank account opened during the marriage is typically community property. Here, we have an account seemingly opened during the marriage in 2010 when the husband inherited \$2.5 million from his grandfather. However, this presumption can be overcome with clear and convincing evidence.

Here, the bank account is entirely in the Husbands name. The only money in the bank account is the \$2.5 million from his grandfather through inheritance. This money is technically Husbands SP because it was inherited. Therefore the only money in the account is SP. No evidence exists that he put other CP money in. The fact that husband has used the funds to pay for the family lifestyle does not turn the FUNDS REMAINING into CP, rather only the funds used on the family have been turned in to CP through the presumption of gifts of SP turning into CP.

Therefore, the bank account is Husbands SP and will not be divided upon divorce.

Tahoe City Home

The Tahoe City home was owned during the marriage. There is no evidence that it was acquired before the marriage. Therefore, it is community property presumptively applying Nevada law.

Reno Home

The Reno home was paid for entirely with Husbands SP from his grandfather's inheritance. However, because it seems that this was a gift made during the marriage to a spouse, the house that would have normally been husband's SP has been transmuted through the gift presumption discussed above.

However, this is not the end of the analysis. The Husband and Wife took title to the house as joint tenants. While most property is presumed CP, it can be overcome through certain titling measures like joint tenancy. Therefore, as the H and W took the house as joint tenants, this presumptively kept the property SP, as it was paid

with SP funds, and therefore each individual is entitled to possess the whole individually and can transfer their interest without the other owners' consent. This is different from CP where both spouses must consent to transfer real property.

Thus, on divorce, the court will not divide the Reno home as it is SP based on how it is titled—the court may allow for a partition though, and a partition sale would benefit each individual from having to live together. In this case, each spouse would get exactly 1/2 of the sales price.

Pension plan of Husband

Pension plans that accrue during the marriage are typically deemed CP under the presumption above. Pension plans can also be part SP if they started accruing before the marriage. However, here there are no facts that the pension plan started to accrue before the almost 20 year marriage. Therefore, the pension plan is entirely CP and will be divided evenly.

If it was acquired before the marriage, the court would use a proration rule of the amount of months the pension plan existed during the marriage divided by the amount of months total the husband could receive it. Further, the husband could not delay distribution but rather the wife would be able to take whenever the pension plan matured. This is typically done by a wait and see rule, which is preferred in Nevada, and the Nevada court retains continuing jdx over the account.

Earnings of H and W

Earnings during the lifetime of the marriage are CP. Here, H earned \$150000 during the marriage and wife earned \$1000 per month as well as \$500 per month in bookkeeping. Each of these amounts remaining will be divided evenly as they are CP.

Alimony

As stated above, the court here has jdx to enter award of alimony based on PJ over the husband. Nevada has the ability to award two types of alimony—"just and equitable" and "rehabilitation."

When awarding just and equitable alimony, the court looks to a multitude of factors such as the length of the marriage, the earnings of each spouse, the type of lifestyle the spouses are accustomed to, etc. Here, the husband will likely owe the wife alimony. The Husband could have avoided this with a premarital agreement, however, none seems to exist. The husband here makes \$150000 annually while the wife only seems to make about \$15000 annually including her part time job bookkeeping. Therefore, based on this alone, the husband will have to make just and equitable alimony payments to the wife. The fact the wife cheated on the husband should not be taken into account, but rather the financial status of the parties.

Moreover, the husband will owe alimony because the wife stayed home typically to take care of the family seemingly. Additionally the family is now accustomed to a lavish lifestyle and this is another factor weighing in favor of awarding alimony to the wife.

The wife likely will not earn rehabilitative alimony however. Even though she makes less than the husband, there are no facts suggesting that she stayed home solely to further the husbands career or lost earning power. Rather, it seems that she just worked part time for no actual reason to further the husbands education or training. She can receive enough alimony through the just and equitable award.

The alimony award will only be dissolved on remarriage of the payee spouse (W) or the death of either spouse. Therefore, the husband will pay alimony to the wife as the court deems is just and equitable.

Child Custody

As stated above, the court must have jdx over the children in order to decide the matter of custody. Nevada presumes that joint legal custody is favored and prefers that joint physical custody also be favored. In deciding custody, Nevada will look at a multitude of factors, such as the needs of the children, the location of the children, the desires of the children, and the spouses ability to support the children. Nevada ultimately decides the issue on the best interest of the child standard.

Here, the court likely does not have jdx over the daughter to enter an award of custody—this must be handled in CA. However, in the event the Nevada court does have jdx, the court will likely award custody of the daughter to Husband. Indeed, daughters wishes are to stay with Husband and blames W for divorce. She really prefers to stay in California as well—where H usually stayed. Moreover, H and Daughter developed a relationship living in California for all of these years primarily together. Daughter's school is in CA. Therefore, it is likely that the court, if it can, will

award custody of D to H.

Nevada definitely has jdx over Son and therefore can enter a custody award. While Nevada would prefer that both parents have physical custody of Son, it is likely to award physical custody of Son to H. There is no presumption in Nevada that a child should remain with its mother--therefore, this factor has no bearing. Moreover, the Husband makes \$150000 a year while the W only makes \$15000 a year. While W is going to receive alimony and will have a better lifestyle, husband still has a higher earning potential. However, the Son wishes to stay in Reno and go to school in Reno where he has been staying with the Wife and her sister for a majority of the time. It is likely that the court will award primary physical custody of S to Wife based on his wishes, even though it means tearing the family apart.

Each parent will have legal custody over each child however, as there is no evidence that any abuse or wrongdoing to the children has occurred. This means each parent will have the ability to make decisions regarding the child's health and education.

Child Support

When parents share joint physical custody of a child, the court awards child support to the parent who makes the least money. When a parent has sole custody of a child, the court will award child custody payments to be paid by the noncustodial parent to the custodial parent. However, there must be at least a 60-40 split in time among the parents to have a joint physical custody analysis.

Here, D will likely stay with H and S will likely stay with W. In other words, each parent will have sole physical custody over one child. Therefore, it is likely that the Father will pay Wife for S's needs and W will pay H for D's needs. The Son needs special schooling and the father is more than capable to cover that amount. However, the Daughter also goes to private school and W likely does not have the funds to front such costs. This will be taken into account. The court will likely offset the alimony payments to W based on H having sole physical custody of D.

The child support awards must be paid until either child reaches 18, or if still in high school, 19. Children are also required to be supported indefinitely if they are mentally handicapped or unable to take care of themselves upon reaching maturity. Here, even though the Son seems to struggle with school, he is not mentally handicapped. Both children will likely be required to be supported until 18, which is only a few years away.

END OF EXAM



**JULY 2017
EXAMINATION ANSWERS**

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

QUESTION 6

6)

Agenda Item 1

Establishment Clause

The Establishment Clause of the First Amendment to the Constitution of the United States says that a religion must not be respected or disfavored by the federal government. This is applied to the states through incorporation under the due process clause of the 14th amendment. In order to satisfy the establishment clause a law must have a secular purpose, not have the primary effect of establishing or disfavoring any religion, and not have excessive entanglements between state and religious actors. The Supreme Court, however, has held that prayer at the beginning of meetings by official state bodies does not violate the Establishment Clause under some circumstances because it has always been a common practice in the United States.

Here, while the invocation prayer has no secular purpose and should violate the Establishment Clause, it may fall under the Supreme Court's exception discussed above. Therefore it's important to analogize the cases. The Supreme Court has typically found that invocation prayers are okay, but in every or nearly every case, the invocation prayers are made by a rotation of leaders of different faiths, thereby fostering a sense of shared community. In this case, however, the City Council of SmallTown has elected to only allow Reverend Michael Jones of the Word of God church to present the invocation prayers. This would arguably be very different from the examples brought before the Supreme Court as it fosters a tyranny of the majority by only allowing prayers that respect the majority religion and would very possibly be struck down.

There may additionally be a challenge under the free exercise clause of the First Amendment, which says that state actors cannot pass laws that target the practices of specific religious groups. If the City Council specifically passed this in order to discourage the practice of other religions in SmallTown, there may also be a free exercise clause claim, but this appears to be a classic establishment clause case.

Free Speech

The First Amendment also says that the government shall make no law infringing on the freedom of speech. This is also incorporated through the 14th Am. Government speech however is not subject to the 1st Am. Government speech would be any message from the government represented as its own views.

In this case, leaders of other religions have no right to present the invocation prayer because it is represented as a communication on behalf of the city government, and they could not compel the city government to deliver a prayer on the government's behalf.

Agenda Item 2

Privileges and Immunities, Art. IV

The privileges and immunities clause of article 4 of the constitution says that states may not pass laws that deny privileges or immunities to citizens of other states that they grant to citizens of their own state. If the law facially discriminates against out of state citizens on the basis of a protected right or economic activity of fundamental importance, the state must show that there is a significant purpose and the law is narrowly tailored.

Zoning is generally permissible, but not when it amounts to a complete ban that would be discriminatory. In this case, the proposed zoning ordinance would prevent anyone from operating a mega-store in SmallTown unless they had been a resident for the previous twelve months. Because Joan is in the business of operating mega-stores this would clearly infringe on a fundamental economic activity of hers, and it is a complete ban on the entire town, rather than controlling mere placement. SmallTown would then have to show a compelling purpose that the zoning ordinance is narrowly tailored to. The purpose offered here seems to be that the store will compete with local businesses. Benefitting in state commerce at the expense of interstate commerce is not considered a compelling purpose, so there is not need to even reach narrow tailoring, as this law would likely be struck down on these grounds. On a procedural note, Joan would have to bring this claim as herself rather than on behalf of Superstore, because the privileges and immunities clause only protects citizens of the United States who are natural persons, not corporations.

Privileges or Immunities, 14th Am.

The Privileges or Immunities clause of the 14th am., applying directly to states, has been interpreted by the Supreme Court to prohibit restrictions on the right to interstate travel that regard important rights. This often takes the form of residency requirements. When the state imposes residence requirements on an important right, they must survive strict scrutiny.

In this case, the ordinance restricts interstate travel because it would discourage Joan from moving to Nevada by denying her the fundamental right to earn a living through her chosen profession. The court has found in some cases that 30 days is a reasonable restriction (in the case of voting), however, here the requirement is a full year and protectionism is still not a compelling purpose, so this ordinance would likely violate the right to travel.

Due Process

The Due Process clause prohibits the infringement of fundamental rights without compelling government reason and the form of the restriction being necessary to achieve the purpose. Infringing on a fundamental right requires the state to survive strict scrutiny.

Here, Joan's fundamental right to earn a living is infringed upon and there is still no compelling purpose.

Dormant Commerce Clause

The Dormant Commerce Clause is the negative implication of the Commerce Clause which grants Congress the right to regulate interstate commerce. The Dormant Commerce Clause prohibits state activity that places an undue burden on interstate commerce, and restricts the state's ability to levy taxes on interstate commerce. In order for a state tax to be valid, the state must have a substantial nexus to the activity or entity being taxed, the state tax is apportioned to the amount of the activity occurring within the state, and state taxes cannot discriminate against out of state entities.

In this case, the ordinance imposes a tax on any entity solely based on what state they are citizens of. Therefore (b) of the proposed ordinance is a per se violation of the dormant commerce clause. Even if it were not, though, the dormant commerce clause also requires laws that discriminate against interstate commerce to survive strict scrutiny which, as described above, this ordinance would not.

As general notes to the ordinance, it does not appear that Joan would be able to get around the ordinance, because it is a complete ban within the limits of the town, she cannot claim a pre-existing non-conforming use, and cannot seek a variance (a variance requiring undue burden to the business and a showing that surrounding properties would not be reduced in value).

Agenda Item 3

Takings Clause

The takings clause of the Constitution says that the state may not take the property of its citizens without providing just compensation and the property is taken for a public use. The two types of takings are a physical taking and regulatory taking (regulation leaves no economically viable use for the property). Just compensation is determined from the perspective of the citizen losing their property, not the benefit to the government. Public use has been construed broadly by the Supreme Court (see Kelo) and would likely cover charitable purposes.

Here, the use of eminent domain is an obvious taking because the government will be physically seizing possession of the property from Joan. However, the town will give her just compensation as she paid 1 million dollars for the land and that was verified by a third party and she is being given 1.5 million dollars here. Whether the taking is for a public use would require more factual development, but the fact that the land is being given to a charity (transferring land to a private entity can still be public use, it doesn't require the land being opened to the public) for environmental purposes that seem sound means this likely to be for public use. Additionally, the town does not need to sell the land to the charity for value, so the fact the charity paid one dollar is immaterial. This is a taking, but is very likely to be found Constitutional.

Standing

In order to challenge any of these issues in court a person would need to have standing. To have standing under federal article III three courts a person would have to show a live case or controversy amounting to an actual injury suffered by that person individually that can be remedied by a ruling in that person's favor. The case must be ripe and not moot. To have standing in Nevada court a person must have a significant interest in the litigation or be asserting a right granted by a constitution or statute.

Here, Joan would not have standing under any of her claims because these are merely proposed ordinances and she has not suffered any injury yet, and the injury is not certain to occur. However, the religious groups within SmallTown would likely have standing under their Establishment Clause claim, because the Establishment Clause is a particular prohibition on the activities of the state and the Supreme Court has found similarly situated plaintiffs to have standing in nearly identical cases. The result being, the religious groups can file their claims now because it is an existing injury, while Joan will have to wait to see if the injury actually occurs or, upon the passage of the ordinances, is certain to occur.

END OF EXAM



**JULY 2017
EXAMINATION ANSWERS**

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

QUESTION 7

7)

PROPERTY

#1 - FORECLOSURE

When there are multiple lenders with secured interests in real property, the security interests are prioritized in order of their notice to all other secured interests. Notice is affected by actual notice, inquiry notice, or by record notice.

Record notice is impliedly provided when a deed or mortgage on real property is properly recorded. A person/entity with a secured interest in real property (lender) may initiate foreclosure proceedings if the debtor defaults on its obligations. A foreclosure procedure allows the lender to take possession of the property to satisfy the debt or to sell the property for proceeds to satisfy the debt.

Here, Owner had taken loans on the office building and had defaulted on Lender Two's loans in March 2017. Therefore, Owner's property was subject to foreclosure by Lender Two.

Purchase Money Mortgage

A purchase money mortgage is when the lender provides the financing for the direct purchase of the property. The purchase money mortgagee has superpriority of its security interest in the property.

Here, Owner bought an office building with financing with Lender One in 2005 in exchange for a deed of trust on the property. Therefore, Owner was obligated to pay on the secured interest or be subject to a foreclosure. Because the financing was to directly purchase the office building, Lender One has superpriority over others with secured interest in the building.

Here, if Lender One is determined not to be a purchase money mortgagee, it would still have priority over all other mortgages as it immediately recorded its deed in 2005 when the loan was made to owner with no prior encumbrances on the property.

Subsequent Mortgages & Security Interests at Foreclosure

All subsequent mortgages or security interests are junior to the senior mortgage and do have priority over properly recorded senior mortgages at the time of foreclosure

Lender Two

Here, on March 1, 2015, owner received a subsequent loan for \$500,000 from Lender Two. Lender Two had recorded notice of Lender One's interest and mortgage on the property. However, Lender Two did not file its deed of trust until September 1, 2015 - 6 months later, thereby not providing any subsequent purchaser or lessor of its interest in the land. If the lease (discussed below) is recorded before LenderTwo's deed, then the LenderTwo deed would be considered a wild deed, and not adequate to provide proper notice.

Tenant Lease Agreement

On June 1, 2015, Owner leased the office building in its entirety to a tenant subject to and subordinate to any deed of trust or mortgage. At the time the Tenant entered into the agreement, he had record notice of Lender One's mortgage but not Lender Two due to its failure to timely record its mortgage. Further, the facts do not indicate that Owner provided actual notice to the Tenant of all of the property's encumbrances and mortgages. Also, if Tenant had inquired of the mortgages, it would be likely he would not be not notice of Lender Two's mortgage unless expressly told by Owner. Therefore, the Tenant had no notice of Lender Two's mortgage and is not subject or subordinate to its loan.

Modification by Lender One

A modified loan loses its priority and becomes subordinate to all other loans prior to the modification. However, any PMM maintains its superpriority interest.

Here, because Lender One modified its loan, it would become subordinate and lose its place in line. However, because the \$1 million was PMM, it will not lose its priority and only the remaining loan of \$500 loan will subordinate to Lender Two's loan.

Distribution

A foreclosure proceeds are first distributed to cover any costs and fees incurred for the sale, then the foreclosing lender receives monies to satisfy its loan in its entirety, all remaining funds are then distributed to junior interests in succession of priority if they were properly noticed of the foreclosure proceedings. If any proceeds remain they are given to the debtor. All mortgages to the foreclosing lender remain with the property.

Here, the foreclosure sale provided sufficient funds to pay off Lender Two's loan and had a remaining \$50,000 in excess proceeds. If Lender Two had properly included Lender One as a necessary party, the \$50,000 would be given to Lender One towards its modified loan of \$500,000 and it would have to proceed against owner for a deficiency judgment for the remaining \$450,000. Deficiency judgments are permitted in Nevada unless the property is the primary domicile of the debtor who has been in constant continuous possession of the property and has not refinanced. Here, the property is commercial and not the primary residence of the Owner. Therefore, he can seek a deficiency judgment.

However, LenderOne's PMM will remain with the land and the tenant would not be required to vacate or honor the LenderTwo's foreclosure.

#2 - OBLIGATION OWED TO LENDER ONE

Owner

A defaulted debtor may remain liable for its debts by privity of contract with the original lender. Here, the Owner does have an obligation to continue to pay the mortgage despite no longer having title to the property. However, if the foreclosure purchaser, Aaron pays Lender One's mortgage, then it cannot also recover from Owner.

Aaron

A foreclosed property remains encumbered with the priority mortgages not discharged by the foreclosure proceeding.

Here, Aaron bought the property subject to Lender One's PMM and is obligated to continue payments on the mortgage or to pay of the loan in full. If not, Aaron's newly acquired property is subject to foreclosure by Lender One.

Tenant

A tenant has an obligation to its landlord through privity of contract and estate. Here, the tenant signed a lease that made the tenant subject to and subordinate to Lender One's mortgage. Therefore, Tenant has no direct obligation to Lender One but would be subject to any foreclosure proceedings.

#3 - AARON'S CLAIMS

Term of Years

A term of years lease is for a definite period of time with an articulated termination date. Here, the owner and tenant entered into a 10 year lease but the document did not provide a definite termination date. Therefore, the lease will likely be classified as a periodic tenancy.

Periodic Tenancy

A periodic tenancy is a lease that automatically renews after a designated period of time. Here, the lease was made for 10 years. The court will likely find the lease was for a 10 year period and available to be renewed.

Termination of Periodic Tenancy

A periodic tenancy can be terminated with sufficient/appropriate notice at the time of a natural expiration. However, a lease longer than 1 year may be terminated within 6 months if it is a residential lease. Here, the property was for an office building, which is commercial. Therefore, the lease is not subject to the 6 month exception.

Here, Tenant informed Aaron it was abandoning its lease on April 1, 2017, just shy of 2 years into the 10 year lease, which is not at the natural expiration of the commercial lease. Therefore, the lease cannot be terminated and the Tenant is in breach.

Landowners Obligations & Damages

A landlord may treat abandoned property as (1) abandoned and demand damages for unpaid rent, (2) surrender its claim against the Tenant; or (2) attempt to mitigate its damages and relet the property to minimize his damages, suing the Tenant for any remaining damages. The latter is the preferred method in Nevada.

Here, Aaron attempted to mitigate his losses by hiring a leasing agent but was unable to find a new tenant to rent the entire space. The new tenant only entered into a 5 year lease. Therefore, Aaron only has partial rent for a partial period of the time. Aaron may seek the remaining rent owed for the unrented 3 years and for the vacant space for as long as it remains empty. Additionally, Aaron may be entitled to incidental damages for hiring the leasing agent.

Defenses

A tenant may be able to terminate its lease if there is a change in circumstances. Here, the tenant rented out the office building for business purposes. However, the business failed and no longer required the space. The court may find that because the business is no longer operative, that the change of circumstances would permit a termination of the lease agreement.

END OF EXAM



**JULY 2017
EXAMINATION ANSWERS**

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

QUESTION 8

8)

To be valid, an inter vivo will must be executed in accordance with formality: it must be in writing in the presence of at least 2 attesting witnesses, contain signatures of the testator and the witnesses. The testators must have capacity to make the will, meaning he must have knowledge in his action and the items and the beneficiaries, without any undue influence, duress or coercion. Here, husband and wife both executed their wills that are prepared by a licensed NV attorney, presumed to be in compliance with formality requirements. Two concurrent wills naming each other spouses that leaves everything to each other is valid under the Nevada law. Here, husband and wife executed their wills simultaneously naming each other beneficiary. Additionally, their only child at the time was named secondary beneficiary, meaning she will take at the time when both husband and wife dies. The facts do not show any issue with the execution of the will, thus the wills were valid at the time of execution.

Revocation - Wife

A will can be revoked at anytime during the life of the testator, by physical destruction of the will, replace with a new will or by codicil that adds or changes the will. It is important to assess the intent of the testator when she revokes a will that was prior executed. For example, if a will was physically destroyed in an accident, the will is still deemed to be valid, and a copy of the will will be admitted into probate.

DDR - If a testator revokes a will under the belief that her new will or codicil will replace the older will, and the revocation was not done proper, the old will is still valid- revived - and the new will/codicil that was executed improperly will just be disregarded.

Thus, the intent and mental capacity of a testator are always assessed by the court whenever there is an issue regarding the validity of a will.

Here, the facts show that the wife tore up BOTH wills without executing any new wills. Her intent in physical destruction of the wills was to ensure her son, who was born after the execution of the wills will receive inheritance.

Unnamed Child born after the will

Generally, a person can intentionally disinherit a child. However, Nevada law protects the interest of a child if the child was omitted accidentally. Specifically, if a child was born after the will's execution and is left out of the will, the law will allow the child to take his share intestate.

Intestacy

Here, the wife's intent to revoke the wills was clear, she wants to make sure her son who was born after the wills were executed, and was not named in the will, to take from both of her and her husband. Thus, the revocation of her will is valid. The fact does not indicate that she intended to make a new will, the fact showed that the couple did not make any updates to their original wills. This results in the wife dying intestate, meaning without a will.

Revocation - Husband

It is arguable that the husband's will is still valid since he did not have any knowledge or intent to revoke his will. It is assumed that his will was conditional upon her will, leaving everything to him at her death. However the facts do not specify whether such condition was required for him to execute his will. Nonetheless, his will could be still valid because he did not have any intent or knowledge to revoke his will when his wife tore up both wills. He is the surviving spouse here and he is free to make changes to his original will or execute a new will during the course of his life.

The following items are analyzed as if the wife died without a will.

Nevada is a community property jurisdiction, meaning all property acquired during the course of marriage belongs to the community. Each spouse is entitled to half of the interest in the community property (50%-50%). When a spouse dies intestate, the surviving spouse will take his share of the community property and 1/3 of the other spouse's separate property, if she is survived by more than 2 decedents. Here, the wife is survived by two children, therefore, the husband will take 1/3 of the wife's separate property.

Las Vegas Home

The title of this property shows that both H and W are joint tenants. In Nevada, joint tenancy with the right of survivorship means each the surviving spouse will take the entire property at the death of the other. Here, the husband will get 100% interest in the Las Vegas home.

Reno Rental Home

This property was purchased by the wife using her inherited fund, since inheritance is separate property, the rental home is the wife's separate property. However, the title for the rental home lists both spouses as tenants in common, this means they each own half of the undivided interest in the property. This interest is divisible, meaning the deceased spouse's interest will pass through intestacy or will. Here, since the wife does not have a valid will, the

husband will take $\frac{1}{2}$ of the interest of the rental home, plus $\frac{1}{3}$ of the other $\frac{1}{2}$ of the interest, leaving $\frac{2}{3}$ of the wife's half to their son and daughter.

Investment Account

For bank accounts, the named beneficiary will take the balance unless there is a dispute. The wife placed her inherited fund in this investment account and it is her separate property. Since the named beneficiary for the investment account is Denies, the couples' daughter, Denies will take the full amount of the investment account.

Checking Account

Joint checking account is under both husband and wife's name, and both deposit their salaries in the account, therefore, some of the balance is community property meaning the husband will take the entire balance in the account. However, the account contains also rental income that is from the rental property purchased by the wife's inheritance. Inheritance is separate property, and under the tracing theory, the rental home that was purchased using this fund and the income generated by this property could be the wife's separate property. If it is treated as the wife's SP, the husband gets $\frac{1}{3}$, and the son and daughter split the $\frac{2}{3}$.

60k shares of ABC Stock

The wife purchased these stock with her inheritance money, which are separate property. The husband is entitled to $\frac{1}{3}$ and the children each gets $\frac{2}{3}$.

Uncashed Payroll check \$5000

The payroll check is the wife's salary. In Nevada, this is considered community property, thus the husband is entitled to it entirely.

Uncashed rental check

Because the husband and wife are tenancy in common with regards to the rental home, the husband has $\frac{1}{2}$ interest in the rental income that the property generates. Thus, he gets \$1500. The remaining \$1500 are split between him and the two children with the husband gets $\frac{1}{3}$ and the children each gets $\frac{2}{3}$, thus each gets \$500.

END OF EXAM